

**INVENTING THE AMERICAN PRESIDENCY.** Edited by Thomas E. Cronin.<sup>1</sup> Lawrence, Kansas: University Press of Kansas. 1989. Pp. xii, 404. Cloth, \$35.00; paper, \$12.95.

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Professor Thomas Cronin, one of the leading scholars of the presidency, has gathered fourteen essays from twelve different contemporary authors into *Inventing the American Presidency*. He has also included *Federalist Papers* 69-73 and relevant sections of the Constitution. Half of the essays have appeared in print previously. However, the book is not a random collection of essays on the presidency. It is designed to provide a comprehensive account of the creation of the presidency by examining the Constitutional Convention, the debates surrounding the Convention, and the precedents set by the first presidents. The book is divided into four essays on the structure of the presidency (each one treating a different element of its design), five on some major powers of the presidency, and essays on each of the first four presidents plus Hamilton. The book concludes with Hamilton's defense and explanation of the presidency from the *Federalist*. The result is a remarkably useful and enlightening collection, in which the many disagreements among the authors serve to enhance the reader's understanding of the issues in dispute among the framers of the presidency.

In *Federalist* 70 Hamilton writes, "There is an idea, which is not without its advocates, that a vigorous executive is inconsistent with the genius of republican government." Hamilton then attacks, and contemptuously dismisses, the view that republican governments do not need a strong executive, concluding that "all men of sense" have to agree "in the necessity of an energetic executive." Although in this way he converts the original idea from an indictment of executive power to a charge against republican government, Hamilton nevertheless acknowledges the difficulty of reconciling republican government and executive energy. And in spite of the fact that Hamilton proceeds to defend republican government by arguing that the Constitution *has* reconciled republicanism and an energetic executive, the tension between the two continues to animate the best political and scholarly discussions of the American presidency, including those in *Inventing the American Presidency*.

The essays in the book on the structure of the presidency are

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generally careful accounts of the ideas and causes that led to the formation of particular aspects of that structure. Michael Nelson shows how the Convention arrived at the age, residency, and citizenship requirements for the president; Schlomo Slonin shows that the electoral college was not designed by accident or to thwart the majority, but to reconcile many different pressures of theory and practice; Thomas Cronin, in discussing the tenure of the president and his reeligibility, is particularly good at bringing out the connection between the form of the office and the ends it is meant to serve; and John Labovitz shows why impeachment remains a rare and generally ineffective check on presidential power. It is interesting, however, that the real clashes in the book begin when it turns from the issues of static structure to those of the powers of the president and the actions of presidents. It is in its dynamism that the presidency reveals its colors.

The view criticized by Hamilton in *Federalist* 70, that republican theory requires rejection of a vigorous executive, is most clearly represented in this collection by Ralph Ketchum, writing on Madison's presidency. Ketchum argues that Madison's weakness, indecision, and hesitation as president must be seen in a broader perspective to represent the triumph of a properly republican conception of the office. The executive, argues Ketchum, should "take its lead in policy from the legislature and be the *executor* of its will." The president is under the law and the law is made by the legislature. Madison's acceptance of unfortunate appointments forced on him by Congress, his failure to remedy Congress's inadequate preparations for war or to arouse the people's fighting spirit, his patient endurance of nearly treasonable opposition, and his scrupulous regard in wartime for civil liberties represent policy failures. But, Ketchum holds, they also reflect principled adherence to the proper role of a republican executive subordinate to the law, the legislature, and the people. And Madison's example, if heeded, might have saved us from the imperial excesses of Richard Nixon. Ketchum concludes that it is better to endure bad policy than to accept monarchical or tyrannical principles.

Ketchum's view is not as naive as it may appear, but one wonders if he fully understands the choice he advocates. He sees a kinship between Lincoln's and Madison's presidencies, implying that if we accept the Madisonian view of the presidency, we can still have our Lincolns. But he can establish this kinship only by ignoring the means used by Lincoln to achieve his noble ends of preserving the Union and putting slavery on the road to extinction. Lincoln not only acted outside of laws passed by Congress, but publicly stated

that he regarded himself as entitled even to violate provisions of the Constitution if that were the only way to save the Union. In this respect Lincoln seems less a kin of Madison than of the dreaded Nixon. One can draw some distinctions of degree between Nixon's ends and Lincoln's, but the fact remains that the rule of law may stand in the way of good as well as of evil.

Ketchum's view is largely shared by David Adler, who contributes essays on the powers of war-making and pardoning. Adler maintains that the president is given no power to initiate military hostilities: the war-making power belongs to Congress. And he holds that the framers unanimously held this view. Accordingly, Adler believes that the War Powers Resolution, which grants the president such power in limited situations, unwisely and unconstitutionally *expands* the constitutional powers of the president.

Adler is right, of course, that the power to declare war was, and was understood to be, given to Congress, but he underestimates the ambiguity of that grant. When discussing the Pacificus-Helvidius debate, for example, he concludes that Hamilton and Madison agree in the decisive respect because both acknowledge that the power to commence war is in Congress. But he ignores the implications of Hamilton's argument that the power to declare war is an executive power given to Congress, and thus to be construed narrowly. If so, while it is technically correct that only Congress can declare war, the president might act with full constitutional warrant to place Congress in such a situation that it had no choice but to declare war, as Hamilton notes. And if it is an executive power, perhaps associated with other executive powers and requiring quick and secret discretion in particular circumstances, the argument that Congress might delegate some aspects of this power is enhanced.

Consistently with the view that the Constitution establishes a strictly limited executive power, Adler argues that the president's pardoning power is an anomaly because it is legally unlimited. Full of indignation at the Nixon pardon, and fearing that other guilty Republicans may be pardoned in the future, he concludes that the Constitution ought to be amended to give Congress the power to veto presidential pardons. Yet Adler is aware of the powerful argument that an unbridled and conclusive pardoning power in the president might be essential in cases of insurrection in order to quell the unrest as peacefully and quickly as possible. The possibility of overturning a presidential pardon would allow such situations to continue to fester as a possibly contentious Congress delayed action, even if it did not overturn the pardon. And he perhaps underesti-

mates the political, as opposed to the legal, constraints on the president's pardoning power—constraints familiar enough to both Reagan and Bush.

Bruce Miroff suggests that John Adams combined the strong and weak presidency in a peculiar mix: the executive should be strong, but not energetic. Adams favored a president who has all of the prerogative power of the British monarch but who would use this power only in a nonpartisan, defensive, and sparing manner. The moderation of this president would come from his disinterestedness and love of fame, rather than from constitutional restraints. Miroff is not impressed by Adams's picture of a virtuous president and concludes that Adams was wrong in believing that the presidency could be freed from partisanship or that it was safe to give it regal powers. But, again with the imperial presidency in mind, he likes the idea that the president should not do much.

Glen Phelps shows us a more successful combination of the strong and the deferential presidency in Washington, who used his initiative and virtue to elevate the rule of law represented by the Constitution.

Robert Spitzer's essay on the veto power moves us into sight of the energetic executive. He argues that the proper use of the veto power is not limited to defense of the presidency and the Constitution, as many supposed in the early years of the republic. Instead, he envisions the veto as a tool designed to give the president a role "in actively shaping legislation."

Perhaps the most expansive theory of presidential power is the idea that he has a prerogative power, a constitutional right to act against the law for the sake of the common good. In investigating this claim, Robert Scigliano finds the concept neither in John Locke (where scholars often say they find it) nor in the American founders (except possibly in regard to the pardoning power). Both Locke and the founders do acknowledge that it might be proper for the executive to act according to the spirit, rather than the letter, of the law. Scigliano suggests that one must look to Lincoln to find a justification of prerogative power in the president.

Yet Scigliano also notes that the founders did recognize the necessity to sometimes act against the law. As Jefferson wrote, "The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation" than "a strict observance of the written laws". In such circumstances one should act and risk the consequences of illegality, throwing oneself on the mercy of Congress or the people to forgive or vindicate his actions. In Jefferson's view, this power should not be explicitly conferred: to ac-

knowledge the need for such power in the Constitution would risk its use in times when it was not truly needed.

In his article on Jefferson, Gary Schmitt observes that Hamilton might respond to Jefferson by noting that extra-constitutional actions may be necessary fairly frequently (as, indeed, they apparently were during Jefferson's presidency). A precedent for acting outside the Constitution then becomes established, and undermines respect for a Constitution seen to be inadequate for the exigencies men must face. It is better, in Hamilton's view, for the Constitution to authorize all the executive powers that are in fact sometimes necessary.

In a suggestive essay on Hamilton, John Koritansky argues that Hamilton's energetic executive has won less than a complete victory in American constitutional history because it contains within it a profoundly illiberal passion at odds with Hamilton's general understanding of government. On the one hand Hamilton grasped more clearly than other founders the non-partisan aspirations of modern liberalism: government has no public purpose other than preventing "social measures whereby one factious interest gains at the expense of the whole." Good administration, not the proper partisan choice, becomes the end of government.

On the other hand, good administration requires that "the 'first characters of the Union' be drawn to public service by the natural 'ruling passion of the noblest minds.'" But to regard governing itself as noble—more noble than self-interest, and therefore attractive to such minds—is to forget that the purpose of government is merely to serve the private self-interests of the citizens. At the heart of Hamilton's energetic executive we find the illiberal notion that the development of the political virtues of the rulers is the purpose of the regime, and that ruling is a prize to be won, not a burden to be borne.

But is this contradiction to be found in Hamilton's thought? And is American constitutionalism as opposed to the cultivation of virtue as Koritansky suggests? On the basis of *Federalist* 35, Koritansky argues that Hamilton understood capitalists to be the true representatives of the American people because their pursuit of material wealth reflected the non-partisan pursuit of material well-being in Americans as a whole. It may be true that Hamilton promoted capitalists and capitalism because of their tendency to undermine all established classes, especially those of inherited wealth. But there is little evidence that Hamilton thought that the final purpose of government was to foster or protect private gain. Koritansky overlooks the fact that capitalists are not presented in *Federalist*

35 as the representatives of the American people, but as the representatives of one set of economic interests. In addition to the merchants, the legislature will consist of middling farmers and, even more importantly, "men of the learned professions" will hold the balance of power. It is they, and not the capitalists, who form "no distinct interest" in society according to Hamilton.

We should also remember that Hamilton is not the only author to praise ambition in the *Federalist*, as No. 51 makes clear. Is Hamilton's praise for the nobility of ruling more dangerous to, or incompatible with, American constitutionalism than Jefferson's pretense of a weak president combined with the reality of extra-constitutional adventures?

Thomas Cronin believes that the strong Hamiltonian executive has triumphed in modern practice. If Hamilton looked to the triumph of the "noblest minds," we may doubt that this has occurred. Perhaps even the strength of the modern executive is not fully Hamiltonian, as Koritansky implies. And that strength sometimes seems overshadowed by an even greater assertiveness in Congress and the courts. The balance of executive energy and subordination to the rule of law cannot be seen apart from that balance in the government as a whole.

**LIBERAL NEUTRALITY.** Edited by Robert E. Goodin<sup>1</sup> and Andrew Reeve.<sup>2</sup> London and New York: Routledge. 1989. Pp. 219. Cloth, \$49.95.

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That the state must be "neutral" among its citizens and their various views of the "the Good" is an axiom of a popular conception of liberalism, a conception held by, among others, John Rawls,<sup>4</sup> David Richards,<sup>5</sup> Bruce Ackerman,<sup>6</sup> and Ronald Dworkin.<sup>7</sup> To the extent that this conception of liberalism is enshrined in the Constitution according to one's favorite theory of interpretation, as, for

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  4. J. RAWLS, *A THEORY OF JUSTICE* (1971).
  5. D. RICHARDS, *FOUNDATIONS OF AMERICAN CONSTITUTIONALISM* (1989); D. RICHARDS, *TOLERATION AND THE CONSTITUTION* (1986).
  6. B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980).
  7. Dworkin, *Liberalism*, in *PUBLIC AND PRIVATE MORALITY* 113-43 (S. Hampshire ed. 1948).