The Problem of the Imperial Presidency

George W. Carey

The Philadelphia Constitution may be dead,[1] but the basic problems which troubled the Framers—*e.g.*, preserving the rule of law, preventing oppressive government—are still relevant, albeit in the new and different context. For instance, by way of introduction to what follows, the marked changes in relative powers of the branches of government since the time of the founding, though they may have drastically altered the character of the constitutional order, in no way diminish the Founders' basic apprehensions associated with a concentration of powers.

As I will endeavor to show in this respect, the enormous growth of presidential powers should be, at least for those who share our Founders' concerns, cause for alarm. True enough, the proponents of the Constitution, if we are to judge from the ratification debates and the relevant essays of *The Federalist*, did not regard the presidency as a likely source of oppression. Yet, by extrapolating from the assumptions and beliefs underlying their justification for the constitutional provisions for separated powers, there can be no question that today they would perceive substantial dangers associated with presidential powers. Moreover, to anticipate a matter I take up later, by examining how the Framers sought to prevent a dangerous concentration of power, we come to appreciate how difficult this task would be in today's altered political environment. In sum, by setting forth the concerns of the Founders surrounding the constitutional distribution of powers, we gain a fuller awareness of the perils associated with the expansion of presidential powers and the obstacles that must be overcome in efforts to curb them.

GEORGE W. CAREY *is Professor of Government at Georgetown University and the author, most recently, of* A Student's Guide to American Political Thought.

I

We can profitably begin our inquiry by briefly examining Federalist essay no. 48 where we find critically important parameters that seemed to have guided the Founders in their efforts to avoid oppressive government and preserve the rule of law. Having defined "tyranny" in the previous essay as the concentration of legislative, executive, and judicial powers in the same hands, Madison turns in essay no. 48 to a major concern, namely, which branch poses the greatest threat to the constitutional separation.[2]

Now, in answering this question, he recognizes an imperative need to reorient the prevailing views about where the greatest threat of tyranny resides. "The

Founders of our republics," he notes, have persisted in equating the executive office with "the overgrown and all-grasping prerogative of an hereditary magistrate, supported and fortified by an hereditary branch of the legislative authority" (257). What they fail to perceive, he remarks, is that "The legislative department is every where...drawing all power into its impetuous vortex" (256-57). He warns in no uncertain terms that in a "representative republic," such as that envisioned in the proposed Constitution, the legislature bears watching since it can grasp all powers unto itself, thereby establishing "the same tyranny as is threatened by executive usurpations." "It is," he insists, "against the enterprising ambition" of the legislature "that the people ought to indulge all their jealousy, and exhaust all their precautions" (257).

The reason for this reorientation in focus is clear enough: to guard against tyranny, the people should concentrate their attention on power and the institutions that wield it. Under British rule, their concern with King George III was justified, but under the forms of the Constitution, Congress is the institution most to be feared. In spelling this out, Madison also indicates the degree to which republicanism is associated with legislative predominance. The legislature's (*i.e.*, Congress's) "constitutional powers," he points out, are "more extensive" than those of the other branches and "less susceptible of precise limit," which enables it to mask "encroachments" on the "co-ordinate departments." Moreover, he adds, it, alone, has "access to the pockets of the people." On the other hand, he notes, "the executive power," which is "more simple in its nature," is "restrained within a narrower compass," while the judicial power is defined "by land-marks still less uncertain" (257-58). On this score, we should also emphasize, the essays immediately following underscore in no uncertain terms the enormous influence the legislature would exercise over the people, a theme reiterated later in essays dealing with the presidency. In short, given the picture of legislative power drawn in these essays, there can be no gainsaying that Madison firmly believed, as he observes in essay no. 51, "In republican government, the legislative authority necessarily predominates" (269).

Madison's analysis and commentary also provide a backdrop against which we can appreciate the degree to which the legislative branch has lost its preeminent status. One indicator of this decline can be derived from essay no. 49 in which Madison critiques Jefferson's proposal that recourse be had to the people when disputes arise between the branches over their respective powers. Madison answers by noting that the branch most likely to aggrandize would be the legislature and that, in addition, the people would most likely side with the legislature if the issue were submitted to them. "The members of the legislative department," he notes, "are numerous...distributed among the people at large" with "connexions of blood, of friendship, and of acquaintance" that "embrace a great proportion of the most influential part of the society." "The nature of their public trust," he continues, "implies a personal influence among the people, and that they are more immediately the confidential guardians of their rights and liberties." Neither the executive nor judiciary, he contends, could match these legislative advantages: the judiciary would be too distant and removed from the people, whereas executive officers were "generally objects of jealousy" and "their administration... always liable to be discoulored and rendered unpopular" (263). In effect, the legislature would be judge of its own cause. Yet, and a significant measure of Congress's decline, is that it no longer enjoys these inherent advantages. On the contrary, there is good reason to believe that today in any such showdown, the executive, and even the

judiciary, might well prove to be an overmatch for Congress.

The fact that Congress has lost prestige and the confidence of the people using the measures Madison sets forth is also reflected in the commonly heard expression, echoed even by senators and representatives, that the Constitution establishes three *equal* and coordinate branches; that Congress is "co-equal" with the other branches. To assert a constitutional equality of the branches, however, is clearly misleading, particularly when it comes to their authority to command the nation's resources and to execute constitutionally delegated powers. Nevertheless, even though inchoate, this three-equal-branches understanding has not only come to prevail, it is generally taken to be the understanding of the Framers as well. Yet, as I have already indicated, this is not the case. Those portions of *The Federalist* that touch upon the separation of powers are unmistakably written from the perspective of legislative predominance, so much so that most of its conjectures about the behavior of the branches and specific threats to the separation of powers have little relevance to our current state of affairs.[3]

The decline of Congress and the growth of executive powers, however, goes well beyond whatever perceptions the people may have. These perceptions would seem to merely reflect a reality resulting from a series of largely extra-constitutional developments that have elevated the presidency at the expense of Congress. The emergence of competing political parties during the early years of our republic was clearly important, and so, too, the election in 1828 of Andrew Jackson to the presidency. Not only was Jackson able to secure his party's nomination through popular channels, dealing a death blow to party nominations by congressional caucuses, equally important, he secured victory in the general election with an overwhelming popular majority, twin achievements that allowed him to plausibly maintain that he represented the people as fully as Congress. Put otherwise, he credibly challenged the traditionally accepted view that the authentic will of the people could only be derived through Congress. It remained for Woodrow Wilson, early in the twentieth century, to develop fully certain strands of thought implicit in Jackson's claims. Wilson had come to conclude that only through presidential leadership could the "progressive" goals to which he subscribed become a reality. In keeping with this view, he went beyond Jackson by asserting that the president was the only authentic national voice; that the nation as a whole possessed "no other political spokesman."[4] He viewed the president as "the unifying force in our complex system, the leader both of his party and the nation."[5] By the middle of the twentieth century, particularly after Franklin Delano Roosevelt, few doubted that the presidency was the dominant institution in the American system. The historian Clinton Rossiter reflected this consensus in setting forth the range of the president's constitutional "functions"—"Chief of State, Chief Executive, Commander in Chief, Chief Diplomat, [and] Chief Legislator."[6] To these constitutional roles he added "five additional functions": "Chief of Party," "Voice of the People," "World Leader," "Protector of the Peace," and "Manager of Prosperity."[7]

II

This growth in presidential powers has been marked by fits and starts with occasional setbacks. At the present time, it seems clear, we are in the midst of an upsurge, presumably prompted to regain ground lost in prior setbacks. Specifically, particularly since 9/11, it has been widely reported that one of the major goals of the administration of George W. Bush is the restoration of the presidential preroga-

tives and powers that were diminished or preempted principally during the Nixon and Reagan administrations.[8] Moreover, this restoration is not a piecemeal undertaking, *i.e.*, simply an effort to return to the *status quo ante* by reclaiming discrete powers that may have been lost or compromised by previous administrations. Quite the contrary, it is based upon a comprehensive "unitary executive theory" that claims constitutional justification for an expansion of executive authority to unprecedented levels.[9] Under this theory, presidents can lay claim to a large and indefinite domain of exclusive authority derived from their constitutional obligation in Article II to insure that the "laws be faithfully executed." Thus, laws or provisions of the laws which, in the judgment of the president, intrude upon his exclusive authority are presumed to breach the separation of powers thereby rendering them unconstitutional and inoperative. In this context, we come to see the significance of President Bush's "presidential signing statements" since they mark out those provisions of the laws regarded as intrusions or potential intrusions of his executive authority.[10] Such statements are nothing new, stretching back as far as the Monroe administration, but they were never as systematically related to a broader theory of presidential authority and relatively few raised constitutional issues. Moreover, the sheer number of signing statements issued by President Bush could make their use commonplace and less controversial for future presidents. If he continues at his present rate, President Bush will have issued more than three times the number issued by all prior presidents.[11]

The nature and significance of these statements can, perhaps, best be seen by examining the most controversial of them that relates to Senator McCain's Detainee Treatment Act of 2005, which eventually took the form of an amendment added on to a defense appropriations bill.[12] McCain's measure, opposed by the administration, sought to prohibit torture in the interrogations of military prisoners and, as such, prompted a signing statement since it was deemed to deal with a concern touching upon executive authority. The most pertinent part of the statement declares that the McCain amendment will be executed "in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief" in order to achieve "the shared objective of Congress and the President... of protecting the American people from further terrorist attacks." Taken as a whole, these qualifiers provide ample room for the president to ignore the congressional prohibition. This is to say, since he is the one who decides what is consistent with his "constitutional authority" in light of "the shared objective," he is free to use his discretion with regard to the use of interrogation techniques. The invocation of the president's authority as "Commander in Chief" is also highly significant. Under the unitary executive theory, this provision renders constitutional any executive action to protect the people during time of war or hostilities. Nor, consonant with the unitary executive theory, may Congress constitutionally place any limitations on the president's discretion to take such action as he may deem necessary.[13] In many respects, the legitimacy of this understanding of presidential authority was at the heart of the lengthy debate concerning the president's disregard of that provision of the Foreign Intelligence Surveillance Act of 1978 (FISA) requiring judicial authorization for the use of wiretaps.[14]

What seems clear, even from this brief survey—which I have purposely confined to marking out the parameters of the president's exclusive domain of power—is that the unitary executive theory expands presidential authority beyond limits previously acknowledged. Compari-

sons are frequently made to Lincoln's actions at the outset of the Civil War to suggest that the current understanding of executive powers is not at all unprecedented. In the last analysis, however, there remains a crucial difference between Lincoln's positions and the rationale of the unitary executive theory. In retrospect the justifications for Lincoln's actions—and a justification he, in effect, set forth for certain of his major acts—comes down to the claim of a prerogative power in the Lockean sense. This power authorizes executive actions, when unforeseen circumstances or emergencies arise that threaten the well being of the people, with the necessary dispatch "according to discretion, for the publick good, without the prescription of the Law and sometimes even against it."[15] This understanding, it is critical to note, acknowledges that some presidential actions taken to preserve the Union were contrary to the laws or the Constitution, whereas under the unitary executive theory these same actions would be viewed as a constitutional exercise of the president's inherent powers. Moreover, prerogative powers are assumed only when the legislature is unable for whatever reason to authorize executive actions. Under the unitary executive theory, however, these powers are inherent presidential powers that can be exercised whether the legislature is capable of acting or not.[16]

It is important at this point to place the Bush administration's conception of presidential power into a broader context. To be sure, we now have before us a conception of executive authority that is by any reckoning more expansive than any previously proffered in our history.[17] But, as I have intimated, given the pattern in the growth of presidential powers, this is hardly surprising. Against the broad backdrop of this growth over the decades, President Bush's restoration project is only a snap shot, so to speak, that catches presidential powers on the upswing. And this upswing, in turn, should also be placed in perspective. For quite some time, the executive has enjoyed extremely broad powers in the international arena as attested to by his capacity to commit the nation to war, leaving the Congress with no alternative but to go along.[18] Many claims of George W. Bush in this important area, therefore, are not without precedent. Nevertheless, it must be acknowledged, at least two factors do render presidential powers in the context of the unified executive theory somewhat exceptional: first, the executive can claim a wide latitude to unilaterally initiate "preventive wars," and second, the ongoing "war on terror"—appropriately dubbed the "long war"—is a war without any foreseeable end. Consequently, unless this unified executive theory is moderated and refined, Americans for the first time will be living without effective constitutional checks on executive discretion or authority for a period that may well stretch on for decades.

III

If we follow the injunction of the Founders, namely, to keep our eyes riveted on the locus of power, then it is evident that we are now obliged to guard "against the enterprising ambitions of" the executive "department." But beyond this rather obvious conclusion is another not quite so obvious one: Given the character of the American political landscape, the presidency promises to be the institution that will permanently pose the greatest threat to liberty and self-government. Thus, whether or not President Bush's restoration effort falls short of its goal or not, we can expect to see a continuous growth of presidential power so long as the Constitution and the political culture surrounding it endure.

The reasons for this are multiple, but the most basic is a critical dissolution of

the motives or impulses that the Framers believed would preserve the intended constitutional separation. Returning to *The Federalist*, we see from that brace of essays dealing specifically with the separation of powers that they believed institutional interest would ultimately serve to preserve separation. We gather as much from Madison's analysis in Federalist no. 51 where he maintains that "the great security against a gradual concentration of powers...consists in giving to those who administer each department, the necessary constitutional means, and personal motive, to resist the encroachment of the others"(268). As far as the "constitutional means" are concerned, they relate to strengthening the weak (vesting the president with a qualified veto) and weakening the strong (dividing the Congress into two chambers). These constitutional means are necessary but not sufficient for maintaining separation; they must be united, as he points out, with an institutional interest so that the office holders will, when necessary, act to defend their "turf" against encroachments. To this end, as Madison maintained, "The interest of the man must be connected with the constitutional rights of the place" (268). He even describes this solution in terms of "supplying, by opposite and rival interests, the defect of better motives" (269).

In light of this, we may ask: Does institutional interest play the role that Madison, and presumably the Framers, believed it would? I think the answer to this question is both "yes" and "no." In my judgment, institutional interest is alive and well within the presidency and the Court, but dormant, if not dead, within Congress. The reason for this is to be found largely in the conjunction and inter-play of two factors: the enormous growth of presidential powers and the president's role as leader of his political party. What we have witnessed, increasingly in modern times, is that when the same party controls Congress and the presidency, Congress is more or less compliant with presidential requests, even those involving institutional prerogatives. In short, in this circumstance, party considerations trump institutional interest. This, it should be noted in passing, is not all surprising. Suffice it to say, sublimating institutional interest to partisan considerations serves the individual interests of the members of Congress.[19] By the same token, when Congress resists executive encroachments—and this, usually, only when there is divided government, *i.e.*, where one party does not control the presidency and both legislative chambers—partisanship, not institutional interest, would clearly seem to be the motivation.[20]

With respect to the presidency, however, institutional considerations are a high priority, perhaps even the highest. This we might expect for various reasons. The president is one individual, high powered and ambitious, who cannot help but focus on leaving a "legacy" that will be looked upon favorably by future generations. In this respect, we can be certain he is going to compare himself with past presidents, and knowing that the "strong" presidents—Jefferson, Jackson, Lincoln, Wilson, Theodore and Franklin Delano Roosevelt—are considered the "greatest," he will not want to leave the office weaker than when he entered. In other words, the connection between the interests of the individual and the office is naturally joined in the office of the presidency. But not so in a numerous legislative body such as Congress, where cohesion on institutional interest—even assuming agreement on its specifics could be had—would be weaker, more diffused, and more likely to dissolve in the face of other, more immediate, individual interests. The upshot is that Congress—contrary to what the Framers anticipated—is no match for the presidency, not at least over the long haul.

IV

We are, I believe, faced with a serious derangement of power; a derangement whose character is markedly different from that with which the Founders were concerned. It would appear, to view this concern from a different perspective, that there is a dynamic under the forms and processes of the Constitution, perhaps due to a failure in its initial design, that is inexorably leading, albeit in sporadic manner, to an "imperial presidency." We can now see that the constitutional system, once set in motion, was destined to move in the direction of presidential supremacy, the more so since the Framers purposely "weakened" the legislature by dividing it. For its part, Congress has not been able to arrest this dynamic, save occasionally and temporarily for partisan, not institutional, reasons.

This state of affairs leads to a critical question, namely, what can be done to avoid the dangers posed by a largely unchecked concentration of power in the presidency? Can this be done, as many suggest, by members of Congress simply coming to the realization of what is taking place and then mustering the necessary fortitude to assert their constitutional prerogatives? Certainly, on paper at least, they have the constitutional muscle to do this. As intimated above, however, partisanship enters into the picture, serving to prevent any congressional reassertion of power save in the case of a grievously weakened chief executive. Past experience also shows, as we have emphasized, that Congress is only an effective check on presidential powers when there is a divided government and even then not always with success, particularly when presidents, as they have been wont to do, commit American forces to hostilities. The prevailing view regarding such commitments, which are certainly among the most crucial a nation can undertake, seems to be that Congress can be constitutionally bypassed; Congress's seeming acquiescence with this understanding being still another indication of its impotence in the face of presidential power. Moreover, while Congress still possesses the appropriations power, this has proved to be a clumsy weapon with which to direct and control a president. Nor can we count on the Court, which is itself guilty of appropriating, without any effective resistance, large swaths of legislative power. While the Court has managed to curb some of the presidential excesses, it is understandably reluctant to curb executive war making powers or to challenge his authority during war.

In light of the fact that Congress has all but abdicated its constitutional responsibilities with respect to the commitment of our armed forces, it seems unlikely that at some future time it will be inclined to do battle with the executive over its lesser powers. In the last analysis, if the past be any guide, we are obliged to conclude that Congress is not likely to check the presidency through the assertion of its institutional interests. Moreover, there is and has been no public outcry of sufficient magnitude about the derangement in powers that might arouse Congress to act upon these interests. In part, as I have noted, the absence of any widespread public concern is attributable to the very incoherence of the "three-equal-branches" understanding of our constitutional system that now prevails.

Having noted this much, let me say that my purpose is not to offer a remedy, but rather to indicate in broad terms the dangers posed by the growth of presidential powers and why their growth seems inevitable. It is depressing, I readily grant, to realize that at the present time there does not appear to be any feasible solution to these problems. It is also somewhat alarming because the dangers associated with the imperial presidency are compounded by an awareness that, while new and more expansive theories of executive author-

ity are seriously advanced, the office is not attracting individuals of high moral and intellectual character. But, above all, in the face of these dangers, it is disappointing to witness the complacency of those who should know better.

1. See my "Who or What Killed the Philadelphia Constitution," 36 *Tulsa Law Journal* 3 (Spring, 2001), 621. I conclude that the Philadelphia Constitution was not suited for the positive government initiated by the New Deal. Thus, to make the Constitution viable for "progressive"ends without recourse to amendments, new meaning had to be given to federalism, Congress's commerce power broadened, the legitimate scope of governmental authority extended, and so forth. The net result, I concluded, was that these changes marked the death of the Philadelphia Constitution. **2.** All citations to *The Federalist* in the text (the essay number when necessary, followed by page number) are to *The Federalist: The Gideon Edition*, eds. George W. Carey and James McClellan (Indianapolis, 2000). **3.** In this respect, consider only Hamilton's judgment that "The superior weight and influence of the legislature...and the hazard to the executive in a trial of strength with that body" suffice to insure that the veto would normally be used "with great caution"; "that, in its exercise, there would oftener be room for a charge of timidity than of rashness" (73:882). **4.** Woodrow Wilson, *Constitutional Government in the United States* (New York, 1961[1908]), 68. **5.** *Ibid.*, 60. **6.** Clinton Rossiter, *The American Presidency*, rev. ed. (New York, 1962), 28. **7.** *Ibid.*, 28 ff. **8.** Whether any such restoration was necessary is open to question. For instance, the War Powers Resolution (1973), a reaction to the war in Viet Nam, that was designed to provide some legislative control over the deployment of American troops, has been ignored by presidents. Likewise, the Budget and Impoundment Control Act (1974), intended to provide greater congressional control over the budget process and to limit the president's discretionary authority over funding, has not proved in practice to have substantially diminished executive authority. The Iran-contra affair, however, did raise questions about the president's authority to conduct foreign policy that do seem related to the restoration program of George W. Bush. See text below. **9.** For an explication and forceful defense of the unitary executive theory, see: John Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11* (Chicago, 2005) and his more recent, *War by Other Means: An Insider's Account of the War on Terror* (New York, 2006). **10.** As Bruce Fein describes them, "signing statements...declare the president's intent to disregard provisions of bills he has signed into law that he proclaims are unconstitutional, for example, a requirement to obtain a judicial warrant before opening mail or a prohibition on employing military force to fight narco-terrorists in Colombia. The signing statements are tantamount to absolute line-item vetoes that the Supreme Court invalidated in the 1998 case *Clinton v. New York*." See "Impeach Cheney"at <http://www.slate.com/id/2169292/pagenum/2/>

A limited investigation by the General Accountability Office (GAO) found that there were 11 signing statements issued by President Bush dealing with 160 provisions of appropriations measures for fiscal 2006. Of the 19 provisions it looked at 10 were executed as written, six were not, and three were not as yet "triggered." See: <http://websrvr80il.audiovideoweb.com/il80web20037/ThinkProgress/2007/signing.pdf> **11.** See: <http://www.boston.com/news/nation/articles/2006/04/30/examples_of_the_presidents_signing_ statements/> **12.** For a text of this amendment see: <http://www.tortureisnotus.org/fulltext.php> **13.** The President's Constitutional Authority To Conduct Military Operations Against Terrorists and the Nations Supporting Them, Memorandum Opinion for the Deputy Counsel to the President, prepared by John Yoo, September 25, 2001 at <http://www.usdoj.gov/olc/war-powers925.htm> **14.** For the entire range of opinion on this issue see: <http://www.fas.org/irp/agency/doj/fisa/> **15.** John Locke, *Two Treatises of Government*, with an Introduction by Peter Laslett, rev. ed. (New York, 1963), chpt. XIV, sec 160. **16.** For a critical analysis of such claims stemming from the unitary executive theory, see the Fourth Circuit decision in *Al-Marri v. Wilkinson* (2007) at: <http://gulcfac.typepad.com/georgetown_university_law/files/al.marri.cta4.decision.pdf> The Supreme Court has rejected extensive claims of unilateral executive power under the unitary executive theory in *Hamdan v. Rumsfeld*, 126 S Ct. 2749 (2006), at: <http://laws.findlaw.com/us/000/05-184.html> **17.** It is interesting to compare the unitary executive theory of presidential authority with Theodore Roosevelt's "stewardship theory." Roosevelt acknowledged limitations: a president, under his understanding, could act unless in contravention of the Constitution or a law. See Joseph E. Kallenback, *The American Chief Executive* (New York, 1966), 246. In other words, the "stewardship theory" acknowledges limitations of law, whereas this is not necessarily the case with the unitary executive theory. **18.** On this point, Edward Corwin wrote in 1957, after the Korean War, but before our involvement in Viet Nam, that, save for the War of 1812 and the Spanish-American

War, our other major engagements—the Mexican War, the Civil War, and the two World Wars—"were the outcome of presidential policies in the making." Of course, there is no question that the president placed the leading role in our involvement in both Viet Nam and Iraq wars. Indeed, the day of congressional declared wars seems to have ended. **19.** Obviously those in Congress can realize the immediate, personal interests far more easily with a president of the same party. For instance, to gain re-election, their prime interest, is facilitated by pleasing their constituents and bringing home the "bacon"—more readily done with a friendly president. In this connection, however, we should note that representatives will desert or distance themselves from a president of their party when the president is clearly so unpopular as to pose an obstacle to their re-election. **20.** What this indicates, of course, is that politics at the national level centers to a great extent on control of the presidency. In turn, this is due to the fact that the resources at the disposal of the executive branch and the president are enormous, unparalleled in history.