The Presidents *and the* Constitution

A LIVING HISTORY

Edited by
Ken Gormley

NEW YORK UNIVERSITY PRESS
New York

CONTENTS

PART V. THE GILDED AGE

PART VI. THE PROGRESSIVE ERA

PART VII. WORLD WAR I AND THE GREAT DEPRESSION

PART VIII. THE NEW DEAL AND WORLD WAR II

PART IX. THE CIVIL RIGHTS ERA

PART X. THE WATERGATE ERA AND REFORM

PART XI. NEW CONSERVATIVES, NEW DEMOCRATS, AND POLARIZATION

PART XII. NATIONAL SECURITY ERA: POST-9/11

Introduction

An Unfinished Presidency

KEN GORMLEY

The presidency of the United States is the most powerful position in the American system of government, and perhaps in the world. As Woodrow Wilson once wrote, the chief executive "is the vital place of action in the system, whether he accepts it as such or not, and the office is the measure of the man—of his wisdom as well as his force."[1] Yet the Constitution dedicates surprisingly little space to defining the duties or powers of the president; instead, it leaves the contours of that high office to be sketched out in real time, as history plays itself out over distinctive eras in American life.

Article II of the Constitution, which barely contains a thousand words, is the provision in which most of the power of the American presidency is housed. In one sense, the article is vast and awesome in scope. After all, in the period following the Revolutionary War, the framers created a new model of a chief executive—a model that had no precise parallel in world history. The office of presidency was designed to maximize the good—and temper the bad—characteristics of executive power known to the framers in the 1780s. This constitutional office thus helped to create a

shining new form of republican government and a bold invention in the history of democracy. In this sense, Article II of the Constitution represents one of the great triumphs of American ingenuity. As two prominent presidential scholars have noted: "The president would not be a king or sovereign. Instead, he would swear to protect and defend a higher authority: the Constitution."[2]

At the same time, if the framers knew they were creating a revolutionary type of chief executive who would play a central role in the life of the nation, they put surprisingly little meat on the bones of this key figure. Article II, Section 1, vests the "executive Power" in the president, but does nothing to define the powers that lie at the heart of the chief executive's office. Section 2 states that the president shall be "Commander in Chief of the Army and Navy," yet it does nothing to clarify the president's authority in commanding the military. Nor does it untangle the president's authority from Congress's separate power to "declare War" (Article I, Section 8, Clause 11), leaving that sticky wicket for another day. Article II, Section 2, empowers the president "with the Advice and Consent of the Senate" to make treaties, appoint federal judges, ambassadors, and certain "inferior Officers," and to seek advice from "principal Officers" in the executive branch. The language is ostensibly packed with power, yet it is surrounded by a mist of uncertainty: If the president must secure the advice and consent of the Senate to *appoint* certain officials, must he or she also obtain permission from the Senate to *remove* these officials? What about "inferior officers" in the executive branch—how much control does the president have over these figures if Congress is empowered (as is often the case) to create them in the first place? And if the president plays a central role in appointing ambassadors and making treaties with foreign nations, does this mean that under the Constitution, the president is the chief actor in foreign affairs, more generally?

Even in areas where the president's powers seem to be clearest, gaps and instances of constitutional silence abound: For example, the Constitution gives the president a seemingly sweeping power to grant "Reprieves and Pardons" for all federal offenses (Article II, Section 2). Another provision gives the president authority to deliver a "State of the Union" address to Congress so that he or she can propose legislation (Article II, Section 3). Interestingly, one of the president's most potent powers—to veto legislation that he or she finds objectionable (Article I, Section 7)—is wedged into the Constitution's opening article rather than with the other key presidential

powers in Article II. Taken together, these provisions seem to crown the president with extraordinary power vis-à-vis Congress. Yet the Constitution is silent as to when, and for what reasons, the president can trump Congress where there is overlap in authority—which occurs frequently. It is almost as if the Constitution assumes that the president and Congress will have to duke it out, battling over the parameters of their respective powers.

The same is true with respect to the judicial branch. Ever since Chief Justice John Marshall in *Marbury v. Madison* (1803) confirmed the power of judicial review over other branches of government, presidents are subject to being checked by the courts. Thus, the Constitution creates an uneasy dynamic between all three branches.

And when the president goes too far or seeks to defy another branch of government, there is the looming presence of Article II, Section 4, which states that he or she "shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." To heighten the drama, impeachments will be initiated in the House of Representatives and tried before the Senate, with the chief justice of the United States presiding over the proceedings (Article I, Section 3, Clause 6). Thus, the other two branches of government, often at odds with the president as they skirmish for authority, have the final power to extinguish his or her time in office, a provision that hangs over the head of each president like a constitutional sword of Damocles.

And who, exactly, is the vice president? This ill-defined official is barely mentioned in the Constitution. His or her only official duty is to preside over the Senate, and this individual does not even have a vote except for ties (Article I, Section 3, Clause 4). What exactly did the framers intend to do when the president could no longer function? Did they envision that this weak vice president would have a temporary role as an acting chief executive who merely exercised "the Powers and Duties" of his or her predecessor for a brief time (Article II, Section 6)? Or was the purpose to fully empower this individual to become the new president? On this point, the Constitution remained silent.

The framers were not unaware of the ill-defined nature of the new presidential office they were creating. Indeed, they reached a consensus in Philadelphia only by leaving many of the bedeviling details to be worked out over time.[3] Records of the Constitutional Convention and other historical sources suggest that the provisions dealing with the presidency were purposely left sketchy, with the intention that the presidents themselves

(starting, the framers expected, with George Washington) would fill in that sketch.

Yet certain common goals no doubt undergirded the drafting of the provisions of the Constitution dealing with the presidency. During the heated ratification debates, James Madison wrote in *The Federalist* No. 47 that "the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[4] Consequently, the principle of separation of powers lay at the heart of the new form of republican government being constructed by the framers. It was derived from the work of writers like Montesquieu, who had spelled out the essentials of the doctrine in 1748 in his famous treatise *The Spirit of Laws*.[5]

As the drafting of the Constitution progressed, it became clear that the principal fear of the Federalists was that the *legislature* would gain too much power and become oppressive. Ironically, during the colonial period, the foremost perceived enemy was the chief magistrate: King George III had ruled like a despot, and British governors in the colonies were forever taxing the colonists and running roughshod over them.[6] With fresh memories of unscrupulous and unpopular governors, the first state constitutions, beginning with Virginia's in 1776, had created weak chief executive positions and placed the lion's share of power in the legislative bodies.[7] Yet the experience of the post-Revolutionary period taught new lessons. Under the newly adopted state constitutions, legislative bodies in some states had run away with seemingly unchecked power and left governors as impotent figureheads. Additionally, Shays' Rebellion in 1787 demonstrated the folly of the Articles of Confederation, which had established a system of government with no chief executive—that crisis escalated because there was no central figure who could take command and quell domestic crises. Indeed, Secretary of Foreign Affairs John Jay wrote to George Washington in 1787 and asked: "Shall we have a king?"[8] States like New York, whose constitution had been adopted in 1777, had established strong governors in their state constitutions, and these executives seemed surprisingly successful.[9] James Wilson of Pennsylvania, the chairman of the Committee of Detail at the Constitutional Convention, therefore led the fight for a single, vigorous chief executive. He favored "a single magistrate, as giving most energy, dispatch, and responsibility to the office." Wilson also believed that a strong chief executive was necessary to blunt

unwelcome acts of the legislature. "Without such a defense specifically a veto power," he declared, "the legislature can at any moment sink it [the executive branch] into non-existence."[10]

Thus, although the framers were wary of monarchs after the period of British oppression, they had become even warier of a runaway legislative branch. As Madison noted in *The Federalist* No. 47, the legislature possessed "an intrepid confidence in its own strength" and an ability to overpower other branches of government.[11] Madison sharpened this point in *The Federalist* No.48, reasoning that the three departments had to be "blended" and interlaced to achieve the desired separation of powers.[12] Additionally, the framers concluded that the Constitution had to include an elaborate system of checks and balances, so that each branch of government was in a position to limit or check the powers of the other competing branches.

The chief executive's place in this new weblike scheme was the subject of considerable debate as different versions of the Constitution were being drafted and subject to negotiation. A central notion that ultimately gained acceptance, as articulated by Alexander Hamilton in *The Federalist* No. 70, was linked to the idea of the president as a force of energy and action in the tripartite system of government. In Hamilton's words, "energy in the executive is the leading character in the very definition of good government."[13] Or, as Hamilton argued in *The Federalist* No. 69, "a feeble execution is but another phrase for a bad executive; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government."[14]

Tench Coxe, a delegate from Pennsylvania, would later write that there was a great advantage to having a democratically selected president over a king who ruled merely by hereditary right. The president, said Coxe, would hold office by virtue of having been selected by the people and "cannot be an idiot, [and] probably not a knave or tyrant, for those whom nature makes so, discover it before the age of thirty-five."[15]

When the delegates of the Constitutional Convention gathered in Philadelphia, in May 1787, they were purportedly assembling "for the sole and express purpose of revising the Articles of Confederation." Yet it quickly became clear that their task was to draft a wholly new constitution. The wrangling that took place before they decided on the type of chief executive they wanted in the Constitution is instructive, because it discloses what options they *rejected*.

Several issues dominated the debate as the American presidency took shape. First, some delegates favored having more than one chief executive.

John Rutledge of South Carolina declared that "unity in the Executive magistracy" was "the foetus of monarchy."[16] In contrast, as described above, James Wilson pressed hard for a unitary chief executive. His argument won the day; the delegates ultimately approved the notion of incorporating a single, unitary head of the executive branch.[17]

The second big decision facing the convention delegates was how the chief executive would be selected. At various times during the debate, they considered having the president chosen by the national legislature, directly by the people, or through a complex scheme of electors (originally, these electors would be selected by the state legislatures).[18] Early in its deliberations, the convention leaned toward a provision that would have the president selected by the national legislature (i.e., Congress) for a single term of seven years.[19] As the summer progressed, however, the framers concluded that election by Congress was too dangerous. Respected delegates such as James Wilson, John Rutledge, and Edmund Randolph of Virginia argued that this system would give the national legislature—specifically the Senate—a disproportionate amount of power. It would vest that chamber of Congress with "such an influence . . . over the election of the President in addition to its other powers, [as] to convert that body into a real & dangerous Aristocracy."[20]

The novel Electoral College ended up being the compromise solution, designed to keep the president from being co-opted by the legislative branch. At the same time, this solution also (at least in theory) kept the electoral process at arm's length from the general citizenry so that the president did not become "tribune of the people" and so that the job of selecting the president was placed in the hands of "men of special discernment."[21] In many ways, the complex, untested Electoral College system that was ultimately adopted mimicked the Connecticut Compromise—it dispersed electoral votes among the states in a fashion that took account of population, while also recognizing the basic equality of each state in the new union. While the Electoral College relied on specially elected "electors," as a practical matter it largely mirrored the will of the general electorate. Thus, populism made its way back into the mix, albeit in a slightly diluted fashion.

A hidden piece of the new Electoral College scheme, however, would leave a dubious imprint on the new nation for nearly a century. Article I, Section 2, Clause 3, provided that slaves would count as three-fifths of persons for purposes of determining population and hence the number of

each state's representatives in the U.S. House of Representatives.[22] This provision, also known as the federal ratio, had been a nonnegotiable condition imposed by the Southern states before they would agree to ratify the Constitution. It guaranteed that Southern states would indefinitely hold the whip hand over Northern states in electing members of Congress. It also gave the South a clever advantage in selecting presidents: Article II, Section 2, mandated that the number of electors would be determined by the number of senators and representatives to which each state was entitled in Congress. Thus, slave owners—and slave-owning states—received a whopping over-vote in the Electoral College. The three-fifths provision therefore skewed the results in favor of the South even though the slaves themselves, whose numbers affected the outcome, "had no more will in the matter than 'New England horses, cows, and oxen.'"[23] Thus, the Electoral College system itself, combined with the insidious Three-Fifths Clause, played a direct role in shaping the U.S. presidency for a century, ensuring that the slavery issue would inevitably come to a head in the new nation.

A third issue confronting the Constitutional Convention was whether to create a "council of revision"—similar to that established by the first New York Constitution—to allow a joint executive-judicial council to override repugnant acts of Congress.[24] The idea was to enable the weaker two branches of government to band together and invalidate "unjust and pernicious laws" enacted by the legislature.[25] In the end, this idea was scrapped on the assumption that the separation of powers built into the Constitution would allow the executive and judicial branches to fend off encroachments by the legislative branch. Yet the death of the council of revision gave birth to an important new presidential power: a limited veto power over congressional legislation. While some delegates (particularly Wilson and Hamilton) were prepared to give the chief executive an absolute veto, this idea was scuttled because it might allow power-hungry presidents to cripple Congress by cutting legislation to ribbons. The limited veto power, on the other hand, contained a safety valve: It permitted Congress to override the veto with a two-thirds vote of both chambers. This was viewed as a prudent middle ground that sufficiently shored up the president's place in the system of government.[26]

As the completed Constitution was being debated prior to its ratification, those who harbored doubts about the potentially powerful and largely undefined office of the presidency were mollified, to a certain extent, by the understanding that George Washington would be the likely first

occupant of the office. Thus, the details of the presidency could be hashed out, at least initially, with an honorable man in the chief executive's post. As Hamilton noted at the conclusion of the Constitutional Convention, the fact that Washington was the presumptive choice for the nation's first president "will insure a wise choice of men to administer the government and a good administration." Moreover, Hamilton said, the choice "will conciliate the confidence and affection of the people and perhaps enable the government to acquire more consistency than the proposed constitution seems to promise."[27] Another delegate wrote after the Convention: "I am free to acknowledge that his powers [the president's] are full great, and greater than I was disposed to make them. Nor, *entre nous*, do I believe they would have been so great had not many of the members cast their eyes towards George Washington as President; and shaped their ideas of the powers to be given to a President by their opinions of his virtue."[28]

As reduced to parchment in the new U.S. Constitution, the presidency was therefore a uniquely American office. More than any other branch of government delineated in the first three articles of the Constitution, the executive branch was left intentionally incomplete. As Professor Akhil Reed Amar has written in his magnificent biography of the Constitution: "The evident openness of the text [in Article II] reflected the framers' genuine uncertainty as they struggled to invent a wholly new sort of executive."[29] Some of the blanks would be filled in during the expected presidency of George Washington; he could guide the way through the fog for future occupants of that office. The rest of the blanks would be left to history itself. The new American presidency would be defined by the Constitution but also would be allowed to play itself out, gradually giving definition to the sparse words of the written document.

For all of the flexibility built into the presidency by the framers, the office has remained remarkably stable. Some of this stability was made possible because presidents—starting with George Washington—voluntarily stepped down from office after two terms to ensure that the office did not transform itself into a monarchy. (President Franklin D. Roosevelt, of course, broke the two-term tradition—a decision that led to the passage of the Twenty-Second Amendment.) Some of the stability of the office also related to the willingness of losing presidential candidates—beginning with defeated President John Adams after the election of 1800 and most recently with Vice President Al Gore in the contested election of 2000—to step aside and transfer power peacefully to the new chief executive.

Some of the stability, as well, can be traced to the physical location of the chief executive. In over 225 years, the home of U.S. presidents has remained remarkably fixed. When George Washington took office in 1789, he initially conducted his executive business from the four-story private mansion on Cherry Street in New York City. That home had been used by the president of the Continental Congress, because there was not yet a permanent seat of government for the new nation.[30] In late 1790, Congress and President Washington both moved to Philadelphia; that city then served as the temporary capital for a decade while the newly planned Federal City (which would come to be named Washington, D.C.) was being built on a swampland along the Potomac River, between Maryland and Virginia. For the duration of his two terms, then, Washington leased a spacious three-story house on Market Street in Philadelphia that belonged to his close friend (and fellow delegate at the Constitutional Convention) Robert Morris. Finally, in 1800, John and Abigail Adams moved into the grand neoclassical White House situated behind wrought-iron gates on Pennsylvania Avenue in Washington, D.C., becoming the first chief executive and spouse to occupy that mansion.

For over two centuries, American presidents have taken up residence in that same structure—with only a brief hiatus during the presidency of James Madison in the midst of the War of 1812: When the British burned the White House in 1814, the Madisons lived temporarily in the Octagon House on New York Avenue. (Newly elected President James Monroe moved back into the refurbished White House in 1818.) Thus, the office has enjoyed remarkable stability, even in terms of its domicile.

Yet bricks and mortar only constitute a backdrop for the story. The study of American presidents and the Constitution is primarily animated by events that must be placed into an historical context. Individual presidents and their personalities, as the framers like Alexander Hamilton had hoped, "energize" the office. Unexpected events in American history play out across the landscape of a president's term in office, creating breezes, strong winds, and at times tornadoes, buffeting around the actors and squeezing out meaning from the sparse words of the Constitution that define the chief executive's role.

This book seeks to bring to life the rich story of forty-four (and still counting) presidents, as they have interfaced with the Constitution, and to tell their stories in the context of American history. (Grover Cleveland served two noncontiguous terms as president; for this reason, the book

consists of forty-four chapters rather than forty-three.) This is not meant to be a book solely, or even primarily, about famous Supreme Court cases defining presidential power. Nor does it follow the pattern of traditional books on presidential power, which examine groups of cases and other material dealing with specific topics, such as presidential power as commander in chief, in foreign affairs, in domestic matters, and so on. Even the most astute reader cannot simply peruse neat folders of material, organized by topic, to get the full picture. The fast-moving events of history that propel presidents into office and animate their time in public life are equally important—or more important—if one is to understand the unique interplay between the American presidency and the Constitution. Thus, this book chronicles the people and events that have pushed, tugged at, lit fires under, made heroes of, or destroyed American presidents as they carried out their duties in office.

The framers constructed the American presidency with an elaborate web of strings attached and affixed these tightly to the legislative and judicial branches. The more one observes the arc of the story over time, the more one can appreciate that all three branches of government are bound together inextricably in this saga. Indeed, the framers ensured this by building into the Constitution the Federalist notion of *separation of powers* and *checks and balances*, so that the three branches of government would remain in a constant state of tension, each guarding its own turf.[31] The events that have most poignantly defined presidential authority under the Constitution—from President George Washington through President Barack Obama—have thus been played out like a stage drama featuring all three branches of government. When one actor performs, the other two step forward or recede accordingly. In this fashion, animated by real people and competing institutions of government and unexpected historical forces, the presidents' roles vis-à-vis the Constitution have sprung to life.

Simultaneously, the framers constructed a system of *federalism*, by which the national government regularly vies with the states for authority.[32] Even as presidents wield enormous power as the chief executive in one of the world's most powerful nations, they must be respectful of dozens of independent sovereignties (in the form of fifty states) nipping at their heels. Federalism thus provides another source of drama and presidential energy.

The goal of capturing all U.S. presidents in action is admittedly an ambitious one. The American presidents have been a busy and lively bunch of political figures. As Franklin D. Roosevelt once stated: "All of our great

presidents [have been] leaders of thought at a time when certain ideas in the life of the nation had to be clarified."[33] Constitutional issues, during the presidents' respective times in office, swirl around like thunderstorms and become relevant only at unpredictable moments. How is it possible to produce forty-four chapters that say something meaningful about each president, especially when some have held office for as little as thirty-one days? (See the chapter on William Henry Harrison.)

The authors selected to write these chapters are experts uniquely suited to answer that question. They are historians, political scientists, judges, legal scholars, and journalists who rank among the nation's leading presidential experts. Their challenge in each case was to create a short, readable chapter that created a colorful portrait of the president and shone a light on constitutional issues that confronted the president, helped to shape the president's time in office, or gave birth to a piece of constitutional precedent during the president's tenure in office. Chapters were then edited and rewritten countless times to weave together an interconnected historical account.

If this were an exhaustive collection of presidential biographies, it would require forty-four volumes. Yet this was not the goal. Nor was the book designed as an assortment of unconnnected essays. It is an ongoing narrative that continues to evolve each time the American citizenry elects a new president and as new elements of the story come to life.

Illuminating the elements that span the divide across presidential administrations makes this a particularly fascinating and worthwhile endeavor. Consider the story of Woodrow Wilson, who in 1914 sought to force a *New York Tribune* city editor named George Burdick to testify in front of a federal grand jury about allegations that a Treasury Department employee was illegally leaking information to the press. President Wilson decided to outsmart Burdick by having a pardon waiting for him so that the editor could not invoke the Fifth Amendment and assert that he might be subjected to criminal prosecution for his testimony. Yet the president was thwarted by the Supreme Court, when it handed down its decision in *Burdick v. U.S.* in 1915, declaring that a pardon "carries an imputation of guilt; acceptance a confession of it," and held that Burdick could not be forced to accept that pardon.[34]

Now, consider Gerald R. Ford in 1976, when he made the politically risky decision to pardon his predecessor, Richard M. Nixon, for all crimes relating to the Watergate scandal. In doing so, Ford sent a young lawyer

named Benton Becker to President Nixon's home in California carrying a copy of the *Burdick* case in his briefcase. At Ford's insistence, the former president was informed that if he accepted the pardon, it would constitute a legal admission of guilt. (It turns out that, for this reason, President Nixon at first refused to accept the pardon, although the American public was generally unaware of this fact.) President Ford was therefore prepared to consummate the pardon deal only because he believed that he was getting from the disgraced former president what the American people most wanted—a formal admission of wrongdoing. Yet only if one connects the dots back to President Wilson's foiled attempt to use the pardon power in 1914 can one properly appreciate President Ford's action in 1976—an action that was tied to Ford's understanding of the Constitution and that helped extinguish his own political career.

Similarly, one needs to place events in an historical context to properly analyze the decisions made by George W. Bush and Barack Obama as they confronted the recent War on Terror, set up military tribunals in Guantanamo, and unleashed drones in Pakistan. Specifically, one must understand the decisions faced by Abraham Lincoln during the Civil War, the role played by new technology (telephones and telegraphs) during the presidency of William McKinley in the Spanish-American War, and the failed effort by Harry S. Truman to exert his commander-in-chief powers in seizing the nation's steel mills during the Korean War, to make sense of such modern-day executive actions.

How will scholars and American citizens assess the fitness of individuals to step into this high office, when it comes time to elect new presidents? How will they judge the records of past, present, and future presidents on dramatic constitutional issues that inevitably define the nation? Only by peering through a specially crafted historical lens can one see links between and among presidents, from George Washington to present-day leaders—links that would otherwise be obscured by a web of distant events.

By helping to untangle this web, this book aims to bring to life a story as unique as the American presidents themselves.

NOTES

1. Woodrow Wilson, *Constitutional Government in the United States* (New York: Columbia University Press, 1908), 73.
2. Michael A. Genovese and Robert J. Spitzer, *The Presidency and the Constitution: Cases and Controversies* (New York: Palgrave Macmillan, 2005), 5.

3. James Madison, just weeks before the delegates arrived in Philadelphia, confided to George Washington that when it came to the chief executive position, he had "scarcely ventured to form my own opinion either of the manner in which it ought to be constituted or of the authorities with which it ought to be cloathed." Madison to Washington, April 16, 1787, in *The Papers of Madison*, ed. William T. Hutchinson et al. (Chicago and Charlottesville, VA: 1962–1991), 9:385, quoted in Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Vintage Books, 1997), 255.
4. James Madison, Federalist No. 47, in *The Federalist Papers*, ed. Clinton Rossiter (New York: New American Library, 1961), 301.
5. For a complete text of the work, see Montesquieu, *Spirit of the Laws*, trans. and ed. Anne M. Cohler, Basia C. Miller, and Harold S. Stone (Cambridge: Cambridge University Press, 1989).

   Montesquieu wrote: "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

   "Again there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression." Philip B. Kurland and Ralph Lerner, eds., *The Founder's Constitution* (Chicago: University of Chicago Press, 1987), book 11, chap. 6, 1:624–625, available at http://press-pubs.uchicago.edu/founders/documents/v1ch17s9.html. A slightly different text version appears in ibid., 157.
6. Edward S. Corwin, *The President: Office and Powers, 1787–1984* (New York: NYU Press, 1984), 5–6; Donald L. Robinson, *To the Best of My Ability: The Presidency and the Constitution* (New York: W.W. Norton, 1987), 37–39.
7. Corwin, *President: Office and Powers*, 6–7.
8. Genovese and Spitzer, *Presidency and the Constitution*, 4.
9. Robinson, *To the Best of My Ability*, 46–47.
10. Max Farrand, ed., *Records of the Federal Convention of 1787*, rev. ed. (New Haven, CT: 1937; repr. 1966), 1:65, 68–69, 98, cited in Corwin, *President: Office and Powers*, 11.
11. Madison, Federalist No. 47, 300–308.
12. James Madison, Federalist Paper No. 48, in *The Federalist Papers*, ed. Clinton Rossiter (New York: New American Library, 1961), 308–313.
13. Alexander Hamilton, Federalist Paper No. 70, in *The Federalist Papers*, 423–431.
14. Alexander Hamilton, Federalist Paper No. 69, in *The Federalist Papers*, 415–423.
15. Tench Coxe, "An American Citizen," *Philadelphia Independent Gazetteer*, September 26, 1787, Doc. Hist., 13:249–251, quoted in Rakove, *Original Meanings*, 276.
16. John Rutledge, quoted in Rakove, *Original Meanings*, 257.
17. Farrand, *Records*, 1:66–69, quoted in Rakove, *Original Meanings*, 257.
18. For selection by national legislature, see Rakove, *Original Meanings*, 260. For selection by the people or by electors, see Corwin, *President: Office and Powers*, 12.
19. Rakove, *Original Meanings*, 260.

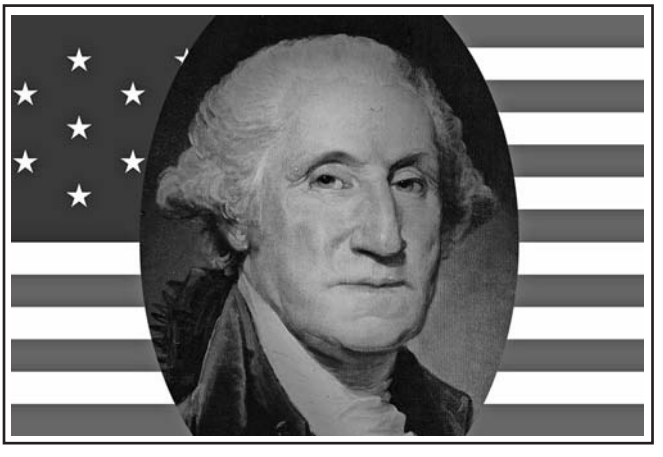
20. Farrand, *Records*, 2:501–502, 511–513, quoted in Rakove, *Original Meanings*, 265.
21. For "tribune of the people," see Genovese and Spitzer, *Presidency and the Constitution*, 5. This reference refers to tribunes of Roman times. But see Akhil Reed Amar, *America's Constitution: A Biography* (New York: Random House, 2005), 151–155 (noting that the notion of populism was emphasized by leading Federalists during the ratification debates). For "men of special discernment," see Corwin, *President: Office and Power*, 13.
22. Gary Wills, *Negro President: Jefferson and the Slave Power* (Boston: Houghton Mifflin, 2003), 1–5; Amar, *America's Constitution: A Biography*, 87–98.
23. Albert F. Simpson, "The Political Significance of Slave Representation, 1787–1821," *Journal of Southern History* 71 (1941): 321, quoted in Wills, *Negro President*, 2.
24. Peter J. Galie, *Ordered Liberty: The Constitutional History of New York* (New York: Fordham University Press, 1996), 44–46. There was also some similarity to the Council of Censors created by the Pennsylvania Constitution.
25. Farrand, *Records*, 2:78 (Mason), 52 (Morris, July 19), 30 (Wilson, July 17), cited in Rakove, *Original Meanings*, 261.
26. Rakove, *Original Meanings*, 258.
27. Alexander Hamilton, *Conjectures About the Constitution: September*, in *The Documentary History of the Ratification of the Constitution* (Madison: State Historical Society of Wisconsin, 1981), 13:277–278, cited in Rakove, *Original Meanings*, 287.
28. Pierce Butler to Weedon Butler, quoted in Genovese, *Presidency and the Constitution*, 6 (emphasis added).
29. Amar, *America's Constitution: A Biography*, 197.
30. President Washington also lived briefly at the Alexander Macomb House on Broadway, before moving to Philadelphia.
31. The separation of powers doctrine, premised on the notion that the sum total of governmental power should not reside in one individual or body, is embedded in the structure and provisions of the Constitution. Pursuant to this doctrine, government is divided into three distinct branches—the legislative, the executive, and the judicial—and each is given its own sphere of power. At the same time, the Constitution provides each branch with the means to check and balance the others and thus further prevent the abuse of power. Keith E. Whittington, "The Separation of Powers at the Founding," in *Separation of Powers: Documents and Commentary*, ed. Katy J. Harriger (Washington, DC: CQ Press, 2003), 1–12.
32. The Constitution's scheme of federalism recognizes that sovereignty exists at the national and state levels. Thus, power is exercised concurrently by the U.S. government and by the governments of the individual fifty states. Willi Paul Adams, *The First American Constitutions* (Chapel Hill: University of North Carolina Press, 1980), 276–291.
33. Arthur M. Schlesinger Jr., Introduction to *George Washington*, by James McGregor Burns and Susan Dunn (New York: Times Books, 2004), xvii; *New York Times*, November 13, 1932, quoted in Corwin, *President: Office and Powers*, 313.
34. Burdick v. United States, 236 U.S. 79, 94–95 (1915).

1

George Washington

RICHARD J. ELLIS

No other president in American history faced so many decisions about the scope of his constitutional powers as did George Washington. Keenly aware that his interpretations of the fundamental charter would set precedent for future generations, and reluctant to appear that he was gathering power like a king, Washington was extremely cautious as chief executive. Throughout his two terms in office, he was especially careful to shore up the notion of separation of powers, ensuring that each branch of government retained its own independent sphere of authority under the new Constitution. Through careful, restrained exercise of power, Washington paradoxically helped to build a strong and respected American presidency.



Introduction

When it comes to the presidency, the Constitution of the United States is a document of remarkably few words. Most presidents navigate their way around the silences of the Constitution by emulating, rejecting, or modifying the actions of their predecessors. In the unique case of George Washington, who served as the nation's first president from 1789 until 1797, there were no presidential precedents to help him figure out what the Constitution required or allowed. There was, of course, the British monarchical model, but few Americans—least of all Washington—wanted the president to be a king. There were also the diverse examples supplied by state governors, but the nation's first president never understood his role to be that of a glorified governor. Washington shouldered the additional burden of knowing that his every step could become a precedent for his successors. Remarkably, the nation trusted this extraordinary power to shape the constitutional meaning of the presidential role to a relatively uneducated career military man whose direct experience in politics was limited to a few months as a delegate to the First and Second Continental Congresses during the mid-1770s.

Born in February 1732, George Washington grew up a farm boy in Virginia's Tidewater region, where the crop of choice was tobacco and the workforce was largely slaves. Washington's father was a hard-edged, upwardly mobile businessman who acquired acreage by the thousands. When Washington was eleven years old, his father died suddenly, leaving the family in a precarious position.[1] At sixteen, with the family's finances at a nadir and desirous of escaping from his exacting mother's control, Washington took up surveying as a career, a fortuitous choice that would allow him to serve some of the wealthiest and best-connected landholders in Virginia. His knowledge of the backwoods of Virginia, acquired from his time as a surveyor, made him invaluable to the British military, and he spent much of his twenties distinguishing himself in the French and Indian War. His marriage to the widow Martha Dandridge Custis at age twenty-six helped make Washington one of the wealthiest men in Virginia. By the time he became president, Washington owned five farms totaling eight thousand acres, which were worked by three hundred slaves and were worth about half a billion in today's dollars.[2]

Washington emerged from his twenties a very rich man but not a well-educated one. Unlike almost all the other famous founding fathers (John Adams, Thomas Jefferson, James Madison, and Alexander Hamilton), he neither went to college nor studied law. Washington may have been, as historian Gordon S. Wood writes, "a man of few words and no great thoughts," but even as a relatively young man, he possessed the commanding bearing, self-discipline, and mature judgment that made him a leader whom other men were willing to follow.[3]

When the American Revolution broke out in 1775, the Second Continental Congress chose Washington to serve as commander in chief of the Continental Army, a post he held until the defeat of the British in 1783. General Washington was hailed as an exemplar of republican virtue for relinquishing military power the moment victory was assured.

In the spring of 1787, Washington came out of retirement to preside over the Constitutional Convention in Philadelphia. Seated on a raised platform in front of the other delegates, he managed to appear detached from the convention's often-rancorous debate. However, he consistently voted with those delegates, like his fellow Virginian James Madison, who favored a strong national government and an independent executive branch. Although the prospect of a strong executive conjured up images of monarchy and despotism among many of the delegates, a majority of the fifty-five convention delegates ended up supporting the creation of a single, independent chief executive. That support probably owed a great deal to the knowledge that the new office would be filled first by Washington.[4]

On September 17, 1787, four months after the convention had begun, the delegates approved the new Constitution and sent it to the states for ratification. After a prolonged debate between those in favor of the Constitution, who referred to themselves as "Federalists," and the "Anti-Federalists," who opposed it, the Constitution was ratified by the requisite number of states. On September 13, 1788, the Congress of the Confederation certified the new Constitution and set the date (March 4, 1789) for the first meeting of the new government. Washington had anxiously monitored the ratification process from Mount Vernon, knowing that he would certainly be selected the nation's first president. True to form, each of the sixty-nine presidential electors cast his ballot for Washington in the nation's first presidential election.

Presidency

Washington was acutely aware that fears of executive power remained a potent part of American political culture. He also knew that the leading statesmen in the new nation remained jealously solicitous of legislative prerogatives. Washington understood that building support for the new Constitution and fostering trust in the presidency required him to exercise great self-restraint, particularly in his interactions with the legislative branch.

Relationship with Congress

Washington's self-restraint was evident in the cautious approach he took toward the veto power granted him by Article I, Section 7, of the Constitution. He admitted to a friend that he signed "many Bills" with which he disagreed. Indeed, during eight years as president, Washington vetoed only two bills. The first, at the end of his first term, was an apportionment bill, which Washington vetoed at the insistence of his secretary of state, Thomas Jefferson. Not only did Jefferson believe that the bill was unconstitutional, he also feared that "non-use" of the veto was beginning "to excite a belief that no President will ever venture to use it." Washington did not exercise his next and last veto—of a bill that disbanded two dragoon companies—until four days before he was to leave office.[5]

Washington also cooperated with Congress when it requested information, even some embarrassing information related to military policy. When the House of Representatives requested War Department documents relating to General Arthur St. Clair's humiliating defeat at the hands of American Indians in November 1791, Washington could easily have stonewalled. The Constitution, after all, did not specify what information the president was required to divulge to Congress. Well aware, however, that his response might "become a precedent" and that Congress might in the future request papers "of so secret a nature as that they ought not to be given up," Washington gave the House investigating committee all the information it requested.[6]

Washington's public communications with Congress were unfailingly deferential. His speeches and messages were never scolding or confrontational. In his inaugural address, he chose to avoid altogether any "recommendation of particular measures." Instead, he paid "the tribute that

is due to the talents, the rectitude, and the patriotism . . . [of the legislators] selected to devise and adopt them." In his first annual message, he dutifully drew Congress's attention to the issues that he believed required legislative action, yet he was careful to avoid specifying what legislation he thought should be adopted.

Behind the scenes, however, President Washington was not entirely passive in shaping legislation, particularly on matters relating to national defense. For instance, his first annual message vaguely referenced the need to establish a "uniform and well-digested plan" for a militia, yet Washington had already drawn up a more specific plan and instructed Secretary of War Henry Knox to work it "into the form of a Bill with which to furnish . . . Congress." It turned out that the First Congress did not share the president's sense of urgency and took no action on the administration's bill. Although deeply disappointed, Washington bore the setback stoically and did not attempt to lobby legislators on behalf of his preferred plan.[7]

Washington had strategic reasons for wishing to avoid being drawn too deeply into the legislative process. For one, taking sides in fractious legislative debates would jeopardize his carefully cultivated reputation as a president above party and faction. In addition, he believed that attempting to influence Congress would be counterproductive because doing so could trigger charges of executive usurpation and arouse legislative resentment. Finally, Washington feared that by intervening in the legislative process, he could damage the prestige of his own presidency and that of future presidents.[8]

However, Washington's restraint was more than just a tactical or political calculation. It also reflected his strict interpretation of the separation of powers embodied in the newly adopted Constitution. Washington believed that the Constitution required the executive not to encroach on legislative powers just as much as it commanded the legislature not to encroach on executive powers. When he thought Congress had trespassed on executive powers, Washington was quick to protest. For instance, when the House of Representatives passed a resolution congratulating the French on adopting their new constitution, Washington complained to Jefferson that the legislature was "endeavoring to invade the executive." At the same time, Washington showed a principled regard for legislative prerogatives. When Attorney General Edmund Randolph suggested an administrative fix to a troublesome law, Washington demurred, insisting that the Constitution "must mark the line of [the president's] official conduct." Washington

informed Randolph that he "could not justify . . . taking a single step in any matter, which appeared to . . . require [the legislature's] agency, without its being first obtained." Congress and the president, in Washington's view, properly occupied separate spheres of action under the Constitution.[9]

Debating Washington's Neutrality Proclamation

As a practical matter, the decision about what fell within the executive sphere and what belonged in the legislative sphere was often not so simple. One of the great constitutional debates of the Washington administration erupted over the question of whether the president or the Congress had the power to declare neutrality vis-à-vis other countries. Article I of the Constitution unambiguously gave Congress the power to "declare war." At the same time, Article II just as clearly gave the president the power to receive ambassadors and the power—with the advice and consent of the Senate—to make treaties. Nowhere did the Constitution mention who had the power to declare neutrality.

This constitutional silence took on tremendous urgency when France—having guillotined its king, Louis XVI—declared war on Great Britain in February 1793. Taking sides in a war between the world's two superpowers was clearly not in the interests of a fledgling nation with no navy and a tiny regular army. Making matters more vexing was that the French—with whom the Americans had signed a treaty of "perpetual alliance" in 1778—wanted the United States to aid them. Many Americans, having just concluded a revolutionary war with the British, sympathized with the French cause. Indeed, a special envoy from France was actively urging American citizens to seize British trading ships off the Atlantic coast and to join the fight against the Spanish (with whom France was also at war) in the territories of Florida and Louisiana.[10]

These events alarmed Washington, who worried that private citizens heeding the French call might provoke the British to declare war on America. Washington asked each member of his cabinet two questions: First, should he call Congress into session? Second, should he issue a proclamation to prevent "interferences of the Citizens of the United States in the War between France and Great Britain?" The cabinet—which included Treasury Secretary Alexander Hamilton and Secretary of State Thomas Jefferson—agreed that Congress did not need to be called back into session. The cabinet also agreed that Washington should issue a proclamation

that made it clear that the United States would not take sides in the war between France and Britain and that the U.S. government would criminally prosecute American citizens who violated this proclamation.[11]

Issued on April 22, 1793, Washington's Proclamation of Neutrality was generally well received. Nobody wanted another war, least of all with Britain. And yet for many Jeffersonian Republicans, who loathed Britain and sympathized with the French republic, strict neutrality was, as Jefferson said, "a disagreeable pill." They asked, how could the American republic be neutral in a contest that pitted republican liberty against monarchy, or how could the republic ignore the duties it owed France under the Treaty of Alliance it had signed in 1778? And what gave the president the right to declare peace without consulting Congress?

Republican newspapers' attacks upon the proclamation provided Hamilton the excuse he needed to enter the fray. In seven tightly argued essays penned under the pseudonym Pacificus, Hamilton vindicated both the president's policy of neutrality and the president's constitutional authority to declare neutrality. Hamilton argued that the Constitution made the president "the organ of intercourse between the United States and foreign nations." According to Hamilton, it was the president's job to declare "the existing condition of the nation with regard to foreign powers." Hamilton found this authority partly in specific grants of constitutional power—the power to receive ambassadors, the power to make treaties with the advice and consent of the Senate, the Commander in Chief Clause, and the power to execute the laws. But he also found authority in the Vesting Clause in Article II, Section 1, Clause 1, which declared that "the executive power shall be vested in a president of the United States." In Hamilton's reading, whereas the Constitution enumerated the legislative powers that were granted to the Congress, the Constitution did not enumerate "all the cases of executive authority." Thus, anything that was in its nature an executive power belonged to the president, except where the Constitution explicitly specified a role for Congress, as it did in granting the legislature the power to declare war and giving the Senate a role in the appointment of officers and the making of treaties.[12]

Hamilton's expansive reading of presidential power appalled Jefferson, who urged James Madison to join the argument: "For god's sake, my dear Sir, take up your pen, select the most striking heresies, and cut him to pieces in the face of the public."[13] Under the pseudonym Helvidius, Madison took up Jefferson's challenge with gusto. Madison rejected

Hamilton's argument that the powers to declare war and to make treaties were inherently executive powers—only those with their "eyes too much on monarchical government" could believe such a proposition. The "natural province" of the executive was to *execute* laws, Madison reasoned. Nothing about making a treaty or declaring war involved the execution of laws. To bolster his case, Madison invoked Hamilton himself, who in *Federalist* No. 75 had proclaimed that the treaty-making power, although neither strictly legislative nor executive, partook "more of the legislative than of the executive character."[14]

While Madison effectively exposed the inconsistency in Hamilton's position, he was less effective in explaining why Washington's proclamation unconstitutionally encroached on Congress's power to declare war. After all, nothing in Washington's proclamation prevented Congress from declaring war on Britain or France. In arguing that the Constitution lodged the powers of making war and peace almost entirely in the legislative branch, Madison did as much violence to the framers' intent as Hamilton did in claiming that the Vesting Clause gave the president a near-limitless reservoir of powers to decide questions of war and peace.[15]

In the end, neither Madison's nor Hamilton's reading of the Constitution had much effect on Washington's decision making. Although Washington may have sympathized with Hamilton's expansive reading of Article II, he steered a prudent course that avoided an institutional showdown with Congress. He sided with Jefferson and against Hamilton in deciding not to abrogate the 1778 treaty with France, and when Congress convened in December 1793, he offered to leave it to "the wisdom of Congress to correct, improve, or enforce" the policy he had announced in his Proclamation of Neutrality. Congress responded by passing the Neutrality Act of 1794, which enabled the administration to successfully prosecute violators of the proclamation, thereby accomplishing President Washington's goal.[16]

Washington's Supreme Court

As the nation's first president, Washington was granted an opportunity not offered to any subsequent president: the chance to pack the Supreme Court with justices entirely of his own choosing. It was an opportunity that he seized.

The Constitution specified that there should be a Supreme Court and "such inferior Courts as the Congress may from time to time ordain and establish" (Article III, Section 1). However, the document did not prescribe the size of the highest court or the number of lower courts. In the Judiciary Act of 1789, Congress supplied the missing pieces. The Supreme Court was to have six members: five associate justices and a chief justice. In addition, there were to be thirteen district courts—roughly one per state—and three regional circuit courts, which could hear appeals from the district courts.

On the same day that Washington signed the Judiciary Act, he submitted his six Supreme Court nominees to the Senate. Two days later, the Senate confirmed all six by voice vote. Washington said he had picked the "fittest characters to expound the Laws and dispense Justice," and his six picks were certainly a distinguished bunch. But legal talent and judicial temperament were not the only criteria that Washington applied. He also sought geographic diversity—his six nominees hailed from six states, three Southern, three Northern. He also picked exclusively from among those who had "strongly supported" the new Constitution. Indeed, three of his six picks—James Wilson of Pennsylvania, John Rutledge of South Carolina, and John Blair of Virginia—had a hand in drafting the Constitution. The Senate's speedy and unanimous approval of Washington's six nominees was a tribute to the distinguished characters the president had selected, but it was also a sign of the Senate's deference to Washington and the absence of organized political parties.[17]

If this was the way the framers always hoped it would be, those hopes were shattered with Washington's choice of John Rutledge to succeed Chief Justice John Jay, who resigned in the summer of 1795 to become governor of New York. Rutledge himself had quit the Court in 1791 after being elected chief justice of South Carolina's state supreme court. The resignations of both Jay and Rutledge serve as reminders that U.S. Supreme Court positions in the early republic were not necessarily seen as more important or desirable than state posts. What made the job especially grueling was the responsibility under the Judiciary Act of 1789 for "riding circuit." That is, Supreme Court justices were responsible not only for hearing cases in the nation's capital but also for traveling thousands of miles on often-poor roads to hear cases in one of the three circuits (Eastern, Middle, and Southern) to which each justice was assigned.[18]

Washington received Jay's resignation after Congress had already adjourned for the year. Not wishing to leave the chief justice's seat vacant for another six months, Washington used a recess appointment to appoint Rutledge (who had already served on the Court) to serve as chief on an interim basis until Congress returned to the capital. However, Rutledge became enveloped by the fierce partisan disagreement over the Jay Treaty—a treaty that Jay had secretly negotiated with Britain while he was still chief justice.

The terms of the Jay Treaty, which addressed trade disputes and other unresolved issues relating to the American Revolution, were publicly unveiled on July 2, 1795, the day after Washington appointed Rutledge. The treaty divided the country along partisan lines: Federalists urged its ratification, whereas Republicans condemned the treaty for forging closer ties with monarchical England at the expense of America's revolutionary ally, France. At a public meeting in Charleston, South Carolina, Rutledge thrust himself into the center of the partisan debate by speaking out against the treaty.[19]

In *Federalist* No. 76, Hamilton had predicted that the Senate's role in judicial appointments would generally be limited to a "silent" role of discouraging presidents from nominating cronies or plainly "unfit characters." Now, however, Hamilton orchestrated a noisy campaign to keep Rutledge off the bench. Undeterred, Washington submitted Rutledge's name to the Senate for approval as soon as Congress reconvened in December. Five days later, with Hamilton lobbying furiously against the supposedly "insane" Rutledge, the Senate voted along party lines to reject Rutledge.[20]

Washington got the message. In place of Rutledge, he nominated a stalwart Federalist, Oliver Ellsworth, to serve as chief justice. As a U.S. senator, Ellsworth not only had enthusiastically backed the Jay Treaty, but also had been, in the words of John Adams, "the firmest pillar" of the Washington administration's policies. From the outset of the republic, then, partisanship was an inseparable part of the process by which presidents nominated and the Senate approved Supreme Court justices.[21]

Moreover, the early Court, which Washington had packed with Federalists, set precedents that strengthened the power of the federal government and ultimately paved the way for the Court's even more expansive assertion of federal power under Chief Justice John Marshall.[22]

Making the First Executive Departments, Convening the First Cabinet

If the Constitution said nothing about judicial review and next to nothing about how the courts should be constituted, it was only marginally less unhelpful when it came to organizing the presidency. The framers did clearly anticipate the creation of executive departments, headed by a "principal officer" (Article II, Section 2, Clause 1), but they left it to Congress to enumerate those departments as well as the principal officers' duties.

During the summer of 1789, Congress created the departments of foreign affairs, war, and treasury. Each department was to be directed by a department head, whose role in advising the president nevertheless remained unclear. Article II, Section 2, stipulated only that the president could require department heads to provide a written opinion "on any subject relating to the duties of their respective offices." Washington soon discovered that following a literal reading of this clause did not allow him "always to compare the opinions of those in whom I confide with one another."[23]

While Washington initially consulted with cabinet members individually rather than collectively, in the final year of his first term Washington began to experiment with a new advisory structure. Instead of relying solely on written opinions and private conversations, the president convened meetings with the three department heads and the attorney general. The gang of four—which Washington now dubbed his "cabinet"—met frequently during the spring of 1793 as the president struggled to forge a policy that would keep the United States out of the war between France and Britain. During these meetings, Jefferson and Hamilton were, according to Jefferson, "daily pitted in the cabinet like two cocks." Although Washington took no pleasure in watching his two chief advisers gouge each other, he found the frank exchange of views invaluable and continued to hold cabinet meetings regularly for the remainder of his time in the presidency.[24]

Seeking the Senate's "Advice and Consent"

The Constitution provided that the chief executive had to obtain the "advice and consent" of the Senate before acting on treaties and certain appointments (Article II, Section 2, Clause 2). Nonetheless, much was left for the first president to interpret. Washington assumed that he should

seek the Senate's advice about treaties in person, because their complexities required the give-and-take of discussion. To communicate in writing would be "tedious without being satisfactory," Washington reasoned. The president put this theory into practice in August 1789, when he visited the Senate chamber for advice and consent on a treaty with the Creek people.[25]

The experiment did not go well. The vice president, John Adams, was asked to read the document the president had prepared, including seven questions on which the president sought the Senate's advice and consent. The noise from the street combined with Adams's rushed delivery prevented the chamber's twenty-two senators from hearing much of what had been read, requiring Adams to reread it. Even then, when Adams asked, "Do you advise and consent?" nobody was quite sure what to say. The awkward silence was only broken by Senator William Maclay's request that previous treaties and other relevant documents also be read so that senators would be better informed. After that information was read aloud, discussion rapidly degenerated into an extended meditation on the process. When it was suggested that the president's document should be referred to a select committee, an exasperated Washington (according to Maclay) "started up in a violent fret," declaring that "this defeats every purpose of my coming here."[26]

It was a rare outburst of anger from a president who was generally the picture of composure. Washington quickly cooled down, however, and both president and Senate agreed to postpone the deliberations for forty-eight hours. Upon returning to the Senate chamber on Monday morning, Washington, his demeanor now "placid and serene," patiently endured a long and sometimes tedious debate over the various questions he had put to the senators. The Senate ultimately approved the instructions with only minor modifications, but a chastened Washington had learned his lesson. Never again would he—or any other president—seek the Senate's advice in person. In the future, senatorial advice on treaties would be transmitted to the president unofficially, through private conversations and consultations, or through communications between committee chairs and department secretaries.[27]

A Failed Experiment: The Supreme Court as Advisory Council

For a brief time, Washington considered the Supreme Court an ex officio advisory council since Congress clearly could not fulfill that role. The Court was blessed with men whose judgment Washington trusted greatly, none more so than Chief Justice John Jay. Washington had wanted Jay to be his secretary of state but had reluctantly deferred to Jay's desire to be the nation's first chief justice. Yet this did not stop Washington from seeking Jay's advice, or Jay from giving it. Neither Washington nor Jay saw this relationship as inappropriate, particularly in view of the several proposals made at the Constitutional Convention, including a proposal by the Committee on Detail (chaired by John Rutledge) to include the chief justice as a member of the council of state.

However, in the first year of Washington's second term, the Court rebuffed his request for advice on legal issues connected to the Proclamation of Neutrality.[28] This reluctance to get involved may have stemmed from the justices' awareness that the president was asking them to referee a political dispute between Secretary of State Thomas Jefferson and Treasury Secretary Alexander Hamilton over the U.S. treaty obligations to France. Or perhaps the justices were slyly playing partisan politics: Recognizing the strength of Jefferson's legal position, they could best advance Hamilton and Washington's policy of neutrality by declining to answer the twenty-nine questions the president had put to them. Or perhaps the Court sincerely believed, as Jay told Washington, that "the lines of separation, drawn by the Constitution between the three departments of the government," prevented the Court from rendering advisory opinions to the president. Whatever the justices' motives, their refusal cut off the judiciary as another potential channel of advice and strengthened Washington's (and future presidents') reliance on their own executive branch officials for advice.[29]

Conclusion

Convinced that the new Constitution was firmly established, Washington chose to exit the public stage in 1796 rather than to seek a third term in office. Although no law required him to do so, Washington believed it was important to show, in the words of political scientist Thomas Cronin, that "the new political system did not depend on any individual."[30]

Washington returned to Mount Vernon, where he spent the final two years of his life with his family, tending to his estate and occasionally accepting an assignment in public service. Besides his voluntary return to private life, Washington has other lessons to teach us as well, lessons that are too often obscured by the heroic myths with which we envelop his memory. Remarkably, the real President Washington little resembles the ideal of presidential greatness that has become embedded in national folklore. One of the great canards of the heroic narrative is that the greatest presidents boldly did what was right, regardless of whether it was popular.[31] Yet no president was more solicitous of his public reputation than Washington. Almost every action Washington took, including running for president, was made with an eye on how it would be perceived by his countrymen and how it would affect his reputation as a paragon of virtue.

Nor does Washington's behavior fit the standard storyline about great presidents fearlessly testing the boundaries of presidential power. Instead, Washington exercised his powers with enormous caution and self-restraint. Washington built presidential authority not through daring defiance of Congress or bold, unilateral action, but through carefully building trust in the competence and judgment of the executive branch.

In fact, Washington was among the most cautious and circumspect of all American presidents. Before making decisions, he consulted broadly and deliberated with excruciating care. Jefferson rightly remarked that "the strongest feature" in Washington's character "was prudence, never acting until every circumstance, every consideration, was maturely weighed." On this one matter, even Jefferson's nemesis Alexander Hamilton was in full agreement. Washington was temperamentally suited to the presidency, Hamilton explained, because the nation's first president "consulted much, pondered much, resolved slowly, resolved surely."[32] What others called bold, Washington regarded as foolish and rash.

Washington's understanding of the Constitution—and the president's role within it—bears little resemblance to the view adopted by most contemporary presidents. Modern presidents are inclined to follow Woodrow Wilson in reading the Constitution as a license that gives a president enormous latitude and leaves the chief executive "at liberty, both in law and in conscience, to be as big a man as he can." Today, deference to other constitutional actors is typically interpreted as a sign of weakness, the restrained use of power a failure of nerve. Washington, in contrast, filled the Constitution's silences with prudent judgments and the careful, restrained

exercise of power. For him, building a strong presidency and a respected government required neither bold, unilateral executive action nor strident bullying of Congress. Rather, it depended upon a sober reckoning of the political, legal, and constitutional constraints on presidential power.

NOTES

1. Ron Chernow, *Washington: A Life* (New York: Penguin Press, 2010), 5–7, 9–10.
2. Ibid., 18–28, 31–32; "The Ten Richest U.S. Presidents," *24/7 Wall St. Wire*, February 17, 2012, http://247wallst.com/2012/02/17/the-ten-richest-u-s-presidents/.
3. Gordon S. Wood, *Revolutionary Characters: What Made the Founders Different* (London: Penguin Books, 2006), 33.
4. Chernow, *Washington*, 521, 524, 529, 531, 543, 537, 549.
5. Washington to Edmund Pendleton, September 23, 1793, in *The Writings of George Washington*, ed. Worthington Chauncey Ford (New York: G.P. Putnam's Sons, 1891), 12:327; Robert J. Spitzer, *The Presidential Veto: Touchstone of the American Presidency* (Albany: State University of New York Press, 1988), 28.
6. James Thomas Flexner, *George Washington and the New Nation, 1783–1793* (Boston: Little, Brown, 1970), 301; Chernow, *Washington*, 668.
7. George Washington, First Annual Message, January 8, 1790, in *The Diaries of George Washington*, ed. Donald Jackson and Dorothy Twohig (Charlottesville: University Press of Virginia, 1979), 5:507–508.
8. George Washington, Communication of Sentiments to Benjamin Hawkins, in *The Writings of George Washington*, ed. Worthington Chauncey Ford (New York: G.P. Putnam's Sons, 1891), 12:72–73; Leonard D. White, *The Federalists: A Study in Administrative History* (New York: Macmillan, 1948), 55.
9. White, *The Federalists*, 55, 53. See also Flexner, *George Washington and the New Nation*, 221.
10. Forrest McDonald, *The American Presidency: An Intellectual History* (Lawrence: University Press of Kansas, 1994), 236. See also Stanley Elkins and Eric McKitrick, *The Age of Federalism: The Early American Republic* (New York: Oxford University Press, 1993), 333–335.
11. Martin S. Flaherty, "The Story of the Neutrality Controversy: Struggling Over Presidential Power Outside the Courts," in *Presidential Power Stories*, ed. Christopher H. Schroeder and Curtis A. Bradley (New York: Foundation Press, 2009), 25.
12. Pacificus (Alexander Hamilton), *Pacificus No. 1*, available at the Online Library of Liberty, http://oll.libertyfund.org/. See also Richard J. Ellis, ed., *Founding the American Presidency* (Lanham, MD: Rowman and Littlefield, 1999), 174–175.
13. Jefferson to Madison, July 7, 1793, in *The Papers of Thomas Jefferson*, volume 26, *May 1793 to August 1793*, ed. John Catanzariti et al. (Princeton, NJ: Princeton University Press, 1995), 444.
14. Madison also objected to Hamilton's claim that specific grants of executive power in Article II, particularly the power to receive ambassadors, made the president "the organ

of intercourse" with other nations. Madison argued that this language did not give presidents the power to conduct foreign policy on their own. For support, Madison again appealed to Hamilton's own words, this time in *Federalist* No. 69. Here, Hamilton had argued that the power to receive ambassadors and other public ministers was merely a recognition that it would be inconvenient to convene the legislature every time a foreign minister arrived in the country. Helvidius (James Madison), *Helvidius No. 1 and No. 3*, available at the Online Library of Liberty, http://oll.libertyfund.org/. See also Ellis, *Founding the American Presidency*, 176–179.

15. *Federalist* No. 75.
16. Louis Fisher, *Presidential War Power*, 2nd ed. (Lawrence: University Press of Kansas, 2004), 28; Flaherty, "Story of the Neutrality Controversy," 43, 48.
17. John Anthony Maltese, *The Selling of Supreme Court Nominees* (Baltimore: Johns Hopkins University Press, 1995), 24–25.
18. Under the 1789 act, each circuit court consisted of three judges—two Supreme Court justices and the local district court judge. In 1793, Congress eased somewhat the Court's burden by reducing each circuit court to two judges—one Supreme Court justice and a district court judge. Circuit riding by Supreme Court justices continued until 1891. For a history of circuit riding—and an unorthodox argument that the Supreme Court should resume the practice—see David R. Stras, "Why Supreme Justices Should Ride Circuit Again," *Minnesota Law Review* 91 (June 2007): 1710–1751.
19. Washington himself had doubts about the terms of the treaty, but believed it was necessary to avoid a war with Great Britain and to achieve a compromise that allowed the two nations to resume peaceful trade.
20. Maltese, *Selling of Supreme Court Nominees*, 19, 26–31.
21. Adams to James Lloyd, January 1815, in *The Works of John Adams*, ed. Charles Francis Adams (Boston: Little, Brown, 1856), 10:112.
22. As early as 1796, the Court took tentative steps into the realm of judicial review, paving the way for the landmark case of *Marbury v. Madison*. The first case in which it confronted a direct challenge to an act of Congress was the little-known case of *Hylton v. United States*. Although the Court unanimously concluded that the law in question (placing a "duty" on privately owned carriages used for transportation) did not violate the Constitution, the case nonetheless was important because it was the first decision to explicitly recognize that the Court could act as a check on the actions of another branch of government. Hylton v. United States, 2 U.S. (3 Dall.) 171, 173 (1796). See also Julius Goebel Jr., *History of the Supreme Court of the United States*, vol. 1, *Antecedents and Beginnings to 1801* (New York: Macmillan, 1971), 778.
23. Flexner, *George Washington and the New Nation*, 401. The Department of Foreign Affairs was established in July 1789 and renamed the Department of State a few months later.
24. Thomas Jefferson to Doctor Walter Jones, March 5, 1810, *The Works of Thomas Jefferson* (G.P. Putnam's Sons, 1904–1905; 12 vols.), available at the Online Library of Liberty, http://oll.libertyfund.org/; Flexner, *George Washington and the New Nation*, 400; Richard F. Fenno Jr., *The President's Cabinet* (Cambridge, MA: Harvard University Press, 1959), 17–18.

25. Elkins and McKitrick, *Age of Federalism*, 56; Flexner, *George Washington and the New Nation*, 216; "Conference with a Committee of the United States Senate," August 8, 1789, in *The Papers of George Washington, Presidential Series*, ed. Dorothy Twohig (Charlottesville: University Press of Virginia, 1979), 3:401.
26. Elkins and McKitrick, *Age of Federalism*, 56–57; Flexner, *George Washington and the New Nation*, 216.
27. Elkins and McKitrick, *Age of Federalism*, 57–58; William Maclay, *Journal of William Maclay*, entry of August 24, 1789, http://memory.loc.gov/ammem/amlaw/lwmj.html.
28. For a discussion of the Court's role in the neutrality debate, as well as the related correspondence between Washington's administration and the Supreme Court, see Maeva Marcus, *The Documentary History of the Supreme Court of the United States, 1789–1800*, vol. 6, *Cases: 1790–1795* (New York: Columbia University Press, 1998), 296–311, 743–758.
29. McDonald, *The American Presidency*, 227. Glenn A. Phelps, "George Washington: Precedent Setter," in *Inventing the American Presidency*, ed. Thomas E. Cronin (Lawrence: University Press of Kansas, 1989), 272; James Willard Hurst, *The Growth of American Law: The Law Makers* (Boston: Little, Brown, 1950), 181; Fenno, *The President's Cabinet*, 15–16.
30. Thomas E. Cronin, "Pro: Resolved, the Twenty-Second Amendment Should Be Repealed," in *Debating the Presidency: Conflicting Perspectives on the American Executive*, 2nd ed., ed. Richard J. Ellis and Michael Nelson (Washington, DC: CQ Press, 2010), 52; Chernow, *Washington*, 752. Although Washington was the first president to step down after two terms, he did not necessarily intend to establish a two-term tradition for other presidents to follow. As Michael Korzi and others have shown, Thomas Jefferson has the best claim to being the intellectual "founder" of the two-term tradition. Michael J. Korzi, *Presidential Terms Limits in American History: Power, Principles, and Politics* (College Station: Texas A&M University Press, 2011), 43–50. But even then, the two-term tradition was always more tenuous than is sometimes believed. It was challenged in the nineteenth and early twentieth century not only by a robust one-term tradition but also by a few presidents who pressed for a third term, notably Ulysses S. Grant in 1880 and Theodore Roosevelt in 1912. The two-term tradition was ultimately broken in 1940, with the election of Franklin D. Roosevelt for a third term. A couple of years after FDR's reelection for a fourth term, Congress passed and the states ratified the Twenty-Second Amendment, which limited all presidents to two terms.
31. Thomas E. Cronin and Michael A. Genovese, *The Paradoxes of the American Presidency*, 2nd ed. (New York: Oxford University Press, 2004), 84.
32. Ron Chernow, *Alexander Hamilton* (New York: Penguin, 2004), 290, 510.