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During the presidential campaign in 2007 and 2008, Barack Obama spoke often about his constitutional principles. In particular, he objected to claims by George W. Bush that the President possesses certain “inherent” powers that could not be checked by Congress or the judiciary. Moreover, Bush promoted the belief in a Unitary Executive, giving the President full control over all agencies and officers within the executive branch. After his inauguration in January 2009, to what degree did the principles announced by President Obama guide his actions over the next eight years? To what extent did he begin to adopt the model of independent power advocated by Bush? More generally, what lessons can we draw about the presidency and our constitutional system?

The book provides a broad framework. The purpose is to analyze the two terms of Barack Obama within the context of previous Presidents, particularly those who served from Truman to the present time. The first chapter examines the presidential power that Obama inherited, beginning with the principles set forth by the Framers. That basic system of separation of powers and checks and balances has been substantially altered by scholars who idealized the presidency, Supreme Court decisions that promoted the belief in presidential exclusive and plenary powers in external affairs, and military initiatives by Presidents from the Korean War in 1950 to intervention in Libya in 2011, taking the country to war without first seeking and receiving authority from Congress.

What general pattern emerges? Presidential achievements are often offset by failures and violations that are then regularly repeated over subsequent decades. With a better understanding of the U.S. system of government, we should not have to see the same presidential errors repeated from one administration to the next, damaging not only the occupant in office but the country and its constitutional system. Too often our vaunted system of self-government has been replaced by presidential initiatives never sanctioned by the Framers and their commitment to democracy.

The sources for this book rely heavily on the Public Papers of the Presidents and Daily Compilation of Presidential Documents: approximately 15,000 pages for the Obama years. Only by reading his remarks to Congress and the press; at campaign rallies and fundraisers; meetings with foreign leaders; documents including executive orders, proclamations, and memoranda; and
his veto messages can one confidently judge the degree to which Obama remained faithful to his announced constitutional principles. The book is fully documented, with citations to numerous secondary sources.

Because the book focuses on constitutional questions, it does not attempt to address and analyze a number of important issues of public policy pursued by Obama during his two terms in office: climate change, commitment to wind and solar power, rescuing the auto industry, education initiatives (Race to the Top and No Child Left Behind), and financial reform (Dodd-Frank). Those issues are covered in substantial detail in books by other authors. Moreover, the book does not attempt to cover every constitutional issue that emerged during the Obama administration, including federalism, property rights, and religious liberty. Ilya Somin addressed those issues in his article “Obama’s Constitutional Legacy,” published at 65 Drake L. Rev. 1039 (2017). I chose to limit my list of constitutional issues so that I could analyze them in greater depth.

An essential presidential duty flows from Article II, Section 3, of the Constitution, requiring the President to recommend to Congress “such Measures as he shall judge necessary and expedient.” The Framers expected national policy to be established through the regular legislative process. Policies adopted by statute have greater permanence and public support than presidential actions in the form of executive orders, proclamations, and other initiatives. Legislative efforts covered in this book include economic recovery, the Affordable Care Act, gun rights, efforts to close Guantánamo, individual rights, immigration policy, campaign finance, and treaties. In analyzing those issues, it is important to discuss the methods used by the Obama administration to secure legislative passage, including remarks by the President in an effort to build public understanding and bipartisan support.

President Obama spoke often about his student years at Harvard Law School, where he served as president (editor-in-chief) of the Harvard Law Review. Later he taught constitutional law for ten years at the University of Chicago Law School. During his campaign for the White House in 2007–08, he was openly critical of many constitutional positions taken by President George W. Bush. On December 20, 2007, in responding to questions from Charlie Savage of the Boston Globe, Obama rejected the claim of the Bush administration that the President possesses inherent powers to conduct surveillance for national security purposes without judicial support and contrary to statutory policy. Obama said: “As president, I will follow existing law.”1 Asked whether President Bush possessed constitutional power to bomb Iran without

seeking congressional authority, Obama replied that the President lacks power under the Constitution to order military force unless to stop “an actual or imminent threat to the nation.” 2 With regard to Libya in 2011, Obama did not follow that basic principle.

As for presidential signing statements, he told Savage it is legitimate for a President to use a signing statement to clarify ambiguous provisions and explain his intent to execute the law, but it would be an abuse of power to use such statements to evade laws that the President does not like. He promised not to use signing statements to nullify or undermine statutory policy, but believed that signing statements could be used to protect a President’s constitutional authority, even though he said the Bush administration had exceeded that principle. As explained in chapter 3, at times Obama also went beyond that principle.

On more general grounds, Obama told Savage that the President “is not above the law” and he “will abide by statutory prohibitions.” Obama rejected the view suggested in Justice Department memoranda during the Bush II administration that the President “may do whatever he deems necessary to protect national security,” including torture in defiance of congressional statutes. To Obama, torture “is unconstitutional, and certain enhanced interrogation techniques like ‘waterboarding’ clearly constitute torture.”

In analyzing the constitutional positions of Obama, both as a candidate and President, my book compares what he said with what he did. It is also important to examine a President’s understanding of how the national government functions. How effective is a President in making public policy by working jointly with Congress to obtain statutory authority? Instead, does the President prefer to act alone? It is possible for Presidents to use some nonstatutory techniques without serious political costs. At times, however, the price can be heavy. In taking the initiative in various areas, how well did Obama and his advisers anticipate the political downsides of acting unilaterally? No doubt Obama faced Republican opposition and often outright obstruction throughout his eight years in office, but did he attempt to keep partisanship within bounds? To what extent did he contribute to polarization that cost his own administration, the Democratic Party, and the political system?

By focusing on Obama’s record, there is no effort to imply that the performance of Congress has been adequate in recent decades. I worked for Congress from 1970 to 2010. For more than two decades I was impressed by the degree to which lawmakers and their staff understood their constitutional duties and performed them well. From 1995 to the present time, the record of Congress has been largely downhill, marked by greater partisanship

2. Id.
and a decline in the number of congressional staff working at the committee level. Finding difficulties at the presidential level does not excuse the failings of Congress. The concluding chapter identifies some constructive steps that Congress should take.

I very much appreciate guidance from David Congdon of the University Press of Kansas for comments on the general theme of this book and particular chapters. Much appreciation also to the two outside reviewers, Joel Aberbach and Bert Rockman, who provided very helpful and specific recommendations. In earlier stages, this book proposal profited greatly from colleagues who offered many constructive recommendations. I appreciate valuable advice from Bruce Ackerman, Dave Adler, Joe Baldi, Reb Brownell, Josh Chafetz, Henry Cohen, Jeff Crouch, Neal Devins, Chris Edelson, George Edwards, Mickey Edwards, Jenny Elsea, Garrett Epps, Tina Evans, Jasmine Farrier, Bruce Fein, Herb Fenster, Mike Glennon, Joel Goldstein, Fred Greenstein, Katy Harriger, Loch Johnson, Bill Jones, Heidi Kitrosser, Mike Koempel, Kevin Kosar, Sarah Kreps, Kyle Lorenzano, Chuck Myers, Walter Oleszek, Dick Pious, Jeff Powell, Harold Relyea, Mort Rosenberg, Mark Rozell, David Rudenstine, Mark Rush, Charlie Savage, Mitch Sollenberger, Ilya Somin, Bob Spitzer, Charles Tiefer, Steve Wayne, and Bill Wirth.

It has been my pleasure to publish many books with the University Press of Kansas. They analyze all three branches and focus on particular policy areas, including war powers, military tribunals, Nazi saboteurs, and religious liberty. For this book, I received excellent copyediting by Jon Howard. As managing editor, Kelly Chrisman Jacques kept in close touch to move the manuscript toward publication.
NOTE ON CITATIONS

All court decisions refer to published volumes whenever available: United States Reports (U.S.) for Supreme Court decisions, Federal Reporter (F.2d or F.3d) for appellate decisions, and Federal Supplement (F. Supp. or F. Supp. 2d) for federal district court decisions. There are also citations to Opinions of the Attorney General (Op. Att’y Gen.) and Opinions of the Office of Legal Counsel (Op. O.L.C.) in the Justice Department. Several standard reference works are abbreviated in the footnotes using the following system:

**Elliot**


**Farrand**


**The Federalist**


**Landmark**


**Richardson**

PRESIDENT OBAMA
PRESIDENTIAL POWER THAT OBAMA INHERITED

It would be misleading to think that contemporary presidential power can be drawn solely from the Constitution’s text, the Framers’ intent, and judicial rulings. In the years following World War II, presidential power expanded greatly in ways that run directly contrary to language in the Constitution and the system of checks and balances promoted by the Framers. What explains this growth? It would be a mistake to attempt an analysis of President Obama’s record solely by looking at his actions during eight years in office.

For more than seven decades, the Presidency has been idealized by scholars, the media, and the Supreme Court, yielding a model of executive power that damages not only constitutional government but, ironically, Presidents who overreach and exercise poor judgment. Initially, Obama rejected many of the extreme theories of executive power promoted by earlier Presidents, particularly George W. Bush. Nevertheless, broad claims of independent presidential power continued throughout Obama’s presidency, contributing to numerous setbacks in Congress and the courts. Before turning to Obama, it is important to understand how and why presidential power has increased from Harry Truman to the present time and how it has damaged both the country and its constitutional system.

The Original Design

When the Framers met in Philadelphia in 1787 to draft the Constitution, they were familiar with existing models of government in Europe that placed the power of external affairs solely in the hands of the executive. In his treatise published in 1690, John Locke spoke of three branches of government: legislative, executive, and “federative.” The latter consisted of “the power of war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth.” To Locke, the federative power (what we refer to today as “foreign affairs”) was “always almost united” with the executive. Any effort to separate the executive and federative powers, he warned, would invite “disorder and ruin.”

Almost a century later, the British jurist Sir William Blackstone developed his model of exclusive executive power over external affairs. He defined the king’s prerogative as “those rights and capacities which the king enjoys alone.”

Some of those powers included the right to send and receive ambassadors and of “making war or peace.” The king could make “a treaty with a foreign state, which shall irrevocably bind the nation.” No legislative branch action was required. He could issue letters of marque and reprisal (authorizing private citizens to undertake military actions) and possessed “the sole power of raising and regulating fleets and armies.”

When America declared its independence from England, all national executive powers were vested in the Continental Congress. The ninth article of the nation’s first national constitution, the Articles of Confederation, stated: “The United States, in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war.” The single exception lay in the sixth article: “No State shall engage in any war” without the consent of Congress unless invaded by enemies or advised that “some nation of Indians” planned to invade and the danger was too imminent to wait for Congress to assemble.

During debate at the Philadelphia convention, the Framers vested in Congress many powers over external affairs that Locke and Blackstone had placed with the executive. The power to go to war was not left to solitary decisions by a single executive. Instead, it required collective decision-making by legislative deliberation. On June 1, 1787, Charles Pinckney said he was for “a vigorous Executive but was afraid the Executive powers of <the existing> Congress might extend to peace & war &c which would render the Executive a Monarchy, of the worst kind, towit an elective one.” John Rutledge agreed that the executive power should be placed in a single person, “tho’ he was not for giving him the power of war and peace.”

James Wilson endorsed a single executive but “did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace &c.”

Edmund Randolph worried about executive power, calling it “the foetus of monarchy.” Delegates to the Philadelphia convention, he said, had “no motive to be governed by the British Governmt. as our prototype.”

2. 2 William Blackstone, Commentaries on the Laws of England 232 (1765 ed.).
3. Id., 233.
4. Id., 244.
5. Id., 250, 254.
7. 1 Farrand 64–65.
8. Id., 65.
States had no other choice he might adopt the British model, but “the fixst genius of the people of America required a different form of Government.” Wilson agreed that the British model “was inapplicable to the situation of this Country; the extent of which was so great, and the manners so republican, that nothing but a great confederated Republic would do for it.”

Although the President was made Commander in Chief, he did not receive Blackstone’s authority to go to war independently or control all matters related to national defense and foreign affairs. Instead, the Constitution provides in Article I that Congress shall have power to “raise and support Armies,” to “provide and maintain a Navy,” and to “make Rules for the Government and Regulation of the land and naval forces.” The British king could make treaties by himself. Under the U.S. Constitution, the President needs the support of two-thirds of the Senate. The rejection of Locke and Blackstone was sweeping.

Early in the debates at Philadelphia, a draft constitution empowered Congress to “make war.” Charles Pinckney objected that legislative proceedings “were too slow” for the safety of the country, particularly during an emergency when Congress might not be in session. James Madison and Elbridge Gerry moved to insert “declare” for “make,” leaving to the President “the power to repel sudden attacks.” Their motion carried, 7–2. After Connecticut changed its vote, the final tally was 8–1.11

The response to the Madison-Gerry amendment underscores the narrowness of the grant of presidential power. Pierce Butler wanted to give the President the power to make war, arguing that he “will have all the requisite qualities, and will not make war but when the Nation will support it.” Roger Sherman strongly objected: “The Executive shd. be able to repel and not to commence war.”12 Gerry protested that he “never expected to hear in a republic a motion to empower the Executive alone to declare war.”13 George Mason spoke “agst giving the power of war to the Executive, because not safely to be trusted with it; . . . He was for clogging rather than facilitating war.”14

Objections to vesting in the President the power to go to war were also made at the state ratifying conventions. In Pennsylvania, James Wilson voiced the prevailing sentiment that the system of checks and balances “will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at

10. Id., 66.
11. 2 Farrand 318–19.
12. Id., 318.
13. Id.
14. Id., 319
large.”15 In North Carolina, James Iredell compared the limited powers of the President with those vested in the British monarch. The king of Great Britain was not only the Commander in Chief “but has power, in time of war, to raise fleets and armies. He has also authority to declare war.” In contrast, the President “has not the power of declaring war by his own authority, nor that of raising fleets and armies. These powers are vested in other hands.”16 In South Carolina, Charles Pinckney assured his colleagues that the President’s power “did not permit him to declare war.”17

The constitutional principles expressed during the debates at Philadelphia and the ratifying debates reflect John Jay’s essay in Federalist No. 4. His expertise in foreign affairs might have made him sympathetic to independent executive actions in matters of war, but he warned: “It is too true, however disgraceful it may be to human nature, that nations in general will make war whenever they have a prospect of getting anything out of it.” Absolute monarchs, he said, “will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans.” Those and other motives, he said, “which affect only the mind of the sovereign, often lead him to engage in wars not sanctified by justice or the voice and interests of his people.”18

Alexander Hamilton is generally considered the Framer most committed to independent executive power, but he understood the constitutional limits placed on the President. At the Philadelphia convention, initially he offered his private opinion that “the British Govt. was the best in the world: and that he doubted much whether any thing short of it would do in America.”19 For him, there could be no “good Govt. without a good Executive. The English model was the only good one on this subject.” The “Hereditary interest of the King was so interwoven with that of the Nation, and his personal emoluments so great, that he was placed above the danger of being corrupted from abroad.” Although members of Congress would have fixed terms, he recommended: “Let the Executive also be for life.”20

In writing essays for the Federalist Papers, however, Hamilton understood the decisive break that America made with the British model. Describing the President in Federalist No. 69, he said “there is a total dissimilitude between

15. 2 Elliot 528.
16. 4 Elliot 107.
17. Id., 287.
19. 1 Farrand 288.
20. Id., 289.
and a king of Great Britain, who in an hereditary monarch, possessing the crown as a patrimony descendible to his heirs forever.”21 The power of the British king extended to “the declaring of war and to the raising and regulating of fleets and armies,—all which, by the Constitution under consideration, would appertain to the legislature.”22

When President George Washington issued his Neutrality Proclamation in 1793, warning citizens that they could be prosecuted if they took sides in the war between England and France, he was rebuffed by jurors who told him in no uncertain terms that criminal law in the United States is made by Congress, not the President. As explained at the start of chapter 3, Washington understood his error, stopped plans to prosecute, and came to Congress to seek statutory authority. Issuance of the proclamation sparked a lengthy public debate between James Madison (using the name Helvidius) and Alexander Hamilton (as Pacificus) concerning the scope of presidential power. Hamilton, while recognizing some limits on the authority to move the country from a state of peace to a state of war, broadly endorsed the use of executive authority.

In response, Madison called war “the true nurse of executive aggrandizement. . . . In war, the honours and emoluments of office are to be multiplied; and it is the executive patronage under which they are to be enjoyed. It is in war, finally, that laurels are to be gathered; and it is the executive brow they are to encircle.” The strongest passions and most dangerous human weaknesses of “ambition, avarice, vanity, the honorable or venial love of fame, are all in conspiracy against the desire and duty of peace.”23 Five years later, in a letter to Thomas Jefferson, Madison said that the Constitution “supposes, what the History of all Govts demonstrates, that the Ex. is the branch of power most interested in war, & most prone to it. It has accordingly with studied care, vested the question of war in the Legisl.”24

Idealizing the Presidency

From its inception in the 1870s and 1880s, the profession of political science was inextricably tied to law. The two disciplines could not be separated. The integrity of that linkage was evident in the work of Edward Corwin, who analyzed presidential power within the framework of constitutional law. Yet from the 1930s to the 1950s, political science began to break from its commitment to constitutional law.
to public law, turning instead largely to behavioral studies. With this development, political scientists now promoted the need for presidential energy, action, and decisiveness, without any legal constraints.25 Similarly, historians had made significant contributions to studying the presidency within constitutional boundaries. During this same period, they too began to find less interest in legal analysis. This shift in both professions influenced the way that the presidency was taught in the classrooms and discussed in professional journals, newspapers, and the media.

From World War II forward, American scholars regularly trumpeted the need for bold and unchecked presidential leadership. Arthur M. Schlesinger, Jr., ironically credited with exposing “the imperial presidency” (the title of his 1973 book), played a major role in promoting a larger-than-life U.S. President. His book The Age of Jackson (1945) described Andrew Jackson as a model for preserving democracy under the 1940s threat of world fascism. He praised Theodore Roosevelt for “usher[ing] in a period of energetic government” and paid tribute to Woodrow Wilson for understanding the need for “executive vigor and government action.”26 His three books on The Age of Roosevelt praised the activism and leadership of Franklin D. Roosevelt.27

In a book published in 1969, Schlesinger again promoted a strong and independent presidency. He explained that the President in domestic affairs did not have “the same constitutional authority as in foreign policy,” citing for support the Supreme Court’s 1936 Curtiss-Wright decision, which described the President “as the sole organ of the federal government in the field of international relations.”28 Simply reading the text of the Constitution would dispel any notion that the President has sole authority over external affairs. As a historian, Schlesinger should have read the speech by John Marshall in 1800 as a member of the House of Representatives, where he referred to the President as the “sole organ of the nation in its external relations, and its sole representative with foreign nations.” The Court in Curtiss-Wright seized on that remark to promote the notion of a President with exclusive control over external affairs.29 Schlesinger failed to analyze Marshall’s speech to see if it promoted plenary and exclusive power for the President in the field of external affairs. Clearly it did not. Marshall defended President John Adams for extraditing a British subject to Great Britain for trial on the basis of authority

26. Arthur M. Schlesinger, Jr., The Age of Jackson 188 (1949 ed.).
presidential power that Obama inherited

expressly provided in the Jay Treaty. Marshall did not support in any way plenary or exclusive presidential power over foreign affairs.

In 1973, Schlesinger decided to issue a personal apology for promoting independent presidential power in external affairs. He explained that especially in the twentieth century “the circumstances of an increasingly perilous world as well as of an increasingly interdependent economy and society seemed to compel a larger concentration of authority in the Presidency.” Why was that “compelled”? Other scholars, including Corwin, did not feel obliged to transfer to the President power that exceeded constitutional boundaries. Schlesinger added: “It must be said that historians and political scientists, this writer among them, contributed to the rise of the presidential mystique. But the imperial Presidency received its decisive impetus, I believe, from foreign policy; above all, from the capture by the Presidency of the most vital of national decisions, the decision to go to war.” It should have been obvious to Schlesinger that such a “capture” would be directly contrary to constitutional principles.

Schlesinger acknowledged that his choice to promote independent presidential power was not compelled. It was a personal choice: “American historians and political scientists, this writer among them, labored to give the expansive theory of the Presidency historical sanction.” What value was advanced by that labor? What good would come from it? Scholars should have understood that concentrating power in the President would weaken Congress, self-government, and the system of checks and balances, all designed to protect individual liberties. That should have been clear from authoritarian regimes that the United States and the Allies fought against during World War II. Every presidential scholar did not march to the same drum. As Schlesinger noted, Corwin did not push the Constitution aside. Indeed, Corwin denounced Schlesinger and other scholars as “high-flying prerogative men” who ascribed to the President “a truly royal prerogative in the field of foreign relations” without appreciating the need for legal and constitutional constraints.

From the 1940s through the 1960s, a number of presidential scholars advanced their professional careers by arguing that it was politically necessary and constitutionally permissible to transfer ever greater power to the President. Clinton Rossiter’s The American Presidency, published in 1956 followed by a paperback edition in 1960, promoted an idealized image of executive

32. Id., ix.
33. Id., 124.
34. Id., 139.
power. The first page of the book offers praise to the U.S. President from an Englishman, John Bright, writing in 1861 that “there is nothing more worthy of reverence and obedience, and nothing more sacred, than the authority of the freely chosen magistrate of a great and free people; and if there be on earth and amongst men any right divine to govern, surely it rests with a ruler so chosen and so appointed.” The words “reverence,” “sacred,” and “divine” describe the British King. Perhaps even a deity. They do not describe the office of the President created by the Framers.

Rossiter admitted that the American presidency has had “its fair share of warts” but wanted “to make clear at the outset my own feeling of veneration, if not exactly reverence, for the authority and dignity of the Presidency.” Veneration and reverence typically express respect, awe, and devotion, describing something as holy and sacrosanct. Nothing in the American presidency from 1789 forward merits that level of flattery and idolatry. Nor is there any possibility of reliable scholarship with that kind of attitude.

When President Harry Truman went to war against North Korea in 1950 without seeking statutory authority from Congress, Schlesinger and fellow historian Henry Steele Commager made short work of constitutional principles by offering their support for Truman. In a letter to the New York Times, published on January 9, 1951, Schlesinger attacked Senator Robert Taft for claiming that Truman “had no authority whatever to commit American troops to Korea without consulting Congress and without congressional approval.” He said Taft was “demonstrably irresponsible” for ignoring what Schlesinger cited as earlier examples of Presidents sending U.S. troops overseas without prior congressional approval.

The precedents Schlesinger provided, such as President Jefferson ordering the Navy into the Mediterranean to combat the Barbary pirates, were defensive actions and had no application to Truman taking the country to war. In fact, Jefferson sought authority from Congress for any offensive actions. Congress passed ten statutes authorizing Presidents Jefferson and Madison to act militarily against the Barbary pirates. Schlesinger concluded that until Taft “and his friends succeed in rewriting American history according to their own specifications these facts must stand as obstacles to their efforts to foist off their current political prejudices as eternal American verities.” The political prejudices were those of Schlesinger, not Taft. Schlesinger would later regret his attacks on Taft, referring to the language “demonstrably irresponsible” as the result of “a flourish of historical

36. Id., 15–16.
documentation and, alas, hyperbole.”

By the early 1970s, Schlesinger wrote that he “freely concedes that Senator Taft had a much more substantial point than he supposed twenty years ago.”

In an article published on January 14, 1951, Commager criticized members of Congress for claiming that Truman’s military actions in Korea had “usurped” power and “violated the laws and the Constitution of the United States.” Those attacks, he said, had “no support in law or in history.” According to Commager, the precedents established by the Framers, the record of Presidents from George Washington to Franklin D. Roosevelt, court rulings, congressional debate, and “learned commentary” left no doubt about the constitutionality of Truman’s unilateral initiative: “It is so hackneyed a theme that even politicians might reasonably be expected to be familiar with it.” Commager claimed that President Jefferson “inaugurated the war with the Barbary pirates” without acknowledging that Jefferson claimed authority only for defensive actions. Anything of an offensive nature, Jefferson said, required congressional authority. As already noted, Congress passed ten statutes authorizing military action against the Barbary pirates.

By the mid-1960s, a chastened Schlesinger and Commager urged Congress to restore its constitutional authority over external affairs by placing effective checks on presidential initiatives. Schlesinger counseled that “something must be done to assure the Congress a more authoritative and continuing voice in fundamental decisions in foreign policy.” Commager told the Senate Foreign Relations Committee in 1967 that there should be a reconsideration of executive-legislative relations in the conduct of foreign relations. During testimony in 1971 he appealed for stronger checks on presidential war powers, remarking that “it is very dangerous to allow the President to, in effect, commit us to a war from which we cannot withdraw, because the war making power is lodged and was intended to be lodged in the Congress.” Schlesinger admitted to contributing “to the presidential mystique.”

Richard Neustadt’s Presidential Power, first published in 1960 and reissued...

39. Schlesinger, The Imperial Presidency, 139.
40. Id., 286.
42. Id.
43. Arthur M. Schlesinger, Jr., and Alfred de Grazia, Congress and the Presidency: Their Role in Modern Times 28 (1967).
44. “Changing American Attitudes towards Foreign Policy,” hearings before the Senate Committee on Foreign Relations, 90th Cong., 1st Sess. 21 (1967).
46. Schlesinger, The Imperial Presidency, ix.
as a paperback four years later, had a profound impact on scholars, students, and the public. The book attracted broad appeal because it focused on stories, case studies, and the examination of presidential power in practical terms. The downside of this approach, as explained by Ronald Moe, was to jettison legal and constitutional values, divorcing presidential power from Corwin’s framework of public law.  

Neustadt begins with a modest and attractive theme by defining presidential power as “the power to persuade.” In a phrase that seems consistent with the constitutional system of checks and balances, he referred to political power as “a give-and-take.” To Neustadt, the Framers did not create a government of separated powers. Instead, they created “a government of separated institutions sharing powers.” Further into the book, however, he urged Presidents to take power, not give it or share it. Power is to be acquired and concentrated in the presidency, used there for personal reasons. His favorite President was Franklin D. Roosevelt, and he criticized President Dwight Eisenhower for failing to seek political power for personal use. As Neustadt explained, the “politics of self-aggrandizement as Roosevelt practiced it affronted Eisenhower’s sense of personal propriety.” Was it merely an issue of personal propriety? A more persuasive explanation is Eisenhower’s respect for such constitutional values as separation of powers and federalism. 

Nowhere did Neustadt ask whether Truman possessed constitutional or statutory authority to go to war against North Korea. Certainly Truman made no effort to “persuade” Congress to grant him authority to take the country to war against another country, as all Presidents before Truman felt compelled to do. For Neustadt, there was no need for “give-and-take” or “shared power.” It was Truman’s duty, he said, “to make decisions and to take initiatives.” Among Truman’s personal values, “decisiveness was high upon his list.” Truman’s image of the President was the “man-in-charge.” Neustadt wrote about “a man who seeks to maximize his power.” His book emphasizes personal power, not institutional or constitutional authority. Neustadt measured success by action, vigor, decisiveness, initiative, energy, and personal power. 

Neustadt did not acknowledge that his model could result in decisions that were not only unconstitutional but harmful to the nation. When his book was reissued in 1990 under a different title, Neustadt seemed to alter his model of the President after the abuse of executive power by Presidents Lyndon B.

49. Id., 43, 45, 47.
50. Id., 42, emphasis in original.
51. Id., 157.
52. Id., 166, 171.
Johnson and Richard Nixon, reflecting the escalation of the Vietnam War and Watergate. He now wrote, in a manner entirely different from the tone of his 1960 and 1964 editions: “To share is to limit; that is the heart of the matter, and everything this book explores stems from it.” 53 Nothing in his earlier editions promoted those values. He now objected that Johnson and Nixon had pursued power “to the point of obsession.” 54

Rediscovering the Constitution

A number of presidential scholars began to push back against the pro-executive models of Rossett, Schlesinger, Commager, and Neustadt. In a paper delivered at the 1970 American Political Science Association annual meeting, Thomas Cronin poked holes in romantic and idealized models of the presidency. He criticized scholars for promoting “inflated and unrealistic interpretations of presidential competence and beneficence.” Infatuation with the President necessarily diminished the role of Congress, constitutional limits, checks and balances, separation of powers, and the democratic process. 55

In a book published five years later, Cronin developed those themes in a chapter titled “The Cult of the Presidency: Halo for the Chief.” He objected to Neustadt’s suggestion that if a President “lacks a consuming hunger for the office and a penchant for manipulating people, then he or she is unfit for the office.” 56 The final chapter of the book has a title that would have been inconceivable to Rossett, Schlesinger, Commager, and Neustadt: “Making the Presidency Safe for Democracy.”

Many critiques of presidential power appeared in the 1980s and 1990s. Books by Larry Berman analyzed the miscalculations and deceit by President Johnson in escalating the war in Vietnam. Manipulation of information helped discredit Johnson and his advisers. 57 John Burke and Fred Greenstein explained how Johnson’s style of leadership compared unfavorably with Eisenhower’s and undermined the reality, feasibility, and constitutionality of U.S. national security policy. 58 In 2000, Alexander DeConde released a trenchant analysis of executive wars, noting that scholars and other writers “built

54. Id., xi.
an industry out of the study of the presidency. They gave it fictitious qualities that defied reality."

James Pfiffner turned his attention (and ours) to presidential lies, big and small. An article published in 2004 critically examined statements by the Bush administration after the 9/11 attacks designed to promote war against Iraq. He followed with a book that analyzed presidential character and the propensity to deceive Congress and the public. A subsequent book, published in 2008, repudiated the political model that permits a President to act militarily, on his own, cut free from the system of checks and balances.

Also in 2008, Gene Healy published a book that analyzes the inflated hopes and dreams of an all-wise, informed, and well-intentioned President. He explains why this fundamentally flawed concept of executive power makes us less safe, less free, and less constitutional. Although Healy recognized some progress in breaking free of the Age of the Heroic Presidency, he cautioned that “we have farther still to go before we free ourselves of our atavistic tendency to see the chief magistrate as our national father or mother—responsible for our economic well-being, our physical safety, and even our sense of belonging.”

A thoughtful study by Peter Shane in 2009 pointed out that “time and time again, it has become evident that Presidents, left relatively unchecked by dialogue with and accountability to the other two branches, behave disastrously.” The model of a unilateral presidency “is thus not appealing either as constitutional interpretation or as good institutional design. To put the point another way, the Framers got this right.”

In two books published in 2013 and 2016, Chris Edelson combines his previous training as a lawyer with his current position as a professor of government to analyze the scope and limits of presidential war power. The first study explains how assertions of inherent and unchecked executive power endanger individual rights and constitutional liberties. In the second, he reviews the predictions by some scholars that the Obama presidency would

restore the rule of law by rejecting extravagant claims of presidential power. Instead, he concludes that the Obama presidency fundamentally continued the approach by George W. Bush and failed to place meaningful limits on presidential power.\textsuperscript{66}

At the same time, some scholars continue to defend broad presidential power in times of crisis. In a book published in 2007, Eric Posner and Adrian Vermeule point to the executive branch as the only political institution with the resources, power, and flexibility to respond to threats of national security. They argue that civil liberties are appropriately compromised because they “interfere with effective response to the threat.”\textsuperscript{67} They wrote the book to “restrain other lawyers and their philosophical allies from shackling the government’s response to emergency with intrusive judicial review and amorphous worries” about the consequences of executive actions in the face of threats.\textsuperscript{68} Similarly, they advised judges to defer to executive decisions “though we have no view about whether these policies are correct.”\textsuperscript{69} In short: defer to executive actions whether they are correct or incorrect.

Posner and Vermeule followed with a second book, published in 2010, that promotes two entirely different methods of analysis. They looked realistically and concretely at the deficiencies of Congress and the judiciary, concluding that neither branch can be entrusted with national security policy. When they turned to the President and the executive branch, however, they abandoned realism and embraced a view of executive power that is highly idealistic and imaginary. They attribute to the President an array of talents and capacities rarely seen in any occupant of the office. According to their analysis, the President “knows the range of options available, their likely effects, their expected costs and benefits—thanks to the resources and expertise of the executive branch—and so, if he is well-motivated, he will choose the best measures available.”\textsuperscript{70} Nothing in the history of presidential military operations justifies that level of trust. They paid no attention to presidential incompetence and errors of judgment in such wars as Korea, Vietnam, and Iraq in 2003.\textsuperscript{71}

\textsuperscript{68} Id., 275.
\textsuperscript{69} Id., 94.
\textsuperscript{70} Posner and Vermeule, The Executive Unbound: After the Madisonian Republic 130 (2010).