



The Presidency in Perspective

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## THE PRESIDENCY IN PERSPECTIVE\*

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It is an axiom of American history that the Constitution came from the framers "a bundle of compromises." Not so generally recognized is the confirmation which is lent this observation by those clauses of the Constitution most nearly affecting the office and powers of the President. The vagueness of the constitutional grants of power to the President has always furnished matter for comment, sometimes favorable, sometimes otherwise, depending on the commentator's bias. "The executive power shall be vested in a President of the United States of America"; "the President shall be Commander-in-Chief of the Army and Navy"; with the advice and consent of the Senate he shall make treaties and appoint to office; he shall have power to "grant pardons for offenses against the United States," he shall "recommend . . . such measures to Congress, as he shall judge necessary and expedient"; and so on and so forth. Yet, in order to exercise any of these powers—in order, indeed, to subsist—he must have money, and can get it only when and if Congress appropriates it. Likewise, he is dependent on Congress for the very agencies through which he must ordinarily exercise his powers, and Congress is the judge as to the necessity and propriety of such agencies. Again, he is bound to "take care that the laws" which Congress enacts are "faithfully executed"—for this purpose all his powers are in servitude; and Congress has the power to investigate his every official act, and can, by a special procedure, if it finds him guilty of "high crimes and misdemeanors," impeach him and throw him out of office. Moreover, by the standard set by the prerogative of the British monarch in 1787, his "executive power" and his power to protect that power were seriously curtailed. The power to "declare war" was vested in Congress; the Senate was made a participant in his diplomatic powers; he was given a veto upon all legislative acts, but this the houses may override by a two-thirds vote.

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In short, the Constitution reflects the struggle between two conceptions of executive power: the conception that it ought always to be subordinate to the supreme legislative power, and the conception that it ought to be, within generous limits, autonomous and self-directing; or, in other terms, the idea that the people are *re-presented* in the legislature *versus* the idea that they are *embodied* in the executive. Nor has this struggle ever entirely ceased, although on the whole it is the latter theory which has prospered. Taken by and large, the history of the Presidency has been a history of aggrandizement.

The office got off to a good start under a very great man. The principle of the separation of powers was not yet regarded as forbidding the executive to initiate legislation. In the act establishing the State Department, Congress itself laid down a "practical construction" of the Constitution which, save for the interregnum of the Reconstruction Period, has left the President absolute master of his official family. A dangerous foreign situation in 1793 brought that family into existence, while it also enabled the President to translate his position as the organ of communication with other governments into a substantive, creative power. Finally, the Whiskey Rebellion provided the occasion for the first step in that course of legislation and of presidential action which has long since clothed the President in situations of widespread disorder, or threat thereof, with powers of dictatorship.

Under Jefferson and "the Virginia School of Presidents" a certain retrogression took place from the notion of presidential autonomy toward that of legislative supremacy. Under Jefferson himself the retreat was theoretical rather than actual. As the founder and leader of the first national party, Jefferson was able to dominate Congress by personal influence, and it was shown for the first time what accession of strength political skill can bring the Presidency. But Jefferson's successors, caught between the upper and nether millstones of their self-abasing conception of the Presidency and their lack of personal force, were reduced to official insignificance. The War of 1812 marked the near elimination for the time being of presidential prerogative in the field of foreign relations; the Monroe Doctrine announced to the world at large that opportunities for aggrandizing the Presidency from foreign adventuring were to be confined strictly to the Western Hemisphere. Jefferson pronounced the dictum that no President

could with safety to our democratic institutions be eligible for a third term, albeit he might nominate his successor; and the successors whom Jefferson himself nominated ratified the ban.

Jackson's Presidency was more than a revulsion to earlier ideas—it was a revolution. A new electorate was organized into a new party whose wide ramifications, focusing in the National Convention, rendered its continuance independent of accidents of personality. Guaranteed this power and persistent support among the people at large, Jackson extended the doctrine of "the President's autonomy to embrace his obligation to the law; constitutional obligation was reduced—or exalted—to the level of *moral* obligation. At the same time the President's duty to "take care that the laws be faithfully executed" was asserted to comprise the right to read the law for any and every member of the Executive Department; and through a vigorous and expanded use of his veto and removal powers, Jackson for the time being made this claim good. Through the latter power, moreover, the Spoils System was for the first time engrafted on the National Government, thereby adding one more weapon to the presidential armory.

Except nevertheless for a few unfortunates like John C. Calhoun and Nicholas Biddle, the Jacksonian "dictatorship" was more bark than bite, more proclamation than performance. The Monroe Doctrine, the taboo on a third term, and, what was even more important, the States Rights conception of national legislative power, all set conspicuous landmarks which Jackson himself had not the slightest inclination to disturb. His most outstanding assertions of power, and especially in the field of legislation, were negative and exercised by veto. Moreover, despite the permanency of the party organization which was reared by his henchmen in every quarter of the Union, the prominence of the office during his incumbency was predominantly a reflection of his own energetic personality. When he left office he left behind him a political vacuum which a resuscitated Congress presently filled, and, thanks to the manipulations of the slavery interest, continued to fill—if exception be made for Slavery's tool, the highly successful Polk—till the outbreak of the Civil War.

For all that, the Jacksonian conception of the Presidency was not forgotten. Indeed, its champions and its critics contributed about equally to render it more articulate than ever—a fact of

the first magnitude when Lincoln became President and found himself confronted with a nation in dissolution. Lincoln's claim to "the war power" was derived from three sources: Jackson's doctrine that *all* the President's powers are autonomous; the Supreme Court's doctrine in *Luther v. Borden* (1849) that insurrection is "war"; and the measures which Pierce and Buchanan had taken in their efforts to put down civil war in Kansas, together with the budget of doctrine which the legal genius of Caleb Cushing had furnished them in justification of their policy.

Initially, Lincoln laid claim only to an *ad interim* war power, one which was operative only until Congress could ratify and reinforce its measures; but the Supreme Court's sweeping language in the Prize Cases (1863) encouraged him to take a more forthright stand, and this, combined with his indisposition to cooperate with Congress, led him to break over constitutional bounds and become a dictator even exceeding the Roman model. Nor was the constitutional corrective applied until after the war was comfortably over, by the Court's decision in *ex parte Milligan* and by Congress's uprising against Johnson. The implication of Lincoln's course that the President has power to meet an emergency without awaiting action by Congress is accordant with the most ancient traditions of Anglo-American law; but when on this implication Lincoln sought to erect a plan of Reconstruction in which the role of the national legislative power was negligible, he brought the Presidency in the person of his too zealous apostle Johnson to the verge of disaster. Even so, it fell to Johnson, by escaping impeachment, to demonstrate the impracticability of this medieval method of controlling presidential power. Moreover, it was during his term that the Supreme Court virtually underwrote, in *Mississippi v. Johnson*, (1867), Jackson's contention that the President's duty to the Constitution is solely the duty of conscience which his oath imposes.

But again the cyclical character of presidential power demonstrated itself. As from 1809 to 1829, so again from 1865 to 1885, the legislative power became the dominant element of the National Government. Indeed, except for the success of Presidents Hayes and Cleveland in using the Army to put down "domestic violence" within the states, the period of congressional preponderance reached to the death of McKinley. But meantime Congress had, by its own headiness, paved the way for the recrudescence of its constitutional rival, by forcing upon McKinley the war with Spain.

By that act and the consequences which ensued from it, the restrictive effect of the Monroe Doctrine on presidential prerogative was seriously undermined. The United States was now a "World Power," and presently found itself involved in a World War.

The great accession to presidential power in recent decades has, however, taken place in the *internal* as well as in the *external* field of Government, and has been signalized by the breakdown of the two great structural principles of the American Constitutional System, the doctrine of dual federalism and the doctrine of the separation of powers; while along with this breakdown has gone a change of even more fundamental character in popular outlook regarding the purpose and scope of governmental power. I mean the replacement of the *laissez-faire* theory of government with the idea that government should make itself an *active, reforming* force in the field of economic enterprise, which means, necessarily, that the *National Government* should be active in this way, inasmuch as the field in question has long since come to transcend state lines.

The result for the Presidency has been twofold. On the one hand, Presidents have made themselves spokesmen of the altered outlook, have converted their parties to it—a conversion not infrequently accompanied by backsliding—and, with the popular support thus obtained, have asserted a powerful legislative initiative. On the other hand, Congress, in responding to the President's leadership in its own peculiar field, has found it convenient to aggrandize his executive role enormously, by delegating to him the power to supplement its measures by a type of sublegislation called "administrative regulations." Not all this delegated power, it is true, has gone to the President, but a vast proportion of it has; and it constitutes a realm of presidential power of which the framers had little prevision, although it began to appear in the field of foreign relations as early as Washington's second administration.

The first exponent of the new Presidency was Theodore Roosevelt, but his achievement was to some extent negated by faults of method. Woodrow Wilson was enabled by the advantage of having critically observed his predecessor, by his knowledge of political methods abroad, by a taste for institution-building, which was later to divert him into an abortive effort at world organization, and finally by the opportunity afforded by our entrance into

World War I, to illustrate on an unprecedented scale both the new roles of the President—that of legislative leader and that of recipient of delegated legislative power. World War I was prosecuted for the most part under laws which were drafted under the appraising eye of the President and which conferred upon him far greater powers than those which Lincoln had exercised as Commander-in-Chief.

But it is the second Roosevelt who beyond all twentieth-century Presidents put the stamp both of *personality* and *crisis* upon the Presidency as it exists at this moment. In the solution of the problems of an economic crisis—"a crisis greater than war"—he claimed for the National Government in general and for the President in particular powers which they had hitherto exercised only on the justification of war. Then when the greatest crisis in the history of our international relations arose, he imparted to the President's diplomatic powers new extension, now without consulting Congress, now with Congress's approval; and when at last we entered World War II he endowed the precedents of both the Civil War and of World War I with unprecedented scope.

The Presidency of this present year of grace, so far as it is explicable in terms of American constitutional law and theory, is the product of the following factors: (1) social acceptance of the idea that government should be active and reformist, rather than simply protective of the established order of things; (2) the breakdown of the principle of dual federalism in the field of Congress's legislative powers; (3) the breakdown of the principle of the separation of powers as defining the relation of President and Congress in lawmaking; (4) the breakdown of the corollary principle that a legislature may not delegate its powers; and (5) the impact on the President's power as Commander-in-Chief and organ of foreign relationship, of two world wars and the vastly enlarged role of the United States in the international field.

Does the Presidency, then, in the light of these factors, constitute a standing menace to popular government and to those conceptions of personal liberty to which popular government is, in part, traceable? So far as concerns popular government in the sense of majority rule, the exact contrary is the case—all the above developments are the direct consequence of Democracy's emergence from the constitutional chrysalis. That, on the other hand, these developments leave private and personal rights in the same strong

position as they once enjoyed would be quite impossible to maintain. Nor is it feasible in this connection to distinguish too acutely between the property and other rights. Not only in the past, but today as well, the property right is the right best capable of holding its own against the State. Without its strong support, indeed, the personal "freedoms" too are doomed to ultimate extinction in an all-engulfing political power.

Yet, even aside from this remoter peril, presidential power is today dangerously *personalized* power, and this in two senses: first, that the leadership which it affords is dependent altogether on the accident of personality, against which our haphazard method of selecting Presidents offers no guarantee; and, secondly, that there is no governmental body which can be relied upon to give the President independent advice and which he is nevertheless bound to consult prior to decision. As a remedy for both phases of the problem I have elsewhere suggested a new type of Cabinet, one to consist principally of congressional leaders. A body thus made up would be able both to *check* the President and at the same time to *aid* him, by facilitating the legislative process; and by so doing it would minimize the excuse for autocratic measures in the meeting of crises. Certainly the condition of tension which has featured the relations between the two political branches since 1943 cannot be permitted to continue indefinitely without threatening the complete breakdown of constitutional government in the United States.