

UC Berkeley  
Public Law  
Research Paper No. 810864

University of St. Thomas  
Legal Studies Research Paper Series  
Research Paper No. 05-17

# Thinking About Presidents

**Robert J. Delahunty**

*University of St. Thomas, St. Paul/Minneapolis, MN*

**John C. Yoo**

*UC Berkeley*

This paper can be downloaded without charge from the  
Social Science Research Network Electronic Paper Collection at:

<http://ssrn.com/abstract=810864>

---

---

## BOOK REVIEW

### THINKING ABOUT PRESIDENTS

*Presidential Leadership: Rating the Best and the Worst in the White House.*  
Edited by James Taranto & Leonard Leo. Free Press: Wall Street Journal  
Books. 2004. Pp. 291. \$26.00.

Robert J. Delahunty<sup>†</sup> & John C. Yoo<sup>††</sup>

Presidents get short shrift in most constitutional law courses. Take some of the leading casebooks. In the most recent edition of *Constitutional Law*,<sup>1</sup> by Jess Choper et al., the discussion of the President's powers vis-à-vis Congress runs about 60 pages out of 1542.<sup>2</sup> In Gerald Gunther and Kathleen Sullivan's *Constitutional Law*,<sup>3</sup> presidential powers also appears in roughly 60 pages of a 1600-page casebook.<sup>4</sup> *Processes of Constitutional Decisionmaking*,<sup>5</sup> by Paul Brest et al., devotes roughly 110 pages out of 1600 pages to presidential power issues,<sup>6</sup> and *Constitutional Law*,<sup>7</sup> by Geoffrey Stone et al., spends about 100 pages out of 1560 on the topic.<sup>8</sup> William Eskridge, Daniel Farber, and Philip Frickey's *Constitutional Law*<sup>9</sup> has a slightly larger percentage: 110 pages out of 1080 pages.<sup>10</sup> All casebook editors must make choices, of course, and certainly they would choose to have more pages on every subject if only book publishers would let them. Nonetheless, the relative space devoted to presidential power in these books suggests the amount of time many, if not most, teachers of

---

<sup>†</sup> Associate Professor of Law, University of St. Thomas School of Law.

<sup>††</sup> Professor of Law, University of California at Berkeley School of Law (Boalt Hall);  
Visiting Scholar, American Enterprise Institute.

<sup>1</sup> JESSE H. CHOPER ET AL., *CONSTITUTIONAL LAW: CASES, COMMENTS, QUESTIONS*  
(9th ed. 2001).

<sup>2</sup>*Id.* at 146-205.

<sup>3</sup> GERALD GUNTHER & KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW* (15th ed.  
2004).

<sup>4</sup>*Id.* at 355-414.

<sup>5</sup> PAUL BREST ET AL., *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES  
AND MATERIALS* (4th ed. 2000).

<sup>6</sup>*Id.* at 621-728.

<sup>7</sup> GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* (3d ed. 1996).

<sup>8</sup>*Id.* at 385-492.

<sup>9</sup> WILLIAM ESKRIDGE ET AL., *CONSTITUTIONAL LAW: THEMES FOR THE  
CONSTITUTION'S THIRD CENTURY* (3d ed. 2003).

<sup>10</sup>*Id.* at 1064-1075.

constitutional law can spend on the presidency in an introductory course.

Notwithstanding the Rehnquist Court's efforts to reinvigorate federalism, research on constitutional law mirrors its teaching by concentrating on judicial review and individual rights. That focus would probably strike many others outside the field of constitutional law as odd. We all tend to mark political time by presidential administration, and we certainly attribute great importance to the decisions Presidents make. Presidents head their political parties, they manage the bureaucracy, and they play a significant role in the legislative process. Most of all, they exercise a host of constitutional authorities, ranging from the power to nominate officials, to execute the laws, to veto legislation, and to command the armed forces of the United States. These powers have become salient in the American response to the September 11, 2001 attack, which has included invasions of Afghanistan and Iraq, a worldwide campaign to capture or kill leaders of the al Qaeda terrorist network, the detention of both aliens and citizens as enemy combatants without criminal trial, the creation of special military commissions to try terrorists, and expanded efforts to ensure homeland security. While Congress has assented to some of these measures, President Bush has invoked his plenary powers as Commander in Chief to institute others.

An engaging new book, *Presidential Leadership: Rating the Best and the Worst in the White House*,<sup>11</sup> sharpens this contrast between the public's fascination with Presidents and the legal academy's relative lack of interest in the subject. The editors are representatives of two institutions that probably would not win a popularity contest among law professors: James Taranto is an editor of the *Wall Street Journal* editorial page and online version, *OpinionJournal*;<sup>12</sup> Leonard Leo is the executive vice president of the Federalist Society, which has served as a haven for conservative lawyers, students, and professors by bringing speakers to law schools and cities throughout the country. <sup>13</sup>*Presidential Leadership* presents a survey of professors of law, political science, and history who were all asked to rank the most successful Presidents. The book then illustrates the results with a short essay on each President in chronological order. These profiles are a gem, as they bring together observations from an eclectic group of writers and thinkers about American Presidents, from the greatest (George Washington) to the worst (James Buchanan).

In this review, we discuss the results of the survey and some of the

---

<sup>11</sup> PRESIDENTIAL LEADERSHIP: RATING THE BEST AND THE WORST IN THE WHITE HOUSE (James Taranto & Leonard Leo eds., 2004).

<sup>12</sup> Taranto is also the author of the "Best of the Web Today" column, one of the funniest political offerings on the internet.

<sup>13</sup> In the interest of full disclosure, one of us is a sometime contributor to the *Wall Street Journal's* opinion pages and a regular speaker at Federalist Society events. See, e.g., John Yoo, *Terrorists Have no Geneva Rights*, WALL ST. J., May 26, 2004, at A16; John Yoo, *The Supreme Court Goes to War*, WALL ST. J., June 30, 2004, at A8.

---

---

stories about the Presidents. We then ask why there is such a gap between popular fascination with the presidency and its academic study, at least in law schools. We conclude with some thoughts about the relationship between presidential success and constitutional law. Part I discusses the book's statistical findings about popularity and the Presidents and the accompanying essays. Part II asks why law professors and political scientists seem to be speaking past each other in the field of presidential studies. Part III suggests some ways in which insights from constitutional law and political scientists could join to provide interesting perspectives on the Presidency. We conclude with some thoughts about Presidents in wartime.

## I

*Presidential Leadership* presents the results of a survey of academic opinions about Presidents. Some of these results are rather conventional, but some are a surprise. What is truly fascinating about the book, however, are the short essays on each President written by different authors. They bring together an amazing array of writers and thinkers. They include political scientists, such as Jeremy Rabkin and Jeffrey Tulis; political philosophers, such as Robert George and Harvey Mansfield; historians such as Robert Dallek and Forrest McDonald; and law professors such as Steven Calabresi, James Lindgren, and John McGinnis. *Presidential Leadership* also includes members of the "commentariat," as one of the editors recently dubbed them:<sup>14</sup> those who write opinion pieces for newspapers and the internet and increasingly appear on the proliferation of political talk shows on network, public, and cable television. These include several editors of the *Wall Street Journal*, including its former and current chief, Robert Bartley and Paul Gigot; former speechwriters like Peggy Noonan; and shapers of public opinion like Judge Robert Bork and second lady Lynne Cheney. There is also a sprinkling of current and former government officials, such as Senator John McCain, former Attorney General Edwin Meese III, and former Solicitor General Theodore Olson. While most of these writers are instantly recognizable as conservatives or Republicans, not all of them are—historians H.W. Brands and Douglas Brinkley, for example.

Ranking presidents may be a peculiarly American enterprise.<sup>15</sup> One has difficulty imagining the French rating the best monarchs and prime

---

<sup>14</sup> See, e.g., James Taranto, *How to Misread a Poll*, OPINIONJOURNAL, Oct. 25, 2002, at <http://www.opinionjournal.com/best/?id=110002528>.

<sup>15</sup> See RICHARD E. NEUSTADT, *PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP* 1 (1960) ("In the United States, we like to "rate" a President. We measure him as "weak" or "strong" and call what we are measuring his "leadership." We do not wait until a man is dead; we rate him from the moment he takes office.").

ministers, or the Chinese scoring the best emperors. It may have to do with some deep American need to create lists, such as the best ten ways to improve one's looks or the ten best cars in America. We have been rating presidents since at least 1948, when historian Arthur Schlesinger, Sr. first polled historians for *Life* magazine and then duplicated the effort in 1962 for the *New York Times Magazine*.<sup>16</sup> Schlesinger's son, Arthur Schlesinger, Jr., conducted the best-known survey for the *New York Times* in 1996.<sup>17</sup> *Presidential Leadership* contains several significant improvements over these earlier studies. First, Schlesinger polled only thirty-two historians and other experts,<sup>18</sup> while Taranto and Leo sent their survey to 132 professors of history, law, and political science, asking them to rate all the Presidents on a five-point scale. Seventy-Eight of them responded.<sup>19</sup> Second, the Schlesinger study faced criticism for relying too heavily on liberal professors; other studies allegedly were too conservative.<sup>20</sup> Taranto and Leo sought to control for political orientation by asking a panel of six experts from different fields and political orientations to suggest lists of survey participants.<sup>21</sup> Third, while the Schlesinger study included approximately only one woman and no minorities; the Taranto and Leo study included about fifteen percent women and minority respondents.<sup>22</sup>

After receiving the results, the editors organized the Presidents into five groups: great, near great, average, below average, and failure.<sup>23</sup> Only three Presidents made "great": Washington, Lincoln, and Franklin Roosevelt.<sup>24</sup> The top eleven Presidents in the survey are the following:<sup>25</sup>

1.	George Washington	4.92
2.	Abraham Lincoln	4.87
3.	Franklin Roosevelt	4.67
4.	Thomas Jefferson	4.25
5.	Theodore Roosevelt	4.22
6.	Andrew Jackson	3.99

<sup>16</sup> Arthur M. Schlesinger, Jr., *Rating the Presidents: Washington to Clinton*, 112 POL. SCI. Q. 179, 179 (1997) (describing the two studies that his father conducted).

<sup>17</sup> *Id.* (describing the author's own recent study).

<sup>18</sup> *Id.* at 190 (listing participants); Alvin S. Felzenberg, "There You Go Again": *Liberal Historians and the New York Times Deny Ronald Reagan His Due*, POL'Y REV., Mar./Apr. 1997, at 51, 51.

<sup>19</sup> PRESIDENTIAL LEADERSHIP, *supra* note 1, at 11. In the interests of full disclosure, one of the authors of this review participated in the survey.

<sup>20</sup> *See, e.g., id.* at 250 n.1; Felzenberg, *supra* note 6, at 51 (criticizing Schlesinger's study as too liberal).

<sup>21</sup> The six experts were Akhil Reed Amar, Alan Brinkley, Steven G. Calabresi, James Caesar, Forrest McDonald, and Stephen Skowronek. PRESIDENTIAL LEADERSHIP, *supra* note 1, at 249. Most scholars interested in the presidency would not dispute the choice of these six.

<sup>22</sup> *Id.* at 251.

<sup>23</sup> *Id.* at 254–57. These are the same categories used in previous surveys. *See id.* at 254.

<sup>24</sup> *Id.* at 255.

<sup>25</sup> *Id.* at 253.

7.	Harry Truman	3.95
8.	Ronald Reagan	3.81
9.	Dwight Eisenhower	3.71
10.	James Polk	3.70
11.	Woodrow Wilson	3.68

The above Presidents from Jefferson through Wilson ranked as “near great.”<sup>26</sup>

Most Presidents rated as above average, average, or below average. Only four Presidents were ranked as failures: Andrew Johnson, Franklin Pierce, Warren Harding, and James Buchanan.<sup>27</sup> The ten worst Presidents in the survey are as follows:<sup>28</sup>

30.	Jimmy Carter	2.47
31.	Zachary Taylor	2.40
32.	Ulysses Grant	2.28
33.	Richard Nixon	2.22
34.	John Tyler	2.03
35.	Millard Fillmore	1.91
36.	Andrew Johnson	1.65
37.	Franklin Pierce	1.58
38.	Warren Harding	1.58
39.	James Buchanan	1.33

Even with the more rigorous methodological measures, the 2000 Taranto/Leo study correlates with the 1996 Schlesinger study at an amazing .94.<sup>29</sup> Apparently, political scientists and law professors shared historians’ basic view of Presidents.

Some interesting observations about the results of the survey are worth making. First, the only real difference between the results of the Taranto/Leo study and the Schlesinger study occurred over the place of Ronald Reagan.<sup>30</sup> In 1996, historians rated Reagan at 25th,<sup>31</sup> which would have tied him with Chester Arthur and Calvin Coolidge and put him behind Clinton. In the Taranto/Leo study, Reagan rose to 8th, even before his death and funeral last year.<sup>32</sup> Much of that change is likely due to the passage of time, which has reduced the bias against Reagan by many liberals in the academy and has increased appreciation for his role in ending the Cold War. Eisenhower experienced a similar rise between the

<sup>26</sup> *Id.* at 255.

<sup>27</sup> The survey did not include George W. Bush because Bush was not yet President at the time the authors conducted the survey. *Id.* at 12. William Henry Harrison and James Garfield both served too short a time to make the survey. *Id.*

<sup>28</sup> *Id.* at 254.

<sup>29</sup> *Id.* at 251 & n.7.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 251, 253.

1962 and 1996 surveys.<sup>33</sup> Intellectuals belittled Eisenhower during and shortly after his administration, but with the passage of time, the revelation of new historical materials, and revisionist historical analyses (particularly Fred Greenstein's *The Hidden-Hand Presidency*<sup>34</sup>), his reputation has risen from just above Andrew Johnson in 1962 to 9th today.<sup>35</sup>

Second, and related to the first point, is the performance of modern Presidents. The ten most recent Presidents ranked in the following way (listed in chronological order):<sup>36</sup>

7.	Harry Truman	3.95
9.	Dwight Eisenhower	3.71
18.	John F. Kennedy	3.17
17.	Lyndon B. Johnson	3.21
33.	Richard Nixon	2.22
28.	Gerald Ford	2.59
30.	Jimmy Carter	2.47
8.	Ronald Reagan	3.81
21.	George H.W. Bush	2.92
24.	Bill Clinton	2.77

Since 1960, only Reagan has made the great or near-great category. One explanation may be that it is difficult to judge recent Presidents, but it also may be that the United States has suffered a run of mediocre leadership since the days of Franklin Roosevelt, Harry Truman, and Dwight Eisenhower. Recent Presidents do appear to be the most controversial, in terms of standard deviations. The most controversial President was Bill Clinton, and, although the second most controversial was Woodrow Wilson, the next three were Ronald Reagan, Richard Nixon, and Lyndon Johnson.<sup>37</sup> More than half of all respondents also listed John F. Kennedy as the most overrated President—a “shocking consensus,” in the words of Professor James Lindgren, who handled the statistical analysis for the Taranto/Leo study.<sup>38</sup> In a demonstration of the difficulty in judging recent Presidents, however, respondents simultaneously ranked Reagan as both the second most overrated President and the first most underrated President.<sup>39</sup>

Third, it is interesting to guess at the predictors of presidential success. Partisan affiliation seems to have little to do with it.<sup>40</sup> Similarly, age at

<sup>33</sup> Compare Schlesinger, *supra* note 4, at 182, with PRESIDENTIAL LEADERSHIP, *supra* note 1, at 253.

<sup>34</sup> FRED I. GREENSTEIN, *THE HIDDEN-HAND PRESIDENCY: EISENHOWER AS LEADER* (1982).

<sup>35</sup> PRESIDENTIAL LEADERSHIP, *supra* note 1, at 253.

<sup>36</sup> *Id.* at 255–57 (listing the ranking of all Presidents).

<sup>37</sup> *Id.* at 258.

<sup>38</sup> *Id.* at 259.

<sup>39</sup> *Id.*

<sup>40</sup> See *id.* at 261–62

time of inauguration seems to have no effect.<sup>41</sup> Selection before the period of nomination by national political conventions has a significant effect, but the most direct impact appears to be whether someone serves more than one term.<sup>42</sup> James Polk is the only one-term President to make the great or near-great category.<sup>43</sup> Of course, this raises a chicken/egg problem: do Presidents win two terms because of their greatness, or does their greatness only emerge because they have eight years to control the office?

Of course, it may also be that mere historical circumstances have brought out the greatness of some of our Presidents. Placing in the great and near-great categories does seem to correlate with moments when the nation is at war. Washington (as a general), Lincoln, and Franklin Roosevelt brought the nation through its three most fundamental conflicts—the Revolutionary and Civil Wars and World War II. Polk’s Mexican-American War made the United States a continent-wide power, and Wilson brought the nation into World War I. If one treats the long struggle with the Soviet Union as a single war, in which the United States was often engaged in conflict, maintained its first large standing military in peacetime, and was under constant threat of attack, then Truman, Eisenhower, and Reagan would also qualify as wartime Presidents. Jefferson, Theodore Roosevelt, and Jackson would be the only great or near-great Presidents left. Although none of these was a war-time President, each of them first made his national reputation during war (Jefferson in the Revolution; Jackson in the War of 1812; Roosevelt in the Spanish-American War).

*Presidential Leadership* is not just a book of numbers. It attempts to bring each President to life with a short essay on each chief executive. There is some excellent academic commentary, particularly by historians: Forrest MacDonald on Jefferson,<sup>44</sup> H.W. Brands on Jackson,<sup>45</sup> Douglas Brinkley on Polk,<sup>46</sup> and Dallek on Lyndon Johnson.<sup>47</sup> Perhaps the most fascinating essays, however, are the work of nonhistorians, in part because they say much about the authors. For example, John McCain writes about Theodore Roosevelt’s devotion to the ideal of American greatness:

He understood the central fact of American history: that we are not just an association of disparate interests forced by law and custom to tolerate one another, but a kinship of ideals, worth living and dying for, and that we deserve to have our ideals vigorously represented at home

---

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *See id.* at 253.

<sup>44</sup> *Id.* at 25–29.

<sup>45</sup> *Id.* at 44–47.

<sup>46</sup> *Id.* at 60–63.

<sup>47</sup> *Id.* at 173–77.



and abroad by our national government.”<sup>48</sup>

One can imagine that McCain hopes that someday biographers will reach the same judgment about him, and in that he likely will not be disappointed. Former Solicitor General Theodore Olson writes that William Howard Taft was a man of judicious temperament and efficient administration as President and Chief Justice.<sup>49</sup> Olson ultimately defended Taft’s theory of the unitary executive pro se in *Morrison v. Olson*.<sup>50</sup> Judge Robert Bork criticizes Franklin D. Roosevelt’s expansion of the federal bureaucracy and failure to cure the Depression, but praises his “unwavering optimism” and performance as Commander in Chief during World War II—this from a man who would not be faulted if he were to have lost his own optimism after his contentious and divisive confirmation hearings.<sup>51</sup>

Commentary on recent Presidents contains some interesting observations. Peggy Noonan, who once wrote about her admiration for Kennedy,<sup>52</sup> strikingly observes that Kennedy did not seem to believe in anything, but feared everything, and marked the beginning of the modern political presidency, which focuses on image and glamour over substance—a trend one might argue she accelerated through her deft speechwriting for President Reagan.<sup>53</sup> Perhaps not surprisingly, once-independent counsel and now-dean Kenneth Starr devotes his essay on Richard Nixon almost wholly to Watergate.<sup>54</sup> Unexpectedly, Starr praises Nixon’s fight for executive privilege as “an act of leadership, for it sought to preserve the power of the office for future Presidents,” and asks whether his decision to comply with the Supreme Court’s order to produce the tapes was not ultimately a similar act of leadership.<sup>55</sup> Professor Harvey Mansfield argues that Reagan did not have a coherent intellectual doctrine, but kept to simple core beliefs—particularly that the Soviet Union was indeed evil and could be defeated by the superior economy and values of the West—that succeeded in winning the Cold War.<sup>56</sup> Historian Paul Johnson extols Clinton’s campaigning skills but conveys a sense of the emptiness behind them with a story: Clinton once came to Johnson’s

---

<sup>48</sup> *Id.* at 129.

<sup>49</sup> *See id.* at 130–34.

<sup>50</sup> *See* 487 U.S. 654 (1988).

<sup>51</sup> PRESIDENTIAL LEADERSHIP, *supra* note 1, at 158.

<sup>52</sup> *See, e.g.,* Peggy Noonan, JFK Disease: It’s More than “Hoff” Wacky, *WSJ Opinion Journal*, 3/4/04 (comparing recent attempts, many unavailing, by Democrats to link themselves with the imagination and leadership qualities of JFK); Peggy Noon, Will the Real John Kerry Please Standup?, *WSJ Opinion Journal*, 7/22/04 (admiring JFK for not attempting to model himself in FDR’s image, and chiding John Kerry for excessively “make believ[ing]” he is JFK).

<sup>53</sup> *Id.* at 168–72.

<sup>54</sup> *Id.* at 178–82.

<sup>55</sup> *Id.* at 181–82.

<sup>56</sup> *Id.* at 194–97.

neighborhood of Notting Hill in London, where an excited and delighted crowd greeted him. Clinton led them to a pub where he ordered a round of drinks for all, to much cheering, and left them all happy and impressed, except for the bartender whom he never paid for the round.<sup>57</sup>

*Presidential Leadership* contains numerous stories and insights like these, and it would be unfair to the authors of the book to repeat them all. It is far better to buy the book, as anyone interested in the presidency should.

## II

Why do law professors not write such interesting books? Or, to ask perhaps the antecedent question, why do law professors not find the presidency interesting enough to inspire sustained, book-length works? This Part suggests that law professors have reached a formalist stalemate over the powers of the presidency and that this stalemate has diverted attention away from interesting avenues of scholarly research. Prevailing methods for analyzing Presidents in political science, which focuses on the individual characteristics of the chief executive as a political leader, only compounds this problem. In a sense, the two disciplines have been talking past each other—law examines the formal constitutional powers, while political scientists have focused on the unique political character of individual Presidents. We think, however, that recent work in law and political science points to new directions that could escape the current stalemate.

Current legal scholarship on the presidency has focused almost exclusively on the meaning of Article II's vesting of the "executive [p]ower" in a single President.<sup>58</sup> Some scholars, most notably Professors Steven Calabresi and Saikrishna Prakash, argue that Article II's Vesting Clause grants the President an inherent executive authority of sweeping range.<sup>59</sup> Others, such as Professor Akhil Amar on executive privilege,<sup>60</sup> Michael Paulsen on judicial review,<sup>61</sup> and the two of us on foreign affairs,<sup>62</sup>

---

<sup>57</sup> *Id.* at 202–07.

<sup>58</sup> U.S. CONST. art. II, §1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

<sup>59</sup> *See, e.g.*, Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994).

<sup>60</sup> *See, e.g.*, Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 VA. L. REV. 647 (1996); Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 HARV. L. REV. 701 (1995).

<sup>61</sup> *See, e.g.*, Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994).

<sup>62</sup> *See, e.g.*, Robert J. Delahunty, *Structuralism and the War Powers: The Army, Navy and Militia Clauses*, 19 GA. ST. U. L. REV. 1021 (2003); Robert J. Delahunty & John C. Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations that Harbor or Support Them*, 25 HARV. J.L. & PUB. POL'Y 487 (2002); John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639 (2002).

have subscribed to certain elements of this approach in writing on more discrete subjects. All of these scholars can trace their basic insight back to Alexander Hamilton's arguments as *Pacificus*. In 1793, President Washington interpreted the 1778 Franco-American Treaty of Alliance as not requiring entry into the European wars on the side of France.<sup>63</sup> Defending Washington's authority to interpret the treaty and declare American neutrality, Hamilton argued that Article II's Vesting Clause provided the President with inherent executive authorities that the Constitution had not specifically transferred to Congress or shared between the President and Senate.<sup>64</sup>

Critics of this theory argue that the Vesting Clause is essentially empty and that the Constitution limits the powers of the President to those enumerated in Article II, Section 2. Scholars such as Lawrence Lessig and Cass Sunstein argue that, while the Vesting Clause may establish a single President, it does not grant any substantive powers.<sup>65</sup> Rather, Congress may structure the executive branch within fairly broad boundaries and direct which officials will execute statutory mandates.<sup>66</sup> They counter Hamilton's textual thesis with the argument that, if the Vesting Clause had the reach he attributes to it, the enumeration of powers in Article II, Section 2, would have been superfluous.<sup>67</sup> They also draw upon the Necessary and Proper Clause to support the claim that Congress can "determine the means for specifying how powers—and again, all powers—in the federal government are to be exercised."<sup>68</sup>

These debates have not resolved themselves. Indeed, they have persisted unabated since the days of the *Helvidius-Pacificus* debates.<sup>69</sup> Such issues were raised during the creation of the first independent commissions during the New Deal but the court dismissed them.<sup>70</sup> They made a brief appearance in the academic literature when President Reagan sought to impose cost-benefit analysis on regulatory decisionmaking without any specific congressional authorization.<sup>71</sup> During the 1990s, they

---

<sup>63</sup> These events are described in John Yoo, *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CAL. L. REV. 851, 896–99 (2001).

<sup>64</sup> See *id.* at 896–99.

<sup>65</sup> See Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 47–48 (1994).

<sup>66</sup> See *id.* at 118.

<sup>67</sup> *Id.* at 48.

<sup>68</sup> *Id.* at 67 (emphasis omitted).

<sup>69</sup> See Yoo, *supra* note 38, at 899–901 (discussing the *Helvidius-Pacificus* debates).

<sup>70</sup> See generally *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

<sup>71</sup> See Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981); Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075 (1986) (discussing the role of presidential supervision in the regulatory process in light of President Reagan's executive orders); Peter L. Strauss & Cass R. Sunstein, *The Role of the*

reappeared in the controversies over President Clinton's invocation of executive privilege<sup>72</sup> and his impeachment.<sup>73</sup> Nonetheless, constitutional law arguments have not moved significantly since the publication of the debates between Lessig/Sunstein and Calabresi/Prakash.<sup>74</sup> Rather, both sides have added to their historical evidence and their textual and structural arguments without really moving each other to adjust their positions. The debate often occurs at the fairly abstract level of whether the President has the authority to command subordinate executive branch officials, or whether Congress can shape the administrative agencies as it chooses. These are not the questions, however, that have appeared in the courts.

Meanwhile, legal scholarship has failed to engage the major themes in the analysis of the presidency in political science. There has always been a significant tradition in political science that has looked to the American presidency to explore themes in American political thought. Such approaches stress the creation of the presidency within the context of the Framing and the larger question of the meaning of executive power within a republican form of government.<sup>75</sup> This work has obvious synergies with the formalist approach to the study of the presidency among constitutional lawyers.

Nevertheless, it is fair to say that political science has moved in a different direction in the last forty-five years since the 1960 publication of Richard Neustadt's *Presidential Power and the Modern Presidents*.<sup>76</sup> Neustadt argued that the presidency was a fundamentally weak office beset by foreign and domestic events and the demands of domestic interest groups, party members, and other institutions.<sup>77</sup> At the same time, the

---

*President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181 (1986) (same); cf. Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War Over Administrative Agencies*, 80 GEO. L.J. 671 (1992) (discussing the constitutionality of the modern administrative state from the perspective of positive political theory); Harold H. Bruff, *On the Constitutional Status of the Administrative Agencies*, 36 AM. U. L. REV. 491 (1987) (analyzing the administrative state in light of the Supreme Court's separation of powers jurisprudence and arguing that independent agencies should not be constitutionally insulated from presidential supervision).

<sup>72</sup> See, e.g., Amar & Katyal, *supra* note **Error! Bookmark not defined.**

<sup>73</sup> See, e.g., Michael J. Gerhardt, *The Historical and Constitutional Significance of the Impeachment and Trial of President Clinton*, 28 HOFSTRA L. REV. 349 (1999); cf. Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L.J. 1 (1999) (addressing impeachment as a method of resolving factional disputes about an officials legitimacy to remain in office).

<sup>74</sup> See *supra* notes 34, 40–41 and accompanying text.

<sup>75</sup> See, e.g., HARVEY C. MANSFIELD, JR., *TAMING THE PRINCE: THE AMBIVALENCE OF MODERN EXECUTIVE POWER* (1989); FORREST McDONALD, *THE AMERICAN PRESIDENCY: AN INTELLECTUAL HISTORY* (1994); *THE PRESIDENCY IN THE CONSTITUTIONAL ORDER* (Joseph M. Bessette & Jeffrey Tulis eds., 1981).

<sup>76</sup> RICHARD E. NEUSTADT, *PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP* (1960).

<sup>77</sup> *Id.* at 36–37 (“[O]utcomes are not guaranteed by [the President’s] advantages.

There remain counter pressures those whom he would influence would bring

public has expected Presidents to guarantee national security and economic growth, and to represent national values.<sup>78</sup> This combination of institutional weakness and popular expectations requires Presidents to seek the cooperation of the other actors in the political system.<sup>79</sup> In order to achieve success, the President must bargain and deal with the members of Congress who write the laws and the bureaucrats who issue the regulations.<sup>80</sup> For Neustadt, “[p]residential power is the power to persuade,” not the power to command.<sup>81</sup> Scholars who have followed Neustadt—most recently Fred Greenstein in *The Presidential Difference*<sup>82</sup>—have sought to root the President’s power in characteristics such as communicative and political skills, organizational ability, vision, cognitive style, and emotional intelligence.<sup>83</sup>

It is important to realize what this theory means for the formal constitutional powers that are at the heart of the law professors’ analysis. According to the approach of political scientists, a President’s reliance upon unilateral constitutional powers means that he cannot persuade, and hence, that he has failed. Presidents who rely on the veto or appointment powers, Neustadt argues, have reached “a painful last resort, a forced response to the exhaustion of all other remedies, suggestive less of mastery than failure—the failure of attempts to gain an end by softer means.”<sup>84</sup> Ironically, law professors consider important exactly those actions that political scientists believe signal failure. Likewise, the issues that political scientists think determine presidential success are exactly those factors that will remain immune to formal legal analysis—personality, charisma, and political skills.

Political scientists seem to define presidential success by their ability to push their agenda through Congress or the courts. This does not

---

to bear on him from vantage points at their disposal. Command has limited utility: persuasion becomes give and take.”)

<sup>78</sup> *Id.* at 10 (describing instances where presidential command is effective, necessary, and yet costly—Truman’s recall of General Douglas MacArthur, his seizure of the steel mills, and Eisenhower’s deployment of federal troops to Little Rock to enforce desegregation orders).

<sup>79</sup> *Id.* at 35 (“The President’s advantages are checked by the advantages of others. Continuing relationships will pull in both directions. These are relationships of mutual dependence. A President depends upon the men he would persuade; he has to reckon with his or fear of them.”)

<sup>80</sup> *Id.* at 46 (“The essence of a President’s persuasive task with congressmen and everybody else is to induce them to believe that what he wants of them is what their own appraisal of their responsibilities requires them to do in their own interest, not his.”).

<sup>81</sup> *Id.* at 35-46.

<sup>82</sup> FRED I. GREENSTEIN, *THE PRESIDENTIAL DIFFERENCE: LEADERSHIP STYLE FROM FDR TO CLINTON* (2000).

<sup>83</sup> *Id.* at 5-6.

<sup>84</sup> NEUSTADT, *supra* note 47, at 24.

measure well on the scale of greatness in the Taranto/Leo study. Washington, Lincoln, and Franklin Roosevelt did not achieve greatness solely by convincing Congress to enact their legislative plans; otherwise, Lyndon Johnson would be considered the greatest President in history. Rather, they achieved success by exercising national leadership through their constitutional and political powers, with legislative cooperation coming sometimes as a *fait accompli*. Hence, Washington kept the United States out of the French revolutionary wars and established the basic workings of the executive branch through unilateral decisionmaking.<sup>85</sup> Lincoln raised troops, blockaded the South, and mobilized the nation while Congress was not in session.<sup>86</sup> Roosevelt moved the nation toward war against one of the most evil régimes in human history, often against the preferences of a recalcitrant Congress, and defined the geostrategic structure of the post-war world through Great Power accords such as the Yalta Agreement, all without congressional participation.<sup>87</sup> Formal constitutional powers and their exercise have something to do with presidential success, at least as measured by the Taranto/Leo survey.

That relationship appears to hold true among the near-great list as well. One does not usually think of Truman, Eisenhower, Reagan, or Polk (and maybe not even Theodore Roosevelt or Andrew Jackson) as great legislative leaders. Rather, their success occurred in part through their unilateral leadership and the exercise of constitutional powers. Truman and Eisenhower, for example, established the basic containment strategy of the United States in the Cold War through executive branch policymaking.<sup>88</sup> Neither President won outstanding legislative successes, and Truman suffered a stunning legislative reversal when Congress enacted the Taft-Hartley Act over his veto.<sup>89</sup> Reagan's aggressive foreign policy toward the Soviet Union probably contributed as much to the winning of that war as his large arms buildup. Polk, of course, waged a war that dramatically expanded the size of the United States, but also did so while somewhat contriving the circumstances that led Congress into that conflict.<sup>90</sup> Understanding successful Presidents demands that scholars focus not just on political persuasion, but also on the constitutional powers that allow Presidents to exercise leadership effectively.

---

<sup>85</sup> See *supra* notes 39–40 and accompanying text.

<sup>86</sup> See DANIEL FARBER, *LINCOLN'S CONSTITUTION* 116–21 (2003).

<sup>87</sup> See HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 96 (1990); ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 110–13 (1973).

<sup>88</sup> See JOHN LEWIS GADDIS, *STRATEGIES OF CONTAINMENT: A CRITICAL APPRAISAL OF POSTWAR AMERICAN NATIONAL SECURITY POLICY* 54–88, 127–97 (1982).

<sup>89</sup> Labor Management Relations (Taft-Hartley) Act, 61 Stat. 136 (codified in scattered portions of 29 U.S.C.).

<sup>90</sup> See, e.g., MAJOR PROBLEMS IN AMERICAN FOREIGN POLICY 258–62 (Thomas G. Paterson ed., 3d ed. 1989).

There is no reason that this divide in the interests and methodology of lawyers and political scientists ought to exist. Once upon a time, scholars on the presidency, such as Edward Corwin or Clinton Rossiter, wrote for both communities.<sup>91</sup> Indeed, recent developments in both law and political science point the way toward a common dialogue. In law, Bill Eskridge, Daniel Farber, and Philip Frickey, among others, have renewed interest in the study of legislation through the lens of institutions and public choice theory.<sup>92</sup> Much of this work has focused on the organization of Congress, the role of interest groups, and the implications for courts in interpreting ambiguous statutes. Some scholars, however, have asked about the role of the President in the lawmaking process and in the administrative state, not with regard to the personality or skills of any individual chief executive, but rather with attention to the Presidency's institutional place in the constitutional and political system.<sup>93</sup> Further work from an institutional standpoint could examine the exercise of the presidential veto, the effect of presidential legislative history, and the executive and congressional struggle for control over the bureaucracy, among other topics. Law professors could prove exceptionally able at these analyses because of their knowledge of the interactions of all three branches.

Such work would be especially propitious because it could take advantage of advances in positive political theory. This approach swept through the study of Congress and administrative agencies in the 1980s and 1990s, in which the President played a role in broader models of the legislative and administrative process.<sup>94</sup> Nonetheless, these works commonly treated the President as less central to the policymaking. In more recent years, scholars have used rational choice approaches to analyze the presidency directly. Two books in particular, Charles Cameron's *Veto Bargaining*<sup>95</sup> and William Howell's *Power Without Persuasion*,<sup>96</sup> have sought to apply rational choice theory to understand the exercise of the President's constitutional powers. These authors are pursuing the same questions that interest law professors. Cameron collects information on

---

<sup>91</sup> See, e.g., EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1957* (1957); CLINTON ROSSITER, *THE AMERICAN PRESIDENCY* (1956).

<sup>92</sup> See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990); DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991).

<sup>93</sup> See, e.g., ROBERT D. COOTER, *THE STRATEGIC CONSTITUTION* (2000); William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992); Daniel B. Rodriguez, *Statutory Interpretation and Political Advantage*, 12 INT'L REV. L. & ECON. 217 (1992).

<sup>94</sup> See, e.g., Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987).

<sup>95</sup> CHARLES M. CAMERON, *VETO BARGAINING: PRESIDENTS AND THE POLITICS OF NEGATIVE POWER* (2000).

<sup>96</sup> WILLIAM G. HOWELL, *POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION* (2003).

presidential threats to use, as well as the actual use of, the veto in order to win legislative concessions from Congress.<sup>97</sup> Howell formally models when Presidents will use their power to interpret statutes and issue executive orders to engage in unilateral policymaking without the approval of Congress.<sup>98</sup> He also conducts an empirical survey of legislative overrides and judicial decisions to determine how executive orders fare in Congress and the courts.<sup>99</sup> Law professors are also interested in how the exercise of the President's constitutional powers affects national public policy and could have pursued the same research projects (except the equations maybe!). In fact, our focus on the President's formal constitutional powers can provide a fruitful starting point from which to identify further research questions. After all, law professors no doubt had long assumed that the President's inherent constitutional powers gave him an important role in setting national policy.

This discussion is only an effort to point out areas where law professors and political scientists can work productively in similar veins while studying similar problems. Legal scholarship, for example, has benefited from the application of rational choice to the process of legislation. We think that similar gains could occur with regard to the study of presidential power. This means not only studying the origins of the President's formal constitutional authorities but also studying the effects of their exercise and how Presidents can leverage them into political gains with regard to the other branches. *Presidential Leadership* provides a metric of success against which we can judge whether we have identified which exercises of constitutional power have proven more successful than others. The next Part suggests some tentative ways to think along these lines.

### III

There are at least three important and related lines of inquiry that would combine the interests of law professors with the insights of political scientists to yield a deeper understanding of the presidency. First, there is a set of questions relating to how the robust powers that Presidents actually exercise could have grown from the seemingly meager stock of formal authorities that the Constitution vests in that office. Second, there are questions relating to how powers that the Constitution might appear to have assigned to Congress have in effect "migrated" to the presidency; or, if that seems an overstatement, why Presidents have succeeded so often, by leveraging their formal powers, to win significant political victories without the support of Congress or even against Congress's will. Third,

---

<sup>97</sup> See CAMERON, *supra* note 94.

<sup>98</sup> HOWELL, *supra* note 95, at 24–54.

<sup>99</sup> *Id.* at 101–74.



researchers could profitably examine to what degree presidential greatness (measured in terms of the standards set for in the Leo/Taranto study) results from a President's willingness to deploy his formal powers in aggressive—indeed, revolutionary—ways.

The formal powers of the President specified in the Constitution are few and readily enumerated. The “executive power” is vested uniquely in him.<sup>100</sup> The President is to be the Commander in Chief of the Armed Forces, as well as of the state militia when called into federal service.<sup>101</sup> The President may require the written opinion of Cabinet officers on any subject relating to their duties,<sup>102</sup> and may grant pardons and reprieves, (except in cases of impeachment<sup>103</sup>) and he may make treaties, by and with the advice and consent of two-thirds of the Senators present.<sup>104</sup> In addition, the President may appoint Ambassadors, Supreme Court Justices, and other principal federal officers, subject to the advice and consent of the Senate, may appoint inferior officers if Congress by law vests such power in him,<sup>105</sup> and may fill vacancies that arise during a Senate recess.<sup>106</sup> The President shall provide Congress periodically with information on the State of the Union,<sup>107</sup> may recommend legislation to Congress, and may, on extraordinary occasions, convene one or both Houses.<sup>108</sup> In cases of disagreement between the Houses with respect to adjournment, he may adjourn them.<sup>109</sup> The President may veto legislation that both Houses have passed, subject to an overriding two-thirds vote of each House.<sup>110</sup> The President shall take care to ensure the faithful execution of laws and shall commission federal officers.<sup>111</sup>

Were we confined to the bare text of the Constitution, the President might well have been a virtual cipher in our political system. Apart from the vesting of “executive power” in the President<sup>112</sup>—which, as we have noted, is a clause with disputed scope and significance—the President's powers might seem few and insubstantial. For instance, the Constitution does not, in terms, grant the President the authority to conduct the nation's foreign affairs. Instead, it merely assigns him the powers to receive foreign ambassadors; to appoint, with the Senate's approval, ambassadors to serve

---

<sup>100</sup> U.S. CONST. art. II, § 1.

<sup>101</sup> *Id.* art. II, § 2, cl. 1.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* art. II, § 2, cl. 2.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* art. II, § 2, cl. 3.

<sup>107</sup> *Id.* art. II, § 3.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* art. I, § 7, cl. 2.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*, art. II, § 1, cl. 1.

abroad; and to make treaties, but only with the concurrence of two-thirds of the Senators present.<sup>113</sup> One searches the text in vain to find explicit provision for such (established) presidential authorities as the power— independent of any authority delegated by treaty or statute—to make binding executive agreements with foreign governments, that would supersede contrary state law under the Supremacy Clause, and that dispose of the property interests and legal claims of U.S. citizens.<sup>114</sup> Nor can one find express textual grants of such powers as the authorities to suspend or terminate treaties,<sup>115</sup> to conduct clandestine surveillance within the United States of agents of foreign governments (including U.S. nationals) on the grounds of national security,<sup>116</sup> or to establish rules and regulations for the detention and trial of irregular combatants in the war on terror.<sup>117</sup> Equally, there are no obvious and explicit grants of authority to control the direction of the Nation’s foreign policy unilaterally in the striking and dramatic ways that Washington did in the Neutrality Proclamation,<sup>118</sup> McKinley did in the Open Door Policy,<sup>119</sup> Franklin Roosevelt did in the Yalta Agreement,<sup>120</sup> Truman did in the Potsdam Declaration,<sup>121</sup> Nixon did in the Shanghai Communiqué,<sup>122</sup> and even as lackluster a President as Fillmore did in ordering the Navy to open Japan.<sup>123</sup> Both legal scholars and political scientists would do well, therefore, to study why Presidents have been able to use their formal powers so effectively to establish and maintain (usually uncontested) dominance in the field of foreign policy.<sup>124</sup> For example, they might consider whether, over the decades, the executive branch and Congress have worked out a series of Coasian bargains, under which

---

<sup>113</sup> *Id.*, art. II, §2, cl. 2.

<sup>114</sup> See *United States v. Pink*, 315 U.S. 203 (1942); *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

<sup>115</sup> See *Goldwater v. Carter*, 444 U.S. 996 (1979) (holding the issue of treaty termination to be a political question).

<sup>116</sup> See *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980).

<sup>117</sup> See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (declining to reach the question of whether the President’s power is inherent).

<sup>118</sup> Proclamation of Neutrality (Apr. 22, 1793), reprinted in 32 THE WRITINGS OF GEORGE WASHINGTON 430–31 (J.C. Fitzpatrick ed., 1939).

<sup>119</sup> 1 William M. Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements Between the United States of America and Other Powers*, S. DOC. NO. 357, 61st Cong., 2d Sess. 244–60 (1910).

<sup>120</sup> Report Signed at Crimea (Yalta) Conference, Feb. 11, 1945, U.S.-U.K.-U.S.S.R., 59 Stat. 1823, 3 Bevens 1005.

<sup>121</sup> Potsdam Declaration, July 26, 1945, available at <http://www.isop.ucla.edu/eas/documents/potsdam.htm>.

<sup>122</sup> Shanghai Communiqué, Feb. 27, 1972, reprinted in 5 THE PEOPLE’S REPUBLIC OF CHINA 1949–1979: A DOCUMENTARY SURVEY 2362–63 (H.C. Hinton ed., 1980).

<sup>123</sup> See PRESIDENTIAL LEADERSHIP, *supra* note 1, at 70.

<sup>124</sup> See generally Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255 (1988) (finding a growing executive prerogative in the area of foreign affairs and calling for reform of the foreign policy process to restore power to Congress and the federal judiciary).

Congress has willingly ceded to the Executive the lead in foreign affairs—usually a matter of little value to members of Congress, but something on which the Executive places a high premium.<sup>125</sup>

Likewise, Presidents have been successful in claiming broad powers to direct and control the federal administration and to exercise prosecutorial discretion over the enforcement of federal law.<sup>126</sup> For instance, they have claimed, without significant congressional or judicial demurral, the unilateral authority to establish systems of classification that regulate access to sensitive intelligence information.<sup>127</sup> Even in the area of appropriations—so clearly vital to Congress, as both constitutional history and public choice theory attest—Presidents have been able, at least episodically, to obtain victories in their claim to have authority to impound (some kinds of) appropriated funds.<sup>128</sup>

Furthermore, if any constitutional powers seem both clearly assigned to another branch and central to that branch's vital interests, those would seem to be the "legislative powers" granted to Congress in Article I.<sup>129</sup> And, indeed, the Supreme Court emphasized as much in Justice Black's opinion for the Court in the famous steel seizure case:

In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.<sup>130</sup>

Yet even those propositions, truistic as they may seem, fail to describe the actualities of presidential power. The formal powers of the President to "recommend[] . . . laws he thinks wise and . . . veto[] . . . laws he thinks bad"<sup>131</sup> have in fact served to ensure that the President usually dominates the legislative process from start to finish.<sup>132</sup>

Consider, for example, the President's power to veto legislation, subject to Congress's authority to override that veto by a two-thirds vote of

---

<sup>125</sup> See generally John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, LAW & CONTEMP. PROBS., Autumn 1993, at 293 (offering a model of institutional rational choice to describe the practice of separation of powers and discussing the executive's exercise of constitutional review in certain areas, such as foreign policy).

<sup>126</sup> See *Lincoln v. Vigil*, 508 U.S. 182 (1993); *Myers v. United States*, 272 U.S. 52 (1926).

<sup>127</sup> See *New York Times Co. v. United States*, 403 U.S. 713, 727–30 (1971) (Stewart, J., concurring).

<sup>128</sup> See *Train v. City of New York*, 420 U.S. 35 (1975).

<sup>129</sup> U.S. CONST. art. I.

<sup>130</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (internal quotation marks omitted).

<sup>131</sup> *Id.*

<sup>132</sup> For a discussion of the President as chief legislator, see Vasana Kesavan & J. Gregory Sidak, *The Legislator-in-Chief*, 44 WM. & MARY L. REV. 1 (2002).

both Houses.<sup>133</sup> On the face of it, this provision conveys to the President only a small slice of formal legislative power. Yet, as Charles Black, Jr. pointed out, the President's veto power gives him immense leverage in congressional deliberations.<sup>134</sup> This is because the veto power is asymmetrical: he can veto legislation, but the majorities in the Houses that sufficed to pass the legislation are insufficient to surmount that veto. Because of the high transaction costs involved merely in securing majorities in each House of a bicameral legislature<sup>135</sup>—let alone two-thirds supermajorities in each—the President's veto power enables him to wield enormous influence over the legislative process (an influence only partially offset by Congress's power to package bills together so as to make the composite product “veto-proof”).

The leverage that the President's veto power affords him illustrates what we take to be a more general truth: the expansion of seemingly modest presidential powers results from the comparatively high transaction costs of legislation—costs magnified by such peculiar legislative practices as the Senate's filibuster. Article I creates, and the practice of congressional and party politics reinforces, a massive inertial bias in favor of the legislative status quo. The difficulty of assembling and maintaining majority coalitions in both Houses to enact legislation—especially when the legislation is controversial—is notorious. The transaction costs of unilateral action by the President are, by contrast, comparatively low. In order to develop a deeper understanding of presidential influence in the legislative field, therefore, political scientists could join forces with law professors to trace the interactions between the formal powers assigned to the President and the procedures that Congress must follow for making law under Article I.

Political scientists' study of comparative transaction costs, if cross-fertilized with legal scholars' analysis of formal constitutional authorities, might help explain presidential successes in a variety of arenas. The executive branch's abilities to act with relatively good information and at relatively low cost to deal with cases of “necessity” can probably explain why both Congress and the courts have acquiesced so often in what might seem to be *ultra vires* conduct by the Executive. This is not a recent development; on the contrary, it seems to have been hard-wired into the original Constitution.

The levying of tariffs in California after the War with Mexico in 1848

---

<sup>133</sup> U.S. CONST. art. I, § 7, cl. 2.

<sup>134</sup> See generally Charles L. Black, Jr., *Some Thoughts on the Veto*, LAW & CONTEMP. PROBS., Spring 1976, at 87 (examining the Presidential veto power and its substantial effect on the legislative process).

<sup>135</sup> For a discussion of transaction costs in the legislative process, see Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471 (1988).

is a good example. After the war and the ratification of the Treaty of Guadalupe Hidalgo ceding California to the United States, U.S. military and executive officials in California confronted the question whether they had the continuing authority to collect peacetime tariffs in that territory.<sup>136</sup> California's military government decided to apply general federal tariff schedules to goods imported into the territory. It also appointed a customs collector—again, after the ratification of the treaty of peace.<sup>137</sup> Even within the executive branch, some officials questioned these actions, principally on the ground that Congress had not enacted any statute for the post-war governance of California. The executive branch (speaking through Secretary of State, later President, James Buchanan) sought to justify its conduct on the basis of “[t]he great law of necessity.”<sup>138</sup> When an importer challenged the legality of the tariffs, the Supreme Court upheld them, finding implicit ratification of the military government's actions in Congress (and the President's) failure to change its policy.<sup>139</sup> In effect, the Court bowed to the compelling necessity of maintaining some form of regular civil government in post-war California—a necessity that, in default of congressional action, only the President could meet.

Political science might also investigate how power accrues to the Executive in default of congressional action when an emergent national consensus has not translated into effective (filibuster-proof) congressional majorities. In situations of that kind, the President may be able to preempt Congress and impose a political outcome that has popular majoritarian support (and in which Congress can later acquiesce). John F. Kennedy's 1961 Executive Order No. 10925,<sup>140</sup> which imposed non-discrimination obligations on federal contractors, was such a presidential initiative. Based on the President's asserted constitutional authority to control the federal procurement process,<sup>141</sup> and modeled on earlier Executive Orders in this field by Franklin Roosevelt,<sup>142</sup> Executive Order No. 10925 established a

---

<sup>136</sup> See GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION & AMERICAN LEGAL HISTORY 152–57* (2004). ). There was no question that they had the authority, pursuant to the President's war powers, to collect such duties during wartime. *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> Letter from James Buchanan, Secretary of State of the United States of America, to William V. Vorhies (Oct. 7, 1848), *reprinted in* S. DOC. NO. 31-18, at 7–8.

<sup>139</sup> See *Cross v. Harrison*, 57 U.S. (16 How.) 164, 193–94 (1853).

<sup>140</sup> Exec. Order No. 10,925, 26 Fed. Reg. 1977 (Mar. 6, 1961).

<sup>141</sup> See *Validity of Executive Order Prohibiting Government Contractors From Discriminating in Employment Practices on Grounds of Race, Color, Religion, or National Origin*, 42 Op. Att'y Gen. 97, 100 (1961):

Except to the extent that legislative action has either required or prohibited certain types of Government contracts or certain provisions to be included in such contracts, the executive branch of the Government has discretion to contract in such manner and on such terms as it considers appropriate to the discharge of its constitutional and statutory responsibilities.

<sup>142</sup> See Exec. Order No. 8,802, 6 Fed. Reg. 3109 (Jun. 25, 1941) (declaring non-

policy that Congress itself (owing to the resistance of congressional foes of civil rights) could not have adopted at the time, but that it has subsequently been willing to leave in place and to fund.

The formal powers of the President, therefore, ensure him important competitive advantages in his dealings with Congress. Although the President is not formally a “lawmaker” (as Justice Black insisted), he can draw on vast reserves of unilateral power to carry out the policies, both foreign and domestic, of his own choice. The President’s unique constitutional position with respect to foreign affairs and military deployments enables him to seize the initiative overseas and to present Congress with accomplished facts, which are difficult to overturn. The President’s control over key nodes of the legislative process—guaranteed formally by his veto power and informally by his leadership of a usually large bloc of Congress—permits him to exploit the high information-gathering and transaction costs of legislation, and thus to thwart congressional policymaking. The necessity in the modern administrative state for expansive delegation of congressional powers (itself a reflection of constitutionally ordained transaction costs of legislation) ensures that many statutory sources of authority will be available to the President, allowing him to introduce major policy shifts through regulation or executive order. The President’s ready access to the media—typified by the annual State of the Union Address—allows him to set the terms of the nation’s political discourse and to focus it on the topics of particular interest to him. The much-maligned “imperial Presidency,” therefore, does not seem to us to be an aberration from true constitutional principles, attributable to the overreaching of wicked men like Richard Nixon, and corrigible by decisive (if regrettably uncommon) congressional action. Rather, it seems to be the likely, perhaps necessary, outcome of an eighteenth century constitutional design, mapped onto contemporary conditions.

Thus, even when a President confronts an antagonistic Congress dominated by his political opponents, the President can usually succeed in implementing major parts of his program. Moreover, this is true even in periods of calm—as distinct from national security crises. For example, confronted after the mid-term election of 1994 with a Republican Congress that was deeply hostile to his legislative initiatives, President Clinton “repeatedly rebounded with a series of steady, incremental reforms, each unilaterally imposed.”<sup>143</sup> These included a patients’ bill of rights, smoking limits in federal buildings, data collection by federal agencies for use in prosecuting the tobacco industry, bans on assault weapons, the declassification of information relating to Nazi war criminals, sanctions

---

discrimination policy in defense program); Exec. Order No. 9,001, 6 Fed. Reg. 6787 (Dec. 27, 1941) (authorizing procedures to expedite war effort); Exec. Order No. 9,346, 8 Fed. Reg. 7183 (May 27, 1943) (creating committee on fair employment practice).

<sup>143</sup> HOWELL, *supra* note 63, at 5.

against warring factions in Angola, and the dedication of millions of acres of Western lands to national monuments.<sup>144</sup> In the area of foreign policy, Clinton ignored significant congressional resistance in launching the United States and its NATO allies into a war in Kosovo—the United States’s first major military conflict in Europe since 1945.<sup>145</sup> President Clinton also oversaw the transformation of the NATO Treaty—by unilateral executive action only—from a defensive alliance operating within the North Atlantic sphere into one geared to undertake preemptive military operations, including humanitarian interventions.<sup>146</sup>

If powerful hydraulic pressures can lead to the steady expansion of presidential power even in times of peace, those pressures are even more irresistible during periods of crisis, economic depression, or war. War in particular brings the characteristic executive virtues of speed, secrecy and energy to the fore. Bold, even radical, unilateral executive measures to

---

<sup>144</sup> *Id.* at 5–6.

<sup>145</sup> For a detailed account of congressional deliberations over the war in Kosovo, including the ultimate decision to fund U.S. military operations there, see Authorization for Continuing Hostilities in Kosovo, Op. Off. Legal Counsel (Dec. 19, 2000), available at 2000 WL 33716980, and John C. Yoo, *Kosovo, War Powers, and the Multilateral Future*, 148 U. PA. L. REV. 1673 (2000).

<sup>146</sup> NATO adopted a new “Strategic Concept” in 1999. See Press Release, The Alliance’s Strategic Concept, NAC-S(99)65 (Apr. 24, 1999), available at <http://www.nato.int/docu/pr/1999/p99-065e.htm>. Going further than some of its European partners, the United States also envisaged at the time that NATO would expand its sphere of operations beyond the traditional areas of Europe and the North Atlantic so as to become “a force for peace from the Middle East to Central Africa.” Major J.D. Godwin, *NATO’s Role in Peace Operations: Reexamining the Treaty After Bosnia and Kosovo*, 160 MIL. L. REV. 1, 90 (1999) (quoting William Drozdiak, *European Allies Balk at Expanded Role for NATO*, WASH. POST, Feb. 22, 1998, at A27).

The 1999 Strategic Concept seemed difficult to reconcile with Article 5 of the NATO Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243. Article 5 provides that in the event of an armed attack against one or more of the parties “in Europe or North America,” the other parties “will assist the Party or Parties so attacked . . . to restore and maintain the security of the North Atlantic area.” *Id.* art. 5, 63 Stat. at 224, 340 U.N.T.S. at 246. Moreover, as recently as 1991, NATO had declared its purpose to be “purely defensive.” See NATO, *The Alliance’s New Strategic Concept*, para. 35 (Nov. 7, 1991), at [www.nato.int/docu/comm/49-95/c911107a.htm](http://www.nato.int/docu/comm/49-95/c911107a.htm); see also Barry Kellman & Stephen Dycus, *International Legal Developments in Review: 1999*, 34 INT’L LAW. 799, 813 (2000) (noting the shift in the focus of NATO from 1991 to 1999, when NATO abandoned its earlier “purely defensive” policy). Notwithstanding such considerations, the 1999 Strategic Concept specifically provided for NATO action in non-Article 5 “crisis response” operations. See Kellman & Dycus, *supra*, at 813. In light of the apparent expansion of the Treaty’s scope and purposes without the Senate’s advice and consent, Congress directed the President to certify whether the Strategic Concept imposed any new obligations or commitments on the United States. See National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 1221, 113 Stat. 512, 786 (1999). In his signing statement on that legislation, President Clinton affirmed that “the Strategic Concept does not create any new commitment or obligation within my understanding of section 1221(a) of the Act, and therefore, will not be submitted to the Senate for advice and consent.” Press Release, The White House, Statement by the President (Oct. 5, 1999), available at [www.clintonfoundation.org/legacy/100594-presidential-statement-on-national-defense-authorization-act-forfu.html](http://www.clintonfoundation.org/legacy/100594-presidential-statement-on-national-defense-authorization-act-forfu.html).

protect the Nation's security—suspending the writ of habeas corpus,<sup>147</sup> mounting a naval blockade to seize foreign ships trafficking with insurrectionary States,<sup>148</sup> provoking clashes with enemy forces in order to draw the Nation into declared war,<sup>149</sup> and breaching neutrality by providing one belligerent with ships and weapons for use against another<sup>150</sup>—have occurred, however questionable their constitutionality.

These observations suggest yet one more area in which legal scholars and political scientists could cooperate with mutual profit. Presidential greatness may emerge from the interaction of extreme circumstances (war or national emergency), formal presidential powers, and the boldness and daring of particular Presidents in testing the outer limits of those powers. A “great” President may be one who does not stay within carefully chalked lines of acknowledged presidential and congressional authority, but one who, to surmount a crisis, revolutionizes the accepted understanding of his powers. Contrast the difference in presidential styles—one making for weakness, the other for greatness—between James Buchanan and Abraham Lincoln, for example. Buchanan, a cautious lawyer anxious not to go beyond a blinkered understanding of his constitutional authority, remained inactive in the supreme crisis of impending disunion and went down as one of the weakest of our Presidents. Lincoln, another lawyer-President—but far abler and bolder—rose to the emergency and raised an army, sent it into the South, seized private property, expended unappropriated public funds, suspended the writ of habeas corpus and, in the course of the war, emancipated slaves, all without prior congressional approval.<sup>151</sup> In saving the Constitution and the Union by such extraordinary acts, Lincoln became “this nation's greatest war President—and ma[d]e this country what it is today.”<sup>152</sup>

Forceful presidencies, revolutionary constitutional vision, and the favor of history are of the same birth. Lincoln provides one case; Franklin Roosevelt another. Like Lincoln, Roosevelt was a revolutionary conservative, stretching the Constitution elastically in order to save it. Roosevelt's vision of the President's constitutional authority emboldened him to order war measures of astonishing daring and breadth, including

---

<sup>147</sup> *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487).

<sup>148</sup> *The Amy Warwick (The Prize Cases)*, 67 U.S. 635 (1862).

<sup>149</sup> See ROBERT DALLEK, *FRANKLIN D. ROOSEVELT AND AMERICAN FOREIGN POLICY, 1932–1944*, at 287–89 (1979) (describing incident in which President Roosevelt had mendaciously claimed that Nazi U-boat intentionally attacked a U.S. Navy destroyer, the *Greer*, and had thereafter proclaimed naval war against Germany without Congressional authorization).

<sup>150</sup> *Acquisition of Naval Bases in Exchange for Over-Age Destroyers*, 39 Op. Att'y Gen. 484 (1940).

<sup>151</sup> See generally Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257 (2004) (defending Lincoln's actions on the assumption of a constitutional power of “necessity”).

<sup>152</sup> Jay Winik, *Abraham Lincoln*, in *PRESIDENTIAL LEADERSHIP*, *supra* note 1, at 80, 83.



those we disagree with, such as the internment of Japanese-Americans and the confiscation of private industries. One recent study of the presidency points out that Roosevelt took extraordinary steps in the months immediately preceding the Japanese attack on Pearl Harbor on December 7, 1941 to prepare the Nation for—indeed, to *precipitate*—war. In rapid succession, he seized sixty-five Axis ships in U.S. ports (March 30), entered into an executive agreement with the Danish minister in Washington for U.S. troops to occupy Danish-owned Greenland in order to head off a German occupation of that island (April 9), declared the Red Sea no longer a combat zone so that British forces in the area could be supplied without violating the Neutrality Act (April 10), addressed the French public with a plea not to cooperate with the Vichy regime because of its collaboration with Germany (May 15), declared “an unlimited national emergency” after the German victories in Greece and Yugoslavia (May 27), froze all previously unfrozen German, Italian and Axis-controlled countries’ assets (June 15),<sup>153</sup> and issued orders to U.S. warships in the Atlantic to destroy any German or Italian warships they encountered (early October).<sup>154</sup>

If Lincoln and Franklin Roosevelt provide models of “great” Presidents—“great” precisely because they shaped the Constitution to their ends—what would make for presidential greatness in the future? The post-9/11 world is likely to be one of continuing war and crisis, with the horrifying prospect that it may eventually involve the use of weapons of mass destruction against American cities.<sup>155</sup> A conflict of this kind is strikingly novel in the history of the nation, for a combination of at least six reasons. First, our principal adversary is a lossely organized network of disguised conspirators<sup>156</sup> (an indefinite number of them U.S. or allied nationals<sup>157</sup>). Second, although this network has global reach<sup>158</sup> and enjoys

---

<sup>153</sup> See STEPHEN GRAUBARD, *COMMAND OF OFFICE: HOW WAR, SECRECY, AND DECEPTION TRANSFORMED THE PRESIDENCY FROM THEODORE ROOSEVELT TO GEORGE W. BUSH* 224 (2004).

<sup>154</sup> *Id.* at 227.

<sup>155</sup> See GEORGE FRIEDMAN, *AMERICA’S SECRET WAR: INSIDE THE HIDDEN WORLDWIDE STRUGGLE BETWEEN AMERICA AND ITS ENEMIES* 210–17 (2004) (describing the President’s responses beginning in October 2001 to credible intelligence reports that Al Qaeda planned to detonate ten-kiloton nuclear device in New York); see also ANONYMOUS, *IMPERIAL HUBRIS: WHY THE WEST IS LOSING THE WAR ON TERROR* 52–58 (2004) (asserting that the use of weapons of mass destruction by Islamic insurgents is probable); John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 745–61 (2004).

<sup>156</sup> See OLIVIER ROY, *GLOBALIZED ISLAM: THE SEARCH FOR A NEW UMMAH* 294 (2004) (“Al Qaeda is an organisation and a trademark. It can operate directly, in a joint venture, or by franchising. It embodies, but does not have the monopoly of, a new kind of violence. Many groups (such as the Kelkal network in France) are acting along the same lines without necessarily having a direct connection with Al Qaeda.”); see also JASON BURKE, *AL-QAEDA: THE TRUE STORY OF RADICAL ISLAM* 8–13, 231–33 (rev. ed. 2004) (explaining the history and structure of the al Qaeda organization).

<sup>157</sup> See ROY, *supra* note 122, at 303, 309 (describing the second wave of al Qaeda militants

the sympathy and support of untold millions of people,<sup>159</sup> it is without territories or populations of its own to defend. Third, this network is unconstrained by the ordinary pressures and incentives of war and diplomacy.<sup>160</sup> Fourth, this network is motivated by religious doctrines that permit or even encourage both the suicide of its own members and the mass murder of civilians.<sup>161</sup> Fifth, this network engages in asymmetric form of warfare that makes our military forces far less useful either offensively or defensively than they would be against traditional enemies.<sup>162</sup> Sixth, this network has or may soon have access to weapons of mass destruction. A conflict of this character, if it proves both to be protracted and to have a high level of lethality, will almost surely impose on this country a security strategy that entails significant constitutional change.<sup>163</sup> In particular, such

---

as consisting primarily of “students, who came from Middle Eastern countries to study in the West; second-generation Muslims, who were either born in the West or came as infants; and converts.”)

<sup>158</sup> See ROHAN GUNARATNA, *INSIDE AL QAEDA: GLOBAL NETWORK OF TERROR* 11 (2002) (“[Al Qaeda] is the first multinational terrorist organization, capable of functioning from Latin America to Japan and all the continents in between. Unlike the terrorists of the 1970s and 1980s, Al Qaeda is not guided by territorial jurisdiction – its theater of support, as well as its operations, is global.”).

<sup>159</sup> See Daniel Pipes, *Who is the Enemy?*, in *CAPITALISM MAG.* (Feb. 20, 2002), at <http://capmag.com/article.asp?ID=1427> (estimating that ten to fifteen percent of world Muslim population, i.e., about 100–150 million persons, are sympathetic to al Qaeda’s vision).

<sup>160</sup> See ROY, *supra* note 122, at 56 (“Al Qaeda terrorism is totally different from that of the ‘usual’ terrorists in the Middle East and elsewhere. . . . [W]ith Bin Laden there is no room for negotiation. His aim is simply to destroy Babylon.”).

<sup>161</sup> See BURKE, *supra* note 122, at 35:

Such a spectacular martyrdom [as those of the 9/11 hijackers] is . . . the ultimate demonstration of jihad as a testament. . . . A suicide attack is designed to demonstrate that faith is lacking on one side and exists on the other and so to force all aware of the martyr’s action . . . to conclude that, despite the apparent imbalance of forces, when the most important quality is considered – the faith that is necessary for victory in the long run – it is the suicide bomber who has it in greatest depth. In an interview in September 2002, al-Zawahiri stated this explicitly, saying: ‘It is the love of death in the path of Allah that is the weapon that will annihilate this evil empire of America, by the permission of Allah.

GUNARATNA, *supra* note 124, at 91:

Martyrdom is assigned the highest priority by Al Qaeda’s volunteers, who have succumbed to the psychological and spiritual influences of Islamist ideologues. Killing and dying for Allah are viewed as the highest form of sacrifice. Although other terrorist groups driven by Islamist ideology, such as Hamas, prepare [their] fighters to die for the cause, no other group has invested so much time and effort as Al Qaeda in programming its fighters for death.

See generally PAUL BERMAN, *TERROR AND LIBERALISM* 128–53 (2003) (examining the evolution of suicide terrorism from the Israeli-Palestinian conflict up to the September 11 attacks).

<sup>162</sup> See ROY, *supra* note 122, at 327–28:

To send an army, one needs a territory and a visible target. But borders and frontiers are no longer territorial. There is no wall defending the enemy, an enemy that is more often than not too elusive to be named and targeted, an enemy who if he is shadowy is sometimes merely our shadow.

<sup>163</sup> On the close connection between geopolitical strategic imperatives and fundamental constitutional change, see generally PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE,*

a conflict would likely necessitate further developments in discretionary presidential power, not reviewable (or only lightly reviewed) by the courts. The test of presidential greatness in these trying circumstances, as in the nation's past, will be to combine a conservative's solicitude for this nation's constitutional traditions with a revolutionary's audacity in adapting them to unanticipated challenges.