

The Presidency and the Challenge of Democracy

THE EVOLVING AMERICAN PRESIDENCY SERIES

SERIES FOREWORD:

The American presidency touches virtually every aspect of American and world politics. And the presidency has become, for better or worse, the vital center of the American and global political systems. The Framers of the American government would be dismayed at such a result. As invented at the Philadelphia Constitutional Convention in 1787, the presidency was to have been part of government with shared and overlapping powers, embedded within a separation-of-powers system. If there was a vital center, it was the Congress; the presidency was to be a part, but by no means, the centerpiece of that system.

Over time, the presidency has evolved and grown in power, expectations, responsibilities, and authority. Wars, crises, depressions, industrialization, all served to add to the power of the presidency. And as the United States grew into a world power, presidential power also grew. As the United States became the world's leading superpower, the presidency rose in prominence and power, not only in the United States, but on the world stage.

It is the clash between the presidency as invented and the presidency as it has developed that inspired this series. And it is the importance and power of the modern American presidency that makes understanding the office so vital. Like it or not, the American presidency stands at the vortex of power both within the United States and across the globe.

This Palgrave series recognizes that the presidency is and has been an evolving institution, going from the original constitutional design as a Chief Clerk, to today where the president is the center of the American political constellation. This has caused several key dilemmas in our political system, not the least of which is that presidents face high expectations with limited constitutional resources. This causes presidents to find extraconstitutional means of governing. Thus, presidents must find ways to bridge the expectations/power gap while operating within the confines of a separation-of-powers system designed to limit presidential authority. How presidents resolve these challenges and paradoxes is the central issue in modern governance. It is also the central theme of this book series.

Michael A. Genovese

Palgrave's The Evolving American Presidency Series Editor

The Second Term of George W. Bush

edited by Robert Maranto, Douglas M. Brattebo, and Tom Lansford

The Presidency and the Challenge of Democracy

edited by Michael A. Genovese and Lori Cox Han

*The Presidency and the
Challenge of Democracy*

Edited by

*Michael A. Genovese
and
Lori Cox Han*

palgrave
macmillan



THE PRESIDENCY AND THE CHALLENGE OF DEMOCRACY

© Michael A. Genovese and Lori Cox Han, 2006.

Softcover reprint of the hardcover 1st edition 2006 978-1-4039-7422-8

All rights reserved. No part of this book may be used or reproduced in any manner whatsoever without written permission except in the case of brief quotations embodied in critical articles or reviews.

First published in 2006 by
PALGRAVE MACMILLAN™

175 Fifth Avenue, New York, N.Y. 10010 and
Houndmills, Basingstoke, Hampshire, England RG21 6XS
Companies and representatives throughout the world.

PALGRAVE MACMILLAN is the global academic imprint of the Palgrave Macmillan division of St. Martin's Press, LLC and of Palgrave Macmillan Ltd. Macmillan® is a registered trademark in the United States, United Kingdom and other countries. Palgrave is a registered trademark in the European Union and other countries.

ISBN 978-1-4039-7423-5 ISBN 978-0-230-60074-4 (eBook)

DOI 10.1057/9780230600744

Library of Congress Cataloging-in-Publication Data

The presidency and the challenge of democracy / edited by Michael A. Genovese and Lori Cox Han.

p. cm.

Includes bibliographical references and index.

1. Executive power—United States. 2. Democracy—United States. 3. United States—Foreign relations. 4. Constitutional history—United States. I. Genovese, Michael A. II. Han, Lori Cox.

JK516.P6385 2006

352.230973—dc22

2005040167

A catalogue record for this book is available from the British Library.

Design by Newgen Imaging Systems (P) Ltd., Chennai, India.

First edition: September 2006

10 9 8 7 6 5 4 3 2 1

Contents

<i>Preface</i>		vii
<i>Notes on Contributors</i>		xi
One	Is the Presidency Dangerous to Democracy? <i>Michael A. Genovese</i>	1
Two	From Presidential Wars to American Hegemony: The Constitution After 9/11 <i>Louis Fisher</i>	23
Three	Guarding the Parchment Barrier: The Attorney General and Presidential Power in Wartime <i>Nancy V. Baker</i>	53
Four	The Constitutional Checks and Balances that Neither Check Nor Balance <i>Nancy Kassop</i>	73
Five	The Commander in Chief Power and Constitutional Invention in the Bush Administration <i>Robert J. Spitzer</i>	93
Six	The President Over the Public: The Plebiscitary Presidency at Center Stage <i>Lori Cox Han</i>	119
Seven	Who Makes U.S. Foreign Policy? Presidential Leadership in Gulf Wars I and II <i>Meena Bose</i>	139
Eight	The President as King: The Usurpation of War and Foreign Affairs Powers in the Modern Age <i>David Gray Adler</i>	159
Nine	Conclusion: The American Presidency in a Post 9/11 World <i>Thomas E. Cronin</i>	191
<i>Index</i>		201

Preface

A Dangerous Presidency in a Dangerous World

Only the most reptilian could read the powerful words of the *Declaration of Independence* and not be moved and inspired. The rush of democratic sentiment, the appeal to reason, the bold language and even bolder message, the call to arms, the proclamation of universal rights all leave the reader reeling with democratic fervor. From the preamble to the last ringing chorus, the men of the founding era were truly men for the ages. The preamble runs thus:

When, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

But that is only the beginning. Yes, we are breaking our bond with the past, and that is why

We hold these truths to be self-evident; that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness.

That, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.

That whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness. Prudence, indeed will dictate that governments long established should not be changed for light and transient causes; and accordingly all experience hath shown that mankind are more disposed to suffer while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new guards for their future security.

The language is concise, clear, to the point, and dripping powerful prose and imagery.

These inspiring words declare guiding principle as well as independence. And to drive their point home, the remainder of the Declaration of Independence is a long list of crimes and grievances against the British Crown. This bill of particulars leveled against King George III included:

repeated injuries and usurpations . . .
 He has refused his assent to laws . . .
 He has obstructed the administration of justice . . .
 He has made judges dependent on his will alone . . .
 He has erected a multitude of new offices and sent hither swarms of officers to harass our people and eat out their substance . . .
 He has affected to render the military independent of, and superior to, the civil power . . .
 He has combined with others to subject us to jurisdiction foreign to our constitution and unacknowledged by our laws . . .
 For depriving us, in many cases, of the benefits of trial by jury . . .
 For taking away our charters, abolishing our most valuable laws, and altering, fundamentally, the forms of our government.

Lamentably, all of this sounds eerily familiar in our age. And while no one would make the case that we have replaced a king of England with a king of America, the ubiquitous presence of the American presidency and the precipitous growth of presidential power in the modern era leads one to draw frightening parallels.

The rise of America has also meant the rise of presidential power. When the United States became a world economic and political power, a strong presidency emerged. With World War II, the Cold War, and now the war against terrorism, the modern presidency has been driven by and shaped by crises and war. With the United States as the world's only superpower, foreign policy animates and empowers a swollen presidency. But this powerful and heroic model of the presidency runs contrary to constitutional design. The presidency was invented as a limited institution, grounded by the rule of law and embedded in the checks and balances of a separation of powers. Crises and wars have not changed the wording of the Constitution, but they have altered the scope of presidential power.

This book is about presidential power in an age of U.S. hegemony and terror. It asks if the presidency has become dangerous to our constitutional republic. This concern is not new. James Madison issued a warning over two hundred years ago when he wrote, "Perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad."¹

As we go abroad in search of demons to destroy, we also sacrifice republican principles at home. As we demand security, we suspend the Constitution. Why give terrorists such a victory they could never earn on the battlefield? Why let thugs and bullies dictate us? Why dismantle the Constitution? The current surrendering of our constitutional safeguards is

not altogether new. In past wars, we have trimmed the provisions of the constitution to suit needs and interests. But what is new is the current justification of said constitutional smashing.

In effect, we today find ourselves at the third stage of a dangerous trend. In stage one, from the beginning of the republic to 1950, presidents sought power, used power, and at times abused foreign and war-making power. But they were always careful to appeal their actions not on the basis of a constitutional authority but by the doctrine of necessity. Presidents such as Abraham Lincoln during the Civil War, or Franklin D. Roosevelt during the depression and World War II did overstep constitutional bounds, but they never claimed that their actions were grounded in a constitutional grant of power. Rather than cloaking themselves in constitutional powers, they paid homage to the Constitution and the power of Congress. Lincoln, referring to the emergency measure taken early in the Civil War admitted in a special session message on July 4, 1861 to Congress that his actions “whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity; trusting then as now that Congress would readily ratify them.”² Lincoln made no claim of inherent power and bowed to the superior power of the Constitution, the rule of law, and the right of Congress to make policy. Presidents may have occasionally acted beyond the law, but they were careful never to claim a right to do so.

Stage two came in the early 1950s when, during the early days of the Cold War, President Harry S. Truman broke from his constitutional past to assert an inherent right as commander in chief to send U.S. troops into combat. This bold and constitutionally baseless claim should have been defanged at birth, but in the early days of the Cold War, Congress, the public, and the courts backed away, and a new “constitutional” principle was accepted, a principle many subsequent presidents, along with the public, Congress, courts, and the media began to accept as a legitimate constitutional provision.

We find ourselves today on the precipice of stage three, with President Bush fighting a war against terrorism that takes Truman’s constitutionally baseless doctrine one giant step further. Not only does Bush claim an inherent constitutional right to send troops into combat without congressional approval, but he asserts an even mere farfetched and dangerous power: that his actions are nonreviewable.³ If the Congress, public, and courts allow such an assertion to become doctrine, what becomes of the system of checks and balances? Is the president to be truly above the law? This transforms our imperial presidency into a monarchical presidency.

Such is the dilemma we attempt to confront in this book. Is the presidency dangerous to democracy, and what are the challenges we face as we attempt to make the presidency powerful enough to promote security while also maintaining democratic accountability? Can we make the presidency strong *and* safe for democracy? This book is drawn from a February 2005

conference sponsored by the Institute for Leadership Studies at Loyola Marymount University in Los Angeles, California. We wish to thank the University for its generous sponsorship of this conference, and to further thank Whitney Izzo for her work in organizing the conference and Theresa Tran for her expert research and accurate typing. We are also indebted to David Pervin at Palgrave Macmillan for his enthusiastic support for this project.

Notes

1. See Arthur M. Schlesinger, Jr., *War and the American Presidency* (New York: Norton, 2004), 47.
2. Abraham Lincoln, "Special Session Message, July 4, 1861," in *A Compilation of the Messages and Papers of the Presidents*, vol. 7, ed., James D. Richardson (New York: Bureau of National Literature, 1897), 3227–9, 3231–2.
3. Jay S. Bybee, assistant attorney general, U.S. Department of Justice, "Memorandum for Alberto R. Gonzales," August 1, 2002. Accessed at <<http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>>, October 21, 2004, and "Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations," April 4, 2003. Accessed at <<http://www.defenselink.mil/news/Jun2004/d20040622doc8.pdf>>. October 21, 2004, Report, "Working Group Report," was to be declassified in 2013, but was declassified on June 21, 2004, after an earlier draft of the report, dated March 6, 2003, had been leaked to the *Wall Street Journal*. Jess Bravin, "Pentagon Report Sought to Justify Use of Torture," *Wall Street Journal*, June 7, 2004, A1.

Notes on Contributors

David Gray Adler is Professor of Political Science at Idaho State University, where he teaches a variety of classes on the constitution and the presidency. He is the author of *The Constitution and the Termination of Treaties* (1986), *Presidential Power and the Steel Seizure Case* (forthcoming), and coeditor of *The Constitution and the Conduct of American Foreign Policy* (with Larry N. George, 1996) and *The Presidency and the Law: The Clinton Legacy* (with Michael A. Genovese, 2002). His research has also appeared in a variety of journals, including *Political Science Quarterly*, *Presidential Studies Quarterly*, and *Constitutional Commentary*.

Nancy V. Baker is Associate Professor in the Government Department at New Mexico State University. Her research focuses on the Office of the U.S. Attorney General and the nexus of law and politics in the Executive Branch. She is the author of *Conflicting Loyalties: Law and Politics in the Attorney General's Office* (1992), as well as multiple articles and essays. Her most recent book, *General Ashcroft: Attorney at War* (2006) examines the tenure of John Ashcroft as Attorney General and the impact of his domestic antiterrorism policies on the U.S. constitutional system.

Meena Bose is the Peter S. Kalikow Chair in Presidential Studies at Hofstra University. She is the author of *Shaping and Signaling Presidential Policy: The National Security Decision Making of Eisenhower and Kennedy* (1998), coeditor of *From Cold War to New World Order: The Foreign Policy of George H. W. Bush* (with Rosanna Perotti, 2002), and coeditor of *The Uses and Abuses of Presidential Ratings* (with Mark Landis, 2003). Her current research focuses on the changing role of the United Nations in American foreign policy.

Thomas E. Cronin is McHugh Professor of American Institutions and Leadership at Colorado College, and the former president of Whitman College. He is the author or coauthor of several books, including *The Paradoxes of the American Presidency* (with Michael A. Genovese, 2nd ed. 2004) *Government by the People* (2004), *State and Local Politics* (2004), *Colorado Politics and Government: Governing the Centennial State* (1993), *Direct Democracy: The Politics of Initiative, Referendum, and Recall* (1989) *U.S. v. Crime in the Streets* (1981), and *The State of the Presidency* (1980).

Louis Fisher is a Specialist with the Law Library of the Library of Congress, after spending 35 years with the Congressional Research Service. He served

as research director of the House Iran-Contra Committee in 1987 and wrote major sections of the report on institutional and constitutional issues. His books include *Presidential War Power* (2nd ed. 2004), *Nazi Saboteurs on Trial: A Military Tribunal & American Law* (2003), *Military Tribunals and Presidential Power* (2005), *Congressional Abdication on War and Spending* (2000), *American Constitutional Law* (6th ed. 2005), and *Encyclopedia of the American Presidency* (edited with Leonard W. Levy, 1994).

Michael A. Genovese is Professor of Political Science and Loyola Chair of Leadership Studies, and is director of the Institute for Leadership Studies at Loyola Marymount University. He has written sixteen books, including *The Paradoxes of the American Presidency* (with Thomas E. Cronin, 2nd ed. 2004), *The Presidency and Domestic Policy* (with William W. Lammers, 2000), *The Power of the American Presidency 1789–2000* (2001), *The Presidential Dilemma* (2nd ed. 2003), and is the editor of *The Encyclopedia of the American Presidency* (2004). He has won more than a dozen university and national awards for teaching.

Lori Cox Han is Professor and Chair of Political Science at Chapman University in Orange, California. Her research focuses on the American presidency, mass media and politics, and women and politics. She is the author of *Governing From Center Stage: White House Communication Strategies during the Television Age of Politics* (2001), coeditor of *In the Public Domain: Presidents and the Challenge of Public Leadership* (with Diane J. Heith, 2005), and *Women and American Politics: The Challenge of Political Leadership* (2006). Her research has also appeared in *Presidential Studies Quarterly*, *Congress and the Presidency*, and *White House Studies*.

Nancy Kassop is Professor and Chair of Political Science and International Relations at the State University of New York at New Paltz. Her research addresses issues of the presidency and law. Recent articles include “The War Power and Its Limits” in *Presidential Studies Quarterly* (September 2003); “The View from the President” in Mark C. Miller and Jeb Barnes, eds., *Putting the Pieces Together: American Lawmaking from an Inter-Branch Perspective* (2004); “Not Going Public: George W. Bush and the Presidential Records Act” in Lori Cox Han and Diane J. Heith, *In the Public Domain: Presidents and the Challenges of Public Leadership* (2005); and “When Law and Politics Collide: Presidents and the Use of the Twenty-Fifth Amendment” in *Presidential Studies Quarterly* (March 2005).

Robert J. Spitzer is distinguished Service Professor of Political Science at the State University of New York College at Cortland. His books include *The Presidency and Public Policy* (1983), *The Right to Life Movement and Third Party Politics* (1987), *The Presidential Veto* (1988), *The Bicentennial of the U.S. Constitution* (1990), *President and Congress* (1993), *Media and Public Policy* (1993), *Politics and Constitutionalism* (2000), *The Right to Bear Arms* (2001), *The Politics of Gun Control* (3rd ed. 2004), *Essentials of American Politics* (with Benjamin Ginsberg, Theodore Lowi, and Margaret

Weir, 2nd ed. 2005), and *The Presidency and the Constitution* (with Michael A. Genovese, 2005). In 2003, he received the State University of New York's Chancellor's Award for Excellence in Scholarship, and he is the author of more than 200 articles, papers, and essays appearing in numerous journals, books, newspapers, and other publications.