

# A CRITICAL INTRODUCTION

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Anniversaries, being arbitrary markings on a calendar, fall randomly into the lives of ongoing institutions. Consequently, we cannot expect that bicentennial reflections on the health of the presidency will necessarily produce some special wisdom, the distilled product of a long two-hundred year view, when there are a few more proximate scores still left to settle. At the end of its first century the United States faced a similar problem, and somehow survived that celebration. In 1876 the President was elected under the most questionable circumstances ever. And on the two-hundredth birthday of independence, a President unelected in another sense sat in the White House.

Alert tuners-in to the news media are aware that behind this interesting fact lies far juicier fare for the connoisseur of birthday blues. Indeed, Vietnam and Watergate have apparently accomplished what no amount of rational argument could have done: They have persuaded at least a few of the noisier advocates of presidential government that the checks and balances the founding fathers wrote into the Constitution may not have been such a bad idea after all.<sup>1</sup> The question now arises whether in their newly-minted enthusiasm for curbing a rampant, villainous presidency these same observers can be convinced that they must show common sense and moderation as well as ingenuity. In short, now that they believe that the founding fathers did well to put checks and balances into the Constitution can they be persuaded that the checks and balances the founders put in are enough?

It is, of course, something of a fiction to believe that contemporary Americans can choose the sort of presidency they want, without reference to all that has gone before. Yet, over the long haul, it is no doubt true that the presidency—as well as our other political institutions—does evolve in part out of the climate of opinions, demands, and expectations that are created by learned analysis.

## I

### RICHARD NIXON AND THE USES OF HISTORY

The presidency of Richard Nixon is currently the great storehouse of illustrations that students invoke in aid of arguments concerning the need to

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1. *Compare, e.g.,* A. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973), *with* A. SCHLESINGER, JR., *A THOUSAND DAYS* (1965).

constrain the presidency in general, and future presidents in particular. This is a part of the familiar procedure by which history becomes grist for the contemporary mill. And yet, being such recent history, it is perhaps no wonder that a fully rounded historical understanding of the Nixon administration is not yet a part of our common literature. Indeed, contemporary commentators are still at loggerheads over such questions as whether the Nixon administration was uniquely evil, or only best in show, or not materially different from its predecessors.

What is at stake in settling questions of this kind is not only a matter of psychological closure on recent historical events. Rather, answers form a basis for recommendations about the future conduct of the constitutional order. Hence they are likely to be far more passionately contested than squabbles of merely scholarly import. Essentially, the radical position with respect to constitutional reform views the worst aspects of the Nixon administration as fundamentally continuous with the Johnson and Kennedy Presidencies, or at a minimum fulfilling a potential clearly implied by the presidency in its modern, unconstrained imperial posture.<sup>2</sup>

Constitutional stand-patters, to the contrary, have a stake in the proposition that the Nixon administration was a once-in-a-blue-moon extravaganza of usurpation and neglect of the common weal, the sovereign remedy for which was the removal of Richard Nixon as President.

There is some merit to both arguments. Although Gerald Ford was an even more conservative Republican than Richard Nixon, and up against a liberal Democratic Congress, the complaints about the Ford Presidency fell far short of noises about impeachment. So Nixon must have been doing at least a few things differently from his successor, and these differences evidently did not turn on partisan politics with respect to public policy. Indeed, not only did the Democratic Congress accept Gerald Ford's enthusiastic partisanship in everyday politics, it also accepted Ford's choice of a Republican for the vice-presidency, although it was well within their power to withhold confirmation.

In any case, none of the counts of the Nixon impeachment expressed simple partisan disagreement over policy. Yet they did allege acts of a sort that subsequent investigation has disclosed were also indulged in by previous administrations. The conservative columnist Nick Thimmesch has prepared a handy catalogue of transgressions, gathered mostly from the reports of the Church committee investigation of intelligence activities:<sup>3</sup>

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2. See, e.g., Bernstein, *The Road to Watergate and Beyond*, 40 LAW & CONTEMP. PROB. no. 2, at 58 (1976); Raskin, *Democracy Versus the National Security State*, 40 LAW & CONTEMP. PROB. no. 3 (1976).

3. See 1-7 *Hearings Before the Senate Select Comm. to Study Government Operations With Respect to Intelligence Activities*, 94th Cong., 1st Sess. (1975); 1-6 SENATE SELECT COMM. TO STUDY GOVERNMENT OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. REP. NO. 755 94th Cong., 1st & 2d Sess. (1975-1976).

We learn, for example, that President Franklin D. Roosevelt ordered FBI Director J. Edgar Hoover to snoop on hundreds of Americans who had sent FDR telegrams “all more or less in opposition to national defense” or that approved Charles Lindbergh’s criticism of Roosevelt. A few years later, Hoover was sending “Personal and confidential” letters to President Truman which contained tidbits of political intelligence—reports of Communist influence in a Senator’s speech, advance word that a scandal was brewing which would be “very embarrassing to the Democratic administration,” and confidential reports on which publications were going to break stories exposing organized crime and corrupt politicians. The Eisenhower Administration also willingly received confidential advisories from the FBI on the role of Communists in the civil rights movement and derogatory raw files on individuals charging the federal government with racial discrimination.

We learn that Presidents Kennedy and Johnson did not halt these questionable practices by the FBI, and actually were happy to make use of them. Kennedy had the FBI pursue steel company executives and newsmen alike during the steel crisis of 1962. Attorney General Robert F. Kennedy, despite repeated denials, had all manner of foes and suspects, including newsmen, wiretapped. He is also finally revealed to be responsible for the wiretapping and bugging of Martin Luther King, Jr. And no other President leaned on the FBI to investigate citizens suspected of being his “enemies” as Lyndon Johnson did. Members of Sen. Barry Goldwater’s staff, a witness in the Bobby Baker case, government bureaucrats, people attending the 1964 Democratic convention, Mrs. Anna Chennault, Spiro Agnew, Vietnam war protesters—all fell under federal surveillance because of Johnson’s feelings of fear and vengeance.

These examples, arguably, provide continuity between the Nixon administration and its predecessors. What about differences? Thimmesch suggests three: Congress in the hands of the opposite party, a “mood” of self-destruction in Washington, and presidential stupidity in such matters as tape-recording in the Oval Office.

It is possible to have a lively debate about the necessity and/or the sufficiency of any of these in producing an impeachable President. As to the first, I flatly doubt that any sort of impeachment moves would have been politically possible, or indeed undertaken, except on a bipartisan basis, and this condition was met. This sharply curtails the force of the argument that such things are possible only when President and Congress are controlled by different parties. As to the “mood” theory, there is nothing much to say. My impression is that Washington is a moody town, and that a case can be made nearly all the time that morale is low, that phantoms of various sizes and shapes are stalking the landscape, and so on. Why no serious impeachment talk during the waning days of the Truman administration? Or when Franklin D. Roosevelt made up his mind to go for a third term? No doubt some sort of anti-government mood is a byproduct of impeachment, but as to its power to cause impeachment, it seems unlikely.

The presidential stupidity theory has more to recommend it. For one thing, it is infinitely expandable, encompassing whatever acts are historically proximate to impeachment activity. Thus it seems likely to provide a ready

explanation not only for Nixon-haters, but also for his defenders, such as, for example, H. R. Haldeman, who can complain that Nixon was chiefly culpable in neglecting to make the "right moves." Thimmesch appears to adopt that line of thought when he says "[i]f Richard Nixon is guilty of anything at all, it is that he threw away the overwhelming support given him by the American people in 1972."<sup>4</sup>

My view is that this is a serious misstatement, all the more serious because it is, of course, quite true that Nixon did indeed squander his political power. But that, as the example of Harry Truman suggests, is by no means enough to invite impeachment. I believe the proper reading of the lesson is that to court impeachment a President must be guilty of substantial misdeeds, abuses of power rising to constitutional dimension, and *in addition* must have alienated the other centers of power in and out of government to which a President, in our complex and interrelated system, must render account.<sup>5</sup>

This diagnosis, I am afraid, vastly complicates the search for a mechanism in the political system that reliably triggers off impeachment proceedings whenever a President meets only one of these conditions, namely lawbreaking. I think a good bit of the thrashing around that constitutional scholars have recently engaged in is directly traceable to their unwillingness to deal directly with, yet their incapacity quite to ignore, the fact that impeachments are by design and, in any event, inescapably, political acts as well as constitutional events. Proposals for permanent special prosecutors, free-floating attorneys general, congressional votes of no confidence, and so on, have to be examined in the light of the politics that will inform their work.

This is not something I shall undertake here in the detail to which these, and no doubt other, proposals are entitled. The dangers in each of these in any event seem easy enough to give in broad outline. On the one hand, the remedies proposed may be too weak, but may by their very existence short-circuit the constitutional devices we already have and which, at least in the Nixon case, appear to have worked.

Thus, the special prosecutor or attorney general may be irresolute or easily hoodwinked, or firmly under the influence of a miscreant President. The vote of no confidence may prove less easy to mobilize than an impeachment investigation, and the pendency of a no confidence motion may effectively prevent the investigation from taking place.

Or, the remedies may prove too strong. The special prosecutor may be an irresponsible careerist, or a semi-paranoid, or a plain old wild man. Such persons have on occasion occupied prosecutorial positions in the past. His—or her—opportunities for mischief would be enormous, and it is difficult to see

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4. Thimmesch, *The Abuse of Richard Nixon*, ALTERNATIVE 5, 6 (Apr. 1976).

5. For a fuller account of this argument, see N. POLSBY, POLITICAL PROMISES 3-14 (1974).

to whom such a prosecutor could be made sufficiently accountable to prevent such misbehavior.

As to the "independent" Justice Department, history already provides a partial analogue: For much of its existence, the FBI, by far the Justice Department's most populous bureau, has to all intents and purposes been politically unaccountable.<sup>6</sup> I think somebody ought to ask the well-meaning reformers—presumably civil libertarians—who want to move the entire Justice Department in the direction of the FBI under J. Edgar Hoover if this is *really* what they want.

Finally, the spectre of a too-strong vote of no confidence. This, insofar as it paralyzes the political direction of the executive branch, is a device for empowering bureaucrats, for encouraging their alliances with the interest groups they serve, and, not incidentally, for pushing them much further than heretofore into alliances with the congressional committees that tend to their appropriations and their legal authorizations to act. Even the most innocent eye can get a glimpse, I think, of what a promiscuously employed congressional vote of no confidence would do to political incentives and political accountability in the national government. It would work a revolution. Have proponents of this measure been altogether candid about this?

Thus the mischief that Richard Nixon did continues to grow and proliferate in the absence of the kind of environmental impact statement that can sort out political costs and consequences of various remedies. Yet few scholars are satisfied that attending to the Nixon case alone fully disposes of the more general problem, which is whether the President has grown too strong, and if so, what to do about it.

## II

### PRESIDENTIAL POWER IN THE SYSTEM

The sources of presidential power are by now reasonably well understood. As Chief Executive he stands at the apex of a large number of bureaucratic agencies, each of which is capable of going on about its business without his intervention, each of which is bound to respond in some fashion when he intervenes to change or sharpen the focus of their activity. He has a particular constitutional duty to conduct the foreign affairs of the nation. And by virtue of his powers of legislative veto, he can powerfully affect the course of the legislative activity primarily confided to Congress.

Like well-invested money in trust, presidential power has been multiplying these last few decades almost without regard to the initiatives of presidents. This has come about because central government and its functions have

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6. I suppose the most useful current discussion of the FBI is S. UNGAR, *THE FBI* (1976). See also V. NAVASKY, *KENNEDY JUSTICE* 3-155 (1971); J. SCHOTT, *NO LEFT TURNS* (1976).

grown, thus inexorably widening the scope of potential presidential initiative, because the world has become more densely interdependent, thus increasing the urgency and the importance of foreign affairs in the overall scheme of government, and because legislative initiatives and legislative business at the center of government have increased, and hence the opportunities for presidential engagement in legislation have likewise grown.

We have, in addition, a firmly established literary tradition in this country of President-worship, which more or less demands that in order to conserve their good repute presidents must be seen conspicuously to grasp and manipulate these levers of power. Of course, levers are in fact only tenuously and partially connected to the main forces in society so that all statements of cause and effect originating in the White House are indifferently supported by feedback from the society at large.<sup>7</sup> In effect, then, the modern President radiates an aura of enormous power, yet floats in a penumbra of uncertainty. From outside looking in, the White House seems all purpose and energy. From inside looking out, it may all seem to be done with mirrors and cosmetics. Since nothing substantial or long-lasting frequently follows from presidential initiatives, large claims of efficacy are as easy to launch as small ones.

What gives these claims their greatest credibility, aside from the enthusiasms of deep thinkers in the mass media, is the undoubted weakness of countervailing agencies. Yet, here it pays to tread carefully. In recent years the courts can hardly be said to have conscientiously maintained their status as the least dangerous branch. Novel constitutional doctrines have emerged to aid the court in such enterprises as the regulation of state abortion legislation according to the development of the fetus.<sup>8</sup> Other doctrines, heretofore interposing limitations upon judicial initiative, such as the doctrine of standing, have fallen into disuse.<sup>9</sup> The cherished constitutional principle of equal protection has become protean in its reach.

Two contributors to this symposium have noted well this trend and have very intelligently explored ways of employing the Court to limit presidential power.<sup>10</sup> Constitutional conservatives are likely to regard such a program as not unlike the expedient of loosing a second plague to stop an earlier infestation. Who kills the wasps once they do in the termites?

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7. The classic formulation of this proposition is Mort Sahl's "Spring is here at last, just as President Johnson promised." For a longer, not necessarily more cogent discussion, see Polsby, *Against Presidential Greatness*, 63 COMMENTARY 61 (Jan. 1977).

8. *Roe v. Wade*, 410 U.S. 113 (1973).

9. See Orren, *Standing to Sue: Interest Group Conflict in the Federal Courts*, 70 AM. POL. SCI. REV. 723 (1976); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1671 (1975).

10. See Gewirtz, *The Courts, Congress, and Executive Policy-Making*, 40 LAW & CONTEMP. PROB. no. 3 (1976); Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, 40 LAW & CONTEMP. PROB. no. 2, at 102 (1976).

A perspective less occupied with the manipulation of doctrines and justifications would, no doubt, confronting the same problem of overwhelming presidential strength within the system, ask if something cannot be done to strengthen the two countervailing *political* instrumentalities that exist in the national arena: Congress and the national parties. There are purely philosophical advantages to this approach that cannot escape the eye even of the most dedicated legalist: Political institutions have popular roots and, like the President, can claim to be in touch with the needs and preferences of people who, according to most renditions of democratic theory, ought to have an important say in the disposition of things.

Yet the means of strengthening Congress and the parties in the political system have mostly gone unexplored. Strengthening Congress at the Court's command is a dubious proposition at best, since presumably what power Congress gains on the executive is willy-nilly lost to the judiciary. This is a serious problem even absent the acceptance of doctrines such as Professors Van Alstyne and Gewirtz have so skilfully proposed. As a number of commentators have perceived, Congress was the big loser in—of all cases—*United States v. Nixon*, where the entitlement of Congress to investigate the executive pursuant to impeachment was overrun by the needs of a criminal trial and only incidentally reinforced by the Court to the supine gratitude of Congress.<sup>11</sup> If Congress is unwilling independently to assert its right to impeach, ought not scholars spend a word or two on how to restore to Congress the vertebrate structure the Constitution so plainly gives to it?

As to the parties, commentary would likewise have been welcome, and especially so because so much post-Watergate reform has focused upon the party system and its peculiar central function, the presidential nominating process. The thrust of legislation in this field has been not to strengthen, but to further weaken parties. Public financing of the nomination process subsidizes partisan disintegration, and encourages successful presidential contenders to ignore parties, party leaders, state party organizations and so on, as utterly superfluous to their selection.<sup>12</sup> Yet an argument could be mounted to the effect that presidents constrained by and responsible to parties are far less likely to misbehave than presidents who have no ties to party. And in a serious contemporary discussion of separation of powers, the silence or hostility of the founding fathers to party gives no warrant for their exclusion.

There remain, however, some useful proposals for specific remedies to

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11. See Gunther, *Judicial Hegemony and Legislative Autonomy: The Nixon Case and the Impeachment Process*, 22 U.C.L.A. L. REV. 30 (1974); Mishkin, *Great Cases and Soft Law: A Comment on United States v. Nixon*, 22 U.C.L.A. L. REV. 76 (1974).

12. A full ventilation of many of the issues involved can be found in ABA, *SYMPOSIUM ON CAMPAIGN FINANCING REGULATION* (1975).

recent ills,<sup>13</sup> some able explorations of the roots of specific presidential powers in legislation<sup>14</sup> and foreign affairs,<sup>15</sup> and three historical essays suggesting that the real limits of presidential power as it has actually been exercised have been political, not constitutional.<sup>16</sup>

Several commentators suggested that understanding how the President actually fits into the constitutional order is a scholarly priority of the first magnitude. Have we reached a situation where a presidency perpetually facing "crisis" of various kinds disguises, under the facade of normality, an unconstitutional capacity to act? Is it realistic to contrast this situation with one in which presidential inaction is preferred to insufficiently legitimized action?

"The central issue," as Professor James Sterling Young put it in an especially able commentary,<sup>17</sup>

is one of the compatibility of presidentialism with constitutionalism . . . . [T]he fundamental rationale of . . . the constitutional system was that inaction is better where the different branches of government cannot agree and don't . . . . [T]he kinds of politics that follow from that constitutional logic are the politics of consensus, coalition building. . . . Now a number of other countries have a rather well articulated—even a constitutionally defined—system when dealing with contingencies which cannot be handled under the rules of normal politics. . . . There are provisions under which a crisis triggers a suspension of the Constitution and democratic politics, elections, and so on. Typically, a junta takes over like in the case of France, the presidency assumes abnormal powers for the duration of the contingencies. It seems to me that our problem in American politics is we have embedded this contingency system in our normal constitutional structure and it is organized . . . around the presidency. We conceal it in the practice of normal politics . . . and [now] we are discovering that there are certain inherent [characteristics] of presidentialism which are in rather direct conflict with constitutional logic . . . .

"There are [three] fundamental alternatives . . . . (1) Disable the contingency system, disable the Presidency because it is an alien presence in the constitutional order and insist on handling all situations within the normal political system. (2) Take the risk, accept the inevitable, the contingency system, and the power that aggregates to it and the Presidency, and wait until the day that the contingency system is domesticated by colonization or annexation by the bureaucracy, or (3) try to regulate the contingency system, in the spirit of the War Powers resolution, compromising both the constitutional system and the contingency system.

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13. See Halperin & Hoffman, *Secrecy and the Right to Know: National Security*, 40 LAW & CONTEMP. PROB. no. 3 (1976); Lacovara, *Presidential Power to Gather Intelligence*, 40 LAW & CONTEMP. PROB. no. 3 (1976).

14. See Black, *Some Thoughts on the Veto*, 40 LAW & CONTEMP. PROB. no. 2, at 87 (1976).

15. See Allison, *Making War: The President and Congress*, 40 LAW & CONTEMP. PROB. no. 3 (1976); Borosage, *Para-Legal Authority and its Perils*, 40 LAW & CONTEMP. PROB. no. 3 (1976).

16. See Bernstein, *supra* note 2; Patterson, *The Rise of Presidential Power Before World War II*, 40 LAW & CONTEMP. PROB. no. 2, at 39 (1976); Sofaer, *The Presidency, War, and Foreign Affairs: Practice Under the Framers*, 40 LAW & CONTEMP. PROB. no. 2, at 12 (1976).

17. J. Young, Introductory Comments to the Symposium on Presidential Power, 1st session, January 23, 1976. (on file at Institute of Policy Sciences and Public Affairs, Duke University)

Surely in theory the contrast is clear enough, but if Professor Sofaer is correct, history is likely to give little comfort to those who urge the workability of the strictly legitimist, the "constitutionalist" model. From the beginning, evidently, our constitutional order has provided room for presidential aggrandizement, especially in situations of crisis.

This peculiar constitutional history by no means invalidates Professor Young's concern. Indeed, as the franchise expands, as the education and articulateness of the American populace grows, as communications costs plummet, the problem of legitimacy is bound to recur in American politics, and if anything, to increase in its urgency. From now on presidents will have to grapple with this problem in ways that Thomas Jefferson, Abraham Lincoln, and even Franklin Roosevelt did not. This is only one way in which the fates have contrived to give the subject of the presidency and its powers a new freshness for scholars and for all those who care about the health of the American constitutional order.