The Constitutional Framework for the Balance and Limitation of Presidential Powers

Rachel Ferrari

Professor Edelson

GOVT-226

4 May 2018

Introduction

In writing the Constitution, the Framers were very conscious of their own history as former British colonists under a tyrant monarch and later as citizens under the failed Articles of Confederation. As a result, they sought to have an empowered and "energetic" executive that could respond to national emergencies,[1] but also wished to avoid the pitfalls of enabling another tyrant figure to gain power. Therefore, the Constitution is meant to provide the general foundation for a system of balances, though it does not include any limitations specifically.

While the Constitution does not explicitly outline limits on emergency presidential power, it does support a general idea of checks and balances that can be applied to the executive as one of the branches of government, and it is clear that the Framers intended to create a balance between presidential power and limits. There is also more to consider than just the Constitution itself, as the definition and status of presidential power has also evolved over time as a result of principles discussed by the Framers in the Federalist Papers, precedent set by past and present action, and Supreme Court cases.

Constitutional Limits as a Matter of Law

As a statement of claimed fact, the assertion that the Constitution is designed to create a balance is based on objectivity; it does not make any normative assessments about what the Constitution *should* do or how it should be interpreted. Instead, it seeks to establish whether there is, *in fact*, a constitutional balance between presidential power and limits. This means that evaluating the question requires a slightly different approach, since one must get to the objective truth, rather than trying to spin reality to support a particular stance or viewpoint.

---

[1] Alexander Hamilton, *Federalist* No. 70.

As with any question of constitutional authority, one must start with the source document: The Constitution itself, which covers the broader topic of government powers by splitting up the document into distinct Articles, each for a different branch of the government. Using this system, one would think that it would be easy to find which power is delegated to which branch; you would simply have to find which Article the power is located in. However, it is not that simple, as certain powers cross over between branches or are not located in the Article corresponding to the branch that uses it or have other deviations make it difficult to follow this sort of pattern.

More specifically looking at emergency presidential power, the Constitution itself does not offer much insight, as "the Constitution does not expressly grant *any* such [emergency] power to the president. The only explicit reference to emergency power of any sort appears in Article I, Section 9."[2] This is referring to the Suspension Clause allowing for the suspension of the writ of habeas corpus, which is found in Article I with other legislative branch powers, though it has historically been exercised by the executive.[3] Clearly, the document itself is more complicated than it seems when it comes to using it as a guide for the allocation of presidential power.

One spot in the Constitution that has invited interpretation as to its intent is the Commander in Chief clause, which states that "the President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."[4] Here, the Constitution designates a military title for the president, but elsewhere it reserves the ability to declare war for Congress. Because of this

---

[2] Chris Edelson, *Emergency Presidential Power*, 7.
[3] Ibid, 3.
[4] U.S. Const. Art II, § 2, cl. 1.

uncertainty, some scholars have noted that there are conflicting views as to whether this title is just a formality or if it denotes specific powers attached to it,[5] which definitely opens the door for interpretation by scholars and government officials.

Scholarly Perspectives: Presidential Power in Theory

Many scholars have weighed in on the issue of presidential power, and a number of schools of thought have emerged. Some of the broad views of Constitutional interpretation include strict construction, which applies only the bare text as it is written; originalism, which seeks to add context through the consideration of the original intent and meaning; and an activist approach, which takes a more active stance in applying the Constitution as a framework to a wider variety of scenarios.[6] More specific to the allocation of emergency presidential power, schools of thought include categorizations such as limited unilateral power subject to retroactive congressional approval, broad unilateral power defined by the president, and emergency power authorized in advance by Congress.[7]

Unitary Executive Theory

One particularly influential school of thought on presidential power is the Unitary Executive Theory, in which scholars such as John Yoo prefer to think of the president as having plenary power inherent to the position itself.[8] For justification, supporters of the Unitary Executive Theory often point to the executive Vesting Clause,[9] which says that all of the

[5] Louis Fisher, *Presidential War Power*, 13.
[6] Louis Fisher, Introduction, *Emergency Presidential Power*, 3.
[7] Chris Edelson, *Emergency Presidential Power*, 7-10.
[8] Ibid, 18.
[9] U.S. Const. Art II, § 1, cl. 1.

executive power is vested in the president and is seen as more broadly written than the legislative Vesting Clause;[10] as well as the Take Care Clause,[11] which states that the president should "take care" to ensure that laws and the Constitution are carried out correctly.[12] To them, this means that the president is tasked with interpreting the Constitution itself, and determining if individual laws abide by that reading.[13] Scholars who favor more narrow presidential power criticize this viewpoint with the argument that giving the president this power is dangerous and "extra-constitutional," as it sets the presidency above even the Constitution as a final arbiter of what is right or wrong.[14] On top of that issue, this power was never assigned to the presidency, and it would seem to be infringing on the judiciary's role.

Other Sources of Constitutional Interpretation

Clearly the text of the Constitution alone is not specific enough on this topic, as there are a wide variety of viewpoints taken from the same source material. Because the document is not sufficient on its own to define emergency presidential power, many scholars believe that it is necessary to expand the search range:

> "By what criteria do we decide how the Constitution allocates the war powers? Four possibilities[...]: the text of the Constitution's war-power provisions, the purpose of those who wrote and ratified the text, evolving beliefs since 1789 about what the Constitution requires, and--irrespective of text, purpose, or beliefs--the *actual* allocation of control that have existed between the President and Congress since 1789."[15]

Subscribing to this theory then, one would find it necessary to look at sources beyond the exact words in the Constitution to gain a complete understanding of the state of presidential power

---

[10] Chris Edelson, *Emergency Presidential Power*, 126.
[11] U.S. Const. Art II, § 3, cl. 5.
[12] Chris Edelson, *Emergency Presidential Power*, 127.
[13] Ibid.
[14] Ibid.
[15] Taylor Reveley, *War Powers of the President and Congress*, 170.

throughout history and as it stands today. One possible way of gaining better insight as to the original intent of the Framers would be to take into consideration the historical context of the time period in which they wrote the Constitution.

Logically, the primary historical influence in the Founders' minds when drafting was the experience of the colonists as British subjects under a tyrannical monarch.[16] Having seen the problems of a system with an executive given unlimited power, they used that experience to create a better system that would not allow the same thing to happen in the United States. At the same time, they also learned from the mistakes of the Articles of Confederation, the early American government that struggled as a result of being far too weak and decentralized, with no executive branch at all.[17] This represented the other extreme of the spectrum with too little power in the hands of the central government. Having seen both of those formats around the same time meant that the Framers experienced the problems of both extremes and wanted to find a middle ground in the form of the Constitution.

The Federalist Papers

Looking at the thoughts and writings of the Framers can also be very helpful in determining what was meant when they drafted the Constitution. Alexander Hamilton, James Madison, and John Jay extensively discussed their thoughts on these topics in the *Federalist Papers*, which were written to support the ratification of the Constitution and address any concerns that people had with the new system of government.[18] Naturally, they used the *Federalist Papers* as a forum for going more in-depth on exactly what they meant by certain

---

[16] *The Declaration of Independence*, 1776.
[17] *The Articles of Confederation*, 1781.
[18] Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers.*

provisions in the Constitution and how they envisioned it being implemented. For example, in *Federalist* No. 47, James Madison discusses the separation of powers and notes that the three branches of government are not meant to be "separate and distinct" but instead overlapping in their responsibilities in order to provide balance and keep each branch in check.[19]

In addition, Alexander Hamilton in *Federalist* No. 69 addresses some of the concerns of the anti-Federalists by laying out the differences between the British King and the proposed executive role under the Constitution. He notes that having a president does not automatically make the position immune to all limitations or above the law of the land:

> "The first thing which strikes our attention is, that the executive authority, with few exceptions, is to be vested in a single magistrate. This will scarcely, however, be considered as a point upon which any comparison can be grounded; for if, in this particular, there be a resemblance to the king of Great Britain, there is not less a resemblance to the Grand Seignior, to the khan of Tartary, to the Man of the Seven Mountains, or to the governor of New York."[20]

Indeed, by comparing the position of president to that of a state governor, Hamilton confirms that the Founders envisioned the presidency as being more restricted than that of an absolute monarchy. This shows that the Framers were aware of the need for limits and therefore intended the Constitution to act as a mediator between the president's power and limitations.

Court Cases and Official Speeches

In addition to the text of the Constitution, the history surrounding it, and the *Federalist Papers*, even more sources of constitutional interpretation regarding presidential power and limits are Supreme Court cases and the speeches of government officials.

---

[19] James Madison, *Federalist* No. 47.
[20] Alexander Hamilton, *Federalist* No. 69.

Court cases generally only occur when there has been some kind of conflict over who is entitled to use a certain power. One scholar notes that in situations like these, "showdowns between the branches have been rare, and most issues of current controversy result from situations in which Congress has delegated power to the president, or in which the president has acted in a legislative vacuum."[21] In other words, the branches tend to stick to their respective areas, and conflict between them generally only arises when it concerns activities that they both may argue a claim to or when there is no clear settled precedent.

This issue became relevant during *Youngstown Sheet & Tube Co v. Sawyer*,[22] the 1952 Supreme Court case revolving around President Truman's seizure of a steel company during wartime. In the case, the company argued that the government was wrong to seize the factories, while the government tried to justify its action as a matter of national security to ensure the continued production of steel during the Korean War.[23] In the end, the Court sided with the steel company and rebuked the government for having gone outside the boundaries of its power, since taking over a company did not have a direct impact on the war itself.

More important is the lasting impact from the case: the concurring opinion written by Justice Jackson created what is known as the Tripartite Framework, which is useful as a guideline for analyzing presidential power and solving disagreements between Congress and the president.[24] It states that there are three scenarios: when the President acts with Congress, his power is at its highest; when he acts against Congress, it is at its lowest; and somewhere in the middle are scenarios where Congress has not weighed in.[25]

---

[21] Abraham Sofaer, *War, Foreign Affairs, and Constitutional Power*, 4.
[22] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579.
[23] Chris Edelson, *Emergency Presidential Power*, 102.
[24] Ibid, 103.
[25] Ibid, 108.

In addition to court precedent, the speech that inspired the sole organ doctrine is also often cited by Unitary Executive theorists as proof that the president should have plenary power, since they are the "sole organ" of foreign affairs.[26] However, this is actually a mistaken concept based on the misinterpretation of a speech by Chief Justice John Marshall that was further perpetuated by the later Supreme Court *Curtiss-Wright* case.[27] Marshall did not mean to suggest that the president could act unilaterally in international affairs, just that that was the way that treaties are executed. Therefore, this point is often included in the debate over presidential power and limitations by those who do not understand its context.

Presidential Power in Practice

Part of determining whether there is truly a balance between presidential power and limits involves looking at how the system actually works in reality, which is slightly different than how it is written into law simply due to the differences in how laws and policies are implemented. Some might argue that there cannot be a difference between theory and practice, especially when it comes to laws. However, as discussed in class early on in the semester, norms play an important role in that government action is often governed by unwritten rules.[28] So even though a rule might not be written down, it still holds weight, and some rules on the books are effectively ignored by everyone in practice. The War Powers Resolution is one example. Initially passed in 1973 over a presidential veto, it was created in response to President Nixon's very unpopular expansion of war powers during the Vietnam War in the context of a larger trend of

[26] Chris Edelson, *Emergency Presidential Power*, 18.
[27] Ibid, 65.
[28] Brendan Nyhan, *Norms Matter*.

unchecked presidential powers during his administration.[29] The WPR is one law that started out with good intentions but now has a very limited impact today because it can only be effective if actively enforced by Congress, which is unlikely due to a systematic the change in the congressional political atmosphere. No longer does Congress assert itself as a united institution/branch of government against the expansion of presidential power; it now is divided so deeply along partisan lines that anything the president does will usually receive at least a moderate portion of support in Congress. So while the War Powers Resolution was originally a strong tool to corral Nixon's wartime activities, these recent political divisions mean that it goes unused, even when presidents' power could be effectively checked by it.[30]

Post-9/11 Understandings of Modern Presidential Power

The attacks on September 11, 2001 are widely considered a pivotal moment in history, and their impact on presidential power and military action cannot be understated. Post-9/11 presidential actions demonstrate the need for strong constitutional limits on presidential power, but it is unclear to what extent those limits actually exist in reality, since it seems that the president can either keep unethical activities secret, have lawyers justify nearly anything they want to do, or can always find a way around the limitations that do exist.

The Bush Administration

In the aftermath of 9/11, the legislative branch united with the executive to pass the Authorization of the Use of Military Force (AUMF) against those who carried out the attacks, which authorized the president to "use all necessary and appropriate force against those nations,

[29] Chris Edelson, *Emergency Presidential Power*, 266
[30] Ibid.

organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks," including anyone who harbored them.[31] In accordance with the Tripartite Framework, this was clearly an example where both branches worked together on military action, giving President Bush the greatest legal authority to use military force in that instance. Compared to other cases of military force, such as Obama's use of drone strikes in Libya, this was a well-justified example of a legal use of force.

However, in the Bush administration, the real issue was with lawyers who authorized secret surveillance programs under the knowledge of only a select few people. One scholar describes the Bush years as "an era of lawlessness in presidential war powers" as executive branch lawyers "manipulated (or were pressed into manipulating) internal decision-making processes to stifle dissent and to legitimize unlawful behavior. They did so, not by disregarding law entirely, but rather through their own instrumental and creative legal interpretations."[32] This characterization of the role of lawyers in influencing government action is very troubling, because there is no accounting for them in the Constitution, and they clearly have more influence over the emergency presidential power process than intended or than even is known about at some points. The was further illustrated in the PBS *Frontline* episode "Cheney's Law" concerning the number of secret memos and activities carried on in the Office of Legal Counsel (OLC) in order to justify President Bush's surveillance programs, with his lawyers going so far as to cause a showdown at then-Attorney General John Ashcroft's hospital room over it.[33] Evidently, Vice President Cheney and the OLC went to very far lengths to expand the power of the presidency with blatant disregard for legality, constitutionality, and the norms of governance.

---

[31] Chris Edelson, *Emergency Presidential Power*, 162.
[32] Rebecca Ingber, *The Obama War Powers Legacy*, 681.
[33] "Cheney's Law," *Frontline PBS.*

The Obama Administration

In the Obama administration, the issue of presidential power was again a key component in the decision to carry out military action in Libya and the resulting controversy afterwards. High-level discussions concerning presidential power revolved around the need for specific definitions of terms. This included debate over what constitutes a "war" or "hostilities," since labeling a situation as being under one of those categories introduces requirements under the War Powers Resolution.[34] To avoid addressing that issue, the administration denied that the situation was either of those, instead choosing to focus on the policy implications and arguing that low costs and low risk to human life meant that it did not count as hostilities.[35] While this might seem like a valid argument given the context of the situation, it does introduce concerns about the precedent being set by such justifications. In the future, if the U.S. military were to become so technologically advanced that it could guarantee no loss of life while taking military action, would that be considered acceptable to exclude from the War Powers Resolution? It could very quickly turn into a slippery slope.

Additionally, just because drone strikes are cheaper than traditional military weapons, that does not mean that the president can simply skirt the constitutional process established for declaring and carrying out war, which is expressly given only to the legislative branch under Article I.[36] These are the questions that must be asked when considered the implications of presidential power arguments.

---

[34] Mariah Zeisberg, *War Powers*, 3.
[35] Ibid, 4.
[36] U.S. Const. Art I, § 8, cl. 11.

The Challenge of Creeping Presidential Authority

One issue that has developed over time is the gradual expansion of presidential authority as a result of precedent being set. Once one president breaks ground on taking a certain action, no successor will want to give up that power again, even if it was only meant to be used in one special situation. Even in the circumstances where presidents-elect say they will work to decrease presidential power, scholars note that those promises do not tend to last very long:

> "When a president comes to office promising to dial back the prior administration's claims to power, as did Obama, and as might future presidents once again, those institutional features favoring continuity and those favoring executive power operate in tandem to entrench the executive power claims that the president inherits. This incremental aggrandizement is our long-term challenge, and its effects extend beyond the limits of any one presidential administration."[37]

In other words, this challenge is an institutional problem with the presidency itself, not a grievance about any specific president, since they are all human and equally prone to carrying on the cycle. Despite the best efforts of the Constitution, the legislative branch, and the courts, presidential power continues to grow, and will likely continue to do so for the foreseeable future, since there is effectively no way to stop the spread of it. However, being aware of the phenomenon and keeping in mind the dangers of setting precedent without fully considering the implications can go a long way towards slowing it down.

Conclusion

In summary, while the Framers left presidential limits rather vague in the actual text of the document, they certainly intended to enact limitations on presidential power, and it has

[37] Rebecca Ingber, *The Obama War Powers Legacy*, 680.

evolved to be interpreted as such. Actions taken since 9/11 have also shown the need for strong limits on presidential power that are actually enforced, not just limits on paper.

In terms of today's current events, these ideas have suddenly been thrust into the spotlight as the country again grapples with itself over the issue of presidential power since the country now has a president who attacks his own government agencies, is caught up in a criminal investigation, and acts erratic and impulsive when it comes to foreign policy. A president like Donald Trump is essentially the worst-case scenario that the Framers had hoped to prevent in structuring the government. Ironically, it seems that the country has come full circle, having begun its life fearful of a strong king-like executive, and then becoming too lax and trusting under the guidance of presidents during times of both emergency and prosperity, only to find itself overwhelmed and unsure what to do when faced again with the serious prospect of a president that is unfit for office. Many of the original concerns of the Framers also still apply today, since they were generally focused on what controls could be used to stop a president who governs irrationally or ignores the will of the people. Therefore, in moving forward, the country must look to its founding documents, historical writings, court cases, and its past precedent in determining how to handle this situation that feels uncomfortably foreign, yet eerily familiar, as if the country is living through the nightmare scenario that its leaders had been trying to avoid all along.

Bibliography

"Cheney's Law," *Frontline PBS*, October 16, 2007. Video.

The Articles of Confederation, 1781. http://www.archives.gov/exhibits/charters/declaration_transcript.html.

The Declaration of Independence, 1776. http://avalon.law.yale.edu/18th_century/artconf.asp.

Edelson, Chris. *Emergency Presidential Power: From the Drafting of the Constitution to the War on Terror*. Madison: The University of Wisconsin Press, 2013. Print.

Fisher, Louis. *Presidential War Power*. Third edition. Lawrence: University Press of Kansas, 2013. Print.

Fisher, Louis. Introduction. *Emergency Presidential Power: From the Drafting of the Constitution to the War on Terror*. Madison: The University of Wisconsin Press, 2013. Print. 3-6.

Hamilton, Alexander, James Madison, and John Jay. *The Federalist Papers.* New York: New York Independent Journal, 1787. Print.

Ingber, Rebecca. "The Obama War Powers Legacy and the Internal Forces That Entrench Executive Power." *The American Journal of International Law*, vol. 110, no. 4 (October 2016): 680-700.

Nyhan, Brendan. *Norms Matter*. POLITICO Magazine, September/October 2017. Web. https://www.politico.com/magazine/story/2017/09/05/why-norms-matter-politics-trump-215535.

Reveley, Taylor. *War Powers of the President and Congress: Who Holds the Arrows and Olive Branch?*. Charlottesville: University Press of Virginia, 1981. Print.

Sofaer, Abraham. *War, Foreign Affairs, and Constitutional Power.* Cambridge: Ballinger Publishing Company, 1976. Print.

The U.S. Constitution, 1787.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579

Zeisburg, Mariah. *War Powers: The Politics of Constitutional Authority.* Princeton: Princeton University Press, 2013. Print.