

CONSTITUTIONAL REVIEW OF THE PRESIDENCY

- Basis of constitutional power found in Article II
- Must be 35 years old, a natural-born citizen, and a resident of the United States for 14 years
- Chief executive
- Commander in Chief of the armed forces
- Power to grant pardons
- Power to make treaties
- Power to appoint ambassadors, justices, and other officials
- Power to sign legislation or veto legislation
- Duty to give a State of the Union report
- Election by electoral college
- Definition of term limits, order of succession, and procedures to follow during presidential disability through constitutional amendments
- Informal power based on precedent, custom, and tradition in issuing executive orders (orders initiated by the president that do not require congressional approval), executive privilege (keeping executive meetings private), signing statements (presidential statements made in conjunction with a president signing a bill), and creating executive agencies

Presidential Powers Are Bolstered Beyond the Expressed Powers in Article I

Besides the constitutional authority delegated to the president, the nation's chief executive also has indirect roles. These duties—such as chief legislator, head of party, chief of state, and chief diplomat—truly define the scope of the presidency. Depending upon the skills of the person in office, the power of the presidency will increase or decrease. Each role has a direct relationship with either a political institution or governmental policy-making body. The skills and ability to use these roles result in a shared-power relationship.

The president as chief legislator develops legislative skills and a shared relationship with Congress. In developing a legislative agenda, the president sets priorities and works closely with members of Congress. Three contrasting presidents—Lyndon Johnson, Jimmy Carter, and Bill Clinton—developed different styles in this area. Johnson, having the experience as Senate Majority Leader, already had the skills of working with Congress when he assumed the office after Kennedy's assassination. He was able to achieve a great deal of success with his Great Society programs. Carter, coming from the Georgia governorship, was unable to work with congressional leaders and did not implement his agenda. Clinton, although a former governor, used his support staff and developed a working relationship with his own party leaders who held a majority in each house. For the first three years of his presidency, Clinton was able to push through significant legislation, including the Family and Medical Leave Act, a National Service Program, AmeriCorps, and the Crime Bill. The fact that Democrats held a majority was a key factor in whether the president's legislative agenda was completed.

After the 2006 midterm election, President George W. Bush had to work with Democratic majorities in the House and Senate. Legislative victories decreased, and he faced mounting criticism for the Iraq War. When Barack Obama was elected in 2008, he was able to use his political capital to pass a historic bill reforming the nation's health care system.

The Veto Is a Powerful Presidential Tool

The veto is a primary tool used by presidents to influence Congress to meet White House agenda priorities. Historically, there have been over 1,450 regular vetoes and fewer than 200 have been overridden by Congress. The presidents who exercised the most vetoes were Franklin Roosevelt (635), Grover Cleveland (304), and Harry Truman (1,100).

Pocket Veto Is Used Less Extensively

Another form of veto a president can use is the pocket veto. This occurs if the president does not sign a bill within ten days and the Congress adjourns within those ten days. This tactic has been used over a thousand times. One of the reasons why the pocket veto is used is that very often there is a rush to pass legislation at the time of planned recesses. One of the issues surrounding the veto is the attempt by some presidents to obtain a line-item veto. Many times, Congress will attach riders or amendments to bills. These riders, often in the form of appropriations, sometimes have nothing to do with the intent of the bill itself and are often considered to be pork-barrel legislation. It becomes a means of forcing the president to accept legislation he would normally veto.

Presidential Appointments that Must Be Confirmed Must Be Approved by the Senate

According to the Congressional Research Service, "The responsibility for populating top positions in the executive and judicial branches of government is one the Senate and the President share. The president nominates an individual, the Senate may confirm him, and the President would then present him with a signed commission. The Constitution divided the responsibility for choosing those who would run the federal government by granting the President the power of appointment and the Senate the power of advice and consent." When the Senate refused to act on a presidential appointment, presidents have waited for the Senate to adjourn for three days or more. The president then used what is called a "recess appointment," which bypasses the Senate for one year. This method has been challenged, and the Supreme Court ruled that recess appointments by the president are unconstitutional, even if the Senate only convenes in a pro forma session—opening and adjourning without doing any other business. Members of the president's White House staff, such as the chief of staff and press secretary, do not have to go through the confirmation process.

Pardon Power Cannot Be Formally Challenged

The president's influence over the judiciary comes from his power to appoint Supreme Court justices and grant pardons and reprieves. Most judicial appointments are made after checking the appointment with the senator of the state the appointee comes from. This kind of "senatorial courtesy" often guarantees the acceptance of the appointment. The difference between a pardon and a reprieve is that a reprieve is a postponement of a sentence and a pardon forgives the crime and frees the person from legal culpability. One of the most controversial pardons came in 1974, when Gerald Ford pardoned Richard Nixon, who had been named as an unindicted co-conspirator in the Watergate scandal. An instance when the court told the president he went too far was the Supreme Court decision in *Nixon v United States* (1974). The Court told Richard Nixon he must turn over the Watergate tapes and rejected his argument of executive privilege. An extension of the pardoning power is the power of amnesty. For instance, in 1977 Jimmy Carter granted a blanket amnesty to Vietnam War draft evaders who fled to Canada. President Clinton was criticized after granting over a hundred pardons in the last hours of his presidency.

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Line-Item Veto Ruled Unconstitutional

In 1994 both houses of Congress passed a line-item veto law, which President Clinton signed. Taking effect in 1997, the purpose of the line-item veto was to let the president strike individual items from the 13 major appropriations bills submitted by Congress that he considered wasteful spending. The goal of the law was to prevent Congress from increasing appropriations with pork. The law was brought to the Supreme Court and was declared unconstitutional as an illegal expansion of the president's veto power.

Informal Powers Complement Formal Powers

Besides the delegated powers listed at the beginning of this unit, the president has an implied power unique to the three branches—an inherent power to make policy without the approval of Congress. This power is derived from the chief-executive clause in the Constitution and the defined power of the president as commander in chief. The policy directives can come in the form of executive orders and executive actions, as well as foreign policy decisions that involve the commitment of troops and weaponry to foreign countries. Congress has pushed back on these powers by taking the president to court and passing the War Powers Act.

Other Powers of the President

Party Leader

As party leader, the president is the only nationally elected party official. Other party leaders, such as the Speaker of the House and the majority and minority leaders of the Senate and House, are elected by their own parties. In this role, the president has much influence in setting his agenda, especially if he is a member of the majority party. Many times, the president will make the argument to the congressional party leaders that their support will “make or break” the presidency. This kind of pressure was put on the Democratic Party when Bill Clinton lobbied for the passage of his first budget. Another key action the president can take to send a message to Congress is to impound funds. By this act the president refuses to release appropriated funds to executive agencies. President Nixon used this practice to curb congressional spending. Congress retaliated by passing the 1974 Congressional Budget and Impoundment Act, which set limits on impoundment and set up an independent Congressional Budget Office. Even though the presidency does not directly have the power to appoint Congressmen to committees, the president certainly can influence a party member by promising to support pet legislation of the congressperson in return for voting in favor of legislation supported by the president.

Executive Privilege

The president has interpreted the Constitution to allow for executive privilege, the ability of the president to protect personal material. Because the definition of executive privilege is not written, President Nixon, in trying to apply this to his Watergate tapes, did not succeed in protecting the tapes from a congressional committee investigating potential obstruction of justice charges.

Required Document

Federalist No. 70

“The Executive Department Further Considered,” is an essay written by Alexander Hamilton arguing for a unitary presidency (only one president) provided for in the United States Constitution. According to Alexander Hamilton, a unitary president is necessary to

- ensure accountability in government,
- enable the president to defend against legislative encroachments on presidential power, and
- ensure “energy” in the executive.

Hamilton argued that a unitary executive structure will best permit purpose, direction, and flexibility in the executive branch—especially necessary during times of emergency and war. Hamilton also makes the argument that one president is best able to protect the people’s liberty against factions. A unitary presidency is also more effective because it avoids conflicts that arise in the Congress.

Key Quote:

“The ingredients which constitute energy in the Executive are, first, unity; secondly, duration; thirdly, an adequate provision for its support; fourthly, competent powers. The ingredients which constitute safety in the republican sense are, first, a due dependence on the people, secondly, a due responsibility.”

Optional Reading

The Chief Magistrate and His Power, by William Howard Taft (1916)

Key Quote:

“It has been suggested by some that the veto power is executive. I do not quite see how. Of course, the President has no power to introduce a bill into either House. He has the power of recommending such measures as he shall judge necessary and expedient to the consideration of Congress. But he takes no part in the running discussion of the bill after it is introduced or in its amendments. He has no power to veto parts of the bill and allow the rest to become a law. He must accept it or reject it, and his rejection of it is not final unless he can find one more than one-third of one of the Houses to sustain him in his veto. But even with these qualifications, he is still a participant in the legislation. Except for his natural and proper anxiety not to oppose the will of the two great legislative bodies, and to have harmony in the government, the reasons which control his action.”

THE CABINET AND WHITE HOUSE STAFF

The Cabinet

The cabinet was instituted by George Washington; every administration since has had one. There have also been unofficial advisors such as Andrew Jackson’s so-called Kitchen Cabinet. Cabinet appointees need Senate confirmation and play an extremely influential role in government. There are currently 19 cabinet-level positions. Creation or abolition of these agencies needs congressional approval. There have been cabinet name changes such as the change from Secretary of War to Secretary of Defense. Cabinet agencies have been created because national issues such as the environment, energy, and education are placed high on the national agenda. Cabinet-level positions have been expanded to include the Office of Management and Budget, the director of the

Environmental Protection Agency, the vice president, the U.S. Trade Representative, the ambassador to the United Nations, and the chair of the Council of Economic Advisors. In 2002, the cabinet was expanded to include the director of Homeland Security. The vice president also is a permanent cabinet member. Cabinet officials have come from all walks of life. They are lawyers, government officials, educators, and business executives. Many cabinet officials are friends and personal associates of the president. Only three—Robert Kennedy as Attorney General, Ivanka Trump, and Jarred Kushner as presidential advisors and not members of the Cabinet—were relatives of the president. Presidents have used cabinet officials in other capacities. Nixon used his attorney general as campaign manager. Cabinets are scrutinized by the American public to see whether they represent a cross section of the population. It was only recently that full minority representation in the cabinet became a common practice. To put this issue in perspective, the first woman, Frances Hopkins, was appointed to the cabinet in Franklin Roosevelt's administration.

Cabinet nominees have been turned down by the Senate. George H. W. Bush's appointment of Texas Senator John Tower was rejected by the Senate as a result of accusations that Tower was a womanizer, had drinking problems, and had potential conflict-of-interest problems with defense contractors. During his term, President Clinton had trouble gaining approval of cabinet appointees. Zoë Baird was nominated as the first female Attorney General. However, because of allegations that Baird had hired an illegal alien as a nanny, Clinton was forced to withdraw the nomination. The event became known as "Nannygate." Issues facing a president include how much reliance should be placed on the cabinet, whether a cabinet should be permitted to offer differing points of view, and how frequently cabinet meetings should be held. Each cabinet member does administer a bureaucratic agency and is responsible for implementing policy within the agency's area of interest.

After Barack Obama was elected president, he established new "vetting" procedures (reviewing of one's credentials) for his appointees. This procedure included a provision that no former lobbyist could serve in an office that the lobbyist had earlier tried to influence. President Obama's first-term cabinet appointment reflected a "team of rivals" in key positions. He appointed his primary presidential campaign opponent, former First Lady Hillary Clinton, as secretary of state and kept Republican Robert Gates as the defense secretary. The rest of the cabinet reflected ethnic and gender diversity. In his second term, some of President Obama's appointments were confirmed with significant Republican opposition. For the first time in Senate history, the secretary of defense appointee was filibustered before gaining Senate approval. President Donald Trump's cabinet consisted of former generals, former opponents from the 2016 Republican primary, and wealthy business executives. No Democrats were appointed to Trump's cabinet.

The president relies on two key cabinet departments for advice—the State Department and the Defense Department, both of which are run by civilians. He also relies on the national security advisor (a staff position), and the directors of National Intelligence, CIA, FBI, and Homeland Security. The secretary of defense is second to the president in directing military affairs. The agency is directly in charge of the massive defense budget and the three major branches of the military. Direct military command is under the leadership of the joint chiefs of staff. It is made up of representatives of each of the military services and chaired by a presidential appointee, also a member of the military. During the First Gulf War, General Colin Powell was a key player giving advice to President George H. W. Bush and Secretary of Defense Dick Cheney.

The secretary of state heads the diplomatic arm of the executive branch and supervises a department with well over 24,000 people, including 8,000 foreign-service officers. There are specialists in such areas as Middle East affairs, and the department includes the many ambassadors who are the country's chief spokespersons abroad. Presidents appoint to the position of secretary of state someone on whom they can closely rely and who can map out a successful foreign policy. Some, like John Foster Dulles, Eisenhower's secretary of state, have played a major role. Dulles

endorsed the policy of brinkmanship—going close to the edge of an all-out war in order to contain communism. President Clinton appointed the first female secretary of state, Madeline Albright, at the start of his second term.

In 1947 the National Security Council was established as an executive-level department. It created as its head the national security advisor. One of the most notable people to head the agency was Henry Kissinger, who served under Presidents Nixon and Ford. Kissinger laid the foundation of Nixon's policy during the Vietnam War and handled the delicate negotiations that led to Nixon's historic visit to China. Condoleezza Rice became a key national security advisor to George W. Bush during his administration. She was appointed and confirmed as the first African-American woman to serve as Secretary of State during Bush's second term.

The White House Staff

The White House staff, managed by the White House chief of staff, directly advises the president on a daily basis. The chief of staff, according to some critics, has an inordinate amount of power, often controlling the personal schedule of the president. Nixon's chief of staff, H. R. Haldeman, kept a personal diary, which revealed the position's close relationship with the president as well as the influence the chief of staff plays in policy formation. Other staff members include the more than six hundred people who work at the White House, from the president's chef to the "advance" staffers who make travel arrangements. The key White House staff include the political departments of the Office of Communications, Legislative Affairs, Political Affairs, and Intergovernmental Affairs. There are also the support services—Scheduling, Personnel, and Secret Service—and the policy offices—National Security Affairs, Domestic Policy Affairs, and cabinet secretaries. Each plays an important role in formulating policy and making the White House run smoothly. The first lady has her own office and staff, as does the vice president.

The role of the nation's first lady is defined by the interests of the sitting president's wife. Hillary Rodham Clinton was given the responsibility of chairing the Health Care Reform Task Force and moved from the traditional office in the White House reserved for the first lady to the working wing of the White House where other staff members work. After the efforts to get a comprehensive health care bill failed, Clinton took on a more traditional role as the country's first lady. This role continued during Bill Clinton's second administration. During the Whitewater investigation, Hillary Clinton was called to testify before a grand jury. No charges were brought against her. Using the theme of her book *It Takes a Village to Raise a Child*, Clinton was an important advocate for children's causes. She also became the only former first lady to seek elective office. She was elected to the Senate in 2000 by the voters of New York, and in 2008 and 2016 was an unsuccessful presidential candidate. First Lady Michelle Obama followed Laura Bush's model and used her influence in taking up the causes of preventing childhood obesity and working with veterans and their families. The newest first lady, Melania Trump, took on the cause of preventing cyberbullying.

Presidential Conflict with Congress over National Security

Another area of potential conflict between the president and Congress is that of national security. As chief diplomat, the president has the constitutional authority of commander in chief of the armed forces, the person who (with the advice and consent of the Senate) can make treaties with other nations and appoint ambassadors. Who are the players and participants in this aspect of public policy? Constitutionally we have already identified the key players:

- President—in Article II, as commander in chief of the armed forces and chief diplomat; the president has the power to appoint ambassadors and negotiate treaties.

- Congress—in Article I, having the power to declare war, support and maintain an armed force through appropriations, as well as approve foreign-aid allocations; the Senate has the power to approve appointments and must ratify treaties.

Illustrative Example

War Powers Act

It is the war-making power of the president that has caused the most problems. Since the Vietnam War, Congress has become concerned with the president's unilateral commitment of American troops. Congress responded by passing the War Powers Act in 1973, overriding a Nixon veto. This act states that a president can commit the military only after a declaration of war by the Congress or by the specific authorization of Congress, if there is a national emergency, or if the use of force is in the national interest of the United States. Once troops are sent, the president is required to inform the Congress within 48 hours and must stop the commitment of troops after 60 days. Congress has the leverage of withholding military funding to force the president to comply. The War Powers Act has been compared to a legislative veto. The proponents of this measure point to such military action as Reagan's invasion of Grenada, Bush's Panama invasion, and Clinton's Somalia and Bosnia policies as examples of why it is necessary for Congress to exercise this authority. Opponents of this act point to the fact that only the president has the complete knowledge of what foreign-policy actions can really have an impact on the national security of the United States. The issue has never been resolved by the courts, and the legislation remains on the books.

Presidential Conflict with the Senate over Supreme Court Nominees

The other two branches of government, the executive and legislative, are linked in the process of selecting federal justices. In addition, special interests such as the American Bar Association give their input. The result is a process that sometimes becomes embroiled in political controversy. The president must win the approval of the Senate for all federal judgeships. In addition, the tradition of senatorial courtesy, the prior approval of the senators from the state from which the judicial appointment comes, has been part of the appointment process. (This courtesy does not apply to Supreme Court justice nominations.) Once nominated, the judicial candidate must appear before the Senate Judiciary Committee and is given a complete background check by the Department of Justice. Usually, lower-court justices are not hand-picked by the president. They come from recommendations of other officials. Many lower-court judgeships are given as a result of prior political support of the president or the majority party in the houses of Congress.

The consideration of judicial ideology has become increasingly important in the selection of Supreme Court justices. When a Supreme Court nominee appears before the Senate Judiciary Committee, issues such as constitutional precedent, judicial activism, and the candidate's legal writings and past judicial decisions come under scrutiny. Other issues such as opinions on interest groups, public opinion, media opinion, and ethical and moral private actions of the nominee have been part of the selection process. Let us look at four recent nominees to illustrate this subject.

When Justice Lewis Powell retired from the court in 1987, President Reagan nominated Robert Bork. Bork had been an assistant attorney general in the Justice Department and was part of the "Saturday Night Massacre," when Nixon fired Attorney General Elliot Richardson. Bork was third in line and carried out Nixon's order to fire the special prosecutor, Archibald Cox, who was investigating the Watergate break-in. Bork was a conservative jurist and believed in judicial restraint. Many of

his writings were questioned, as well as a number of his views regarding minorities and affirmative action. He was rejected by the Senate.

After his defeat, the term “Borked” was coined. It refers to a presidential appointee who does not get approved by the senate because of ideological reasons. Douglas Ginsburg was nominated by Reagan after Bork’s rejection. He was also considered extremely conservative. Under intense Senate questioning, conflict of interest issues surfaced as well as allegations that Ginsburg had used marijuana when he was a professor in law school. Reagan withdrew his nomination and finally succeeded in getting unanimous Senate approval for the more moderate Anthony Kennedy.

The most heated debate over confirmation occurred when President Bush nominated Clarence Thomas in 1991 to replace the first African-American Justice, Thurgood Marshall. This nomination brought to national attention the actions of the male-dominated Judiciary Committee when it came to questioning both Thomas and witness Anita Hill. Thomas was narrowly confirmed by a vote of 52–48. The confirmation process brought to the forefront the conflict between the president’s constitutional authority to nominate the person he considers best qualified and the responsibility of the Senate to approve the nominee. The partisanship of the committee as well as the leaks leading to the testimony of Hill added to the controversy.

When Clinton became president, his first two nominees, Ruth Bader Ginsburg and Stephen Breyer, reflected an attempt on his part to depoliticize the process. Both nominees received easy Senate approval.

The second term of George W. Bush brought about a major change in the makeup of the Supreme Court. Sandra Day O’Connor, the Court’s first female appointee retired, and Bush nominated John G. Roberts Jr. to replace her. Roberts had clerked for William Rehnquist in 1980 when Rehnquist was an associate justice. Roberts went on to serve on the U.S. Court of Appeals for the District of Columbia Circuit in 1992. He had argued 39 cases before the Supreme Court. Roberts described himself as a “strict constructionist,” one who relied heavily on precedent in determining the outcome of cases that came before him.

Before the confirmation process began, Chief Justice William Rehnquist died, and President Bush decided to nominate Roberts as chief justice, leaving O’Connor’s seat vacant until Roberts was confirmed. After the confirmation hearings were completed, the Senate voted to confirm Roberts as the seventeenth Chief Justice of the Supreme Court. Roberts became the youngest chief justice since John Marshall. Bush’s nominee to replace O’Connor was federal appeals judge Samuel Alito, who was confirmed by the Senate.

THE NEW TECHNOLOGY AND THE PRESIDENCY

The Bully Pulpit

If you think of the presidents who have been powerful and influential and who have demonstrated leadership, they all have one thing in common. These presidents, such as Theodore Roosevelt, Franklin Roosevelt, John F. Kennedy, and Ronald Reagan, all used the “bully pulpit” to advance their policies and communicate with the American people. The term was coined by Theodore Roosevelt, who saw the White House as his bully pulpit to advance his agenda. The bully pulpit is used by presidents to

- manage a crisis,
- demonstrate leadership,
- announce the appointment of cabinet members and Supreme Court justices,
- set and clarify the national agenda,
- achieve a legislative agenda, and
- announce foreign-policy initiatives.