
THE OFFICE OF THE PRESIDENCY

POWERS AND RESPONSIBILITIES

First Edition

JAKOB MILLER

Taylor University

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*To Elyse: I don't know if this book would have been written without you.
I'm certain, however, that without you it wouldn't be worth reading.*

Preface

I'd like to thank Taylor University, for the sabbatical leave that made researching and writing this book possible.

Thanks to Benjamin Kantack, for his encouragement and assistance, and for his own textbook that I've been pleased to use in my class that inspired this project.

Most of all, thanks to my wife, for her editing, prayer, and support.

If you like anything you read, the credit should go to those above. If you find a flaw, the responsibility lies solely with me.

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Chapter I

Introduction

Preface for Students

Perhaps when you were younger you wanted to be the President of the United States when you grew up. Actually, given that you're enrolled in a political science class on the presidency, that still might be your goal – in which case, do remember to mention this book during your inauguration address.

Our daydreams about being the President tend to focus on solving problems with simple, sweeping proclamations and common sense that everyone else seems to lack. We tend to spend rather less time dreaming about the details of what you're actually getting into once you've been inaugurated. I've had more than a few students in my classes over the years who were eyeing the White House, and I've yet to hear any of them fantasize about explaining to their political supporters that the campaign promise they ran on won't be fulfilled because they couldn't cajole a recalcitrant Senator into supporting the necessary legislation, or because they have little direct control of the independent agency in charge of implementing the new rule.

This is a presidency textbook that focuses heavily on the limitations and edges of presidential power that our daydreams tend to ignore, because I believe those restrictions are exactly what make the office so fascinating to study. For some context, though, let's start by talking about nuking the Sun.

In the movie *Sunshine* (2007)^a, a group of astronauts try to reignite the Sun by hitting it with a nuclear bomb. While in the movie, of course, our heroes are eventually successful, Hollywood has uncharacteristically taken some liberties with scientific accuracy here.^b Astronomers' best estimates of the effect of dropping a nuclear bomb on the sun range from "it would do nothing" to "it would do almost nothing" depending on how pedantic your particular astronomer is feeling at the moment.

The problem is one of scale – nuclear weapons, even the most powerful humanity has ever produced, simply pale in comparison to the power of the sun. The sun outputs a massive amount of energy constantly – a nuclear

a: Not recommended.

b: Forgive my sarcasm.

bomb manages a tiny fraction of that for only a moment. It's a bit like tossing a match into a raging forest fire. But screenwriters know that "our heroes bowed passively to the inevitable" isn't a terribly satisfying plot, and they also know that most people have difficulty with numbers and ideas that are so mindbogglingly large. The sun is big, nuclear bombs are big, and the gap between them is hard to estimate. Besides, if there's one thing movies have taught their audiences, it's that nuclear bombs are powerful enough to do whatever the plot requires.

In some ways, there are similar issues when discussing the United States presidency. Large segments of the American public believe that the president can suspend the Constitution in times of war or emergency, or single-handedly enact laws without Congressional approval, or declare war, or control the economy. If you believed in one of those yourself before reading this, you were in very good company! Some research, for example, finds that nearly half of Americans (49%) believe that the President can unilaterally suspend the Constitution – something that would have perhaps been welcome news to any number of past presidents who found Constitutional limitations impeding their plans. We'll cover this in more depth in a later chapter, but there are any number of reasons why we tend to overestimate Presidential power. Popular fiction finds it more convenient to have dramatic policies declared by a President than to pause the narrative and follow Congress going through its slow bicameral legislative process. News reports on politics find it easier to focus on one central figure than a bureaucracy with a multitude of actors. Much like those Hollywood screenwriters, people who discuss politics tend to know that "The President did X" is a much more satisfying narrative than "X is the result of a wide variety of interlocking actions by innumerable stakeholders working through a complicated process subject to complex and interconnected factors".

This is part of the idea of the *leadership dilemma*, a central theme in this book. Also known as the expectations gap, this is the idea that we, the public, expect far more from presidents than they are actually capable of – that they are expected by the public to exert far more control over events than the powers granted by their office allow.^c Faced with this challenge, presidents often attempt to expand the power of their office and make creative use of what powers they do have to try and live up to our expectations. We're going to focus in this book on three major questions: What can presidents do? What can they not do? And, perhaps most intriguing, how do they try to bridge that gap?

Focusing on the limits and edges of presidential power might seem like an odd choice for a presidency textbook. After all, doesn't that seem to reduce the importance of the thing you're going to be spending this semester learning about? But just because a nuclear bomb isn't powerful enough to ignite the Sun doesn't mean it isn't incredibly powerful. Saying that the president can't single-handedly control the economy or cancel the Constitution should not

^c Experts in the field use words like *excessive* and *unreasonable* when talking about the public's demands on a president.

be misinterpreted as calling the presidency weak.

Instead, it makes studying the presidency much more interesting. A Hollywood president who can wave a hand and simply order something fixed is at best boring and often infuriating – the only question you’re likely to have is why it took so long to do the obvious, and the only answers range from incompetence to evil. When we hold the president in proper scale to the rest of the vast apparatus of the American government, like a nuclear bomb to the sun, the challenges confronting a president are far more intimidating – and compelling. Being given highly limited grants of power while at the same time saddled with sky-high expectations is what most presidents have faced after Inauguration Day, and their struggles to achieve their goals by making creative use of what limited power they do possess are fascinating. If we keep to our theme of movies about space, being president is far closer to the scene in *Apollo 13* (1995)^d where engineers are given a box of random parts and told to build an air filtration system out of them.

The American presidency is a unique political position, not quite like that of any similar role in other nations. It’s a far more stressful and limited office to hold than our daydreams generally assume. Whether you’re planning on a career in politics or simply life as a regular citizen, however, learning about the presidency and tempering your expectations can make the actions of our Presidents, and our whole political system of which that office is a key part, make far more sense.

d: This movie I will recommend.

And if you’re still planning on running for the White House someday, you should know what you’re getting yourself into.

How To Use This Book

This is a free introductory textbook for undergraduate students in political science courses on the presidency.

Free refers to the license this book is published under. You can read that license yourself for more details, but essentially this book is yours to use, with no need to pay anyone anything. The growing open textbook movement has seen a number of political scientists publish educational materials for free in an effort to bypass an increasingly noncompetitive textbook publishing market and make sure all students have access to quality materials. This is my small contribution to that movement.

Introductory means that this book is purposefully concise and focused. My goal for this book is that you can read each chapter comfortably in one sitting, and come away from that reading with a very basic introduction to the most essential elements of that chapter’s topic. The presidency is a rich topic, and it’s no wonder that so many other textbooks adopt a more maximalist approach when there’s such an ample supply of fascinating anecdotes, compelling characters, historical context, details, and trivia. No one writing about the presidency is in any danger of running out of material.

Here, however, I've tried to strip away all distractions so we can focus on a few basic key principles. Whenever something piques your interest and you want to learn more, see my recommendations for further reading or ask your instructor – I promise that's one of any teacher's favorite questions.

Political science means that this book is neither a reference book (a good library and an internet connection will serve you better) nor a history book (though we'll make use of plenty of history as we go) nor a book of political opinions (no author can promise to be perfectly neutral, but I'll try to assume that you'll provide your opinions yourself). All of those things might be useful – in particular, working with excellent historians for colleagues has made me more aware of both the value of history in studying politics as well as the fact that I'm no historian – but that's not what this book is. Instead, we're interested in big questions about the presidency: What sort of personal characteristics make you more likely to survive the presidential election process? Why do Presidents so often seem disappointed with the people they appoint to the Supreme Court? How effective is a presidential speech at swaying public opinion?

Presidency means that this book isn't about the presidents, the people who have gotten to be president of the United States. Instead, we're interested in the position those people held – the presidency. It can be hard to separate a role from the people who have held it, and we'll certainly have to mention many individual presidents by name over the course of this book. You won't be any more able to name all the presidents of the United States when you finish this book than you were when you started, but you should have a lot more ideas about what any given president can and can't do to try and improve the economy.

Preface for Instructors

This is just a brief note on how this book differs from the many other options you have for your presidency class.

For one, it's an open educational resource. You probably know that already, but I mention it because it means this book is free for you to use as you see fit. Use it all, break it up into parts, or just assign one chapter or section you find helpful. The rising cost of textbooks, and my own experience with adopting free books in my classes, makes me want to write something that students are more likely to actually read.

Two, this book uses a somewhat informal or casual tone. I want this to be a readable introduction to the important concepts in presidential scholarship, not a full review of the literature aimed at scholars in the field. Formatting in each chapter is minimal in order to make it more like reading – well, something students might read by choice. Attempts at humor are also minimal^e, and certainly not the point of book, but are there to keep students' attention from time to time. Occasionally, I've had to summarize a

^e: In both quantity and quality.

concept in a way that would make any good presidential scholar raise their finger and say “Well, actually...” – and I accept that. This book is aimed at someone who has never read an issue of *Presidential Studies Quarterly*, and will hopefully make them more interested in doing so when they’re done with it.

Third, this book is short – at least, as short as I could make it. I certainly spent more time cutting things out than I did writing them in. That means some things that might be covered in a larger, more completionist book are missing. The goal was to touch on some of the most important points about the presidency, and to keep each chapter easily readable in one sitting for an average student. Where things aren’t essential to the point of the chapter, they’re contained in boxes that students are free to skip. Where I’ve included stories, they’re hopefully more efficient in illustrating a complex concept than a longer definition might be. I’d much rather have a book to which you can add your favorite articles and resources, than a book that you find yourself skipping through.

I hope you find it useful.

Chapter 2

Creation and Change

Introduction

The authors of the Constitution had no idea what they were doing when they created the presidency.

That isn't an insult or criticism. No one on earth had experience doing what the framers – those at the Constitutional Convention who wrote the document that would become the highest law of the United States – were attempting. They had no existing models they could easily copy, or at least no models that they liked. The framers themselves agreed about how hard it was to create the presidency: Hamilton wrote about the presidency that “There is hardly any part of the system which could have been attended with greater difficulty in the arrangement of it...”. Past experience with monarchy had made many of those at the convention deeply distrustful of concentrating power in the hands of individuals. Recent events in the early United States made it apparent to most of them that doing so would, however, be regrettably necessary. Its design was almost certainly the most creative part of the Constitution: How could they make the office strong enough that the presidency could energetically execute the laws, while at the same time making sure that the people who held that office were restrained by the laws themselves? The presidency was, by necessity, something entirely new.

The office^a they created was unique then, and remains notably unlike the chief executive offices of most nations today. Occupying the American presidency isn't like being prime minister or premier or king. Article II – the short section of the Constitution that lays out the presidency – gives the office a few powers, quite a few duties, a large collection of limits and safeguards, and largest of all, a list of unanswered questions. What happens when a president believes a law to be unconstitutional? Must he still enforce it, or does his oath of office – where he swears to uphold the Constitution – require him to disobey Congress? Can the president defend the nation from attacks before Congress has officially declared war? How much of the

a: That is, the official position or job that those who serve as president hold, not the actual physical office (the Oval one) where they have their desk and meetings.

decision-making process in writing a law can Congress leave to the president? Can the president pardon himself for a crime he committed?

As different people held the presidential office, some of those questions demanded answers. Others remain unanswered today, waiting for circumstances to make them relevant. We'll have to wait for some president to try pardoning himself before we find out whether the office can do that.^b As those questions have been answered and the nation has grown, the presidency has changed along with it. The early occupants of the office would likely be shocked by the sheer number of responsibilities its modern holders are now tasked with.

To understand the modern presidency, we'll first examine how the presidency was built – some of the design goals of the people who created the presidency, and some of their most important decisions about what the presidency should be like. After that, we'll look at how and why the office has changed over time. That's too big a topic for a short section – in fact, it's almost too big for this book – but we'll see at least some of the major ways in which the presidency has changed, and some of the reasons for those changes.

b: If you ever become president, I want to make it clear that I think you should not commit any crimes. But if you get the chance to pardon yourself, go for it! A lot of Constitutional scholars will appreciate you satisfying their curiosity.

Creating the Presidency

The presidency was created, along with the rest of the Constitution, by the delegates to the Constitutional Convention. The Articles of Confederation were the basis of the first government which the United States had used since the end of the Revolutionary war, and to put it mildly, they were a failure. The government was so ineffective that many worried about the long-term survival of the United States. The Constitution, as the new basis of government, was to repair the faults of the Articles – and central to that repair was the creation of an entirely new office, one which had never existed before: the presidency.

This means that you can understand the presidency as an attempt to fix a problem, or a set of problems. Complicating the delegates' attempts to design a solution for those problems was the deep distrust they and much of the general public had of concentrated power, especially executive power. As James Wilson, one of the people who wrote the Constitution, put it when talking about the political experience of Americans before the Revolution:

"...the executive [...] powers were placed neither in the people, or in those who professed to receive them under the authority of the people. They were derived from a different and a foreign source: they were regulated by foreign maxims, they were directed to a foreign purpose. Need we be surprised, then, that they were objects of aversion and distrust?"

Given that chief among the complaints that had led to the Revolutionary War was the conduct and abuse of power of both the King of England^c and the governors he had installed in the United States, the framers couldn't simply

c: The Declaration of Independence is inspiring – "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights...". Read beyond the preamble, however, and you'll find a long list of specific complaints about the conduct of the king.

create a king of the United States, or any sort of executive office that looked too much like a king. Even the title of the office they'd create – president – was chosen to differentiate the chief executive of the United States from monarchs or emperors. To preside merely means to sit before – to be at the head of a meeting.

Nor could they turn to the state constitutions. Though the various states that made up the United States had enacted about 17 different constitutions in total, many of those faced the same problems that the national government under the Articles of Confederation did. Most of those state constitutions established strong legislatures that held almost all governmental power and weak executives who primarily served simply as an errand boy or servant of the legislative branch. Governors of these states had little of the decision-making power that we associate with presidents today, and very little involvement in the legislative process. Absolute vetoes, for example, were highly uncommon. Most governors were limited in the discretion they had in how to carry out the law, and their ability to check or disagree with the legislative branch in their state. Wilson, when criticizing the state constitutions, said that the legislative branch had “into its lap, every good and precious gift profusely thrown.”

Of course, the framers couldn't base their new office on the Articles. After all, the entire point of their convention was to address the shortcomings of the Articles of Confederation – if it had been a suitable model for an executive branch leader, the Convention might have been unnecessary! The Articles were a good example of the same mindset that had led to strong legislatures and weak executives in the state governments. In fact, the government of the articles arguably had no real executive at all. While there were presidents under the articles, they weren't at all like our presidents today. The presidency under the Articles was a purely legislative officer – they presided (hence the name!) over meetings of the legislature, and had almost no part in executing the laws.^d

So: the framers had problems to solve, and their models mostly showed them what they *didn't* want – not what they did. They agreed on little more than that there should be a presidency, and that the office they were creating had to work no matter what sort of people (good or bad) would hold it in the future. No wonder that Hamilton thought that this was the most difficult part of writing the Constitution. Let's look at some of the key features of the presidency, the problems those features were designed to address, and why the framers made the choices that they did.

Unitary

Only one person can be president of the United States at a time.

Today, that seems so obvious that you're wondering why I bothered to write it down. For the framers, it was a much more open question. Why not

d: You now have a great trick trivia question for annoying your friends – ask them how many presidents there have been in the United States, then point out that they forgot the presidents under the Articles.

a group of three people, or a council of a dozen or more? Congress, the legislative branch, was going to be made up of many different individuals. Was there any reason that the executive branch should be different?

For many of the framers, yes. Groups take longer to make decisions than individuals do. For an example, consider how long it would take you to decide where to have lunch today on your own. Now imagine that you are going to lunch with a friend, and you have to make that decision together. It would take you longer, as you compare schedules and discuss favorite restaurants and make travel plans and all the rest. The more people who need to make the decision together, the longer it's likely to take – if you were trying to go to lunch with a few hundred friends, you might starve to death!

The experience of the Revolutionary War had shown many of the framers the difficulty in leading wars by committee. There was a reason that Washington had been made the commander of American forces. For those framers who were worried about future conflicts with Britain, which had kept forces on American borders despite agreements promising not to do so, having someone capable of making quick decisions in place to respond to a potential invasion was extremely important. As Hamilton put it in the *Federalist Papers*, a series of essays on the Constitution: "...energy in the executive is the leading character in the definition of good government. It is essential to the protection of the community against foreign attacks..."

There were also internal crises demanding rapid response and decisive action. The failures of the government under the Articles cascaded into one another – when the legislature failed to raise enough money to pay the veterans of the Revolutionary War, many of them ended up in debtor's prisons. This led to what became known as Shay's Rebellion, with the dissatisfied veterans marching on armories and state capitols. The legislature was completely unable to respond, and private citizens had to pay for mercenary troops to take down the rebellion out of their own money. Clearly, there was a need for a part of government that could respond more quickly in times of crisis than the legislature – and so the presidency would only be one person.

Though it might not seem like it, the question of "How many people can be president at once?" is still at the core of several political debates we're having today. While only one person can be president, the presidency has accumulated more and more staff over time. Today, there are hundreds of people serving in the Executive Office of the Presidency – aides, assistants, advisors, and other staff who help the president make and carry out decisions. There are calls for presidents to govern more collegially – to meet and make decisions with their Cabinet, the heads of the various departments of the executive branch. Proponents of the unitary executive theory, by contrast, argue that since the Constitution gives the executive power to one person – the president – none of his subordinates should be able to exert executive power on their own without presidential oversight.

Selection

So, one person will be president at a time. How do we decide who that person will be?

For this, the framers laid out a clear selection process, many parts of which were soon amended. We'll look in more detail at how presidents are chosen in a later chapter. Right now, we have a more basic question – who should get to decide, through whatever process, the person who will fill the presidency?

The framers were torn. They could have the president selected by Congress, like the Prime Minister was chosen by Parliament in Britain. But that would make the presidency subservient to Congress, and an independent executive that could check the legislature was important to them. Nor were they willing to have the president chosen by the American people – that, they worried, would lead to presidents being chosen based on their skill at the “low arts of popularity”. Essentially, they were worried that if presidents were chosen by the people, presidents would largely be celebrities and rabble-rousers, and might attempt to use their popularity with the public to bully the other branches of government. Not to mention that it would make it easier for foreign nations to interfere in the election of the president.

If not Congress, and not the people, then who? The framers came up with a number of creative ideas. Dickinson, for example, suggested that each state should choose the “best citizen” living in that state, and then Congress could pick the president from that group. If that seems impractical, other ideas were to have some politician be chosen by lot to serve as president – essentially, drawing names of random politicians out of a hat.

Eventually, they settled on the Electoral College. Each state would select a number of electors who could be chosen however the state wished, and these electors would then meet in their state capitals and send their votes to Congress, where they would be counted. Each state could choose as many electors as they had members of Congress. If no candidate managed to get enough votes from the electors to win, Congress would choose from the top candidates. (Very) broadly speaking, that's the system we still use today to choose our presidents.

Making presidents chosen by the states neatly solved most of the problems the framers had. A president chosen by the states would be independent of Congress, and more likely to oppose or check Congress if it seemed necessary. Congress, through counting the elector's votes and making the choice when the Electoral College stalled, would still retain some oversight of the process. Being chosen by the states would help to keep the legislative and executive powers separate. At the same time, making presidential selection a duty of the states, not the people, helped to insulate the president from public opinion, and ensure that presidents wouldn't simply blindly follow whatever the public wanted that day. Too, it would

make it harder for them to claim that the “will of the public” should allow them to do whatever they wanted, like popular dictators and demagogues from Roman history that would have been heavy on the framers’ minds.

Tenure

One person, chosen by the states, gets to be president. For how long?

That’s actually a whole list of smaller questions. Not just how long can the president remain in office, but also whether or not they can run again, and how many times if so? What happens if they stop being president? How do you get someone doing a terrible job out office early?

We could have had a presidency that was held for life. Today, President-for-life doesn’t have the best political connotations. But other members of the United States government, like Supreme Court justices, serve for life terms. It’s thought to keep them above the pressure of politics, ensuring they make their decisions wisely without worrying about what will win or lose them votes. Hamilton, who we heard from above, gave a passionate speech arguing for a presidency that was held for life, in addition to calling for other powers to be added to the office. It was too close to a king for most of the framers, however.

Hamilton’s Proposals

Hamilton called, among other things, for the presidency to have an absolute veto (the ability of the presidency to shut down a law passed by Congress with no way for Congress to override him), to negotiate treaties on his own, to be able to pardon any offence, and more. While the presidency ended up far weaker than this design, many of those ideas made it into the final version in a more limited form. Whether Hamilton truly wanted such a powerful presidency is unclear – he might have simply been making such a strong proposal as a psychological or bargaining tactic, describing a truly strong presidency to make the one they were designing seem less of a threat by comparison.

At the same time, if presidents could only serve for a short time, they would barely have time to learn how to do the job, and would have to constantly be concerned with their re-election. If presidents could only serve once, then not only will every person to have the job be new, but anyone who does a great job at fulfilling the duties of the presidency won’t be able to do it again. The framers also worried about people becoming president who were motivated by a desire for fame or ambition instead of a

desire to be a good public servant. The ability to be elected again, they thought, would be a good reward for such people – it would give them a reason to try and do a good job once in office, since they could hope to get elected again if they did so.

Eventually, they settled on four-year terms – longer than the governors of some of the states at the time, and hopefully long enough for presidents to gain experience and skill at the job. Presidents could run for re-election any number of times, which worried those like Jefferson who thought we might have presidents serving “four years to four years to life”. However, after Washington, the nation’s first president, stepped down after his second term no president broke the unofficial tradition of limiting themselves to two terms until FDR. Congress later amended the Constitution to add an official two-term limit. The framers also created a vice presidency, to take over the presidency in case the current president died or was incapacitated.

They also created the impeachment process, by which Congress could remove a president from office. Those framers who were worried that the presidency they were creating was too strong wanted to make sure Congress had some check on a president who abused his power, and those who favored a strong presidency knew that people would be more comfortable giving power to a leader who could be stopped if necessary. Impeachment was intentionally made difficult – the House may vote to impeach a president, after which the Senate votes to convict and remove him from office – and has only been used a few times in the nation’s history. No president has yet been removed from office this way, meaning that most presidents can count on either four or eight years in office.

The impeachment process is a good place to note how much the presidency rests and relies on the Constitution. In 1998, Clinton was impeached by the House of Representatives. This was the first time that had been attempted in one hundred and thirty years. Yet despite that, and despite Clinton’s personal popularity with the public, there was no real question from either party that he would comply with the process, and leave office if the Senate convicted him. No one seriously believed that he might simply refuse to leave – even though other executives throughout history threatened with removal from office have decided to simply stay. Some thinkers, like Woodrow Wilson or Patrick Henry, believed that the power of the presidency was truly limited only by the ambition of the man who holds it. The twenty-one words of the Constitution that set up impeachment are a good argument otherwise.

Speaking of powers and limits...

Powers, Duties, and Limits

One person, chosen by the states, serving for four years at a time.

What do they do?

Some answers to that question were obvious. Part of the point of creating a presidency was to ensure the nation was capable of responding quickly to attacks. The presidency was given the role of Commander in Chief of the nation's armed forces, and defending the Constitution of the United States was made part of the presidential oath of office.

In fact, it was easy for the framers to find duties and responsibilities they wanted to leave to the president. They were far more reticent, however, about giving the presidency power to accomplish those goals.

Making the presidency the leader of the nation's military left many framers worried. History was full of examples of generals using their control of the military to install themselves as life-long dictators. What would stop any future president from doing the same? So while the president could command the military, only Congress would be given the authority to declare war. Not only that, but Congress would be in charge of funding the military, and passing the laws that would regulate it.

That recipe – a heavy duty, a little power, and strict limits – is one the framers would use over and over again to deal with the problems of government under the Articles of Confederation. In the roughly 1,000 words that describe the presidency in the Constitution, there are far more mentions of limits and requirements than there are of granted powers.

For example, foreign relations under the Articles of Confederation were deeply difficult. The divided Congress, weak central government and strong state governments meant that it could be hard for the ambassadors of other nations to even know who to speak to. The weakness of the government, unable to force the states to abide by its agreements, also meant that they might not want to bother. Britain, as mentioned, violated treaty agreements and kept armed forts on the nation's border, while Spain closed the Mississippi river to American shipping vessels and foreign nations refused to sign even the most modest trade deals with the United States. Individual states attempted to make deals with foreign nations on their own, allowing those nations to play the states of the Union against one another.

The Constitution solved that by forcing the president to be the one to meet with foreign ambassadors (“he shall receive Ambassadors...”). The presidency was also given the power to appoint ambassadors for the United States, and to make treaties with other nations. Now there was one office for other nations to talk to, and it was clear who spoke for the United States. But letting one person be the voice of the nation would have been far too much power for one person – so the Constitution only allows for the presidency to choose ambassadors and finalize treaties if Congress approves.

Or take the execution of the law. Under the Articles of Confederation, the national legislature had little power to carry out the laws it wrote, or to make the states obey them. The fact that there was no clear body charged with carrying out national laws meant that the members of the legislature would form committees and groups to try and make sure the laws they wrote were actually put into action.^e

e: If it wasn't enough to write and then carry out the laws, they were also occasionally judges – the Congress had to settle all disputes among the states. This was a huge addition to the already high workload, despite the fact that the states ignored the judgement of Congress as often as they did its laws.

The presidency, therefore, was given yet another responsibility: “he shall take Care that the Laws be faithfully executed”. But that short phrase is all the Constitution says. Presidents reading that have been inclined to think it means they are granted all the powers they need to enforce the nation’s laws – and as the number of laws have increased over time, that gives the presidency ever greater power. That phrase, however, has long also been a limit on presidential power – presidents must enforce the laws that Congress writes, whether they agree with them or not. Three presidents so far have been impeached for violating their duty to faithfully execute the law. This is one of the areas where the framers left the presidency with unanswered questions. Presidents from Jefferson to the modern day have declined to enforce laws they don’t agree with, or that they believe are unconstitutional. Too, there are many ways that any given law could be enforced – what does “faithfully” mean? The president is charged with enforcing the immigration laws that Congress creates, among others, but where should they concentrate their efforts? How should they look for violators of immigration laws? What’s the best way to deal with immigration? How much effort and how many resources should they put into enforcing immigration law, as opposed to other laws like those about illegal drugs or environmental policy that also need their time and attention? How do you tell if the president is really trying to follow the law? The president’s political opponents are almost certain to disagree with his choices – and accuse him of being derelict in his duties.

Why so many limits? In addition to the framer’s own worries about the United States becoming a dictatorship, as so many revolutions have in the end, they had to worry about the public as well. When the Constitution was presented to the public at the end of the Convention, it drew strong criticism. Patrick Henry called the presidency “deformed” and “squinting towards monarchy”. Referencing the role of commander in chief of the armed forces, he argued that presidents would be worse than kings, since they could simply use the military to keep themselves in power. “What will then become of you and your rights?” Despite the failure of war by committee, the solution of a commander in chief was still unpopular with many. Even given the problems of the Articles, there were those who would have preferred those known problems over the uncertain solution of this new singular executive.

While the presidency is given many responsibilities in Article II, it is given only one significant power that can be used without interference from another branch of government - that of issuing pardons for federal crimes, aside from impeachment. Every other presidential power, from vetoes to appointments, allows Congress or the courts to step in and stop or hinder the president’s attempts to make use of his office.

Independent

The framers placed plenty of limits on the presidency. However, it was not the only branch of government that they worried about – Congress was equipped with vast powers over trade, war, currency, the military and the judiciary. The idea of members of Congress abusing their legislative powers was on many minds. Too, state legislatures had passed some extremely foolish laws under the Articles – from trade wars between states to the creation of nearly worthless state currencies that almost collapsed economies to seizures of property from those who had been loyal to Britain. That last was a treaty violation that undermined America's position abroad.

So, the presidency would have to be able to check Congress, and act to restrain the legislative branch. But how could the framers ensure that the presidency and Congress wouldn't collaborate – that the presidency would actually want to pick fights with Congress?

The answer lay in design. Congress and the presidency would be chosen independently, as we saw above. The salary attached to the presidency was insulated from Congressional tampering, so Congress couldn't use its financial power to threaten or bribe presidents. In return, though the presidency was charged with appointing people to fill offices, members of Congress were barred from such position while they were in office. The presidency wouldn't be able to provide jobs and salaries as incentives to members of Congress. Presidents would be allowed to be re-elected, so that they would have a reason to want to defend the power of their office in the long-term against any attempts by Congress to weaken or control the presidency.

Material rewards were only one area of insulation. The powers each branch were given generally encouraged conflict between the presidency and Congress. Take the negotiation of treaties – the presidency can negotiate them, but needs Congress to approve them. That means that if the presidency wants to gain more power over treaty negotiation, it will likely have to gain that power at the expense of Congress, giving Congress a reason to fight the presidency to take it back. That's exactly what we see with executive agreements, ways in which the presidency tries to negotiate international agreements on its own, and in Congress' repeated attempts to stop the presidency from doing so.

Such a recipe for conflict is also present in the presidency's legislative role. While the president is permitted by the Constitution to suggest ideas for laws to Congress, Congress isn't obligated to pay any attention to such suggestions. The only real power the presidency has in the making of the laws they are required to faithfully execute is the veto. The president's main tool, then, is the ability to make it harder for Congress to pass a law. Harder, not impossible – while Hamilton and other proponents of a strong presidency wanted an absolute veto would stop a law permanently, Congress is allowed to override a presidential veto with a supermajority

vote. For presidents who are deeply invested in the legislative process – and given their role in executing the law, most are – the main tool they have is a blunt instrument that is likely to produce resentment and frustration from Congress when they use it.

We'll look later at how successful this separation strategy was over the course of the nation's history. For now, just note that despite the fact the presidency's main role would be carrying out the laws that Congress wrote, the Constitution made sure that the presidency would be its own office, not merely an arm of the legislature.

The Changing Presidency

The framers, then, created an office held by one person chosen by the states, serving for four years, given many responsibilities and fewer powers, with each power^g coming with limits from the other two separate branches of government.

That still serves a reasonable description of the office today. In broad terms, the presidency is the same as it was when Washington was first inaugurated. In other ways, however, the presidency today has changed greatly from its earlier incarnations.

Washington took office with almost no staff, and had to pay for a secretary out of his own money. Today, presidents have hundreds and hundreds of people in the Executive Office of the Presidency to assist them, as well as uncountable numbers more in the executive branch which they head. Early presidents were far from the center of public attention – modern presidents are the single best-known political figure in the country, and almost certainly the world. Today, we expect presidential candidates to promise sweeping policy plans to improve everything from the economy to the environment to our health, and achieve that – somehow - with a limited veto and constitutional permission to make polite recommendations to Congress.

Today, the presidency is far bigger, more public, and simply does far more than the original design. Why has it changed so much?

^g: Aside from pardons.

Ambiguity

We've seen some of the questions that the Constitution doesn't answer about presidential power. On important issues, the framers were either silent or vague when they set up the office. This ambiguity has led to greater room for the office to change and expand. The presidency, for example, is given "the executive power" in Article II. What is that power? It doesn't say. It might simply be a way of referring to the explicit powers, like vetoes and pardons, listed in the Constitution. But because of its ambiguous phrasing, you could also argue that is a power all on its own – and presidents have argued exactly

that. From the very beginning, presidents have cited those words to support all sorts of actions, from seizing steel mills to detaining prisoners to firing government workers.^h

Congress, by contrast, is given a strict list of topics on which it is permitted to make laws. And while Congress has certainly taken broad views on what some of those topics mean – Congress has used its ability to regulate interstate commerce to achieve all sorts of policy goals – those topics are largely fixed. If members of Congress want to make laws about healthcare or the environment or any other topic not granted to them in the Constitution, they have to either change the Constitution through amendments or try to find a way to accomplish their goal with the powers they have. A president who wants to do something new can certainly try to accomplish his goal with the powers he already has as well, and we'll see plenty of examples of presidents doing just that. But unlike Congress, a president can also point to unclear areas of Article II, like "the executive power", and claim that those phrases have always meant that the presidency was able to do whatever-it-is.

Why is so much of Article II ambiguous? Why so many unanswered questions? In part, the very difficulty the framers had in designing the office discussed at the start of the chapter is responsible. The presidency was new – so it was difficult for the framers to anticipate and answer every question that might arise. Plenty of scenarios that future presidents had to deal with – from nuclear war to the rise of political parties – were simply hard to foresee. Can a president be sued personally for what he does in office? The framers left it to future practice and the courts to determine.

Too, the presidency was contentious. On every design feature we've looked at, there were those who supported other options – multiple presidents, shorter term presidents, presidents appointed by the Senate. Not many framers liked Hamilton's proposal for a strong, life-time president, but finding the right balance between strength and weakness to produce a presidency that could check the other branches and make sure the laws were enforced was difficult. The framers used vagueness as a way to compromise. What can a president be impeached for? Treason, bribery, or "other high crimes and misdemeanors". You can read almost anything into "other high crimes" – so those who wanted a presidency that would be easy to remove could relax, and those who wanted a presidency that would be hard for Congress to check could assume that such high crimes would be rare.

Lastly, it might have been an intentional strategy to increase presidential power. Framers like Hamilton and his friend Morris, who favored a stronger presidency, were in the minority. Morris, however, added two words to the Constitution as part of the redrafting process. The phrase that gives the presidency the executive power reads "The executive power shall be vested in a president of the United States of America". Morris changed the similar phrase granting the legislative power to Congress to read "All legislative

h: Firing was actually one of the first times the phrase was used. While Article II spelled out how the presidency could appoint people, it didn't say anything about whether or how it could remove people it had appointed. The presidency's removal power was based on the idea that it was an inherent part of "the executive power".

power *herein granted* shall be vested in a Congress of the United States” (emphasis granted). Those two words – *herein granted* – are small. But many presidents were able to rely on them to argue that since the Constitution said Congress was given only the powers *herein granted*, and the presidency was simply given the executive power with no such limit attached, there must be more powers given to the presidency than those listed in Article II – than those *herein granted*. In this view, at least some of the framers left Article II a little vague in the hopes of giving the presidency room to grow.

The framer’s silences can be read multiple ways. Strict readings say that a decision not to grant a particular power was an intentional one, forever limiting the presidency from doing that thing. Others interpret it as the intentional creation of a blank space, an area for Congress to add or remove presidential powers as they saw fit. Presidents tend to take silence as both permission and forgiveness – if the framers didn’t mean for the presidency to have some power, they would surely have said something. What we know for certain is that this ambiguity, and the high stakes involved, have meant that almost every single word in Article II has had multiple legal battles waged over it, down to the word “the”.ⁱ

Interpreting the Law

Even small parts of Article II, like the wording of the oath of office, have their unanswered questions. Today, we take it for granted that if the president thinks a law is unconstitutional, that’s a case for the Supreme Court. But early presidents, from Jefferson to Lincoln, didn’t always agree. They argued that their oath of office – “preserve, protect, and defend the Constitution of the United States” – meant that they had to act on the Constitution as they saw it. Simply leaving its interpretation to others would, they thought, be a dereliction of their duty.

Jackson put this forcefully when he rejected a bill to recharter the Bank of the United States. Though he opened his veto message by saying that he thought a national bank might be convenient for the government and useful for the people, he personally believed a national bank was against the Constitution. The Supreme Court however, in *McCulloch v Maryland*, had held that the Constitution allowed Congress to create a national bank if it wished. Jackson explained his decision to veto the bank recharter:

“The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate,

i: “The”, you see, is singular. Since “the” executive power is vested in the president, one argument goes, it can’t be used by anyone else.

and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it of the supreme judges...”

Jackson’s veto prevailed, and the National Bank of the United States was soon no more. Though the country has the Federal Reserve today, the United States still has no national bank as it did then. Jackson’s interpretation of the Constitution, at least in some respects, is the one that won.

We’ll see more about the presidency and the courts in an upcoming chapter. Here, just note how the unanswered questions in Article II – even over as small a thing as the exact meaning of the presidential oath of office – open doors for presidents to exert influence. You can see other ways the presidency has changed in this story as well. Today, presidents are far more comfortable simply vetoing a bill because they personally don’t like it, and don’t feel the need to make constitutional arguments when they do so. On the other hand, language from a president that argued he wasn’t obligated to obey a Supreme Court decision would likely provoke a far stronger reaction from the public. The presidency is always changing.

Congress

Oddly enough, the same branch that was to be the key check on presidential power has also been responsible for adding powers to the presidency. Congress writes the laws which the president is bound to execute – and in so doing, they often end up empowering the office of the presidency whether they intend to or not.

For example, today we have a far larger national government than the early United States did. The nation is larger and more populous, our economy is more globalized and intertwined with other nations, and the government has taken a role in areas it never did then, such as healthcare and the environment. All this results in Congress creating an ever-larger body of law^j, and more and more executive branch agencies and government personnel to carry them out. While every law passed is a burden on the presidency – something they are obligated to see faithfully executed – it is also a gift. Multiple conflicting laws give the president some choice on which to execute and which to ignore – if Congress has passed laws trying to increase oil production and other laws concerning clean air and water, a president can claim to be simply enacting the will of Congress no matter what they do regarding any given oil well. Laws establishing many different priorities allow the president to decide which ones actually get resources and attention. And given a sufficiently large collection of laws, a creative

^j:By some estimates, attempting to read all the current United States laws and regulations would take you well over three years – assuming that you didn’t have to read the new laws that were passed while you were reading the old ones.

president is almost guaranteed to find one that lets him do what he wants. When Clinton wanted to stop mining on an area of land, he used an old law about creating national landmarks to declare the land nationally protected – and incidentally immune to mining efforts.

Congress doesn't simply empower the president by accident, however. They also, for various reasons, intentionally give the president new powers. For example, Congress passed the Budget and Accounting Act, requiring the presidency to submit a budget proposal for the entire federal government to Congress. The mix was similar to the recipe used in Article II, with a lot of responsibility and little power: presidents had to now, by law, do an immense amount of work and research to send Congress a budget which Congress could implement, ignore, or modify as they saw fit. But overnight, the president had gained a role in the budget process that they had never had before – the ability to set baselines, be the one producing the authoritative data members of Congress would turn to as they made decisions, speak for government agencies and make public pronouncements of government priorities. Why would Congress give the president any grasp on their power over government funding? Because dealing with budget requests and reports from hundreds of agencies was confusing and nigh-impossible, and handing the work of consolidating all those budgets into one to the president was a tempting way to simplify their work.

That motivation isn't simple laziness, either. Imagine a Congressional law that regulates the safe amount of some chemical in drinking water. Are members of Congress – elected for their political skills, not their grades in chemistry class – supposed to determine the safe level on their own? What if new medical research comes out, or water purification technology changes, or it proves more difficult than expected to change water systems? Should Congress pass a new law every time? Writing a law that charges the presidency, or researchers in the executive branch, with determining and enforcing [INSERT LEVEL HERE] allows Congress to rely on experts and create longer-lasting laws that can adjust to changing circumstances. At the same time, writing a vague law that the president will have to fill in the details of means that blame for controversial issues like immigration, or unpopular outcomes like rising prices or unemployment, can be passed from Congress to the presidency. Sometimes the president is given a greater role in domestic politics against his will.

And the presidency was designed to respond quickly to emergencies – something the slow legislative process of Congress isn't well suited to doing. Members of Congress worried about future emergencies can grant presidents broad emergency powers – powers the president can use only in case of some emergency. This makes sense – like making sure you have a fire extinguisher just in case – but since presidents have wide discretion on what qualifies as an emergency, these become more powers in the presidential toolkit. Presidents are granted broad authorities in wars and other crises, and these often remain long after the emergencies that inspired them.

These grants of power are easier for Congress to give to the presidency than to take back. Congressional attempts to limit the power of the president, from limiting what government funds can be used for to laws like the War Powers Resolution that place new limits on the president, tend to come after presidents have already done what Congress is trying to stop. Too, presidents are often able to find ways to work around or prevent Congressional limits – the veto means that legislation that empowers the presidency is far easier to pass than legislation that weakens it, and a vast code of laws means that presidents can often find alternative routes to what they wanted to accomplish.

History And Tradition

Other changes to the office of the presidency aren't changes in Constitutional interpretation or passed by Congress – in lieu of a better way of saying it, they just happen. Consider the State of the Union – while the Constitution says the president must “give to the Congress Information of the State of the Union...”, it doesn't say how. Wilson ignored the tradition of submitting written reports to create the new, modern tradition of annual speeches to Congress that are also broadcast to the public, where presidents can make the case to both audiences for their priorities. The new version of the State of the Union has even spawned its own traditions, such as the recognition of guests of the president or a response by the opposition party. Or take signing statements, which we'll learn about in a later chapter: while originally they were simply ceremonial speeches given when the president signed a law, today they carry some amount of political and legal weight as presidents have used them to make comments on their interpretation of the law they are signing.

For a more significant example, Washington issued a proclamation in 1793 declaring that the United States would be neutral in the war between France and other nations. It ordered Americans not to get involved in the conflict and threatened punishments for those who did. Whether Washington had the force to issue such a proclamation on his own was unclear – but it held until Congress passed a Neutrality Act a year later, giving it legal force. Presidents after Washington continued to make use of proclamations.

The presidency is the active part of the United States federal government – the reason the office is held by one person is to make it quick and decisive, and its role in responding to threats and emergencies means it has to be so. That also means, however, that presidents have an advantage in building traditions over time. Presidents can simply act, like Wilson deciding to address Congress in person, and wait for the other branches to respond. If they never do, a precedent can be set which gives the president's action the force of tradition – future presidents can point to history to say that their office has always been allowed to do that. Today it would be difficult for the

Speaker of the House to avoid inviting the president, even though it isn't any sort of legal requirement to do so.

2020 State of the Union

During the 2020 State of the Union address, Speaker Pelosi ripped up the copy of the president's speech that is traditionally given by the president to the Speaker of the House on camera. She did this to show her personal and political opposition to Trump. While the moment attracted some political attention, the bigger story was less commented on: she had ended up inviting Trump to give the State of the Union address to Congress even though there was no real reason beyond tradition for her to do so. Tradition has some very real force.

Thus over time, we come to have greater and greater expectations of presidents, which end up transferring some power (and often more responsibility) to the office. Presidents have often used their public position to advocate for their party, and for what they thought their party should do. Now, the current president is treated as the de facto head of his political party, responsible for what any member of the party does or says – the official heads of the party national committees are far less visible. Theodore Roosevelt offered to mediate between workers and employers in a coal strike. Presidents from Truman to Reagan followed suit in intervening in labor strikes, using everything from attempts at legal intervention to simply their recognition and offers to moderate negotiations. Today, when there is a prominent strike, the media starts asking what the president is going to do about it.

The Public

Ask anyone in the United States to name a politician – you'll almost certainly get the name of the current president. Ask children who runs the American government, and they'll tell you the president does. Don't blame them – many adults will do the same thing. Presidents have monuments and statues, their faces on our money and our mountains. Their names and images are attached to historical moments – the Monroe Doctrine, Lincoln and the Civil War, FDR and Pearl Harbor, Nixon and China, Obamacare. We don't do that for Senators or Representatives or Supreme Court justices.

The framers might have intended to insulate the presidency from the public with the Electoral College, but that distance didn't last. And while the American people might have been skeptical of the ideal of monarchy and power concentrated in one person's hands, there were also more than a few

Americans who would have happily crowned George Washington King of America. Jackson and the presidents who followed him became more and more public presidents: intentionally building up their popularity with the public, and trying to make political use of it. When presidents talk today, they often use the presidency, the president, the government, the nation, and the American people interchangeably, as if they were all essentially the same thing. When they mention Congress, if they do, it's most likely for criticism – especially for not obeying the will of the people, which is often described as exactly matching the president's own priorities. We'll look at how effective presidential attempts to use the public to get their way with Congress are in a later chapter.

Presidents can use their status as the “leader of the American people” as justification for pursuing more power. But it also might be the reason why presidents pursue more power in the first place. Today, Americans expect the president to keep the economy growing (both the national economy and their local economy at the same time), though what the president can do to achieve that isn't clear. Presidents should make the government achieve more, while also bringing down the debt. Presidents are expected to keep peace in the United States and address humanitarian crises in other nations. The American people want them to act as legislators, implementing the vast policy plans they laid out when they were running for office, and addressing everything from keeping bridges repaired to going to the moon. We demand that they fulfill all the duties in the Constitution, and more besides. Presidents are also supposed to act as symbols of the nation as a whole while being the leaders of their particular political party, as well, somehow. We ask them to clean our air, protect our borders, build our roads, heal our sick, teach our children to read, stop (and build) nuclear weapons, and prevent natural disasters. In notable incidents, large groups of Americans have blamed the president for everything from shark attacks to the weather.

Sharks

In 1916, there was a series of shark attacks that caused a panic in the United States. This ended up making its way to the president's desk, and Wilson held a cabinet meeting where he declared war on the sharks. If that sounds silly – and nowhere in Article II will you find “sharks” on the presidential list of responsibilities – Wilson was probably right to try and do something about it. Scholars have analyzed election data to argue that voters blamed Wilson for the shark attacks, costing him votes in 1916.

What the public demands is far, far beyond what the powers of the presidency can actually do. That's not because the presidency is weak, but

because expectations are so high. In order to fulfill those expectations, presidents must constantly find ways to use the powers they do have creatively, seek new powers from Congress, argue for broader readings of their Constitutional authority. The presidency pushes while the other two branches try, sometimes, to restrain it. And every success presidents achieve not only remains for future presidents, empowering the office long-term, but also drives expectations higher and higher. Why can't every president be as transformative as FDR, as commanding as Lincoln, as respected as Washington?

Conclusion

Because the presidency doesn't work.

At least, it doesn't work how most Americans think it does. Presidents, in their letters and memoirs, are often keen to share the frustrations of their office. Kennedy asked an audience watching him receive an honorary degree to keep precisely that in mind. "The powers of the presidency are often described. Its limitations should be remembered." Lincoln expressed a similar feeling of helplessness: "I claim not to have controlled events, but confess plainly that events have controlled me." Carter was even more blunt: "Maybe I was overly confident when I was inaugurated about what I could do." Clinton laughed about it: "Being President is just like running a cemetery – you've got a lot of people under you and nobody is listening." Nor were presidents merely upset about a lack of power or control: Washington expressed his overall frustration by saying "I had rather be in my grave than in my present situation..." Jefferson called the job "unceasing drudgery" and complained of his "daily loss of friends". Adams said that if he could do his life over again he would be a shoemaker instead. When presidents try to describe the experience of their office, they use words like taxing, tiring, miserable, painful, and thankless, and compare it to being in slavery or in Hell.

Forgive the wall of quotes, but it's important. If we're to learn what the office is really like, then we have to let go of our mental pictures of what it's like – movie presidents who can wave their hands and simply have things happen. Aside from issuing pardons (and perhaps launching nuclear missiles), very little presidents achieve happens that way. The office isn't easy.

We can see that in the performance of presidents, by looking at their performance as a measure of the health of the office. More presidents than not have failed to achieve two terms. In recent years, presidential scandals have attended almost every single administration. After a 130-year hiatus, impeachments are back and rising in frequency. Presidential approval ratings trend lower and lower over time, as do measures of trust in the presidency and the rest of the government that Americans conflate with it.

More individually, the office tends to destroy those who hold it. Compare photographs of presidents before their inauguration and after leaving office – they often look as though they’ve aged decades in four years.

Presidents are expected to be chief of state, chief executive, commander in chief, chief diplomat. And those are only their official duties – head of their party or chief legislator aren’t on that list constitutionally, but we still demand that our presidents fill those roles. The growth of the presidency comes with plenty of downsides – a larger executive branch is harder to control. More laws to execute means more responsibility. Being seen as the leader of the party means it is far harder to appear, as some past presidents did, above party and small politics. Truman had a sign on his desk in the Oval Office: “The Buck stops here.” When others try to avoid responsibility, somehow it always drifts towards the White House.

The presidency is, above all else, a constitutional office and a limited one. President can and do try to push their boundaries – but pushing is far different from ignoring. It is the presidency that controls what presidents can do, what they can’t, and what will take them an awful lot of time and effort and missed sleep to attempt.

The office (the presidency, not the room) is larger than the people who hold it, and molds presidents into similar shapes. Candidates run for office by criticizing the current president for their behavior – on excessive secrecy or executive orders – and then repeat that exact same behavior themselves once in office. Presidents with mild and aggressive personalities alike both vigorously defend their office against encroachment from other branches. Presidents who enter with the most collegial, collaborative styles of management and policy-making end up locked in single combat with Congress by the end of their term. Huge numbers of grand presidential initiatives fail, and those that are achieved are generally far watered down from their original design. Are our presidents all hypocritical, power-hungry, aggressive, and incompetent?

We give presidents far too much blame, and perhaps too much praise, when we view them only as people. If we ignore their office, and place all their accomplishments and failures on their shoulders alone, we end up giving them credit for every good thing that happened to happen in the four years they were in office while we ignore the monumental efforts they put into struggling with the limitations of their post. We explain their actions by looking at their personalities or their character, and ignore the degree to which the presidency itself shaped their choices. We both unfairly lionize and minimize them.

Let’s look at this thing the framers struggled to create and created to struggle with its fellow branches. Let’s examine the office that its occupants fought for and hated, that shapes so much of what its holders can and must and want to do, and see what the presidency is actually like.



Further Reading

- The Federalist Papers, 69-77
While the entirety of the Federalist Papers are worth your time, this are of particular importance for anyone who wants to learn about the presidency. In these, Hamilton lays out both a description and defense of the office of the presidency to skeptical audience, giving us some idea of the vision the framers had in creating it.
- *Blind Retrospection: Why Shark Attacks Are Bad For Democracy*, by Achen and Bartels.
This piece was referenced above. If you want the full story of the shark attacks and how blame for them got transferred to the presidency, this is a great read.
- Bank Veto Message (1832), by Andrew Jackson
The entire message from Jackson, explaining why he was going to veto the national bank, gives a look at how one occupant of the office saw the presidency, and how he thought it related to the other branches. It also illustrates some other topics we'll discuss, such as appeals to the public.
- Article II of the United States Constitution.

Reading the words that set up the office we'll study is essential. An annotated copy is included in the back of this book.

Chapter 3

Nominations and Elections

Introduction

The United States Constitution lays out only three requirements to be eligible to be President of the United States:^a

1. You must be a natural born citizen.
2. You must be at least thirty-five years old.
3. You must have been a resident of the United States for thirteen years or more.

a: A later amendment added one more - you must not have served as president twice already.

Those are pretty broad qualifications. Every four years, hundreds of millions of Americans satisfy all three of them and are eligible to run for the White House. Yet every presidential election, only a handful of people out of all those millions actually make any attempt to be elected. Nor are the people in that handful normal. That is, the sort of people who try to be president are different in predictable ways from those who do not. They tend to be fairly well off financially, for example, and even though the official age requirement is only 35, they tend to be older than the average American. And even in that small, abnormal handful some candidates are considered clear favorites to win while others, despite meeting all three of those qualifications laid out in the Constitution as well as anyone else, are almost certain to lose.

The process by which America winnows a field of millions down to a single person is complicated, a result of a long series of changes over time to our original presidential selection method. It involves not just laws and regulations, but also private non-governmental actors like political parties and individuals. Presidential elections aren't just about competition between candidates, but between states and parties and political factions as well. However, it is important for us to understand the challenges that anyone wanting to become president must face. If we made the only way into the Oval Office a rope ladder, we could be confident that all our

presidents would likely be above average at climbing. In the same way, selection effects^b mean that anyone who has made it through the presidential election process is likely to have some traits in common, and understanding how people are chosen for the presidency tells us what we can expect from the people who will hold that role.

In this chapter, we'll first look at presidential primaries, which precede the actual race for the White House. We'll then look at how presidents are elected, and how candidates campaign for office.

Primaries

Before the general election in which Americans vote for who they want to be president, we have the presidential primaries, in which some Americans vote for which candidate a particular political party^c ought to run (or “nominate”) in the general election. The primaries go on for roughly four to five months, though many candidates will start campaigning long before then – often years in advance of Election Day! Having an election to decide who's going to run in another, different election might seem like an odd system to you. The Constitution doesn't specify anything about such a process, and parties are largely free to do as they like. Why did the parties create this system? Why don't parties simply decide which candidates they're going to run, instead of leaving it up to a vote? After all, political parties are private entities trying to appeal to the public. That also roughly describes Coca-Cola and Pepsi, but neither company asks its consumers who should be the next soft-drink CEO.

Originally, that's more or less precisely how the system worked. Political parties would have gatherings, called conventions, at which party leaders would decide who their party would nominate to run for president, and then announce their choice. Parties might have primaries or caucuses in which voters could tell the party who they wanted, but those weren't generally binding. The party leaders were free to choose whoever they wanted, regardless of what anyone else thought. Voters in the general population could only choose between the candidates each party presented on Election Day. This system lasted until roughly 1968, when the Democratic party had a particularly disastrous convention in Chicago.^d In response they adopted political reforms designed to give everyday supporters of the Democratic party more control than party leaders over who the party nominated, and the Republican party soon adopted similar reforms of their own. This was the origin of the modern primary process.

Today, each state (and U.S. territory) is given a set number of delegates by the national party. These delegates will attend the national convention and vote in favor of a given candidate to be the party's nominee in the general election. To decide which candidate these delegates will support, the parties in most states use a primary election, in which some people in the state

b: A selection effect is when a selection process favors a certain characteristic or trait, causing a selected group to not be representative of the general population the group was chosen from.

c: A political party is an organized group of people who share broad political goals and work together to win elections, hold public office, and shape government policy.

d: Without going into too much detail, Democratic party leaders chose Hubert Humphrey as the Democrat nominee. Humphrey hadn't won any primaries, but that did not matter according to the rules at the time. Those who wanted other candidates (who had won some primaries) to be the Democratic nominee instead were angered, and clashes between Democratic party leaders, as well as protesters and police, were widely televised.

(either those formally registered as supporters of that party or a broader group) vote, and those votes are translated into convention delegates. Some parties in some states use the caucus system instead, in which instead of casting a ballot, participants engage in a longer social process involving speeches and discussion about the candidates. Each state can have their primary on a different date, set by the state government, so this process can take several months to complete. After all the primaries or caucuses have been held, the party holds its national convention. At that convention, the delegates chosen by the primaries and caucuses, as well as other delegates from the party itself who are generally free to vote however they please^e, meet and cast their votes, and the party officially announces the winner.

You might think that system seems a bit complicated, and that description fairly light on details. Correct on both counts! The reforms that gave rise to the modern presidential primary system were based on pre-existing practices in each state, and involved a lot of different decision-makers. Focusing on the two main American political parties alone – the Democrats and the Republicans – we have two national party organizations, 50 state legislatures that control their state election laws, about 100 state party organizations, U.S. territories like American Samoa and Guam, and innumerable local party organizations, court rulings, and the like. All of those groups can change or influence the way primaries work today to pursue their different goals. This means that the details of the presidential primary process can change frequently, and vary widely. Many third parties^f use a process to choose their nominees that looks very little like what's described above!

e: These delegates are often referred to as superdelegates. The two parties have different rules for how they can participate.

Primaries Are Complicated

Here's an example of how complicated the primary process can be: the conflict over the date of the 2024 New Hampshire Democratic Presidential Primary. Traditionally, New Hampshire is the first state to vote in the primary process, sending 24 delegates to the Democratic National Convention. Iowa (which you might think is the first state in the presidential primaries) is the first state to vote using a caucus, with a state law requiring that their caucus be held at least eight days before any other state's nomination contest. Note that this means they can go before New Hampshire without triggering New Hampshire's state law, since that only refers to primaries.

In 2022, however, following a request from then President Biden (an incumbent running on the Democratic ticket, and the front-runner to win the eventual nomination), the Democratic Party changed its calendar to put South Carolina first instead, citing a

f: *Third party* is a term for parties that are neither of the two dominant political parties, the Republican or Democrat party. Third parties often run candidates for the presidency, though they generally fail to seriously compete with the top two.

desire to have their early states be more diverse.

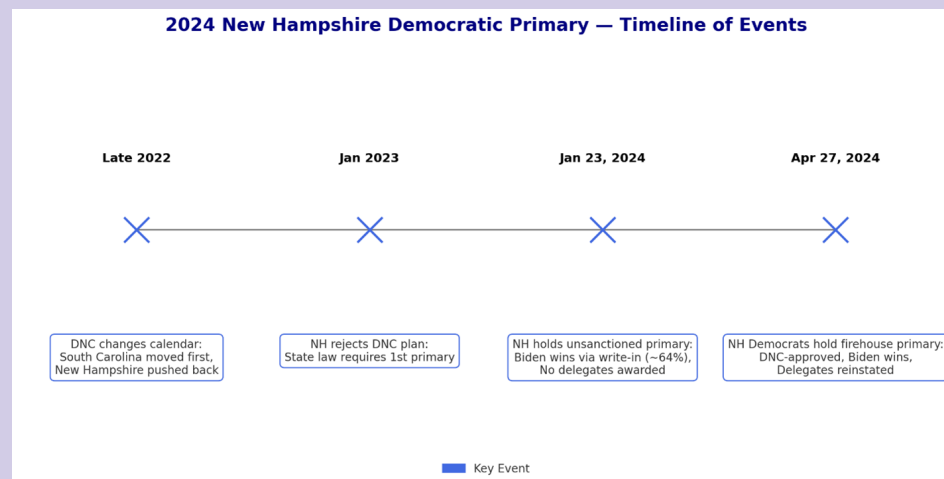
Many New Hampshire state lawmakers and government officials strongly opposed the move, wishing to protect their states early position in the presidential primary calendar. Early states often receive greater media attention than states that vote later in the process, and their voters may have more choices as some candidates will likely drop out over time, leaving voters in late states with fewer options. Since those state lawmakers controlled their state's election laws (one of which mandates that New Hampshire be the first primary in the nation), the Secretary of State for New Hampshire (coincidentally a Republican) kept the New Hampshire primary scheduled at its original early primary date in January 2024, following state law and ignoring the request of the Democratic Party.

The DNC, in turn, promised not to award delegates from this primary contest, calling it "meaningless". In effect, they would not count the 24 delegates from New Hampshire at the national convention that would be held later. Despite this, several candidates running for the Democratic nomination for the presidency still listed their names on the New Hampshire ballot. They cared less about the opinion of party leaders than about the chance to get some press attention. The Biden campaign, however, in cooperation with the Democratic National Committee (DNC), chose not to register his name on the New Hampshire state ballots. Worried that a loss by default in the state could prove bad publicity for the Biden campaign later in the election, several members of the New Hampshire State Democratic Party (not the national Democratic party) still led a campaign asking Democrats in the state to write his name on their ballot, despite it not being a listed option. This succeeded, with Biden taking about 64% of the vote of those eligible to participate in New Hampshire primaries: in this case, registered Democrats and unaffiliated voters who chose a Democratic primary ballot.

Still, the Democratic party stuck to its promise, reiterating that it did not sanction the contest and would not be bound by the results, prompting a threat of legal action from the state of New Hampshire over voter suppression. Eventually, to resolve the ongoing dispute with New Hampshire, the Democratic National Committee held a second primary of its own in the state months later. Known as a "firehouse" primary or private primary, this was run solely by the party and not the New Hampshire state government. Two dozen people voted on a ballot on which Biden was the only candidate, and following this vote, the Democratic National Committee voted to accept the 24 New Hampshire delegates at the convention later that summer.

If that seems confusing, then it's fair to note that this was a far

more complicated primary election than normal. If you can believe it, this is the simplified version of this story – some details and subtleties have been cut out to make this easier to follow. However, that complication is the point of the story. Note how many different groups of people had roles to play in determining what happened: the candidates running for President, multiple groups of people within the state and national Democratic parties, the state of New Hampshire and its officials, voters both affiliated with the Democratic party and not, and potentially even the courts. Many of these actors had different and sometimes conflicting goals: the Democratic National Committee may not have wanted to recognize the early New Hampshire primary as legitimate, but that didn't stop candidates from registering to have their name on the ballot anyway. We can see how the reforms of 1968 took control over candidate choice away from the national party leaders.



Why does it matter to us how the presidential primary process works? Because the way in which the parties select their candidates determines what sort of candidates – and thus what sort of presidents – we'll end up with. Since the two major parties have changed the way they choose their nominees, we should expect to see our modern presidents share some common characteristics compared to presidents from previous time periods.

The loss of control by the parties democratized access to the nomination process. Now, candidates themselves choose if they want to run or not – they self-select. Voters can have a far greater impact on who their party would run for office, instead of simply responding to their party's choice. Indeed, today, it's often seen as corrupt or illegitimate for party leaders to try and push for candidates they favor, instead of letting voters decide. This lack of top-down control extends to the point that political parties may end

up running candidates for the presidency that their leaders would not have chosen. Many Democratic party leaders were not enthusiastic about Carter's candidacy, but they had to abide by his primary victories. In a similar manner, in 2016, Republican party leaders paid for advertisements criticizing Donald Trump, who would later become the Republican nominee despite their opposition.

The Party Decides?

Parties still matter a great deal in deciding who gets to be their nominee. Superdelegates – delegates that aren't assigned through the primary process but are free to vote how they like – give the party some voice in presidential nominations, though both parties have put rules in place to limit them to some degree. Parties are also natural places for candidates to go during the “invisible primary” phase of setting up and funding their campaign, and party endorsements and support can help to steer attention and resources to their favored candidate. Some even accuse parties of changing their own rules to help favor the candidates they prefer – generally, these accusations are made by those who support someone the party leaders do not.

Political scientists are still debating just how much control political parties have over who their nominee will be. For our purposes, all we need to know is that the control parties have over their primaries seems to have decreased compared to the days when candidates were solely chosen by party leaders, and that anyone attempting to run for the presidency is likely to be someone skilled at commanding public attention.

The reduced influence of party leaders has resulted in a loss of peer review – while before the primary reforms candidates had their capabilities evaluated by party leaders and other politicians, today the public is largely in control of the process. This means that modern presidential candidates can afford to be highly critical of their party, or even run campaigns where they make promises different from what party leaders might want. Such candidates are often called “mavericks” or outsiders. The candidate, not the party, is often central to a campaign.

Since party leadership is less in control of the candidate selection process, they are less able to restrict the field of challengers trying to win the nomination, which means that there is often a large number of candidates vying for one party's nomination, especially if there's no incumbent running for that party. Prior to 1968, characteristics that a group of party

leaders might look for in a candidate included political experience, party loyalty, or personal connections. Today, candidates are likely to be more successful in being nominated if they have characteristics likely to attract public attention and support.

Candidates who want to run for president, therefore, need to be able to attract public attention. Media coverage of all kinds is especially important, as positive (or negative) attention can help a candidate to stand out in a crowded primary field, gaining valuable name recognition. This is true of the traditional news media, but also any other form of gaining attention: the 2024 presidential primary saw increased attention to podcasts and other forms of what was termed “new media”, while Jimmy Carter went on a cooking show in Iowa while campaigning in that state’s primary. His focus on Iowa was due to an intentional strategy – he hoped to perform better than expected there, which would lead to media attention due to the surprising result. Since Iowa was first, he planned to use this early burst of favorable media coverage to attract more attention and fundraising support in later primaries. This strategy of turning an early strong performance into resources for further victories is often referred to as momentum, and is one reason why states early in the primary process receive more attention from candidates than those later in the calendar. Carter was not unusual in his focus on gaining public attention. Often, candidates will engage in behavior that they hope will garner public attention, attempting to appear aggressive, confrontational, or unorthodox. Trump, for example, skipped a presidential debate in 2016 in Iowa – an unusual move that may have garnered him attention and helped him stand out from the handful of other candidates for the Republican nomination.

The need to compete for public attention means candidates need to be prepared and organized long before the primary race begins. This means hiring staff, making advertisements, managing media, printing T-shirts, arranging appearances, registering and dealing with laws and regulations, and so much more. The earlier this work can be accomplished, the better. Of course, all this work takes money and resources. Earlier states can be the most important to win and solid campaign finances mean a candidate can spend more time campaigning and less fundraising. Candidates who do well at fundraising and organizing in this stage often go on to strong performances in the primary, while failing to get donations or establish a solid campaign organization can lead to a candidate dropping out or deciding not to run before the race even begins. This means that fundraisers and political activists can help to filter which candidates will be able to mount serious campaigns for the nomination, which raises concerns about the influence of money and elites on our presidential selection process. This pre-primary organizational phase where candidates are winnowed from the field is sometimes called the “invisible primary”. Of course, some candidates are wealthy enough to fully or partially fund their own campaigns.

Money doesn’t guarantee success in either the primary or general

election.^g However, having access to funds early means that financially well-off candidates get to pass a hurdle that candidates with fewer resources or connections might not be able to clear.

Our primary process, then, means that we should expect some common trends among those individuals running for the Presidency. The decreased control of the parties means that “maverick” candidates who go against the wishes of party leaders are more likely. The loss of peer review, with candidates chosen by the public instead of party leaders, means that candidates for the presidency may be more amateur, with less political experience. The need to appeal to primary voters rewards candidates who are skilled at commanding public and media attention: increasing numbers of celebrities have run for public office since the 1968 reforms. Candidates who the media pays a great deal of attention to are also favored, so we should expect most presidential nominee candidates (and thus, most presidents) to stand out and be more unorthodox than not. The invisible primary means that most presidents will likely be better off financially than the American average and/or have networks of political and financial connections and support.

Of course, getting through the primary is only the first step. Winning the nomination only gives the candidate a chance to compete in the general election.

What Does It Mean To Stand Out?

What does it mean to say that modern presidents are generally good at attracting media attention? There are a lot of potential answers. Some argue that the modern primary system rewards candidates who cause controversies or engage in negative messaging, since those often get covered by the news media for free (hence why this type of coverage is often called “earned media”). Others would point to the effort candidates put into their social media presences. One intriguing idea is that “standing out” might be literal in some cases – candidates who are taller tend to do better, on average, and elected presidents have been trending taller over time. For more on this idea, you can look up trend analyses of the heights of U.S presidents over time.

g: See the next chapter for more evidence of this. The Clinton and Harris campaigns are also good examples of a presidential candidate outspending their opponent and still failing.

The Presidential Election

The way in which we choose our presidents influences how they see the country. Here, we’ll look at how the presidential election works, particularly

the Electoral College and how many and what sort of people turn out to vote.

The Electoral College

An Electoral College Timeline

1. Parties in each state (as well as the District of Columbia) nominate lists (or “slates”) of electors, people pledged to vote for their presidential candidate in the Electoral College. Methods for nomination differ by party and state.
2. On Election Day in November, citizens in each state vote for a slate of electors. After the election, the winning electors are certified and appointed by the state government.
3. About a month after Election Day, electors in each state gather in the state capital to cast their votes. These votes are sent to Congress.
4. In January, Congress gathers to count the votes from the electors and certify the winner of the presidential election.

Presidents are not chosen by the American people, but by the United States. While most of those who turn out to vote on Election Day assume they have cast a vote for a presidential candidate, and most presidential inauguration speeches talk about receiving votes and a mandate from the people, it is the electors of the Electoral College who choose the next president of the United States. What is this system, and why does it exist?

In the United States, elections are run by the individual states themselves – there are no real national elections. A voter in Arkansas might vote for who they want to be their Senator in an election run by Arkansas, and for the most part, the state government of Arkansas will be in charge of administering that election, setting rules for how people will participate, collecting and counting the ballots, announcing the results, and so on. That process works for almost all elected positions, from Congressional representatives to local dogcatchers: Arkansas runs elections in Arkansas, Ohio runs elections in Ohio, and so on.

The Presidency, however, is not a state office, but a national one. In fact, the presidency (along with the vice presidency) is the only elected office with a nation-wide constituency in the United States. Senators serve their states, Representatives their districts, but presidents are supposed to serve the nation. So how do we get a single national result out of a system with no

national elections? While the Constitution vested power over elections with the state governments, it also established a system for combining results from each state into one single national decision. That system is the Electoral College.

Every state can choose a number of electors equal to how many members it has in Congress, both in the Senate and in the House. This means that the lowest number of electors a state can have is three: two for the two Senators that every state has, and at least one representative (the minimum) in the House. More populous states will have more House representatives, and thus more electors. Despite the fact that Washington, D.C. is not a state and has no voting power in Congress, the 23rd amendment to the Constitution also granted the District of Columbia three electoral votes. In total, the Electoral College has 538 electors. It is these electors who ultimately meet and vote on who should be the next president of the United States.

To decide who should serve as their electors, most states use winner-take-all elections. Indiana, for example, must choose 11 electors to vote in the Electoral College (Indiana has two Senators, and nine House Representatives). When citizens of the Hoosier State turn out on Election Day in November and cast their vote for President, they are actually choosing between groups (or “slates”) of electors nominated by various political parties. Methods for nominating these electors vary by party and by state, but are generally committed members of that political party chosen for their loyalty to the party’s presidential ticket. If one of our hypothetical Hoosiers voters marks their ballot for the Democratic presidential candidate, they are voting for the slate of electors that the Indiana Democratic Party has chosen, which are pledged to the Democratic party candidate. Since Indiana uses a winner-take-all system, whichever party’s slate gets the most votes from Indiana citizens wins all 11 electors. Election night reporting often colors states red or blue based on whether the Republican or Democratic electors won, respectively.

Two states, Maine and Nebraska, use a slightly different system – what’s known as the “congressional district method”. This awards two electors (the ones for the state’s Senators) to whichever candidate got the most votes in that state. Each congressional district within the state then chooses one elector, based on whichever candidate got the most votes there. While in a winner-take-all system each state’s electors are pledged entirely to one candidate, the congressional district method means that a given state’s electors might be split between multiple candidates. In 2024, for example, Maine awarded three electors to Harris (two from getting the most votes statewide, and one from getting the most votes in the first congressional district) and one to Trump (for getting the most votes in Maine’s second congressional district).

After the election, each state officially certifies and appoints the winning electors. About a month after Election Day, each state’s electors gather in their state capital to cast their vote for who should be President of the United

States. These electoral votes are sent to Congress, who officially counts them and confirms the winner of the presidential election in early January. A candidate must win at least 270 electoral votes, a majority of the votes cast, in order to become President. If no candidate wins at least 270 votes, Congress votes using a special procedure to break the tie.

How Can States Choose Their Electors?

How much freedom do states have in deciding how they'll pick people to serve as their electors? In general, a great deal. Today, almost all states award all their electors to the winner of a statewide election, with only two exceptions. However, though states use highly similar methods today, there was more variety in the past. Some states divided themselves into electoral districts equal to their number of electors, with the winner in each district getting one elector. Others had an election to choose a pool of potential electors, with the state legislature choosing electors from that pool. In other cases, the state legislature simply chose electors directly, with no involvement from the state's population at all. South Carolina used this last method up until the election of 1860! Even today, several states have signed an agreement called the National Popular Vote Interstate Compact, which would have a state legislature ignore the voters in that state and instead award its electors to whoever the legislature determines got the most votes nationwide.

While today we tend to assume that the president is chosen by the people, states ultimately have the power to decide how their presidential electors are chosen. For more details, look up the Supreme Court case *McPherson v. Blacker*.

Many Americans are unaware of the Electoral College, or at least the details of how it works. Ballots are generally presented so that the names of the presidential candidates are visible, but not the names of the pledged electors voters are actually voting for. The news media, and the nation as a whole, generally acts as though the election is over on election night in November – there is much less attention paid to the electors voting in their state capitols, or Congress certifying the vote in January.

The Electoral College is one of the most controversial parts of our political system, receiving many petitions and proposals for reforms. Let's briefly look at two major concerns raised about the system, and what each tells us about the people who will serve in the presidency.

Faithless Electors: The fact that presidential elections are indirect – that is, instead of voting directly for a presidential candidate voters are instead

voting for electors who will then vote on their behalf - raises the question of what obliges electors to vote the way they've been told to. Electors are pledged to support a certain candidate when they cast their electoral votes. But what if they break their promise and cast their vote for a different candidate instead?

The idea is interesting, and dramatic. Exceptionally close or emotional elections can inspire worries about a faithless elector defecting from the candidate who appeared to win on election night in November. Alternatively, there have been attempts to publicly urge electors to defect from especially unpopular winners as a sort of last chance attempt to keep them from office. Most people, especially those who were under the impression that they voted directly for their preferred candidate for president, are often deeply upset by the idea of an elector not voting as promised. While the potential for faithless electors can make good fodder for political coverage around election season, the reality is less dramatic.

First, faithless electors are extremely rare. Remember that electors are nominated by the parties. While they use varying methods to choose their electors, all parties in all states value party loyalty and commitment to the party's presidential/vice-presidential ticket. That alone makes the chance of an elector going rogue low. In the tens of thousands of electoral votes cast over the nation's history, less than a hundred of those cast for president have been faithless. That number includes electors who had no choice, as their pledged candidate died between Election Day and the day the Electoral College voted. It also includes what may have been genuine mistakes, such as the elector in 2004 who accidentally cast their vote not for Kerry as pledged, but for his vice president Edwards.^h No faithless elector has ever changed the outcome of a presidential election in American history.

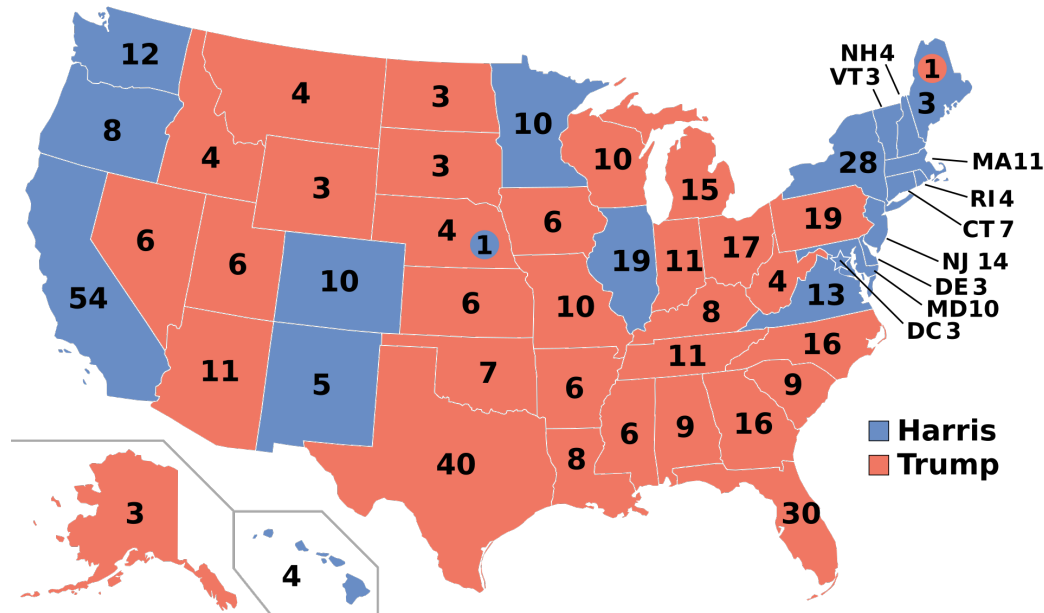
Second, even if electors acting faithlessly is rare, states (which are in charge of elections) still take the idea quite seriously. The majority of states have laws in place requiring their electors to vote the way they have pledged. These laws have a variety of enforcement mechanisms, from fining or otherwise penalizing electors who break their pledge to invalidating their votes and/or replacing them. The Supreme Court has held that the fact that states hold authority over their elections allows state governments to bind electors to their pledges. As an additional safety measure, members of Congress can object to a vote cast by a faithless elector when they count and confirm the electoral votes in January.

Therefore, while the idea of an elector ignoring the people who voted for them is interesting, it is unlikely to ever decide who occupies the presidency. Actually, the very fact that Americans tend to regard themselves as voting directly for a presidential candidate (and ignore the existence of electors) is a testament to how faithfully they are generally represented: electors are so faithful that they can be ignored.

Winner Take All: If you watch the results come in on election night, states will be colored entirely red (representing their electoral votes going to

^h: The poor elector even got Edwards' name wrong: technically, "Ewards" should have been awarded one electoral vote that year.

the Republican candidate) or blue (for the Democratic party).ⁱ For an example, see this map of the 2024 presidential election results. Some states so predictably go for one party's candidates over the other that they are even called red or blue states in everyday discourse, and this has become common shorthand to refer to states that lean one way or the other politically.



Of course, the pure red and blue map oversimplifies reality. While California has supported the Democratic candidate in the past few presidential elections, making it a “blue” state, it’s also a state with a large diverse population. Of course there are plenty of Republican supporters living there as well. The same is true of Texas, which tends to go red but certainly has plenty of blue voters. When you map individual voters, the sharp divide between red states and blue states on Electoral College maps looks more like shades of purple.

Since under the winner-take-all system winning a state by one vote or one million is the same, the victor in the Electoral College is not always the same as the candidate who got the most votes nationwide. A candidate might win a huge number of votes in one state but only receive the electoral votes from that state, while their opponent might do better by winning multiple states by only a few votes each. This has happened a few times in America’s history, such as 1824, 1888, and 2016. Generally, this sparks a burst of criticism of the Electoral College, especially from supporters of the losing candidate. Such critics argue that this violates the idea of majority rule. Many push for reforms such as more states adopting the congressional district method or for a Constitutional amendment to allow direct popular election of the President. Supporters of the current system often point out potential flaws in those reforms, such as states drawing their congressional district maps to favor one party, nationwide recounts, or incentivizing

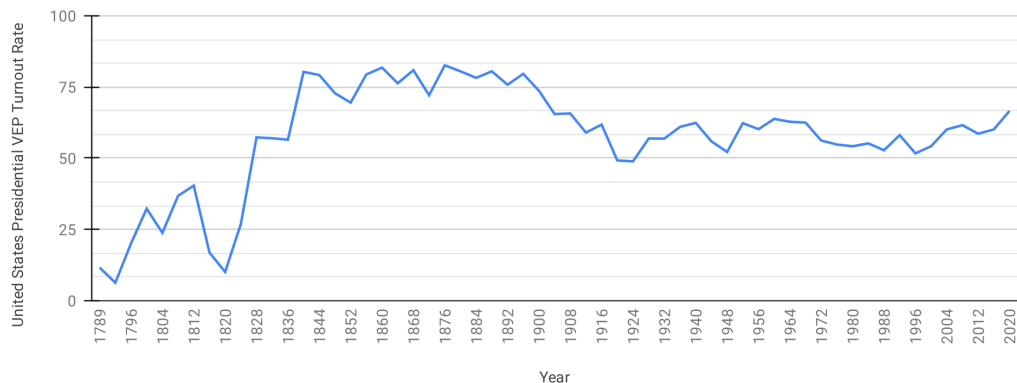
ⁱ: Generally, everyone reporting election results has to come up with their own system of how to display Nebraska and Maine, which don’t use winner take all. Asterisks, circles, or colored boxes are common.

presidential candidates to focus only on large population centers. They acknowledge the lack of majority rule, but point to other non-majoritarian American political institutions such as freedom of religion in the Bill of Rights, which protects the interests of small religious minorities even against large political majorities.

This system means that our presidential hopefuls tend to see a nation of sharp red and blue divides – and that view of the nation might persist when they are in office. While campaigning, candidates might ignore deep red or blue states, assuming those states are already lost or won. That habit of writing off the opposition could persist once they're in office. Lastly, while candidates are doubtless happy to have the support of as many Americans as possible, they want that support to be spread among multiple different groups of people throughout the nation, rather than simply getting concentrated support from one group only.

Participation and Turnout

United States Presidential VEP Turnout Rate Over Time



Far more people turn out to vote in the general presidential election than in the primaries. About 60% to 70% of eligible voters cast a vote in most presidential elections, while primary turnout in most states is generally less than half of that. More people vote in presidential elections than in non-presidential elections as well. This is not surprising: Presidential elections are the center of vast amounts of media attention, while primaries are often far less visible. The fact that the general election is one day nationwide, while primary election dates vary from state to state over a period of months, makes remembering to vote in the general election easier. Primaries in some states can require some form of partisan affiliation or registry, while everyone can vote in the general election.

Not only do more people vote in the general election than in the

primaries, but different sorts of people as well. The less visible, more difficult, more partisan nature of primaries means that the voters who show up tend to be more partisan and politically active than those voting in the general election. This means that presidential candidates who want to do well in the primaries are incentivized to behave in ways that appeal to the most engaged members of their party, while to do well in the general election, a candidate might want to appeal to a broader audience by seeming moderate and less partisan. This awkward balancing act results in candidates engaging in what is known as the “post-primary pivot” or “swing to the center”, where candidates start softening their rhetoric or suddenly talking about “unity” and “common ground” right after winning the primary. Whether a candidate is a moderate who acted more partisan or a partisan who is now trying to act more moderate is a topic for debate, and often the subject of campaign ads that accuse candidates of changing their mind, or “flip-flopping”.

Of course, just because *more* people turn out to vote in the general election does not mean that *everyone* is equally likely to cast a vote. Turnout among eligible voters is different across various demographic groups. Richer and more educated Americans tend to find it easier to vote. Older people vote more than younger people do, perhaps due to free time or an increased interest in government programs such as Social Security. With regards to race and gender, white voters tend to turn out more frequently than other racial and ethnic groups, while women are consistently more likely to vote than men. Other groups, such as religious affiliations, are not always as predictable.

Presidential candidates, then, see a nation that’s a little older, richer, and more female. Those candidates who best appeal to the groups that are most likely to turn out and vote have an edge in the race to the White House. This means you’re unlikely to see a president who wants to get re-elected propose drastic cuts to Social Security benefits for the elderly. As turnout in these demographic groups changes, presidential candidates change with it.

A Mandate From The People?

A common theme in inauguration speeches is the idea of a mandate. Upon taking office, most presidents like to claim they have broad political support from the American people, legitimizing their actions and implying broad public backing for their political priorities. It can be an especially useful tactic for presidents who assume they’ll have disagreements with Congress. After all, who would be willing to go against the will of the American people?

While presidents certainly like the idea, the reality is a bit trickier. First, how do we even figure out how many voters voted for the winning candidate? Remember that there is no national election, and that voters

don't vote for presidents directly. If you were to sum up the votes cast for a given candidate's pledged electors in each state, you could potentially get a rough idea of how many total votes were cast for that candidate nationwide. Despite there being no national election, this is generally referred to as the national popular vote for that candidate. Even calculating this number can be more difficult than it seems. In 1960, for example, Alabama chose several electors without requiring any pledges from them. Since a vote for one of those candidates doesn't easily track to a vote for either Kennedy or Nixon, it's difficult to determine exactly what the "popular vote" was for either candidate that year. At various points, both Nixon and Kennedy were officially recorded as the winner of the national popular vote.

Secondly, interpreting what the popular vote *means* is not much easier than trying to figure out what it *is*. The fact that a given candidate got more votes than their opponent certainly seems like a good indicator of popular support. More supporters should equal more votes. But the number of voters who turned out for a given candidate is also a function of our election rules. What if a candidate has a supporter who didn't bother to vote? If their state was certain to send their electors to some other candidate, this might make sense. After all, in a winner-take-all system, why vote if you don't think your candidate can get first place in your state? There's no prize (and no electoral votes) for coming in second.

Even when using the national popular vote as our best estimate of popular support for the president, things don't get better for the idea of a presidential mandate. Turnout in most recent presidential elections has hovered somewhere between 60% and 70%, as you can see in the section on turnout. True landslides in presidential elections are also rare, with most winning candidates receiving just over half of the votes cast. If a third-party candidate receives a significant share of the vote, the winning candidate might have significantly less than half, receiving a plurality but not a majority. All this means that most recent presidents have had just about a third of Americans who were eligible to vote actually cast a vote for them, with the majority of the country not voting for them out of active opposition, apathy, or so on. And that doesn't even consider the fact that that third is likely not representative of the population as a whole, or that only a small fraction of that third is likely to be aware of or support the policy goals of the person they voted for.

None of this implies that our presidents are less than legitimate. The presidential election process we've looked at in this chapter is the currently agreed-upon way that the nation chooses who should occupy the White House. Win the Electoral College, and you are president. But we should be careful about reading more into election results than is really there. When presidents claim they have a mandate from the American people, and a unique role as champion of the public will, we ought to view those claims more as strategic rhetoric – an attempt to wrestle with political rivals – rather than fact.

Further Reading

- Presidential Election in the United States, by the Congressional Research Service. https://www.congress.gov/crs_external_products/RL/PDF/RL30527/RL30527.3.pdf. This report from the Congressional Research service goes into more detail on the entire process of presidential elections. If there was anything in this chapter that you wanted more detail on, this is a great place to start.
- Mandate for Reform, by the McGovern-Fraser Commission.
This is a statement by the group charged with reforming the Democratic Party primary process after the 1968 convention. You can see the current state of primaries at that time, as well get a look at party leaders debating with each other how to manage their role in the primary process.
- The Invisible Primary and Its Effects on Democratic Choice, by John Aldrich
This scholarly article talks in more detail about the primary reforms, momentum, and other ideas this chapter discussed, while arguing that fundraisers, donors, and activists are becoming more influential than the general public over time.
- Election Statistics from The American Presidency Project. <https://www.presidency.ucsb.edu/statistics/elections>. The American Presidency Project is a great resource for studying the presidency in general. Here, you can see their archive of historical election results and maps, including turnout by state and much more.

Chapter 4

The Presidential Campaign

Introduction

Get enough delegates to win the nomination, then get enough electors to win the presidency. Becoming president sounds simple. Competing with your opposition for those delegates and electors, though, is anything but. In fact, the term we use to describe a candidate's attempt to get elected – their campaign – was borrowed from military language. As Napoleon mounted a campaign against Russia, so presidential hopefuls mount a campaign for the White House.

Winning elections is a complicated business, involving large sums of money, huge amounts of nationwide travel and activity, immense media attention, and high-level strategy. We'll look at how campaigns are funded, what a presidential campaign actually does, and the strategies campaigns adopt in the race for the White House. Lastly, we'll ask two important questions: how much of a difference does all this effort make? And what does going through the ordeal of a campaign do to our presidents?

a: Math not adding up? The two candidates weren't the only ones spending money. We'll see more about that below.

Campaign Financing

Presidential elections are expensive, and generally getting more so over time. In 2024, for example, Harris' campaign raised over a billion dollars while Trump's campaign raised far less, but still well over 300 million. In total, the 2024 presidential election was one of most expensive, with over 15 billion dollars being spent.^a Whether or not American presidential elections are too expensive is a subject of some debate. Some scholars point with alarm to the ever increasing amount of money spent in elections over time, while others argue that American presidential elections seem relatively cheap. After all, the amount the Harris and Trump campaigns raised isn't even half of Coca-Cola's advertising budget for the same year. Some scholars even argue that we don't spend enough on presidential elections!

What's more interesting for our purpose – learning about the presidency

– is not what campaigning for the White House *should* cost, but how presidential candidates deal with what it *does* cost. Whether it's more or less than the price of a Coke, X billion dollars is a sizeable price tag, and it means that anyone who wants to be president needs to spend a considerable amount of time and energy on the finances of their campaign effort. Let's look at how presidential hopefuls raise the money they need, how money is spent, and how important money is to the presidential election process.

Raising Money

In presidential elections, as in most of life, it's harder to get money than it is to spend it. That is, various federal laws place harsh limits on how presidential campaigns can raise money, though they are generally more free in how they can spend it once they have it. There are a few key sources of money for campaigns – individual donations, donations by organized groups, and self-funding.

Individual donations are by far the dominant source of campaign contributions. Individual Americans are free to give to any or all of the various candidates who want to be president. There are limits, however – while the exact amount is regularly adjusted for inflation, you can't give more than a few thousand dollars per candidate per election. In the 2024 election, for example, the limit was \$3300. Other limits apply as well – for example, campaigns must report any donation over \$200 to the FEC, which maintains a public database allowing you to see how much anyone has donated, and to who. Since individual donors can't donate more than a certain amount, presidential campaigns work to make the process of receiving these donations as efficient as possible. Online donations, for example, allow a candidate to easily and simply receive funds while freeing up more time to be spent on the campaign trail.

Organized groups (aside from tax-exempt groups, such as churches) can also give money to campaigns. Groups like corporations and labor unions, however, are barred by federal law from directly transferring money to a campaign. Instead, these groups must first set up a Political Action Committee, or PAC. After the group gives them a small amount of setup money, the PAC is responsible for raising its own funds. There are numerous PACs representing all sorts of groups, from one representing the National Association of Teachers to another representing the Dairy Farmers of America. PACs also face limits on how much they can donate to a given candidate, and how much any given individual can give to a PAC. Those limits, along with the sheer volume of individual donors, mean that while PAC contributions to presidential candidates have been generally trending upward over time they are outweighed by individual donors.

Aside from donations, candidates can also self-fund their campaigns. While this option may be appealing for wealthier candidates – no need to sit through a fundraising dinner, just transfer some cash into your campaign

and hit the trail! – history has also shown it to be less than successful, and a good example of how money $\neq$ votes:

- Michael Bloomberg spent roughly one billion dollars of his own money on his primary campaign. His team produced musical numbers, a massive advertising blitz including celebrities, and even bought an extremely expensive premium television time slot during the Super Bowl. His campaign lasted three months, only winning American Samoa before he dropped out.
- Tom Steyer, a billionaire climate activist who had been funding ads calling for impeachment of Trump for years before his run, spent over 20 million dollars on campaigning in South Carolina alone. By some counts, his ads there were aired seven times more often than any of his competitors'. He came in third in the state and dropped out of the primary.
- Ross Perot, a Texas industrialist, spent 63 million dollars on his campaign for the presidency, famously buying expensive half-hour long time slots on major networks to explain his policy ideas to viewers with charts and graphs. He received no electoral votes.

While self-funding can allow a wealthy candidate to shore up their campaign's weaknesses or insulate them from the need to spend time constantly pursuing donors, funding a campaign with outside donations seems to be more effective. That fundraising dinner might also generate some media coverage in the local paper, and donations to a campaign are a sign of confidence and public support that can help a candidate to be taken seriously by others.

There is another source of funding for presidential candidates: you! The American taxpayer, that is. When you pay your income taxes, you'll find a small check box asking whether you want to donate to the Presidential Election Campaign Fund. The box won't raise or lower your taxes, but checking it will mark a small amount of your money to go to the Presidential Election Campaign Fund. This fund is designed to reduce the reliance of candidates on donors or self-funding by publicly funding presidential candidates who meet certain criteria for eligibility. In recent elections, however, no major candidate has accepted public funds for the general election. While turning down free money might seem like an odd decision, it is a good strategic choice. Accepting public money also means agreeing to certain fund-raising and spending limits. In the 2008 presidential election, Obama refused public funds when running against McCain. Obama was able to raise and spend as much money as he wanted while McCain, who took the public money, had limits. Obama was able to spend roughly twice what McCain did. Since then, presidential campaigns tend to avoid public funding in order to avoid having any limits placed on their ability to spend.

Spending Money

Once money is raised, it needs to be spent. Running for president isn't cheap, and candidates need to pay for travel, staff, merchandise, events, polling, and ironically fundraising.^b By far the biggest expense for most campaigns, however, is advertising – 50% to 80% of a typical campaign's entire budget is often spent just on ads.

If you live in the right state during the months before a presidential election, you might think that everything on TV ends with the words “I’m [CANDIDATE NAME HERE], and I approve this message.” Other nations place strict limits on television advertising by campaigns such as restricting campaigns to certain periods of time or a certain number of minutes of coverage, and often providing strictly regulated public advertising time to campaigns to make up for this. The United States, by contrast, has no such limits. Campaigns can advertise as much as they are able – assuming they haven't agreed otherwise by taking public funds, as described above.

Of course, not every ad in a presidential race is made by a presidential campaign. As a matter of fact, a lot of those political advertisements you see won't be made by either candidate, but by third party groups. Labor unions, corporations, PACs, political parties, activism and advocacy groups – all of these and more have an interest in running political ads during election season, whether to promote a candidate they favor or raise awareness of some issue that concerns them. In 2007 in *Citizens United v. Federal Election Commission*, the Supreme Court struck down an older 1990 decision that had allowed the government to ban groups from spending money on political messages during election season, citing First Amendment protection for political messages. Certain limits still apply, of course. The most important is that these groups cannot work directly with campaigns when creating their messages, as this would essentially constitute a donation of an ad in place of cash, bypassing donation limits. Spending by third parties in recent elections, especially in presidential elections, has risen steadily.

^b:At least in this case, it does in fact take money to make money.

Citizens United

Citizens United is a nonprofit political organization. In 2004, they argued that campaign finance rules should stop filmmaker Michael Moore from airing a documentary he had produced that was highly critical of then-President Bush. Essentially, they argued that his documentary was really a campaign ad, and thus was like donating money to Bush's opponent. When the Federal Election Commission held that Moore's documentary did not violate campaign finance law, Citizens United produced their own documentary – which the

FEC held *did* violate the law.

In 2008, the group made another documentary, this time criticizing Hillary Clinton. This sparked a legal battle over whether it could be released to the public. When the case came before the Supreme Court, the justices focused on the First Amendment and free speech. Famously, Justice Kennedy asked if regulations on groups spending money during campaigns meant the government could ban a book because it contained one sentence asking the reader to vote a certain way. The government answered that they thought they could ban such a book.

The Supreme Court ultimately held that “If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech.” Citizens United was controversial when it was decided, and remains a subject of argument to this day, with disagreement over whether groups of people have free speech rights or whether limits on spending to create or spread messages are really limits on free speech. Presidential candidates, depending on their political party’s current stance on Citizens United, accuse each other of supporting either corruption or censorship – but all major presidential candidates these days have outside groups spending heavily in their favor.

c: This does happen – outside groups will spend in primary elections for the opposite party. Sometimes this backfires: Democratic PACs supported Trump-friendly candidates in numerous Republican primaries in 2022. While the assumption was that these candidates would be easier for a Democrat to beat in the general election, several of them ended up winning office.

Third-party spending makes learning about presidential elections difficult in a few ways. For one, it can be hard to keep track of the vast number of groups involved. For example, let’s say you’re extremely passionate about the environment. You and some of your friends come together, raise some money, and make a film about the importance of environmental policy that happens to come out during election season. How do we tell if you’re trying to help the presidential candidate that talks more about environmental policy or not? Which candidate would we mark your spending down as supporting? What about groups that create ads supporting candidates they don’t favor, hoping to force the opposing party to elect a weak nominee – how should spending support from the opposition count?^c Even groups that aren’t trying to change election results get involved in third-party spending: one group of researchers, for example, spent 9 million on advertising to experiment with how much they could boost support for Biden.^d Defining what messages are and are not designed to affect the campaign, and figuring out exactly how much money was spent in support of a given candidate, can be extremely hard to do.

d: Their conclusion? Not much.

It also means that presidential candidates have only limited control over their campaign’s message. While they control what messages they spread with their own money, the limits on coordination mean that candidates can’t tell third parties what ads to make or what topics to focus on. A

candidate might want to run a positive campaign, but have allied outside groups flood the nation with vicious attack ads bad-mouthing their opponent. While there are some ways that campaigns and candidates try to get around the restriction on coordinating with third parties, such as delaying their official campaign announcement to give time for pre-planning or leaving footage of the candidate online for outside parties to “find” and use in their ads, these are limited and only work if the third party is interested in following the candidate’s lead.

In short, most of the spending in a presidential election, and most of the messages you see, might not be under the control of either candidate at all.

The Importance of Money

A great deal of focus is given during any presidential election season to money. Candidates brag about their fundraising totals to present themselves as the frontrunner while at the same time sending desperate emails to their supporters asking for more donations. Political journalists write about how much each candidate is spending, and where, as a way to track the strength and activity of each campaign. Activists and scholars argue about campaign finance regulations and the influence of money on elections. So how important is money to becoming president?

Having and spending more money than your opponent certainly doesn’t guarantee victory. Bloomberg’s billion-dollar bid for the nomination alone shows that much. Both Clinton in 2016 and Harris in 2024 spent far more than their opponent in the general election and lost. Ultimately, presidential elections are won or lost based on electoral votes, not cash, and winning those requires getting Americans to vote for you. Barring extreme violations of election law, you can’t simply buy those votes directly – bribery is illegal.

The main focus of campaign spending – advertisements – can only change the votes a candidate will get in a few ways. Either an ad can affect *how* someone will vote, such as changing which candidate they’ll support, or *whether* someone will vote, such as getting a voter who likes your candidate to actually turn out to vote on election day. Both are difficult. It’s hard to imagine the ad that is persuasive enough to overcome an individual’s lifetime of political preconceptions, attachments, and habits in a thirty second TV spot someone sees at the gym. And there must be some saturation point. How many times can you remind one of your supporters that this election is the most important ever before more reminders don’t make them any more likely to go vote? In general, research tends to find fairly weak effects for most campaign advertisements.

None of this means that money doesn’t matter in elections. In general, though not always, the winning candidate is the one who raised and spent the most. Whether that’s because the spending helped them win or that donors wanted to make sure they were giving to the winning side, though, is hard to tell. While you can’t buy the presidency, it’s certainly true that

running for the White House isn't cheap. Money won't win you the White House, but having enough funds to run your campaign is essential. That means our presidents are more likely to be skilled fundraisers and to have financial connections than not.

Campaign Activities

What does a presidential campaign actually do? Creative campaign managers have tried a great number of tactics over the years, but there are a few that most campaigns engage in.

Presidential Debates

If presidential elections have one central event aside from Election Day itself, it's the presidential debates.^e These debates are a tradition, not legally required, and have generally been run by non-profit organizations such as the League of Women Voters and the Commission on Presidential Debates. Despite the name, American-style presidential debates are perhaps best thought of joint press conferences, where both candidates appear together on stage and take turns responding to questions from moderators. These events are hyped up by political pundits and journalists as Super Bowl style competitions that could completely change the race. Coverage of the debates is extensive. Campaigns try to simultaneously brag about their candidate's skills while also trying to keep expectations low. Journalists show highlights and clips of the debate for days. As public a spectacle as these events are, however, most researchers agree that they seldom determine who wins and who loses the election.

There are of course famous debates and memorable moments from them. The 1960 debate between Kennedy and Nixon is often cited as one example of a "knockout" debate. Kennedy looked bronzed and handsome, Nixon had refused makeup and looked pale and sick. The contrast between the appearance of the two candidates supposedly propelled Kennedy to "win" the debate. But remember the debates in American presidential elections aren't true debates – candidates aren't responding to each other most of the time or being evaluated by judges, and there are no formally declared winners and losers. The only true prize is a change in public opinion, and most debates don't move the needle very much. Candidates rehearse lines and phrases that they hope will garner attention. But while there are famous lines and clips from the debates, such as Reagan deflecting criticism of his advanced age by promising not to hold his opponent's youth and inexperience against him, such moments seldom seem to produce any reliable shift in votes. So after most debates, both candidates can – and will – declare themselves the winner. Supporters, motivated by a desire for their

^eThere are also primary debates, where candidates for a party's nomination appear in similar events. The major difference is that there are often more than two candidates, all from the same party.

side to win, focus on the best of their candidate's performance and the worst moments for the opponent.

Even debates that are clearly "won" by one candidate and do seem to affect public opinion don't seem to produce durable effects. The first debate between Obama and Romney in 2012 produced a clear victory for Romney, with most viewers saying he had done the better job and public opinion seeming to shift slightly his way. But this shift in poll numbers didn't last – and given that the debates are held long before election day, most debate effects seem likely to wear off before people actually vote.

That's not to say the debates *never* matter. In 2024, Biden's poor performance in a presidential debate raised questions about his health and likely influenced his decision to end his campaign. Still, barring a truly exceptional performance one way or the other, the White House isn't won or lost on the debate stage. Even if debates don't change voter's minds, though, the fact that candidates are forced by the nature of the format to try and explain their views on various topics in a relatively concise manner likely helps to educate some voters on the candidates and their opinions.

Campaign Advertising

As mentioned in the section on campaign finance, this is the biggest expense for most campaigns. Campaigns spend a great deal on digital and television advertising, as well as lesser amounts on radio and print ads.

In general, ads can either persuade or mobilize. Persuasive advertisements are designed to change the minds of their viewers. They use a wide variety of strategies, from pointing out the good characteristics of their candidate to negative ads that highlight the flaws of the opposing candidate. Often, persuasive ads try to influence what issues voters are thinking about. A candidate who has a good record on healthcare policy but little experience in international affairs might try to persuade voters that healthcare is the most important issue in this election. In general, persuasive ads are more influential in primary elections, where voters are deciding between multiple nominees from the same party that they may know little about. In the general election, most voters favor one party over another and seldom vary from supporting it. Researchers tend to find that genuinely undecided or independent voters, who would be most persuadable, are rare.

Mobilizing advertisements, instead of changing a viewer's political beliefs, attempt to make them more or less likely to vote. Campaigns commonly invest effort in finding supporters who potentially might not vote and reminding them to do so. This can take the form of simple reminders, appeals from celebrities and public figures to vote, concrete guidance and assistance on how to register or cast a ballot, and emotional appeals about the civic duty of voting or the apocalyptic consequences if the opponent wins. Ads can have multiple goals – a negative advertisement

about an opponent's flaws might persuade some of their supporters to switch sides, while also inspiring your supporters to go vote to make sure someone so terrible doesn't win. Most research finds that campaigns are more effective at mobilizing supporters than persuading undecided or opposing voters. This might lead candidates to spend more time talking to their own side than trying to reach across the political aisle, and some scholars of the presidency think this habit might last even into the Oval Office.

It's not unusual for both campaigns to produce a great deal of negative (or "attack") advertisements. The attention-grabbing nature of such advertisements seems to make voters more likely to remember them, though scholars are still debating if negative ads are any more effective than other kinds. Still, fear-mongering might seem more likely to campaigns to scare friendly voters to the polls than positive messages about their civic duty of voting. In addition, accusations against the opponent can spark controversy and conversation that results in free coverage for the campaign – see earned media below. While there are often complaints about how negative election season has gotten and calls for candidate to produce more positive messages promoting their qualifications and accomplishments, negative advertising has been a long-standing feature of American presidential campaigns. In the election of 1800, for example, Jefferson and Adams produced advertisements accusing each other of being war-mongers, royalists, supporters of murder, Satanists, and in one notable case, deceased.

Campaigns attempt to target their advertisements to certain states and audiences. Simply running ads nationwide is generally inefficient. Why spend money to advertise in a state that is unlikely to vote for you? A mobilizing advertisement in such a state might even backfire, reminding voters who don't like you to turn out. Digital advertising allows campaigns to be even more specific, showing their ads only to voters that have certain characteristics. A campaign might show a mobilization ad only to individuals that seem likely to support them, or a message about the importance of space policy only to voters whose search history indicates that they're interested in such a thing. Campaigns and political advertisement companies have databases with entries for every single individual American voter, and offer ads tailored to appeal to an individual's unique personality traits and interests.^f

f:For an example, see the 2016 Concordia presentation by Alexander Nix, the CEO of Cambridge Analytica in Further Reading. Note that the company later went out of business due to scandals over how they obtained user data.

Earning Media

Paying for coverage is expensive, which is why campaigns invest effort in trying to get media coverage of their campaigns. A candidate might do something unusual, such as work a shift at a fast-food restaurant or make a surprise appearance at a public event, in the hopes that the news will cover it. Beyond simple publicity stunts, campaigns maintain online presences on most social media platforms to hopefully draw attention and spark

conversations. Campaigns can also court controversy to attract attention. An outrageous claim might spark fact-checking and public debate, picking a fight with an opponent or public figure can create a back and forth that stays in the news for quite some time as they respond, and behaving in ways that people don't expect from a presidential candidate can draw coverage and attention. While not necessarily free – a lot of planning and focus group testing often goes into a candidate's efforts to spontaneously attract attention – these can be very cost-effective. Of course, the candidate has little control over how the media will cover the story, if they do, but the broad coverage can potentially be a good return on investment. Making an outrageous claim while describing your defense policy might get your defense policy repeated on major networks and platforms, and perhaps make the public care more about defense in general.

Rallies and Personal Contact

Personal contact with a campaign is one of the most effective types of campaign activity. Research suggests that seeing a candidate in person can make someone significantly more likely to cast a vote, and might even have persuasive effects. So why don't campaigns do constant personal appearances?

For a candidate for small-town mayor, going to every door in town might be a great idea. But a presidential candidate has a massive nation to travel, and many other demands on their time. Every moment spent in a small-town restaurant talking to the patrons is one not spent fundraising or shooting an ad or preparing for an interview. Even being strategic and only having the candidate make personal appearances in the most important states only limits the demand so much, and the time spent traveling adds up as well. Campaigns often solve this problem with large public events – candidates host rallies, speeches, addresses or so on to as large a crowd as possible. Campaigns also focus on personal contact with people other than the candidate, recruiting volunteers to go door-to-door canvassing. Overseeing these volunteers is often a significant demand upon the campaign's time, with many campaigns establishing elaborate hierarchies of regional managers and neighborhood captains to get out the vote. Guidance from the campaign tracks who has been contacted, and custom apps allow canvassers to micro-target their knocks based on the campaign's information on the occupants of each house.

Allies and Endorsements

Campaigns also spend time recruiting endorsements and allies. An endorsement from a popular celebrity might spread awareness of the campaign to all of the celebrity's audience, even those who aren't particularly politically engaged and thus hard to otherwise reach. An

endorsement from a trusted institution or public figure might cause voters to respect a candidate or take them more seriously. Endorsements from groups such as the National Rifle Association or the World Wildlife Fund can signal a candidate's commitment on some policy area like gun rights or the environment to voters, or help voters who identify with a certain group to determine which is "their" candidate.

Of course, many partisans might be happy to promote a candidate simply to increase their chances of winning – or to decrease the opponent's chance. A candidate's co-partisans will often endorse them during a campaign even if they were formerly opponents. However, not all endorsements are easy to get. Some figures are in a position to request focus on various policies they care about in return for their endorsement. In particular, endorsements from former primary opponents are particularly valuable. These voters had supporters in the primary election, and their endorsement in the primary can bring their voters to your side in later states. In the general election, an endorsement from a primary opponent can help to reduce intra-party tension, bringing together different factions in the same party under one banner. This makes former opponents who have left the race particularly valuable to recruit. It is not uncommon for candidates to appoint former opponents who have left the race to various positions in their new administration, leading to accusations that some candidates in primaries are really running for a Cabinet position.

Other Activities

Of course, there are any number of other things candidates on the campaign trail might do. They've appeared on cooking shows and comedy programs and podcasts. They've recorded musical numbers and videogame streams. They've designed and sold hats, shirts, books and guacamole bowls, all branded with their names and slogans. They invest in databases about every American voter and pay for detailed polling to predict what the public thinks. Creating and distributing yard signs alone is a massive task every election year! In general, though, these broad categories: advertising to voters, appearing at events, attracting public attention, and gathering allies and endorsements describes a great deal of what occupies a presidential candidate's time.

Campaign Strategy

Battleground States

In a presidential campaign only one thing matters: electoral votes. That means that rather than spread their campaigning efforts evenly across the nation, or focus on major population centers, candidates must have a plan of

which states they'll win to get to the magic number of 270 electors. Candidates choose which states to focus on based on how many electoral votes they'll provide, how cost-effective it is to campaign there, and perhaps most importantly, how competitive the state is.

While some states quite predictably give their votes to the Republican or Democratic candidate, other states tend to produce very close election results or are more likely to swing between parties from election to election. The former - states that are consistent in their support for one candidate - are sometimes referred to as "safe" states, while the latter are generally referred to as "swing" or "battleground" states. There is no definitive list of which states are considered safe for which party, and election scholars often disagree about how consistent any given state should be expected to be and how trends in that state might change its future behavior. Generally, the majority of states are considered to be safe. What is important, however, is that the candidates tend to focus their efforts on the relatively small number of states they consider battlegrounds. After all, why should a candidate waste effort and funds campaigning in a state that is almost certain to go for their opponent? Or in a state that is certain to support them?

This tends to produce a focus by both major candidates on the same small handful of states, with five to 10 states receiving the vast majority of a campaign's advertising dollars, candidate appearances, and so on. A citizen who lives in one of these battleground states might be inundated with advertising and messages from both campaigns, while their friend across the state border might see almost nothing. Not all campaigns are identical in how they target battleground states: a candidate with resources to spare or who doesn't have a clear list of states to get them to 270 might play offense by campaigning even in states likely to support the other party. A candidate who is confident that they have enough safe states supporting them to get to 270 might play defense instead, focusing on ensuring that those states stay in their camp. Ambitious campaigns can try to "thread the needle": focusing all the campaign's effort on a very specific and narrow set of states to get just enough electoral votes to win. Of course, campaigns also respond to their opponent's strategy and developments during campaign season, so no campaign strictly falls into one of these boxes. Still, strategy and the logic of the Electoral College draws most campaigns to face off in the same few states.

In it to win it?

Are all presidential campaigns solely focused on winning? Perhaps not. Some presidential candidates are accused of running for office for other reasons. Numerous third-party candidates run each year despite low odds of victory, often using their candidacy explicitly to

raise awareness of various political issues. Candidates during the primaries are sometimes said to be running for Vice-President or a Cabinet position if it seems like their campaign is more about getting an attractive position in some other candidate's administration: see "Allies and Endorsements" for more on that idea. Some candidates have even been accused of running as publicity stunts, drawing attention to their books, businesses, or other projects. Proving such accusations is difficult – it's unlikely for a candidate to admit that their bid for the White House isn't serious, and poor performance could have a lot of causes besides a lack of serious effort. In general, there are far easier ways to gain attention than the expensive, time-consuming, and stressful process of running for the White House.

The Fundamentals

While we've focused on campaigns in this chapter – that is, what candidates for president actually do in order to try and get elected – those campaigns don't operate in a vacuum. Whatever's going on in the real world is obviously going to affect who wins and who loses, and these outside factors can often have a decisive impact on the race. There are any number of possible factors that could impact an election – some scholars believe that if the weather had been different in 2000, Gore might have won the election instead of Bush. There are also one-off factors – the COVID-19 pandemic had a massive impact on what voters were worried about and also how they could physically cast their vote.

Instead of trying to look at every possible outside influence on campaigns, we'll look at three that matter in most presidential elections and are generally agreed to be substantially impactful: incumbency, war, and the economy. These, along with a few other indicators such as the president's approval rating, are often referred to as the fundamentals.

In a presidential election, a candidate who is running for re-election is called the incumbent. Generally, incumbent candidates seem to have an advantage over their challenger, with a majority of incumbent candidates who seek re-election winning. This advantage is easy to understand: not only have incumbents shown they are capable of winning office before, their previous run for the White House gives them valuable experience. Their role as president assures them of plentiful earned media coverage and name recognition, and potential primary challengers often decide to wait until there is no incumbent running, making it easier and less costly to gain their party's nomination.

War, by contrast, is less predictable. A war can produce a "rally-round-the-flag" effect that causes voters to approve more of the

incumbent president. Americans tend to put aside partisan differences in times of crisis to support their leaders, at least temporarily. Yet wars are also generally unpopular with the American public, especially as casualties and costs mount, and the incumbent president is often held responsible for the nation's wars and ongoing military conflicts.

The state of the economy is likely the most important of these factors. In fact, during the Clinton campaign, a campaign strategist scrawled "It's the economy, stupid!" on the wall of a meeting room, and the campaign later used it as a slogan. In general, the more optimistic Americans are about the economy, the better the incumbent party candidate tends to perform. Incumbent presidents with a strong economy during election year tend to focus on economic issues and take credit, while focusing on other issues during an economic downturn. Challengers have exactly the opposite incentives.

These factors are extremely important: if you knew the state of the economy and whether the incumbent was running and nothing else, you could do a pretty good job of predicting most presidential elections. Despite how much these facts control the outcome of the election, however, candidates can do little to control any of these things during election year. Incumbent presidents are sometimes accused of trying to boost the economy or manufacture a conflict before election day, but have limited ability to do either. Which candidate wins may be more at the mercy of fundamental forces – or the weather – than their rhetorical skill or campaign strategy.

Choosing a Vice President

While originally the vice president was simply the runner-up for the presidency, and later chosen by the parties at their conventions, today the selection of a running mate is left up to the candidate. Who the candidate will choose is the subject of a great deal of media attention, with journalists trying to track everyone the candidate might be auditioning and producing profiles of potential hopefuls, as pundits and political commentators publicly advocate for their preferred choices. Candidates have a lot of potential goals in selecting their vice president.

In part, of course, the candidate wants a competent Vice President with political skill and experience. Early vice presidents were often given little to do besides break ties in the Senate, leading to Vice President John Nance Garner complaining that the office "wasn't worth a bucket of warm spit". Modern vice presidents, however, often act as surrogates for and close advisers to the President, and are commonly put in charge of overseeing major projects by their administration.

In addition to choosing someone good at the job, however, candidates also make their choice of VP with an eye on election strategy. Candidates might try to balance the ticket, choosing a vice president from a different region of the country or ideological faction within their party, hoping to

broaden the appeal of their campaign. They might even balance on more abstract factors, choosing a young VP to counter criticism of their age or a VP from a demographic group that they do not represent. Candidates can also choose a vice president to appeal to a certain state – perhaps the hometown pride from choosing a vice president from a particularly important battleground state could be enough to tip the state in their favor. Having experience in working with and appealing to the media can also be a decisive factor, as the campaign will require the vice president to campaign almost as much as the candidate themselves.

All this means that vice-presidential candidates are chosen not for their ability to step in and replace the President alone, but also for how they can help get the candidate elected. The fact that candidates are trading off experience for electability is unfortunate, given that most researchers have concluded that the impact of choosing a vice presidential candidate on the election is minimal at best. While Richard Nixon's crack that a vice president "could only hurt you" in the election might be a bit overblown, the fact remains that choosing a vice president for their skill and experience seems like the best option.

Do Campaigns Matter?

Obviously the answer to that question is yes. The amount of money and time alone invested in presidential elections would make them important even if it was all invested in nothing but balloons. A better question is whether the choices an individual candidate makes while running the campaign are likely to win or lose them the election. That is, is a candidate's skill at campaigning what determines who wins and who loses? Can campaigns really change the outcome of an election? The best answer scholars have is – it depends.

Most campaign research argues that campaigns are at their most persuasive in two circumstances: when voters are unfamiliar with the candidates, and/or when one side has vastly more resources than the other. Neither scenario is especially likely in a presidential campaign. While in the early stages of the nomination contest voters might be unfamiliar with the many people running, by the time of the general election ubiquitous coverage will have made almost every American informed to the point of fatigue about two main candidates. There is little chance of a campaign reaching a voter who hasn't already formed a strong opinion on both candidates.

Mobilization seems to be more effective, with most campaigns able to reliably encourage their supporters to turn out and vote. Since both campaigns do this, though, we don't know what would happen if one candidate campaigned and the other did not. Perhaps campaigns are more like deadlocked arm-wrestlers, staying still despite how much they struggle against each other. While it is true that some campaigns will have more

resources to get out the vote than others, in general, both major party candidates in an election will be able to spend sizable sums of money against each other and largely balance out their opponent's efforts.

In short, campaigns seem to matter less than most Americans tend to assume. Candidates spend a great deal of sweat and treasure on their campaigns, but partisanship and the state of the economy are far more likely to decide the outcome on Election Day. Before you conclude that this entire chapter doesn't matter, however, there's another question we could ask: How does a presidential campaign influence those people who become presidents?

Regardless of how effective it is, a candidate spends a huge amount of their time during a campaign talking – appealing to voters, donors, supporters, opponents. Is it any surprise, then, that the habit remains once they're in office? Writing in 1960, the presidential scholar Richard Neustadt wrote that “Presidential power is the power to persuade”, arguing that presidents have to persuade other branches of government and even officials in the executive branch itself in order to be successful. Later scholars focused on other persuasive strategies that presidents often employ – for example, a president who wants Congress to do something might bargain with them directly. Alternatively, drawing on their campaign skills, they could attempt to go directly to the public, hopefully putting the pressure of public opinion on Congress as a result. Do presidents learn from their unsuccessful persuasion attempts, and get in the habit of spending most of their effort trying to fire up their own side instead of reaching across the aisle? It's hard to say.

Campaigns can also determine who serves in a president's administration. Cabinet seats and other positions can be used in campaign negotiations to secure an endorsement or ensure the nomination. Vice-presidents are picked for what appeal they can bring to the ticket, not just their suitability as a presidential replacement. And where else would a newly elected president turn when choosing their new staff but the trusted campaign staff they've already worked with for potentially years at this point? It's not uncommon for senior campaign staff to make the jump to positions like press secretary or presidential advisor.

Campaigns take ever increasing amounts of time, and organizing one's campaign resources and structure early gives an advantage. Today, many presidents engage in what political scientists refer to as the permanent campaign, spending their entire administration concerned with their popularity instead of governing. In 2016, for example, Trump filed the paperwork to run for re-election on the same day he was inaugurated, and was holding campaign fundraisers the same month.

So is giving the perfectly-worded speech going to be what wins the election for a given candidate? Almost certainly not. The price of gas or the condition of voters' wallets come election day is more likely to do that. But the experience of surviving the campaign trail, of trying to steer a campaign

strategy in the face of powerful, uncontrollable external forces, almost certainly shapes the strengths, skills, and staff a president brings with them when they take office, and what they plan to do when they get there.

Further Reading

- Conventional Wisdom and American Elections, by Baumgartner and Francia.

This book deals with several assumptions people make about elections, and for each shows how they're myths or misconceptions, and what evidence actually shows. Highly recommended if you want a clearer picture of what a presidential campaign is actually like.

- A 2 Million-Person, Campaign-Wide Field Experiment Shows How Digital Advertising Affects Voter Turnout, by Aggarwal et al. <https://doi.org/10.1038/s41562-022-01487-4>

A scientific study on how much campaign ads affect the outcome of an election. In addition to being notable for the amount spent on campaign ads, this is also a good example of how quite a bit of campaign research finds that campaigns have fairly weak effects.

- The Power of Big Data and Psychographics, by Alexander Nix. <https://www.youtube.com/watch?v=n8Dd5aVXLCc>

This presentation is by the head of a political advertising company, and shows how such companies can use data on individuals to tailor their ads uniquely to them. Note that this company was later investigated for unethical data gathering.

- The Republicans Should Pray for Rain: Weather, Turnout, and Voting in US Presidential Elections, by Gomez et al. <https://doi.org/10.1111/j.1468-2508.2007.00565.x>

This piece argues that the weather could have affected turnout enough to decide two presidential elections. It's a good illustration of how an election can be beyond a candidate's control.

Chapter 5

Taking Office

Introduction

“He’ll sit here, and he’ll say ‘Do this! Do that!’ And nothing will happen. Poor Ike – it won’t be a bit like the army. He’ll find it very frustrating.”

Those were Truman’s words when talking about his successor to the presidency, Eisenhower. While Eisenhower’s previous role as a general had come with the ability to give commands, Truman complained that all the president could do was ask: “I sit here all day trying to persuade people to do the things they ought to have sense enough to do without my persuading them. ... That’s all the powers of the president amount to.”

Truman’s words are almost certainly a bit overblown – after all, Truman himself accomplished a good deal during his time in the Oval Office. But his words do raise an important point about how the public perceives the presidency. Many regard the president as just the equivalent of a general or CEO, who simply gives orders to his subordinates which are promptly carried out. In reality, any occupant of the presidency faces an uphill battle against internal and external factions to control their own branch of the government.

In upcoming chapters, we’ll discuss the relationship and the power struggles between the presidency and the other branches of government: legislative and judicial. Before we can do that, however, we should look first at the power struggle between the presidency and the executive branch.

We’ll first look at the constitutional roots of the presidency’s power over the executive branch – what abilities does the president actually get when they’re sworn in and take the oath of office? After that, we’ll look at the executive branch itself, to see what the president is trying to control and what allies they have to call upon. Lastly, we’ll look at what tools the presidency can bring to bear to control the executive branch, and how effective each is likely to be.

The Executive Power

Let's start with the basics. Where does the presidency come from? What makes the holder of the office the chief executive?

Article II of the Constitution describes the office of the presidency. It lays out the various duties that the holder of the office is expected to fulfill, such as "he shall take Care that the Laws be faithfully executed". To ensure that the holder of the office can accomplish those duties, Article II also lays out the powers given to the office. What's referred to as the vesting clause gives the presidency "the executive power". Specifically, it says that "The executive power shall be vested in a President of the United States of America." While there are some further details on what powers are and are not granted to the presidency in the rest of Article II, the executive power, whatever it is, is never clearly defined.

This is not the case with Congress. Congress is granted the legislative power in Article I ("All legislative Powers herein granted shall be vested in a Congress of the United States"), and those legislative powers are very clearly spelled out, or enumerated. Congress has a list of all the topics on which they are permitted to make law, such as fighting piracy or establishing post offices, a process that must be followed in order to pass any laws on those topics, and a list of things that are explicitly forbidden – Congress can't grant noble titles, for example. That doesn't mean that there haven't been a great many arguments about the exact extent of Congress' authority – but the question "What are the legislative powers granted to Congress?" has a fairly clear answer.

By contrast, here's Supreme Court Justice Robert Jackson, trying to answer the same question about what powers are granted to the presidency in the Constitution:

A judge [...] may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision [...] must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question.

In other words, we know that the presidency is entrusted with the executive power. The only question left is what that means.

There are at least two broad answers to that question, each generally associated with a former occupant of the office. President Taft argued that the vesting clause in Article II worked in much the same way as it did for Congress. The executive power given to the president was simply referring to those powers, like granting pardons or recommending laws to Congress, listed explicitly further on in Article II. As Taft puts it:

[...] the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power [...]. Such specific grant must be either in the Federal

Constitution or in an act of Congress passed in pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest.

Taft was making the case for a limited presidency, that could only do those things specified in the Constitution or that they were instructed to do by Congress.^a “Residuum” means leftover: beyond what was laid out, there was nothing left. The presidency is capable only of what the Constitution explicitly says it is.

Theodore Roosevelt, Alexander Hamilton, and others had a vastly different view of the power of the presidency. This view, sometimes called stewardship theory, agrees with Taft that the presidency has all the powers explicitly listed in the Constitution. However, it holds that the executive power is a unique power all its own, not merely an acknowledgement of powers granted later. In this view, the president is charged with the duty to take care that the laws are faithfully executed, and the president must therefore have the powers necessary to do that whether or not the Constitution ever spells out such powers. Someone must be able to respond to emergencies until Congress has time to make law. Instead of being limited to what the Constitution spells out, the formula is inverted: in this view, the only limit on what the presidency is capable of is that the executive power may not be used in a way prohibited by the Constitution or a Constitutional law passed by Congress. Theodore Roosevelt described this idea:

[...] the executive power was limited only by specific restrictions and prohibitions appearing in the Constitution... I declined to adopt 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.

These are wildly different views of the same few words, and of the office. One is an office with a narrow set list of powers, relying on Congress to authorize more as needed. The other is an office with broad sweeping powers, only occasionally reined in by Congress when it oversteps. Which view is correct has been argued since the earliest days of the United States Constitution. The very first Congress had to deal with the question of whether the presidency had the power to fire workers in the executive branch, since the Constitution was largely silent on the subject. The Supreme Court has also had to deal with the issue numerous times. Justice Oliver Wendell Holmes pointed out that if we assumed the words “the executive power” were meant to give the president all the powers of an executive, it made specific presidential powers listed in the Constitution such as requiring the opinion of his Cabinet members or appointing people to office redundant. On the other hand, the Court has upheld various claims of inherent executive power - in one instance ruling that the executive power (whatever it was) allowed the president to provide a bodyguard for a judge whose life was threatened, despite no specific law or piece of the Constitution saying he could do so.

So, the modern presidency, in practice, has some level of power beyond

^a:Perhaps it shouldn't be surprising that Taft seemed far happier serving on the Supreme Court than in the White House.

what is explicitly listed in the Constitution. Yet it isn't quite as simple as Roosevelt's formulation, and a modern president shouldn't expect their office to be able to do anything they want with only the explicit limits in the Constitution to get in their way. Not only can Congress create laws that explicitly forbid the president from doing certain things, court cases such as the steel seizure case we'll look at later^b have established that the implied will of Congress – what the laws passed by Congress suggest – can also limit presidential actions. For example, if Congress creates a certain way that the president *can* do something, the court may reject a presidential attempt to perform that action in some other way. Not only that, but the presidency is bound to enforce all the laws – whether or not the president personally supports them. It is not uncommon for presidents to be accused of putting little effort into enforcing laws they don't like, though proving that a president is intentionally underperforming would be very difficult. More rarely, presidents have explicitly refused to execute a law that Congress has passed, generally leading to legal battles in the courts.

So: a president taking office will find that while the Constitution does put his office in charge of the executive branch of government and charges him with the execution of the laws, the powers it explicitly provides to accomplish this are relatively threadbare and undefined. Even something as simple as firing someone working for the executive branch runs into the question of the vague nature of the executive power, and while its lack of clear limits might seem to give the presidency a great deal of leeway, it also allows other actors (like the other two branches of government, among others) to play a major role in defining what the executive power is. The presidency comes with clear responsibilities but unclear powers to fulfill them.

^b:Youngstown Sheet & Tube Co. v. Sawyer, if you're curious right now.

Why?

Why was the executive power not clearly explained? Did the authors of the Constitution just forget to include the section with the definition?

Probably not. But it's hard to say exactly what reason they did have for leaving it vague. For advocates of a stronger executive, vagueness may have left the door open for presidential power to grow in the future. For those focused on getting the new Constitution ratified, leaving the executive power undefined may have made it easier for differing groups to compromise and support the Constitution. For legal theorists, the fact that the presidency would be charged with both executing the instructions of the legislative branch while also having to serve as part of the checks and balances that limit that branch may have made the power hard to define. Some have suggested that the executive power was seen as

a sort of wild card or temporary patch – able to fill in where there were defects in the law, yet remain lesser than the law. Of course, the authors of the Constitution may have simply used the term to refer to the other listed powers in the Constitution, like the veto, and nothing more.

We're unlikely to be able to definitively answer this question. The Federalist Papers, commentary on the Constitution, say a great deal about what the presidency will and should do, but little on the nature of its power. The truth is likely a combination of the above options. At least, we can be sure that the nature of the executive power is part of the design, and not simply an oversight.

The Executive Branch

While the presidency is given the duty of making sure that the laws are executed, the president obviously can't enforce all the laws alone. If you commit mail fraud, you'd be quite surprised to find the current president on your doorstep, waiting to arrest you personally in his role as Chief Executive. Instead, you're far more likely to find a postal inspector. That postal inspector works for the United States Postal Service, part of the executive branch, and is part of what is commonly referred to as the federal bureaucracy.^c

The president is nominally in charge of that inspector as the chief executive. Congress, however, is the only part of the government that can pass laws, create agencies to enforce those laws, and provide funding for those agencies and their employees. Over the course of the nation's history, Congress has greatly increased the size of the bureaucracy as the country has grown larger and the role of the national government has expanded. While the president might prefer a streamlined, pyramidal organization of power with themselves at the top of a clear hierarchy, Congress has different goals. Congressional additions to the bureaucracy – new agencies, programs, departments, etc. – are generally added piecemeal, based on the needs of the moment, the interests of Congressional constituents, partisan and factional struggles within Congress, and the electoral concerns of members of Congress focused on getting back into office. The workers within the bureaucracy may work there their entire lives, and will have to balance responding to the leadership of a president who will be around for four years against the Congress that created their job and funds their pay, as well as outside interests.

In short, the executive branch that the president must use to fulfill the duties of their office and attempt to make use of their executive power is a complicated tangle of various organizations, often with overlapping responsibilities, that are only partially under the president's control.

c: Bureaucracy is a term for the system of federal government agencies and officials that carry out laws and administer public programs. The word is a combination of the word *bureau* and the root *-cracy*, which describes a type of government or rule. So like democracy can be read as “the rule of the people (demos)”, bureaucracy can be read as “the rule of the desks”.

Below, we'll look at the bureaucracy in a few major sections: the Executive Office of the President, the cabinet heads and the departments they oversee, and the non-cabinet agencies that exist outside of the regular structure. After that, we'll look at the overall structure of the bureaucracy, and particularly what aspects of that structure make presidential control of the executive branch so difficult.

The Executive Office of the President

In 1937, the Brownlow committee, a group of political scientists, released their report: "The President needs help." Franklin D. Roosevelt (FDR), president at the time, had commissioned the report and used it to ask Congress for more support. A few years later, Congress agreed, creating the Executive Office of the President, or EOP.

Why did the Brownlow committee think the President needed help? In their view, he was being left behind. Jefferson had a personal staff of two during his time in the presidency – a messenger and a secretary – and paid their salaries out of his own resources. Even much later, during the Hoover administration, the president only had a staff numbering roughly in the thirties. Meanwhile, the size of the executive branch that the president was supposed to oversee grew far more rapidly than the president's resources did.

Today, the EOP consists of thousands of people, divided and subdivided into various offices and agencies, and overseen by the Chief of Staff. The White House Office, for example, contains aides and advisors to the president, while the Office of Management and Budget prepares the budget the president is required to submit to Congress. The president has a great deal of freedom in choosing staff for their EOP, with only a few positions requiring approval from Congress.

During the Constitutional Convention, some proposed a presidency occupied by multiple people. Three, five, or twelve people might have all served as presidents at once. While that's not the system we ended up with, it still makes some degree of sense to think of the president as plural. After all, the aides and advisors that work in the EOP have a massive role to play in what the president does. If the president is the decider, the staff of the EOP are likely the ones who will let him know there is a decision to be made, research and brief the president on the necessary background information, present the president with a list of options to choose from, convey the choice he makes to the relevant parts of the bureaucracy, coordinate the carrying-out of the decision, and keep track to make sure the decision is being followed. If the president selects poor staff for the EOP, it can make it much harder for the president to accomplish his goals.

Most recent presidents have relied on a strong, centralized EOP, particularly the White House Office, to deal with the executive branch and fulfill the many responsibilities that come with the office of the presidency.

Ideas of decentralized decision making and a more collegial approach to policy-making appeal to many presidential hopefuls. Once they're in office, however, most presidents find themselves under immense public pressure to take action and confronted with a vast and confusing array of federal agencies in the bureaucracy. Under those circumstances, relying on a close core of subordinates and advisors who can be trusted to do what they're told has an obvious appeal. Many recent presidents, for example, have treated their vice presidents more as assistant presidents to help them wrangle the executive branch than as mere emergency backups.

Ironically, in recent years, the growth of the EOP has presented presidents with a familiar problem. As the number of people, offices, and units within the EOP grows, presidents may find themselves less and less able to fully monitor and control its members. Political opponents of the president will often allege that the staff of the EOP are more in charge than their superior: Bush 2 faced this accusation over the responsibility he delegated to Vice President Cheney, and Biden over staff acting for him due to health concerns. Much like the Brownlow commission said, the president may still need help.

Cabinet Departments and the Cabinet

If the EOP is the part of the executive branch closest to the presidency, the Cabinet departments are the largest. The fifteen cabinet departments form the bulk of the executive branch, employing millions of people and overseeing vast amounts of federal spending. Each department is a large administrative organization that oversees a broad policy area—such as the massive Department of Defense or the much smaller Department of Education—and contains numerous subagencies, bureaus, and offices that administer specific programs. Together, these departments carry out the laws passed by Congress and implement the president's decisions on how best to execute those laws. Cabinet departments are the backbone of federal administration, managing the nation's most important public functions: national security, law enforcement, public health, economic regulation, infrastructure, and more. Over time, new departments have been added by Congress to address emerging challenges, reflecting the growing scope of government and the increasing demands placed on the presidency.

Each department has a head – most are referred to as Secretary, though the head of the Justice Department is the Attorney General. These department heads, along with the Vice President and some other officials, form the Cabinet itself – a group that advises the President.

The Cabinet is not officially created by the Constitution. Instead, in keeping with the vague nature of the executive power, it stems from an interpretation of a power the presidency receives in Article II: to “require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective

Offices". After the first president organized his principal officers into an advisory Cabinet, the structure has held ever since.

It's often common for the public to assume that the Cabinet is a collective decision-making body, with the president as the head of a group of colleagues. Presidential candidates often promise to rely on their cabinet more than their predecessor did. In practice, however, this is not the case.

The executive power is given to the presidency. The Cabinet has no authority of its own, and is largely a custom that presidents maintain. The president is under no obligation to meet with his Cabinet, and can do so as often, or as rarely, as he likes. Presidents often meet with their cabinet less and less over the course of their term in office, with some presidents having Cabinet meetings only once or twice a year.

Presidents also have great authority over the Cabinet heads. They appoint them, though the appointments must be approved by the Senate. Once in office, the heads of the cabinet departments serve at the pleasure of the president, meaning that he can remove them from office at any time. The president doesn't need to give a reason for this decision, and doesn't need approval from the Senate to do so. When a president selects members for his cabinet, he not only selects for experience in whatever policy area a cabinet head will oversee, but also for general management experience. In addition, presidents may choose cabinet heads for electoral reasons as discussed in a previous chapter, and may appoint some cabinet heads more for their value as political symbols than for their administration experience.

Many presidents tend to favor appointing outsiders – candidates with less experience in the role and little previous involvement in Washington – to their Cabinet. This is a way to try and avoid what Nixon called "going native", where a Cabinet secretary starts identifying more closely with their department than with the president. The Cabinet heads serve as a liaison between the presidency and their departments: long-standing institutions with their own professional staffs, traditions, and interests. Pressure from that bureaucracy – as well as relevant Congressional committees and groups that work with their departments – can lead a cabinet head to have different priorities than what is on the president's agenda.

Why do presidents have so few Cabinet meetings? In part, because Cabinet meetings are generally not an effective way to have serious policy discussions. Cabinet members are all in competition for the scarce resource that is presidential time and attention. Each cabinet member tends to focus on their own department, leading to additional competition over which department should be in charge of a given issue or how resources should be allocated. And the president's ultimate authority means that he is the sole decision-maker in the room, free to ignore the rest of the cabinet if he chooses. Thus, presidents don't *need* to have cabinet meetings. The ones they do have are often symbolic, used for public relations purposes instead of decision making, and are more concerned with the president giving directives (often created by working with his staff in the EOP) to the

department heads rather than making decisions *with* them. This does not mean that the president won't work closely with some Cabinet secretaries – often the heads of high-priority departments like Justice or Treasury – but the Cabinet as a body has little power. A lot still rests on the presidency.

The Cabinet Departments

Department of State (1789) Handles foreign affairs, diplomacy, and representation abroad.

Department of the Treasury (1789) Manages federal finances, collects taxes, and produces currency.

Department of Defense (1947) Oversees the armed forces and national security policy.

Department of Justice (1870) Enforces federal laws and represents the United States in legal matters.

Department of the Interior (1849) Manages public lands, natural resources, and relations with Native American tribes.

Department of Agriculture (1862) Oversees farming, food safety, and rural development.

Department of Commerce (1903) Promotes economic growth, trade, and technological innovation.

Department of Labor (1913) Protects workers' rights and regulates workplace conditions.

Department of Health and Human Services (1953) Administers programs on health, welfare, and social services.

Department of Housing and Urban Development (1965)
Addresses housing policy and urban development.

Department of Transportation (1966) Regulates highways, air travel, and public transit systems.

Department of Energy (1977) Manages national energy policy and nuclear security.

Department of Education (1979) Oversees federal education funding and student aid.

Department of Veterans Affairs (1989) Provides benefits and healthcare to military veterans.

Department of Homeland Security (2002) Protects against terrorism and manages border, immigration, and disaster response.

The Department of Homeland Security

The newest Cabinet department on that list is the Department of Homeland Security (DHS). It was formed by Congressional legislation after the 9/11 terrorist attacks on the United States. Reports of intelligence failures and a lack of coordination between various government agencies incentivized the creation of a new department that would hopefully centralize and collect information in one place and coordinate the many different parts of the bureaucracy devoted to intelligence gathering.

Multiple existing agencies were moved to the new department. The Secret Service, for example, moved from the Treasury Department to the DHS, as did the Coast Guard from the Department of Transportation. The Office of Domestic Preparedness from the Justice Department and the National Domestic Preparedness Office from the Federal Bureau of Investigation also moved in, showing some of the redundancy that the new department hoped to fix. The Federal Emergency Management Agency, an independent agency that had previously not been part of the Cabinet structure, joined as well.

Even after merging over twenty different offices into the new department, there were still intelligence agencies outside the DHS that it would have to coordinate with. The new department not only required a Cabinet head, but also meant that staff had to be added to the EOP to help the president manage and work with the new department.

The creation of the DHS shows how Congress creates, alters, and occasionally ends agencies within the Cabinet in response to political needs and pressures. It shows the broad range of responsibilities that a department can have – who would have guessed that the Secret Service, most known for their task of protecting the nation's leaders, was once part of the Treasury Department? A given agency might share responsibility for a task with other agencies in the same department, different departments, or even with agencies outside the department structure all together.

The presidency doesn't oversee a simple system where all the responsibilities of executive government are divided into neat departments, but a complex and interlocking web of agencies where simply determining who is responsible for what can be a massive logistical challenge.

Non-Cabinet Agencies

Not all parts of the executive branch are housed within the Cabinet departments. A large number of federal organizations operate as independent agencies, which exist outside the traditional departmental structure. These agencies are created by Congress for various reasons. The National Aeronautics and Space Administration (NASA), for example, is not part of either the Defense Department or the Transportation Department, but was created as an independent agency in 1958 during the Cold War. Congress hoped that making the agency independent and reporting directly to the president would free it from some bureaucracy, ideally making it faster and helping the nation to compete with the Soviet Union. Additionally, making the space agency not part of the Defense Department was intended to portray a peaceful image of America's space efforts to the rest of the world and free the new agency from short-term defense needs in favor of long-term goals. Other reasons Congress might create an agency outside of the department structure are for efficiency, to focus on a highly specific role that requires detailed expertise, or to insulate an agency from presidential control.

Non-cabinet agencies come in several forms. Some, like the Central Intelligence Agency (CIA), Environmental Protection Agency (EPA), or NASA, are executive agencies whose heads are appointed and removable by the president. They tend to focus on specific policy areas.

Congress can also create government corporations. These corporations often look and act similarly to normal businesses – you can buy a ticket for a train ride from Amtrak, a government corporation, the same way you might buy a ticket for a flight. You can buy a stamp in a Post Office just like you'd buy anything in any other store. However, there are some differences: Amtrak operates routes that lose them money, as Congress wants to continue providing train service to those communities. The Postal Service provides mail delivery even to areas that a private business might dismiss as too expensive to be worth covering. The heads of these corporations often report to a board or to Congress instead of to the presidency.

Agencies such as the Federal Communications Commission (FCC), the Nuclear Regulatory Commission (NRC), or the Securities and Exchange Commission (SEC)—are independent regulatory commissions or agencies. These are generally led by multi-member boards whose members can usually be removed only “for cause”, meaning that the president cannot simply remove them at will like a Cabinet head, but only for specifically defined legal reasons. Often, these agencies have restrictions on appointments as well, such as staggering appointments over time so no one president can appoint everyone who works there. These structural protections are meant to keep them insulated from presidential concerns like re-election or short-term partisan battles. Congress might do this because they want to ensure the agency focuses on technical expertise, as

with the NRC, or to promote impartiality (as with the SEC), or simply as part of a power struggle with the executive branch.

Independent agencies are unusual, and controversial. While they wield executive power, they are created by Congress with some protection from presidential control – hence the term “independent”.

Opponents of independent agencies often turn to the vesting clause. It vests the executive power solely in a president, and the use of singular terms like “the” and “a” suggests that both were intended to be singular. This idea is often referred to as the idea of the unitary executive. Proponents of the idea argue that all executive power must ultimately lie with the president. For an official to exercise executive power but not be subject to presidential control – such as the head of an independent agency being protected from presidential removal – means that such officials, not the president, holds part of the executive power on their own. They argue for stronger presidential power over subordinates in the executive branch, particularly removal. In addition to Constitutional arguments, proponents of the unitary executive idea argue that it would make government more accountable, as responsibility would clearly lie with one elected official, and that centralizing control could lead to more efficient and consistent governance, such as responding to emergencies. Opponents of the unitary executive idea – or supporters of independent agencies – argue that giving the president such control over agencies would make important technical, or regulatory, or economic decisions change according to partisanship and election results instead of policy expertise, and lead to a lack of stability.

So, who’s correct? Can an independent agency wield executive power without full presidential control? The issue has been taken up by the judicial branch many times, and likely will be again. In practice, the courts have taken both sides. The Supreme Court has found in the past that while the president could remove officials that were part of the executive branch – serving, in the Court’s words, as “an arm or an eye of the executive” – certain executive branch agencies might be considered “quasi-legislative” or “quasi-judicial” if they did work that resembled making laws or acting as judges. That difference, said the Court, justified limitations on the presidency’s ability to remove those officers. On the other hand, the Court has also repeatedly upheld the president’s removal power, and rejected attempts to let other branches of government fire or supervise executive branch officials or to explicitly and completely insulate part of the executive branch from all possible presidential oversight.

For our purposes, what matters is that a president might find that some important parts of the executive branch are beyond his direct control, and don’t have to listen to his instructions: the fact that many presidents have public disagreements with the Federal Reserve over monetary policy is a good example of this.

Executive Branch Structure

Size and Complexity

So why is the executive branch so difficult for presidents to control? In part, it's due to the sheer size and complexity we saw above. There are many agencies of varying kinds, all with broad areas of authority, and all with different chains of command. FDR once complained in a memo:

You might find out if any Alaska bears are still supervised by (a) War Department, (b) Department of Agriculture, (c) Department of Commerce. They have all had jurisdiction over Alaska bears in the past and many embarrassing situations have been created by the mating of a bear belonging to one Department with a bear belonging to another Department. P.S. I don't think the Navy is involved, but it may be. Check the Coast Guard. You never can tell.

The federal government has gotten much larger since the days when FDR tried to figure out which part of the executive branch was in charge of which bears. Millions are employed by the Cabinet departments and non-Cabinet agencies described above. Millions more work for the government in some looser capacity – employees of the state governments who are funded by the federal government, contract workers, or researchers who receive grants and awards from the federal government. The executive branch is involved in the life of everyone in the United States at every age, and is active around the world. If there were no other obstacles – if the bureaucracy was simply and cleanly organized, if everyone in the bureaucracy served purely at the pleasure of the presidency and had no other interests except doing what the president wanted – issuing orders to such a large organization with so many different responsibilities would be extremely difficult. It might not even be possible to fully comprehend all the programs and activities that the executive branch is engaged in.

Of course, the bureaucracy is not simply and cleanly organized. Congress creates departments, agencies, and offices in all of the various kinds we've discussed, and it creates them as needed, to fit the policy and political goals of the moment. If a complete and accurate organizational chart of the executive branch exists, members of Congress don't consult it before adding more to it. Hence, we get responsibilities or agencies placed where they don't seem to logically belong. For example, the Occupational Safety and Health Administration (OSHA), part of the Labor Department, has also been given the role of protecting financial whistleblowers from retaliation. This means that if an employee of a major bank reports illegal behavior by his supervisor and is fired, it won't be the Department of Justice or the Securities and Exchange Commission (SEC) that first has responsibility to investigate. Instead, it will be the same agency that makes sure safety railings are installed at work sites. Congress also creates agencies with redundant or overlapping responsibilities. The Food and Drug Administration (FDA), which is part of the Department of Health and

Human Services, is in charge of inspecting ham sandwiches. If the sandwich is open-faced, however, then meat is now considered to be the main ingredient, and the Department of Agriculture (which has the responsibility for meat inspections) is now in charge. Since different members of Congress (and their constituents) can have widely varying interests, different parts of the bureaucracy can even directly work against one another. Some government agencies work diligently to discourage people from smoking, while other agencies work hard to support tobacco farmers and sales of their products.

Most modern presidents have proposed some form of reorganization of the executive branch, often hoping to make it easier to control in the process. Eliminating an agency or merging it with another requires Congressional action, however, so the presidency has little power to determine whether or not such reorganization plans go through. See the box above on the Department of Homeland Security for an example of such a reorganization.

Red Tape

Simply because the president can locate the proper agency with responsibility to carry out an order, doesn't mean that order will be accomplished quickly. Indeed, many presidents have left office with orders they gave early in their administration still working their way through the bureaucratic process. There are so many rules and procedures governing how agencies may act that there's a common term for them – "red tape".^c Why so much red tape? It serves various important interests. For members of Congress, laying out rigid rules for what an agency can do and how they can do it makes agencies more predictable and stable over time. It helps Congress to control what an agency will do after it has been created, even when it is part of the executive branch and largely beyond official legislative control. There are other benefits as well: requiring an agency to go through a lengthy period of accepting public comments on an action before they can perform it ensures that anything the agency might do to upset a member of Congress' constituents will likely get noticed before it happens, allowing members of Congress to keep an eye on the agency's actions while "outsourcing" the work of monitoring to the public.

c: Why red tape? Government papers in other countries were once bound with red ribbon, or tape. The more paperwork, the more tape would be required – hence the term.

Permanence

Early in American history, presidents could simply pick who they liked to work in the executive branch. The distribution of positions and salaries was a key focus of presidential elections, and a winning president would replace thousands of existing bureaucrats to distribute their jobs to his supporters and campaign workers as the "spoils of war". While this led to incompetence (as workers were selected more for party loyalty than skill), it took the assassination of President Garfield by a deranged man who believed

Garfield owed him a job to spark reform to the so-called spoils system. The Pendleton Act created the modern civil service – positions in the federal bureaucracy for which hiring was done by merit and exam performance, and which were protected from presidential firing for political reasons. While it initially covered only a small portion of total executive branch jobs, today the majority of the executive branch is under such protections.

While civil service reform was important for promoting professionalism in the government, from the perspective of the presidency it was a sharp reduction in power. Many lower-level positions were now much harder to reach with the presidential appointment or removal powers. In addition, employees could now stay at agencies and departments long enough to outlast the president who appointed them. This permanence meant that various parts of the bureaucracy started to naturally develop cultures and interests all their own, separate from the current president. And in the struggle between those different interests, long-lasting civil servants gain the benefit of experience over a relatively short-lived and amateur president.

Outside Influence

Congress has already been mentioned repeatedly, and it should be easy to see how agencies that technically report to the president care a great deal about what the members of Congress who control their funding have to say. As an apocryphal line from a NASA director during a Congressional hearing put it, “I can give you the Moon, but you have to give me the money.”

But Congress is not the only external force to which the executive branch responds. If my restaurant sells ham sandwiches, then I obviously care about the rules and regulations and performance of the FDA that inspects them. Since my interests are deeply affected by the work of the agency, we could say I’m part of their clientele, or call my restaurant an interest group.

Agencies and their clientele are natural allies. If the agency does a great job of serving its clientele, then naturally the people the agency serves will defend it in turn. If the FDA does a great job inspecting my sandwiches, I’m likely to get quite annoyed when I hear about Congress proposing to cut the agency’s funding. Not only can agencies get political support from their clientele, but information as well. If the Department of Education needs information about teachers, who better to ask than the National Education Association (NEA)? In exchange, of course, the NEA gets to be the one offering the information and providing the advice to the decision-makers.

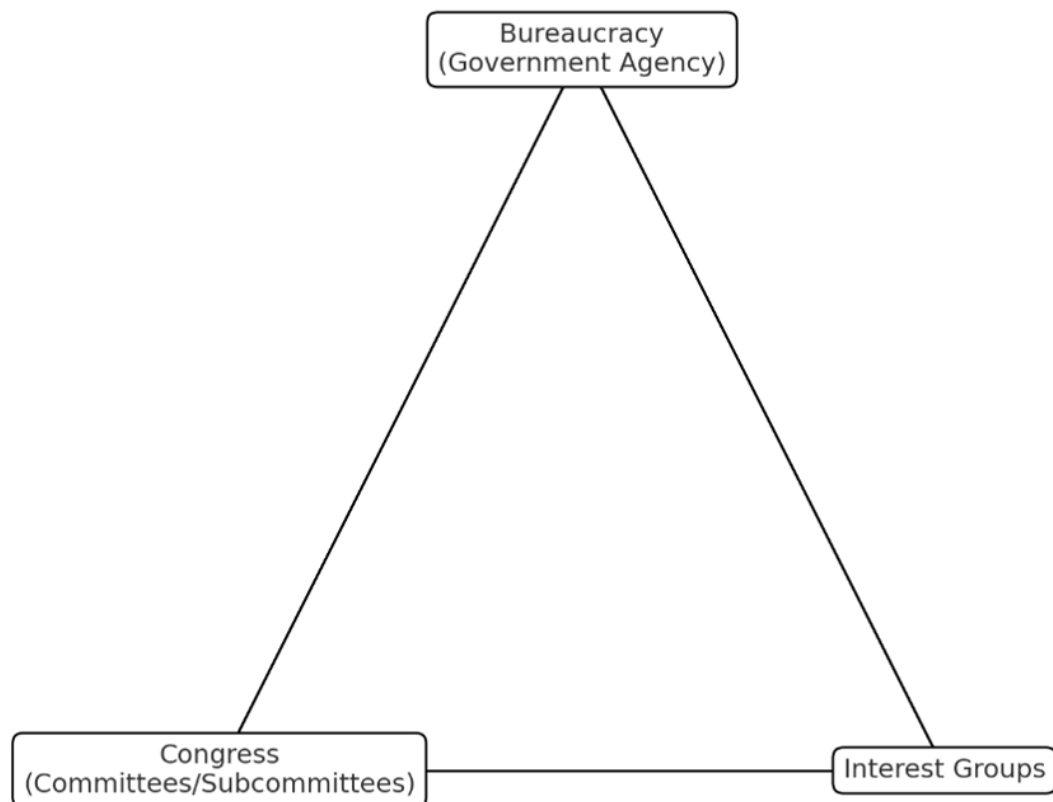
Agency-clientele alliances can have significant negative effects. While providing political support for an agency that does good work is one thing, some clientele groups have quite self-centered definitions of “good work”. Oil company personnel, for example, wanted the Minerals Management Service (MMS) to be more permissive during safety inspections of their off-shore oil rigs. While good for the company, this wasn’t positive for

anyone else – as the massive 2010 Gulf oil spill off the American coast demonstrated. In exchange for such treatment, clientele groups like the oil company can offer normal political support, lobbying members of Congress on behalf of the agency and its funding. Rewards can also be more personal – members of the MMS were given private flights on helicopters to music concerts, paid for by the oil company. Hiring is another avenue of external influence – agencies often recruit from the clientele groups they regulate, and members of said agencies are often hired after retirement by said groups. A salary can be a powerful incentive.

This three-way relationship – between interest groups, the bureaucracy, and Congress – is so stable that scholars refer to it as the Iron Triangle. Iron triangles can form wherever there is an agency and an interest group. Every point of the triangle has something it wants from the other two – funding, regulations, support. Note that the presidency isn't part of the triangle.

For the presidency, this external influence not only reduces control over the executive branch, but magnifies the possibility of corruption and incompetence ruining the presidency's public standing. However, such relationships are difficult for an outsider – like the president – to break.

The Iron Triangle



Stable relationship between Congress, interest groups, and bureaucratic agencies that shapes policy through mutual benefit and support.

Executive Branch Control

So what tools does the presidency have to control the executive branch? Relatively few compared to the size of the task, and most of those tools come with restrictions that mean they can't be used freely. Below, we'll look at some of those tools: the power to appoint and remove personnel, to decide how to execute the law, and to affect the structure of the executive branch itself.

Appointment

The Constitution invests the presidency with the ability to:

...nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The ability to choose who will serve in the executive branch would seem to bring a great deal of control – just staff the whole thing with friends and allies, and you're set! But note the limits present in that clause of the Constitution. First, only non-inferior (or principal) officers are to be nominated by the president, and those must be approved by the Senate. Congress can allow inferior officers to be appointed by others. Which officers are inferior? The Constitution gives little guidance. The Supreme Court has generally focused on how much supervision a given position has when cases are brought before them. However "inferior" is defined, a sizeable number of officers are able to be appointed by someone other than the president, and in some cases even by members of other branches. Congress can also place restrictions on who the president may appoint as an inferior officer, requiring job qualifications that severely limit the choices available to fill a position.

Senate approval is a significant check on the appointment power as well. Senate confirmation hearings are generally long, intrusive affairs where political opponents of the president will look for any possible misconduct or flaw in the president's nominee. The prospect of spending so much time being investigated and politically attacked can cause even highly qualified nominees to refuse to serve. The time the process takes is also a problem for the president – it can take well over a hundred days for a nominee to be approved, and that number has generally been going up over time. Even a single Senator can often have a great deal of power to delay a nominee's appointment. Without the ability to put a team in place, the president may

have little ability to control his branch, and may have to invest a great deal of effort in getting candidates nominated early in his term in office instead of achieving his policy priorities. This is especially true if the Senate is not controlled by the same party as the president, but the different political interests of the presidency and the Senate mean that no president – even one with a fairly friendly partisan Congress – can count on an easy appointment process. Congressional traditions such as “senatorial courtesy”, where the senators from a nominee’s home state expect to be consulted and allowed to block a nomination, are just one example of the obstacles a president can run into.

The process of securing Senate confirmation of nominees can be so grueling that presidents try to avoid it entirely. One way to do so is through recess appointments. Article II of the Constitution allows for temporary appointments when the Senate is not in session, bypassing the normal confirmation process. In the days when the Senate was often not in session for much of the year, the idea of a vital appointment being unable to be filled was concerning. These days, the Senate is in session for most of the year, but recess appointments were still a way for presidents to get some of their personnel picks in more easily. To block this, the Senate has held *pro forma* sessions – meetings of Congress only a few minutes long, but proving that the Senate was technically in session and so the recess appointment power could not be used. When Obama tried to issue recess appointments despite this, arguing that the *pro forma* session Congress held did not really constitute the Senate being open for business, the Supreme Court held that it was not the place of the presidency to determine when Congress was and was not in session. Since then, presidents have had much fewer opportunities, and little need, to make use of recess appointments. So why do we care about recess appointments?

Presidents took a minor power – to appoint temporary placeholders for real appointees when the Senate could not meet – and strategically made use of it to expand their power relative to the other branches. This attempt required creative thought, such as the Obama administration’s legal challenge to the idea of *pro forma* sessions, but couldn’t survive a challenge from the other branches. This is a good example of what sort of behavior the leadership dilemma can produce in presidents as they try to expand their power, and how the limits inherent in the presidency can still be difficult for presidents to overcome. It also shows how the presidency, despite being on top of the executive branch on paper, is often desperate to find ways to gain more control.

Removal

Presidents want to remove poor performing officials from office, make sure that officials are motivated to carry out their duties in the way the president wishes, and remove appointees from the previous administration who don’t

share their goals. The ability of the presidency to appoint officers is clearly laid out in the Constitution. The power to remove people from office, however, is not mentioned anywhere in the document. This has led, as you might expect by now, to a long series of debates. As we mentioned earlier, it was relatively quickly accepted that part of “the executive power” was removing executive branch officials from office. Early presidents certainly acted as if they had the ability to fire people.

Aside from the basic question of whether or not the presidency comes with the ability to fire people, perhaps the next most debated question is what limits, if any, come with that ability. In general, supporters of the unitary executive hold that removing people from office in the executive branch should be the domain of the presidency, and that other branches should not be able to limit the presidency’s ability to control subordinates in this way. To do so, they argue, creates people who wield executive powers but who do not answer to the president. Others argue that Congress should play a role in determining who is able to be removed from office and how. After all, Congress is heavily involved in the appointment process. Why not the reverse?

The Supreme Court has had to deal with this issue many times, and almost certainly will again. In general, the Court has split the difference between the two camps above. The Court has repeatedly upheld the removal power of the presidency, especially over officials like Cabinet department heads who serve at the pleasure of the president. It has also permitted Congress to place limits on that power, such as creating positions where people other than the president (such as the head of the relevant Cabinet department) have removal authority, or where the president can remove someone only for certain listed reasons. See the section above on independent agencies for some examples. Yet the Court has also limited Congress’ ability to place restrictions on removal authority, striking down protections that would leave the president completely unable to supervise a position or place removal authority solely with Congress.

For the presidency, the ability to remove officials from office for non-compliance – or at least credibly threaten to do so – is a major part of executive branch control. Despite some limits on this power, presidents make creative and effective use of it. The Saturday Night Massacre, for example, was an episode in which Nixon ordered his Attorney General (AG) to fire a Special Prosecutor. When the Attorney General refused, Nixon fired the AG, ordered his replacement to fire the prosecutor, and repeated the process until the prosecutor was eventually removed. Presidents can also intensively search for a reason to fire someone, going over the record of someone they want to remove with a fine-toothed comb in hopes of meeting whatever requirements Congress has put in place. Presidents can also make their intention to fire someone clear and encourage them to leave, such as with a surprise retirement party, hoping that the person will decide to leave voluntarily. Given how important this power is to the presidency, future

presidents will likely try to increase their use of it.

Note how the vague nature of the removal power, which doesn't have explicit Constitutional guidelines, has sparked a power struggle between the president and other branches to define its reach and limits. Note too how the popular conception of the president as unquestioned head of the executive branch doesn't quite match reality. Unlike the head of a company, if a subordinate goes against the wishes of the chief executive, it can be quite difficult for the president to remove them.

Executive Orders

So the presidency has some limited ability to appoint people to serve in the executive branch, and to remove them. How well can the presidency issue orders to those people while they're in office?

Since Congress writes the laws that the executive branch executes, it might seem that there is little room for presidential instructions when Congress has already told them what to do, leading some presidents to complain about being the “chief cook and bottle washer” for Congress. However, congressional legislation is often not a set of complete instructions. For example, members of Congress who are more concerned with elections than chemistry may pass a law about barium tariffs that instead of giving a fixed number simply says that experts should determine how much barium the nation needs and determine the proper number accordingly. Congress often gives extremely broad or vague directives to the bureaucracy, such as “improve the environment”. Doing so helps members of Congress to agree on legislation more easily instead of fighting over details and pass briefer legislation more efficiently.

Executive orders rely on such vagueness. In essence, you can think of them as instructions on *how* to carry out the instructions of Congress or the Constitution. Instructions on *how* to carry out other instructions might not seem impressive, but they can allow creative presidents to accomplish a great deal. Bush II, for example, issued an executive order instructing executive branch workers to include fish on fish farms when counting fish to determine population sizes. This increased the recorded population of some species, in turn making them seem less at risk and rendering the land they were on no longer under environmental protection and allowing it to be developed. Presidents have used executive orders to enact sweeping price controls, lock up Americans with Japanese ancestry in camps, and grant temporary legal status to migrants.

While appointments often require the president to get the consent of Congress, executive orders can be done by the president alone – they are what we refer to as unilateral. This makes them quick. The popular children's educational series *Schoolhouse Rock* has an entire song sung by a cartoon bill, lasting several minutes, explaining the legislative process of how Congress creates laws. A comedic parody of this song about executive

orders is, in its entirety, “I’m an executive order, and I pretty much just happen” – and that isn’t too far from the truth.^d

Presidents generally appreciate the ability to take quick decisive action on their own. There is no need to seek Congressional approval – or anyone else’s. As a presidential advisor once mused “Stroke of the pen, law of the land. Kind of cool.” Most modern presidents come to their inaugurations with executive orders already drafted and ready to issue, often focused on many of the key issues they campaigned on. They continue to issue them throughout their time in office – researchers have investigated whether the presidency is most likely to do so when facing a hostile or a friendly Congress, when dealing with controversial or quiet political issues, when popular or unpopular, but all agree that presidents make extensive use of them. They have since the very beginning, with Washington issuing the first – a request to his Cabinet to prepare a report on the current status of the nation. In addition to executive orders, presidents have many other ways to issue instructions to their branch, accomplishing much the same purpose under different names: proclamations, memoranda, directives, and instructions. While there are some differences between these, the core – instructions from the presidency to the executive branch – is the same.

That said, and despite how “kind of cool” they might be, executive orders are not the same as making a law. Presidents cannot simply command the executive branch to do anything they wish. Executive orders must not violate existing law. If a president wants to disband a Cabinet department, they must wait for Congress to do so, since they can’t unilaterally erase the law that created it. A president might issue instructions to prepare for closure, or to shut down every function of the agency not explicitly required by the law, but could not go against the express instructions of Congress. This was made clear when Truman attempted to seize control of national steel production to stop a strike. The court held, among other things, that the president could not simply seize the steel mills when Congress had laid out other procedures for handling strikes.

In the same way, the president can’t simply issue any order. There must be some basis given, such as a specific law being executed, or a Constitutional duty being pursued.^e While the ever-increasing amount of laws and the vague nature of the executive power can give the president a great deal to work with here, it does mean that presidents cannot simply order whatever they wish. In the fish example above, the president could not simply order the land freed from environmental protections, but had to find a statute about counting fish that could be used to accomplish that goal.

Just because the presidency can issue executive orders unilaterally doesn’t mean the other branches are unable to interfere. Congress can act to end executive orders they dislike. Most directly, they can simply change whatever law the president is executing. Also despite a Supreme Court ruling that Congress could not give itself the ability to veto the president’s instructions to agencies, Congress still requires many agencies, formally or

d: See the Saturday Night Live sketch, “How a Bill Does Not Become a Law”.

e: Most presidents state the legal basis for the order in the text of the order itself. There is no formal requirement to do so, however.

informally, to consult with them before taking certain actions, giving Congress a chance to interfere any order the president issues. The courts can also overturn executive orders, ruling that they conflict with existing laws or aren't valid attempts to implement the law given as the order's basis. Workers in executive branch agencies can simply ignore executive orders, trusting in their congressional job protections or future court battles to help them survive the president's displeasure. And perhaps most importantly, executive orders are temporary. While presidents have used them to create major organizations and long-running programs, a future president can end an executive order as easily as his predecessor issued it in the first place.^f

Still, even given their limited scope and ability to be overturned, executive orders allow the president to act and wait for the other branches to respond. Given the slower speed of the legislative and judicial branches, a president might be able to accomplish all or part of their goals in the time it takes an executive order to be overturned, if it ever is.

The Leadership Dilemma

The presidency is a powerful office – certainly people see it as one. Yet in terms of a direct control, a generalship or CEO position almost certainly gives more direct control of subordinates. A president must make use of every power at their disposal, and often push for a maximalist interpretation of what powers they do have, in order to attempt to control the executive branch. Other actors – primarily Congress, but including others both internal and external – also push for executive control. When the public demands presidential action on some issue, there may or may not be any way for the presidency to even achieve it on paper, let alone actually overcome resistance from political opponents.

This is at least part of the reason presidents seem ever-ready to push for greater executive power. Job titles and nicknames like “chief executive” and “leader of the free world” create a massive expectation gap between presidential power and reality. And without that constant effort to make creative use of vague authority, it would be entirely possible for the president to say “Do this! Do that!” ... and have nothing happen.

f: Of course, if the executive order had heavy investment, was extremely popular, or is otherwise hard to cancel, the next president might be less free to actually overturn the executive order in practice.

Further Reading

- Has Barack Obama Embraced the Unitary Executive?, by Ryan Barilleaux and Jewel Maxwell

If you're interested in the idea of the Unitary Executive, this is a great summary. It also shows how the office of the presidency can change those who hold it – in particular, how Obama's views on restraining executive power changed after he took office.

- The American Vice Presidency: From Irrelevance to Power, by Jules Witcover

We mentioned the vice presidency only briefly in this chapter, but in recent years many presidents have come to rely more on their vice presidents to help them deal with the executive branch. In the process of explaining the shift from early, powerless vice presidents to the modern conception, Witcover shows the magnitude of the executive branch and the difficulty of attempt to manage it.

- The Federal Register: Executive Orders <https://www.federalregister.gov/presidential-documents/executive-orders>
This is a full list of all executive orders presidents have issued since 1937, along with the text of each. Try reading a few random ones to see what sort of instructions presidents are sending their branch.
- The True Size of Government, by Paul Light
This book attempts to measure the actual size of the executive branch, and in the process demonstrates just how complicated a task that is.

Chapter 6

The President and Congress

Introduction

Any modern presidential campaign will feature a host of policy promises and proposals for new programs. Major legislation is nicknamed after the president who pushed for it – Obamacare, Trump’s wall, etc. When the government is shut down over failure to pass a budget, the president generally gets a share of the blame. Yet the Constitution is clear – it is Congress who makes the law, and the executive branch merely carries it out. Unlike the vague executive power, Congress has specific listed powers over major issues: regulating interstate commerce, laying taxes, declaring war, and more. Presidents have very little ability to control the legislative process, but are broadly held responsible for laws by the public. While early in American history presidential candidates spent little time championing specific policies or promoting legislation, who can imagine a major presidential candidate today answering a policy question on the debate stage with “Go ask your Senator, that’s not my job”?

Presidents must work with Congress to accomplish any of their legislative goals. Presidents must push through the lengthy and intentionally inconvenient legislative process, attempting to get Congress to use its powers in ways that suit them, or try to block their attempts to use those powers in ways that don’t. In this struggle, the presidency is equipped with little formal power, and their success or failure in influencing Congress is determined largely by factors – like the partisan makeup of Congress – that lie out of their control. We’ll first look at that legislative process: why passing legislation is so complicated, and so difficult for the presidency to influence. We’ll then turn to the tools the presidency does have to influence law-making: first the role of personal persuasion and influence, and then what formal powers the presidency possesses. Finally, we’ll look at how Congress can influence, check, and conflict with the presidency.

The Difficult Legislative Process

Why is it so difficult for the presidency to get favorable legislation through Congress? In part, because the legislative process that Congress uses was intentionally designed to make passing any legislation at all difficult. For Congress to pass a bill into law, it must first be submitted to the House and Senate by a member. Then, the bill needs to survive committees that can easily amend the bill to something completely different, or even more easily simply ignore it and let it die. Even should the bill survive the committee, it needs to be voted on by the entire chamber of Congress to which it was introduced. After all that, the bill still isn't done – the other chamber of Congress must go through the same process, and pass an identical bill before it can go to the presidential desk for a signature. That short summary doesn't even factor in many of the other ways a bill can fail to become a law, such as filibusters in the Senate. Such onerous, complicated requirements like the House and Senate both needing to pass legislation act as safeguards against impulsive legislation. Congress holds tremendous power over important issues such as international trade and war, and it makes sense that such power comes with numerous safety features. It should be no wonder that the presidency has a difficult time influencing a process from the outside that stymies many of the people inside Congress.

Of course, those Congress-members might have no interest in cooperating with the president in the first place. Members of Congress represent states or districts, and can almost always run for reelection. The presidency is chosen by the states via the Electoral College, and can only serve two terms at most. Since they listen to different people and operate on different timescales, we should expect Congress and the presidency to diverge greatly in terms of their political goals and interests. For example, despite the growing prominence of national political issues, many members of Congress remain focused on delivering benefits to their home states and districts: this is part of the reason why the government budgets that Congress passes often have high levels of pork-barrel spending.^a This focus on small parts of the country can greatly frustrate a presidency that is focused on the nation as a whole.

These different incentives are present even if both chambers of Congress are controlled by the same political party that controls the presidency. If there are partisan differences, that only makes it harder for the president to influence the legislative branch. The opposition party has a strong electoral incentive to see the president fail, even beyond ideological or policy differences. A president that has failed to deliver on his campaign promises might be easier to defeat when they are up for re-election, and as the branch that controls government funding, Congress finds it easy to encourage such failures.

Congressional procedures like the filibuster, which requires more than a mere majority to pass most legislation in the Senate, means that the

^a:Pork barrel spending is a term for government funding for local projects secured by legislators to benefit their districts or supporters, often criticized as wasteful or politically motivated. The name may reference the idea of “bringing home the bacon”.

presidency will almost always have to deal with some opposition party members in Congress, unless the president's party won an overwhelming majority. Presidents are generally unlikely to see such one-sided results. American voters seem to be prone to giving at least one chamber of Congress to a different party than the president (what we call "divided government") in modern elections. It is also very common for the midterm elections that follow a presidential election to go poorly for members of Congress from the president's party, in part because opponents of the current president are likely to be more upset and thus more motivated to vote.

The legislative process only gets harder for the presidency to affect over time. The aforementioned midterm swing is one reason why, but there are many others. After an election, a new president more or less willing to veto different ideas and new members of Congress with different goals and preferences from their predecessors may be able to take action on policies that the previous Congress couldn't find the votes to pursue. These opportunities – policies that are "unstuck" by a president taking office – are finite, and Congressional action will tend to slow after a post-election burst. As a president's term goes on, the pressure to focus on the next election increases, taking time and effort away from a focus on Congress. Presidents tend to steadily lose public support and approval ratings over their time in office, giving them less political capital to draw on, and presidential actions once in office create growing numbers of enemies that oppose presidential initiatives. This decline is part of the reason why it has become common to focus on a president's first 100 days in office, or what is sometimes referred to as their "honeymoon."

To recap: the presidency is attempting to exert influence over an intentionally cumbersome process, which is controlled by politicians who have different incentives from the presidency at best and actively oppose presidential success at worst, and which only tends to get more difficult to affect over time. Presidents adopt a number of interconnected strategies to try and get their preferred legislation through Congress. We'll first look at how effective the presidency is at affecting the legislative process through talking and communicating, and then at what formal powers the presidency has to influence the process.

Persuasion

Some scholars of the presidency – most famously, Richard Neustadt – have referred to presidential power as the power to persuade. Certainly, presidents *try* to persuade Congress to act in ways that will benefit them. How effective these persuasion attempts are, though, can be difficult to determine. We can break presidential persuasion into two broad categories.

First, the presidency can attempt to influence what Congress is working on. At any given time, there are any number of topics that Congress could

hypothetically be debating and considering for legislation. Far more ideas get sent to and circulated around Congress than ever get formally introduced as bills, and far more bills are introduced than are ever passed into law. Many factors, from outside events like terrorist attacks or financial scandals, to public demand, media coverage, electoral concerns, rules and deadlines that mandate votes on topics like trade deals or budgets, congressional leadership, and the personal interests of individual members of Congress^b all help to determine what specific topics out of the universe of all possible legislation Congress will choose to actually put on its agenda.

The presidency has the constitutional power to recommend measures to Congress and give them information on how the nation is doing. Presidents have turned this over time from a simple written report to a yearly multimedia event: the State of the Union address. This speech gives the president a chance to directly tell Congress what policies they consider important. Presidents can do that at any time, however – it isn't that far from the White House to Capitol Hill. Perhaps more importantly, the public also pays attention to the State of the Union speech. In fact, the presidency commands a great deal of political attention in general. This means that presidents can use their other public appearances – interviews, speeches, social media announcements – to try and build public attention for an issue, in the hopes that members of Congress will feel compelled to address an issue if more of their constituents start to care about it. Presidents can even take actions to drive attention to a certain policy area. Regardless of how effective they are at actually addressing a problem, visible actions the president takes to, say, fight obesity or deter crime can generate news coverage about those topics, and in that way put pressure on Congress. In this case, a high-profile presidential attempt that fails can still be a major success if it leaves the public clamoring for something to be done.

Presidents seem reasonably effective at getting the attention of Congress. While this isn't certain, and there's every possibility that a president can talk themselves hoarse without raising the attention of either the public or Congress, research suggests that most major policies a president invests effort into heavily promoting will eventually receive some kind of attention from Congress.

That said, a president who successfully puts something on Congress's agenda hasn't won yet. The presidency has the power to recommend measures to Congress, but only a member of Congress can actually start a bill down the legislative process. Presidents might get some sort of action from Congress on their priorities, but there's no guarantee that what they'll get is what they wanted. If the first category of persuasion is influencing what Congress thinks about, the second is changing the behavior of members of Congress – how they'll vote, what they'll put in the legislation, what amendments they'll offer, whether they'll work on a bill in their committee or ignore it. Here, the president is on far shakier ground.

Presidents try to persuade members of Congress to do things their way,

^bIndividual members of Congress have been the key drivers of legislation on topics as diverse as alternative medicine, the proper treatment of prisoners of war, and UFOs.

and will bring everything they have to bear in support of legislation they care deeply about. Presidents study members of Congress and lobby them to support their agenda. The Office of Legislative Affairs, part of the Executive Office of the President, helps the president communicate with Congress. Where simple appeals don't work, presidents will often turn to making deals. Presidents pass out favors to members whose votes they need: from meetings and public appearances with the president (taking advantage of the attention the president attracts) to more material rewards, like taking their advice on appointing certain officials or pushing federal projects and funding towards their district.^c If bargaining fails, presidents can resort to more confrontational measures. Johnson (LBJ) was known for the "Johnson treatment," physically standing close and looming over members of Congress who didn't agree with him. Presidents have also been known to make electoral threats. If the member of Congress is in the same political party as the president, the president might publicly support a challenger for a congressional seat in an election with the goal of threatening their seat in Congress. Presidents can even bring the general public into the fight, asking Americans to directly write or call their legislator and ask them to side with the president – we'll look at this in more detail in a later chapter.

Despite the effort presidents invest in these persuasive attempts, most don't find them terribly rewarding. A member of Congress focused on re-election is almost certain to do what they think will go over best in their home district, regardless of what the president wishes. The impact of presidential persuasion on the outcome of legislation is generally far outweighed by the importance of things like which party has how many votes in Congress and how open the parties are to compromise with each other. A president is unlikely to be able to spur a split House and Senate to action, or to get favorable legislation from an opposition party controlled Congress. Even when a president does get legislation they generally like, the differing incentives of Congress-members and the president mean that it will rarely be written in the exact way the president would prefer, and there is no direct way for the president to change it. That doesn't mean that presidential persuasion has absolutely no influence – but the ideology, partisanship, and electoral concerns of members are often far more important to determining how they behave.

^cCertainly, Congress could simply enact these projects and funding decisions on their own. But Congress often gives great discretion to the executive branch in precisely how laws should be carried out, rather than voting on every highway project or research grant. For any individual member of Congress, persuading the president – one person – may be far easier than trying to win the support of enough of their colleagues to make it through the legislative process. This means that reducing the overall amount of federal government spending can also weaken the presidential bargaining position with Congress, as it leaves the presidency with less to bargain with.

Legislative Powers of the President

If simply asking (and bargaining, and threatening) aren't enough to get Congress to act the way the president wants, what powers does the presidency offer to affect the legislative process? Only a few, and each with their own limits and drawbacks. We'll look at a constitutional source of influence (the veto), one from a law passed by Congress (budget proposals), and one largely created by presidents themselves (signing statements).

The Veto

Despite the separation of powers in the Constitution, the executive branch presidency does possess some legislative power due to the existence of checks and balances. Specifically, the presidency can veto legislation. Once both chambers of Congress have passed a bill, the president must sign or reject it within 10 days. If he signs, or ignores the bill for 10 days, it becomes a law. When the president rejects the bill, or vetoes it, it is sent back to Congress. Congress can override a presidential veto, but the requirement of a two-thirds majority in each chamber means that this is often hard to do.^d In essence, you can think of the presidency as having the ability to make the passage of a bill far more difficult or potentially impossible, right at the last step of the legislative process.

Given its status as the presidency's only formal role in the legislative process, you might expect the president to make frequent use of the veto. Most presidents, however, use it fairly sparingly. Early presidents only used the veto to reject bills they believed to be unconstitutional. While modern presidents feel more free to use their veto simply because they personally disagree with a bill, presidents still only issue a few vetoes per year.

In part, this is because the threat of the veto can be more effective than its actual use. Presidents communicate with Congress, as we saw, and letting legislators know that the president intends to veto legislation can change their behavior. Legislators might abandon a bill that they know won't survive a threatened veto, or add concessions to make a bill less objectionable to the president. Low numbers of presidential vetoes might be evidence of the veto's value to the presidency, as Congress is forced to shape legislation to the president's preferences.

On the other hand, it might be Congress that prevents the presidency from using the veto power freely. Just as the president can threaten to veto legislation, Congress can threaten to override those vetoes. More realistically, as organizing enough members of Congress to create a two-third majority can be difficult, Congress can call the president's bluff. The veto is an all or nothing blunt instrument. The president either signs the entire bill into law or rejects the entire bill, but can't pick and choose bits and pieces. This means that Congress can send the president bills that contain pieces or provisions that the president deeply opposes, but can't afford to veto in its entirety. Would a president really veto funding for an important agency just because Congress gave the presidency less control over the funds than he would have preferred? He might threaten to do so, but actually doing so would be risky, especially since it's unlikely that the bill will come back in a more acceptable form. The fact that Congress has tended in recent years to pass bills as part of large omnibus packages means that using a veto would require a president to reject dozens or hundreds of bills all bundled together, not simply one.

A Congress controlled by the opposition party can go a step further.

^d:If Congress is not in session, the president can ignore the bill for 10 days and it will not become a law, with no chance for Congress to override the veto. This is called a pocket veto. The ability of Congress to determine when they are in session, hold pro forma sessions, and leave agents to receive presidential veto messages means the pocket veto has become somewhat harder for presidents to use over time.

Adding “poison pills” to legislation the president deeply wants or needs can force the president to choose between handing Congress a legislative victory or a popular one. A bill that couples necessary military funding and also attacks the presidents’ signature healthcare program, for example, lets the president choose between signing on against his own policy or being accused of hating the troops in the next election.

Presidents have long asked for the ability to veto specific parts of bills instead of entire bills, called a line-item veto. Though Congress once passed legislation giving the president such power, the Supreme Court struck it down for altering the legislative process laid out in the Constitution. Why would Congress even attempt to give up such a powerful advantage over the executive branch? In part, because they hoped that the presidency could be made to take responsibility for curbing excess government spending. This is part of a general trend we’ll see repeated in this chapter and elsewhere in this book – Congress is often willing to give power to the presidency in the hopes of also passing on the accompanying work or responsibility.

So, as the only real involvement the Constitution gives the presidency in the legislative process, the veto leaves a lot to be desired from the standpoint of the executive. While it can force Congress to alter what bills they’ll present to be signed, the blunt instrument nature of the veto means that Congress can give the president bills just barely good enough to be signed, force his signature on unappealing parts of necessary bills, or force him to use the veto in ways that will anger the public. In addition, a sufficiently united Congress can simply ignore a presidential veto. While the veto is a useful bargaining tool, it is no guarantee that the president will get the legislation he might prefer.

The Budget

On paper, the government’s budget is entirely Congress’s job. Congress sets taxes, coins and borrows money, and votes on how much funding to appropriate for each part of the government. Yet the presidency is heavily involved in the process of funding the government at almost every stage, and manages to have significant influence despite Congress’s constitutional responsibilities.

First, the presidency is charged with preparing a government budget and submitting it to Congress. Congress passed a law giving the presidency this responsibility in 1921. Congress is under no obligation to pass the budget the president presents them, and can make any alterations they wish, even completely ignoring the president’s proposal. Looked at this way, it may seem like the president gets all the fun of being legally required to do accounting homework, with nothing to show for it.

However, the reason that Congress gave this responsibility to the presidency is the same reason that the presidency’s suggestions carry real weight: creating a budget for the United States federal government is

extremely hard work. The Office of Management and Budget (OMB), part of the Executive Office of the President, collects exhaustive financial reports from executive branch agencies. They prepare detailed forecasts of the American economy, and give specific suggestions for not only exactly how much funding each agency should get but also for how it should be used. Presidential budget proposals stretch into the thousands of pages. Congress saved itself a great deal of effort by offloading responsibility for all this research and writing onto the executive branch. However, that means that members are to some degree “forced” to use the presidential proposal as their starting point for changes and negotiations, and their primary source for information on the federal budget. In addition, when the president negotiates with Congress, he is likely to have more and more accurate budget information available than whichever member he’s working with. For members of Congress to draft their own budget from scratch, or conduct their own independent research, would put the cost of effort back on Congress, defeating the point of handing this responsibility to the presidency in the first place. Despite attempts by Congress to build up their own capacity in this area, such as creating offices to do research on government finances for the legislative branch, the presidency’s role in creating a budget proposal still gives them an information advantage and ability to set the baseline.

Budgets, unlike most other legislation, are also something that Congress is forced to act on. Failure to do so can result in a government shutdown that one or both parties will take the political blame for. Presidents can use this to try and force action on their policy priorities by building them into the budget, and attempting to draw public attention to their budget proposal to put further pressure on Congress. On the other hand, the president may receive blame from the public if Congress fails to pass a budget, even if the president has no budget bill on his desk to sign.

Presidents can also exert influence on funding after a budget has been passed. While Congress could create detailed instructions on how to spend every dollar, they don’t do so in practice. The executive branch is often given discretion over exactly how money should be spent. What company should get the contract to do government work? Where should emergency relief funds be focused? In which state should a new government project be located? At times, Congress can be even more broad – agencies might receive large amounts of funding that can be used for almost anything related to their central purpose, and emergency funds are created that a president can tap into almost at will (unless “emergency” is strictly defined). Presidents can also transfer funds, with Congressional acquiescence. A creative president can likely find some source of funding for a project, even if Congress didn’t explicitly authorize any. As an example, Trump redirected defense funding towards his border wall project when the budget Congress passed didn’t allocate any funds for it.

The Money Must Be Spent

Presidents can move and redirect money, and make broad decisions on how it should be spent. One of the biggest limits on presidential budgetary influence, however, is that they *must* spend the money given to the executive branch.

Early presidents would occasionally simply not spend money given to them by Congress for some purpose. The classic example is Jefferson – given money by Congress to build gunboats, Jefferson found the gunboats unnecessary and impounded the money, citing his executive power as the basis for doing so. This presidential power lasted until Nixon's time in the office, when the Supreme Court found the practice unconstitutional. They held that once Congress had passed legislation allocating funds, the president couldn't simply refuse to spend the money – in essence, that would be like giving the president a second, unassailable veto. Today, a president who simply refuses to spend allocated funds faces legal challenges and court battles.

Still, Congress found a role for the president in limiting spending. Congress created procedures whereby the president could formally ask for Congress to cancel funds that they had allocated, or temporarily delay spending money. While Congress seldom approves of presidential requests to take back money they have allocated, presidents have made effective use of the ability to delay spending to block or delay policies they don't agree with.

When members of the public wonder why a president is funding a program he doesn't agree with, or blame the president for high government spending in general, it's important to note that it is far easier for a president to spend money than it is for him to not do so.

Signing Statements

As an example of how presidents are creative in their attempts to influence Congressional legislation, let's look at signing statements. A president is required to issue a statement when he uses his veto power, explaining why he is rejecting the bill. There is no corresponding requirement that the president issue a statement explaining why he did sign the bill when he does not issue a veto. Still, presidents rapidly realized the potential public relations value of issuing such statements. Initially restricted to written statements, today the signing of a high-profile bill can be an entire ceremony that might include video coverage, special guests responsible for

and affected by the legislation, members of Congress^e, speeches, souvenirs (presidents will occasionally sign their name with multiple pens to ensure that more than one person can receive a souvenir pen that signed the bill into law), and more.

The signing statement technically holds no more legal weight than the souvenir pens. Both are just ceremonial, and it is the signature that matters, not the ceremony. But presidents have moved on from statements that simply say how happy they are to sign such an excellent bill to giving their own interpretation of what the text of a bill means and listing their objections to specific parts of the legislation. A president might object that a bill meant to protect privacy could interfere with his constitutional duty to defend the nation, and direct the executive branch to interpret the legislation only as applying to privacy that is not related to national defense. While not in any way part of the law, such a statement would be officially published. Agencies and officials in the executive branch would see the statement much like they would an executive order – official instructions from the president on how to carry out a law. Courts have turned to published presidential signing statements when interpreting a law as well.

This practice has caused a significant amount of controversy. Critics argue that the president should veto a bill he believes to be unconstitutional, not sign it into law but with semi-formally stated objections. Those critics also claim that instructing the executive branch to assume part of a law to be unconstitutional and not to enforce it is almost the same as the line-item veto that the Supreme Court denied the presidency, and a violation of the president's constitutional duty to ensure that the laws – all the laws – are faithfully executed. They point out that separation of powers should keep the president from interfering in the legislative work of writing a bill, or the judicial work of interpreting it. Supporters of the practice point out that it would be impractical for the president to reject large combined packages of omnibus legislation over a single issue, and that a president's duty to follow the Constitution is a higher priority than his duty to obey Congress. Congress has considered legislation that would ban signing statements, but has not passed such legislation yet.

Regardless of controversy, presidents have made increasing use of signing statements over time. It's important to note again that signing statements are not law. Only the text of the bill that Congress approved and the president signed is actual law. Executive branch officials can disobey signing statements as they could an executive order, and officials who follow a presidential signing statement and decline to enforce part of a law can face legal challenges and court battles. Still, presidents have issued – and at least attempted to follow through on – signing statements claiming laws they are signing unconstitutionally limited their ability to determine how to treat detainees, required executive branch officials to get approval from congressional committees, or barred the provision of certain medical procedures to children of military servicemembers. If the veto is a blunt

^eNote that appearance at a signing ceremony is another potential bargaining chip for presidents to use when trying to persuade members of Congress to do things their way.

instrument, presidents have turned signing statements into a tool with some amount of precision.

Congressional Influence on the Presidency

If the presidency has only a limited ability to influence the work of Congress, how effective are the members of Congress at influencing the presidency? Congress holds a few obvious advantages here, the most obvious being that they write the laws the executive branch executes and provide the funding for them to do so. In addition, Congress is often heavily involved in the use of other presidential powers, such as the requirement of Senate approval for presidential appointees or treaties. So not only can Congress tell the presidency what to do and how much money there is to do it, but they can also often simply say “No.” when a president attempts to use the powers of his office. With such seemingly massive advantages on their side, how is it that Congress doesn’t completely dominate the presidency?

We discussed presidential appointments in an earlier chapter, and we’ll discuss treaty negotiation and approval in a later one. In fact, you’ll see Congress popping up in nearly every chapter of this book, despite our focus being the presidency. Since we will talk about the others elsewhere, we’ll focus here on three tools Congress has for controlling the presidency that are neither legislation nor tied into a presidential power: hearings, investigations, and impeachment.

While the Constitution provides Congress numerous explicit powers, the ability to hold inquiries isn’t one of them. Still, the Supreme Court held early in the nation’s history that if Congress was to have the power to make law, it must also have the power to do research in order to determine what laws to make. Thus, Congress can hold hearings and launch investigations into topics on which they might make legislation, and has the power to summon members of the executive branch to appear before it and answer questions. Indeed, Congress can issue subpoenas, and even arrest anyone who refuses to comply for “contempt of Congress” – though the jail cells once in the Congress building for such a purpose have apparently been closed.

A congressional hearing is a formal meeting of a House or Senate committee (or subcommittee) used to gather information, hear testimony from witnesses, and build a public record on a specific issue. The ability to hold hearings lets Congressmembers monitor agencies to which they have delegated decision-making responsibilities, as well as get information that helps them create new laws. While hearings don’t officially offer Congress any control over what agencies do, agency heads are likely to listen to comments from the people who create and fund federal agencies. This gives Congress influence over the executive branch. Public hearings into executive branch failures can also draw media attention and embarrass the presidency.

If a hearing is a public event, a congressional investigation is the overall behind the scenes effort of which a hearing is only one part. Members of Congress as well as congressional staff can all participate in investigative efforts. Congressional investigations into the executive branch can result from a genuine belief in presidential misconduct, or be motivated by partisan differences. In either case, however, investigations can both occupy a great deal of executive branch time and energy (resources that generally already in short supply) and tarnish a president's reputation. As an example, Clinton fired seven employees of the White House Travel Office, allegedly for financial misconduct. Critics argued the president was trying to find reasons to justify firing those employees so that he could hire friends of the Clinton family. In response, Congress (particularly a committee in the House focused on government oversight and reform) launched an investigation. Not only did the public attention to the matter cause Clinton to rehire most of the seven fired employees and remove the Clinton associates, but the committee also questioned the First Lady at a hearing (which garnered widespread public attention) and Congress voted to reimburse the seven fired employees for all of their legal expenses. When Clinton refused to provide documents the committee had asked for, they threatened to hold him in contempt of Congress. In all, a seemingly simple attempt by the president to replace seven executive branch employees ended up becoming a protracted distraction for his administration due to Congress's decision to investigate.

Ultimately, a congressional investigation may result in impeachment. Impeachment is the process by which Congress can remove a currently serving president from office, and ban them from ever serving again. Each chamber of Congress controls part of the process: the House votes to impeach a president, and the Senate then votes on whether or not to convict. The House has voted to impeach a president a few times over the nation's history, while the Senate has never yet voted to convict an impeached president – meaning that no president has ever yet been removed from office this way. Political partisanship and division in Congress make calls for impeachment more common, but also make reaching the two-thirds majority needed for conviction in the Senate much harder. Members of Congress tend to follow party lines fairly closely on impeachment votes, with co-partisans largely voting to support the president and members of the opposite party voting to impeach and convict.

Hearings, investigations, and impeachment are, of course, far from the only tools at Congress's disposal. After all, the presidency is charged with executing whatever laws Congress writes, and control of major governmental powers like taxing, spending, funding, approving nominees, and declaring war gives Congress a huge amount of control over what the presidency will and can do. If sufficiently motivated, Congress holds the power to block almost any presidential action by denying it staff and funding, or to force the president to take almost any action through laws and

constitutional amendments.^f Often, it is a lack of that motivation, as Congress is preoccupied by internal struggles and partisan battles, that keeps Congress from exerting more control over the presidency than it currently does. As it becomes increasingly difficult for a divided Congress to pass legislation (especially by enough margins to overcome a presidential veto) Congress has turned to extra-legislative options like hearings and investigations more and more frequently.

Executive Privilege

Just because the Constitution gives Congress the ability to ask questions, doesn't mean the executive branch is necessarily obligated to answer them. Such is the idea behind executive privilege, where the executive branch simply refuses to cooperate with Congressional inquiries.

How can the presidency resist an inherent legislative power? By claiming one of their own. When an early military campaign went disastrously, Congress wanted to launch an investigation into its failure. Worried that publicizing the weakness of America's military would lead to aggression from foreign powers, Washington refused to cooperate, citing national security and his duty to defend the nation. The Supreme Court has upheld this power, finding it part of the inherent executive power and the separation of powers – Congress cannot use its power of inquiry to block the executive branch from properly carrying out its duties. Presidents frequently cite national security as a reason for not providing information to Congress. Another reason they give is their interest in receiving accurate, unbiased advice from their staff, which they argue might be affected if they knew that their advice to the president was going to be made public.

Since the idea of executive privilege is implied, rather than spelled out in the Constitution, its limits are somewhat vague. The full scope of executive privilege is also difficult to determine because Congress and the presidency tend to settle disagreements over executive privilege through negotiation and compromise rather than court battles that would create precedents. For example, in the story above of the seven fired Travel Office employees and the resulting congressional investigation into the Clinton administration, you might remember that Clinton initially refused to provide the committee with the documents they asked for. After being threatened with contempt of Congress, Clinton agreed to give the committee some – about a third – of the documents they wanted. This sort of back and forth is the more common way for showdowns

f:Not that the presidents always simply sit back and meekly comply with laws they don't favor. See the story of Congress's TikTok legislation in the next chapter for an example of how the presidency can avoid or delay following Congress's instructions.

about executive privilege to be resolved. That isn't to say those court battles never happen: Nixon in Watergate and Clinton in the Lewinsky scandal both asserted executive privilege and lost in the courts. But in general, questions like whether former presidents can assert executive privilege once out of office, or whether presidents can claim it for their spouses or assert it pre-emptively before Congress asks for any information, still remain to be answered.

Summary

The president's constitutional powers to affect legislation are sharply limited, and the president faces a number of restrictions that keep them from being able to wield what powers they do have, such as the veto, freely. Despite the constitutional structure of checks and balances where the branches are assumed to struggle against each other, Congress has often been responsible for giving the president greater influence over the legislative process. Delegation of budget preparation gives the president the ability to shape debates over government funding. Broad laws with wide discretion give presidents room to shape legal interpretations, as well as leverage they can use to bargain with congressmembers. Given how heavily presidential success in legislative endeavors depends on Congress, the makeup of Congress – partisan composition, division, and electoral incentives – matters far more than persuasive skill or bargaining when it comes to whether or not a president gets his way. Congress's perennial difficulty with acting collectively gives its members a strong incentive to cede more responsibility over the law to the presidency, and with that added responsibility almost inevitably comes more power.

Once Congress has empowered the presidency, they are unlikely to take their power back. Nor is Congress, as a body, generally greatly concerned with protecting its powers from presidential encroachment. A Congress controlled by the opposition party might refuse to support the president's goals and threaten investigations and impeachments, but they are unlikely to diminish the power of all future presidents. While the Constitution seems to assume two branches jealously competing with each other for power, reality finds a Congress that is often all too happy to leave things to the presidency, with the presidency slowly ratcheting up its involvement in their work over time. We've come a long way from the days when ambitious politicians despised the presidency as a powerless office and set their sights on Senate seats instead.

Thus, the presidency today exerts a surprising amount of control over a process where their sole constitutional tool is a non-absolute veto. But even this growth in power hasn't kept pace with public perception, and the

legislative process remains firmly in Congress's hands. For all that we name major legislation after presidents, their actual ability to compel Congress to act is weak. The result is a presidency forced to keep pace with public expectations by finding ever more creative ways to use their accumulated powers to get around or through a Congress more concerned with its own priorities, and desperately hoping for their political party to do well in the next congressional elections.

Further Reading

- **VoteView** voteview.com
Voteview is a treasury of information on Congress. In addition to information on every congressional roll call vote in American history, you can view information on individual members of Congress such as their attendance, loyalty to their party, and an estimate of their ideology. The maps of the Senate and House, where you can see each member's position on a left-right political scale, are a great way to visualize some of the partisan divisions we've seen this chapter.
- **The Legislative Process**
<https://www.congress.gov/legislative-process>
While not as musical as the excellent Schoolhouse Rock video on how a bill becomes a law, this is a thorough explanation of the law-making procedure we talked about more briefly in this chapter. A good way to see just how complicated the process the presidency is trying to influence is, and how small a role the president plays.
- **Veto Messages from The American Presidency Project**
<https://www.presidency.ucsb.edu/documents/app-categories/presidential/veto>
Another fascinating resource, this is an archive of presidential veto messages. You can read the messages that presidents have sent to Congress when they veto a bill. The American Presidency project also has statistics on how many vetoes each president has issued, if you want to look at trends over time.
- **Constitutional Conflicts between Congress and the President**, by Louis Fisher
If you want an entire book of showdowns between the presidency and Congress, you've got plenty of options. Fisher is both thorough and cleanly organized, making his book an excellent place to start.

Chapter 7

The President and the Courts

Introduction

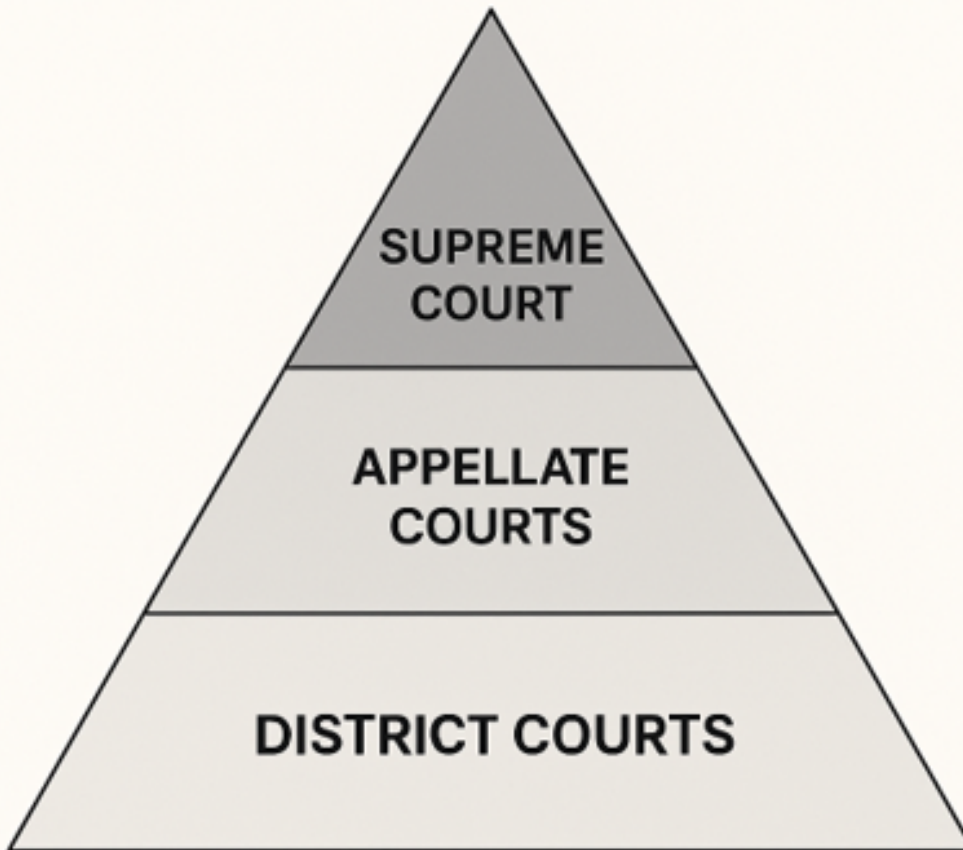
Throughout the past few chapters, as we've looked at how the office of the presidency relates to other branches, the presidency has been repeatedly slapped down by the Supreme Court. When Truman attempted to seize steel mills, the Court said no. When Nixon argued he could keep the Watergate tapes secret due to inherent executive power, the Court forced their release. When Congress sought to give Clinton a more powerful form of the veto, the Court restrained the growth of executive power over the objections of both other branches of government.

Examples like these should be puzzling. Don't presidents appoint federal judges, including Supreme Court justices? Why would they choose justices inclined to rein in presidential power instead of expand it? And how does the Supreme Court, composed of nine legal scholars in robes and described by Alexander Hamilton as the weakest of the three branches of government, ever succeed in telling the president "no" when the presidency is responsible for enforcing their decisions?

We'll look briefly at the structure of the federal judiciary first, then at their power of judicial review and their ability to check presidential actions. Then we'll turn to nominations, which is the main power of the presidency to influence the judicial branch, and look at how effective the president can be when trying to choose judges who will support his goals.

The Federal Judiciary

FEDERAL COURT SYSTEM



The Constitution, in Article III, creates only the Supreme Court. It gives responsibility for creating any other federal courts (as well as setting the number of Supreme Court justices and other such decisions) to Congress, which has created two more layers: the district courts, and the appellate courts. The majority of the more than 800 federal judges serve on the district courts, each one responsible for federal cases in a state or a part thereof. Next most numerous are the appellate courts, which hear appeals to review cases from the district courts. Above them in the hierarchy is the Supreme Court. With only 9 members, the Supreme Court is the final court of appeals, where decisions of the appellate courts can be reviewed. The Supreme Court also hears cases appealed from the Supreme Court of each state^a, as well as some cases that the Constitution refers to it directly.

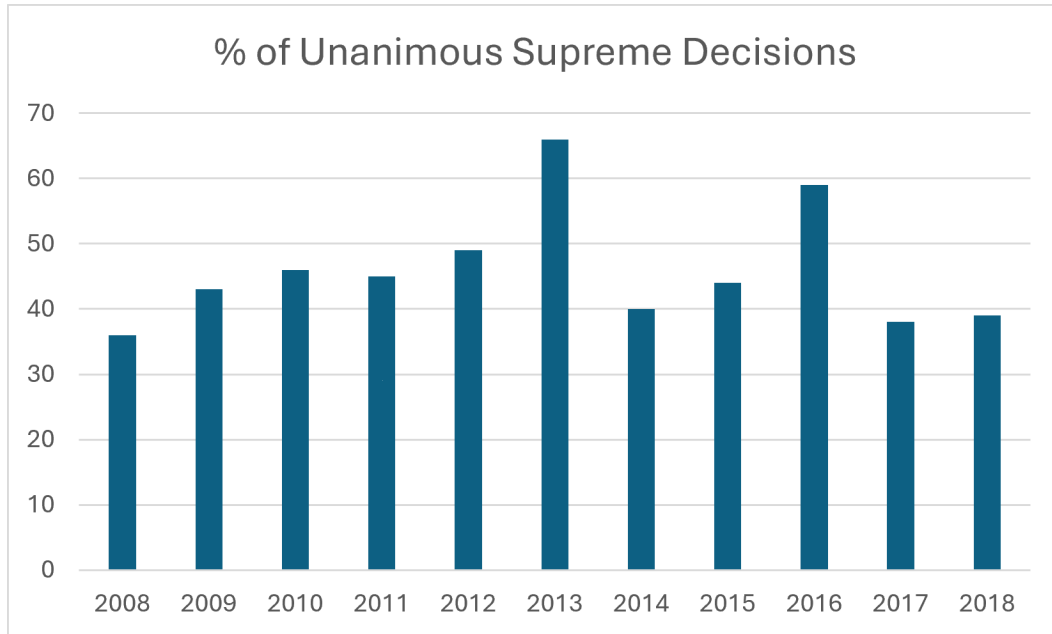
Unlike members of Congress or presidents, federal judges have no need to run for office or re-election. Instead, all federal judges are nominated by the president and confirmed by the Senate. This means that judges aren't partisan in the way that a member of Congress might be an official member of the Republican or Democratic parties. Instead, judges are appointed to interpret and uphold the law, and serve until they resign or are impeached.

That isn't the impression you might get from media coverage of the courts. Supreme Court decisions – and, increasingly, lower court decisions – are the subject of intense media attention, and judges are commonly referred to based on the party of the president that nominated them (not the partisan composition of the Senate that confirmed them, for some reason) as “Republican appointed” or “Democratic appointees” or so on, assuming they have some sort of loyalty to the president who appointed them. Political pundits tend to assume that judges act like other partisan politicians, working for the benefit of their party and their personal political goals.

We'll look at presidential nominations in more detail later on. For now, it's simply important to realize that judges, at the very least, aren't completely partisan. They certainly don't see or portray themselves as such, with all federal judges stressing their independence and adherence to the law. The fact that judges presented with same facts and laws can come to different decisions is at least in part a testament to how many different legal theories and modes of interpretation exist, with judges citing law and precedent (past cases) to explain their decisions, not partisan motivations. And partisan motivations alone do a poor job of explaining the behavior of judges. Anywhere from a third to well over half of Supreme Court decisions in a typical term are unanimous, and many of the remaining cases are split along non-partisan lines.

We can't tell the difference between a judge who starts with a partisan goal and finds legal support for it, and one whose legal principles and interpretations truly dictated their decision in a case (and likely also which party they chose to support). We can say that federal judges don't seem to see themselves as and don't reliably act like the partisan, re-election focused politicians that the presidency confronts when it struggles with Congress.

a: State court systems are separate from the federal system we're discussing.



b: This is so important to the Court that you will find it on a plaque on the wall at the Supreme Court building.

The Judiciary VS The Presidency

The main power of the courts is that of judicial review, by which they can declare an act of the president (or Congress) to be unconstitutional. As Chief Justice John Marshall once wrote, “It is emphatically the province and duty of the judicial department to say what the law is.”^b In the American political system, all authority for government officials to act comes from the law – so to say that a president didn’t follow the Constitution when taking some action is the same as saying the president was never permitted to take that action in the first place, and effectively renders the action null and void.

Who Interprets the Constitution?

There isn’t a sentence in the Constitution that says “The Supreme Court shall have the power of judicial review”. Instead, it was simply assumed by many of the framers that the courts must have the ability to say what is and is not constitutional, and early courts did so. Presidents also have an interest in interpreting the law, however (see signing statements in the last chapter). Who’s to say whose interpretation of the law should be final? The Supreme Court stated the idea of judicial review explicitly in a case that shows off a power struggle between the Court and the presidency.

The election of 1800 was famously bitter, with Jefferson

eventually defeating the incumbent Adams. Just two days before he left office, outgoing president Adams nominated a large number of federal judges, who were then approved next day by the Senate. Adams and his Secretary of State, John Marshall, then set about writing, signing, and delivering letters of commission to the new judges. With little time before Jefferson took office, several letters were never delivered. After Jefferson was inaugurated, he found the remaining letters. Jefferson instructed his Secretary of State, James Madison, to not deliver the remaining commissions. In Jefferson's view Adams' failure to deliver the commissions had rendered them void. William Marbury, one of the people whose commission was not delivered, went to the Supreme Court and asked them to compel Madison to give it to him. Specifically, he asked for a writ of mandamus. Congress, in a 1789 law that had also set up a great deal of the federal court system, had given the Supreme Court the power to issue these writs to federal government officers, forcing them to act.

This put John Marshall, now the chief justice of the Supreme Court, in a difficult situation. Beyond his own involvement in the case, which likely should have prompted him to remove himself from the case, he faced conflicting goals. Marshall believed that Marbury was owed his commission – the president had nominated and the Senate confirmed, which was all the Constitution required. But if he ordered the commission delivered, Jefferson would almost certainly not obey. And since the presidency was charged with enforcing the judiciary's decisions, the Court would have no real way to force him.

The idea of the presidency openly defying a Supreme Court decision strikes us as unusual and obviously wrong today. But Jefferson was an advocate of departmentalism, a view that each branch of government had a duty to interpret the Constitution for themselves. His oath of office bound him to the Constitution, not the Supreme Court. Why should he follow the Supreme Court's reading of that document instead of his own? In private letters, Jefferson worried that blind obedience to the Court could lead to oligarchy. And keep in mind that the Supreme Court did not have nearly the reputation it enjoys today: it met in a small office room, not a grand building, and Marshall had reportedly taken the position of Chief Justice since he thought it would give him enough free time to write a book. With the Court in such humble circumstances, public outcry likely wouldn't force Jefferson's hand either.

Marshall solved this struggle between the presidency and the judiciary by taking aim at Congress instead. In *Marbury v Madison*, the Court said that the 1789 law Congress had passed allowing it to

issue writs of mandamus conflicted with the Constitution's description of their jurisdiction, which did not mention such a power. Thus, Congress' law was unconstitutional, and the court had no legal authority to issue Marbury a writ of mandamus – allowing Marshall to neatly avoid a showdown with Jefferson. In the process, the Court overturned an act by another branch of government as unconstitutional, clearly stating that it had the power to do so. “A law repugnant to the Constitution,” said Marshall “is void.”

Scholars still debate both the details of this case and the idea of judicial review in general. Presidents still issue signing statements offering their interpretation of what a law means. For our purposes, it's a helpful example of the presidency and the judiciary facing off against each other, and how the struggle over who gets to interpret the Constitution has long roots.

Taken in a vacuum, the ability to say what the law is seems almost unstoppable in a system where presidents are bound to follow the law. By this logic, the judiciary should be an extremely strong check on presidential power, and there are numerous examples of the Court doing exactly that. Let's review three examples we've seen before to show how effective judicial review can be at restraining the presidency.

In the Steel Seizure case, the Supreme Court rejected Truman's attempt to take control of steel mills by executive order to prevent a strike by the steelworker's union. Despite the president pointing to the ongoing military conflict in Korea and his duty to defend the nation, the Court held that the president had no inherent power to seize the mills. Because Congress had passed a law (overriding Truman's veto) dealing with unions and strikes, the Court said he must turn to the procedures in the law to deal with the strike instead. Despite Truman's stunned fury at the unexpected verdict (in private correspondence, Truman compared the decision to the Dred Scott decision upholding slavery), Truman immediately complied with the order. Here we see compliance by a president despite deep personal opposition to the Court's order.^c

There's also the example of the Watergate tapes. When Nixon claimed executive privilege (see the previous chapter) meant that he did not have to produce the tapes requested by a special prosecutor, the Court ruled that he did. In doing so, the Court was the body to decide that the need to hold people accountable for illegal conduct was more important than the president's need for confidential communications with his advisors, and limit the scope of executive privilege for the presidency on a long-term basis. Nixon complied with the ruling and supplied the tapes despite knowing that it likely meant the end of his time as president. If Nixon had refused and destroyed the tapes, the Court would have had no recourse – only impeachment by Congress would have remained as an option. Still,

c: At a dinner arranged by Justice Black between Truman and some of the other justices afterwards, Truman told them he had been so angry he had been ready to go before them and argue the case himself. He also compared the court's decision to the infamous Dred Scott decision.

Nixon obeyed.

As a final example, consider the line-item veto, also from the previous chapter. The ability to reject only parts of a bill instead of an all-or-nothing veto is something presidents desperately want, since it would turn the blunt instrument of the veto into a fine-grained precision tool. Congress, instead of opposing a growth in presidential power, supported the idea in the hope that it would lead to spending reductions as the president trimmed the fat off the bills they sent him. Despite a Republican Congress passing a law that gave this authority to a Democratic president, Clinton, the Court held that Congress could not delegate its power of making law to the president. With Congress and both parties on its side, the presidency still gave up its long sought-after prize of the line-item veto after only having it for a short time.

It's clear therefore, that the Court can check the presidency. Presidents have been willing to go against their own interests and comply with court rulings even when nothing seemingly compels them to do so. Why? In large part, the reputation of the court system is what compels presidential obedience. Outright defiance of a court ruling would likely provoke public outcry and perhaps prompt impeachment.

Still, the presidency isn't powerless. The office enjoys a number of distinct advantages over the judiciary that make the presidency more likely to succeed in a court case, or perhaps even avoid one altogether. None of this means that the presidency will always win its legal battles, but it does mean that the relationship between the courts and the presidency is far from one-sided.

d: Hence the expression, "don't make a federal case out of it", roughly meaning "don't take this so seriously".

Speed and Reactivity

Just because the president does something, doesn't mean the courts will necessarily get a chance to rule on it. The Supreme Court cannot simply issue a judgement when they believe the presidency has crossed a Constitutional line. Someone must bring a case for the judges to resolve. Nor can you or I or anyone else sue the president simply because we disagree with his actions or think he has broken the law. We need to show actual harm, that we have something at stake, in order to demonstrate what courts refer to as standing. In the Steel Seizure example above, Truman was sued by the owners of the steel mills, who had their ownership and investments at stake. In the line-item veto case, six members of Congress who had opposed the line-item veto argued to the courts that it was unconstitutional. They may have been right, and in fact the Supreme Court would later agree with them, but their complaint was dismissed since they could not show any way they had been harmed by the line-item veto. It took until Clinton used the line-item veto to cancel some federal funds for New York that someone was able to sue, with the funding they should have gotten and didn't serving as their stakes.

Nor is bringing a federal case a simple or quick process.^d To look just at the

Supreme Court, they receive thousands of petitions to hear cases every year, of which they hear less than one percent. Getting a case to the Supreme Court normally requires working one's way through the entire court system from federal district court up through the courts of appeals and onward, or through an entire state court system to the state supreme court and then onward. This process easily takes years, in a system where the president is only in office for at most two four year terms. There have been instances where freshman students suing over admission have graduated before their case was heard, or the people involved have died before the Supreme Court could rule.

This is a major advantage for the presidency. Where the courts are reactive and slow, the presidency is by design capable of (relatively) quick proactive actions. A president can take an action that might not survive in court and hope that no one will bother to bring suit against him. For some presidential actions, especially more obscure or abstract ones, it may not be clear who if anyone has standing to sue – Clinton cut funds to a specific group with his line-item veto, but if he had cut funding to a obscure nation-wide clean air program would anyone have known they could sue? Would they even have known about the cuts at all? Other presidential actions might be popular enough that no one wants to challenge them, or minor enough that suing isn't worth the amount of time and effort it will take.

Speed matters as well. Since it can take so long for a case to ultimately be decided, the president can often accomplish their goals before the court has time to rule their actions unconstitutional. When there was a spate of cases over the presidents detaining and questioning terrorism suspects, often the administration was able to detain someone and get the information they wanted before the courts could rule on their treatment. Much like a cartoon character who runs so fast they don't have time to fall, the president can often act so fast that they don't have time to be illegal.

Courts also generally restrain themselves to ruling on the specific facts and legal questions before them. When considering Nixon's refusal to produce the tapes, the Court didn't settle all questions of executive privilege forever. They didn't even answer whether criminal justice concerns would override executive privilege claims in general, but simply they did for Nixon in that particular case. The justices were careful to say that if the President had offered a different reason for not producing the tapes, they might have decided differently. This specificity means that even if someone sues the president, makes it all the way to the Supreme Court, and wins, a president can often simply quickly alter what they were doing slightly to comply with the ruling and continue. Challenging their new action would require starting the whole process over, and likely produce only another specific defeat. There is an example of this from the Biden administration – when Biden's plan of student loan forgiveness under one law was struck down, he immediately complied with the Court's order. He also immediately launched a new student loan forgiveness effort under a different law. Trump

later did the same thing when the Court ruled he lacked authority under one law to issue tariffs – he immediately issued new tariffs, claiming a different law let him do so.

Courts aren't powerless in this regard. The use of quick temporary injunctions to pause executive actions while the case is being heard has been growing for the past few decades, and has been the subject of great deal of controversy (and presidential opposition). But the ability of the presidency to simply act and wait for judiciary to catch up, if they ever do, is a massive boon to presidential power.

Enforcement

It's likely not true that Jackson said of a Supreme Court decision he didn't agree with that "John Marshall has made his decision; now let him enforce it!". Accurate or not, the quote is, however, a good demonstration of another major problem that confronts the judiciary when dealing with the presidency. As Hamilton put it in Federalist 78: "the judiciary . . . has no influence over either the sword or the purse . . . and can take no active resolution whatever. It may be truly said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." Since the presidency is in charge of enforcing the decisions of the courts, and the courts have no real enforcement power of their own, the president is always in charge of enforcing decisions against himself. Put that way, the three presidential defeats that we reviewed earlier are remarkable.

Outright defiance is likely the first thing that springs to mind. What would the Court have done to stop Nixon if he had decided to simply not produce the tapes and ignore the Court? Would the nine justices have walked over to the White House and tried to force their way in to grab his tape recorder? There was fear at the time that a refusal by Nixon could result in a Constitutional crisis, and relief when he complied.

Outright defiance is unlikely – the reputation and respect the public has for the court makes such an action unlikely and politically risky. The prospect, however, seems to be one that can influence the Court. Judges might try to avoid rulings that would push a president to outright defiance, worried about what losing such a showdown could do to the reputation of their institutions. And there are certainly instances of presidential defiance: during the Civil War, Lincoln and Chief Justice Taney had strong partisan and political differences. The Chief Justice, as a Democrat, was a supporter of the Southern states and slavery. When he issued a ruling that the president could not suspend habeas corpus during the war, Lincoln ignored it. Tellingly, the Chief Justice also never directly ordered Lincoln to release the Confederate saboteur at the heart of the case, likely knowing he would be ignored. As Taney said: "I have exercised all the power which the Constitution and laws confer on me, but that power has been resisted by a

force too strong for me to overcome.”

More likely than outright defiance is bias. Consider what would happen if your professor put you in charge of grading your own final exam. I assume that you wouldn’t simply ignore the answer key and immediately give yourself a perfect score. But it would certainly be tempting to give yourself the benefit of the doubt whenever possible. We shouldn’t be surprised if presidents tend to favor themselves or read creatively when enforcing judgements, especially judgements they don’t like or agree with. Remember what you’ve already learned about signing statements. President might have lost the line-item veto, but they have still found a way to record their objections to parts of bills.

For a more recent example, take the Supreme Court case over TikTok. Congress passed a law mandating the sale or ban of TikTok by January 19, 2025. When the Supreme Court upheld the law, both the Biden and the Trump administration still found ways not to enforce it. The Biden administration argued that it would leave enforcement to the incoming Trump administration. Trump, in turn, issued executive orders stating that while he would enforce the law, he would *delay* enforcement of the law to allow for a sale to be arranged.

Even if presidents don’t outright defy the court or go easy on themselves during enforcement, the power imbalance between the president and the courts is a constant pressure that courts have to deal with and factor into their decision making, while the presidency can rely on being able to comply with court decisions in the manner that best suits them.

Deference

Somebody must run this war. It is either Roosevelt or us. And we cannot.

-Supreme Court Justice Hugo Black

Justice Hugo Black said the quote above privately when discussing the case of Fred Korematsu. Fred was arrested in 1942 after Franklin Delano Roosevelt issued an executive order that Americans of Japanese ancestry should be locked in camps. When Fred challenged his arrest to the Supreme Court, the justices found against him, finding that the presidency did have the power to arrest people based on their race. This is a notable historical example of a broader trend of the judiciary deferring to the presidency. Why do judges tend to respect and yield to the presidency?

One major reason is the presidency’s role in supplying the courts with information. The Solicitor General, an executive branch employee, appeals cases for the federal government, argues them before the Court, and files briefs for the justices to use in cases the government isn’t directly involved in. The Solicitor General is notably more successful than other lawyers who appear before the Supreme Court, due to their experience and the trust the judges place in the information they provide. Judges have to rely on

information from the president's branch frequently, as judges are legal experts but not always versed in other areas. For example, a judge is likely to turn to reports or analysis by the Environmental Protection Agency in a case involving chemical waste to understand what the effects of such waste might be, and what can be done to manage it. If a case involves some foreign nation, it is likely an executive branch diplomatic or intelligence agency that would help a judge understand what the foreign policy ramifications of their decision are likely to be. Information from the president's branch helps to form and shape the decisions that judges issue.

Judges are especially likely to defer to the presidency on cases involving foreign affairs or war. While the role of the presidency in foreign policy is something we'll examine in more detail in a later chapter, for now it's enough to know that judges are hesitant to constrain the president's freedom to act in these matters. Imminent dangers and threats are one reason – the Supreme Court said so explicitly in *Korematsu*, worried that limiting the president's powers during war might result in the loss of American lives. Judges uphold presidential actions they would be far less likely to approve during peacetime. Justices may also be worried about the proper separation of powers, seeing involvement in military decisions as going beyond their proper role as judicial officials. We see both in Justice Black's quote – the acknowledgement of the ongoing threat of the war, and the worry that checking Roosevelt's executive order would put the Court in the position of making military decisions they didn't have the skill or expertise to make.

Not every case that involves war or foreign policy is automatically a victory for the presidency. The Steel Seizure case is a good example – Truman's takeover was denied even though he argued it was necessary for the war effort. But courts can defer to the presidency even when handing it a loss, by being careful to acknowledge presidential power in their decisions or keep other avenues of presidential action open. While the court denied Truman his seizure, Justice Jackson laid out a three-part test to analyze the executive power, arguing that executive power claims were strongest when Congress approved, weakest when Congress objected, and in a "zone of twilight" or uncertain state when Congress was silent. While Truman lost – Congress had said clearly how they wanted the presidency to respond to strikes – the "zone of twilight" acknowledged that the executive power could be used independently of Congress, and future presidents would use that passage to claim that Congressional silence should equal judicial approval of their actions. We can see similar events in domestic policy – when the justices rejected Nixon's claim of executive privilege, they were also careful to note that executive privilege was a power the presidency had in general. Future presidents could cite that bit of the decision to *support* their executive privilege claims. What was a loss for one president turned into a victory for the power of the presidency overall.

Because of the speed of the judiciary, presidential victories can have long-

lasting impacts. A victory for the power of the presidency during a threat can remain long after the threat is gone, and be applied in ways far beyond what the courts might have anticipated. As Justice Jackson said in his dissent to the Korematsu decision:

...the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that bring forward a plausible claim of an urgent need...

True to his prediction, it took until 2018 for the Court to finally overrule its decision on Korematsu.

Judicial Restraint

Yet another limit on judicial review are the restraints that the judiciary places itself under. One example of this is the idea of political questions. When a Senator sued Carter over his decision to end a treaty, the Supreme Court said that it could not hear the case. Treaties were a power given to Congress and the presidency in the Constitution, and how the United States would go about making and breaking treaties was a question to be settled by those two branches and by politics (voting for different members of Congress or a different president) and not a legal question. When a court believes that a decision constitutionally belongs to some other branch of government, it will generally refuse to rule on the case. The presidency generally benefits from this – Congress would have had to use its own powers to block Carter’s rejection of the treaty. The judiciary was leaving the whole matter alone.

The president also benefits from presidential immunity.^e When a man sued Nixon for firing him, the Supreme Court held that Nixon could not be sued. Otherwise, said the justices, anyone could sue a president for any action they took, and the judiciary would have to review and approve everything any president ever did. Citing separation of powers and worry that the president would be unable to do his job, the court gave the president immunity from being personally sued for performing his official actions. There are limits to this – a president’s personal conduct isn’t immune, for example, and they can still be impeached – but the presidency comes with broad protection against being personally sued while on the job.

Both of these are examples of limits that the judiciary, particularly the Supreme Court, places upon itself. Since judicial officials are motivated by legal principles such as the separation of powers and respecting the decisions of past courts, they tend to create principles that limit them from using judicial review and then abide by those principles long-term. Again, this isn’t a hard limit on the judiciary: past justices created those limits and

e: Presidential immunity is the term for legal protection shielding the president from civil suits for his official acts, but not for private behavior or from criminal investigation.

modern courts could attempt to overturn or weaken them. But in general, the president faces a judiciary that is worried about overstepping its bounds.

Summary

The Court certainly can check a president, but the presidency enjoys several institutional advantages over the judicial branch. Being able to act first and act faster, being the office the judiciary relies on to enforce their decisions, and the likelihood of judges deferring to the president and trying not to encroach on presidential powers all help presidents to make the seemingly one-sided exercise of judicial review into more of a wrestling match between the branches.

The Presidency VS The Judiciary

Appointments

With few exceptions, the main way that the presidency can exert power over the judicial branch is through appointments. When a federal judge leaves office or is impeached, the president nominates their replacement, to be confirmed by the Senate. This makes appointments uncertain for any individual president: since judicial impeachments are not common, presidents must wait for death or retirement, and hope for a friendly Senate. Still, overall, the presidency seems to have a strong influence on the judicial branch, even if no one president can count on remaking the judiciary in his image. Some scholars argue the reason for the deference described above is that every justice on the Supreme Court was chosen by a president – and why would any president nominate a justice who wants to limit their power?

Seemingly, the president can nominate anyone they want to the federal judiciary. The lack of formal job requirements in the Constitution mean that the president could choose to nominate a Supreme Court justice who is not a lawyer. In fact, there are no requirements that the president's choice be of a certain age or even nationality: theoretically, a president could nominate a Canadian teenager with no legal training to the Court. Despite this seeming freedom, however, the president needs confirmation from the Senate for any of his nominees, while the Senate is under no obligation to approve or even hold a vote on the president's choices. This sharply limits how the presidency's appointment power can be used at every level of the federal judiciary.

Appointments to the district courts are the least controversial. This could be in part due to lack of attention these smaller courts receive compared to the Supreme Court. It is also likely due in part to traditions like senatorial courtesy, in which the president will secure the support of the home-state senators for his nominee, and those senators will lobby their

peers in the Senate. Another way to describe senatorial courtesy is that the Senate will reject a district court nominee if the senators from that state do not approve. Despite the tradition dating back to the first presidential administration, the exact rules change relatively frequently. In general, senators from the state in question are asked to evaluate the president's nominee on forms printed on blue paper. Failing to return a positive "blue slip" is a serious mark against a nominee, making it less likely that the Senate will support them. This tradition helps to strengthen the power of individual senators vs the presidency through collective action, and makes it generally faster for district court appointments to be selected and confirmed.

Appellate court nominations are generally more heated. The traditions of senatorial courtesy and blue slips no longer reliably apply, and the process can take much longer. It is more likely that a presidential nominee will be blocked or voted down, even if they have been previously appointed to a district court position. Both parties in the Senate generally take positions based on which party currently controls the White House. The opposition party will stress the role of the Senate as a check on presidential power, while the other party will accuse them of slow-rolling and blocking qualified nominees for political reasons. When party lines change, these positions will reverse. A good example is that of the "nuclear option" – Senate Democrats altered the rules of the Senate to prevent filibusters of Obama nominees, making them able to be confirmed with 60 votes instead of 50. Republicans strongly objected. Later on, Republicans deployed the nuclear option for Trump's Supreme Court nominee, over the strong objections of those same Democrats.

Supreme Court nominations are the most controversial and attention-grabbing by far. Sizable numbers of Americans say the most important thing about the presidential candidates they vote for is who they would nominate for the Supreme Court. Presidential candidates talk about the sort of justices they would appoint on the campaign trail, from general traits to giving lists of specific names. Somewhat ghoulishly, the age and health of all the Supreme Court justices is analyzed every presidential election to see how many appointments the next president is likely to be able to make.

Part of this controversy is because Supreme Court appointments have become more politicized and more partisan over time. Originally, the Senate saw its role as simply voting on the legal qualifications of the president's nominee. While a president with a friendly Senate still had an easier time getting his nominee confirmed, it was normal for a presidential nominee to receive plenty of support from the opposing party. This norm changed in 1987 with the nomination of Robert Bork. Democratic Senators explicitly voted against Bork not for his legal qualifications, which were widely acknowledged, but for his political views. After Bork, the norm of cooperation between the parties broke down, with both parties rejecting

nominees for purely partisan reasons.^f

Table 7.1: Supreme Court Nominees and Opposing-Party Confirmation Votes

Nominee	Year	President's Party	Crossover Votes
Clarence Thomas	1991	Republican	11 Democratic votes
Ruth Bader Ginsburg	1993	Democratic	41 Republican votes
Stephen Breyer	1994	Democratic	34 Republican votes
John Roberts	2005	Republican	22 Democratic votes
Samuel Alito	2006	Republican	4 Democratic votes
Sonia Sotomayor	2009	Democratic	9 Republican votes
Elena Kagan	2010	Democratic	5 Republican votes
Neil Gorsuch	2017	Republican	3 Democratic votes
Brett Kavanaugh	2018	Republican	1 Democratic vote
Amy Coney Barrett	2020	Republican	0 Democratic votes
Ketanji Brown Jackson	2022	Democratic	3 Republican votes

After this, Senate confirmation hearings have become much more public affairs. A nominee to the Supreme Court can expect opposition senators to criticize everything from their political views to their morals, generally aimed at playing to the television audience. Activist groups also get involved, mounting public attacks on the nominee and digging through their background for any hint of scandal or misconduct in the hopes of swaying Senator's votes. Whoever a president chooses can count on being thoroughly attacked for everything they've ever done or said, and likely some things they haven't.

f: The event was so impactful that Bork's name became a verb. To *bork* a nominee is to obstruct them through public attacks and vilification. It may have also led to the slang term *borked*, meaning broken.

Packing the Court

One of the more famous examples of a presidential attempt to influence the Supreme Court was FDR's court-packing plan. Following a string of defeats for government programs that the president favored, FDR publicly called for adding additional justices for every one over 70. Ostensibly motivated by concern for the age of the justices, it was clear that the real reason for the bill was to allow FDR to appoint more justices (or "pack" the court) and reverse his recent defeats. Since the Court then went on to issue some decisions that were more favorable to the president shortly after, this is often seen as an example of a president successfully threatening the judiciary to influence their decisions.

The reality is a little more complicated. Congress, not the presidency, controls the makeup of the Supreme Court. All Roosevelt could do was ask Congress to add more judges. Perhaps

because of widespread public backlash to the plan, including a massive letter-writing campaign, Congress refused. And evidence suggests that the justice responsible for the administration's victories had made up his mind on those cases long before FDR proposed the idea of packing the court. Indeed, the justices seemed angry at the implication that they could be politically bullied.

What the story of the court-packing idea can show us is how much presidents rely on their appointment power to shape the courts. Roosevelt pushed for this idea since the justices' life tenure had denied him the chance to appoint anyone to the Supreme Court. The resounding defeat of the plan, despite FDR's personal popularity, shows how the Supreme Court's reputation provides it public support and illustrates the limitations of presidential influence on the legislative process.

Presidential Nominees

I could carve out of a banana a judge with more backbone than that.

– Theodore Roosevelt on Oliver Wendell Holmes, who he nominated to the Supreme Court.

It's clear that presidents face some constraints in who they choose to nominate, even if the Constitution doesn't limit their choices. A president who wants to have a lasting impact on the courts might choose a younger nominee with a longer life expectancy. Presidents are far more likely (though not certain) to choose nominees from their own political party. Many presidents make pledges while running for office about who they will nominate that they feel bound by once in office. And a president facing an opposition Senate is likely to have to moderate their choice significantly if they want any hope of getting their nominee confirmed.

Still, it is surprising how many presidents seem to regret their Supreme Court choices. From Theodore Roosevelt, quoted above, to Truman, who said of his nominee Tom Clark "he hasn't made one right decision I can think of", many presidents have publicly expressed disappointment in their choices. There are individual instances of justices not deciding a particular case in the way the president who nominated them would like, of course: Justice Roberts, nominated by the Republican Bush, was the key vote in the Supreme Court case that upheld the Democratic Affordable Care Act. But that much is to be expected given that justices are less partisan and more concerned with the law than presidents.

FDR expected that Justice Felix Frankfurter would be a "flaming liberal" but was disappointed to find him a "rank conservative." Bush had the opposite complaint about his choice of Souter. What explains justices

systematically voting in ways that their nominator would not approve of? Given that the president can research as much as he likes before and after a vacancy opens, has the resources of the federal government available to investigate potential nominees (such as FBI background checks), and the assistance of whatever outside legal and political groups and experts he respects in finding and profiling potential options, why do presidents ever select nominees who don't do what they expect?

In part, this is due to the struggle between the Senate and the presidency. The presidency needs Senate confirmation of nominees, but the Senate needs nothing from the president – they don't even have to vote on the president's nomination unless they wish to. Even if the party the president belongs to also has a majority in Congress, presidents and senators have different political goals and incentives. Political parties are often split internally on important legal debates, and it's easy to see how Senators might favor nominees they think will enhance Congressional oversight of the executive branch more than a president would.

To get around this, presidents can attempt to make use of their informational advantage. It's difficult to predict how a nominee would rule on a case that hasn't happened yet. Nominees, committed to principles of judicial impartiality, refuse to answer questions about how they would rule on hypothetical cases. Famously, Justice Ginsburg said during her Senate confirmation hearing that she would offer “no hints, no forecasts, no previews”. A president who wants to secure confirmation for a nominee who is closer to their personal views than the Senate would prefer might choose someone less of a public track record in terms of decisions, publications, and so on. By doing so, the president is betting that they are a better judge of the character of the nominee than the Senate will be able to be. The Senate will find less to object to in a less clear record, hopefully easing the confirmation process, and will be able to read whatever views they want into the blank spaces in the nominee's record.

This helps to explain why so many presidents are disappointed with their appointees. By picking less predictable candidates, they may be able to avoid a situation like the Senate's rejection of Bork. But they also reduce their own influence on the Court, appointing justices whose actions they can't predict instead of presidential clones. Add to that the fact that most presidents are better versed in immediate political controversies than the legal debates that animate justices, and it is no wonder that so many presidents haven't had the impact they wanted on the Court.

Once in office, of course, justices have independence. There's very little a president can do to control a sitting Supreme Court justice or stop them from acting as they see fit. Presidential nominees can go on to drastically change their stances on certain issues, as Oliver Wendell Holmes did on free speech – nothing binds them to the stances they had and discussed with the president while being nominated.

Rather than thinking of the president's ability to nominate judiciary

officials as the ability to place loyal subordinates, it might be more helpful to think of the president as gambling. With every nominee the president chooses, they have to guess what the Senate will be willing to confirm and what their candidate might do in the future, with no control after they make their choice.

Pardons

The other main power the presidency possesses to get involved in judicial affairs is that of the pardon. The Constitution says that the presidency “shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.” This allows the presidency the equivalent of a veto for judicial affairs, overturning a guilty verdict.

The president can only pardon “Offences against the United States” – meaning that presidents cannot use their power in state-level offenses. Beyond that and the limitation on impeachment, however, there are few other limitations to the pardon power. The presidency can issue pardons at any time after the crime’s commission (though not before) and can pardon crimes in whole or in part. Pardons can be issued to almost anyone – presidents have controversially pardoned whole classes of individuals charged with certain crimes and even members of their own family.⁸ The Supreme Court has generally held that Congress cannot place limits on the pardon power beyond what is present in the text. Once issued, presidential pardons are permanent – they cannot be revoked, even if the presidency changes hands.

Presidents make use of their pardon power in a number of ways, and to varying degrees.⁹ Some presidents issue broad clemency for offenses like drug possession, signaling their policy priorities. Others use pardons as publicity tools, pardoning activists or figures aligned with certain causes. Presidents can also use the pardon to protect their allies, or block incoming presidents from being able to prosecute individuals.

While useful and with few real limits, the pardon power gives the president little practical influence over the courts. It seldom has any application to the Constitutional questions that define presidential power, and its use is generally controversial. An individual who receives a presidential pardon may very well still be condemned in the court of public opinion.

g: Experts still debate whether a president could legally pardon himself.

g: Presidents issue anywhere from hundreds to thousands of pardons (and commutations) during their time in office.

Summary

The presidency’s relationship with the judiciary is one of push and pull. The judiciary’s power of judicial review lets it set the boundaries of executive power, but their institutional limitations help presidents to push for their preferred interpretations of the law. At the same time, despite its central

importance to defining what the presidency can and can't do, presidents are left with only one real tool to influence the courts, and not one they can use predictably or reliably. A lack of deaths or retirements, an unfriendly Senate, or simply an independently minded nominee can all hamper the presidential nomination power. Both branches, then, have a strong incentive to cooperate with each other – and presidents are unlikely to agree with Hamilton that the judiciary is the weakest branch.

Further Reading

- *Youngstown Sheet & Tube Co v. Sawyer*, by CSPAN.
<https://landmarkcases.c-span.org/Case/7/Youngstown-Sheet-&-Tube-Co.-v.-Sawyer>
This entry in the CSPAN series on important Supreme Court cases covers the Steel Seizure case mentioned in this chapter in detail. It has a wealth of details on how the presidency struggled against the judiciary.
- *Presidential Success in Supreme Court Appointments*, by Matt Hitt.
<https://doi.org/10.1111/psq.12067>
This article describes how presidents try to make use of their nomination power, and why they are so often frustrated in doing so.
- *Marbury v. Madison*, by Justice Marshall. <https://www.archives.gov/milestone-documents/marbury-v-madison>
o The full opinion of the case that described judicial review. Read Marshall's opinion and see the tension between the Chief Justice and the current administration.

Chapter 8

The President and the Public

Introduction

To inform the minds of the people, and to follow their will, is the chief duty of those placed at their head.

– Thomas Jefferson

Jefferson's description of the dual role of America's chief executive highlights the complex relationship between the presidency and the public. On the one hand, presidents are seen as democratic public servants. At some level, then, their job is to execute the will of the people who voted for them. However, at the same time, presidents are seen as leaders. They seek to "inform the minds of the people" – to shape public opinion and change minds.

In this chapter, we'll look at those two interconnected and somewhat contradictory goals – servant and leader. First, we'll examine public opinion on the presidency and how presidents learn what the public thinks about them and their actions. Second, we'll see how presidents attempt to steer public opinion and make use of it for their own ends, and how successful they are at doing so.

The Public Image of the Presidency

The public conception of the presidency has changed greatly over time. Washington, the first holder of the office, was popular and respected in a way that no modern president can match. It was relatively common for American households to have an image of him on their wall. Whether intentionally (through his attention to creating rituals and traditions surrounding the new office) or unintentionally (through sheer charisma), Washington lent the office of the presidency much of the gravitas and dignity it would come to be associated with.



A medallion of Washington from the Metropolitan Museum of Art.

Despite that, we could say that Washington was not a public president. The presidency as an office was designed with numerous safeguards to insulate or separate presidents from public opinion. Some of the creators of the office greatly feared the prospect of presidents becoming demagogues or rabble rousers or subject to the will of the mob. Both the first and the last of the Federalist Papers speak of this worry in their commentary on the Constitution. This is part of the reason for the Electoral College, which we looked at in an earlier chapter. While there were certainly other reasons for

the framers to design presidential elections in the way that they did (such as the impracticality of direct elections in the early United States and/or the desire to represent state governments), having state governments select the president instead of the majority of the population meant presidents did not have to answer to the populace. Presidents were also given relatively long terms in office (4 years) so that they would have time to serve in their office without having to worry about public opinion. The norm of only two terms in office that Washington set, and which was later made into law, also served to limit how much the presidency would respond to public opinion. A president in his second term would seemingly have little reason to care what the public thought. Even the president's communications were prescribed by the Constitution, with the presidency being told to give formal recommendations or reports to Congress. There was no corresponding constitutional requirement to address the public.

Early presidents, like Washington, behaved accordingly. They gave far fewer public speeches and public addresses than modern presidents. Some, like Washington, went on national tours, but this was difficult given transportation at the time. It was also seen as a distraction from the real duties of the office. The idea of a president framing themselves as a servant of the people, or giving a speech attempting to influence the public against Congress, was seen as a violation of constitutional norms.

Despite those constitutional safeguards, however, the presidency became a public institution over time. Many scholars point to Jackson as a key person who helped to change this. After a failed election bid, Jackson urged more states to allow their citizens to vote on which presidential candidate should receive the support of the state's electors, increasing the overall influence the public had on presidential elections.^a Jackson also made extensive attempts to strengthen his reputation using what we would recognize as something like modern public relations – campaign songs, rallies, attack ads, even lighted signs. Jackson's rowdy inauguration celebration, with the public crowding in for a celebration and free alcohol on the White house lawn, marked a shift in how the presidency was seen. Other forms of presidential insulation from the public, such as having party leaders pick candidates, would also end up eroding – see the section on primary reforms in an earlier chapter.

Today, the presidency is seen by the American public as the most important part of the government. Indeed, survey research shows that until they are teenagers, most children think the American government is a purely presidential system. The role of Congress or other parts of the government is almost completely ignored. Perhaps because of the need for symbols in a nation that is still comparatively young and rejected monarchy, the president is seen by most members of the public as a symbol of the nation and of the American people. Perhaps part of the reason for this is because in the American system, the president is both head of the executive branch and also head of state, in charge of representing the nation to ambassadors and so on, unlike a system with both an executive leader and a

a: The election Jackson lost had no clear majority winner, and thus the president had to be chosen by Congress. They chose John Quincy Adams over Jackson, even though more people had voted for Jackson than Adams. This doubtless helped to motivate Jackson's support for greater public influence in the political process.

separate symbolic leader of the nation.

When asked, most Americans believe that the presidency has broad powers over things like legislation, the economy, the actions of their political party and other politicians, and even the actions of other nations. Presidents are the most recognizable people in American politics by huge margins, and the office comes with popular titles like “leader of the free world.”

We’ll look in more detail at how presidents attempt to make use of this reputation later in the chapter. For now, it is enough to note that the presidency is seen as being a powerful office that is accountable to the American people. This is not always a positive thing for presidents – a greater respect for the office can lead to increasing demands upon the individuals who hold it. While the office of the presidency enjoys high approval from the American public, this increasingly does not apply to the individuals who hold it.

Learning About Public Opinion

If a president is to follow the will of the public, he must know what the public will is. Unfortunately, that is far easier said than done. It simply isn’t possible to ask every American citizen what they think about politics, and even if you could, you wouldn’t easily be able to form a clear, simple answer out of the mass of responses that you received. Early presidents mostly made use of informal, nonscientific methods when they tried to gauge what the public thought. Presidential staff and advisors read letters sent to the president, newspapers, and letters to the editor. Presidential aides were sent to places where people gathered – such as barbershops, restaurants, or bus stops – to listen to what the average person was saying. The best such methods could produce for the president was a gut feeling or intuition about what the public wanted.

Around the time of the second World War, modern scientific opinion polls became available. These are vastly more valuable and informative than relying on mere intuition. Relying on reading letters sent to the White House only tells you a lot about the sort of people who write letters to the White House – not “regular people”, whatever those are. Someone who talks only to people in a certain area or to people they know may only get the opinion of a small group instead of the whole. As a New York resident was reported to say after Nixon’s election, “I can’t believe Nixon won. I don’t know anyone who voted for him.” Scientific random sampling procedures ensure that everyone, not just New Yorkers, has an equal chance of being represented in the results. Pollsters also try to give a statistical measurement of how confident they are in their estimates, which makes them more accountable than a mere gut feeling.

Although presidents initially differed in their opinion of the value of

such polls, opinion polling rapidly became a standard presidential activity. Today an official White House polling staff creates and consumes polling research for the president almost constantly. Presidents also work with outside groups, like their respective party committees, to conduct even more polls, as well as other modern opinion research techniques such as focus groups and experimental studies. Presidents conduct polls on hundreds of topics, wanting to know what the public thinks of their policies, their supporters and their opponents, and of course, them personally. Presidents might show multiple versions of speeches to voters to test which one people like best, or cite poll results as evidence that they are doing what the public wants and that the public is on their side.



Truman deeply disliked opinion polls.

Still, despite all the money and time they invest in the effort of measuring what the public thinks, presidents still have a hard time both measuring and discussing public opinion. Let's look at a few reasons why.

Knowledge

Most Americans know who the president is. Far fewer can name even the most important of other government officials – their senators, the Chief Justice of the Supreme Court, or the governor of their state. For most people, this saves cognitive effort. It's useful for the public to boil the entire complex

system of government down to one person. This puts the presidency in the spotlight, in a way – regardless of what political issue is being discussed, the public will tend to focus on the actions of the current president in a way they might not focus on more relevant political actors.

Most of the public is also broadly ignorant of politics. When tested, Americans do badly on specific questions such as identifying current politicians and being aware of recent events. They also do badly on more basic tests about how the American government works in general (How does Congress pass a law, anyway?), or even fundamental political landmarks such as the differences between the two main political parties. Some scholars have argued that most of the public should be considered ignorant even of the reasons behind their own votes. Pick up any political science book on public opinion and you'll be regaled with examples: Over a third of voters can't name a single branch of government (which raises the question of what they think the president is in charge of). Huge majorities can't name a single one of the protections in the First Amendment. Supporters of one presidential candidate who are given the policy proposals of their opponent will express support for the ideas, if they're told that they came from their preferred candidate instead. Some states have started listing candidates in a random order on the ballot, since voters were so likely to vote for the first name on the list that candidates whose last name came towards the beginning of the alphabet had a significant advantage. Many Americans had sharply different opinions on the Affordable Care Act vs Obamacare – despite those names referring to the exact same bill. Complicated topics – such as how the president is actually elected – are known by only a small fraction of the American public.

b: Water.

While this might be amusing in some contexts, this widespread ignorance presents a series of problems for the president. It's not just that it might be hard to find enough people who know about Thailand so you can ask them about your foreign policy towards that country. How do you screen out the answers of people who are guessing from those who actually care about the issue? And is it ethical, if you do so, to only listen to the views of the most educated? In some cases, will there even be enough public knowledge to say that the public has any meaningful opinion on the issue? What should the president do when ignorant voters give him contradictory "instructions?" Many Americans support both increased government spending and cutting taxes. We'll leave the question of what the president should do when the public is simply wrong for later – but sizeable numbers of people say they want a ban on dihydrogen monoxide.^b

Plurality

Up until now, we've been using "public" as a singular noun. The public has an opinion. But there are lots of Americans (citation needed), each belonging to many different and overlapping groups, and we can examine the opinion of

each particular group if we wish. Opinion polls often “flatten” some of these group differences. If 60% of Americans say they support a given candidate, that includes both enthusiastic fans of that candidate, and people who deeply hate that candidate but hate the opposing option slightly more.

That means a president can’t simply take America’s temperature and know what the nation thinks. Sure, Americans overall might seem to like your policy idea. But what about the Americans most likely to vote? Or the ones in states with midterm elections where you’re hoping to pick up some more support in Congress? Or how about just your supporters? If the general public likes your idea, but your supporters are split, should you abandon it?

Presidents care more or less about different groups of the public – or at least, they respond differently to them. The news that your latest action is wildly unpopular with people who don’t vote probably doesn’t worry you too much, nor does the fact that the opposing party hates it. After all, they didn’t like you anyway – and they can’t vote against you twice. Political supporters and the politically active are a higher priority for most presidents. Every president has to decide into what groups they are going to break down the public, and to which groups they’ll pay the most attention. Carter even had polls results broken down by the type of home heating each person used! No president can simply look at the opinion of “the” public.

Junk Polls

While there are plenty of high quality, reputable polling organizations that do careful work, there are also plenty of other pollsters. From “polls” that simply let anyone who wants offer their opinion (“We asked people standing in line to buy presidential campaign merchandise whether they liked the president, and 98% of them said yes!”) to push polls that try to get a certain result (“On a scale of 1-10, how much do you approve of my opponent, who wants to raise your taxes and is probably a cannibal?”), there are vast amounts of numbers out there that look like they come from high-quality polls, but don’t. All of these numbers get reported and shown to the public as though they were equivalent.

While the president has staff to help sort the wheat from the chaff, this still raises difficulties. Attempting to use poll results against your opponents is difficult when they produce their own numbers that favor them. It also tends toward wishful thinking – which poll do you believe more, the one that says you’re beloved by all or the one that shows everyone wants you to be impeached? Having a personal polling staff means that presidents can always ask for another poll to be done, and focus on the one that they like best. Polling is so important to politics that it has become common for presidents to accuse polls that don’t go their way of being biased against them.

This doesn’t even address some of the chief complexities of doing good

opinion polling, such as question design. New Yorkers, for example, indicated in polls that they “supported” a policy to make riding the city’s buses free. However, in a separate question, they indicated that they didn’t think the city should actually do it. People in that poll read the word “support” in the sense of moral support, not as practical instructions to their governing officials. A single mistake can result in people answering a very different question than the one a president thought they asked.

Implications

For the presidency, all of these difficulties mean that learning about public opinion is difficult, and doing so with any real degree of certainty is even harder. There generally isn’t one answer to the question, “What does the public think about this?” but a wide variety of attempts to divine (or claim to have divined) the public’s will.

Approval Ratings

One of the most common types of poll, and one of the most interesting to any president, is the presidential approval poll. The classic example asks something like “Do you approve or disapprove of the way INSERT NAME HERE is handling his job as President?” While there are plenty of variations, from asking about approval of how the president is doing in various areas such as war or trade to asking about approval of specific things the president has done, some version of that basic question is asked constantly by pollsters. The percentage of people who say they approve is given as the president’s approval rating – the closer to 100%, the better. Presidents brag about high approval ratings and use them to pressure political opponents, while low approval ratings are taken as a sign of weakness. Despite the widespread individual ignorance we discussed, presidential approval ratings are generally stable and move in predictable and rational ways.

With a few exceptions, presidential approval ratings tend to all follow a similar pattern. When presidents take office, they are typically at the high point of their popularity. Their approval ratings will then almost inevitably drift downward over time, bottoming out around the 2-2½ year point of their 4 year term. Presidents who are reelected tend to see the same pattern play out much faster.

What explains this seemingly inevitable decline? For one, the public image that the presidency has accumulated tends to work against presidents. For a public accustomed to thinking of the presidency as the most powerful office in American politics, having your candidate elected on promises to save the economy is wonderful. When the president, equipped with almost no tools to directly affect the economy, fails to do so, disappointment is inevitable. Worse, the president might succeed at doing

something. While a campaign promise generally implies broad upsides for all (“I’ll make the economy better!”) any actual legislation or action the president manages to take will have to be specific and limited to benefitting particular groups. Other scholars suggest that Americans simply like their presidents less and less the more they hear about them, suggesting this is a sort of fatigue effect. Regardless of the reasons, most presidents can count on leaving office less loved than they entered it.

A few things have a sharp impact on how much the public approves of the president beyond the simple passage of time.

Party

Not surprisingly, supporters of the same political party as the president tend to approve of his performance more than fans of the opposite party. This is true at the beginning of a president’s time in office, and remains so even as their approval ratings wane. More interestingly, this difference has been increasing over time. The gap between Republican and Democrat evaluations of the president was somewhere around 30 percent when modern polling began. In 2025, approval polls for Trump, a Republican, showed 90% of Republicans approved of how he was handling the job of president while only about 1% of Democrats did.

Rally

When a disaster, war, crisis, or other notable event occurs, we sometimes see what political scientists call a “rally around the flag” effect. Americans will suddenly become very positive in their evaluations of how the president is doing. Following the 9/11 attacks, for example, George W. Bush’s approval ratings shot up to around 90%, and while they started to decline, still remained higher than they were before for quite some time. Huge majorities of Republicans and Democrats both said they approved of the job he was doing. Rally effects are not generally as large as that, and it can be difficult to predict which events will and won’t trigger them. A tornado striking a town, for example, is unlikely to do so. Most political scientists point to an increase in patriotism in the public as the cause: the presidency is a symbol of the nation, and Americans give the president more praise in the same way they might put up a flag or donate after a disaster.

Economy

The better the economy, the better the president’s ratings will be. This is true regardless of whether or not the president has done anything that could have caused the economy to improve. Despite Congress’ control over the nation’s funds and the strong independence of the Federal Reserve Board,

which sets monetary policy, presidents still get the credit – or the blame. A poor economy – or even the public perception of a poor economy – can sharply lower presidential approval ratings, leaving the president with the blame for a problem they can do little to fix.

Modernity

Over time, the presidency as a whole seems to have declined in approval much as each individual president does during their time in office. Since modern polls have been taken, presidents have been slowly averaging lower approval ratings than their predecessors. There are exceptions to the trend, but in general, any president today should expect to be less popular than if they were in office several decades ago. Scholars disagree on the reason for this – some point to the modern media environment, which we'll look at in the next chapter. Others blame the increasing polarization between the parties or changing historical factors, like the end of the Cold War.

Summary

These factors are so important and predictable that approval ratings tend to follow highly similar patterns. During June in the first year of the second terms of Bush, Obama, and Trump, all three presidents had approval ratings around 45%. Besides the factors listed above, others are obviously important as well. Presidents generally experience a slight surge in approval following a presidential ceremony such as the State of the Union, for example – acting presidential seems to help individual presidents draw on the popularity of the office. Sometimes, we know that a given topic is obviously important, but scholars aren't sure how it affects the public's approval of the president. Does it matter what position a president takes on a given political issue, like abortion or crime? Specific stances on issues are complicated and difficult to assess. Did the president boost his popularity by taking the public's side on an issue, or does the public support the issue because the president took that stance on it?

Leading Public Opinion

Jefferson's first phrase, "to inform the minds of the people," describes the goal of most presidents: not just to learn what the public thinks, but to change their minds. Theodore Roosevelt put it more bluntly: "I did not 'divine' what the people were going to think. I simply made up my mind what they ought to think and then did my best to get them to think it."

Presidents certainly attempt to influence public opinion, both of themselves and other topics. Presidents from Washington to Wilson have invented ceremonies where none existed to bolster the image of the office.

The president's staff includes image consultants, speechwriters, and even experts in clothing who make sure the president will look his best in any given photograph. Whole offices in the Executive Office of the President do nothing but strategize on how best to sway the mind of the American public. Presidents travel and give speeches frequently, as though they were still on the campaign trail, and presidential surrogates from the Vice President to the First Lady are dispatched to represent the president where he can't appear in person. Presidents play into and encourage the way the public views their office – most presidents avoid mentioning Congress, and it is common for them to refer to themselves as synonymous with the American people and the nation.

The question is how effective all this effort is. Will the right words in a serious speech by the president persuade the public to support a policy they did not before? Or is the presidency at the mercy of public opinion it cannot control? Let's look at one of the central ways presidents try to shape public opinion: going public.

Presidents since Jackson have attempted to use public opinion as a hammer against other branches, especially Congress, in order to get their way. This is the idea of going public – instead of trying to directly influence Congress to do what they want, the president can rally public support for his agenda in hopes that Congress, eager to please their voters, will go along. As Wilson put it: "His is the only national voice in affairs. 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."

One example of this strategy succeeding comes from Reagan. Faced with a Congress that did not fully support his proposed tax cuts, Reagan made prime-time television addresses to the nation, explaining his tax cuts and asking citizens to write in to their members of Congress and tell them to vote for the cuts. So much mail arrived for Congress that special mail trucks had to be assigned to carry it all. Congressional staffers described overflowing mailboxes and offices deluged in envelopes. The tax cuts passed.

But though that story serves as a goal for many presidents who have their own policy priorities, it leaves us with questions: was the mail effective, or would Congress have done what Reagan wanted anyway? Did Reagan actually change the public's mind, or simply remind them of something they already liked: the idea of lower taxes? And does this strategy work reliably?

While we can't rewind the past and see what Congress would have done without the mail trucks, it seems unlikely that public pressure campaigns will greatly influence what members of Congress do. Each congressman, after all, is only strongly incentivized to care about the opinions of one part of the nation, and then only the opinion of their likely supporters in that part. Members of Congress certainly care about what the people who live in their state or district think, and have staff who read letters and messages from their constituents and respond. But appeals from the mass public, the nation as a whole, are unlikely to shift Congress' partisan deadlocks.

That's assuming the president can cause such a deluge of mail in the first place. Most scholars believe that successful efforts to go public are the exception, not the rule. Most of the time, the public doesn't respond to what the president tells them. Bush mounted a nationwide campaign to change the public's views on Social Security Reform, and Obama did the same on trade policy. Neither met with notable success. Perhaps we shouldn't be surprised that it is difficult to influence a public that doesn't pay much attention to or know much about politics. The nationwide address that Reagan made for his tax cuts got a great deal of public attention – today, there's more competition for people's limited time. Most Americans will hear about any presidential speeches secondhand – from social media, talk shows, friends – if they hear about them at all. Presidents are often better off looking for pre-existing support they can attach their own goals rather than trying to drum up fresh enthusiasm.

That's not to say that the presidency is powerless to shape public opinion. Certain segments of the public pay great attention to what the president says – business leaders, for example, generally listen quite closely to presidential announcements about the economy. Experiments show that people often use the presidency as a cue to guess their own position on issues they might not know much about. If I like the president, then it's a safe bet I have the same opinion he does on whatever this issue with Tanzania is. And even if presidents can't make the public share their opinion on Social Security reform or trade policy, they can raise the profile of the issue through their words and their actions. The imposition of tariffs by Trump in his second term made the public much more likely to be aware of and have an opinion about tariffs than they were before. Being able to shape what the public is concerned about is something, even if it's not the dominating leadership Wilson envisioned.

Presidents make other attempts to influence public opinion as well, with similar mixed results. Presidents make endorsements and public appearances to try and help their fellow party members win Congressional elections, hoping for more support for their ideas in Congress. But while a public photo op with the president can be of great help to a campaign struggling for name recognition, the party that occupies the White House almost always does poorly in the Congressional elections after inauguration no matter how much effort the president invests. This phenomenon is so well known that presidential strategies plan around it, and even a victory for the opposition party that was merely smaller than expected can be portrayed as a victory for the president.

If trying to lead public opinion is so unreliable, why do presidents invest so much effort into it? Because while being popular might be of uncertain practical value, being unpopular is a certain sign of weakness. The modern presidency never really stops campaigning. The lines between campaigning for office and governing from the Oval Office have blurred almost entirely. What used to be distinct phases—running for president, then governing as

president—have merged into one continuous effort to manage public opinion, project favorable images, and keep political momentum alive. In this “permanent campaign,” every speech, appearance, or policy rollout is framed with public reactions in mind.

Presidents are expected to respond instantly, to sell every policy as though it were a product, and to sustain their approval ratings as a form of political capital. Staffers who once might have been policy experts now include media strategists and pollsters. Compromise with opponents, once a sign of a canny politician, is now a public relations risk – who wants to be seen as weak? Governing, in other words, increasingly resembles campaigning – not just for reelection, but for the legitimacy and leverage needed to lead.

The permanent campaign helps explain why presidents keep trying to “go public,” even when it rarely changes minds. Success or failure in policy is measured as much in polls, headlines, and viral clips as in legislative outcomes. Every administration understands that losing control of the public narrative can mean losing control of the White House. The presidency has thus evolved from an office of persuasion and deliberation into an ongoing performance of leadership—one that never truly ends.

Summary

There are limits on how much the president can know about what the public wants him to do, and limits on how effectively the president can change what the public thinks about politics. Neither side of Jefferson’s description of the president’s role seems easy for the president to accomplish. Which option – lead or follow – should we want the presidency to take, and is the office capable?

Supporters of presidential leadership don’t just point to the power it brings the presidency, as Wilson did. They also point to the need for principled leadership and a strong executive. As Truman put it, “I wonder how far Moses would have gone if he’d taken a poll in Egypt?” There are many times in American history when huge majorities have supported policies – internment, slavery, and more – that we would want a leader to stand against. And no matter how widespread public ignorance might be, supporters of presidential independence from public opinion point to the fact that we should hope that the presidency is held by someone more competent and knowledgeable about politics than the average person. They also point to the need for a unifying national symbol – with an increasingly complex government, Americans need someone to personalize, symbolize, and explain political events to them.

Opponents of presidential leadership point out that the president is only one voice among many. Why should the president influence what the public thinks about policy more than Congress, or their state governor, or the town

council that will affect far more of their daily life? When the president makes a speech about trade policy, is he informing the public and letting them make up their own minds or abusing the status of his office to sway the public to his side as a weapon against the other branches? The idea of the president intentionally influencing public opinion at all can seem unethical or elitist, and reminiscent of government propaganda. And why should presidents focus on their rhetorical skills or appearances to the detriment of their policy research and governing expertise? A loud, public president might have less room to compromise and negotiate with the rest of the government than a quiet, private one.

Those who think the president should follow the public will point to the fact that the president is the only nationally elected office.^c Shouldn't the only office all Americans can vote for represent them? Presidential rhetoric that identifies the president with his supporters and the American people suggests the president is beholden to the people. Too, the various failures and scandals of previous presidents suggest that relying on presidential character or expertise is no more certain than the public. Surely, a public servant should serve the public.

But if presidents are supposed to follow the public will, we have to reckon with the fact that many publics in the past have given "their" president immoral or impossible marching orders. As James Madison said when discussing politicians making appeals to the public: "The passions, not the reason of the people would sit in judgement." We also must ask which public the president is supposed to follow – American citizens, or the good of all nations? His supporters who voted for him, or all Americans? The politically active or informed, or the disengaged? Those who support a publicly-guided presidency generally have some groups in the population they would be happy to have the president ignore. The will of the public is vague and hard to determine – and most supporters of the idea of a president who follows the public tend to assume that their priorities are the same as the public's. And what is the president to do on an issue when there's no time to take an opinion poll, or the polls return no clear guidance?

A French politician reportedly once said, on seeing a mob running down the street, "There go my people. I must find out where they are going so I can lead them there." Perhaps this best sums up the complicated relationship presidents have with the public. The office of the presidency is seen as both a public servant and a leader. Presidential candidates lay out their principles they will never compromise in the same speeches in which they promise to do whatever the public wants. The difference between a president who has persuaded the nation to think their way and a president being swept along with the tide of public opinion while acting like a leader might be hard to discern. For better or worse, the presidency and the public are tied together, and it's never entirely clear who's in charge.

^c They are also likely to support Electoral College reforms that would make that statement more accurate.

Further Reading

- Constitutional Government in the United States, by Wilson
Before Wilson was a president, he was a political scientist. Here, you can see Wilson arguing that president can and should lead the nation by leading public opinion.
- The Roper Center for Public Opinion Research – Presidential Approval
<https://ropercenter.cornell.edu/presidential-approval>
Here you can see approval ratings over time for all the presidents on which we have data. Their history of presidential polling is also useful if you want a more detailed look at how presidents measure public opinion.
- Address to the Nation on Federal Tax Reduction Legislation, from the Reagan Library
<https://www.reaganlibrary.gov/research/speeches/72781d>
Here you can watch one of Reagan's primetime television addresses to the nation, where he explicitly asks the public to put pressure on Congress.
- RealClearPolling
<https://www.realclearpolling.com/latest-polls>
There are any number of polling organizations available - this site simply collects them. Take a look at the various polls taken trying to learn about the opinions of the American public – you're almost certain to see something about the current president when you visit.

Chapter 9

The President and the Media

Introduction

There's an old tall tale about Franklin Roosevelt (FDR). Supposedly, on one of the president's visits to a small town, a man went running up to his wife yelling excitedly that the president actually talked to him – him, personally!

“What did he say?” asked the man's wife.

“He said, ‘Please get out of my way.’ ”

True or not, the story highlights how rare it is for individual Americans to personally talk with a president. As we saw in the last chapter, presidents draw a great deal on their relationship with the public. But the office of the presidency is held by one person, and no matter how many rallies or speeches or public appearances the president puts on, no matter how many surrogates like the vice president are sent out in the president's stead, there's a limit to how many people the president can meet and talk to directly. Most Americans will never see their president in person.

Instead, Americans learn about the presidency secondhand. Like a view of the outdoors through a window, information travels to them through something else. A reporter interviews the president, and you read the article they wrote. The president gives a speech, and you see pundits discussing clips of it on the news. The president posts on social media, and the social media company's algorithm puts it (or a reaction to it) on your feed. In almost every case, information about the presidency travels through some sort of medium to get to the public – and the plural of medium is media.

Americans depend on the media to know about the presidency and what the current holder of the office is doing. Presidents, in turn, are forced, often resentfully, to rely on the media to get their message to the public. The relationship between the president and the press tends to be hostile, and to grow more hostile over time. George Washington considered resigning after

his first term because of the way the newspapers wrote about him – and Washington faced a far friendlier media market than many other presidents.

Just like your choice of window can affect your view of the outdoors – a stained glass window will make the world look a lot more colorful – the media shapes how people see the presidency. While Americans have strong opinions about press bias, the media has an unavoidable impact on the information they transmit. No story can include every detail. No media outlet can cover every story. Just by what they choose to cover, if nothing else, the media influences how the presidency is seen. In this chapter, we'll first look at a few key features of the media in the United States that impact how they cover the presidency. We'll look at presidential attempts to exert direct control over the press, and at the institutional resources they turn to when direct control falls short. Lastly, we'll look at the overall relationship between the presidency and the media.

The President and the Modern Media Market

A president taking office in the early United States would find a world where the chief way information traveled was by newspapers, which were expensive to print and ship. Given the expense of printing a paper, newspaper companies often had their finances bolstered by public political sponsors. Skip ahead a bit in time, and our imaginary president suddenly has to deal with a profusion of papers made cheap by innovations in printing. Constant printing leaves newspaper owners constantly on the lookout for political scandal and excitement that can fill page space, attract public interest, and boost their sales. A little further, and three major broadcast television stations dominate American news coverage – if the president has a televised press conference on the news at six o'clock, the viewing public will either have to watch him or get up to turn off their TV set. A last jump, and the president can write a public challenge to a foreign leader that a social media company will show to millions of Americans before he ever gets out of his bed.

Technological innovations constantly change the way we get our information. Changing business models affect the way that different media outlets make money, in turn changing how those outlets behave.

Describing all of the various types of media in the modern U.S. – even just limiting our discussion to those the presidency will interact with the most – would take most of the rest of this book and be out of date before you read it. Instead, let's examine a few key features that apply broadly to the entire American media market, and what they mean for the presidency.

Fragmentation: Today, it's rare for people to have watched the same shows. There are a lot of options, after all – a profusion of streaming services, and many other kinds of things to watch besides. That's (relatively) recent: it wasn't so long ago that a show could reasonably expect to get a

sizeable fraction of the American audience to watch it. When the popular show *M*A*S*H* aired its finale in 1983, approximately half the nation watched. Over three quarters of all televisions in the nation were tuned to it, and it had it a massive impact on plumbing demands.

The person next to you probably doesn't get their news from the same places that you do. If the president vetoes a bill, you may or may not both hear about it. You're almost certain not to get the same stories about the veto, what it means and why the president did it. That's unlikely to surprise you – there an awful lot of places to get your news, and everyone's free to make their own choices. This variety seems normal to us today – but to Americans who lived in an era with three television stations or a few nationally-respected newspapers, when everyone could count on getting more or less the same news and seeing the same shows, it would be shocking.

Modern media is fragmented. By fragmented, we mean that there's both *plurality*, or a huge number of different platforms, outlets, creators and audiences, and a lack of *centrality*. There's no one source or small group of sources that everyone turns to.

This fragmentation is often brought about by technological innovation. Cable and satellite television meant that different channels didn't have to jockey for space on the broadcast spectrum the way their predecessors did. A channel didn't need its own expensive tower and its own frequency from a limited number controlled by the government, just a number from the cable network. Early cable television offered customers an unbelievable several dozen channels. Today, there are hundreds.

If cable seems like an old example – it is! But it's also a good way to think about what the internet and social media have done to the media environment. The cost of starting a media outlet is lower than ever before. Individual people can gather huge audiences with nothing more than the phone in their pocket and an internet connection. Lower barriers to entry mean that people try new ideas and new ways of conveying information, older media companies have to fight against their new competitors, and the public has an ever increasing array of choices, splitting into smaller and smaller groups.

For the presidency, this means that the days when a president could "address the nation" are gone. There are no messages broadcast from the Oval Office or radio chats from the fireside that will reliably reach most of the public. Presidents certainly still try, but any message the president sends will only reach subsets of the public. A countless number of intermediaries, most of which the president might not even be aware of, will repackage any presidential address – extracting clips or quotes, discussing it on roundtables and podcasts, analyzing and critiquing it in essays and videos, and in general turning it into content for their specific corner of the media market. And that's only for the Americans who are interested – faced with an endless amount of options, many will choose not to learn about

what the president said at all.

Competition: A more fragmented media market, with a greater amount of options, is also a more competitive media market. Any individual media outlet has to compete with all the others for the finite resources of consumers' attention and time. This means that coverage of the presidency has been more and more driven by the need of news outlets to attract public attention and viewership.

Competitive pressure means that the news media must fight for viewership in a way that they did not when ABC, CBS, and NBC dominated the broadcast television market. Some of this desire for viewers is meaningless or at least harmless to the president. If CNN invests in a hologram to cover a presidential acceptance speech, newspapers run autoplaying videos on their online articles, or a news outlet decides to specialize in a certain topic in order to draw in a loyal core audience, this doesn't make much difference to the presidency.

In addition to gimmicks like constantly scrolling chyrons^a, however, competition encourages the news to be more negative – to focus on scandal, crisis, and outrage. During Kennedy's tenure in office, multiple journalists were brought evidence of his extramarital affairs. The news market at that time was far less competitive, and most outlets refused to cover, or at least to cover extensively, news that they considered tawdry. It might hurt their reputation! Today, the idea of a cable news program or YouTube commentator having direct evidence of a presidential affair and not immediately rushing to be the first to air the story is almost unimaginable. The competitive pressure is simply too great.

For the media, the logic is simple. A story about a bridge collapsing draws a great deal of attention, a story about the president signing a bill to slightly increase funding for bridge inspections does not. Since attention can be converted into profit through advertisement, it's an easy choice. For a president who has spent a considerable amount of time and effort begging Congress to pass the bridge inspection funding bill, the lack of attention to his triumph is less easy to accept. Note that media outlets that rely on subscriptions or other funding models instead of advertisements are far less subject to this pressure, at least to the degree they want to produce high quality content for their subscribers instead of attempting to attract more new ones. This is why an organization like Reuters, which makes much of its money from a core group of subscribers, can often seem so much calmer than other, more popular news outlets.

Negative media bias means that media outlets will tend to focus on negative stories over positive ones – a presidential scandal will outweigh a presidential success. In addition to the choice of stories, it also affects the way they are presented. Controversy is emphasized. A disagreement over budgetary policy with Congress is described as a showdown or a battle, not a negotiation or compromise. Criticism of or by the president is given front-page treatment – “The President SLAMS Congresswoman X!” – while

^a: The scrolling text at the bottom of most cable news channels. Originally, this was only done for breaking news events, but when it was found to grab the attention of those flipping through channels, most cable news programs made it permanent.

compliments are less emphasized. Complicated issues are covered by having two pundits who disagree fight it out on air— both providing drama and controversy as they argue and insult each other, and giving at least the appearance of balance.

Urgency and impact are also exaggerated. When midterm elections roll around, the president may fare disastrously if members of the party he belongs to don't win elections, or have a resounding triumph if they win a few victories, but it will be almost impossible for the election results to be described as "typical". Most issues are presented as vastly more consequential than they really are – note how every election is the most important in our lifetime. Oddly enough, this also means that long-term slow-moving issues can be hard for the president to draw attention to. Many presidents from both parties have tried to draw national attention to government debt or entitlement funding, but have found it difficult to get media coverage.

For the most part, this competitive pressure makes the media act in ways the presidency doesn't find useful. While a president might be able to gain more attention for some policy or initiative by describing it as a crisis, issues that are important but hard to sell as exciting can suffer. The Obama administration created an animated online video the price of American cherries to draw attention to trade policy – the media paid far more attention to the ongoing partisan battles of the time, and accusations that the president wasn't born in the United States. Presidents who want to portray themselves as competent leaders want to focus on their accomplishments, their new appointees to federal offices and their qualifications, their victories and successes. And while the media generally does talk about these things for the first few months or weeks of a president's term in office, when the president is still new and fresh and interesting, this rapidly wears off. This is so normalized that scholars describe the expected life-cycle of presidential-news relations: from friendliness earlier in the term, to growing mutual criticism, to a presidential retreat from the press, and often an attempt to find some new avenue to reach the public.

Speed: When information had to be physically moved, it limited the speed of the news and how often Americans got it. Early American news moved at the speed of the horse or boat, and Americans far from the White House could expect to hear about presidential actions only long after they happened. When newspapers dominated, news came out once weekly or daily. Today, information travels nigh-instantaneously and is created constantly. If the president says something, and someone standing nearby has a phone, anyone in the world can know about it a few seconds later no matter what they're doing. This puts enormous pressure on the media – if consumers are constantly available for information, the media must constantly be competing for them. In the 1930's, the BBC announced at the beginning of a scheduled news program that there was no news to report

that day, and filled the rest of the time with light music. Today, news outlets constantly produce new articles, videos, podcasts, live streams, social media posts, and much more. The media is driven to produce *quickly* and *constantly*.

For the president, this can be both good and bad. Getting in-depth media coverage of the president's proposed budget might be more difficult, as analyzing and understanding complicated legislation and policy is time-consuming for media workers. Clips of politicians arguing about the president's proposal are not only more attention-grabbing, they're far quicker and easier to create. And discussion of social media posts about the president's budget plan, or the tie he wore that day, are even easier still. For a president who wants to discuss policy in depth, a fast media is a problem. For a president happy with softer or "junk" stories, this tendency of the media can be quite useful – an easy-to-cover political stunt can draw attention away from more substantive issues.

This tendency towards softer stories also means that media has another incentive to focus on the negative. Scandals, gaffes, and arguments between politicians are often easier and faster to cover than many other types of stories. This is not always true – an agency in the executive branch might mishandle a policy in a way that requires long, complex research to understand and relay to the public – but for the most part, presidential misbehavior also fits the media's need for speed.

The speed of the media also means that no single story, post, report, or other individual piece is likely to draw in-depth public attention for long. The story goes that a journalist once aired a highly critical report of Ronald Reagan, and was surprised to get a thank you from the administration. When she asked why they were thanking her for criticizing the president, the response was that the stock footage of the president she had chosen was great – Reagan in front of waving flags, appearing at the Special Olympics – and the administration was far more concerned with the visuals than the words, which would soon be forgotten.

The pace of media coverage also puts a great deal of pressure on the modern presidency. Any issue of any political importance (and many of none), anywhere in the world, will be expected to receive presidential attention and comment. While the presidency used to only have a few reporters with the White House as their official assignment, or beat, today there are thousands of credentialed reporters on the official list, and far more in the broader mass media who make regular coverage of the president their business. The modern presidency faces a great deal of pressure to be endlessly reactive, and the amount of time and effort it takes to learn about and respond to the almost endless cascade of issues of the day is a significant institutional investment.

Partisanship: When Andrew Jackson was president, federal office holders (appointees of the president) were expected to subscribe to the *Washington Globe*. That was Jackson's paper, and funded by those subscriptions and government printing contracts, the *Globe* made no secret

of its allegiances, openly and loudly praising the president. The Globe was just one of many papers that were also partisan. The idea of the impartial journalist that we have today was less prominent then – newspapers were expected to take a political side. Some faced criticism for being wishy-washy or dishonest if they didn't.

It's likely over-dramatic to say we've returned to those days. Certainly, though, presidents today find a wide variety of news outlets who are openly partisan, cheering for one political side. In addition to the growth in openly partisan sources, many news outlets that publicly claim to be neutral are understood by the public to be partisan. Surveys show Americans believe Fox News and talk radio to be conservative and MSNBC and BlueSky to be liberal. While individuals and parties differ on the precise ratings, most Americans broadly agree on the political loyalties of most major outlets. It's rare for a major news outlet to have the trust of both conservatives and liberals.

A broad market strategy – where a newspaper or station attempts to serve a wide variety of all Americans – is no longer easily possible. This means that a news outlet of any kind is likely better off trying to attract a smaller, committed audience over a broad cross-section of the public. So while a news outlet with a broad, diverse audience might try to keep its political coverage relatively balanced so as not to lose any of its viewers, an outlet with a smaller and narrower audience doesn't face that same risk. Indeed, playing to the audience and running more stories that agree with their existing beliefs is a solid way to keep them as loyal subscribers.

The presidency confronts a news market that is sharply divided between red and blue – at the very least in the public mind. This raises innumerable challenges for any president. Attempting to give a balanced or non-partisan message is nigh-impossible when outlets are able and incentivized to add a political meaning to it. Reading books to school children, a safe and simple photo op, will be championed by friendly outlets and mocked by the opposition, both of whom will attach greater political meanings to the event. Reaching the other side for bargaining and compromise is far harder when they get their news from unfriendly sources. And echo chambers – environments where news consumers only hear sources that reinforce their existing beliefs – mean that the president has to deal with small, committed groups in the population with fringe or unusual beliefs in everything from extreme policies to aliens to conspiracy theories to obscure ideologies. To the extent that echo chambers tend to make their inhabitants more politically extreme, even friendly news sources can be a burden on the president, incentivizing the president to act more politically extreme themselves in order to receive friendly coverage.

Doubt: There have always been false stories in the American political media. John Adams spreading the news that his rival Thomas Jefferson was dead is just one example. The modern media, however, finds itself less trusted than ever. This is true both overall – fewer and fewer Americans say

that the media can be trusted most of the time when asked – and individually, as most media outlets have seen their reputations decline over time. There are certainly partisan differences. Conservative sources tend to be more trusted by conservatives, and liberals tend to trust most sources more than conservatives – but in general, most political news faces more doubt from the public than in the past.

There are numerous reasons for this, and scholars debate the primary causes. Some point to the growth of disinformation. Adams' false stories about Jefferson weren't the first or last, and false stories about presidents are common. They can come from political rivals, media outlets in need of content, conspiracy theorists or other groups in the general public, or foreign nations. Social media is also commonly blamed for increasing misinformation. By removing barriers and making it easier to reach the public, it also removed safeguards like editorial review that had helped to keep false stories from proliferating. In the election campaign between Trump and Clinton, teenagers in foreign nations found it profitable to create fake news stories about the pair to gain attention – and ad revenue – on social media.

Others point to the changes discussed above, like the rise of competitive market pressure and partisanship. When news agencies must compete against entertainment for viewers, it forces them to act less like serious news sources, harming their reputation. A proliferation of sources, some biased, also means viewers can choose the source that suits them best – and dismiss reports that differ.

Whatever the reason, the loss of trust the media has experienced is both good and bad for presidents. As the media is what the president relies on to reach the public, a loss of trust can correspond to a loss in the president's ability to get his message to the public reliably. The presidency also has to deal with more false accusations than before. At the same time, given the normal negative nature of the media-press relationship, most presidents will not mind the media getting less trust from the public. In fact, presidents might even be incentivized to use the lack of trust as a shield to dismiss accusations – both Joe Biden and Donald Trump dismissed media stories that criticized them as fake.

Direct Access

Given the different incentives that the presidency and the media have, one would expect presidents to try and find a way to directly address the public without their message being mediated. Presidents have made multiple attempts at this over the years. FDR used the new medium of radio for his "Fireside Chats," speaking live to the nation on a single topic for roughly 10 to 30 minutes. Here the president could speak to huge chunks of the nation – over fifty percent of the national radio audience heard some of the

addresses. Still, FDR had to rely on existing radio networks to carry his addresses – and nothing forced them to agree to carry him.

Following presidents also attempted to address the nation directly. Reagan, for example, gave a nationwide address on primetime television about his Strategic Defense Initiative program. But as the market has fragmented, it has become harder and harder for presidents to find central media outlets, or even a collection of central media outlets, that can carry a presidential message to the majority of the nation even if they would agree to do so. A presidential speech may or may not be carried on any given channel, and is more than likely to only be carried partially, as clips with added commentary.

Presidents have still attempted to find new ways of reaching the public while bypassing or sidelining the media. Clinton created the first White House website. Obama formed a team that focused on digital initiatives such as online videos. Trump held large public rallies, and adversarially accused networks that did not cover them the way he wished of bias (a repeated tactic was to demand, sometimes with audience chants, that television cameras present rotate to show the entire crowd).

Many presidents have made use of social media. While social media seems to give presidents a direct channel to the public – a president can post from the phone in his pocket and have it be available to the public a few moments later, and classified as an official communication from the United States presidency – it is still mediated. Social media companies, as private companies, exert a great deal of control over what content can and cannot appear on their platforms, with some going so far as to remove the accounts of presidents. Algorithms and preference settings determine which people will even be shown content from the president, and the proliferation of various social media networks means that no one social media platform reaches the entire American audience, or even a broad cross section.

Whatever the next technological innovation in media is, the presidency is almost certain to try to use it as their new best chance to have a direct line to the public.

Limits on Presidential Media Control

Faced with a press that is the only access to the people, you can see why the presidency is understandably incentivized to try and exert some control over the media. Considering the fact that the media, at least from the perspective of the Oval Office, delights in focusing on the scandals of the administration and not the hard won compromises negotiated with Congress, you can perhaps also see the basis for the animosity that might drive the presidency to punish or silence media figures. The presidency is equipped with remarkably few tools to do either, however.

Unlike in some other nations, there is no one central government news

source that the president can easily influence or issue direct orders to. The United States government has certainly sponsored or funded many media outlets, from National Public Radio to the Public Broadcasting Corporation to the Voice of America, but presidential control over these is relatively slight, and they do not dominate the media environment in the United States. The vast majority of the media market in the United States is non-governmental.

The First Amendment, with its guarantee of press freedom, strongly protects non-governmental media sources in the United States. Perhaps the biggest limit this amendment places on the presidency is the inability to pre-emptively silence the press, or exert what is called prior restraint or censorship. While the presidency can classify information and attempt to stop it from getting to the press, once the press has access to the information they can publish it, and only then can the president react. In the case of the Pentagon Papers, for example, when the New York Times gained access to classified government documents from a government employee, the paper started running a series of articles on the documents. The executive branch ordered them to publish no further articles, citing national security as the reason. The Supreme Court, however, struck down the presidency's attempt at censorship. This forces the presidency to be reactive – they can attempt to react to content that has been published, but only after the public has seen it.

Nor is regulating content that has been published much easier. While the presidency can attempt suits for libel or slander, in general the courts have held that the press is free to publish publicly available information in a broadly truthful manner. Nor can the president easily punish reporters for taking stances he does not agree with. When the Associated Press (AP) chose to use the name Gulf of Mexico instead of the administration's preferred Gulf of America, the Trump administration tried to ban the AP from certain press events. The courts struck this down as a First Amendment violation and ordered the AP's access restored.^b

Freedom of the press, despite the name, applies to almost all forms of media. While broadcast radio and television need government licenses due to using the public airwaves, attempts by the government to argue that the internet should be regulated similarly have been largely unsuccessful. While the government could require television stations to play educational content after cartoons in order to get a license, they cannot regulate the content of most types of media. In the case of social media, calls by both parties for the creation of agencies that would ban online disinformation, however that is defined, seem unlikely to succeed. In addition, a legal provision referred to as Section 230 shields online platforms from being held liable for most user-generated content. Presidents have attempted to take action against this protection, including through executive order, but have mostly not succeeded.

Since the relationship between the presidency and the press is generally hostile, presidents are often not great fans of the First Amendment. FDR

b: As a callback to our chapter on the judiciary: the judge who first restored the AP's access was appointed by...Trump himself! This is a good illustration of the fact that presidents do not control their judicial appointees once they are in office.

claimed that 85% of newspapers in the country were against him, and said: “Our newspapers cannot be edited in the interests of the general public from the counting room. And I wish we could have a national symposium on that question, particularly in relation to the freedom of the press. How many bogies are conjured up by invoking that greatly overworked phrase?”

Beyond freedom of the press, there are other limits on presidential media control as well. The Freedom of Information Act requires the government to provide records to the public on request. While the process can be long and involve heavy censoring, and presidents can argue for individual documents to be exempted from the law, this limits the ability of the presidency to conceal information. The Presidential Records Act, similarly, means that all presidential messages and documents, from reports to text messages, are the property of the public, not the president.

That said, the presidency isn't totally powerless to act against the media. Several times, laws have been passed that allow for the presidency to prosecute its critics. During the Adams administration, the Alien and Sedition Acts made it a crime to “write, print, utter, or publish... any false, scandalous and malicious writing” against the President. Though the law was allowed to expire and was widely condemned as unconstitutional, over twenty of Adams' opponents, mostly newspaper editors, were arrested. Woodrow Wilson did much the same under the Espionage Act during World War I, especially by keeping publications he did not approve of from using the postal service. In 2013 the Obama administration obtained the records of various reporter's office phone lines as well as their home and cell phones, seizing them without notice, citing national security and terrorism. Times of threat tend to increase the power of the presidency to control the media, or at least the willingness of Americans to tolerate such control.

Though presidents cannot directly control journalists or fully conceal information, they can act to keep them from obtaining information in the first place. Recall that presidents often have a loose grip on the executive branch. There are generally many government workers willing to provide, or leak, information about the government's activities to the press, generally against the presidency's wishes. Presidents continue to prosecute members of the government who leak classified information to the press, sometimes still using the Espionage Act. By investigating and prosecuting leakers – some prominent leakers have had to flee the country to escape prosecution – the presidency can cut journalists off from information about the government's internal workings. Of course, the president can initiate leaks and rumors himself to test how a story will be received before taking official action.

In short, the president has little ability to control the media directly. Tight control over their own branch can reduce what information journalists have available, but openness laws like the Freedom of Information Act and the Presidential Records Act make even that difficult.

Presidential Media Relations Institutions

Early presidents handled their relationships with the media personally. Through personal friendships with individual reporters or the editors of partisan papers, presidents would spread their message to the public. As technological shifts led to the growth of mass media, the president alone was not sufficient to keep up with the burgeoning media market. The invention of the press conference was almost accidental – Wilson had his staff arrange a series of one-on-one talks with reporters. Finding all the reporters instead gathered together and more numerous than expected, he instead addressed the entire group, starting a practice almost every president after him would follow. Presidents would go on to formalize their relationship with the media, adding staff to the Executive Office of the President to help them manage the press. While there are many staff that help the presidency, including a variety of teams focused on digital media that tend to change with each new president, let's look at two: the White House Press Office, and the Office of Communications.

The White House Press Office

The Press Office can be thought of as the more reactive of the two offices. Headed by the Press Secretary, it responds to requests from the media and holds the almost constant press briefings required to keep up with the pace of the modern media market. It also cooperates with the Senate press gallery to regulate the White House press corps, a group of credentialed reporters cleared and assigned to cover the White House. While this is more formal than the personal friendships earlier presidents relied on, many presidents still become close with some of the regular members of the press that they interact with frequently, and several reporters from the press corps have gone on to join the administrations they covered.

A press briefing is normally a daily routine. The press secretary will meet with reporters, describe the president's positions on recent issues and topics of media interest, and answer questions. These briefings are generally under an hour, and they tend to become more adversarial over the course of the administration, much as the presidential relationship with the press does. Informal meetings between reporters and press office staff are also common, and may be more friendly.

Presidential press conferences are a more serious affair than a mere briefing. Presidents hold these direct meetings with reporters as and when they like. Generally, the media believes that presidents do not hold them often enough. Some presidents engage in a great deal of preparation, holding full rehearsals and drafting prepared answers to questions they expect. Others prefer spontaneity, answering whatever questions reporters ask off the top of their head.

Presidents cannot formally restrict what questions they or their staff will

be asked. However, they can simply refuse to answer questions they don't wish to deal with. In addition, the relationships built up by the press secretary allow the office to make good estimates of what sort of questions each reporter will ask, so a president has good odds of getting the questions he'd prefer. In addition, presidents can use the press office to pressure reporters or media outlets. Presidents have rearranged seating to put their least favorite reporters in the back of the room, attempted to rescind the press credentials of reporters who they view as uncooperative, and even use access to press events as leverage – as with the Trump administration attempting to force the Associated Press to use the name of the Gulf of America. While courts sometimes strike down the more serious of these actions, they still can serve as a message of presidential displeasure. And while the Associated Press was awarded its press privileges back, the Trump administration then removed a seat for wire services (such as the AP) and added a seat for “new media.”

The Office of Communications

“You don't let the press set the agenda. They like to decide what's important and what isn't important. But if you let them do that, they're going to trash your presidency. [...] That means that about half the time the White House press corps is going to be [censored], and that's all right. You're not there to please them. You're there to run an effective presidency. And to do that, you have to be disciplined in what you convey to the country. The most powerful tool you have is the ability to use the symbolic aspects of the presidency to promote your goals and objectives.”

That's former vice president Richard Cheney on the art of presidential press management. If the Press Office is a tool for responding to the media, the Office of Communications takes the initiative instead. The office creates messages that it wants the public to receive – for the day, the week, or the length of the term – and does whatever it can to keep the media on its chosen message, exerting message discipline.

The Office of Communications contains speechwriters who craft both major addresses, like the State of the Union, and minor ones, like seemingly spontaneous conversations with reporters. They also craft slogans and talking points. Message crafters also go beyond words by working on the appearance of the president with visuals such as backdrops and locations, marking the place where the president should stand, and more – anything that will help to promote the script the presidency wants to stick to. Once created, the office coordinates anyone involved in dealing with the press to make sure they are all portraying the same message. Some administrations have used a rule that every item on the presidential schedule needed to predict the headline it would generate – and actions that would generate headlines that didn't match the desired messages had to be altered or canceled. For observant members of the public, this can result in multiple

media sources all suddenly using the same phrases or talking about the same topics, as the presidency tries to make sure its chosen narrative is the only one available to reporters. The Office also does what it can to push the president's message as broadly as possible, from spreading it to local news outlets and television stations, to mass mailings to the public, to social media and memes.

Perhaps it seems odd that the presidency relies heavily on an office that worries so much about appearance and repetition over substance. When we see this effort as an outgrowth of the campaign that the president waged to get the office, it makes more sense. Certainly, when message discipline goes too far it can seem artificial. And poorly done image management can backfire: Michael Dukakis, a presidential candidate, attempted to push a message of himself as tough on defense by riding around in a tank so pictures and video could be taken. The result was so obviously not genuine that the rival campaign got hold of the recording and aired it themselves, and some scholars believe that seriously hurt Dukakis' attempt to become president. A campaign that has learned the lesson of message discipline and image management isn't likely to abandon it once ensconced in the White House. Faced with a fragmented media market, every part of which has its own incentives, presidents lack a direct unfiltered channel to the public. To fix this, they often turn to the lessons they learned on the campaign trail.

Summary

The media is the public's window on the presidency, and so presidents are forced to care a great deal about it. That window, though, isn't one clear pane but many small ones, each with their own tints. There is no one view of the presidency – every member of the public sees a slightly different one, which might go some way to explaining the widening variation in approval ratings we saw last chapter.

With technological and market forces pushing the media one way, and the incentives of the presidency pushing the president in another, it's no wonder relationships between the media and presidents have been tense from the first administration to the current one. Without the legal tools that would let them exert direct control over the media, presidents try to bypass the media to reach the public directly and make use of their campaigning skills to ensure the messages they're sending into a fragmented market are as cohesive as possible. The media, in turn, resists attempts at presidential influence and chafes at presidential focus on things that don't seem newsworthy.

Whether an adversarial press is more likely to find and expose presidential misconduct, by acting as a watchdog, or drive down trust in government and the media alike by focusing too much on negative news, is a matter of argument. You can guess the answer most presidents prefer. But

the presidency and the media, however reluctantly, rely on each other, just as the public relies on the media to be its window on the White House.

Further Reading

- - Fireside Chat December 1940, by FDR.
<https://www.whitehousehistory.org/audio/franklin-d-roosevelt-fireside-chat-december-1940>. Here, you can listen to a recording of one of the Fireside Chats mentioned in this chapter. Note the way that FDR directly addresses Americans, and how he refers to the government and the presidency.
- Tank Ride, by Dukakis. <https://www.c-span.org/clip/public-affairs-event/reagan-anti-dukakis-tank-ad/4495699>. This ad, made with footage from the Dukakis campaign, is a good demonstration of just how important image can be to presidents.
- If the News is So Bad, Why Are Presidential Polls So High?, by Cohen. This piece by Cohen looks at why negative coverage of Clinton didn't seem to affect his approval ratings with the public, and how modern political coverage has changed over time.
- - Speech to the American Newspaper Publishers Association, by JFK.
<https://www.jfklibrary.org/archives/other-resources/john-f-kennedy-speeches/american-newspaper-publishers-association-19610427>. This speech by JFK to an audience of newspaper publishers illustrates how the president expects hostility between himself and the press, and focuses on the presidency's desire for reporters to restrain themselves. Pay special attention to how JFK mentions he can't control the press as the leaders of other nations might.

Chapter 10

War and Foreign Policy

Introduction

I've always thought this country could run itself domestically – without a President; all you need is a competent Cabinet to run the country at home. You need a President for foreign policy; no Secretary of State is really important; the President makes foreign policy.
- Nixon

You have to pity Nixon's Secretary of State. Nixon's larger point, though, is interesting – and the reason that we need a separate chapter on foreign policy when we've talked about the presidency's role in making policy quite a bit already. There's a clear difference between the role of the presidency in domestic policy-making here at home, and the role of the presidency in foreign affairs. The divide is so sharp that some political scholars have argued that there are really two presidencies – a weak and limited domestic presidency, and a far stronger foreign presidency.

That split might be too sharp – but it's undeniable that the presidency seems to gain strength when dealing with issues abroad compared to ones inside the United States. It isn't that presidents want power over war and foreign affairs more than they want power over other policy areas. But presidents are forced by the expectations we place on their office to seek all the power they can, wherever they can find it. The difference is that the other branches of government, as we've seen in our chapters on Congress and the judiciary, are far more tolerant of presidential attempts to gain power during times of war or international crisis. The presidency has gained far more foreign policy powers than the relatively meager ones granted in the Constitution, and found ways to circumvent or avoid many of the Constitutional limits designed to rein them in. In fact, the office of the presidency seems to gain strength not only for the duration of some war or foreign policy crisis, but keep at least part of those gains permanently. Perhaps this broader freedom to act, and act alone, explains why presidents tend to move away from domestic policy towards foreign affairs over their time in office.

We'll first compare the presidency's role in domestic policy to foreign policy. Then, we'll look at how the United States itself has changed its role on the world stage over the course of its history, and how that has affected presidential power. We'll then look at the explicit foreign policy powers granted to the presidency in the Constitution and by Congress, and how each of these powers has expanded in practice to encompass much broader authority over time. Last, we'll look at limits on the presidency's dominance in foreign affairs, and what that dominance means for the presidency as a whole.

Domestic vs Foreign Policy

Say you're a presidential candidate all the way back from our chapter on presidential elections. You're running on a campaign promise to achieve something for Americans at home – better education for their children, safer roads, cheaper healthcare, a better economy. Once you win the election (congratulations) and finish your inauguration, you decide to get down to work and carry out your promise. What can you do?

The answer to that question largely revolves around a long list of other people, and what they're willing to permit. Even assuming the federal government has the authority to do anything about your issue at all, and it isn't in whole or in part the domain of the state governments, your tools are limited and your need to deal with other institutions is great. Congress has the actual power to make laws on those topics given to the federal government – you simply enforce those laws. If you need new legislation or funding, you'll have to hope that members of Congress share your priorities.

Perhaps you can make use of existing laws that Congress has already passed. Most congressional statutes leave a lot of room for interpretation and executive decision-making, after all. But as you prepare to issue your executive orders, carefully and creatively staying within the bounds of the laws Congress has passed, you have your own branch to wrestle with. Executive branch officials, most of whom you didn't get to appoint, with their agencies created and funded by Congress, may pay far less attention to your orders than you'd like. After all, you're likely to leave your job before they do. Independent agencies are explicitly insulated from your control – if the Federal Reserve doesn't agree with your economic campaign promises, they're under little obligation to listen to you. And even if your orders are carried out to your satisfaction, courts can block or overturn them. All the while, various interest groups are watching and criticizing, exerting pressure on you and all the other actors in this process to shift decisions their way.

The point is not that the presidency is weak, but that a president with a policy goal for the United States – to fulfill a campaign promise, leave a legacy, increase the power of the presidential office – must work with and against a

large number of competing institutions and actors, in a complicated web of checks and balances.

By contrast, if you just want to blow something up abroad, the odds are pretty good that you can simply make it happen.

More seriously, an old American political adage says that “all politics stops at the water’s edge”. While that’s an overstatement – Americans have plenty of disagreements over foreign policy – there is some truth to it. Most people see a need for unity as a nation when dealing with other countries or international threats, and that discourages the sort of vigorous debates we see on internal issues. American citizens generally tend to prioritize domestic issues over foreign ones, perhaps because of the nation’s economic status or geographic distance from other nations, and pay less attention to what the president is doing abroad than his actions at home. Members of Congress, closely concerned with their own home states and districts, are more likely to support presidential initiatives, approve funding, or grant the president sweeping new powers when it comes to foreign matters that are less likely to determine whether or not they get reelected. The courts, too, are far more likely to defer to presidential decision making and accept claims that an action was necessary when it comes to military matters than domestic policy. For the president, mixed control over agency officials is replaced by the far more solid title of Commander-in-Chief over the military. Legally, foreign policy is solidly the domain of the federal government, with no need to worry about state governments.

While politics might not stop at the water’s edge, from the perspective of the presidency, it does get a lot simpler.

The Changing Global Position of the United States

The presidency’s strength in foreign policy has been enhanced by the changing role of the United States in world politics. Early presidents saw a highly limited role for the United States in international affairs. Washington, for example, in his farewell address, told the public:

Europe has a set of primary interests, which to us have none, or a very remote relation. Hence she must be engaged in frequent controversies, the causes of which are essentially foreign to our concerns. Hence therefore it must be unwise in us to implicate ourselves, by artificial ties, in the ordinary vicissitudes of her politics or the ordinary combinations and collisions of her friendships or enmities.

Our detached and distant situation invites and enables us to pursue a different course.

Here, Washington makes the case that the United States should pursue its own interests, which he says must be different from that of Europe. Because of its geographic separation from much of the world – the United States shares a border with only two nations and is separated from much of

the world by large oceans – Washington argues that the nation can remain uninvolved in the frequently contentious conflicts of the more closely-packed European nations. Elsewhere in the same speech he urged for friendly commercial relations with the far richer nations of Europe while keeping as politically separate from them as possible. Early actions by the United States such as the Monroe Doctrine, which officially stated that the United States was against any further European colonization of the Western Hemisphere and in turn pledged to remain uninvolved in European affairs, held to this minimalist position.

A minimally involved foreign policy meant that the United States seldom had need for large scale military mobilization. When Congress did declare war, it would be ready to dramatically slash military budgets when the nation returned to peacetime. This meant that presidential power over the military was limited by the temporary nature of the military – Congress funded a military only when it was needed. After the Civil War for example, despite Lincoln successfully expanding the power of the presidency in wartime, Congress cut military spending by 96% of what it had been during the war. After WWI, Congress reduced the size of the nation's army by 97

The presidency in this period was powerful, but heavily limited. Polk pushed for war with Mexico by ordering troops into disputed territory, but needed Mexico to attack those troops in order to convince Congress to declare war. Lincoln would take strong, unilateral actions during the Civil War but also routinely seek Congressional approval for many of those actions. Wilson ordered attacks on Mexico despite having no Congressional permission to do so, but was forced to withdraw when Congress refused to fund his efforts.

World War II, and the Cold War that followed, dramatically changed this. The defense budget never went back to pre-war levels after World War II as it had in previous wars. Tensions with the Soviet Union (also known as the USSR) created an arms race, in which the United States spent vast amounts on nuclear weapons, missiles, bombers, and any number of other technologies to keep up with the USSR. Efforts to prevent the global spread of communism and counter Russian intelligence and foreign influence operations led to a United States far more heavily involved in global affairs, not just those of its neighbors. The United States' isolated geographical position, which had spared it much of the destruction that World War II had caused, and its massive wartime manufacturing capacity buildup, meant that after World War II the United States became the world's dominant economic power as well, in a world where international trade and globalization have led to far more economic connections between nations.

These changes dramatically lifted constraints on the presidency. The United States' military spending today is roughly equal to that of the next nine or ten nations combined. For an idea of scale, the United States Air Force is the largest air force in the world. The United States Army and Navy operate enough planes that they can often take second or third place –

meaning that the United States has enough aircraft to appear on the list of largest airforces multiple times over, even during peacetime. Not only does the presidency command a huge amount of now-permanent military resources, but public support for, or at least acceptance of, the legitimacy of US foreign involvement abroad is much higher after decades of United States foreign intervention has made the public more accustomed to it. And the American economic boom meant that the president was no longer simply negotiating with other nations as one trading partner among many, but often as the dominant economic power in any given area, while globalization gave the president much more international trade to have influence over.

In the next section, we'll look at the Constitutional powers of the presidency over foreign affairs, and how they've expanded over time. It's important to keep in mind as we do, however, that the nation the modern presidency seeks to control has taken a far larger role over time in foreign affairs, and that foreign affairs have correspondingly become a far larger part of the political focus of that nation.

Constitutional Foreign Affairs Powers of the Presidency

One political scholar called the relationship between Congress and the presidency laid out in the Constitution an "invitation to struggle for the privilege of directing American foreign policy". If so, it's a struggle that the presidency seems to be winning.

In the Constitution, the presidency is given a few clear foreign affairs powers. The presidency is in charge of receiving ambassadors, negotiating treaties for the Senate to approve, and acting as Commander in Chief of the nation's armed forces, though only Congress may take the nation to war. Congress, with extensive foreign relations and military powers of its own, has added more powers to the presidency's list by passing laws that delegate decision-making to the president, or by establishing presidential emergency powers. This doesn't tell the whole story, however. For each of those powers, the presidency has succeeded at increasing what it can do in practice beyond the original limit. The presidency has even invented new powers beyond those explicitly granted.

There are more presidential foreign affairs powers than just these – presidents appoint ambassadors and other foreign relations officials, travel abroad and make speeches, oversee intelligence agencies, and much more. We'll focus here on just a few: recognition, negotiation and diplomacy, the use of force, and statutory authority.

Presidential Recognition and Diplomacy

Tucked between the ability to convene special sessions of Congress and the presidential duty to make sure the laws are faithfully executed is the phrase “he shall receive Ambassadors and other public Ministers”. To modern ears, this might seem like a symbolic duty – when the French ambassador arrives, the president is in charge of shaking their hand and perhaps hosting dinner. While that assessment isn’t completely wrong, the duty laid on the presidency in that phrase is more than merely ceremonial – at least, presidents since Washington have certainly argued that it is more than that. The decision to receive (or not to receive) an ambassador is equivalent to the decision to recognize a foreign government as legitimate.

As an example, consider the Russian revolution of 1917. At that time, there were multiple groups of people each claiming to be the true government of Russia. It was up to the president to determine which group the United States would recognize, or treat as the legitimate leaders of Russia. Because of various human rights abuses and property seizures, the United States refused to recognize the communist government of Russia until Franklin D. Roosevelt did so in 1933. While the United States’ refusal before that point certainly didn’t mean that the USSR did not exist, it did make relations with the United States more complicated and hampered the efforts of the USSR to convince other nations that it was the legitimate government of Russia.

This recognition power belongs solely to the presidency. Recognizing the USSR was FDR’s decision alone, as was Carter’s decision to recognize the People’s Republic of China (PRC) as the government of China, instead of the Republic of China (ROC) based in Taiwan. Early in the history of the United States, there were attempts by other nations to bypass the president and negotiate with various parts of the American government. There were even efforts by individual American citizens to negotiate with foreign powers on their own. In response, John Marshall^a spoke about the need for the United States to speak with one voice. As he put it, the presidency was the “sole organ of the nation in its external relations, and its sole representative with foreign nations”. While the phrase would be used by later presidents to argue that the presidency should have sole, independent control of all United States foreign relations, here it was just a admission of the fact that while Congress held the power to declare war, regulate commerce, and shape foreign policy through statute and appropriations, United States foreign policy would be *communicated* through the presidency. This understanding has persisted in the modern day. In *Zivotofsky v. Kerry* (2015), the Supreme Court held that even though Congress had passed a law ordering passports for American citizens born in Jerusalem to have “Israel” listed as their place of birth, doing so would interfere with the presidency’s authority to decide which nation to recognize as the legitimate government of Israel.

a: You remember him as the Supreme Court justice (and failed letter-deliverer) from *Marbury v. Madison*, in an earlier chapter.

Presidential recognition also carries symbolic and strategic weight. The president can dangle recognition as a carrot when bargaining with new regimes, or use it as a signal to the rest of the world of the United States' priorities and alignments. And in addition to receiving ambassadors, presidents are capable of acting as diplomats themselves. When Nixon visited China in 1972, it was called "the week that changed the world" – the American public saw images of mainland China for the first time in decades, it laid the groundwork for Carter's recognition mentioned above, and helped to determine the outcome of the cold war. While Nixon's trip was "just" a visit, it had a massive impact.

Treaties

The Constitution, after granting substantial power over international commerce and other foreign affairs matters, says that the presidency "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur...". This makes treaties almost the inverse of laws, in some ways: unlike the presidential role in the legislative process, here the president creates the text, while Congress decides to approve or not approve. Treaties, as binding agreements between nations, are both foreign policy but also enforceable within the United States.

Already, this gives the president a great deal of power, and not merely in foreign relations. During the Wilson presidency, Congress attempted to ban duck-hunting. Naturally, the law failed in the courtroom – the Constitution listed out the powers of Congress explicitly, and none of them mentioned ducks. In response, Wilson negotiated a treaty with Canada in which the United States promised to protect the ducks and other migratory birds. Here, the president could essentially create a law that Congress had no power to create itself.

The treaty clause also provides a good example of how presidential power expands over time, especially in areas that are more ambiguous. While the Constitution explains how to make treaties, it is silent on how to end them. While both the legislative and executive branches took a role in ending treaties in the early United States, presidents eventually began to assert that they had the ability to end a treaty on their own with no input from Congress necessary. Carter, for example, single-handedly ended a decades-long United States treaty with Taiwan as part of recognizing the People's Republic of China. When members of Congress sued Carter, saying that the president should be required to get Senate approval as was necessary when making a treaty, the Supreme Court declined to answer the question. Whether the president can legally exit a treaty on his own is still legally an open question, but presidents have continued to insist that they can do so.

Given that presidents can negotiate the text of treaties and effectively end

them when they wish, you might be surprised to learn that presidents have been making them less and less. Instead, today the presidency is far more likely to rely on what are called executive agreements.

Much like a treaty, an executive agreement is an agreement between two nations. An executive agreement, however, is more specifically an agreement between that nation and the presidency. Provided that a president doesn't violate the law or the Constitution in making agreements with the heads of foreign nations, they can be as effective as a treaty in many cases. But because the Constitution says that *treaties* require Senate approval, not *agreements*, executive agreements can be made by the presidency alone with no involvement from Congress in their creation.^b They commonly cover areas such as trade, defense, or environmental policy, and may or may not be made public.

Presidents have made extensive use of executive agreements, which allow them to bypass the cumbersome requirement of Senate approval and act on their own. While there have been only a few hundred or so treaties ratified in the past few decades, presidents have signed thousands of executive agreements in that same time. The growth of the United States' economy and global trade has meant that the presidency will be called upon to do far more negotiation with other nations than in the past. Today, presidents are likely to turn to a formal treaty only when there is some particular need or incentive to do so, such as when Carter sought Senate approval for the unpopular treaty giving up American control of the Panama Canal.

Members of Congress generally strongly dislike the use of executive agreements, as it cuts out their constitutional role in negotiating with other nations, but they often find it difficult to restrain presidents from making them. For example, Congress failed by one vote to pass a constitutional amendment that would have required executive agreements to get approval from the Senate just like treaties. Congress has managed to pass legislation obligating the presidency to inform them of all executive agreements that are made, so that they could attempt to block or legislate about agreements they did not approve of. Presidents, however, continued to keep some of their agreements secret, often by simply using yet another name – they're not *treaties*, or *agreements*, but now *understandings*.

Executive agreements (whatever you call them) are far easier to make than treaties, but can also be much less stable as a result. In the absence of congressional approval, presidents generally have great power to negotiate and re-negotiate agreements as and when they see fit. As an example, take the Paris Climate Agreement. Obama entered the United States into this agreement in 2016. In 2017, Trump announced that the United States would be leaving the agreement, and did so in 2020. On his first day in office, Biden re-entered the agreement. When Trump was re-elected, he announced that the United States would exit the agreement again on his first day in office: January 20, 2025. Depending on how future presidential elections go, there

b: Presidents may require Congressional legislation in order to implement or fund some agreements. The North American Free Trade Agreement is an example: while negotiated by presidents, Congress had to pass a law (not it's normal two-thirds treaty vote) in order to actually make it effective.

are likely more rounds of executive agreement hokey-pokey to come.

Making War

The office of the presidency comes with the title of Commander in Chief of the nation's armed forces. But despite the confusion of many Americans^c, Congress was the only branch given the power to declare war.

As Lincoln put it:

The provisions of the Constitution giving the war-making power to Congress was dictated, as I understand it, by the following reasons: Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This, our convention understood to be the most oppressive of all kingly oppressions, and they resolved to so frame the Constitution so that no one man should hold the power of bringing oppression upon us.

The practicalities of war and the need for rapid decision-making meant that the framers of the Constitution wanted a single commander in chief. But since history showed that giving one person command of the military would lead to its use, and often a takeover of the government, they gave the power to declare war to Congress instead, as well as the power to raise armies, create a navy, fund the military, and to make the laws that regulate the United States military in general.

The model is simple, then: Congress was to raise, fund, and regulate the military, then authorize the president to make use of it through a declaration of war when the members of Congress determined war was necessary. Congress has done so about five times in the nation's history, with the last United States declaration of war in 1945, bringing the United States into World War II.

If you're a history fan, you might already have a question: if the last war the United States declared was World War II, then what was the Korean War? Or Vietnam? How did the presidency respond to the 9/11 attacks? Clearly, congressional declarations of war can't be the whole story. While the president cannot declare war, there are still plenty of ways that the United States can enter into armed conflict besides a formal congressional declaration of war.

Take the early days of the Civil War. After the attack on Fort Sumter, but before Congress officially recognized hostilities, Lincoln ordered a naval blockade of Southern ports. The owners of some ships that were seized filed a lawsuit: since their boats had been taken before Congress got involved, surely the president hadn't had the right to order the United States military to seize their vessels. The Supreme Court disagreed: war, they said could arise in two ways. Congress could declare a war, and the presidency would then be in command of the war effort. But if the nation was attacked, a war would simply come into being.^d "If a war be made by invasion of a foreign

c: Survey research shows that only about half of Americans know that Congress is the branch that declares war, and that a sizeable minority of Americans believe the presidency is charged with declaring war instead. Given what you'll see in the rest of this section, their confusion is perhaps understandable.

d: Very poetically, the Supreme Court described the Civil war as springing forth suddenly like "a Minerva in full panoply of war" – a reference to mythological story in which Minerva was born by springing forth from her father Jupiter's forehead, fully grown and wearing battle armor.

nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority.” The precedent was firmly set that the president didn’t need to wait for congressional permission before acting to defend the nation.

That makes sense – if a foreign nation launched missiles at the United States, we wouldn’t expect the president to call Congress and ask for an emergency vote on whether he could or should attempt to shoot them down. This also gives the president much greater control over whether the nation will go to war or use force, however. A president might, like Polk, attempt to provoke another nation into an attack to which they can respond “in defense”. Defense is also a slippery concept – what can you defend against? An attack on a United States fort seems clear enough, but can you defend against the buildup of forces that haven’t been used yet? Is a shipment of illegal drugs into the United States an attack like the launch of a chemical weapon would be? Could a president preemptively attack a nation he believes to be a threat in defense of the nation?

e: Hence why it is generally referred to as the Korean War.

We also need to examine what we mean by the word “war”. The United States’ military involvement in Korea was certainly a war in the way that most regular people use the term.^e But Truman consistently refused to refer to it as such, since that would require congressional approval for his actions. Instead, he adopted an idea from a reporter and referred to it as a “police action”. Other presidents followed suit, finding different euphemisms and reasons to insist that what they were doing with the nation’s military was not “war”. Clinton’s Secretary of State told a student who asked about the Iraq War that it was, instead, a use of military force against Iraq. The student was understandably confused. Obama distinguished his bombing of Libya from a war by arguing that a war must have a serious threat of United States casualties, which air strikes against Libya did not. Presidents also rhetorically claim authorization from sources other than Congress to support their actions: appeals from the United Nations, the global community, NATO and other United States allies, and even remarks by individual members of Congress are used as sources of legitimacy. Of course, none of those groups can declare war on behalf of the United States, but presidents still find it useful to highlight their support.

Congress is also willing to support these not-wars, even if they are unwilling to formally declare them. Congress authorized or supported conflicts such as Korea and Vietnam with legislation and resolutions authorizing the presidency to use military force, and providing funding and resources. A modern example is the Authorization for the Use of Military Force, or AUMF, adopted after 9/11. It’s short enough that we can read all the important bits right now:

That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed,

or aided terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Congress passed this nearly unanimously a few days after the attacks that destroyed the World Trade Center, with only one member of Congress voting against it. It is still in force today. Note that the presidency is given the role of determining who planned, authorized, committed, or aided the attacks. There's also no cut-off: an individual or organization who committed the attacks is certainly a valid target. What about an ally of that organization? Or an ally of that ally? The chain of relationships can stretch far beyond what Congress might have pictured in those post-9/11 days, with no clear limit. Presidents from Bush to Obama to Trump have cited the AUMF to support operations and strikes in Libya, Kenya, Cuba, Somalia, the Philippines, Georgia, Ethiopia, and more, and the full list of targets the presidency believes is covered by the AUMF has itself been classified.

Presidents today, therefore, can undertake extensive military operations abroad on their own initiative. Congress has occasionally attempted to re-assert their control of the use of force. The War Powers Resolution (WPR) is one example. Passed by Congress in 1973 over a presidential veto, it required a declaration of war or other authorization from Congress before the president could make use of the Armed Forces. It also required presidents to report to Congress when they committed troops, consult with Congress before doing so, and set a sixty day time limit for conflicts not explicitly authorized by Congress. The WPR not only failed, but arguably backfired as an attempt for Congress to take back its war power. Every president since the WPR was passed has insisted it is unconstitutional. Presidents have found ways around the WPR whenever possible, such as saying that routine executive agency reports to Congress satisfy the consultation requirement or simply refusing to start the sixty-day countdown. In fact, presidents have used the WPR, designed to limit their power, to argue for *enhanced* presidential power instead: since the act places a 60-day limit on military actions not approved by Congress, presidents have interpreted that to mean that the WPR allows them to use military force as they see fit, with no need for approval, for a period of 60 days. Other tactics that members of Congress could use to check the presidency's use of force, such as Congress' constitutional control of military funding, are less effective today than in the past. While Wilson may have had to withdraw from Mexico due to a lack of funds, modern presidents have a well-resourced and funded military, capable of supporting extensive military operations out of general funds alone. Presidents can often find enough funds that even if Congress specifically blocks funding for their goals, money can be turned up from somewhere or other to pay for them. When Congress did not pass funding for Trump's border wall project, for example, he redirected some defense funds to pay for its construction.

The “invitation to struggle” for control of the war power is still there. Congress could rescind its authorizations to use force, take sharper control of military funding, make effective use of the WPR’s mechanisms to force the president’s hand, and otherwise reassert its place in deciding when the nation will be at war. For now, though, Congress seems broadly content to let responsibility – and blame – for conflict abroad lie with the presidency.

Power From Congress

Many of the greatest increases in presidential power over foreign affairs have been gifts to the presidency from Congress. In addition to the constitutional sources of power we looked at above, Congress has given the presidency a good deal of power through broad laws and statutes. Since Congress controls areas like international trade or immigration, their laws can grant the presidency a great deal of influence in such areas. The Immigration and Nationality Act (INA) is a good example. Among its many other provisions, it allows the president to suspend entry into the United States of any person or group of people if he believes their entry would be “detrimental to the interests of the United States”. Trump issued a proclamation^f using this law to prevent anyone from a list of eight countries from coming to the United States. When the law was challenged, the Supreme Court wrote that Congress had given the presidency “broad discretion” so that the order was “squarely within the scope of Presidential authority under the INA.”^g

Why did Congress delegate so much decision-making over immigration to the president? Why do they continue to do so on that and many other topics? There are a number of reasons. Allowing the president to make on-the-fly decisions allows laws to be flexible and apply to many different situations, as opposed to a rigid immigration law where Congress listed every nation in the world and whether they had permission. That would have to be changed every time a new country was founded or an old one stopped existing, as well as every time a country changed enough to warrant new restrictions. It can also be more efficient for Congress to hand the work of research off to the presidency. The International Religious Freedom Act, for example, charges the executive branch with the task of identifying nations engaged in religious persecution and gives the president a menu of options to enact against such nations. Similarly, Congress is slower than the presidency: turning decision-making over to the presidency ensures that if a nation suddenly becomes a threat, immigration from that country can be shut off without Congress having to race to pass new legislation on the topic.

Often, speed is the primary concern of Congress when it grants the president emergency powers. It might be helpful to think of these emergency powers like the “In case of fire, break glass” boxes you see in buildings, containing extinguishers and the like. Congress creates laws granting specific powers to the presidency, which can only be used when the

f: See the section on executive orders in an earlier chapter.

g: For more details, you can look up the Supreme Court case *Trump v. Hawaii*. Note that the Court also explicitly pointed out that the Immigration and Nationality Act was vague: The law offers no standards that would enable courts to assess, for example, whether the situation in North Korea justifies entry restrictions while the terrorist threat in Yemen does not.

president has declared a national emergency. This lets Congress ensure that the government will have the tools it needs to deal with a future crisis swiftly, without waiting for Congress to meet and vote when there may be an imminent threat.

Currently, the United States is under dozens of simultaneous declarations of national emergency, some decades old. Presidents have declared national emergencies in response to everything from the 9/11 attacks to strikes by mail carriers and high energy prices. Why? Well, under the International Economic Emergency Powers Act, the presidency can declare an emergency and then freeze assets, block transactions, and regulate imports and exports. That sweeping trade power is just one of the broad grants of power presidents unlock by declaring emergencies, giving them a strong incentive to do so.^h

Congress can unmake or change these laws and emergency powers as easily as they made them, of course. Often, though, they have little incentive to do so: tasks like investigating the religious behavior of other nations, or deciding how best to spend foreign aid money to accomplish US goals abroad, is work many members of Congress seem to be happy to leave to the presidency. And it can be difficult for Congress to find the spirit and unity to act in peacetime, without the fear that motivated them to pass the emergency powers in the first place as a spur.

Inherent Power

So far, we've looked in this section at powers granted to the presidency by the Constitution or congressional statutes. Presidents, however, also insist that they have inherent authority over foreign affairs, similar to the idea of the "executive power" that we looked at in a previous chapter. This idea of inherent power in foreign affairs rests on the claim that the Constitution implicitly grants the presidency broad, even exclusive, authority to conduct the nation's external relations. This notion found one of its strongest judicial endorsements in *United States v. Curtiss-Wright Export Corp.* (1936), where Justice Sutherland used the phrase "sole organ" to mean something new:

...the plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.

That phrase later became a kind of mantra for executive dominance abroad. The Court suggested that because sovereignty in foreign affairs passed from the British Crown to the United States as a whole, much of the

h: Courts generally uphold these emergency powers, at least broadly. Right now as I write this, the Supreme Court is considering whether or not the IEEPA, in allowing the president to regulate trade, allows him to impose tariffs. Regardless of what the justices eventually decide about the meaning of the word "regulate", they are unlikely to touch the other emergency powers the presidency gained when IEEPA was passed.

monarchy's authority naturally fell to the President, whose unity and secrecy made him uniquely fit to manage diplomacy and national security.

Presidents ever since have invoked this inherent authority to justify military and surveillance actions without explicit congressional approval, often citing *Curtiss-Wright* as precedent. Some presidents used this idea of inherent authority to challenge the actions of other branches of government. Bush II attached a signing statement to a bill about treatment of detainees that included language specifying he intended to interpret the law in a manner "consistent with the Constitutional authority of the President" – in other words, saying that he did not believe the law could limit how he treated detainees due to inherent presidential power. Obama did something very similar – when Congress placed rules on how money could be given to the International Monetary Fund, Obama attached a signing statement claiming that he would not abide by the law if it limited his authority as president to conduct foreign policy.

Inherent foreign affairs authority is a murky area. Presidents are strongly incentivized once they hold office to assert and defend its existence. Obama criticized Bush's signing statement and treatment of detainees before taking office, then used signing statements himself and opposed attempts to limit the presidential detention power. All presidents find themselves having to push the limits of their office to live up to the high expectations people have of the presidency. Congress, on the other hand, has some incentive to be doubtful of the idea of inherent presidential foreign affairs authority, and has occasionally challenged presidents over this. The Supreme Court, in settling these disputes, has tended to afford the presidency broad latitude in foreign affairs while rejecting a number of claims founded specifically on the idea of inherent power, such as when Bush argued he had the inherent power as president to detain suspected terrorists.

Summary

Why has presidential power over foreign affairs expanded so much, especially at the expense of Congress? Scholars have several potential explanations:

The Ratchet Effect: During war or crisis, Congress gives power to the presidency, and the courts are more likely to support the presidency's claims of power against legal challenges. The powers granted and precedents created, however, tend to outlive the problems that motivated them – lying about like a "loaded weapon", to use Justice Jackson's phrase in *Korematsu v. United States*. Over time, this has led to the presidency gradually picking up more and more power.

Jackson on Korematsu

It's worth reading how Justice Jackson put it in more detail:

A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes.

While Jackson was referring specifically to the Court permitting FDR to engage in racial discrimination during WWII, the same idea can be applied to many kinds of presidential actions during all sorts of wars and crises.

Design: It may be the design of the presidency itself is simply well-suited to foreign affairs. As an executive, the presidency was created with advantages of unity (the president is one person), secrecy (presidents since George Washington have asserted the ability to classify and conceal information), and speed. Not only are these important qualities to have in foreign policy, which can require quick decision-making and operational security, they are qualities that Congress lacks. Presidents can act quickly and quietly to achieve their goals, and leave Congress with the burden of investigating their behavior and reacting if they want to rein them in.

A Changing World: Others point to the shift we discussed in a section above – the United States now has a vastly different position in the world than it did when it was founded, and the world itself has changed greatly as well. Perhaps a world with nuclear missiles on hair triggers and a massively interconnected global economy is just too quick and too complex for legislative leadership, for formal declarations of war and Senate deliberation on treaties that worked well when attacks and international news traveled on slow-moving boats.

There are more possible explanations, of course. Regardless of the reason, it would be a mistake to think of the presidency as all-powerful when it comes to foreign affairs. Presidents face plenty of pushback. Congress holds investigations and hearings to push against presidential secrecy, confirms and influences presidential nominations of foreign relations officials, controls funding and can place explicit limits on what it

can be used for that presidents have to work to bypass, and can act on its own in foreign policy through legislation on topics like defense or trade. The Countering America's Adversaries Through Sanctions Act (2017), for example, placed sanctions on Iran, North Korea and Russia, and passed by a veto-proof majority despite objections from Trump. And decisions like the Steel Seizure case we discussed in a previous chapter show that the judiciary is also willing to shut down some claims of presidential power, even when national security is invoked.

The executive branch, too, is an actor here. The presidency may come with the title of Commander-in-Chief, but presidents cannot do much as individuals without relying on others. There are many examples of military and diplomatic personnel, high and low, disagreeing with and working to frustrate presidential goals, from modern leakers of classified information to General MacArthur's public criticism of Truman's decisions in Korea. Too, the executive branch is complex and difficult to oversee, as we saw in an earlier chapter, and that can seriously limit the presidency's ability to act even in the absence of opposition. In 2003, Bush asked his Secretary of Defense and the head of the Provisional Authority in Iraq which one of them was responsible for looking for weapons of mass destruction. Both confidently said that the other one was.

Even the public serves as a limit – while Americans tend to pay little attention to foreign affairs, they do generally resent it when foreign affairs demand their attention. Presidents who have presided over increases in gas prices or trade wars that impact the grocery store will find Americans suddenly quite loud about foreign policy. Perhaps the greatest limit on the presidency's freedom in foreign affairs is the simple need for support – most of the greatest successes in United States foreign policy have been made by presidents cooperating and working with the rest of the American government. Many of the most notable failures – from the Bay of Pigs to Iran-Contra – were made by presidents acting largely on their own.

It would also be a mistake to think of the presidency's power in this area as all upside for presidents. Increasing power brings with it an increasing amount of responsibility and attention. As a noted presidential scholar, Neustadt, put it: "A President may retain liberty, in Woodrow Wilson's phrase, 'to be as big a man as he can.' But nowadays he cannot be as small as he might like." Presidents tend to focus more and more over time on their foreign policy goals during their tenure in office, perhaps attracted by the ability to act on their own, and this is often to the detriment of their domestic policy agenda. The importance of the United States in world events, and the role of the Presidency as head of state, mean that almost every world event creates demand for a presidential response. Modern presidents may have much more sway over foreign policy than their early predecessors – but their predecessors had a far easier time ignoring world events they didn't want to deal with. The power and the duties of the office can sweep away the goals of the individual people who hold it.

Washington spoke of the United States' "detached and distant situation" as a political benefit. "Why forego the advantages of so peculiar a situation? Why quit our own to stand upon foreign ground?" Today the presidency will likely find it far harder to follow one of his other lasting instructions:

Observe good faith and justice towards all nations; cultivate peace and harmony with all.

Further Reading

- George Washington's Farewell Address
https://www.senate.gov/artandhistory/history/resources/pdf/Washingtons_Farewell_Address.pdf
 This speech by Washington as he left office is useful for two reasons. First, Washington spends a good portion of the speech talking about his view of foreign policy, and his goal for the future the United States' role in international affairs. More broadly, this is the first holder of the presidency reflecting on his time in that office – what could be more appropriate as the book draws to a close?
- Justice Jackson's Dissent in *Korematsu v. United States*
<https://tile.loc.gov/storage-services/service/ll/usrep/usrep323/usrep323214/usrep323214.pdf>
 It's well worth your time to learn about the case of Fred Korematsu in general – there are plenty of excellent books and documentaries on the topic. I'd specifically recommend Jackson's dissent in the case, in which he argued that the executive branch lacked the authority to detain Japanese American on the basis of their race, is a good look at how the president is often granted new authorities during times of crisis.
- *Libya and War Powers*, by Louis Fisher https://www.foreign.senate.gov/imo/media/doc/Fisher_Testimony.pdf
 Louis Fisher has written a number of pieces on the presidency and the war power, all of which are well worth reading if you are interested in this subject. The specific piece recommended above is a speech that Dr. Fisher gave to Congress in 2011 – a highly approachable and often witty look at many of the issues we examined in this chapter with keeping the presidency and war power separate. Example: "During Senate hearings in June 1951 on the military conflict in Korea, Secretary of State Dean Acheson conceded the obvious by admitting 'in the usual sense of the word there is a war.' What sense of the word had he been using?"
- Nixon's Conversations on China
<https://www.nixonlibrary.gov/nixons-trip-china>

Nixon's office recordings are part of the United States National Archives. You can listen to him discuss everything from the geopolitical motivations of the trip to the threat of nuclear war to the panda bears the United States was given as a gift. An excellent way to get some first-hand insight into what might be going through the mind of a president as they engage in foreign policy.

Appendix A

Annotated Constitution

The Constitution of the United States

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article I.

Section 1

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of

ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.^a

Section 3

The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.^b

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.^c

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall

a: See the chapter on Congress for more details. Note that the House has the power of impeachment, but as we'll see, the Senate oversees impeachment hearings.

b: Since presidents now have more control over who serves as their vice president, this gives them some small degree of indirect influence over Congressional voting. Note that the requirement that the Senate vote be a tie significantly limits how useful this is, however.

c: Here is the Senate's power to try impeachments brought by the House. Note that though the Chief Justice of the Supreme Court presides, they have little control over the outcome. The requirement that two-thirds of Senators vote to convict means that it is far easier to impeach a president than to go on to convict them.

nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section 4

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section 5

Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office

under the United States, shall be a Member of either House during his Continuance in Office.^d

Section 7

All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law.^e But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

The Pocket Veto

This gives the presidency a time limit on veto decisions, so no president can simply refuse to make up their mind and keep a bill from becoming law that way, and thus avoid having their veto overridden. Despite limiting the veto power, this does give the presidency a consolation prize. By refusing to sign a bill within ten days while Congress is adjourned, a president performs what is called a “pocket veto”. The bill simply does not become law, with no chance of a veto override. Of course, Congress can simply not adjourn or hold pro forma sessions to avoid giving a president the chance to do so.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment^f) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

d: Here we see an attempt to limit the presidency from influencing the legislative branch. Presidents cannot attempt to reward Members of Congress with appointments and salaries while they are in office.

e: Here is the base of the presidency’s veto power. The two-thirds requirement to overturn a veto means that the president can make it much more difficult, though not impossible, to pass a bill. The War Powers Act of 1973 is a good example of Congress overriding a presidential veto.

f: This does matter. Whether or not Congress is in session or adjourned matters to the presidency in areas such as pocket vetoes or recess appointments. This parenthetical, along with other language in the document, helps make it clear that Congress, not the presidency, determines when it is and is not in session.

The Legislative Veto

This is sometimes known as the Order, Resolutions, and Votes Presentment clause. This helps make it clear that Congress can't make law and bypass the presidency's veto power by calling a bill something else. The requirement that Congressional actions be presented to the president can serve as a boost to presidential power. For example, Congress routinely passed laws giving the executive branch power to make decisions, but included provisions that a resolution by one house of Congress could block or "veto" any such decision. This ability to block legislation made Congress more comfortable in delegating power to the executive branch. When the Supreme Court held such "legislative vetoes" to be violations of this Constitutional requirement to present laws to the president, it removed Congress' ability to block executive decisions while leaving the laws delegating decision-making to the executive branch in place.

Section 8

The Congress shall have Power

- To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;
- To borrow Money on the credit of the United States;
- To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;
- To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;
- To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;
- To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;
- To establish Post Offices and post Roads;

- To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;
- To constitute Tribunals inferior to the supreme Court;
- To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;
- To declare War^g, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
- To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
- To provide and maintain a Navy;
- To make Rules for the Government and Regulation of the land and naval Forces;
- To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
- To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;^h
- To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And
- To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

g: Though this power is listed as belonging to Congress, see the chapter on War and Foreign Policy for some of the ways in which presidents have been able to engage in military conflicts without Congressional approval.

h: Despite the presidential role of Commander in Chief, Congress maintains substantial oversight of the armed forces.

Section 9

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty

may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section 10

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Article II.

Section I

The executive Power shall be vested in a President of the United States of America.ⁱ He shall hold his Office during the Term of four Years^j, and,

i: This entire short section, roughly 700 words long, is the entire basis of the presidency. With such a large office resting on such a small foundation, almost every word of the text has been scrutinized, and presidents have attempted to use almost every word and phrase to their advantage.

j: This limits presidents to holding the presidency for four year terms. It does not limit how many four year terms they can have. You'll see that limit introduced via an amendment later on.

together with the Vice President, chosen for the same Term, be elected, as follows:

The Executive Power

See the chapter on Taking Office for more on this sentence. Note the lack of a clear definition of “the executive Power”. The singular nature of “the” executive power and “a” President is the basis of the idea of the unitary executive, which argues that the president should have sole control over the executive branch, and this passage is often brought up when presidents try to exert more control over executive branch officials.

Each State shall appoint, in such Manner as the Legislature thereof may direct^k, a Number of Electors, equal to the whole Number of Senators and Representatives^l to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

Electors and the Separation of Powers

Again, you can see the effort that is made into keeping the presidency and the legislative branch separate. As we discussed in the chapter on presidential elections, most electors are “faithful” – that is, they vote as pledged – so being an elector doesn’t offer much freedom to sway the outcome of elections. This safeguard is therefore less important under our modern system of presidential elections than it otherwise might be.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then

k: This passage gives states the ability to choose how they appoint their presidential electors. While all state legislatures today allow their citizens to vote and choose their electors, nothing in this passage requires the states to do so. Theoretically, a state legislature could choose electors directly, and ignore the opinions of citizens of that state entirely.

l: This is the basis for how many electors each state receives. Since every state has two Senators regardless of population, the number of electors each state receives is not strictly based on population either, though large population states receive many more electors than small population states. Both groups of states have argued that this system puts them at a disadvantage.

the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

m: This is why the presidential primaries can go on for such a long time, as each state can set a different date for its primaries, but the general election is always on the same day.

The Original Method of Election

This is part of the original system of electing presidents. Originally, electors cast two votes each. The presidency went to the person who received the most votes (and a majority), while the vice president was the person who was runner-up in receiving electoral votes. This system led to issues as soon as Washington was not running for office. The Vice-President might be deeply opposed to the president, as Jefferson was to Adams, or a tie between a candidate and their hopeful vice president, such as Jefferson and his ally Burr each getting 73 votes, might lead to Congress having to decide the election despite one candidate clearly winning. This entire system, vice presidential selection and all, was replaced in the 12th amendment (below).

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.^m

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

The Natural Born Citizen Clause

This is one of the three qualifications to be president, along with age and residency. Despite there being only three requirements, there has been some interest in repealing the requirements that presidents be born in the United States. Amendments to change this

have been occasionally offered in Congress (these are sometimes nicknamed Schwarzenegger amendments, as one prominent attempt was explicitly aimed at making it possible for Governor Schwarzenegger to run for president). There have also been legal challenges to the requirement based on the 14th amendment's Equal Protection clause.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Officeⁿ, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation^o, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."^p

Section 2

The President shall be Commander in Chief^q 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; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

Opinions in Writing

The ability of the president to require reports in writing from Cabinet heads and other principal officers is sometimes used to counter the unitary executive theory – if everyone in the executive branch is subordinate to the president, why bother to say that the president can require written reports from them? President often require reports from officers on the feasibility of actions they would like to take but cannot without Congressional approval, or ways to

n: The 25th amendment replaced this entire paragraph, including more detailed procedures for determining when a president was unable to discharge their duties.

o: This has actually been a subject of controversy as well. Practically every part of Article II has had a legal fight over it at some point.

p: The presidential oath of office. It's common for presidents to refer to their oath to support some action they have taken, especially when attempting to assert their interpretation of the Constitution over a competing one.

q: The clear appointment of a commander in chief was a key difference between the Articles and the Constitution. Commander in Chief authority isn't simply useful in foreign affairs, but can also be leveraged by presidents to achieve other domestic policy goals.

accomplish their broader goals. For example, a president who wishes to shut down a federal agency might require the head of that agency to submit a report on how shutting down that agency would work, and a plan for doing so; or a report detailing everything that can be done to trim down the agency within the bounds of Congressional statutes and requirements.

r: Giving the president the ability to negotiate treaties was another change from the Articles of Confederation. The requirement of Senate approval is one reason why many presidents have turned to executive agreements and other alternatives to the formal treaty process.

The Pardon Power

One of the very few presidential powers that has no real check from Congress or other actors. Presidents face few limits (besides potential public disapproval) on who they can pardon. Of course, this only applies to federal crimes, as states can still prosecute someone for violating their laws. Movie scenes where a president pardons someone for murder or the like generally ignore that murder is a state, not federal crime.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur^r; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States^s, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers^t, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

s: Here, the presidency's ability to nominate and appoint ambassadors, Supreme Court justices, and other executive officers (the phrase "all other Officers" is doing a lot of work) is established. Again, the Senate' approval is needed.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Recess Appointments

Here is the origin of those recess appointments mentioned above – one of the reasons why it matters when Congress is in session and when it isn't. Recess appointments might be temporary, but they don't need to go through Congress. Originally meant simply as a way to ensure that vacancies in the executive branch wouldn't go empty for long period when Congress wasn't available, recess appointments became a way for presidents to bypass Congress – at

t: What's the difference between inferior and other officers? The text doesn't make that clear. Most presidents, of course, favor the interpretation that lets them nominate the most people. The Supreme Court has had to weigh in on this issue multiple times.

least for a while. Obama attempted to use recess appointments to bypass a Congress that wasn't providing advice and consent on his nominees quickly enough for him, despite Congress holding short sessions (essentially just calling a session to order and immediately adjourning) to block this, arguing that Congress wasn't really in session. The Supreme Court held that Congress was in session when it said it was, allowing Congress a relatively easy way to check the president's use of recess appointments.

u: The State of the Union address is one version of this – but originally presidents simply sent Congress written reports. The modern version, given live and televised, is another, and one that lets presidents garner more public attention for their priorities.

Section 3

He shall from time to time give to the Congress Information of the State of the Union,^u and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them,^v and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them^w to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

v: While presidents have gotten some use out of this – such as Theodore Roosevelt calling a special session of Congress to discuss a Panama Canal treaty – it is far less useful in the modern day, where Congress stays in session much longer and takes fewer breaks.

The Take Care Clause

There is no easy way to make commentary on this clause – known as the “Take Care” clause – short. The clause limits the presidency – presidents cannot violate the law or order their subordinates to do so, remaining under the law instead of above it. It also empowers the presidency, as presidents have refused to execute laws on the basis that the president believes they are unconstitutional, and thus it would violate the duty to faithfully execute the law to enforce them. Presidents have also used this to campaign against Congressional statutes that they argue would hamper their ability to enforce the law. The question of what “faithful execution” means has no clear, objective answer.

w: No president has ever done this.

x: This last addition means that while treason and bribery are certainly grounds for impeachment, Congress has wide latitude in what else they can consider to be an impeachable offence.

Section 4

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.^x

Article III.

Section 1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;— between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Article IV.

Section 1

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section 3

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.^y

Article V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention

^y: While this might not seem to have much to do with the presidency, the charge to protect the states against invasion and (on request) uprisings by the states' own citizens gives presidents a lot of leeway. Presidents can be creative with how they define "invasion" or attempt to pressure state legislatures to call them in.

for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Article VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Article VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

Amendments

Amendment I (1791)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment II (1791)

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Amendment III (1791)

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV (1791)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V (1791)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI (1791)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VII (1791)

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment VIII (1791)

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX (1791)

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X (1791)

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment XI (1795/1798)

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Amendment XII (1804)

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest Number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President.^z But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed,

z: Here we see the amendment that altered the presidential election procedure. Note that votes for president and vice-president are now separate – no one should now become vice president by surprise.

and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

Amendment XIII (1865)

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV (1868)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article

Amendment XV (1870)

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XVI (1913)

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Amendment XVII (1913)

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Amendment XVIII (1919)

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

aa: This amendment, among other changes, fixed Inauguration Day for presidents on January 20th.

Amendment XIX (1920)

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

Amendment XX (1933)

Section 1. The terms of the President and Vice President shall end at noon on the 20th day of January,^{aa} and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Section 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Section 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Section 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this Article

Section 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

Amendment XXI (1933)

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

bb: Before Franklin Roosevelt's third term, presidents refused to serve more than two terms largely out of custom. This amendment made it legally binding – now presidents get no more than eight years in office.

Amendment XXII (1951)

Section 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once.^{bb} But this Article shall not apply to any person holding the office of President, when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

cc: This amendment is why Washington D.C., despite not being a state, still gets to vote in presidential elections. Since Washington D.C. is not a state, it has no state legislature, so Congress acts as its government in this case.

Amendment XXIII (1961)

Section 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State^{cc}; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXIV (1964)

Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXV (1967)**The Twenty-Fifth Amendment**

In the aftermath of the assassination of John Kennedy, and the health concerns of his successor, Congress decided to clarify several details about how the vice president succeeds the president. This amendment also created the procedure by which the vice president can become the acting president, either by the president (several presidents have used this to transfer their powers to their vice president temporarily when undergoing medical procedures) or by the vice president and cabinet members. The latter scenario, in which a vice president and a majority of the cabinet declare a president unable to serve and the vice president immediately become acting president, has never occurred.

Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Section 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties

of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

Amendment XXVI (1971)

Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXVII (1992)

No law varying the compensation for the services of the Senators and Representatives shall take effect, until an election of Representatives shall have intervened.

Glossary

approval ratings: Polling measures of public support for the president, tracking how favorably citizens view the current holder of the office.

Articles of Confederation: The first governing document of the United States, ratified in 1781, which established a weak central government with no executive branch. Its failures led directly to the Constitutional Convention.

Authorization for Use of Military Force (AUMF): A congressional resolution granting the president authority to use military force against a specified enemy. AUMFs are often broadly worded, giving the president wide discretion in how and against whom they are applied.

battleground states: States where either major political party has a realistic chance of winning the electoral votes, making them the primary targets of presidential campaign resources and attention.

Cabinet: The heads of the major executive departments (such as the Secretaries of State, Defense, and Treasury), who advise the president and administer the largest agencies of the executive branch.

Commander in Chief: The president's constitutional role as supreme commander of the nation's armed forces, established in Article II, Section 2.

Constitutional Convention: The 1787 gathering in Philadelphia at which delegates drafted the United States Constitution and created the office of the presidency.

Electoral College: The system by which each state appoints a number of electors equal to its congressional delegation; these electors formally cast votes to elect the president.

executive agreements: International agreements negotiated by the president with foreign governments that do not require Senate ratification, unlike formal treaties.

executive orders: Presidential directives, typically used to manage the operations of the executive branch or to implement existing legislation.

Executive Office of the Presidency (EOP): The collection of agencies and staff that directly support the president's work, including the White House Office, National Security Council, and Office of Management and Budget.

executive power: The authority vested in the president by Article II of the Constitution. The scope and limits of this power have been contested since the founding.

executive privilege: The president's claimed right to withhold certain communications and documents from Congress, the courts, and the public.

expectations gap: See *leadership dilemma*.

framers: The delegates to the Constitutional Convention who drafted, debated, and ultimately produced the United States Constitution.

going public: A presidential strategy of directly appealing to citizens and cultivating public opinion in order to pressure Congress or other actors to support the president's goals.

impeachment: The process by which the House of Representatives formally charges a federal official with misconduct; conviction and removal from office requires a two-thirds vote of the Senate.

inherent power: Presidential authority that presidents claim to possess by virtue of the office itself, beyond the powers explicitly listed in Article II of the Constitution.

invisible primary: The pre-election competition among presidential candidates for fundraising, endorsements, media attention, and organizational support before any primary votes are cast.

judicial deference: The tendency of courts to defer to presidential judgment, particularly in matters of foreign affairs, national security, and the internal workings of the executive branch.

judicial review: The power of federal courts to strike down laws and executive actions that conflict with the Constitution, established by *Marbury v. Madison* (1803).

leadership dilemma: The structural gap between the enormous expectations the public places on the presidency and the relatively limited formal powers the office actually possesses. Also called the *expectations gap*.

pardon: The president's power to forgive individuals for federal crimes, established in Article II; one of the few presidential powers not subject to a check by another branch.

permanent campaign: The continuous, campaign-style management of presidential image, messaging, and public relations that characterizes modern administrations.

pocket veto: A presidential veto in which the president allows a bill to die by not signing it within ten days while Congress is adjourned, preventing a veto override.

presidential primary: An election in which voters affiliated with a political party select their preferred candidate for the presidential nomination.

recess appointments: Appointments made by the president while the Senate is in recess, allowing positions to be temporarily filled without Senate confirmation.

recognition power: The president's exclusive constitutional authority to recognize foreign governments as legitimate, exercised through the decision to receive or refuse to receive their ambassadors.

separation of powers: The constitutional principle dividing governmental authority among the legislative, executive, and judicial branches, with each branch possessing distinct powers and checks on the others.

signing statements: Written comments issued by the president at the time of signing a bill into law, sometimes used to signal the administration's interpretation of the legislation or intent to enforce it selectively.

State of the Union: The annual presidential address to Congress required by Article II, Section 3; originally delivered as a written report, it is now a major public speech broadcast to the nation.

Take Care Clause: The Article II provision requiring the president to "take Care that the Laws be faithfully executed," which both constrains the presidency to follow the law and empowers presidents to claim broad authority to enforce it.

treaty: A formal international agreement negotiated by the president that requires the advice and consent of two-thirds of the Senate before it can take effect.

two presidencies: The theory that the presidency operates with substantially greater power and independence in foreign policy than in domestic affairs.

unitary executive theory: The argument that because Article II vests "the executive power" in a single president, the president has sole and complete authority over all personnel and decisions within the executive branch.

veto: The president's constitutional power to reject legislation passed by Congress; Congress may override a veto with a two-thirds vote in both the House and Senate.

War Powers Resolution: A 1973 law, passed by Congress over a presidential veto, requiring the president to notify Congress within 48 hours of committing troops abroad and setting a 60-day limit on unauthorized military deployments.

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THE OFFICE OF THE PRESIDENCY

POWERS AND RESPONSIBILITIES

Popular imagination gives the President of the United States vast, sweeping power. The Constitution tells a different story. This book is about the gap between the two.

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