Conclusion

An Evolving American Presidency

KEN GORMLEY

The "energy" that the framers envisioned in the American presidency is not evident in the sparse text contained in Article II of the Constitution. Nor does it leap from the pages of the presidential-powers cases handed down by the Supreme Court over the past two centuries. Even reading a thick biography of each president would not tell the full story.

The complete picture only comes to light by tying together threads that span across presidencies. The foregoing chapters, when read together, illuminate remarkable images that would otherwise be obscured by a web of interrelated events. President Gerald Ford might not have pardoned Richard M. Nixon during the Watergate crisis if it were not for the exercise of the pardon power by President Woodrow Wilson in 1914, resulting in the Supreme Court's pronouncement in *Burdick v. U.S.*, which held that acceptance of a presidential pardon generally amounts to an admission of guilt. Once the dots are connected, it becomes clear that events that shaped the presidencies during the founding period are tied to the pre–Civil War period, or to the Progressive era, or to modern times, creating a web of interconnected events that tell a rich, remarkable story.

To be sure, certain foundational principles help shape the presidency within the nation's broader constitutional framework. As texts on the presidency commonly note, the principles of *separation of powers* (the allocation of powers among the three branches of government) and *federalism* (the distribution of powers between the federal and state governments) are regularly implicated as chief executives vie for power under the Constitution. There are dozens of examples of these principles at work in the foregoing chapters. For instance, George Washington tested the boundaries of presidential power in relation to Congress (separation of powers) in issuing the Neutrality Proclamation in 1793. President Andrew Jackson emphasized the sanctity of state authority (federalism) in vetoing bills that sought to recharter the national bank.

These foundational principles flow from the structure of the Constitution itself. They run throughout the story line as American presidents bring to life the nation's fundamental charter. Yet there is much more to understanding the story: Certain provisions in the Constitution have taken shape over time, creating a sturdy set of guideposts for present and future presidents. There also exist intricate threads that connect presidencies like a woven fabric; untangling these threads reveals hidden themes and clues about the direction that the American presidency will likely take as it continues to evolve.

While an exhaustive summary of these intersections would double the size of this volume, certain connections are important to highlight. This chapter seeks to arrange the puzzle pieces to construct a fresh look at issues that have linked the great array of American presidencies discussed in the preceding chapters, leading readers (hopefully) to new areas of exploration and discovery.[1]

The Presidential Arena

None of the vast powers of the chief executive becomes relevant, of course, until an individual withstands the process of being elected or succeeding to the presidency. Identifying the rules that govern those rare individuals who enter and exit the presidential arena is a good way to start organizing the stories of forty-four presidents, before discussing the powers that they can wield. Consequently, one very important group of constitutional provisions on display in the foregoing chapters relates to the selection, removal, and replacement of presidents.

Election and Succession

The constitutional provisions dealing with the election of presidents and the transfer of power have adapted over time, producing a surprisingly stable system of government. George Washington, in voluntarily stepping down after two terms in office, established an informal precedent that served the country well for many decades. Ulysses S. Grant flirted with running for a third nonconsecutive term, but lacked the support to do so. FDR won an unprecedented third and fourth term in the midst of World War II, dying just months after his fourth inauguration. The Twenty-Second Amendment was then added in 1951 to formally limit presidents to two elected terms, to avoid a repeat of the FDR model. Yet most presidents followed Washington's lead voluntarily. This has distinguished the American presidency from monarchies, dictatorships, and other forms of governance in which chief executives have maintained power indefinitely or as long as they could cling to it.

The Twelfth Amendment, added in 1804, provided for the separate election of president and vice president. Among other things, this amendment eliminated the awkward situation of having a president paired with a vice president of a different party (as was the case when President John Adams was forced to endure having his archrival, Thomas Jefferson, serve as his vice president). The Twelfth Amendment also allowed the president to avoid being stuck with a vice president who was a political liability. Jefferson quickly took advantage of this provision in 1804, dumping his vice president Aaron Burr (who had shot and killed former Secretary of Treasury Alexander Hamilton in a duel earlier that year) and selecting a new running mate—Governor George Clinton of New York—who was more compatible with his own political philosophy and comportment in office. Thus, the Twelfth Amendment improved the system for selecting executive leaders.

Moreover, the peaceful transfer of power that has taken place when American presidents have sought reelection and failed—starting with John Adams's loss to Thomas Jefferson in the famous "Revolution of 1800"—created a model that further shored up the stability of the system for electing chief executives, in a distinctly American fashion.

CONTESTED ELECTIONS

A few highly contested elections have tested the foundations of the scheme constructed by the framers. The contested election of 1824, in which John Quincy Adams struck a "corrupt bargain" with House Speaker

Henry Clay of Kentucky, haunted Adams for his entire term until he was ushered out of office. The wildly disputed Hayes-Tilden election of 1876 threw the selection of the president into the lap of Congress, wreaking political havoc and forcing Congress to pass the Electoral Count Act of 1887, which established clearer rules to resolve disputed elections under the Twelfth Amendment. Ironically, the most recent instance of a hotly contested election—the Bush-Gore presidential race of 2000—never provided Congress an opportunity to test the mechanism created in the aftermath of the Hayes-Tilden election. When the Supreme Court injected itself into the matter by deciding *Bush v. Gore* and delivering a victory to Republican George W. Bush, it took the matter away from Congress and moved it into the judicial realm. The Court's action only fueled the fires of partisan disharmony, damaging the Court's own reputation in the process.[2]

In the end, however, the history of stability that has defined the process of electing presidents and transferring power, even under the most difficult circumstances, has been a key component of America's constitutional resilience.

DEATH IN OFFICE

The Constitution creates various mechanisms to replace presidents in the case of death, incapacity, and infirmity. These provisions have led to a swirl of activity throughout American history.

Originally, the Constitution was unclear about what the precise title or role of the vice president should be in the case of the president's death in office. Article II, Section 1, Clause 6, stated only that in the case of the president's death or removal from office, "the Powers and Duties of the said Office . . . shall devolve on the Vice President." When President William Henry Harrison died in office after only thirty-one days, congressional foes of Vice President John Tyler sought to diminish his role by treating him as the "Vice President, now exercising the duties of President." Yet Tyler persevered. After he was sworn in as chief executive, he established the *Tyler precedent*, thus ensuring that a vice president actually becomes president in these circumstances. The Twenty-Fifth Amendment in 1967, after the assassination of President John F. Kennedy, formalized this constitutional interpretation: "In case of the removal of the President from office or of his death or resignation, the Vice President shall become President."

Over the course of forty-four presidencies, eight presidents have died in office: William Henry Harrison, Zachary Taylor, Abraham Lincoln, James A. Garfield, William McKinley, Warren G. Harding, Franklin D.

Roosevelt, and John F. Kennedy. Interestingly, the successors of these chief executives have been plagued by a curse of their own: none has won more than a single term in office on his own.

IMPEACHMENT AND CENSURE

Several presidents have been subjected to efforts to impeach, censure, or remove them from office. Over the course of two centuries, none of these efforts has succeeded. Indeed, most efforts have never moved beyond political blustering and posturing.

John Adams, the second president, found himself threatened by censure or impeachment by Congress for his role in the Thomas Nash affair. Representative John Marshall (who later became chief justice) vigorously defended Adams in the chambers of Congress, extinguishing the effort to reprimand or remove him. Impeachment charges were drawn up against President John Tyler, in the House of Representatives, for his vigorous (some said reckless) use of the presidential veto power; yet, these efforts died on the vine before ever getting to the relevant congressional committee. President Andrew Johnson was the first president in American history to be actually impeached by the House of Representatives. He was charged with defying the Tenure of Office Act and other alleged misdeeds during the roiling period of Reconstruction. However, Johnson escaped conviction by one vote in the Senate, completing his term in office intact.

President Richard Nixon was teetering on the edge of impeachment for his Watergate misdeeds when he resigned from office and received a pardon from his successor, President Gerald R. Ford. While Nixon managed to circumvent the looming impeachment process, his legacy as president was forever damaged by that stamp of infamy. President William Jefferson Clinton became the second president in American history to be impeached in the House of Representatives; he was impeached, by a strict party-line vote, for allegedly lying under oath about an affair with former intern Monica Lewinsky. Yet Clinton prevailed; he was conclusively acquitted in the Senate, with the House Managers or prosecutors failing to come close to the two-thirds vote required for conviction.

At times, Congress has sought to punish, reprimand, or otherwise weaken presidents or their surrogates through the censure mechanism. Some censure votes have been aimed at the president himself; some have been aimed at his top cabinet members. The Senate censured Andrew Jackson for firing his treasury secretary and for removing federal deposits from the national bank;

however, several years later, the Senate expunged its censure of Jackson after he successfully protested that action. President Grover Cleveland's attorney general, Augustus Garland, was censured by Congress for refusing to turn over documents relating to the president's appointment of a new U.S. attorney in Alabama. Most recently, President Barack Obama's attorney general, Eric Holder, was held in contempt by the House of Representatives, largely by a party-line vote, for failing to turn over documents in the Fast and Furious investigation. In the end, President Obama invoked executive privilege and threw a wet blanket over that effort, causing the contempt proceedings to fizzle out: Thus, the censure mechanism, which appears nowhere in the Constitution, has generally proven to be an ineffective tool.

The Presidential Tool Kit

Once presidents are elected and ensconced in office, their principal powers flow directly from the language of the Constitution. However, because these powers are spelled out in different places throughout the document, one cannot develop a clear picture of presidential authority unless one organizes the powers into logical groups. By studying the foregoing chapters to understand how American presidencies interface with the Constitution, one can identify clusters of power that form the core of the chief executive's authority. The resulting presidential tool kit consists, generally, of three components: basic functions that are essential to running the executive branch of government; functions that flow from the president's unusual role in the legislative process; and crucial functions relating to foreign affairs and commanding the military.

Basic Executive Functions

OVERSEEING THE EXECUTIVE BRANCH

The job of overseeing the executive branch of government is one of the primary functions of the chief executive under the Constitution. It flows primarily from Article II, Section 1, which states: "The executive Power shall be vested in a President of the United States" (the *Vesting Clause*). This provision, coupled with Article II, Section 3, Clause 4, which states that the president shall "take Care that the Laws be faithfully executed" (the *Take Care Clause*), creates an important set of instruments in the presidential tool kit, particularly on the domestic front. Taken together, these

sweeping commands empower the president to run an entire branch of government and to ensure that the laws enacted by Congress are implemented faithfully.

President George Washington was the first chief executive to develop these broadly stated powers. Initially, he sought to utilize the Supreme Court as a sort of advisory council to aid him in making important executive decisions. When Chief Justice John Jay rebuffed that effort, Washington turned to advisers within his own administration—which he dubbed his cabinet—thus solidifying the authority of that group for future presidents. President Franklin D. Roosevelt took dramatic steps to enhance the powers of the chief executive, establishing the Brownlow Committee to propose sweeping new managerial powers. This led to the Reorganization Act of 1949 and the creation of the Executive Office of the President, which allowed for the issuance of executive orders by the president and otherwise restructured and expanded the office of chief executive.

President Benjamin Harrison invoked the Take Care Clause of Article II to protect Supreme Court Justice Stephen Field, who had been the subject of a death threat. President Reagan invoked the same clause to fire air traffic controllers who had engaged in strikes in defiance of federal law. Thus, the president's role as overseer of the executive branch has brought with it vast authority, which has expanded dramatically as the nation itself has grown.

APPOINTMENT AND REMOVAL OF KEY OFFICIALS

Another important aspect of the president's executive powers relates to appointment and removal of principal and inferior officers (Article II, Section 2, Clause 2). Initially, the power of *appointment* served as a major vehicle to reward loyal supporters and to manage a sprawling federal bureaucracy. President Andrew Jackson famously pushed this power to new limits through overt political patronage. The heated debate over patronage came to a head with the assassination of President James Garfield by a disgruntled office seeker; this led to the enactment of massive civil service reforms—including the creation of a nonpolitical Civil Service Commission—during the presidency of Chester A. Arthur. (Ironically, Arthur himself had been the beneficiary of patronage in New York.)

Battles have frequently erupted, as well, over the presidential *removal* power. President Andrew Jackson fired his treasury secretary without first consulting Congress, and stood his ground. Of course, the passage of the

Tenure of Office Act in 1867 constitutes one of the most dramatic attempts by Congress to curb the removal power of presidents without the advice and consent of the Senate. It led to the impeachment of President Andrew Johnson the following year, before it was repealed in 1887 at the urging of President Grover Cleveland. Several decades later, President Woodrow Wilson removed a postmaster without the advice and consent of the Senate, and this executive action was later upheld by the Supreme Court. Yet when FDR tried to remove an appointed member of the Federal Trade Commission (FTC) without congressional approval, before the expiration of that appointee's term, the Court disallowed this action, finding that the function of the FTC commissioner was not executive in nature but quasi-judicial or quasi-legislative, or both. Thus, even after the death of the Tenure of Office Act, removal issues linger.

The *recess appointment* provision of Article II, Section 2, Clause 3, gives presidents a certain degree of latitude to side-step the advice and consent provision when the Senate is not in session. Yet that provision is not a blank check. The Supreme Court in 2014 clipped the wings of President Barack Obama when he sought to bypass that constitutional language to deal with an obstinate Senate that was dragging its feet on his appointments. Drawing on the *Pocket Veto Case* from the Hoover era, which discussed the definition of *adjournment*, the Court found that the recess in question was too short (and thus technically not a recess) to justify bypassing the normal requirement of obtaining advice and consent from the Senate.

Thus, the American presidency is filled with examples of presidents and Congress battling over the scope of the chief executive's power to appoint or remove federal officers, particularly when the action occurs without the express permission of Congress. Power struggles between the two branches, undoubtedly, will continue in future cycles of American history.

REPRIEVES AND PARDONS: A SWEEPING POWER

Another important executive function can be found in Article II, Section 2, Clause 1, relating to the power to grant reprieves and pardons. President George Washington first used this power to pardon rebels engaged in the Whiskey Rebellion, to calm the new nation after that insurgence. President Abraham Lincoln tapped into this power liberally to commute the sentences of Native Americans involved in the Sioux Uprising and deserters in the Union Army who agreed to return to duty. President Andrew Johnson

issued a sweeping pardon to former Confederate officers after the Civil War, to unify the nation after that prolonged period of bloodshed. President Warren Harding commuted the sentence of socialist leader Eugene Debs, to end the period of governmental zeal in punishing alleged subversives during the World War I era. President Calvin Coolidge pardoned a bootlegger during Prohibition, to signal his administration's disapproval of harsh punishment relating to alcohol sales after the adoption of the Eighteenth Amendment. President Gerald Ford ended the long national nightmare of Watergate by pardoning former President Richard Nixon of all crimes he might have committed in that scandal. And President Jimmy Carter, fulfilling a campaign promise, granted unconditional pardons to those who had evaded the draft during the Vietnam War.

As the chief executive, the American president has ultimate authority to determine how and when laws should be executed. Thus, the Constitution gives the president wide latitude to determine when those convicted of crimes should receive mercy or leniency, for the greater good of the nation.

SAFEGUARDING PRESIDENTIAL POWERS: EXECUTIVE PRIVILEGE

More than one president has invoked the notion of executive privilege to ward off perceived intrusions by other branches of government that threaten to hamper the exercise of his executive powers. The success rate has been mixed. President Richard Nixon unsuccessfully invoked an absolute notion of executive privilege to keep the Watergate special prosecutor and grand jury away from his secret White House tapes during the Watergate affair, claiming that releasing the material invaded the confidentiality that necessarily surrounds executive decision making and violated separation of powers. Nixon lost that battle in *U.S. v. Nixon*, which held that executive privilege is limited and must give way, when necessary for the fair administration of justice. Similarly, President Bill Clinton unsuccessfully sought to postpone (until after he left office) his deposition in the sexual harassment lawsuit filed by Paula Jones: In *Clinton v. Jones*, the Supreme Court concluded that no constitutional privilege or immunity—even temporary in nature—existed to halt a pending civil case against a president, unrelated to his or her official duties. Several years later, however, President George Bush and Vice President Dick Cheney successfully invoked executive privilege to prevent the disclosure of names of members of that administration's energy task force, convincing the Supreme Court that

such a disclosure might reveal sensitive materials and impinge on presidential confidentiality.

It is undeniable that the president's powers as head of the executive branch are wide-ranging. They constitute the central source of his or her authority in the constitutional system. For that reason, the concept of executive privilege protects the sphere of confidentiality surrounding the chief executive, to a certain extent. Yet this zone of privilege is not unbounded; the Constitution ensures that it is held in check by Congress and the courts.

POLICY-MAKING ROLE: THE POWER OF THE BULLY PULPIT

One of the most striking functions of the American presidency, as that office has evolved, is the chief executive's ability to articulate and implement far-reaching policies for the nation. This authority is nowhere expressly set forth in the Constitution. Yet it is strongly implied in the president's power as the unitary executive in the constitutional system.[3] It also flows from the president's role as principal spokesperson for the country in the realm of foreign affairs. Certain presidents throughout American history have been extremely effective in using this bully pulpit to advance their policy agendas.

Expansionism has occurred in the United States largely through presidents' assertion of power and spearheading of their own initiatives. President Thomas Jefferson led the drive for the Louisiana Purchase, knowing that nothing in the Constitution gave him the express power to do so: Jefferson referred to the Louisiana Purchase as a "treaty" to give himself cover, then pressed Congress to approve the purchase (and his actions) for the good of the nation. President James Monroe issued the Principles of 1823—otherwise known as the Monroe Doctrine—and ended up shaping America's foreign policy for the next two centuries. This was true even though the Monroe Doctrine was never codified in a treaty or statute and never approved by Congress. President James Polk articulated his vision of Manifest Destiny, declaring that the country needed to pursue an expansionist policy to open up more land for agriculture; by the end of Polk's presidency, the United States had annexed Texas and acquired huge tracts of additional territory. After Congress declared war on Spain, President William McKinley added the Philippines, Puerto Rico, Guam, and Hawaii, believing that these foreign territories were important for America's security and commerce; McKinley used the White House bully pulpit

to lead the nation down the path of supporting this imperialist vision. And President Theodore Roosevelt, who was convinced that a Latin American canal was essential to U.S. trade interests, pushed through the Panama Canal project by dint of his strong willpower, dramatically shaping America's role in that part of the globe for the next century.

In a different way, Abraham Lincoln brilliantly tapped into the hidden powers of the presidency. Most notably, in delivering the famous Gettysburg Address, he recast the justification for the Civil War as a battle for the basic democratic principles of equality and freedom, reshaping the entire debate over the war. Similarly, Theodore Roosevelt used his influence to advance the Progressive agenda, including an environmental conservationist initiative and a crusade against abuses by big business. President William Howard Taft used his office to press Congress for a constitutional amendment to make federal income taxes lawful; his efforts led to a resolution proposing the Sixteenth Amendment, which was ratified in 1913. President Woodrow Wilson, at first wary of women's suffrage, became an ardent spokesman in favor of women's right to vote after witnessing the key role played by females in assisting the war effort during World War I; Wilson's strong support led to the ratification of the Nineteenth Amendment in 1920. President Franklin D. Roosevelt leveraged his popularity and credibility with the American public to accomplish sweeping policy changes in the United States through his New Deal program, to pull the country out of the Great Depression.[4] And President Barack Obama, a latecomer when it came to endorsing same-sex marriage, ultimately refused to enforce the Defense of Marriage Act and used his second inaugural address to openly embrace the legal recognition of same-sex marriage, helping to change the national dialogue on that subject on a grand scale.

Over time, the role of American presidents as shapers of national and international policy has become a key function of that high office. Presidents have used this power to push through bold initiatives and to achieve significant advances, often with nothing but the presidential bully pulpit to accomplish changes that forever impact the nation.

Legislative Function: The Chief Executive's Unusual Role

Strongly tied to the chief executive's implicit power as a policy maker is the president's express role under the Constitution in shaping legislation. Although the function is often overlooked or misunderstood, the president

has a formal role in the legislative process. This is different from the president's role in the tug-of-war that routinely occurs between the executive and legislative branches, as each branch protects its own turf in carrying out the separation-of-powers principle. Several provisions of the Constitution expressly give the president a role in how laws are introduced, approved, and interpreted. This is a uniquely American feature of the president's constitutional power.

LAUNCHING LEGISLATIVE INITIATIVES

Article II, Section 3, begins by stating that "from time to time" the president shall give Congress information concerning the "State of the Union" and recommend to Congress "such Measures as he shall judge necessary and expedient." Spurred forward by these commands, presidents throughout history have proposed significant legislation and even drafted bills for Congress's consideration. President Benjamin Harrison worked with Congress to produce the Sherman Anti-Trust Act of 1890. The Kennedy and Johnson administrations drafted versions of civil rights legislation that ended up being instrumental in Congress's enacting of the Civil Rights Act of 1964 and the Voting Rights Act of 1965. President George W. Bush and his administration were deeply involved in drafting the USA Patriot Act in the aftermath of the terrorist attack of 9/11. And President Barack Obama and others in his administration took a lead role in conceiving of, and shepherding through Congress, the Affordable Care Act, using the president's loosely defined authority in the Constitution to advance this major, albeit controversial, legislative initiative.

Ever since the presidency of Dwight D. Eisenhower, the White House has maintained an Office of Legislative Affairs, which serves as a liaison with members of Congress and their staffs in pursuing joint enterprises. Thus, while the president's central role is to oversee the executive branch, he or she also plays a direct, constitutionally mandated role in the legislative process.

CONVENING SPECIAL SESSIONS

The Constitution even gives the president power to convene special sessions of Congress on "Extraordinary Occasions" (Article II, Section 3). At various moments in history, presidents have utilized this provision, typically in times of urgency or emergency. Examples abound: Thomas Jefferson called Congress into session to ratify the Louisiana Purchase in

1803, and President James Madison convened Congress in special session at the outset of the War of 1812. President Franklin Pierce convened a special session of Congress in 1856 to force the legislature to allocate funds for the army. In 1929, President Herbert Hoover called Congress into session to address the serious recession in the farm economy. During the election of 1948, President Harry Truman famously invoked this provision, calling the "Do Nothing Congress" back into session and challenging it to pass legislation implementing pieces of the Republican Party platform.[5] Thus, the Constitution gives the president a direct vehicle for spurring Congress to action when he or she believes such action is necessary.

VETO POWER: THE PRESIDENT'S CHECK

One of the most potent tools that the president has at his or her disposal, when it comes to the legislative process, is exercising the veto power. Article I, Section 7, Clause 2, of the Constitution—in setting forth the process by which legislation is enacted—specifically gives the chief executive power to return a bill unsigned, thus throwing the ball back to Congress. Congress can then try to override the presidential veto or abandon the bill and go back to the legislative drawing board.

The chief executive's breadth of authority in exercising veto power has grown, rather than diminished, over time. President George Washington purposely took a cautious approach in vetoing legislative acts; he did not wish to appear to be usurping Congress's power or to be repeating the sins of the British monarchy. During his eight years as president, Washington exercised his veto power only twice. Other early presidents took the position that the veto power was limited to situations in which they determined that a legislative bill was flatly unconstitutional, rather than objectionable for political reasons. Yet this cautious approach soon melted away. Presidents Andrew Jackson and John Tyler made robust use of the veto power to check Congress on major pieces of legislation with which they disagreed, including the reauthorization of the national bank. Soon, it became clear that there was virtually no limit on the number of vetoes or the justification for using such vetoes.

President Grover Cleveland used the veto power more than all of his predecessors combined—170 times in the first term and 414 times in the second term. President Richard Nixon sought to take the veto authority to new heights, impounding funds allocated for the Clean Water Act to thwart its implementation, after Congress overrode his veto of that act.

This action prompted the passage of the Impoundment Control Act of 1974 to curb future presidents from thwarting the will of Congress in this fashion. Federal courts largely held against Nixon's impoundment actions; one Supreme Court case struck down his withholding of funds for the Clean Water Act.[6]

Thus, the president's veto power has grown steadily over time. Indeed, this power is virtually absolute. The only check Congress has over it, in modern times, is to use the constitutional mechanism afforded to the legislature by the framers: Congress must muster a two-thirds vote in each chamber to override the president's veto.

PRESENTMENT CLAUSE

A related aspect of the legislative process in which the president and the Congress have occasionally butted heads, particularly in modern times, relates to the Presentment Clause contained in Article I, Section 7, Clause 2. This provision states that before a bill can become law, it must be "presented to the President" to give the chief executive an opportunity to exercise a veto. President Ronald Reagan won a Presentment Clause battle in *INS v. Chadha*, when he prevented Congress from exercising a one-house veto of decisions of the Immigration and Naturalization Service relating to the deportation of noncitizens, without first sending the matter back to the president: The Supreme Court concluded that this violated the Presentment Clause. In *Clinton v. City of New York*, during the presidency of Bill Clinton, the Supreme Court nullified the Line Item Veto Act, which would have given the president the power to strike portions of legislation (including appropriations) he disliked while leaving the rest of the legislation intact. The Supreme Court concluded that the line-item veto mechanism violated the Constitution's Presentment Clause: It would improperly permit a chief executive to invalidate portions of duly enacted laws without going through the entire process anew.[7]

SIGNING STATEMENTS: AN EXECUTIVE IMPRINT?

Presidents—particularly in the past few decades—have also tried to leave an imprint on the legislative process by appending *signing statements* to bills they approve, explaining their reasons for signing legislation in an effort to graft these statements onto the legislative history of congressional enactments. President Ronald Reagan used signing statements extensively, as did his Republican successors, presidents George H. W. Bush and George

W. Bush. Even Democratic President Barack Obama, despite questioning the use of presidential signing statements as a senator, has continued the trend, although not as robustly. It remains unclear how much weight or precedential value presidential signing statements have after a bill becomes law. Yet they constitute another executive thumbprint on the complex, interactive legislative process.

In sum, even though the president and Congress occupy separate spheres in the American system of government, the Constitution gives the president a number of formal and informal roles in the making and enacting of laws. These roles ensure that the president cannot be boxed entirely out of Congress's law-making enterprise; after all, it is the president, ultimately, who has the constitutional duty of enforcing the end product of Congress's work.

Foreign Affairs and Military Command Powers

The president's authority in foreign affairs, acting as commander in chief, and in quelling domestic violence, has evolved in such a way that American presidents are typically at the apex of their power in this realm.

LEAD ROLE IN FOREIGN AFFAIRS

Then-Congressman (later Chief Justice) John Marshall, who argued that the president was the "sole organ" in implementing foreign policy, successfully defended President John Adams when Adams turned over to Great Britain one of its citizens charged with murder, pursuant to the Jay Treaty. In doing so, Marshall established early on that matters of foreign affairs and issues abroad—while not within the exclusive domain of the chief executive—fell within the joint realm of the president and Congress.

President James Monroe took this power to a new height when he issued the Monroe Doctrine, which helped define America's role in the world and solidified the president's function as chief spokesperson regarding foreign policy. President William McKinley gathered up foreign possessions after the Spanish-American War, underscoring his preeminence as the nation's leader on the international front and creating a new brand of imperialistic presidency. Presidents Woodrow Wilson and Franklin D. Roosevelt wielded enormous power abroad in leading the country's efforts during the two World Wars. President John F. Kennedy took dramatic steps to exert his authority during the Cuban Missile Crisis, exercising his

foreign policy authority to its utmost. And Jimmy Carter, who had been politically crippled by the Iran hostage crisis, was still able to utilize his foreign policy influence to establish a claims tribunal to resolve a political standoff with Iran.

COMMANDER IN CHIEF: SHARED WARTIME POWERS

The Constitution states that Congress is empowered to "declare War" (Article I, Section 8, Clause 11). Yet it also states that the president is the "Commander in Chief" of the army and navy (Article II, Section 2, Clause 1). This results in the two branches of government sharing, or vying for, authority in this area. Numerous presidents have launched military action without first consulting Congress. James Polk began the Mexican-American War without involving Congress until after blood had been shed. William McKinley sent troops into China to quell the Boxer Rebellion without first seeking Congress's permission. Woodrow Wilson armed vessels and moved the country into World War I with Germany, without congressional authorization. President Harry Truman committed troops in Korea unilaterally. President Nixon secretly bombed Cambodia and committed troops to Southeast Asia, provoking Congress to pass the War Powers Resolution to reel him in. Thereafter, presidents have found ways to circumvent that statute, presumably under the theory that Congress never possessed constitutional authority to restrict the president's power so broadly in the first place. Yet there is often a delicate dance between the two branches of government when it comes to the War Powers Resolution: For instance, in early 1991, Congress authorized President George H. W. Bush to use force against Iraq if he reported that diplomatic efforts had failed; Bush thereafter gave such a report to Congress and launched Operation Desert Storm.

New technology has facilitated the expansion of presidents' commander-in-chief powers. President William McKinley conducted the Spanish-American War remotely from the White House, thanks to the invention of telephones and telegraphs. President George H. W. Bush helped to redefine warfare during Operation Desert Storm, using cruise missiles, stealth bombers, and modern computerized technology that decimated the opposition before it could respond. After 9/11, President George W. Bush invented a completely new method of doing battle in the war on terrorism, using national security tools, including the monitoring of emails and phone calls, as a means of waging war against a new brand of

enemy. President Barack Obama, more recently, used drones for the targeted killing of suspected terrorists abroad, employing dramatic advances in technology to redefine the way America would fight enemies in other parts of the globe.

The commander-in-chief powers have been invoked by presidents for a wide variety of purposes, beyond committing military troops in foreign wars. President Zachary Taylor used his commander-in-chief powers to halt the effort by Narciso López and Southern "filibusters" (private mercenaries) to seize Cuba to make it a haven for slavery. President Abraham Lincoln invoked these same powers to issue the Emancipation Proclamation, to suspend the writ of habeas corpus, and to convene military tribunals during the Civil War. President Franklin D. Roosevelt used his commander-in-chief authority to evacuate Japanese American citizens from the West Coast and to move them to internment camps after the bombing of Pearl Harbor. (In 1988, the United States publicly apologized for this action and compensated individuals of Japanese descent and their families who had suffered because of these actions.) President Harry S. Truman summoned his powers as commander in chief to fire General MacArthur for defying him, after the general sought to expand the Korean War into China. President George W. Bush relied on these powers to justify employing "enhanced interrogation techniques" (some called it torture), to set up a detention camp in Guantanamo Bay to house prisoners beyond America's shores, and to create secret an NSA data collection program as part of a war on terror. (Not all of these efforts, in the end, met with success in the courts.)

QUELLING DOMESTIC VIOLENCE

A type of authority often associated with commander-in-chief powers—but quite distinct from it—relates to the president's ability to quell domestic violence. The Preamble of the Constitution states that the government should "insure domestic Tranquility, [and] provide for the common defence." Article IV, Section 4, provides that the United States must guarantee to every state "a Republican Form of Government" and goes on to state that the legislative or executive branch, or both branches, must protect states against "invasion" and "domestic Violence." Relying on this language, presidents have sometimes used military force (including calling in state militias) to deal with domestic disturbances.

President Andrew Jackson issued his Proclamation of Nullification that led to the Force Bill, which authorized him to use military force against

South Carolina after that state defied a federal tariff. President John Tyler declared that he was prepared to call in militias from two states to quell the Dorr Rebellion in Rhode Island and was upheld by the Supreme Court in asserting that authority. President James Buchanan ordered twenty-five hundred troops—nearly one-third of the U.S. Army at that time—to oust Brigham Young as governor in Utah and to quell a purported Mormon uprising.

In more recent times, in 1957, President Dwight Eisenhower called in the National Guard to Central High School in Little Rock, Arkansas, to enforce the integration command of *Brown v. Board of Education*. President John F. Kennedy sent in troops to enroll James Meredith at Ole Miss and to confront Governor George Wallace in Alabama when Wallace blocked African American students from enrolling at the University of Alabama.

Thus, the president can wield enormous military power not only as commander in chief (which is generally linked to foreign affairs), but also on the domestic front, a power that flows from distinct sources in the Constitution.

Connecting Threads

As the prior section highlights, the Constitution provides presidents with a tool kit in order to handle their constitutional duties as chief executive. Yet over time, presidents have had to confront an expansive array of problems that are not spelled out in the Constitution. They have done so by plunging themselves into events and being swept along by the currents of history, using their own ingenuity and judgment to stay afloat. The chapters of this book make visible a variety of broad "themes" that connect presidencies over time, quite distinct from the formal powers that define the office in the text of the Constitution. Some of these recurrent themes are particularly worth highlighting. Not only do they allow readers to map out important points of intersection among forty-four distinct chief executives, but they also provide a context for understanding why individual presidents behave as they do, and provide clues as to where the currents of history will likely take future American presidents, as they confront issues that are simultaneously new and part of the inevitable cycle of recurring historical events.

Race: A Haunting Theme

If one were required to identify a single subject that has consistently dominated the story of American presidents and the Constitution, from the beginning of the nation until modern times, it would be race. Indeed, this dark, self-destructive theme jumps off the pages of the preceding chapters more so than any other theme does. The framers of the Constitution had largely ducked the issue of slavery, although it was unmistakably present in the document.

The infamous Three-Fifths Clause in Article I, Section 2, Clause 3, of the Constitution gave Southern slave-owning states a shrewd advantage for nearly a century. By stating that slaves were considered three-fifths persons for purposes of determining the number of representatives in Congress, Southern states amassed more representatives and won more electors in the Electoral College, while keeping blacks enslaved in the process. Another part of the Constitution provided that the slave trade could not be ended by Congress for twenty years, that is, until 1808 (Article I, Section 9). Moreover, slaves held in one state and escaping into another had to be "delivered up" to their owners, ensuring that slaves would remain private property of their white owners for the indefinite future (Article IV, Section 2, Clause 3). Presidents George Washington, Thomas Jefferson, and other early chief executives were themselves slave owners. Thus, the issue of race and slavery was impressed into the nation's constitutional fabric from its inception. Moreover, the Three-Fifths Clause kept Southern states in control for nearly a hundred years. It was not until the Fourteenth Amendment was ratified in 1868 that this odious provision was nullified.

In the decades before the Civil War, the slavery issue dominated most others. President James Monroe backed the Missouri Compromise of 1820, by which Missouri was free to determine if it would permit slaves, while slavery was prohibited in the rest of the Louisiana Territory. President Martin Van Buren sought to influence the courts in the *Amistad* case, unsuccessfully arguing that Africans who had staged a revolt on that ship constituted the property of Spain and should be returned to Cuba as slaves. (Former President John Quincy Adams, who had become an ardent abolitionist while serving in Congress, represented the Africans and won their freedom.) President Zachary Taylor had a plan to end the growing friction between North and South; tragically, Taylor died in office before he

could ever implement his plan. Instead, President Millard Fillmore helped to push through the Compromise of 1850, which included the notorious Fugitive Slave Act of 1850 and unleashed new friction between North and South, culminating in the Kansas-Nebraska Act (during the presidency of Franklin Pierce) and "Bleeding Kansas."

The assassination of President Abraham Lincoln was a culminating event in the battle over the race issue at the conclusion of the Civil War, placing a pall over the country and making clear that the conflict was not over. Lincoln's successor, President Andrew Johnson, tried to veto the Civil Rights Act of 1866 (Congress overrode his veto); Johnson then urged states to reject the Fourteenth Amendment and sought to restore Confederate leaders to positions of authority in the South. President Ulysses S. Grant tried to advance the newly adopted Fourteenth and Fifteenth Amendments—yet he was largely frustrated by the Supreme Court's decisions of the Dreadful Decade, during which time Reconstruction efforts collapsed and the country turned its attention to more worldly economic interests.

Even after Reconstruction, the race issue continued to demand executive attention. President Grover Cleveland served as chief executive when *Plessy v. Ferguson* established in 1896 the harsh "separate but equal" doctrine—a decision he favored. President Dwight D. Eisenhower held office when the Supreme Court handed down its historic decision in *Brown v. Board of Education* (1954), which undid *Plessy*, yet Ike encouraged the Court to move slowly in *Brown II*, hoping to give Southern states latitude to end their segregationist ways in a "gradualist" fashion. In an ironic twist, however, Eisenhower was forced to send troops into Little Rock to maintain order at Central High School. Similarly, President John F. Kennedy and his brother, Attorney General Robert Kennedy, both of whom had proceeded cautiously on volatile race issues, were compelled to send Justice Department officials and troops into Mississippi and Alabama to enforce the Supreme Court's *Brown* decision in those Deep South states. The Kennedy administration went on to win several key civil rights cases in the Supreme Court on narrow grounds, as it struggled to get civil rights legislation adopted by Congress. That only occurred, however, after JFK's tragic assassination, which enabled President Lyndon B. Johnson to push through the Civil Rights Act of 1964 and the Voting Rights Act of 1965, largely as a tribute to the slain president.

President Jimmy Carter ushered in a new, proactive era, advocating for affirmative action to give boosts to minorities in higher education and

employment and paving the way for the Supreme Court's landmark decision in the *Bakke* case. Three decades later, however, the Supreme Court handed down rulings limiting the scope of affirmative action in higher education. Ironically, this took place while President Barack Obama—the first African American president in the nation's history—took up residence in the White House.

And in a chilling reminder of the Missouri Compromise of 1820 and the Kansas-Nebraska Act that spawned Bleeding Kansas and the Civil War, President Barack Obama was forced to dispatch his own attorney general to Ferguson, Missouri, in the summer of 2014. Eric Holder's task was to quell race riots that erupted after an unarmed black teenager was shot to death by a white police officer, a sobering reminder that violence over race issues was not a relic of the Civil War period.

The issues of race, slavery, desegregation, affirmative action, and equal protection for all citizens have haunted the United States since its inception, revealing a nation with a dual personality.[8] More so than any other thread that ties together the evolving story of American presidents and the Constitution, the subject of race has overshadowed all others.

The Commerce Clause

Another conspicuous thread relates to the Commerce Clause contained in Article I, Section 8, Clause 3, of the Constitution. Although this provision relates to a *congressional* power, it has played an important role in the initiatives of many American presidents.

The framers deliberately gave Congress broad powers under this provision, largely because the legislature's inability to regulate interstate commerce under the Articles of Confederation had rendered the legislative branch nearly impotent during that era. The Supreme Court's decision in *McCulloch v. Maryland* (1819), during the presidency of James Monroe, shored up Congress's ability to create a national bank by declaring that the states could not tax it out of existence. *McCulloch* articulated an extremely broad, almost unbounded concept of congressional authority under the Commerce Clause. In the late nineteenth century, however the Court adopted a crabbed view of the Commerce Clause, standing in the way of efforts by Congress and several presidents to break up powerful corporate trusts and monopolies. In *U.S. v. E.C. Knight* (1895), during the presidency of William McKinley, the Court prohibited Congress from using the

Sherman Act to regulate a trust in the sugar refining industry, concluding that the production of sugar involved merely manufacture, not commerce, and holding that it was beyond Congress's reach.

Yet the Court eventually went full circle, embracing an extraordinarily broad interpretation of Congress's powers under the Commerce Clause during Franklin D. Roosevelt's presidency. When FDR threatened to pack the Court with additional justices to push through his New Deal legislation, the Court abruptly approved several sweeping New Deal initiatives pursuant to Congress's power under the Commerce Clause.[9] In *Wickard v. Filburn* (1942), the Court went so far as to uphold the Agricultural Adjustment Act, which imposed quotas on the amount of wheat farmers could produce for private consumption, even though the wheat was not meant for shipment in interstate commerce. The Court concluded that Congress had sweeping power under the Commerce Clause and could even regulate a local farmer's wheat production "if it exerts a substantial effect on interstate commerce."

In creating their civil rights strategies, Presidents John F. Kennedy and Lyndon B. Johnson took advantage of this generous interpretation of Congress's power under the Commerce Clause. Both presidents avoided the rigid Reconstruction-era precedent under the Fourteenth Amendment's Equal Protection Clause, instead premising major civil rights bills on Congress's powers under the Commerce Clause. This approach culminated in LBJ's pushing through the Civil Rights Act of 1964—the most significant piece of civil rights legislation in the nation's history—which the Supreme Court upheld as a valid exercise of Congress's Commerce Clause powers.[10]

More recently, President Barack Obama succeeded in navigating through Congress the Affordable Care Act, which relied heavily on the legislature's power under the Commerce Clause. Although the Supreme Court's ruling on that controversial statute restricted Congress's power under the Commerce Clause, in one respect, it nonetheless underscored the potency of that constitutional provision in modern times. In *National Federation of Independent Business v. Sebelius* (2012), the Court drew a line in the sand, concluding that Congress lacked the authority under the Commerce Clause to enact the controversial individual-mandate provision of the act—because it amounted to *compelling* individuals to purchase health insurance coverage and to engage in commerce. Yet the Court went on to uphold the provision under Congress's broad taxing power. Moreover, the

overall structure of the Affordable Care Act, by which Congress regulated the sprawling health-care industry, was clearly premised on a recognition that, in today's world, health care has become an interstate business and Congress can regulate it utilizing the legislature's enormous powers under the Commerce Clause. Indeed, that assumption was explicitly recognized by the Court when it upheld the statute.[11] In the end, the enactment of the Affordable Care Act turned out to be another de facto victory for the Commerce Clause.

Thus, the Commerce Clause has been an engine by which Congress and American presidents, working in tandem, have forged important legislative initiatives throughout many periods of American life.

National Security versus Free Speech and Privacy

Numerous presidents have elevated national security to an urgent priority, often at the expense of citizens' free speech and privacy rights. This tension has animated the office of the presidency from the earliest days; it has reached a crescendo in modern times. President John Adams supported the Alien and Sedition Acts to punish dissenters and political dissidents during the Quasi-War with France. President James Monroe, perhaps the first "national security" president, established a broad power to speak for the nation in the realm of foreign affairs: In articulating the Monroe Doctrine, he laid the groundwork for future presidents to broaden their power in this domain. With the arrival of World War I, President Woodrow Wilson utilized the Espionage Act of 1917 and the Alien Act of 1918 to censor and prosecute opponents of the war, including conscientious objectors. Wilson's actions led to the Supreme Court's decision in *Schenck v. U.S.* (1919), establishing the restrictive "clear and present danger" test that allowed the government to wield a heavy hand in prosecuting alleged subversive speech, notwithstanding the guarantee of free speech embodied in the First Amendment.

President Warren Harding was deeply troubled by the government's prosecution of citizens who had opposed the U.S. war effort or expressed views contrary to the government. In a powerful, symbolic move, Harding commuted the ten-year prison sentence of Socialist Party of America leader Eugene V. Debs, who had been convicted under the Espionage Act for delivering an antiwar speech in Canton, Ohio. Yet the "clear and present danger" test persisted in various forms until decades later, permitting

the governmental restriction of citizen speech deemed subversive. It was not until the aftermath of the infamous period of McCarthyism in the late 1950s, during the Eisenhower presidency, that the Supreme Court, in *Yates v. U.S.*, finally signaled its abandonment of that restrictive test, which had served to chill free speech.

During the post–World War II years of Harry S. Truman's presidency, the United States took major steps toward becoming a "national security state," with the passage of the National Security Act of 1947 and the creation of the National Security Council and the Central Intelligence Agency. (The formation of the United Nations—forged in 1942 by President Franklin D. Roosevelt and British Prime Minister Winston Churchill, along with representatives of twenty-six countries—was another step in this process.) Once again, however, the strong emphasis on national security was used to bolster efforts by Congress and the executive branch to restrict free speech and free press in the name of protecting the country.

A half century later, after the terrorist attacks of September 11, 2001, President George W. Bush swiftly secured the passage of the USA Patriot Act and established the Department of Homeland Security in 2002, creating a new unparalleled national security state. Bush also launched a secret NSA program, authorizing widespread, warrantless governmental wiretapping and collection of emails and phone calls (including those of American citizens) in the quest to root out terrorists. In carrying out this unprecedented data-gathering initiative, the Bush administration bypassed the judicial and legislative branches, concealing its actions in the name of national security. These efforts were so far-reaching that, once they became public, many Americans came to fear that their Fourth Amendment privacy rights were being threatened on an ongoing basis by their own government. In response, Congress amended the Foreign Intelligence Surveillance Act (FISA) to strike a more careful balance between the president, Congress, and the courts, particularly where the constitutional rights of citizens were affected.

President Barack Obama continued his own secret programs to pursue the war on terror, authorizing the mining, collection, and retention of details from the Verizon phone records of millions of Americans in the process. President Obama also confronted something completely new: the disgorgement of massive amounts of classified military information through WikiLeaks dumps, as American

citizens such as Private First Class Bradley (later Chelsea) Manning and Edward Snowden made use of new technology to release unprecedented amounts of classified information into the public domain. The Obama administration vowed to prosecute these actions to the fullest extent under the Espionage Act, while Snowden (who fled to Moscow) declared his First Amendment right to make this information available around the globe.

The American presidency has repeatedly collided with First and Fourth Amendment rights as chief executives and Congress have sought to protect national security. In most cases, the interests of national security have won out—particularly during times of war and other crises. These recurring examples stand as a sober warning that the free speech and privacy rights of American citizens are often circumscribed by the exigencies confronting the country at specific moments in its history; moreover, times of fear and danger often produce an environment in which presidents and Congress can wield greater power than ever.

Gender: The Forgotten Struggle

While issues relating to race have regularly consumed the attention of a large percentage of American presidents, a relatively small amount of attention has been paid to the issue of gender equality. The subject of voting, for instance, provides a vivid illustration. The U.S. Constitution, as originally drafted, did not even address the question of voting rights, leaving the matter to the states. Most states did not allow women to vote; indeed, New Jersey and several other states initially gave that right to females and then revoked it. During the presidency of Ulysses S. Grant, the Supreme Court concluded that the Privileges or Immunities Clause of the newly ratified Fourteenth Amendment did not require a state to admit women to practice law (*Bradwell v. Illinois*, 1872). The Court also held that this clause did not guaranty women the right to vote in state elections.

It was not until President Woodrow Wilson witnessed the great contributions of females during World War I that he eventually became a supporter of women's suffrage and helped to propel the ratification of the Nineteenth Amendment in 1920. The right to vote was designed to open up a whole panoply of other rights to women in the United States; however, that did not happen so swiftly.

Presidents as early as Harry Truman and Dwight D. Eisenhower favored passage of an Equal Rights Amendment (ERA) to the Constitution, expressly forbidding discrimination based on gender in a broader context. By the late 1970s, the movement to ratify the ERA had picked up considerable steam. President Jimmy Carter signed a bill extending the ratification period by three years, strongly endorsing the ERA's adoption. Yet the effort fizzled out—partly because *Frontiero v. Richardson* (1973) and other landmark cases created a higher standard of scrutiny for classifications based on gender under the Equal Protection Clause. Moreover, the *Roe v. Wade* decision (1973) injected the contentious abortion issue into the debate over the proposed amendment. By 1989, President George H. W. Bush had declared that the ERA was "unnecessary." It never made a comeback.

Similarly, it took nearly two hundred years before women were able to assume major roles in public service. It was not until the presidency of Ronald Reagan, in 1981, that the first female justice—Sandra Day O'Connor—was appointed to the U.S. Supreme Court. In 1993, the first female attorney general of the United States—Janet Reno—was sworn in during the presidency of Bill Clinton.

Occasionally, First Ladies have assumed the status of quasi-public figures by virtue of being married to chief executives. Dolley Madison—wife of President James Madison—was the first First Lady to take on a significant public persona, entertaining guests and helping to found a home for orphaned girls in Washington, D.C., thus beginning the long-running tradition of First Ladies' sponsoring projects of importance. Eleanor Roosevelt, the wife of President Franklin D. Roosevelt, was a powerful figure during her husband's presidency and, after his death, became U.S. representative to the United Nations, an organization that her husband had helped establish. Jackie Kennedy captivated the nation as a proponent of the arts and in spearheading an historic preservation effort of the White House. In 2001, former First Lady Hillary Rodham Clinton was elected to the U.S. Senate from New York and thereafter was appointed secretary of state (2009) under President Barack Obama, establishing herself as the first former First Lady to become an internationally renowned public official in her own right.

In sum, the issue of gender equality—and the role of women in the American system of government—has been surprisingly dormant throughout most of the nation's history. Only in recent years have presidents begun

paying regular attention to this issue, in terms of appointments and other matters. This gradual but steady shift likely serves as a bellwether for more positive change during future presidencies.

Special Prosecutors: Policing Modern Presidents

Particularly in modern times, chief executives must be aware that forces outside Congress or the judicial branch are watching to see if they have mishandled the powers in their presidential tool kit. Beginning with Watergate, the appointment of special prosecutors and independent counsels to investigate alleged criminal conduct on the part of presidents—and their closest advisers—has added a new layer of risk to the job of serving as chief executive in the United States.

The first special prosecutors were appointed to investigate the Teapot Dome scandal during the presidency of Warren Harding; the stress from that criminal investigation likely contributed to Harding's death in office. Atlee Pomerene and Owen Roberts (later a justice on the Supreme Court) investigated that scandal and unearthed a scheme of bribery and corruption at high levels of the executive branch, although President Harding was never directly implicated in wrongdoing. During the Watergate scandal, Archibald Cox became the archetype for a modern, principled special prosecutor, standing up to President Richard Nixon in subpoenaing key White House tapes that ultimately proved Nixon's culpability in the Watergate cover-up. (When Nixon fired Cox in the infamous Saturday Night Massacre, a firestorm of public protest led to the appointment of a new special prosecutor, Leon Jaworski, and the ultimate unraveling of the Nixon presidency.)

Every president since Richard Nixon has been haunted, in some fashion, by the ghosts of Watergate. President Gerald Ford was ushered out of office in part for pardoning Nixon and for frustrating the work of the Special Prosecutor's Office as it investigated Nixon's crimes. Jimmy Carter signed into law an Independent Counsel Law as part of the Ethics in Government Act (1978); this piece of legislation created a separation-of-powers nightmare for later presidents. Carter himself was the subject of a special-prosecutor investigation relating to alleged financial irregularities on his family's peanut farm.[12] Presidents Ronald Reagan and George H. W. Bush were swept up in the Iran-Contra investigation that left a blot on their respective presidencies. President Bill Clinton was the target of

a multifaceted independent-counsel investigation that led to impeachment proceedings and nearly toppled his presidency. With the nation exhausted from that onslaught of scandals and investigations, Congress allowed the independent-counsel statute to expire in 1999. Nonetheless, President George W. Bush was forced to allow the appointment of a special prosecutor, overseen by the Department of Justice, to investigate the alleged improprieties of his vice president's close adviser, I. Lewis "Scooter" Libby.[13] And President Barack Obama, although he became the first president in modern times to avoid a full-blown independent-counsel investigation during his presidency, endured regular calls by political foes for the appointment of special prosecutors to investigate his actions.

Thus, the Watergate affair during the Nixon presidency created a new, unprecedented role for special prosecutors in policing presidents and their closest advisers in the executive branch. While the Independent Counsel Law has faded out of existence, the culture of special prosecutors has attached itself to the office of president in modern times, creating an ever-present threat of criminal exposure and, in extreme cases, the potential for removal from office if a president makes a fatal misstep.

Shaping the Supreme Court

Presidents have interacted with, and tried mightily to shape, the Supreme Court since the beginning of the nation. In selecting the six original Supreme Court justices, President Washington sought geographic diversity and avoided overt politics in making his appointments, largely because organized political parties did not yet exist. Yet that tradition did not last long; subsequent presidents increasingly made their picks based upon political considerations in filling vacancies on the Court. President John Adams, for example, selected as his final judicial appointment John Marshall—an ardent Federalist like himself—to serve as chief justice. Marshall went on to shape the nation's jurisprudence in profound ways, accomplishing Adams's political goal.[14]

The relationship between presidents and the Supreme Court has sometimes been volatile. President Andrew Jackson openly defied the Court after its controversial decision in *Worcester v. Georgia* (1832), in which the Court held that the federal government, not the states, had exclusive authority over Native American affairs. In response, Jackson purportedly declared: "[Chief Justice] John Marshall has made his decision; now let

him enforce it!" When the Supreme Court ruled that President Abraham Lincoln could not suspend the writ of habeas corpus during the Civil War, in *Ex Parte Merryman*, he simply ignored that decision. President Theodore Roosevelt was so irate at the Court and at his own appointee, Justice Oliver Wendell Holmes, after the Court's decision in *Lochner v. New York*, which meddled in his Progressive initiatives, that he waged an unsuccessful campaign to permit the recall of judges and justices. President Franklin D. Roosevelt went a step further, unveiling a bold proposal to pack the Court with additional justices to rein in recalcitrant jurists, until the Court capitulated and upheld key pieces of FDR's New Deal legislation.[15]

Dating back to the presidency of George Washington, presidents have learned a lesson when they have tried to nominate a justice whom Congress found offensive: Washington selected John Rutledge (via a recess appointment) to serve as chief justice in 1795, when John Jay stepped down to become governor of New York. After Rutledge gave a speech condemning the Jay Treaty with England, the Senate swiftly rejected this nominee and forced Washington to pick a new chief justice. Similarly, Congress thwarted President John Tyler in his final nomination to the High Court, riled by Tyler's then-unprecedented use of the veto power. The Senate dragged its feet and adjourned without taking action on the last nominee, leaving Tyler's successor to fill the seat as a final slap in the face of the outgoing president.

In modern times, increasingly, politics has entered into the judicial appointment process. Some presidents have seen great successes, while others have seen colossal failures flowing from their efforts to shape the Court. With the appointment of Chief Justice Warren Burger and later Justice William H. Rehnquist, President Richard Nixon put a conservative stamp on the Court that lasted for decades. President Ronald Reagan triggered one of the bloodiest battles in judicial appointment history when he nominated Judge Robert Bork (Nixon's controversial solicitor general and attorney general) for the Court. After a vicious partisan battle, the Senate shot down the nomination and set a new, aggressive tone for waging political warfare over a president's judicial nominees. Yet Reagan also hit a home run when he appointed the first female justice—Sandra Day O'Connor—who had a profound impact on the Court for decades. Indeed, Reagan reshaped the entire federal judiciary in a conservative mold with his systematic approach to selecting jurists who shared his political philosophy.

President George H. W. Bush unleashed an unexpected uproar when he nominated Judge Clarence Thomas for the High Court to replace the first African American justice, Thurgood Marshall; allegations of sexual harassment surfaced during Thomas's confirmation hearings, because of testimony from a former EEOC lawyer, Anita Hill. Yet Thomas survived the confirmation hearing in a dramatic standoff with Senate Democratic accusers and ended up further solidifying the conservative majority on the Court.

President Barack Obama appointed the first Hispanic to the Court—Justice Sonia Sotomayor. As of 2016, however, President Obama never had the opportunity to shift the Court's five-to-four conservative majority by replacing any of the justices in the majority, a goal that eluded him during his two-term presidency.

After the White House: Post-Presidential Roles

Many presidents have not finished shaping the country after their time in the White House; some have continued to exert substantial influence during their post-presidential years. Indeed, some presidents' activities after leaving the White House have significantly shaped their legacies as public figures, even more so than their time as chief executives.

President John Quincy Adams, after losing his bid for a second term in the White House, was elected to the U.S. House of Representatives, where he served for seventeen years. It was here that Adams became a leading opponent of slavery, battling to end slavery in the District of Columbia, representing the escaped Africans in the *Amistad* case, and even fighting off efforts by fellow members of Congress to censure him for his antislavery positions. President John Tyler, ever devoted to the Southern cause in the years leading up to the Civil War, left office and was later elected to the Confederate House of Representatives. The only president with that dubious distinction, Tyler died before he was able to take his seat as a representative of the Confederacy, yet that mark has remained stamped on his record forever. President Andrew Johnson, Abraham Lincoln's successor who sought to thwart the congressional Republicans' efforts at Reconstruction, left office in ignominy after he narrowly escaped impeachment. Johnson then unsuccessfully ran for both the U.S. House of Representatives and the U.S. Senate from Tennessee. The state legislature finally

selected him to serve in the Senate on the fifty-fourth ballot in January 1875, when he reportedly declared: "Thank God for the vindication." Johnson died shortly after this victory, however, having served in the U.S. Senate for only a few months.

President William Howard Taft became the first chief executive to be appointed chief justice of the United States, serving with distinction in that role for nearly a decade. Taft's record as chief justice arguably outshone his record as chief executive and elevated his place in American history. President Jimmy Carter, widely viewed as one of the most ineffective presidents of modern times, went on to become a renowned advocate for human rights and an international mediator, winning the Nobel Peace Prize and becoming one of the most effective former presidents in the nation's history. President Bill Clinton, having fended off multiple criminal investigations and prevailed in his impeachment trial while in office, went on to become a global philanthropist, an international ambassador of goodwill, and a wildly popular elder statesman. Clinton was largely credited with winning a second term for President Barack Obama by delivering a rousing speech at the Democratic Convention. Of equal significance, Clinton's spouse—Hillary Rodham Clinton—went on to become a U.S. senator from New York, secretary of state, and two-time presidential candidate (2008 and 2016), becoming the first former First Lady in American history to achieve such distinction as a public figure in her own right. This is unmistakable evidence that presidents' spouses will increasingly—in future eras—help to shape the legacy of the presidents themselves. They may even leave independent marks on history that equal (or outshine) those of their spouses.

A Living History

The American presidency—as it interfaces with the Constitution—has not finished evolving, not by a long shot. As the forty-four chapters of this book illustrate, the energy that the framers of the Constitution pumped into the novel office of the chief executive continues to bring life to the American presidency in unexpected ways, as new eras appear and recede into history. Each time a new president takes office, he or she inherits a rich body of experience and precedent; he or she must draw upon that valuable storehouse in riding out unexpected gusts, gales, and tsunamis,

keeping the ship of state steady and creating a fresh set of markers for future occupants of the office. At the same time, each president must wrestle with unplanned events, in order to shape his or her own legacy. As the framers' unfinished sketch of the American presidency continues to emerge through the energetic performance of the individuals thrust into this high office at specific moments in history, the story will continue to gain new layers of texture and sharp detail. This book now awaits unwritten chapters, as the story of American presidents and the Constitution continues to evolve and expand in unforeseen directions, taking paths that would have surprised and heartened the nation's founders.

NOTES

1. Unless otherwise indicated, all material referenced in this chapter derives from the earlier chapter associated with the relevant president.
2. If the Supreme Court had left the disputed Florida electoral votes to Congress as set forth in the Twelfth Amendment, the result would have most likely been the same. Because the House of Representatives was controlled by a Republican majority, that body almost certainly would have selected Bush as president. Yet, if Congress had been free to follow the mechanism set forth in the Twelfth Amendment, partisan uproar would have probably been far less intense.
3. For an excellent discussion of the unitary executive model, see Louis Fisher, "The Unitary Executive and Inherent Executive Power," *University of Pennsylvania Journal of Constitutional Law* 12 (2010): 569.
4. President George H. W. Bush pushed hard for an amendment to the Constitution banning flag burning after the Supreme Court held that this was a form of political speech protected by the First Amendment. Although Bush failed, if he had won a second term in office, he might have succeeded, particularly in light of the outpouring of patriotic sentiment that followed the Gulf War.
5. Train v. City of New York, 420 U.S. 35 (1975).
6. Nixon's holding on to funds resulted in the passage of the Impoundment Control Act of 1974, to curb future presidents from thwarting the will of Congress by impounding funds in this fashion.
7. Legislative and committee vetoes continued in an "underground" fashion even after this decision, because these vetoes benefited both the legislative and the executive branches in certain instances by providing a swift way to reverse the decisions of executive agencies without going through the full legislative process. Louis Fisher, "The Legislative Veto: Invalidated, It Survives," *Law and Contemporary Problems* 55 (1993): 273.
8. This issue was not limited to former slaves of African origin. During the presidency of Chester A. Arthur, the Supreme Court, in Elk v. Wilkins, 112 U.S. 94 (1884), held that Native Americans were not citizens of the United States, with the meaning of the Fourteenth Amendment.

9. These included the ability to require collective bargaining in the steel industry pursuant to the National Labor Relations Act, in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), with the Court declaring that the manufacture of steel bore a "close and substantial relation" to interstate commerce.
10. Heart of Atlanta Motel and Katzenbach v. McClung, 379 U.S. 294 (1964).
11. The majority opinion by Chief Justice Roberts, in numerous places, emphasizes that the individual mandate was unconstitutional because it compelled individuals to engage in commerce rather than merely regulating commerce. By implication, the chief justice suggested that the power to regulate the health-care industry was valid under the Commerce Clause: "Given its expansive scope, it is no surprise that Congress has employed the commerce power in a wide variety of ways to address the pressing needs of the time. But Congress has never attempted to rely on that power to compel individuals not engaged in commerce to purchase an unwanted product." National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2586 (2012). Even Justice Scalia, who vigorously dissented in arguing that Congress lacked authority to adopt the individual mandate, seemed to acknowledge that Congress had the power to regulate the health-care industry, generally, under the Commerce Clause: "Congress has set out to remedy the problem that the best health care is beyond the reach of many Americans who cannot afford it. It can assuredly do that, by exercising the powers accorded to it under the Constitution. The question in this case, however, is whether the complex structures and provisions of the Patient Protection and Affordable Care Act (Affordable Care Act or ACA) go beyond those powers. We conclude that they do." Ibid., 2566, 2642–2643.
12. The Carter peanut-farm investigation took place before the passage of the Independent Counsel Law.
13. Libby was charged with making false statements to federal agents who were investigating a leak of the covert identity of CIA official Valerie Plame. Libby was ultimately convicted on multiple felony counts.
14. One exception was President Franklin Pierce, who avoided politics and patronage scrupulously, going so far as to consult with the sitting justices before nominating Justice Archibald Campbell.
15. Congress has sometimes altered the number of justices by statute. It raised the number from six to seven in 1807 and from seven to nine in 1837. During the presidency of Andrew Johnson in 1866, Congress reduced the number of justices from nine to seven, to prevent Johnson from furthering his own Reconstruction agenda by appointing another member to the Court. When Ulysses S. Grant became president, Congress regained confidence in the chief executive and, in 1869, returned the number of justices to nine, where it has remained ever since.