

PRESIDENT OBAMA AND THE FRAMERS' PRESIDENCY

JOHN YOO*

Legal scholarship on the presidency is moving toward more focus on constitutional design rather than political legitimacy or historical authenticity. But even if we were to design the presidency anew today, we might well keep the form of the original presidency. Many of the problems we have with executive power today likely have less to do with the intentions of the Framers in 1789 and more to do with political expectations for the person who holds the office today. Presidents have increasingly turned their attention and powers toward domestic affairs, where the Framers believed that Presidents would have the least influence, rather than focusing on national security, where the Framers understood the executive to have the greatest.

President Barack Obama's first years in office provide a vivid illustration of the tension between the twenty-first century Presidency and its original constitutional role. His disappointing first years in the Oval Office elicited a widespread rejection of Democratic policies and candidates in the 2010 elections.¹ The electorate was both filled with rage at the powers that be and opposed to specific Administration policies on health care, the economy, immigration, and terrorism.² But the explanation goes

* Professor of Law, University of California at Berkeley Law School; Visiting Scholar, American Enterprise Institute. This essay was adapted from panel remarks given at the 2012 Federalist Society Annual Student Symposium held March 3, 2012, at Stanford Law School in Palo Alto, California. I thank Lauren Escher and James Phillips for their valuable research assistance.

1. See, e.g., Stephen Dinan, *Democrats lose centuries of seniority in House*, WASH. TIMES, Nov. 3, 2010, <http://www.washingtontimes.com/news/2010/nov/3/democrats-lose-centuries-seniority-house/>; Richard Wolf, *GOP picks up Senate seats, but not enough*, USA TODAY, Nov. 2, 2010, http://usatoday30.usatoday.com/news/politics/2010-11-02-Senate_N.htm.

2. See *A Clear Rejection of the Status Quo, No Consensus about Future Policies*, PEW RESEARCH CENTER, Nov. 17, 2010, <http://pewresearch.org/pubs/1789/2010-midterm-elections-exit-poll-analysis>.

much deeper than polling. President Obama struggled because he has spent the first half of his term following an approach to the presidency that was inconsistent with its original design.

President Obama's primary focus in his first few years in office has been on domestic policy. He led a sweeping federal overhaul of the health care markets, which are responsible for about 18% of gross domestic product.³ He and his party sought to bring the economy out of recession with a large domestic spending program and federal intervention in different markets, including taking on large ownership stakes in some of America's largest companies.⁴ His administration has used its delegated authority to delay the construction of a Boeing plant in a right-to-work state,⁵ to block the construction of the Keystone XL Pipeline bringing shale oil from Canada,⁶ and to create a new type of legal immigrant status for potentially one million illegal aliens.⁷

President Obama's 2010 State of the Union message nicely summed up his topsy-turvy approach to the presidency. President Obama pressed for a new jobs bill, more domestic spending, and health care nationalization.⁸ He attributed his political setbacks not to broad opposition to his domestic ambitions but to "a deficit of trust—deep and corrosive doubts about how

3. COUNCIL OF ECONOMIC ADVISERS, THE ECONOMIC CASE FOR HEALTH CARE REFORM 2 (2009).

4. See, e.g., Binyamin Appelbaum, *U.S. takes majority stake in GMAC, giving lender \$3.8 billion more in aid*, WASH. POST, Dec. 31, 2009, <http://www.washingtonpost.com/wpdyn/content/article/2009/12/30/AR2009123002049.html>.

5. See Melanie Trottman, *Boeing, NLRB Clash Over Non-Union Plant*, WALL ST. J., June 15, 2011, <http://online.wsj.com/article/SB10001424052702304665904576385980251033122.html>.

6. See Deborah Solomon & Laura Meckler, *Obama Says No, for Now, to Canada Pipeline*, WALL ST. J., Jan. 19, 2012, <http://online.wsj.com/article/SB10001424052970204468004577168892140746430.html>.

7. The Obama Administration decided not to enforce the removal provisions against an estimated population of 800,000 to 1.76 million aliens illegally present in the United States. By taking this step, the Obama Administration effectively wrote into law "the DREAM Act," which has so far failed to pass in Congress. Miriam Jordan, *Immigration- Policy Details Emerge*, WALL ST. J., Aug. 3, 2012, <http://online.wsj.com/article/SB10000872396390443545504577567441019730890.html>. See generally Robert J. Delahunty & John Yoo, *The Obama Administration, the DREAM Act, and the Take Care Clause*, 91 Tex. L. Rev. (forthcoming 2013), available at <http://ssrn.com/abstract=2144031>.

8. Address Before a Joint Session of Congress on the State of the Union, 2010 DAILY COMP. PRES. DOC. 55 (Jan. 27, 2010).

Washington works that have been growing for years.”⁹ National security amounted to little more than an afterthought. President Obama devoted one paragraph each—out of the approximately 110 paragraphs in the speech—to Iraq, Afghanistan, and terrorism.¹⁰ The historical equivalent would have been if President Lincoln had spent most of his first inaugural address discussing the transcontinental railroad and the Homestead Act, rather than the impending dissolution of the Union.

The electorate received President Obama's agenda with a political version of shock and awe. Public approval of President Obama's job performance dropped like a stone, from 67% in January 2009¹¹ to 43% by the end of August 2010.¹² In the public's mind, President Obama sat lower than either of the Bushes or Bill Clinton after their first twelve months in office.¹³ President Obama spent his first two years leading Democrats to pass a stimulus bill that did not stop unemployment from hitting double digits, presiding over bailouts of banks and auto companies, passing command-and-control plans for health care and energy use in the nation, and treating terrorism as a problem best handled by the civilian criminal justice system. His health care bill received no Republican votes for passage,¹⁴ and his stimulus and global warming bills received little Republican support.¹⁵ A majority of

9. *Id.*

10. *Id.*

11. *Presidential Job Approval Center: Obama Job Approval*, GALLUP, <http://www.gallup.com/poll/124922/Presidential-Approval-Center.aspx> (last visited Nov. 13, 2012).

12. *Id.*

13. *Id.*

14. See *Final Results for Roll Call 165*, U.S. HOUSE OF REPRESENTATIVES, <http://clerk.house.gov/evs/2010/roll165.xml> (last visited Nov. 13, 2012); *U.S. Senate Roll Call Votes 111th Congress—1st Session*, U.S. SENATE, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00396 (last visited Nov. 13, 2012).

15. See *Final Results for Roll Call 477*, U.S. HOUSE OF REPRESENTATIVES, <http://clerk.house.gov/evs/2009/roll477.xml> (last visited Nov. 13, 2012) (showing only eight Republican congressmen voting for the global warming bill); *Final Results for Roll Call 70*, U.S. HOUSE OF REPRESENTATIVES, <http://clerk.house.gov/evs/2009/roll070.xml> (last visited Nov. 13, 2012) (showing no Republican congressmen voting for the stimulus bill); *U.S. Senate Roll Call Votes 111th Congress—1st Session*, U.S. SENATE, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00064 (last visited Nov. 13, 2012) (showing only three Republican senators voting for the stimulus bill).

Americans (52% in one recent poll)¹⁶ told pollsters that they disapprove of the President's handling of health care. In August 2012, Americans trusted Republicans more than Democrats on eight out of ten issues, including national security (47% to 37%), the economy (45% to 40%), health care (44% to 41%), immigration (47% to 34%), Social Security (43% to 40%), Afghanistan (42% to 38%), government ethics (40% to 35%), and taxes (46% to 41%); the two parties were tied on education (41% each).¹⁷

The chief problem, however, is not ephemeral political conditions, but President Obama's approach to the presidency. He believes the chief executive should lead broad social, economic, and political changes, but defer to the other branches of government on questions of national security and foreign policy. This upends the Framers' vision of the presidency. They thought the chief executive's powers would expand broadly to meet external challenges while playing a modest role at home.

In fact, President Obama made the same mistake as the first President elected from his party, Thomas Jefferson. When Jefferson won office two centuries ago, John Marshall predicted that he would "embody himself with the [H]ouse of [R]epresentatives."¹⁸ The Chief Justice meant that his political rival (and distant cousin) would govern by combining forces with his party's legislative majorities. This strategy would "increase his personal power," Marshall predicted, but it would lead to the "weakening [of] the office of President."¹⁹

Marshall's observation explains much about Obama's difficult first term. By associating himself so closely with Democratic majorities in Congress, Obama became responsible for their every misstep and overreach. Their reckless overspending and earmarks for liberal pet projects in the stimulus became his own. Their corrupt deal to buy senators' support for nationalized health care became his corrupt deal. Their

16. 52% *Favor Repeal of Health Care Law*, RASMUSSEN REPORTS, http://www.rasmussenreports.com/public_content/politics/current_events/healthcare/health_care_law (last visited Nov. 13, 2012).

17. *Trust on Issues*, RASMUSSEN REPORTS, http://www.rasmussenreports.com/public_content/politics/top_stories/trust_on_issues (last visited Nov. 13, 2012).

18. Letter from John Marshall to Alexander Hamilton (Jan. 1, 1801), in 6 THE PAPERS OF JOHN MARSHALL 46 (Charles F. Hobson ed., 1990).

19. *Id.*

command-and-control approach to global warming, where the government sets limits on energy use and industrial production nationwide, became his command-and-control approach.

Putting the President's prestige and fortune in the hands of Congress not only makes for poor politics, it also upends the Framers' designs for the office. The writers of our Constitution saw Congress, not the presidency, as the main threat to the people's liberties. In a republic, James Madison wrote in *Federalist* 51, "the legislative authority necessarily predominates,"²⁰ because it has access to the "pockets of the people."²¹ He warned, "[I]t is against the enterprising ambition" of Congress "that the people ought to indulge all their jealousy and exhaust all their precautions."²²

Against the "impetuous vortex" of Congress the Framers established the presidency as a counter-balance.²³ Following Madison, Alexander Hamilton wrote in *Federalist* 70 that a vigorous executive would protect against those "irregular and high-handed combinations which sometimes interrupt the ordinary course of justice"²⁴ and provide security against "enterprises and assaults of ambition, of faction, and of anarchy"²⁵ that would emanate from the "humors of the legislature."²⁶ The great threat to the Constitution, Hamilton wrote, was not the President but the "propensity of the legislative department to intrude upon the rights, and to absorb the powers, of the other departments," such as the executive branch, the courts, or the states.²⁷ The *Federalist Papers* do not discuss the veto power as a sword to be used by the President to convince Congress to enact his program. Rather, they discuss the veto power as a way for the presidency to protect its own constitutional authorities and to "furnish[] an additional security against the enactment of improper laws" — laws passed by Congress that would be unfriendly to the public good.²⁸

20. THE FEDERALIST NO. 51, at 322, 310 (James Madison) (Clinton Rossiter ed., 1961).

21. THE FEDERALIST NO. 48, *supra* note 20, at 310 (James Madison).

22. *Id.* at 309.

23. *Id.*

24. THE FEDERALIST NO. 70, *supra* note 20, at 423 (Alexander Hamilton).

25. *Id.*

26. THE FEDERALIST NO. 71, *supra* note 20, at 433 (Alexander Hamilton).

27. THE FEDERALIST NO. 73, *supra* note 20, at 442 (Alexander Hamilton).

28. *Id.* at 443.

President Obama has inverted the presidency in domestic affairs by transforming it from a check into a facilitator of Congress. According to media accounts, the White House supported the nearly \$800 billion stimulus bill but left it up to Congress to fill in the details.²⁹ The law became a grab bag of pork-barrel spending projects to benefit congressmen's home districts, without direction on national priorities or attention to projects ready to provide the quick economic injection needed.³⁰ On health care, press reports suggest that the Democratic loss in the 2010 Massachusetts Special Senate election had prompted the White House to consider compromising with Republicans on a modest reform of insurance markets.³¹ Congressional Democrats scotched the idea in favor of sweeping national regulation of health care, despite evidence that the majority of Americans opposed the proposals for change.³² If he had followed the Framers' original design, President Obama should have used his veto to force Congress to moderate these initiatives.

The second, and even more significant, reversal of the presidency's constitutional function is President Obama's hesitance and even, at times, retreat from its core purpose as the protector of the nation's security. Throughout his first two years, Obama has placed national security issues second to his ambitious plan to remake the American economy and American society. Even as President Obama continually delayed the decision on whether to conduct a surge of 30,000 troops to Afghanistan, he retreated from his predecessor's aggressive strat-

29. See, e.g., Jackie Calmes, *Obama Team Is Seeking Stimulus by New Year*, N.Y. TIMES, Dec. 19, 2008, at A31 ("The Obama plan could end up at about 15 pages, an adviser said, leaving precise legislative language and some details to Congress.").

30. See Dan Eggen & Ellen Nakashima, *Despite Pledges, Stimulus Has Some Pork*, WASH. POST, Feb. 13, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/12/AR2009021203502.html>.

31. See, e.g., Janet Adamy & Laura Meckler, *Obama Retreats on Health*, WALL ST. J., Jan. 19, 2010, <http://online.wsj.com/article/SB10001424052748703405704575015571791474224.html>; Sheryl Gay Stolberg & David M. Herszenhorn, *Obama Weighs Paring Goals for Health Bill*, N.Y. TIMES, Jan. 21, 2010, at A1.

32. See Patricia Zengerle, *Most Americans oppose health law but like provisions*, REUTERS, June 24, 2012, <http://www.reuters.com/article/2012/06/24/us-usa-campaign-healthcare-idUSBRE85N01M20120624>.

egy against al-Qaeda.³³ He remains intent on closing the detention facility at Guantanamo Bay, Cuba, despite the clear and growing evidence that released jihadists have rejoined al-Qaeda and were even linked to the Christmas Day 2009 bombing attempt.³⁴ He announced the end of the tough interrogation of al-Qaeda leaders that had yielded crucial intelligence on their plans, and he transferred the trial of Khalid Sheikh Mohammed and other plotters of the September 11, 2001, attacks from specially created military tribunals to federal civilian court in New York. Sending Khalid Sheikh Mohammed and the "Christmas Day bomber" into the civilian law enforcement system effectively gives the final say on what to do with terrorists to the judicial branch, not the Commander in Chief.

President Obama's inversion of the Framers' presidency has also included attempts to limit the vigorous constitutional executive in foreign affairs. For example, the Obama Administration's striking claim that the Libya conflict was not a war³⁵ would have surprised Col. Gaddafi, as the United States was trying to kill him during the conflict. President Obama delayed U.S. intervention so that he could get United Nations approval, which the current administration thought was more important than getting approval from Congress.³⁶ The Framers likely never contemplated the remarkable event of a President trying to limit his own freedom of action by tying the fate of our national policy to an organization that is not part of our political system.

Just as the presidency was meant to be retiring at home, it was designed to be vigorous in opposite measure abroad. As Hamilton wrote, the executive was to be that part of the government to respond with "[d]ecision, activity, secrecy, and dispatch" to unforeseen crises and emergencies, the most dangerous of which

33. See Joby Warrick & Karen DeYoung, *Obama Reverses Bush Policies On Detention and Interrogation*, WASH. POST, Jan. 23, 2009, <http://www.washingtonpost.com/wpdyn/content/article/2009/01/22/AR2009012201527.html>.

34. See, e.g., DEFENSE INTELLIGENCE AGENCY, FORMER GUANTANAMO DETAINEE TERRORISM TRENDS—UPDATE (2009); John F. Burns, *Terror Inquiry Looks at Suspect's Time in Britain*, N.Y. TIMES, Dec. 29, 2009, <http://www.nytimes.com/2009/12/30/world/europe/30nigerian.html>.

35. See Charlie Savage & Mark Landler, *White House Defends Continuing U.S. Role in Libya Operation*, N.Y. TIMES, June 15, 2011, at A16.

36. Administration lawyers argued that the U.S. mission in Libya was constrained by a U.N. Security Council Resolution but not the War Powers Resolution. See *id.*

was war.³⁷ “Of all the cares or concerns of government,” Hamilton wrote in *Federalist* 74, “the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand.”³⁸ In his great *Democracy in America*, Alexis de Tocqueville observed in the 1820s that the presidency was a cipher that would become a great office only after foreign affairs became important to the United States.³⁹ The Framers expected the executive branch to come to the fore in foreign policy.⁴⁰

The conduct of foreign policy is the only reason why it is necessary to have an executive independent from the legislature. The Framers could have created a parliamentary system of government where the majority party in the legislature appoints a cabinet to execute its policies. Yet they thought America ought to have something different in the realm of foreign policy because of its unique characteristics. Foreign policy is unpredictable: It is very difficult for the legislature to pass laws in anticipation of what is going to happen in foreign affairs. There is more advantage for one person to act with what the Framers called “[d]ecision, activity, secrecy, and dispatch,”⁴¹ because the national danger, the harm to the country, might be greater. The public might be willing to accept more errors by a single person in exchange for his ability to act more quickly and decisively. As Alexander Hamilton in *Federalist* 74 observed, war is the greatest challenge of these challenges; and so war is that area of human life which is best suited to administration by the executive.⁴²

It is possible to have a government by large deliberative bodies, such as the parliamentary systems of European countries. But the trade-off is that it is very hard for legislatures to act quickly. They arguably may make fewer mistakes: The more people who participate in a decision, the less likely they are to make an error. The Constitution creates more checks in domestic than in foreign affairs; bicameralism and presentment make it harder for the federal government to act domestically in part

37. THE FEDERALIST NO. 70, *supra* note 20, at 472 (Alexander Hamilton).

38. THE FEDERALIST NO. 74, *supra* note 20, at 477 (Alexander Hamilton).

39. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 125–26 (J.P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1835).

40. See, e.g., JOHN YOO, *CRISIS AND COMMAND: THE HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH* 47 (2009).

41. THE FEDERALIST NO. 70, *supra* note 20, at 424 (Alexander Hamilton).

42. See THE FEDERALIST NO. 74, *supra* note 20, at 500 (Alexander Hamilton).

because there is no great harm from slowness in domestic affairs. If the federal government fails to act, there is no vacuum or absence of public regulation. The States provide a pre-existing background of regulation, especially the great sea of state common law. In foreign affairs, however, there can be a high cost to inaction, and there is no safety net provided by the States, which are constitutionally incapable of acting abroad. There is an advantage to acting faster.

Low approval ratings for presidents who have proceeded too deferentially toward the legislature are not just a modern phenomenon. Historically, most presidents that we regard as mediocre deferred too much to Congress in foreign affairs and did not exercise sufficiently vigorous executive power. According to a poll of 300 history and legal scholars asking them to rank presidents conducted by the Federalist Society and *The Wall Street Journal*,⁴³ the worst President, by a clear margin, is James Buchanan.⁴⁴ Buchanan served as President immediately before Lincoln.⁴⁵ He was one of our most accomplished candidates for President: Representative and Senator from Pennsylvania, Ambassador to Russia and Great Britain, and Secretary of State. He did everything one is supposed to do to prepare for the presidency.⁴⁶ Yet he thought the President had no right to stop secession to head off the Civil War.⁴⁷

James Madison is another example of a mediocre president. Madison was probably one of the most intelligent men to occupy the Oval Office, but he also believed in executive deference to the legislature, particularly in foreign policy.⁴⁸ As a result, he allowed the United States to be drawn into the War of 1812, arguably the most short-sighted American war, from a strategic

43. JAMES LINDGREN ET AL., *RATING THE PRESIDENTS OF THE UNITED STATES, 1789-2000: A SURVEY OF SCHOLARS IN HISTORY, POLITICAL SCIENCE, AND LAW* (2000), available at <http://www.fed-soc.org/publications/details/ratings-the-presidents-of-the-united-states-1789-2000-a-survey-of-scholars-in-history-political-science-and-law>.

44. *Id.* at 8.

45. See JEAN H. BAKER, *JAMES BUCHANAN* 1-7 (2004).

46. *Id.*

47. YOO, *supra* note 40, at 205-07.

48. *Id.* at 138-43.

perspective.⁴⁹ Prior to the war, the United States pursued a policy of neutrality between England and France and profiting from trade with both. Despite this, Madison decided to declare war against the only country that had a navy and troops on the U.S. border,⁵⁰ primarily because many in the legislature wanted to invade Canada.⁵¹ The war was a disaster: U.S. efforts to invade Canada were repulsed, and the British took the U.S. capital and burned it to the ground.⁵² Had the British invasion of New Orleans succeeded, the European powers would have pinned the United States to the eastern seaboard for decades. The failure of the War of 1812 highlights the disaster that results from congressionally led action in the area where the Framers felt that a vigorous executive, not a deferential one, should govern.

President Obama can take a lesson from his political hero and the last truly great Democratic President, Franklin D. Roosevelt. If World War II had not come, President Roosevelt might have ended up an average President at best. His New Deal, we now know, did not end the Great Depression and may even have prolonged it.⁵³ His efforts to drive through more radical changes in national regulation, accompanied by an attack on the Supreme Court and resisting Southern Democrats, wrecked his own political party in the process.⁵⁴ Similarly, President Obama took office in the midst of a dire economic crisis but allowed the congressional wing of his party to press for cures that went well beyond the disease: the nationalization of health care; the \$800 billion stimulus; the bailout of auto companies and banks; the tripling of the budget deficit from just under \$500 billion in 2008 to approximately \$1.5 trillion in 2010; climate change legislation; and on and on. President Obama has not lacked in ambition, but his presidency will end in failure if his expansion in powers does not match the demands of the times. The most salient examples of presidential failure have emerged when a President has refused to rise to a great national crisis, but fiascos have also oc-

49. See, e.g., DONALD R. HICKEY, *THE WAR OF 1812: A FORGOTTEN CONFLICT* 302–03 (1989).

50. *Cf. id.* at 11–13.

51. *Id.* at 26.

52. *Id.* at 302–03.

53. YOO, *supra* note 40, at 286–88.

54. *Id.* at 272–75.

curred when a President overreacted to events that demanded no expansion of executive power.

President Roosevelt joined the pantheon of Presidents Washington and Lincoln as one of our three greatest Presidents anyway. He took his deserved place not because of the New Deal, but because of his foresight and preparation for the existential threat posed by Adolf Hitler and the Axis powers. As President Roosevelt himself said, "Dr. New Deal" had to give way to "Dr. Win-the-War."⁵⁵ Our three greatest Presidents saw the nation through the wars of its birth (President Washington), rebirth (President Lincoln), and survival (President Roosevelt). Most of our other great chief executives guided the United States through the wars that followed (Presidents Truman, Eisenhower, and Reagan), or put it on its path to expansion through conquest (Presidents Jackson, Polk, and Theodore Roosevelt). Presidential success has ultimately been judged more on the balance beam of foreign affairs than in the partisan arena of domestic policy.

Obama should follow the real lesson of President Roosevelt and our other great Presidents and turn away from the failures of health care reform and economic centralization. He will be remembered if he follows through in Iraq, pursues al-Qaeda to its end, and wins victory in Afghanistan. If he loses in war to advance nationalization at home, he may well take his place in presidential history alongside President Carter or President Johnson and their failed presidencies, rather than with the successful administrations of President Roosevelt or President Reagan.

55. YOO, *supra* note 40, at xiii.