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# *Presidential Greatness and Constitutional Power*

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An American President faces war and finds himself hamstrung by a Congress that will not act. To protect the national security, the President orders actions that seem to violate laws enacted by Congress, invoking his powers as Commander-in-Chief, and is criticized for usurping dictatorial powers, placing himself above the law, and threatening to “break down constitutional safeguards.” Commentators exclaim that the Constitution “does not give the President *carte blanche* to do anything he pleases in foreign affairs.”<sup>1</sup> Senators and scholars denounce the policies as illegal and unconstitutional.

Is this President George W. Bush, choosing to use harsh interrogation measures on high value al Qaeda leaders and to wiretap suspected terrorists’ communications without a warrant in the war on terror? Could be.

Yet these particular attacks on presidential power occurred in the years leading up to American entry into World War II. In sending destroyers to Great Britain, President Franklin D. Roosevelt was, many believed, violating Congress’s laws, which required American neutrality. Upon hearing the news of FDR’s destroyer-for-bases deal, Princeton political scientist Edward Corwin asked in *The New York Times*, “why may not any and all of Congress’s specifically delegated powers be set aside by the President’s ‘executive power’ and the country be put on a totalitarian basis without further ado?”<sup>2</sup> Of the deal’s defense by the Attorney General, Corwin scoffed that it was “an endorsement of unrestrained autocracy in the field of our foreign relations, neither more nor less.” And indignantly exclaimed that “no such dangerous opinion was ever before penned by an Attorney General of the United States.”

Throughout American history, times of crisis have called forth broad uses of presidential power, episodes invariably accompanied by loud protest that the President has arrogated the powers of a king. Yet history portrays such moments as times of challenge and presidential greatness. In the darkest depths of the Civil War, Abraham Lincoln invoked his powers as Commander-in-Chief to issue the Emancipation Proclamation and free the slaves of the Confederacy, acting wholly without the approval of Congress and in the face of contrary statutes. Then and since, critics have asserted that the Emancipation violated the Constitution’s protections for private property (in the *Dred Scott* case, the Supreme Court had found slaves to be property). Lincoln’s decision to free the slaves was not permanent, nor, until the ratification of the Thirteenth Amendment in 1865, did it extend to the Union states. Lincoln also took extraordinary measures to raise and fund an army

without appropriations, used military force against the seceding states, suspended habeas corpus, and instituted military trials for civilians working with the Confederacy. He was dogged throughout his presidency by harsh criticism that he was seeking “absolute power” with acts “subversive of liberty and law, and quite as certainly tending to the establishment of despotism.”<sup>3</sup> Civil liberties did suffer, and perhaps he went too far at times, but Lincoln led the Union through the terrible crisis of secession, slavery, and Civil War.

Exercises of presidential power can go badly wrong, of course. Richard Nixon is the most salient example of presidential authority used for ill, having ordered the covert surveillance of political opponents, the infiltration of anti-war groups, and the harassment of critics—all on grounds of national security that were strained at best, and at worst criminally deceitful. He used executive privilege to conceal information from criminal investigators in the Watergate scandal, fired special Justice Department prosecutors, and ultimately resigned before his almost certain impeachment by the House of Representatives. After he left office, Nixon defended his actions in a television interview with David Frost saying, in a damning over-generalization: “when the president does it, that means that it is not illegal.”<sup>4</sup> Nixon, Lyndon Johnson, and John F. Kennedy came to symbolize an “imperial presidency” grown out of control during the 1960s and 1970s, to the point where it seemed fundamentally to threaten American liberty.<sup>5</sup>

Post-Watergate efforts to restrict the executive branch have not made the American president less central to the political universe. Presidents have led the country into wars, short and long, successful and difficult. They have sparked important social changes, from the emancipation of the slaves to the construction of the modern welfare state. They have become “legislators-in-chief” expected to advance a comprehensive domestic policy. As political leaders responsible for the success of their political parties, they are required to solve everything from world peace to the unemployment rate. Presidents are also now media celebrities, whose personal lives are fodder for instantaneous media scrutiny, 24/7.<sup>6</sup>

The broad exercise of presidential power is not unique to the 20th or 21st centuries but represents the growth over two centuries of the constitutional powers of the office. It started with the Revolutionaries’ effort to avoid executives that might slip into monarchy or dictatorship. By the time of the Constitution’s ratification, however, the Framers’ views had evolved in favor of an independent, forceful President.

Although the Constitution devotes more of its attention to listing the powers of Congress, it deliberately painted the President's powers in broad strokes. Our greatest Presidents from George Washington on have filled in these sketchy outlines in the ways in which they have met national challenges, both foreign and domestic. Presidential power has grown as the nation's power has grown, both in constitutional law and in prestige and substantive power.

I admit that these conclusions are at odds with the prevailing scholarly accounts of the White House. Richard Neustadt, author of the most influential book on the Presidency of the last half century, views the story of modern chief executives as a story of "presidential weakness."<sup>7</sup> Presidential power, as Neustadt famously argued, is "the power to persuade." After examining Truman's firing of General Douglas MacArthur and his seizure of the steel mills during the Korean War, and Eisenhower's use of troops to desegregate the Little Rock schools, Neustadt concluded that resort to formal presidential orders was "suggestive less of mastery than failure."<sup>8</sup> While Neustadt conceded that formal constitutional authority was part of a President's personal influence, he made clear that "the probabilities of power do not derive from the literary theory of the Constitution." Scholars following Neustadt find presidential power in characteristics such as communicative and political skills, organizational ability, vision, cognitive style, and emotional intelligence.<sup>9</sup> Neustadt would recommend that Presidents rely upon these skills and avoid any invocation of their constitutional powers.

A longstanding tradition in political science views executive power as a problem, not a solution. Future President Woodrow Wilson argued that the Framers had designed a defective Constitution. In 1885, Wilson famously pressed for "congressional government" in which the President would be in effect a prime minister, at the head of the executive branch and the majority party in Congress. Wilson thought that would be the only way to coordinate both branches of government and overcome the debilitating effects of the separation of powers.<sup>10</sup> But by 1907 Wilson had changed his mind and put his hopes in a President who would act as a powerful leader in national affairs.<sup>11</sup> Professor Clinton Rossiter, author of the classic *The American Presidency*, identified several duties incumbent on the Chief Executive, from "Protector of the Peace" to "Manager of Prosperity."<sup>12</sup> Rossiter worried that if the President did not use all of his formal and informal powers to lead the nation, the government would become "weak and disorganized." This view, echoed

most recently by James MacGregor Burns, argues that the Constitution's original separation of powers divided the executive from the legislative far too well, creating paralyzed government as a result.<sup>13</sup> Presidential government, Burns observed, would "strengthen democratic procedures" and help achieve "modern liberal democratic goals."

For others, the problem is the reverse: that the Constitution checks presidential power too little, not too much. After abuses of executive authority under Kennedy, Johnson, and Nixon, scholars argued that the political checks on presidential behavior had grown too weak and that a return to constitutional principles was necessary. Arthur Schlesinger, Jr., for example, who had praised the exercise of presidential power in his celebrated biography of Andrew Jackson, then as court historian to Kennedy, changed his tune after Vietnam. In *The Imperial Presidency*, he claimed that a "shift in the constitutional balance" of power between Congress and the President had occurred, one marked by "the appropriation by the Presidency, and particularly by the contemporary Presidency, of powers reserved by the Constitution and by long historical practice to Congress."<sup>14</sup> Claims that the Presidency has violated the Constitution's original design continues to characterize the work of some of the nations' leading law professors, such as Bruce Ackerman, John Hart Ely, Michael Glennon, and Harold Koh.

Both approaches assume that the original Presidency was designed to be a weak office, and that circumstances have expanded executive power far beyond the limits intended by the Framers of 1787. One side welcomes this development, the other seeks to return to an eighteenth-century version of the Presidency. I believe that both sets of scholars underestimate the Framers' intentional desire to create a Presidency with broad, rather open-ended powers in specific areas, such as foreign affairs and national security. They meant to leave these boundaries flexible. And so, from the beginning, Presidents have acted forcefully to respond to emergencies and unanticipated events without consulting Congress. The Framers counted on politics to check and balance presidential initiative, not "parchment barriers." The Constitution used broad grants of authority to sketch the outlines for presidential power, and executives from George Washington to George W. Bush have filled in that design. This development was not fated; the Presidency could have evolved into a weak office whose occupants served as the Clerk-in-Chief to Congress. As it happened, the United States grew in size, population, and complexity, and the Presidency grew with it, in power and standing.

Exercising constitutional power in periods of emergency and crisis has more often led Presidents to success than to failure through history. The longstanding debate in American law and politics over the proper scope of executive power is reflected in today's controversies over Bush administration authorization of post-September 11, 2001 military attacks, eavesdropping with and without warrants, detentions with and without criminal charges, harsh interrogations, trials by military tribunal, and executive orders to limit the use of federal funds on new stem cell research. That Bush terminated the Anti-Ballistic Missile Treaty without consulting the Senate, and pulled the United States out of international agreements like the Kyoto Accords, the International Criminal Court, and the International Court of Justice has also aroused concern, as has the issuance of hundreds of signing statements, more than any previous president, expressly reserving his right to not enforce laws he believes are unconstitutional. Bush didn't veto much legislation in his first six years in office, but began to with the election of a Democratic majority in Congress. Claiming executive privilege, Bush has refused to hand documents over to Congress or to the courts, such as information about his Energy Task Force headed by Vice President Dick Cheney, and he has established a White House office of faith-based initiatives to increase the participation of religious groups in government programs, which some object to as a violation of the separation of church and state.

None of this, current political hyperbole notwithstanding, is a partisan innovation. The Clinton administration was just as criticized for its unilateralism in war and its assertions of executive privilege. Members of the Bush administration are more up front about supporting the interpretation of executive power. Vice President Cheney probably had no idea that his comment early in the administration that, "I have repeatedly seen an erosion of the powers and the ability of the president of the United States to do his job. We are weaker today as an institution because of the unwise compromises that have been made over the last 30 to 35 years," would be quite as controversial as it would become.

Critics of the Presidency argue today that Congress must always authorize executive action. Even though Lincoln took extraordinary steps at the beginning of the Civil War, they claim, he at least turned to Congress for support after the fact. This claim recognizes a deep truth about the Constitution's structure. Presidents cannot act alone for long. The other branches can impose effective checks on the executive, as can the political climate. Without the cooperation of the courts, no President

can successfully keep anyone in detention, either as a criminal suspect or as a prisoner of war. A President cannot conduct military operations at all without military budgets approved by Congress. Modern warfare is expensive, requiring periodic infusions of billions of dollars—that gives Congress a veto over war. Domestic legislation can either implement or frustrate a President’s policies, and the courts can block national security policy within their ambit. The Supreme Court, for example, recently required that military tribunals for terrorists meet certain Geneva Convention standards, and extended habeas corpus rights to terrorists held at Guantanamo Bay, Cuba, overruling a series of World War II decisions upon which the Bush administration had relied.<sup>15</sup> But that wasn’t the end of the story. The President and Congress then passed new laws effectively overruling the courts and codifying the executive branch’s prior terrorist interrogation and trial procedures, as well as reinstating Bush’s prior legal interpretation that the Geneva Conventions could not be enforced in federal courts. The new laws also explicitly provided that the President had the power to interpret international treaties such as Geneva in matters of detainee interrogation. The Supreme Court responded again, recently striking down by a narrow 5-4 margin Congress’s effort to limit its habeas corpus jurisdiction over Guantanamo Bay.<sup>16</sup>

Efforts to limit the executive branch sometimes idealize Congress or minimize its institutional problems. When writing laws, Congress can fail to speak clearly or to take important considerations into account. Congress can resort to vague language or hand off difficult decisions to other branches when it is paralyzed by partisanship or is trying to avoid political risks. Special interests can paralyze Congress’s ability to act in the national interest, as can sheer lack of information. Laws can be not only ambiguous but conflicting, with aspirational goals that overpromise and under-deliver, such as the much-criticized “unfunded mandates” on the states.

Congress’s institutional design is quite distinct from the executive. Its 535 voting members all have competing visions of the national good. Organizing all of these members into a majority coalition to reach decisions is difficult, particularly in times of emergency or uncertainty. Congress often casts the responsibility on the executive branch to work out problems and ambiguities, deal with unresolved issues, or fill in the blanks. The President and Vice President are the only two officials elected by the people as a whole. They can claim to democratically represent the common good of the nation as well as Congress can, or at

least to bring a coherent, singular perspective to national problems. As President, Thomas Jefferson said he could “command a view of the whole ground,” bringing better expertise and information to bear than individual Congressmen.<sup>17</sup>

The vigorous Presidency has been stimulated in part by today’s newly active Congress and judiciary. Post-Nixon and Watergate, Congress sought to restrict executive authority, extend its own taxing and spending powers, and exert more control over foreign policy. Our system is designed to limit the power of any single branch by encouraging the others to check each other, yet the contemporary impulse to disempower the executive may well carry distressing unintended consequences. Resentment of the U.S. in the world, for instance, might stem less from American engagement than from the unreliability and inconsistency of a foreign policy that shifts with the latest public opinion poll. Weak Presidents and over-active Congresses can create instabilities in our make foreign policy that leave allies in the lurch.

Presidents, when they err, suffer the consequences at the voting booth. But it is the executive, not Congress, who is tasked to manage the executive branch and represent the nation, particularly in matters of foreign policy and war. Recent Presidents like Bush or Clinton have exercised the powers of their office not because they are power-hungry, but because it is in the best interests of the nation to pursue a single coherent vision while running the government from day-to-day. More often than not, Congress goes along with a President’s policy decisions. Though jealous of its own prerogatives, Congress often nevertheless chooses to empower the executive. Witness the Republican Congress’s 1994 effort to give President Clinton the power to veto specific spending projects only to be blocked by the Supreme Court.<sup>18</sup>

Media attention has transformed Presidents into celebrities, making their every move seem central to the political universe, without explaining the true nature of their limited constitutional powers. Legal scholars for their part tend to focus on constitutional case law rather than history and politics. Leading schoolbooks on constitutional law used in American schools devote less than 10 percent of their pages to the Presidency.<sup>19</sup> Current legal scholarship focus pays the most attention to the question of the meaning of Article II’s vesting of the “executive [p]ower” in a single President and whether that gives the President the power to fire executive branch officials for any reason. Their constitutional authorities range from the power to nominate officials, execute the laws, veto legislation, and command the armed

forces of the United States. Presidents' power has grown well beyond the constitutional, as they head their political parties, manage the bureaucracy, and play a significant role in the legislative process.

The Presidential initiatives of today are novel in their application, rather than in their constitutional justification. Looking back through American history, recent exercises of presidential power, as Commander-in-Chief, manager of the executive branch, and chief law enforcer, are well within what prior Presidents presumed to be their ambit of power. Even pre-emptive war breaks no new constitutional ground—James Polk invaded Mexico, captured its capital, and seized roughly 40 percent of its territory. And Presidents have led the nation into war without a declaration of war—Harry Truman sent U.S. troops to fight in Korea without any congressional authority. Terminating the ABM treaty and withdrawing from the International Criminal Court, military trials, and detaining enemy combatants without criminal charge, go back to Lincoln.

Understanding the growth and nature of executive power requires an interdisciplinary approach including political science, history, and law. To combine these fields is too rare. The origins of the “unitary executive,” go back to Alexander Hamilton and before him Montesquieu, Blackstone, Locke, and Machiavelli. The unitary executive theory says that the President has the “executive power” of government, just as the text of the Constitution says—that is, the authority to manage the agencies and exercise powers inherently “executive” in nature, in particular the conduct of foreign policy. This vesting of power contrasts with the Constitution’s grant of specified, or “enumerated,” powers to Congress. While the colonists’ rebelled against executive power, legislative supremacy during the Revolution caused its own problems, which led to the establishment of a strong, independent executive by the Constitution’s Framers.

In 2005, the *Wall Street Journal* and the Federalist Society asked 130 prominent historians, political scientists, economists, and law professors to rank each American President on a 1 to 5 scale:

Great

- |                       |      |
|-----------------------|------|
| 1. George Washington  | 4.94 |
| 2. Abraham Lincoln    | 4.67 |
| 3. Franklin Roosevelt | 4.41 |

Near Great

4. Thomas Jefferson	4.23
5. Theodore Roosevelt	4.08
6. Ronald Reagan	4.03
7. Harry Truman	3.95
8. Dwight Eisenhower	3.67
9. James Polk	3.59
10. Andrew Jackson	3.58. <sup>20</sup>

The growth of the powers of these Presidents had an important effect on the nation's fortunes. All these Presidents believed that their office was equal and not subordinate to Congress or the courts and took for granted that the broad exercise of that authority was essential to their success. Several of these Presidents are, in fact, responsible for some of the most explosive constitutional confrontations in American history. An enormous historical literature, indeed, trumpets their "great" or "near great" status precisely because they were so bold as to assert power with extraordinary vigor, and precisely in the most contested or doubtful circumstances.

Because the Constitution leaves the executive power open-ended and flexibly responsive to emergency, the original understanding of the Framers can provide only a starting point, rather than an endpoint, to the analysis of the proper scope of presidential power. The history of some of America's best and worst chief executives helps us to understand the outer limits and best uses of presidential power. Looking at the use of constitutional power through a few presidents may seem questionable to historians, who usually try to understand an individual leader by presenting him in his every detail—hence the recent biographies examining the childhood, medical health, psychologies, marital relations, and more of presidents. I do not take issue with the broadening of presidential history, only here the focus remains on the intellectual, political, and legal development of the office. While important, the new social history does not provide as much useful context for an inquiry into constitutional powers as do political, diplomatic, and economic histories.

A related point is the importance of practice as a source of constitutional meaning. When confronted with any legal question, lawyers will turn first to judicial opinions as an authoritative source of interpretation. Supreme Court opinions parse the constitutional text in light of its original meaning, structure, history, and subsequent interpretation by

earlier Courts. In the area of the separation of powers, however, especially in those involving foreign affairs and national security, judicial opinions are few and far between. There is no Supreme Court decision, for example, defining what the Senate may consider in giving its “advice and consent” to a treaty, or a Supreme Court nomination for that matter. The Supreme Court has never decided whether the President must receive a declaration of war or other form of congressional authorization before beginning military hostilities abroad. As the Justices themselves have observed, “the decisions of the Court in this area have been rare, episodic, and afford little precedential value for subsequent cases.”<sup>21</sup>

Historical practice has outsized importance because of this absence of judicial precedent or other forms of binding resolution of disputes between the branches of government. Practice reflects the understandings developed by the branches of government over time for reaching decisions in these areas. Presidents, for example, have never understood “advice and consent” to require personal consultation with the Senate before negotiating a treaty or choosing a Supreme Court nominee because of a practice that began in George Washington’s first year in office. Practice also represents the considered views of leaders of different branches over American history on separation of powers questions. It is a record of the way in which government actors have adapted broad constitutional principles to discrete questions over time. The cumulative effect of their decisions may reveal sturdy truths about the way our government should best work within the system established by the Constitution. Justice Felix Frankfurter put the point well in the Steel Seizure case, *Youngstown Sheet & Tube v. Sawyer*, in which the Court blocked President Truman’s takeover of steel mills during the Korean War: “The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature. Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them.”<sup>22</sup>

Studying practice closely may provide us with a quality of understanding similar to that enjoyed by courts. Judges usually avoid deciding questions until they arise in a real case, in part because the abstract principles do not become real until weighed in the context of actual parties, events, and facts. Similarly, it makes sense to examine executive power under these Presidents because the meaning of broad

constitutional principles becomes sharper and clearer in the context of the challenges that they confronted. During periods of peace and domestic tranquility, Presidents, Congresses, and courts will cooperate much of the time, and so no occasion for the definition of their respective constitutional powers will arise. It is only during times of high stress on the political system when the principles of the constitutional framework clearly emerge. Two cautions are in order, however. Just because practice exists does not make it right—the persistence of Jim Crow laws for almost 100 years does not, in my mind, make the separate-but-equal interpretation of the Reconstruction Amendments legitimate or correct. Second, practice may be wrong because earlier generations operated under worse information or did not confront the same types of circumstances that we do today.

Close examination of these “great” and “near-great” presidents will show that the constitutional powers of the Presidency grew along with its political position as party leader and representative of a national majority. These involve control over the administrative state, over law enforcement, over the conduct of foreign policy, national security, and, to the extent the Constitution is unclear, over interpretation. The institutionally independent, unified executive and its powers were built through our history, at the hands of powerful Presidents who guided America through the shoals of birth, re-birth, and rise to global pre-eminence. Presidential power has expanded with each crisis and emergency, to keep the nation out of the Napoleonic Wars (Washington), to purchase Louisiana (Jefferson), to free the slaves (Lincoln), to bring the nation into World War II (FDR), and to contain and defeat the Soviet Union (Truman, Eisenhower, Reagan). At these times, our greatest chief executives have vigorously used their powers to benefit, even to save, the nation.

This is not to say that Presidents can act unilaterally for very long, or that success inevitably follows executive initiative. Emergencies may call upon a President to lead, and robust exercises of presidential power can jolt the political system into recognizing new realities. But resistance and opposition almost always arise in response. Congress and especially the courts may try to defend the status quo. Presidents need the help of congressional majorities, or well-organized political parties, or a passive judiciary for their policies to stay in place over the long term. Nonetheless, Presidents who hold narrow visions of their powers, or those who are overly deferential to Congress, such as a James Buchanan, will experience failure in crisis. So too did Richard Nixon,

who expanded presidential power in a time of war and foreign challenge, but did so self-servingly against perceived political opponents. The system checked his abuses, and he failed.

Nixon and Watergate prompted understandable concerns that the abuse of presidential power was a real threat to our democracy, yet permanently curbing executive power may prove even more damaging. The most radical critics of presidential power seek a return to an idealized system of government that has not existed for more than 100 years, ignoring the complexity of the world today. Congress is a large and unwieldy committee that rarely agrees on a single vision. Congress itself has chosen over the years to delegate enormous authority to the President—to regulate the environment, education, welfare, the internet, and many other areas—precisely because it knows the executive branch is the only way to bring management expertise to national problems. Our Constitution designed the executive to wield power effectively and flexibly and our history has favored forceful, not constrained, presidencies such as those of Washington, Lincoln, and FDR.

#### ENDNOTES

<sup>1</sup> The quotes are from Edwin Borchard, a Yale law professor, criticizing President Franklin Roosevelt's decision in 1940 to trade American destroyers for British bases in the Western Hemisphere. See Edwin Borchard, "The Attorney General's Opinion on the Exchange of Destroyers for Naval Bases," 34 *Am J Int'l L.* 690, 691 (1940).

<sup>2</sup> Edward S. Corwin, "Executive Authority Held Exceeded in Destroyer Deal," *N.Y. Times*, Oct. 13, 1940.

<sup>3</sup> See "To Erastus Corning and Others," June 12, 1863, note 1, in 6 *The Collected Works of Abraham Lincoln* 261 (Roy P. Basler ed. 1953).

<sup>4</sup> Transcript of the Third Nixon-Frost interview, *N.Y. Times*, May 20, 1977, p. A16.

<sup>5</sup> The case against the imperial presidency is most famously made by Arthur M. Schlesinger, Jr., *The Imperial Presidency* viii (1973).

<sup>6</sup> For a useful survey of the different challenges confronting a President, see Thomas E. Cronin & Michael A. Genovese, *The Paradoxes of the American Presidency* (2d ed. 2004).

<sup>7</sup> Richard E. Neustadt, *Presidential Power from FDR to Carter* xi (1980 ed.).  
<sup>8</sup> *Id.* at 21.

<sup>9</sup> Fred I. Greenstein, *The Presidential Difference: Leadership Style from FDR to George W. Bush* (2004).

<sup>10</sup> Woodrow Wilson, *Congressional Government: A Study in American Politics* (1885).

<sup>11</sup> Woodrow Wilson, *Constitutional Government* (1907).

<sup>12</sup> Clinton Rossiter, *The American Presidency* (1956).

<sup>13</sup> James MacGregor Burns, *The Deadlock of Democracy* 6 (1963); James MacGregor Burns, *Presidential Government* (1965).

<sup>14</sup> Schlesinger, *supra* note 5, at viii.

<sup>15</sup> *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). For discussion of the case, see Julian Ku & John Yoo, “*Hamdan v. Rumsfeld*: The Functional Case for Foreign Affairs Deference to the Executive Branch,” 23 *Const. Commentary* 179 (2006).

<sup>16</sup> *Boumediene v. Bush*, No. 06-1195, 06-1196, 2008 WL 2368628 (June 12, 2008).

<sup>17</sup> Thomas Jefferson, First Inaugural Address, Mar. 4, 1801, in 1 *Messages and Papers of the Presidents, 1789–1897*, at 321, 324 (James D. Richardson ed., 1896).

<sup>18</sup> See *Clinton v. New York*, 524 U.S. 417 (1998).

<sup>19</sup> The most recent edition of *Constitutional Law* by Geoffrey Stone, Louis Seidman, Cass Sunstein, and Mark Tushnet, for example, devotes only 100 pages out of a 1,560 page book to conflicts between the powers of the President and Congress.

<sup>20</sup> *Presidential Leadership: Rating the Best and the Worst in the White House* 11 (James Taranto & Leonard Leo eds. 2005).

<sup>21</sup> *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981).

<sup>22</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring). For views on the power of precedent in constitutional decisionmaking by courts, see David A. Strauss, “Common Law Constitutional Interpretation,” 63 *U. Chi. L. Rev.* 877 (1996); Michael J. Gerhardt, *The Power of Precedent* (2008).

