

THE CONSTITUTIONAL POWERS OF THE PRESIDENT

THOUGH THE FRAMERS nearly unanimously agreed about the need for a strong central government and a greatly empowered Congress, they did not agree about the proper role of the president or the sweep of his authority. In contrast to Article I's laundry list of enumerated powers for the Congress, Article II details few presidential powers. Perhaps the most important section of Article II is its first sentence: "The executive Power shall be vested in a President of the United States of America." Nonetheless, the sum total of his presidential powers, enumerated below, allows him to become a major player in the policy process.

The Appointment Power

To help the president enforce laws passed by Congress, the Constitution authorizes him to appoint, with the advice and consent of the Senate, "Ambassadors, other public Ministers and Consuls, judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law." Although this section of the Constitution deals only with appointments, behind that language is a powerful policy-making tool. The president has the authority to make more than 6,000 appointments to his administration (of which 1,125 require Senate confirmation),⁸ and he technically appoints more than 75,000 military personnel. Many of these appointees are in positions to wield substantial authority over the course and direction of public policy. Although Congress has the authority "to make all laws," through the president's enforcement power—and his chosen assistants—he often can set the policy agenda for the nation. And, especially in the context of his ability to make appointments to the federal courts, his influence can be felt far past his term of office.

It is not surprising, then, that selecting the right people is often one of a president's most important tasks. Presidents look for a blend of loyalty, competence, and integrity. Identifying these qualities in people is a major challenge that every new president faces. Recent presidents, especially Bill Clinton and George W. Bush, have made an effort to create a Cabinet and staff that, in President Clinton's terms, looks "more like America," as is underscored in Table 8.2, which indicates the proportion of women appointed by recent presidents. In fact, of the first five major appointments announced by President George W. Bush during his first term, all but one were women or minorities: retired General Colin Powell (secretary of state), Condoleezza Rice (national security adviser), Texas Supreme Court Justice Alberto Gonzales (White House counsel), and longtime Bush adviser Karen Hughes (counselor to the president)—two blacks, two women, and a Hispanic. President Bush's early second term Cabinet appointments were also historic and included the nomination of Rice as secretary of state and Gonzales as the attorney general.

TABLE 8.2 Presidential Teams (Senior Administrative Positions Requiring Senate Confirmation)

	Total Appointments	Total Women	Percentage Women
Jimmy Carter	1,087	191	17.6%
Ronald Reagan	2,349	277	11.8%
George Bush	1,079	215	19.9%
Bill Clinton	1,257	528	42%
George W. Bush	862 ^a	182	21%

^aAs of June 2002.

Sources: "Insiders Say White House Has Its Own Glass Ceiling," *Atlanta Journal and Constitution* (April 10, 1995): A4; and Judi Hasson, "Senate GOP Leader Lott Says He'll Work with Clinton," *USA Today* (December 4, 1996): 8A. Updated by the authors from data available at <http://www.appointee.org>.

In the past, when a president forwarded a nomination to the Senate for its approval, his selections traditionally were given great respect—especially those for the **Cabinet**, an advisory group selected by the president to help him make decisions and execute the laws. In fact, until the Clinton administration, the vast majority (97 percent) of all presidential nominations were confirmed.⁹

Rejections of presidential nominees as well as onerous delays in their approval can have a major impact on the course of an administration. Rejections leave a president without first choices, affect a president's relationship with the Senate, and affect how the president is perceived by the public. Rejections and delays also have a chilling effect on other potential nominees. George W. Bush's nomination of conservative John Ashcroft as attorney general unleashed a torrent of liberal criticism and protracted hearings. But, in the end, Ashcroft was confirmed on a 58–42 vote. It wasn't until fourteen months into his presidency that one of President Bush's nominees, Charles W. Pickering, Jr. to the U.S. Court of Appeals, was defeated. Even though Republicans controlled the Senate, Democrats launched filibusters to keep some of the president's federal judge nominations from coming to the floor for a vote.

The Power to Convene Congress

The Constitution requires the president to inform the Congress periodically of “the State of the Union,” and authorizes the president to convene either or both houses of Congress on “extraordinary Occasions.” In *Federalist No. 77*, Hamilton justified the latter by noting that because the Senate and the chief executive enjoy concurrent powers to make treaties, “It might often be necessary to call it together with a view to this object, when it would be unnecessary and improper to convene the House of Representatives.” The power to convene Congress was important when Congress did not sit in nearly year-round sessions. Today this power has little more than symbolic significance.

The Power to Make Treaties

The president's power to make treaties with foreign nations is checked by the Constitution's stipulation that all treaties must be approved by at least two-thirds of the members of the Senate. The chief executive can also “receive ambassadors,” wording that has been interpreted to allow the president to recognize the very existence of other nations.

Historically, the Senate ratifies about 70 percent of the treaties submitted to it by the president.¹⁰ Only sixteen treaties that have been put to a vote have been rejected, often under highly partisan circumstances. Perhaps the most notable example of the Senate's refusal to ratify a treaty was its defeat of the Treaty of Versailles submitted by President Woodrow Wilson in 1919. The treaty was an agreement among the major nations to end World War I. At Wilson's insistence, it also called for the creation of the League of Nations—a precursor of the United Nations—to foster continued peace and international disarmament. In struggling to gain international acceptance for the League, Wilson had taken American support for granted. This was a dramatic miscalculation. Isolationists, led by Senator Henry Cabot Lodge (R-MA), opposed U.S. participation in the League on the grounds that the League would place the United States in the center of every major international conflict. Proponents countered that, League or no League, the United States had emerged from World War I as a world power and that membership in the League of Nations would enhance its new role. The vote in the Senate for ratification was very close, but the isolationists prevailed—the United States stayed out of the League, and Wilson was devastated.

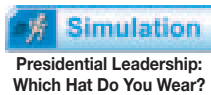
Cabinet

The formal body of presidential advisers who head the fifteen executive departments. Presidents often add others to this body of formal advisers.

■ When President George W. Bush became frustrated by the Senate's failure to approve Charles W. Pickering's appointment to the bench, the president elevated Pickering with a recess appointment, which sidestepped the confirmation process. Declining to face another Senate vote, Pickering resigned from the U.S. Court of Appeals after serving less than a year.

Photo courtesy: Brooks Kraft/Corbis





executive agreement

Formal government agreement entered into by the president that does not require the advice and consent of the U.S. Senate.

veto power

The formal, constitutional authority of the president to reject bills passed by both houses of Congress, thus preventing their becoming law without further congressional action.

The Senate also may require substantial amendment of a treaty prior to its consent. When President Jimmy Carter proposed the controversial Panama Canal treaty in 1977 to turn the canal over to Panama, for example, the Senate required several conditions to be ironed out before approving the canal's return. U.S. control of the canal came about because the United States supported Panama's efforts to seek independence from Colombia in 1903. In 1904, under a treaty, the new nation of Panama granted the United States the rights, for a period of one hundred years, to the strip of land through the center of Panama that became the canal. The U.S. Senate's narrow vote to accept the treaty negotiated by the Carter administration remedied a long-standing, contentious issue that was hampering U.S.-Latin American relations.

When trade agreements are at issue, presidents often are forced to be mindful of the wishes of Congress. What is called congressional "fast track" authority protects a president's ability to negotiate trade agreements with confidence that the accords will not be altered by Congress. Trade agreements submitted to Congress under fast track procedures bar amendments and require an up or down vote in Congress within ninety days of introduction.

Presidents often try to get around the constitutional "advice and consent" of the Senate requirement for ratification of treaties and the congressional approval requirement for trade agreements by entering into an **executive agreement**, which allows the president to form secret and highly sensitive arrangements with foreign nations without Senate approval. Presidents have used these agreements since the days of George Washington, and their use has been upheld by the courts. Although executive agreements are not binding on subsequent administrations, since 1900 they have been used far more frequently than treaties, further cementing the role of the president in foreign affairs, as revealed in Table 8.3.

Veto Power

Presidents can affect the policy process through the **veto power**, the authority to reject any congressional legislation. "Presidential vetoes have been vital to the development of the twentieth-century presidency."¹¹ The threat of a presidential veto often prompts members of Congress to fashion legislation that they know will receive presidential acquiescence, if not support. Thus, simply threatening to veto legislation often gives a president another way to influence law-making.

During the Constitutional Convention, proponents of a strong executive argued that the president should have an absolute and final veto over acts of Congress. Opponents of this idea, including Benjamin Franklin, countered that in their home states the executive veto "was constantly made use of to extort money" from legislators. James Madison made the most compelling argument for a compromise on the issue:

Experience has proven a tendency in our governments to throw all power into the legislative vortex. The Executives of the States are in general little more than Ciphers, the legislatures omnipotent. If no effectual check be devised for restraining the instability and encroachments of the latter, a revolution of some kind or other would be inevitable.¹²

In keeping with the system of checks and balances, then, the president was given the veto power, but only as a "qualified negative." Although the president was given the authority to veto any act of Congress (with the exception of

TABLE 8.3 Treaties and Executive Agreements Concluded by the United States, 1789–2002

Years	Number of Treaties	Number of Executive Agreements
1789–1839	60	27
1839–1889	215	238
1889–1929	382	763
1930–1932	49	41
1933–1944 (F. Roosevelt)	131	369
1945–1952 (Truman)	132	1,324
1953–1960 (Eisenhower)	89	1,834
1961–1963 (Kennedy)	36	813
1964–1968 (L. Johnson)	67	1,083
1969–1974 (Nixon)	93	1,317
1975–1976 (Ford)	26	666
1977–1980 (Carter)	79	1,476
1981–1988 (Reagan)	125	2,840
1989–1992 (Bush)	67	1,350
1993–2000 (Clinton)	209	2,047
2001–2002 (G.W. Bush)	21	262

Note: Number of treaties includes those concluded during the indicated span of years. Some of these treaties did not receive the consent of the U.S. Senate. Varying definitions of what an executive agreement comprises and their entry-into-force date make the above numbers approximate.

Sources: 1789–1980: *Congressional Quarterly's Guide to Congress*, 291; 1981–2002: Office of the Assistant Legal Adviser for Treaty Affairs. U.S. Department of State.

THE PRESIDENT'S MANY HATS



Photo courtesy: John Bryson/Time Pix

■ Chief law enforcer: National Guard troops sent by President Dwight D. Eisenhower enforce federal court decisions ordering the integration of public schools in Little Rock, Arkansas.



Photo courtesy: Mark Reinstein/The Image Works

■ Leader of the party: Ronald Reagan mobilized conservatives and changed the nature of the Republican Party.



Photo courtesy: Wally McNamee/Folio, Inc.

■ Commander in chief: President George Bush and his wife, Barbara, with troops in the Persian Gulf.



Photo courtesy: Bettmann/Corbis

■ Shaper of domestic policy: President Jimmy Carter announces new energy policies. Here, he wears a sweater to underscore that thermostats in the White House were turned down to save energy.



Photo courtesy: Dirck Halstead/Getty Images

■ Key player in the legislative process. President Bill Clinton proposes legislation to Congress and the nation.



Photo courtesy: Bettmann/CORBIS

■ Chief of state: President John F. Kennedy and his wife, Jacqueline, with the president of France and his wife during the Kennedys' widely publicized 1961 trip to that nation.

joint resolutions that propose constitutional amendments), Congress was given the authority to override an executive veto by a two-thirds vote in each house. The veto is a powerful policy tool because Congress cannot usually muster enough votes to override a veto. Thus, in over 200 years, there have been approximately 2,500 presidential vetoes and only about a hundred have been overridden, as revealed in Table 8.4.

As early as 1873, in his State of the Union message, President Ulysses S. Grant proposed a constitutional amendment to give to presidents a **line-item veto**, a power enjoyed by many governors to disapprove of individual items within a spending bill and not just the bill in its entirety. Over the years, 150 resolutions calling for a line-item veto were introduced in Congress. Presidents from Gerald R. Ford to Bill Clinton supported the concept. Finally, in 1996, Congress enacted legislation that gave the president the authority to veto specific spending provisions within a bill without vetoing the bill in its entirety. This move allowed the president to project his policy priorities into the budget by vetoing any programs inconsistent with his policy goals. It also allowed President Clinton to do away with more outrageous examples of pork (legislators' pet projects that often find their way into a budget). The city of New York soon challenged the line-item veto law when the president used it to stop payment of some congressionally authorized funds to the city. In *Clinton v. City of New York* (1998), the U.S. Supreme Court ruled that the line-item veto was unconstitutional because it gave powers to the president denied him by the U.S. Constitution. Significant alterations of executive/congressional powers, said the Court, require constitutional amendment.¹³

line-item veto

The authority of a chief executive to delete part of a bill passed by the legislature that involves taxing or spending. The legislature may override a veto, usually with a two-thirds majority of each chamber.

TABLE 8.4 Presidential Vetoes

President	Regular Vetoes	Vetoes Overridden	Pocket Vetoes	Total Vetoes
Washington	2	0	0	2
J. Adams	0	0	0	0
Jefferson	0	0	0	0
Madison	5	0	2	7
Monroe	1	0	0	1
J. Q. Adams	0	0	0	0
Jackson	5	0	7	12
Van Buren	0	0	1	1
W. H. Harrison	0	0	0	0
Tyler	6	1	4	10
Polk	2	0	1	3
Taylor	0	0	0	0
Fillmore	0	0	0	0
Pierce	9	5	0	9
Buchanan	4	0	3	7
Lincoln	2	0	5	7
A. Johnson	21	15	8	29
Grant	45	4	48	93
Hayes	12	1	1	13
Garfield	0	0	0	0
Arthur	4	1	8	12
Cleveland	304	2	110	414
B. Harrison	19	1	25	44
Cleveland	42	5	128	170
McKinley	6	0	36	42
T. Roosevelt	42	1	40	82
Harding	5	0	1	6
Coolidge	20	4	30	50
Hoover	21	3	16	37
F. Roosevelt	372	9	263	635
Truman	180	12	70	250
Eisenhower	73	2	108	181
Kennedy	12	0	9	21
L. Johnson	16	0	14	30
Nixon	26	7	17	432
Ford	48	12	18	66
Carter	13	2	18	31
Reagan	39	9	39	78
Bush	29	1	17	46
Clinton	37	2	1	38
G. W. Bush ^a	0	0	0	0
Total	1,485	107	1,068	2,553

^aAs of January 2005.

Sources: Harold W. Stanley and Richard G. Niemi, eds., *Vital Statistics on American Politics, 2001–2002* (Washington, DC: CQ Press, 2001): 256. Data for Clinton and G. W. Bush from Office of the Clerk, U.S. House of Representatives, http://clerk.house.gov/histHigh/Congressional_History/vetoes.php.

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The Power to Preside over the Military as Commander in Chief

One of the most important constitutional executive powers is the president's authority over the military. Article II states that the president is "Commander in Chief of the Army and Navy of the United States." While the Constitution specifically grants Congress the authority to declare war, presidents since Abraham Lincoln have used the commander-in-chief clause in conjunction with the chief executive's duty to "take Care that the Laws be faithfully executed" to wage war (and to broaden various powers).

Modern presidents continually clash with Congress over the ability to commence hostilities. The Vietnam War, in which 58,000 American soldiers were killed and 300,000 were wounded, was conducted (at a cost of \$150 billion) without a congressional declaration of war. In fact, acknowledging President Lyndon B. Johnson's claim to war-making authority, in 1964 Congress passed—with only two dissenting votes—the Gulf of Tonkin Resolution, which authorized a massive commitment of U.S. forces in South Vietnam.

During that highly controversial war, Presidents Johnson and then Nixon routinely assured members of

Congress that victory was near. In 1971, however, publication of what were called *The Pentagon Papers* revealed what many people had suspected all along: Lyndon B. Johnson systematically had altered casualty figures and distorted key facts to place the progress of the war in a more positive light. In 1973, Congress passed the **War Powers Act** to limit the president's authority to introduce American troops into hostile foreign lands without congressional approval. President Nixon vetoed the act, but it was overridden by a two-thirds majority in both houses of Congress.

Presidents since Richard M. Nixon have continued to insist that the War Powers Act is an unconstitutional infringement of their executive power. In 2001, President George W. Bush sought, and both houses of Congress approved, a joint resolution authorizing the use of force against “those responsible for the recent [September 11] attacks launched against the United States.” This resolution actually gave the president more open-ended authority to wage war than his father had received in 1991 to conduct the Persian Gulf War or President Lyndon B. Johnson had received after the Gulf of Tonkin Resolution in 1964.¹⁴ Later, in October 2002, after President Bush declared Iraq to be a “grave threat to peace,” the House (296–133) and Senate (77–23) voted overwhelmingly to allow the president to use force in Iraq “as he determines to be necessary and appropriate,” thereby conferring tremendous authority on the president to wage war. (See Join the Debate: The War Powers Act.)

The Pardoning Power

Presidents can exercise a check on judicial power through their constitutional authority to grant reprieves or pardons. A **pardon** is an executive grant releasing an individual from the punishment or legal consequences of a crime before or after conviction, and restores all rights and privileges of citizenship. Presidents exercise complete pardoning power for federal offenses except in cases of impeachment, which cannot be pardoned. President Gerald R. Ford granted the most famous presidential pardon when he pardoned former President Nixon—who had not been formally charged with any crime—“for any offenses against the United States, which he, Richard Nixon, has committed or may have committed while in office.” This unilateral, absolute pardon prevented the former president from ever being tried for any crimes he may have committed. It also unleashed a torrent of public criticism against Ford and questions about whether Nixon had discussed the pardon with Ford before Nixon's resignation. Many analysts attribute Ford's defeat in his 1976 bid for the presidency to that pardon.

Even though pardons are generally directed toward a specific individual, presidents have also used them to offer general amnesties. Presidents George Washington, John Adams, James Madison, Abraham Lincoln, Andrew Johnson, Theodore Roosevelt, Harry S Truman, and Jimmy Carter used general pardons to grant amnesty to large classes of individuals for illegal acts. Carter, for example, incurred the wrath of many veterans' groups when he made an offer of unconditional amnesty to approximately 10,000 men who had fled the United States or gone into hiding to avoid being drafted for military service in the Vietnam War.



Photo courtesy: Anja Niedringhaus/Pool/Reuters/Corbis

■ In 2003 President George W. Bush surprised American troops in Iraq on Thanksgiving Day.

War Powers Act

Passed by Congress in 1973; the president is limited in the deployment of troops overseas to a sixty-day period in peacetime (which can be extended for an extra thirty days to permit withdrawal) unless Congress explicitly gives its approval for a longer period.

pardon

An executive grant providing restoration of all rights and privileges of citizenship to a specific individual charged or convicted of a crime.



THE WAR POWERS ACT

OVERVIEW: It is difficult to interpret how the Constitution divides war powers between Congress and the president. Over the course of American history, it is the executive branch that has assumed considerable constitutional discretion in how the United States engages in war and diplomacy. Though the Constitution gives Congress the authority to declare war, “to make rules for the government and regulation of” military forces, and to provide appropriations for the armed services, it is the president’s constitutional jurisdiction over the war power that has steadily increased since the nation’s founding. For example, President James Madison would not go to war with Great Britain in 1812 without a war declaration from Congress, yet the last six major American conflicts—in Korea, Vietnam, the Persian Gulf, Kosovo, Afghanistan, and Iraq—were conducted without formal declarations of war. And, at times, presidents have withheld information from Congress. During the Vietnam War, President Richard M. Nixon, for example, authorized bombing neutral Cambodia and Laos without notifying Congress.

The War Powers Act of 1973 was an attempt to rein in the war-making authority of the president by demanding, among other things, that the executive notify Congress when committing the U.S. military to hostile action. The War Powers Act requires the president “in every possible instance” to report to Congress within forty-eight hours after deploying the armed forces to combat; implied is the understanding that the information Congress receives is timely and accurate.

The intelligence information that the president and Congress receive is critically important in determining whether to engage in and support armed conflict. The president’s constitutional authority as commander in chief gives him access to significant intelligence resources through which to conduct foreign affairs, but sometimes these sources are flawed. Pres-

ident Bill Clinton, for example, ordered the destruction of a chemical plant in Sudan that he believed produced nerve gas but that may have produced less dangerous pharmaceuticals. More recently, President George W. Bush made the case for invading Iraq in part due to the fear that Iraq possessed, after having displayed the will to use, weapons of mass destruction (WMD). WMDs loomed large in the national debate about whether to intervene in Iraq, and the fact that stockpiles are not found raised concerns of many senators who voted to authorize the use of force there.

According to *Federalist No. 3*, the decision to go to war is one of the most solemn a republic can make. Considering the events of September 11, 2001, should a president, in times of crisis, be limited in his ability to defend the United States? Conversely, should there be additional constitutional constraints on the executive’s war-making authority in light of the experience of American history? What can be done to ensure that when the United States goes to war, the war is both necessary and just and is conducted with the least amount of casualties and damage to all parties? How can the American people be sure the information that they, the Congress, and the president receive is accurate and timely?

Arguments for the War Powers Act

- **The War Powers Act reflects the will of the American people.** The doctrine of civilian supremacy places ultimate war-making authority with the American people, and the War Powers Resolution reflects the will of the people as expressed through the representative institution of Congress. This support is confirmed by the congressional override of President Richard M. Nixon’s veto.
- **The War Powers Act is an attempt by Congress to restore the balance of shared control of the military with the executive.** The act’s stated purpose is to “fulfill the intent of the framers . . . and insure that the collective