

Introduction

Here is a quick multiple choice exam:

1. Barack Obama . . .
 - (a) was a wise leader who faithfully observed constitutional limits.
 - (b) abused his powers and violated the Constitution.
2. Donald Trump . . .
 - (a) was a wise leader who faithfully observed constitutional limits.
 - (b) abused his powers and violated the Constitution.

It is unlikely that many of us chose the same option for both questions. Such disputes over the constitutionality of presidential actions are nothing new. Many Americans, not just in the South but also in the North, denounced Abraham Lincoln as a dictator wielding unconstitutional authority. Over the past forty years, Presidents Ronald Reagan, George W. Bush, Barack Obama, and Donald Trump stand out as lightning rods for claims of unconstitutional usurpation of power. Two presidents during those four decades were impeached by the House of Representatives (one of them twice), though they both escaped conviction in the Senate.

We need to keep in mind that the same constitutional powers are held by the presidents we revere and those we detest. There's a powerful temptation to celebrate presidential powers when exercised by the presidents we admire, forgetting that those powers can also be used badly by other presidents. I felt this temptation when writing a book about Lincoln and the Constitution. I constantly had to remind myself that other presidents had used those same powers with less judgment and compassion and sometimes toward bad ends. The great American historian Arthur Schlesinger Jr. fell into this trap while celebrating Franklin D. Roosevelt's use of the war power, only to realize during the Vietnam War that he had overlooked the dark side of that power.

Our tendency to tailor our view of presidential power to the current political situation makes the constitutional issues even harder to understand. Regardless of who is in the White House these days, there has been a fiery debate over whether that particular president has stepped over the constitutional line. The debate features spirited claims of constitutional usurpation on one side and the need for strong leadership on the other. Someone is sure to say there's a constitutional crisis. All of which must leave many people wondering: What constitutional powers does the president have? And why, after more than two centuries, are the boundaries of those powers so unclear?

I wish I could give definitive answers to those questions. But even among scholars, many of the issues are hotly contested. Not everything is up for grabs, and this book is partly about what constitutional law *does* tell us about presidential power and its limits. But it is also about the gaps and uncertainties. I cannot always provide answers, but I can explain what the debate is about so you can judge for yourself.

Ultimately, there are two reasons for the gaps in established law. One is simply that from the beginning, Americans have found it difficult to strike the right balance between limiting abuse of power and authorizing its exercise when needed. The other reason, however, is

that the process of resolving conflicts over presidential power is as much political as legal. Many disputes take place outside the courts, so there is no neutral party to decide when the president has transgressed congressional mandates or whether those mandates themselves are constitutional. Without a neutral arbitrator, we end up with a tug-of-war between presidents and Congress with no definitive answer in sight.

Presidential powers can provide sorely needed national leadership, especially in times of crisis. Those powers also come at a price. Centralizing control of the executive branch in the White House can lead to more coherent, decisive federal policies. Centralized power also allows presidents to force the executive branch into actions that may be unconstitutional or violate a federal statute. A president may act for personal gain or to reward campaign contributors. Giving the president broad authority over foreign policy and the military can be crucial in a dangerous world, but it creates dangers of its own if those powers are misused.

My political views are no secret. A quick look online will reveal my opposition to President Trump. But this is not a book about the Trump presidency. There are already plenty of books attacking or defending the constitutionality of his actions. That's an important debate but not one this book aims to join. Pitched disputes about the scope of presidential power existed long before he became president and will long outlast him. For me, Trump is a reminder of the need to balance the dangers of executive power against its benefits. If you disagree about Trump, I'm sure you can find another recent president whose actions you consider an abuse of power.

Like virtually everyone else in America, I have strong views about Trump and other recent presidents. But this is not a book about the terrible transgressions of President X or Y, or the unjust accusations of abuse of power by President Z, or even the glorious achievements of A, B, or C. It can be really hard to think about the constitutional

issues in isolation from our strong feelings about the person who currently inhabits the White House. Rules that give power to good presidents also give power to bad ones; and rules that prevent presidents from doing bad things will also sometimes prevent them from doing good things. This is true whatever your personal opinion about which presidents are good and what presidential actions are bad. That's why rules have to strike a balance between empowering presidents and constraining them—an extremely difficult balancing act.

This book is not intended as an argument, much less a polemic, about any particular president. It's not even an advocacy piece for a narrow or broad reading of presidential powers. But it is very much an advocacy piece in another sense. It advocates for something simple, something we all used to take for granted: the need to carefully consider arguments that we disagree with, along with the need to apply the same legal standards to the leaders we like and those we hate. Maybe that seems like a trite perspective. Yet a quick look at current public discourse makes it dramatically clear just how endangered that perspective is. I feel strongly that our health as a democracy and the preservation of the rule of law depend on strengthening that perspective. It may seem strange to say that I am passionately devoted to the ideal of reasoned debate. Yet that *is* what I believe, and it is the perspective I mean to advocate.

If there has never been full consensus about what the Constitution intended for the presidency, that may well be because the Framers did not have a very clear sense of the office they were creating, or at least not one that was sufficiently explicit and clear to drive a consensus in later years. After the Constitution was ratified, conflicts almost immediately arose about the role of the president among some of the Constitution's leading supporters.

Many issues that arose in the early years continue to percolate today. One such issue involves the degree of presidential control over the executive branch: What positions does the president get to fill,

when do those appointments need Senate approval, and can the president remove government officials at will, including special prosecutors? The Supreme Court has been especially active in this area recently. Other major disputes concern the president's power on issues relating to foreign affairs and national security. These include the power to recognize foreign governments, make executive agreements (rather than treaties), and withdraw from treaties. Especially fraught issues involve the president and the war power: the decision to use force, Congress's power to declare war, the commander in chief power, and the delegation of power from Congress. And cutting across these categories is the power of presidents to take emergency action without express authority from Congress or sometimes even contrary to congressional dictates.

Of course, there are many informal forces that can keep a president in check, including public opinion, the desire for reelection, and resistance from other parts of the executive branch. But constitutional law also limits presidential power in several ways. Courts may intervene either to prevent the president from invading the powers of other branches of government or to enforce the restrictions that the Bill of Rights places on all governmental powers. The clash between presidential powers and individual rights has led to some dramatic Supreme Court decisions, the War on Terror and Donald Trump's travel ban being recent examples. Judicial efforts to limit presidential powers encounter constitutional issues of their own, involving matters such as executive privilege, presidential immunity from damages, and possible limits on criminal prosecution of a president. Congress also has the ability to impose checks on the president, using the power of the purse, congressional investigations, and ultimately the power of impeachment. These also raise constitutional issues.

I would like this book to be useful for everyone, regardless of political stance or viewpoint on executive power. My focus is not on proposing a new theory for resolving disputes about the constitutionality of

presidential power. I try to distinguish as clearly as I can between my descriptions of the history and state of the law and the parts of the discussion where I am giving my own views. In general, my own view is that the presidency is best seen as an evolving institution, heavily shaped by the course of our history. Many disputes about presidential power are resolved through the political process, but when courts intervene, they need to maintain a balance between the need for vigorous presidential authority and the necessity of restraints against autocracy.

To set the stage for the discussion, I begin with some general background about the institution of the presidency and the Constitution's relatively brief discussion of presidential powers. Then I give a preview of the main issues involving presidential power.

The American Presidency

Questions about presidential power are not unique to the United States. Some other countries have followed our approach to executive power. But this is far from universal. Americans are so focused on the presidency that many would be surprised to learn that our presidential form of government is in the minority among democratic systems internationally.

Most democracies have a parliamentary system in which the head of government, usually called the prime minister, is chosen by the legislature (or sometimes one house of the legislature). Thus, the British parliamentary system has actually turned out to be more popular than our system. Some nations with prime ministers have a separate figure, often called the president, who serves a largely ceremonial function as head of state. In the British setting, parliamentary government generally guarantees that the executive and the House of Commons represent the same political party, minimizing conflict between the two branches. Divided government of the kind we see in the United States is unlikely to occur in Britain, and normally the prime minister and

the House of Commons are in full agreement. But such conflicts do sometimes arise. During Brexit, the British Parliament demanded a role in decision making, even though foreign affairs issues have always been considered the province of the Crown (meaning, in practice, the prime minister). In contrast, our own system of government is actually designed to produce tension between the executive and legislative branches, in the name of “checks and balances.”

Commentators are divided about the merits of presidential and parliamentary systems. Critics of the presidential system argue that it invites impasses between the executive and the legislature, often tempting the executive to take unilateral action. They also argue that our system leads to a “cult of personality” surrounding the president that lends itself to populist politics rather than reasoned public debate. Moreover, second-term presidents are not eligible to run for a third term, so they are lame ducks from the time they take office. Supporters of presidential government argue that it has many compensating virtues. They argue that it provides more unified administration and greater electoral accountability because the president provides a focal point for voters and greater stability because Congress and the president generally have to agree to any change in law. Supporters of the presidential system also point to flaws in the parliamentary system, such as the possibility that party control will leave the prime minister unchecked and unaccountable.

Both systems have strengths and weaknesses. Our system of government is clearly committed to the presidential model. Yet the critics are right about some of the weaknesses of this system. Alongside the formal constitutional rules, informal norms have evolved that can sometimes counter those weaknesses. Those norms aren’t “law,” but they can have real power to restrain presidents. Donald Trump was as uninhibited by norms as any president in history, but even so, he found it necessary to give way to them on more than one occasion.

For instance, Trump clearly had the legal authority to halt an investigation by a special counsel into possible cooperation between the Trump campaign and the Russian government. Doing so would have required some roundabout action. He clearly had the authority to fire the attorney general and install an acting attorney general who would carry out his wishes. The attorney general could have rescinded the regulation authorizing the appointment of special prosecutors and then fired Robert Mueller. If necessary, Trump could have repeated the process as often as needed until he got an acting attorney general who would do what he wanted. That is essentially what Richard Nixon did during the “Saturday Night Massacre” when he tried to halt the Watergate investigation.

Although Trump did eventually fire Attorney General Jeff Sessions, none of the rest of this process occurred. It would have been legal for Trump to fire Mueller, but even his congressional advisers told him that doing so would provoke a crisis that would imperil his presidency. Sometimes norms are stronger than law: Trump did not have the practical power to do what he clearly had the legal power to do.

The constitutional text provides a barebones sketch of presidential power. The first sections of the Constitution deal with Congress (Article I), the president (Article II), and the courts (Article III). Article II of the Constitution, which defines the presidency, is relatively brief—much shorter than Article I’s coverage of Congress and its powers. And the language specifically relating to presidential powers is even shorter. Maybe that’s because everyone already understood what those powers would be. Or maybe it was because no one was really sure, so they left the issue for later development.

Article II begins with the statement, “The executive Power shall be vested in a President of the United States of America.” As we will see, this vesting clause can be read either as a grant of authority or as merely descriptive of the president’s role vis-à-vis the other branches of government. One of the great fracture lines in constitutional de-

bates over presidential power is what to make of this language. For some, it means everything; for others, it means almost nothing.

Section 1 then provides a lengthy description of election procedures. This was the result of much labored debate at the Constitutional Convention. The delegates to the convention had a hard time figuring out who should elect the president, how long the president should serve, and whether the president should be term limited. Section 1 concludes with the presidential oath clause, prescribing a special oath for this office, in which the new president swears to “faithfully execute the Office of President of the United States, and to the best of my Ability, preserve, protect, and defend the Constitution of the United States.”

Sections 2 and 3 of Article II describe certain presidential powers. In terms of national security and foreign affairs, the president is made commander in chief of the military, given the power to make treaties (subject to Senate approval), and given the authority to receive ambassadors. In terms of the internal operations of the government, the president can request written opinions from “principal officers,” can appoint government officials including ambassadors and judges, can issue pardons for “Offenses against the United States,” can propose legislation, and is more generally directed “to take Care that the Laws be faithfully executed.” By its language, the take care clause imposes a duty on the president; there is debate about whether by implication it gives the president additional powers to carry out this duty.

There are some powers that are not specifically described: the power to begin military hostilities, the power to recognize (or refuse to recognize) foreign governments, the power to remove federal officials, the power to order lower-level officials to take specific actions or refrain from those actions, and the power to withhold information from Congress or the courts. The vesting clause might give the president some or all of these powers, or perhaps they can be implied

from some of the specific grants of power. Or maybe the president does not have these powers at all, except to the extent that Congress chooses to give them. Constitutional issues about presidential powers are not cut and dried.

After prescribing how to pick a president and what the president's powers are, Article II describes how to get rid of a president. Section 4 states that the president and all other civil officers "shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." The courts have never defined the scope of the grounds for impeachment, such as whether impeachment is limited to activities that violate criminal laws. (Most commentators believe that impeachment is not so limited.) Three presidents (Andrew Johnson, Bill Clinton, and Donald Trump) have been impeached by the House, but none has been convicted by the constitutionally required two-thirds of the Senate. It is generally thought, however, that Richard Nixon would have been impeached and convicted if he had not resigned first.

What presidents do today is far more sweeping than Article II's list of powers might suggest. Domestically, the Office of the President rests atop a giant bureaucracy administering laws on subjects from immigration to environmental protection. Internationally, the president controls ambassadors, as well as the State Department, the Central Intelligence Agency (CIA), the National Security Agency (NSA), and other agencies of the world's most powerful country. The president is commander in chief of the world's strongest military, with everything from navy SEALs to nuclear weapons at the ready. Presidential responsibilities have become so large that the Office of the President now has several thousand employees.

As we will see, the modern president's powers are robust, to say the least, but they are not unlimited. Every recent president has been accused of usurpation of power by the political opposition. Courts have intervened when they have concluded that the president has