

## THE PRESIDENT AND CONGRESS: SEPARATION OF POWERS IN THE UNITED STATES OF AMERICA

### ABSTRACT

Although the framers of the *Australian Constitution* adopted many features of the *United States Constitution*, they rejected the separation of legislative and executive power in favour of responsible government in a parliamentary system like that of the United Kingdom. In doing so, Australians depended on existing conventions about the nature of responsible government instead of specification of its attributes in constitutional text. The *United States Constitution* contains detailed provisions about separation of powers, but unwritten conventions have produced some central features of American government. This article reviews conventions developed by Congress that constrain Presidents in the domestic sphere with regard to the appointment of executive and judicial officers and the funding of the federal government. The article then reviews conventions developed by Presidents that liberate them in the conduct of foreign relations and war making. These aspects of the American experience may aid the analysis of problems of executive power under the *Australian Constitution*.

### I INTRODUCTION

Like our peoples, our constitutions are cousins. Ever since the framers of the *Australian Constitution* adopted some features of the *United States Constitution* (especially federalism), the development of constitutional law in the two nations has proceeded along similar although not identical paths.<sup>1</sup> This article considers a feature of the *United States Constitution* that Australia did *not* adopt: separation of the legislative and executive branches of government. Instead, our framers adopted the model of responsible government as it then existed in the separate Australian colonies and in the United Kingdom. This combination produced an innovative form of government that is deeply interesting to an American observer.

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<sup>1</sup> For an excellent comparative analysis, see Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis* (Hart Publishing, 2011).

In order to describe and analyse some features of American separation of powers that should especially interest Australians, I shall compare them to aspects of both the Australian and British systems. In that sense my article might be titled ‘Three Constitutions Compared’ in homage to Sir Owen Dixon’s great essay, which attributes the strength of our ‘community of interest’ to sharing the common law tradition that originated in England.<sup>2</sup> That tradition explains much of what I will say in these pages. The particular comparisons that this article makes flow from our shared common law tradition, because the generation of conventions that form constitutional law in all three nations occurs through a common law process of setting precedents that attain binding effect through acceptance by the actors in the political systems, and by the peoples of the three nations.

It is a commonplace that while the constitutions of the United States and Australia are written, that of the United Kingdom is not. This is true in a sense, but it is highly misleading. For the constitution of the UK *is* written down, but in many places — in important statutes, in judicial decisions and above all in the history books.<sup>3</sup> Similarly, the constitutions of the US and Australia have many important unwritten features. Australians will not be surprised by this observation because the central feature of your system, responsible government, goes almost entirely unmentioned in your constitution, except for such indirect references as the requirement that Ministers be Members of Parliament.<sup>4</sup> Therefore, one cannot interpret the *Australian Constitution* without an understanding that it incorporates traditions of responsible government that antedated it.<sup>5</sup>

Surprisingly, many Americans *would* be surprised by my assertion that critical aspects of the *United States Constitution* are unwritten — constitutional discourse in the US, at both the legal and political levels, often proceeds as if the hoary text were all that matters. (The current debate in the US about ‘original intent’ interpretations of the *United States Constitution* is one example of this tendency.)<sup>6</sup> Perhaps the difference in national attitudes toward constitutional text results from the fact that in the US the text preceded the development of unwritten practices that interpret it, whereas in Australia the text assumes the existence of well-developed, pre-existing practices. In any event, it is the history of the American government that has shaped the separation of powers as it operates today.

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<sup>2</sup> Dixon’s ‘Two Constitutions Compared’ is in Woinarski (ed), *Jesting Pilate and Other Papers and Addresses* (Sydney Law Book, 1965) 100.

<sup>3</sup> Peter Leyland, *The Constitution of the United Kingdom* (Hart Publishing, 2nd ed, 2012).

<sup>4</sup> *Australian Constitution* s 64. For an illuminating discussion of the unwritten aspects of the *Australian Constitution*, see Helen Irving, *Five Things to Know About the Australian Constitution* (Cambridge University Press, 2004).

<sup>5</sup> For Australian constitutional history, see John Williams, ‘The Emergence of the Commonwealth Constitution’ in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 1.

<sup>6</sup> For an example of this approach, see Antonin Scalia, *A Matter of Interpretation* (Princeton University Press, 1997).

Divergence between the American and Australian constitutions is partly due to a historical accident. At the American founding in 1787, responsible government had not yet developed in the UK. Instead, as the American framers saw Britain, a king ruled arbitrarily through his Ministers, dominating Parliament partly through what was called ‘corruption’, the awarding of lucrative offices to Members of Parliament in an effort to secure their allegiance to the Crown.<sup>7</sup> The American system of separated legislative and executive powers was a reaction to this perception — the branches were kept apart to prevent executive domination of the legislature.

As events in the UK proved in succeeding decades, however, a system of blended powers can be dominated by either partner. By approximately 1835, Britain had achieved ministerial responsibility to the House of Commons so that the practical control of government could center in Parliament not the Crown. The developing Australian colonies also followed that path and codified the model of responsible government at the time of Federation. Eventually the power of the Prime Minister grew sufficiently in both the UK and Australia to provoke persistent complaints that the government dominated Parliament overmuch. It appears that executive power has a tendency to resist control.

Thus, proceeding by somewhat different routes, all three nations have developed powerful executives. Let us turn to the features of the *United States Constitution* that remain distinctive. It is elementary that the American constitutional system relies on both the separation of powers and checks and balances that blend the branches partially in hopes of achieving an overall balance of power. The incompatibility clause in art I of the *United States Constitution* guarantees the separation by forbidding anyone to serve in both the executive and legislative branches at the same time, although they may move from one to the other.<sup>8</sup> This provision has forestalled evolution of the American government toward a parliamentary system.

Several of the *Constitution’s* checks have assumed great importance in modern American government.<sup>9</sup> First, the President nominates principal executive officers and judges subject to confirmation by a majority vote of the Senate.<sup>10</sup> The President may not, as in a parliamentary system, simply choose Ministers and judges who are minimally acceptable to the majority party. Second, a Bill becomes a statute only after gaining support from three separate bodies having different constituencies: the House of Representatives, with its local constituencies; the Senate, representing

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<sup>7</sup> Harold H Bruff, ‘The Incompatibility Principle’ (2009) 59 *Administrative Law Review* 225, 231–32.

<sup>8</sup> *United States Constitution* art I § 6: ‘no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office’.

<sup>9</sup> For more development of the points made in the remainder of this Introduction, see Harold H Bruff, *Balance of Forces: Separation of Powers Law in the Administrative State* (Carolina Academic Press, 2006).

<sup>10</sup> *United States Constitution* art II § 2: ‘he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, ... Judges of the Supreme Court, and all other Officers of the United States’.

the states; and the President, who has a national base.<sup>11</sup> This scheme was supposed to limit the power of Congress and to ensure that legislation served the broad public interest rather than narrow special interests.

The framers gave the President the additional check of a qualified veto, which can be overridden by 2/3 majorities in both houses of Congress.<sup>12</sup> In practice, a presidential veto is very difficult to override, because Presidents can almost always muster the support of a third of one house, whereupon they prevail. Presidents cannot ignore Congress, however. As in the British and Australian systems, Congress received the power of the purse, the discretion to grant or withhold ‘supply’ as a primal control on the executive.<sup>13</sup>

The coexistence of the President’s veto and Congress’ power of the purse appears to be a prescription for deadlock, but for most of American history it has brought the branches together. This is because when Congress wants to legislate they must craft bills that will avoid the President’s powerful veto, and when the President wants funding, he or she must come to Congress, which can prevail by doing nothing.

The American framers did not believe in political parties. Instead, they envisioned a republic of civic virtue, in which elected officials would pursue the general public interest in a nonpartisan fashion.<sup>14</sup> This dream was hopelessly naïve — the forerunners of the two modern American parties were in place within a decade of the founding. But the *United States Constitution*, reflecting the dream of the framers, nowhere mentions parties and makes no provision for them.

It soon became clear that party politics could alter the framers’ scheme in either of two fundamental ways. If the same party held the presidency and both houses of Congress, legislation might flow rapidly, almost unimpeded by the formal separation of powers, mimicking a parliamentary system in practice. The famous ‘hundred days’ of New Deal legislation under President Franklin Roosevelt is an example.<sup>15</sup> But if different parties held the presidency and one or both houses of Congress, deadlock could ensue in these periods of divided government. For most of the past 45 years, the US has experienced divided government and recurrent instances of deadlock. Similarly, Australia’s experience of deadlock in 1975 stemmed from having a system of responsible government but two houses having different compositions, so that when the Senate refused supply there was no easy resolution of the crisis, leading to the Governor-General’s controversial dismissal of the Whitlam Government.<sup>16</sup>

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<sup>11</sup> Ibid art I § 7.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid art I § 8.

<sup>14</sup> Akhil R Amar, *America’s Unwritten Constitution* (Basic Books, 2012) ch 10.

<sup>15</sup> Johnathan Alter, *The Defining Moment* (Simon & Schuster, 2007).

<sup>16</sup> George Winterton, ‘1975: The Dismissal of the Whitlam Government’ in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 229.

## II THE PRESIDENT 'BOUND'

Now let us turn our gaze to the contemporary situation in the US as it is affected by the separation of powers and conventions that have developed under the party system. There is an apparent paradox in how American government functions — an inconsistency between what I will call the 'President bound' in domestic matters and the 'President unbound' in foreign affairs. Domestically, a deadlocked Congress with a Republican House and a Democratic Senate teeters constantly on the brink of inability to pay the nation's bills and fund its government. Nor can the President readily induce the Senate to confirm executive and judicial nominees. By contrast, in foreign affairs Presidents conduct the war on terror with the vigour that has produced the death of Osama bin Laden, secret computer warfare against nations like Iran and the use of drones to kill al Qaeda leaders wherever they may be found. It is surely true that in most modern democracies, the government can act with more freedom in foreign than domestic matters, but why is the divide so stark in the US today?

The answer lies in the unwritten *United States Constitution*, in the evolution of conventions that have favoured Presidents in some ways, and disfavoured them in others. I define a convention as 'a rule of behaviour accepted as obligatory by those concerned in the working of the constitution'.<sup>17</sup> A convention, then, is binding in the simple sense that everyone will abide it, whether or not it is legally enforceable in any court. This distinction about enforceability is important — the conventions I discuss here are almost all unenforceable in court — they are 'political questions' that are left to the political branches of government to resolve. They are, nevertheless, binding in the sense that informal sanctions within the political system enforce them quite effectively.

As the constitutional history of Chapter II of the *Australian Constitution* demonstrates, a convention can supplement or even contradict the apparent meaning of text. The same is true in the United States. The critical feature of these conventions is that they have been developed by the legislative and executive branches themselves, and not by the courts. It may dismay but cannot surprise the reader that conventions developed by Congress have favoured legislative power; conventions developed by Presidents have favoured executive power. We expect judicial development of the common law to display the neutrality that we require of judges, but it may be too much to ask to expect elected political leaders to develop their own traditions neutrally.

First, the 'President bound'. Here the text of the *Constitution* has combined with some traditional practices and contemporary politics to hamstring the President. The essential problem is that pertinent provisions of the constitutional text carry offsetting implications, allowing the evolution of conventions that have favoured

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<sup>17</sup> Kenneth Wheare, *Modern Constitutions* (Oxford University Press, 1951) 179 quoted in Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Clarendon Press, 1984) 7. I believe this to be a standard ('conventional') definition of convention. See Ian Killey, *Constitutional Conventions in Australia: An Introduction to the Unwritten Rules of Australia's Constitutions* (Australian Scholarly Publishing, 2009).

some textual provisions at the expense of others — and at the expense of presidential power. Article I of the *United States Constitution* creates and empowers Congress. Quite sensibly, art I provides that a majority of each house constitutes a quorum for doing business, such as legislating.<sup>18</sup> This apparent entrenchment of majority rule certainly accords with conventions about the conduct of collective decision-making bodies that antedate the *United States Constitution*. But it also authorises each house of Congress to make rules for its internal operations.<sup>19</sup> This is also a sensible and necessary provision, but it has allowed the Senate to develop the convention of the filibuster, which deeply undermines the precept of majority rule.

The ordinary definition of a filibuster is an individual Senator's engagement in extended debate in an effort to stop passage of a Bill.<sup>20</sup> In early American history the filibuster was used only rarely, and was confined to contexts of high importance or principle, for example in the great debates over slavery. By the end of the 20th century, however, its use had expanded so much that it had become an obstacle both to ordinary legislation and to routine nominations of executive and judicial officers. The rules of the Senate enshrine the filibuster by allowing the closure ('cloture') of debate only if 60 of the 100 Senators concur. Consequently, the Democratic Party, which currently holds 56 seats in the Senate, has been unable to control the legislative process without Republican support, which is rarely forthcoming. In the limited context of confirmation of executive officers and judges of the lower federal courts, the Senate has recently altered its rules to provide that a majority vote prevails. This is a heartening development, but it leaves the filibuster in place for legislation and Supreme Court nominations.

I believe that the filibuster is unconstitutional, because the American political precept of majority rule should guide interpretation of art I.<sup>21</sup> It is unlikely, however, that the Senate will abandon it entirely, notwithstanding the Senate's recent willingness to confine its application. Senators are aware that today's majority can become tomorrow's minority, and are unwilling to give up the safeguard for legislative minorities that the filibuster provides. Nor will the other branches of government invalidate the filibuster. The President lacks the internal leverage in Congress that would exist in a parliamentary system. Party loyalties to the President within Congress are offset by institutional resistance to executive meddling. American courts have regarded most issues concerning the internal processes of Congress as 'political questions' that are not fit for judicial resolution.<sup>22</sup>

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<sup>18</sup> *United States Constitution* art I § 5: 'a majority of each [House] shall constitute a Quorum to do Business'.

<sup>19</sup> *Ibid*: 'Each House may determine the Rules of its Proceedings'.

<sup>20</sup> The much larger House of Representatives (435 members) operates under majority control, enforced by a powerful Rules Committee that governs debate.

<sup>21</sup> Such an interpretation would leave ample scope for the rulemaking power of the houses, which could regulate the flow of legislation and other matters in many ways consistent with majority rule.

<sup>22</sup> Peter M Shane and Harold H Bruff, *Separation of Powers Law* (Carolina Academic Press, 3rd ed, 2011) ch 2.

In consequence, in the United States today, even when a party holds only one of the houses of Congress, it can dictate policy to the other house and President within broad limits. Because revenue Bills must originate in the House (as in a system of responsible government) and spending Bills ordinarily do so, that body always holds ultimate control over supply. This is a salutary feature, but in the American system the Senate has full power to amend or reject funding bills. If the Senate always operated by majority rule, the American legislative process would be much less vulnerable to a minority in that body.

The current gridlock is greatly exacerbated by a new phenomenon in American politics: the presence of a large numbers of legislators who are willing to stop the federal government as a whole from performing its essential functions. Lord John Russell once remarked that any political system that vests final decisional authority in more than one entity relies on mutual forbearance if it is to work.<sup>23</sup> American politics has lost that forbearance, which traditionally relied on both political parties' desire for the government to function and their willingness to compromise to achieve that end. In recent times, however, the American right wing, partly embodied by the Tea Party, is perfectly willing or even anxious to dismantle many current functions of the federal government in pursuit of a hazy 19th century Arcadia of sharply limited government that exists in their minds. They are also willing to have the United States default on its debt if that is the price of the severe spending cuts they favor. The recent controversy over deep mandatory spending cuts, or 'sequesters', which were enacted as the price of authority to extend the debt limit, is an example of this spirit of the wrecking ball.

A convention that is really a version of the filibuster has stymied presidential nominations to staff the executive and judiciary — and may continue to do so in some cases notwithstanding recent reforms to the filibuster rule. Here the supposedly limited check of Senate confirmation has expanded to make each Senator as powerful as the President. Because each Senator represents a state constituency, Senators have always expected to have a voice in the selection of all state-based federal officers, such as local federal judges or customs officers. Over the years, Presidents sparred with powerful Senators to determine which branch would control patronage. It was a game played with no rules other than power politics.

The Senate, having powerful incentives to maximise the political gains for incumbent Senators that flow from controlling patronage, quickly developed the practice of 'senatorial courtesy', by which the entire Senate will defer to a single member's objection to a nominee. This meant that senatorial control of the selection of local federal officers was always potentially present and was often the reality, unless the President's own party powers could counteract it. Senators place 'holds' on pending nominations to force the administration to yield to their demands on wholly unrelated matters. This leverage is so powerful that it is easy to understand why the Senate as a whole is unlikely to reform the practice, no matter how much damage it does to the nation. As with the filibuster, Presidents and courts cannot force reform.

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<sup>23</sup> Quoted in Woodrow Wilson, *Congressional Government* (Houghton, Mifflin, 1885) 163.

It remains to be seen whether the courtesy convention will negate filibuster reform for all statebased federal officers.

Recent Presidents have responded to domestic gridlock by using the tools that are available to them. In particular, they tap the reservoir of administrative discretion that is contained in the existing body of statutes. For a long time, Presidents who lacked the legislative support needed to obtain new statutory authority have issued executive orders to the agencies, instructing them to take particular actions that are neither clearly authorised nor clearly forbidden by existing statutes.<sup>24</sup> The use of this workaround has accelerated in recent years, under both President George W Bush and President Barack Obama. A prominent example is President Obama's order to immigration authorities to cease deportation efforts against undocumented aliens who have been in the United States since childhood. Thus, Presidents who are unable to command effective legislative majorities dance at the edge of existing statutes, making incremental policy advances where they can.

Now we have seen the 'President bound', chained by the intransigence of legislative minorities or even individual legislators who rely on congressionally developed conventions that are in tension with portions of the constitutional text that ought to be controlling. This situation cannot be consistent with the expectations of the American framers, but there is no obvious remedy for it unless and until the American people elect Members of Congress who will pledge to stop it.

### III THE PRESIDENT 'UNBOUND'

In American foreign affairs a different picture emerges. The reason for the difference is that the practical power to take effective action shifts from Congress to the President, who gains the opportunity to generate the controlling conventions. Possession of the initiative is critical in a system of separated power. Even though Congress can generally check or reverse presidential action after the fact in foreign affairs, the President possesses both broad constitutional powers and ample practical means to take actions that will very likely survive. Here, in sharp contrast to the domestic context, constitutional conventions have evolved in ways that empower Presidents, rather than disabling them.

The President's explicit constitutional powers regarding foreign policy and war are surprisingly sparse and are mostly shared with Congress. The President is Commander-in-Chief of the military, but Congress declares war and regulates the military.<sup>25</sup> The President nominates ambassadors, but a majority of the Senate confirms them. The President negotiates treaties, but a 2/3 vote of the Senate is needed to ratify

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<sup>24</sup> Bruff, *Balance of Forces*, above n 9, ch 5.

<sup>25</sup> *United States Constitution* art II § 2: 'The President shall be Commander in Chief of the Army and Navy of the United States.' Under art I § 8, Congress has power, inter alia, 'to declare War', 'To raise and support Armies', 'to provide and maintain a Navy', and 'To make Rules for the Government and Regulation of the land and naval Forces'.

them.<sup>26</sup> The President receives foreign ambassadors, but that function may have been intended as merely ceremonial, rather than a power to decide what governments to recognise.<sup>27</sup> Congress possesses other relevant powers as well, for example to regulate foreign commerce.<sup>28</sup>

It is very difficult to glimpse the world's most powerful officer in this congeries of textual fragments. There is a good reason for the sketchy and incomplete description of the presidency in art II of the *United States Constitution*: the framers had no model for the office to aid them. They knew that they did not wish to create a monarch, having just rid themselves of one. Nor did they wish to proceed without any executive branch at all, as the temporary *Articles of Confederation* had done.<sup>29</sup> Hence they specified the features of the presidency that occurred to them, and left the rest to statutory implementation and to the precedents that would be generated by the Presidents themselves as they conducted the office.<sup>30</sup>

It is largely in the provisions of the *United States Constitution* that structure the federal government that the vast potential power of the presidency lies, hidden in plain sight. First, the President derives a massive institutional advantage over Congress from the vesting of the executive power in a single individual, who can operate the executive branch with 'energy, secrecy, and dispatch'.<sup>31</sup> Congress, as a many-headed institution, is built to be deliberative, open and slow to react. The President's daily control of the executive apparatus of government empowers him or her to dispatch diplomatic and military officers around the globe, carrying communications or bearing arms. What these officers do under presidential command forces events that Congress must confront and can attempt to control only in retrospect.

Second, the President is elected independently of Congress for a term of four years.<sup>32</sup> This is the central difference between the American system and a parliamentary one. Its importance is revealed by the fact that the *United States Constitution's* framers considered and ultimately rejected providing for a President who would be elected by Congress for a set term.<sup>33</sup> Even if the President inhabited a formally separate branch of government, that arrangement would have greatly increased the dependency of

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<sup>26</sup> Ibid art II § 2: 'He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur'.

<sup>27</sup> Ibid art II § 3: 'he shall receive Ambassadors and other public Ministers'.

<sup>28</sup> Ibid art I § 8.

<sup>29</sup> Bruff, *Balance of Forces*, above n 9, ch 1.

<sup>30</sup> Harold H Bruff, *Untrodden Ground: How Presidents Have Interpreted the Constitution* (University of Chicago Press, 2015) ch 1.

<sup>31</sup> This phrase was used at the Constitutional Convention by James Wilson. Max Farrand, *The Records of the Federal Convention of 1787* (Yale University Press, revised ed, 1966) 66. Article II § 1 of the *United States Constitution* begins: 'The executive Power shall be vested in a President of the United States of America'.

<sup>32</sup> *United States Constitution* art II § 1.

<sup>33</sup> Bruff, *Balance of Forces*, above n 9, ch 1.

Presidents on congressional support, both in the promises that would need to precede election and the compromises in office that would enable re-election, if allowed. Instead, the independent political base has allowed Presidents to govern — and even govern effectively at times — when the opposition party holds one or both houses of Congress. The resultant tensions are understandable to Australians, because your Senate tends not to be in the hands of the party holding a majority in the House of Representatives.

The President's set term of four years produces independence from both Congress and the people, absent impeachment. America's decoupling of the presidency from the will of a current majority of the people mystifies most inhabitants of parliamentary systems, and it is certainly a mixed blessing for the United States. There have been times in American history when a parliamentary executive would have been dismissed by Congress. Two examples will suffice to show how the fixed term of office can allow Presidents to be courageous. During the Civil War, in the dismal summer of 1864, Abraham Lincoln thought he would fail to be re-elected in the fall; he might well have been sacked by a Congress having that power. In 1951 Harry Truman endured a political firestorm after his justified dismissal of General Douglas MacArthur in Korea. In both cases, politics eventually took a turn and these Presidents went on to their other considerable accomplishments.

Of course a term that is guaranteed absent impeachment can cause great havoc in the US. Andrew Johnson wrecked Reconstruction and survived impeachment; Richard Nixon wrecked the rule of law and was forced out of office rather than suffer impeachment.<sup>34</sup> In any event, the specified term is certainly empowering while it lasts as compared with parliamentary office. As the imbroglio involving Bill Clinton demonstrates, a popular President need not fear removal by impeachment for sins less dire than grave malfeasance in office.

Third, the two-term limit on presidential service that began as a practice with George Washington and was eventually enshrined in the *United States Constitution* by Amendment XXII makes each President a lame duck the morning after re-election, but it is also liberating.<sup>35</sup> Barack Obama, like many of his predecessors, has followed his re-election by showing increased aggressiveness toward Congress and an eye for his place in history. Unfortunately, several recent Presidents have suffered second-term failures, suggesting that diminished political accountability has its hazards for both the incumbent and the nation.<sup>36</sup> A system of responsible government such as Australia's does not encounter this hazard of an untethered executive.

A structural quirk in the constitutional organisation of the early federal government allowed Presidents to develop broad foreign policy and war powers without

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<sup>34</sup> Bruff, *Untrodden Ground*, above n 30, chs 6, 11.

<sup>35</sup> The amendment was added after Franklin Roosevelt was elected four times, breaching the tradition.

<sup>36</sup> I count Lyndon Johnson, Richard Nixon, Ronald Reagan and Bill Clinton in this category. George W Bush did rather better in his second term than his first, except for his failed response to Hurricane Katrina.

interference from Congress. Once developed, these powers have endured. From the inception of the *United States Constitution* until 1933, Presidents were inaugurated in March but Congress did not meet in regular session until December.<sup>37</sup> This gave new Presidents a nine-month window of opportunity to take unilateral action with the statutory tools and funds that were available. (Congress was out of session much of the rest of the time as well.) Presidents could present their belatedly assembling Congress with *faits accomplis* that were very difficult politically to overturn. Some of the most important presidential actions that have expanded executive power took place while Congress was absent. Prominent examples include Washington's declaration of neutrality in the European war in the 1790s, Thomas Jefferson's acquisition of Louisiana in 1803 and Lincoln's early aggressive conduct of the Civil War in 1861 (including his suspension of habeas corpus).

Presidential power grew over the years in a process resembling the evolution of the common law, with particular actions forming precedents that would sustain later actions by Presidents if Congress and the people acquiesced in them (the courts often did not review presidential actions, or did so well after the fact). For example, George Washington treated the presidential power to receive ambassadors as a unilateral power to decide what foreign governments the United States would recognise and all subsequent Presidents have claimed and exercised that power without challenge. Again, the difference from the common law is that a self-interested officer rather than a neutral judge generates the conventions that will support later executive action.

By the time of Australian federation early in the 20th century, American Presidents felt free to determine foreign policy unilaterally in any way that did not require a treaty or violate a statute. Presidents also deployed the military at their discretion even if a war might be provoked. For example, in 1846 President James Polk sent the US army into a part of southern Texas that Mexico claimed; hostilities erupted and Congress speedily declared war. Presidents also conducted many small-scale military operations that did not seem to call for a declaration of war, such as punitive expeditions in Latin America.

This already potent office was empowered more permanently after World War II when the US created a massive standing military establishment for the first time. (Demobilisation had followed all prior wars.) Nowadays, the American national security establishment is vast and highly secretive. Congress finds it very difficult even to monitor, much less to control, what the executive branch is doing. The accountability of the President to the people that the Constitution contemplated, either directly or at least through Congress, is much attenuated.

The aftermath of the terror attacks on the United States of September 11, 2001, has tested the limits to presidential power. President George W Bush immediately sought and received from Congress the equivalent of a declaration of war against

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<sup>37</sup> Amendment XX removed this odd arrangement; now Congress convenes each January and is in session much of the time. Presidents are inaugurated in January as well.

al Qaeda.<sup>38</sup> No one doubted the general constitutional propriety of the military pursuit of al Qaeda in Afghanistan that followed. Some of the President's particular actions, however, lacked any statutory support or even violated statutory restrictions.<sup>39</sup>

Here, a fundamental distinction must be emphasised. Presidents take many actions that are based directly on their constitutional powers without plausible support from any statute. Often these actions are fully justified; for example, an immediate military response to an attack on American citizens. The question is one of limits, and the limits are mostly unknown in the realms of foreign policy and war. There is much loose talk about 'inherent' executive power to do this or that, but in fact presidential actions can almost always be tied to some explicit grant of constitutional power (although the connection is somewhat tenuous at times).<sup>40</sup> These constitutionally-based presidential initiatives differ fundamentally from actions that violate existing statutory restrictions. In fact, Presidents have very rarely contravened clear statutory constraints on their power.<sup>41</sup> Any attempt to do so threatens destabilisation of the American constitutional scheme, because if successful it disables congressional control of executive action.<sup>42</sup>

President Bush's actions did contravene statutory limits in at least two contexts. First, the Supreme Court held that his executive order establishing military commissions to try terror suspects for war crimes violated statutory limits and the *Geneva Conventions*.<sup>43</sup> Second, his secret program for electronic surveillance of terror suspects ignored statutory restrictions on that activity.<sup>44</sup> Neither statutory violation was necessary — Congress readily altered the statutes to grant the President the discretion he sought once the legal difficulties became known.

In two other contexts, President Bush stretched his constitutional powers to a degree that violated either the constitutional rights of individuals or federal criminal statutes. He ordered terror suspects to be imprisoned indefinitely with no substantial process to identify whether the individuals detained were actually dangerous.

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<sup>38</sup> It is styled an *Authorization to Use Military Force (AUMF)*, Pub L No 107-40, 115 Stat 224. From a constitutional perspective it serves the purpose of a declaration of war.

<sup>39</sup> For exploration of these matters, see Harold H Bruff, *Bad Advice: Bush's Lawyers in the War on Terror* (University Press of Kansas, 2009).

<sup>40</sup> Australian constitutional law also features a debate about inherent executive power. The classic analysis is George Winterton, *Parliament, The Executive, and the Governor-General* (Melbourne University Press, 1983). For a fine recent analysis, see Peter Gerangelos, 'The Executive Power of the Commonwealth of Australia' (2012) 12 *Oxford University Commonwealth Law Journal* 97.

<sup>41</sup> The most prominent example is Andrew Johnson's refusal to enforce the Reconstruction statutes, for which he was impeached and nearly removed from office.

<sup>42</sup> The Supreme Court's iconic steel seizure case, *Youngstown Sheet & Tube Co v Sawyer*, 343 US 579 (1952) makes this point emphatically.

<sup>43</sup> *Hamdan v Rumsfeld*, 548 US 557 (2006).

<sup>44</sup> The Supreme Court has not adjudicated the merits of this question. For analysis, see Bruff, *Bad Advice*, above n 39, ch 7.

The Supreme Court held that the due process clause in Amendment V to the *United States Constitution* required fair procedure to make these determinations.<sup>45</sup> Even more controversially, the President approved ‘enhanced’ interrogation techniques that may well have constituted torture, in violation of both federal criminal statutes and international law.<sup>46</sup>

By the end of President Bush’s time in office, many of the early excesses of the war on terror had abated substantially.<sup>47</sup> Suspects enjoyed some procedural rights, electronic surveillance and trial by military commission were authorised by statute and the most brutal interrogation techniques were no longer in use. When Barack Obama succeeded Bush as President, there was widespread expectation that he would change the conduct of the war on terror dramatically. He did not do so. Instead, he continued many practices, such as the indefinite detention of the most dangerous suspects. He modified others, for example by limiting interrogation techniques to traditional military practices.<sup>48</sup> The imperatives of effective response to the murky threats of terrorist attacks abide, whoever occupies the presidency.

What has most surprised observers about Barack Obama’s approach to the war on terror is his expansion of some activities to levels not seen in the Bush administration.<sup>49</sup> The American political and legal systems are still trying to understand these developments and to craft ways to conform them appropriately to law. All three of the activities that I will describe — military special forces raids, drone attacks and computer attacks against other computers — are conducted secretly. American law usually imposes three kinds of rudimentary legal controls on such ‘covert’ activities.<sup>50</sup> First, they must be funded. The money is usually hidden in the giant budgets of the Department of Defense and the Central Intelligence Agency (‘CIA’). Second, the President must take personal responsibility for each action by signing a secret ‘finding’ describing it and asserting its necessity. And third, the President must ordinarily report his decisions and actions to the intelligence oversight committees in the two houses of Congress, or at least to their leaders. The sufficiency of these controls to meet basic norms of legitimacy in a constitutional democracy is open to serious doubt, but better alternatives have yet to emerge.

Obama has implemented a number of new and expanded initiatives. First, he sharply increased secret raids by military special forces in Afghanistan and Pakistan (‘AfPak’), to over ten per night.<sup>51</sup> Of course, the most famous of these raids was the one in Pakistan that, at long last, killed Osama bin Laden.<sup>52</sup> Early in his presidency,

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<sup>45</sup> *Hamdi v Rumsfeld*, 542 US 507 (2004).

<sup>46</sup> Bruff, *Bad Advice*, above n 39, ch 11.

<sup>47</sup> Jack Goldsmith, *The Terror Presidency* (W W Norton, 2009).

<sup>48</sup> Jack Goldsmith, *Power and Constraint* (W W Norton, 2012).

<sup>49</sup> David E Sanger, *Confront and Conceal* (Crown Publishers, 2012).

<sup>50</sup> Bruff, *Bad Advice*, above n 39. Goldsmith, *Power and Constraint*, above n 48, explores these and other control techniques.

<sup>51</sup> Sanger, above n 49, ch 10.

<sup>52</sup> *Ibid* ch 4; Thomas Mann, *The Obamians* (Penguin, 2012) ch 21.

Obama had instructed the CIA to reinvigorate the hunt for bin Laden, which had gone cold. Once bin Laden was tentatively located, the plans for the raid were held very close within the administration. The Government of Pakistan was not informed due to its mixed loyalties. President Obama displayed considerable courage in ordering the raid in the face of uncertainty as to whether bin Laden would be found in the targeted compound, and with the risks of an operational failure like earlier ones in Iran and Somalia or a violent reaction by Pakistan to the presence of American troops. Whether the mission was explicitly to kill bin Laden or to attempt a capture if possible was left uncertain, but the obvious nightmares that would attend having a live bin Laden in the dock may have registered with all concerned.

After monitoring the bin Laden raid from the White House with his advisers huddled around him, Obama reacted to the news of success in his characteristically restrained manner: ‘We got him’.<sup>53</sup> Legal justifications for the killing relied on the congressional declaration of war against al Qaeda, the President’s Commander-in-Chief power, international law rights of national self-defense and the right to kill enemy combatants under the law of war.<sup>54</sup> Surely these were adequate grounds in the case of bin Laden; controversy has focused on other killings.<sup>55</sup>

In his second major initiative, Barack Obama stepped up the military campaign against al Qaeda by increased use of unmanned, ‘drone’ aircraft in AfPak.<sup>56</sup> In his first term, Obama ordered over 250 drone attacks, compared to about 40 by Bush. Strikes within Pakistan in particular required secrecy to avoid offending the Government of Pakistan by broadcasting the continuing infringement of its sovereignty. Over 400 drones are operated by the Air Force and the CIA from over 60 bases around the world. During his first term, the President would say little more about the program than that it was on a ‘tight leash’.<sup>57</sup>

The consequent constitutional questions are as difficult as they are novel. Does the President’s Commander-in-Chief power allow him to target and kill any enemy of the United States anywhere in the world? The constitutional argument for the initial phase of drone assaults in AfPak was relatively straightforward: Congress had authorised military force against al Qaeda, and the law of war allows targeting those who plan to attack in an act of self defence.<sup>58</sup> Soon, however, the drones ranged beyond the initial theater in AfPak where the congressional authorisation and the law of war had the clearest application.

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<sup>53</sup> Sanger, above n 49, 101.

<sup>54</sup> Goldsmith, *Power and Constraint*, above n 48, 225.

<sup>55</sup> Bruff, *Untrodden Ground*, above n 30, ch 15.

<sup>56</sup> Mann, above n 52, chs 7–8, 15.

<sup>57</sup> Sanger, above n 49, 252.

<sup>58</sup> This argument also countered criticism that the President was breaking a still-extant promise made by President Gerald Ford in a 1975 executive order banning assassination of foreign leaders. Because it is politically impossible to rescind Ford’s promise openly, Presidents have evaded it when necessary.

In a controversial case, the President approved drone strikes that eventually killed an American citizen named al-Awlaki, a radical Islamic cleric based in Yemen who had fomented terror activities against the United States. The Obama administration formally justified targeting this American citizen overseas as a form of ‘lawful extra-judicial killing’.<sup>59</sup> The explanation was that after due diligence, it must appear to the executive that the target is an active combatant who poses an imminent threat to the United States, and that capture is impracticable.

This might be a sensible interim approach from the perspective of American constitutional law, whatever its merits in international law. For a very long time, Presidents have lashed out at anyone they can reach who seems to threaten Americans, as in many ‘police actions’ in Latin America. Modern technology has greatly expanded the President’s practical capacity to strike, however, raising questions about the need for new constitutional controls. At present, the executive’s decisions are not checked in advance by a neutral magistrate (as occurs with electronic surveillance). The only external check consists of whatever scrutiny the congressional committees provide. The drones operate at (or perhaps over) the edge of law.

Obama’s third initiative involved what is called ‘cyber warfare’, the use of one computer to attack another. This form of covert assault is even stealthier than drones, because the victim may be unaware that an attack has even occurred and will likely have great difficulty identifying the source. Since cyber wars do not involve physical violence, are they governed by the domestic and international law of war at all, and, if so, how? Here is a known example of this new kind of activity to consider.

Iran possesses both nuclear dreams and an ingrained hostility to the United States. Military action against Iran’s well-protected nuclear facilities may not be feasible and President Obama has wanted to divert Israel from attacking the facilities in self-defense. While pressuring Iran with sanctions, Obama tried unsuccessfully to negotiate with its leaders.<sup>60</sup> The failure of traditional means for influencing or forcing Iran to abandon its nuclear program led Obama to conduct the first major cyber war in history. President Clinton had tried ordinary sabotage against the program, for example by having defective industrial parts and designs shipped to Iran. President Bush had initiated some cyber attacks on the computers controlling Iran’s nuclear facilities by sending ‘worms’ into their software, while trying to prevent collateral damage to civilian facilities such as schools and hospitals.<sup>61</sup> Thus analogies to traditional law of war concepts have guided the American approach from the outset.

In a closely guarded operation called Olympic Games, President Obama initiated a new kind of cyber war.<sup>62</sup> A worm now known as Stuxnet invaded the Iranian computers and caused physical damage in the nuclear facilities by, for example,

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<sup>59</sup> Scott Shane and Charlie Savage, ‘Report on Targeted Killing Whets Appetite for Less Secrecy’, *The New York Times* (New York), 6 February 2013, A11.

<sup>60</sup> Sanger, above n 49, ch 7.

<sup>61</sup> *Ibid* ch 8.

<sup>62</sup> *Ibid*.

causing centrifuges to spin out of control. As a covert intelligence operation, Olympic Games required presidential findings, which were crafted and provided to the intelligence committees in Congress. The President stayed closely involved as the operation developed, insisting that the worm be kept ‘unattributable’ as long as possible. It appears that Stuxnet significantly damaged the Iranian program before it was revealed after having escaped accidentally into international cyberspace, where it created a furore.

There now exists a United States Cyber Command, a joint effort of the National Security Agency and Department of Defense, with a staff of about 13,000 people and a budget of about \$3.4 billion.<sup>63</sup> Most of its activities are unknown beyond selected precincts in the executive and Congress. The administration admits defending against cyber attacks coming from anywhere. For example, it appears that an attack on the computer systems of some large American banks was an Iranian effort to retaliate for Stuxnet. Recent news reports trace computer assaults on American computers to a Chinese army facility. Both domestic and international concepts of lawful warfare must evolve to grapple with this new reality.

Because war by machines can be precisely targeted, minimising the collateral damage that conventional warfare imposes and is cheap in both American lives and money, its availability provides a constant temptation to overuse, especially in the absence of developed legal constraints. President Obama has been busily developing both the operational and legal fronts of these two new kinds of war, but without meaningful participation by Congress, except for consultation with the relevant committees and occasional hearings. Nor, of course, do the American people know much about the facts, except for the occasional bulletin concerning a completed drone attack or computer crash. Thus we glimpse executive actions that have emerged into public view, leaving all else hidden. What other covert activities is the administration conducting? We do not know.

At its core, the President’s duty and opportunity to interpret the *United States Constitution* and to develop precedents under it remain deeply personal. The primal links to the other two branches of government and the people do remain, although in altered form. Congress knows of most important presidential initiatives, and has opportunities to exert informal pressure or even to intervene with controlling legislation. The courts eventually show their willingness to play a role in regularising the war on terror. The people eventually learn what their Presidents have been doing and provide a verdict that informs history and future Presidents. In a world marked by vast leaks of information — for example, the disclosures by Edward Snowden — no President should contemplate taking action in the expectation that it will remain secret for long.

Thus the presidency is controlled either too much or too little, with not much middle ground where the control seems about right. Where Congress controls the development of constitutional conventions, presidential discretion is bounded too much. Where Presidents control the development of those conventions, their discretion

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<sup>63</sup> Ibid ch 10.

is bounded too little. American lawyers and politicians are struggling to make our 18th century constitution function in the 21st century. Fortunately, the *United States Constitution* is flexible enough to adapt to the times, if 21st century Americans have the wisdom to make it work well.

#### IV CONCLUSION: AUSTRALIA VIEWED FROM AMERICA

What are the implications of the American experience for the development of Australian constitutional law? Australian constitutional lawyers and judges have displayed increased interest in the limits of executive power in recent years, as old certainties have been shaken by cases such as *Pape v Commissioner of Taxation* and *Williams v Commonwealth*.<sup>64</sup> The issue in these cases is whether the *Australian Constitution's* grants of executive power in Chapter II can support spending by Parliament on subjects not within the heads of power granted it directly, such as the school chaplaincy program struck down in *Williams*. The primary constitutional concern is federalism, to protect the residual powers of the States from an undue expansion of Commonwealth power. This general tension is understandable to an American, because the United States has a long line of Supreme Court cases that define the scope of federal legislative power.<sup>65</sup> The American cases, though, speak exclusively about the power of Congress under its enumerated grants in art I of the *Constitution*.

What is new to an American observer is the idea that the grants of executive power in Chapter II of the *Australian Constitution* can empower the legislature to enact statutes that would otherwise be beyond its power. This possibility is far easier to imagine in a fused system like Australia's than in a separated one like America's. Especially intriguing is the prominence of a 'nationhood' concept in *Pape*, which allows the Commonwealth to take some actions that inhere in independent nationhood and are beyond the competencies of individual States, such as the national emergency disbursement in that case. Because such issues would not have arisen in Australia before independence was fully attained, they remain rather new and only partially explored.

By contrast, the United States has over two centuries of experience with arguments about 'inherent' executive powers. The question arises regularly because of our separated executive and the vagueness of art II of the *Constitution*, which sketches executive responsibilities. (Of course, it is far more specific than Chapter II of

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<sup>64</sup> *Pape v Commissioner of Taxation* (2009) 238 CLR 1 ('*Pape*'); *Williams v Commonwealth* (2012) 86 ALJR 713 ('*Williams*'); Gabrielle Appleby and Stephen McDonald, 'Looking at the Executive Power through the High Court's New Spectacles' (2013) 35 *Sydney Law Review* 253; Anne Twomey, 'Pushing The Boundaries of Executive Power — Pape, The Prerogative and Nationhood Powers' (2010) 34 *Melbourne University Law Review* 313.

<sup>65</sup> In a recent prominent case, the Supreme Court upheld federal health care under the taxing and spending power, but not the commerce power. *National Federation of Independent Business v Sebelius*, 132 S Ct 2566 (2012).

the *Australian Constitution*.) The American experience supports the concern that has surfaced in the Australian literature about unfocused discussion of ‘inherent’ executive powers. Such discussions careen around in the American constitutional literature like loose cannons. But, Presidents have usually grounded their actions in particular constitutional powers, so that legislators, courts and citizens might then dispute the validity of these actions in an informed way. For example, Abraham Lincoln’s Emancipation Proclamation did not simply free all the slaves in the United States — Lincoln correctly assumed he had no such power. But he did assert the power to issue a military order under his power as Commander-in-Chief to free slaves in regions still in rebellion in order to undermine the rebel military effort, and that is what he did. Thus an essential control on presidential development of conventions about executive power is the justification of a precedent in a way that locates it in constitutional text and, where available, prior presidential practice.

In Australia, the executive duty of ‘maintenance’ of the *Constitution* and laws under s 61 is susceptible to some of the essentially unguided and unbounded arguments about ‘inherent’ power that have bedevilled American constitutional law. In Australia, as in the United States, assertions of power to ‘maintain’ the nation will be made by the government, which has an interest in expanding executive power. Although such an expansion would also increase legislative power in Australia, your system of responsible government does not include the American check of the separation of legislative and executive power, with all of its attendant jealousies. That leaves the courts as the constraining institution, with the difficult duty of defining what it means to ‘maintain’ the *Constitution*. To an American, this seems to place great pressure on the judiciary to decide questions it may feel unsuited to resolve.

Another unsolved question in American constitutional law may arise in Australia. The issue is whether some executive actions are immune from legislative control in that they may not be limited by statute. In most parliamentary systems, this kind of question is very unlikely to occur because Prime Ministers will not act without the support of their House, which can readily alter existing legislation that may bar proposed executive action. In Australia, however, with a separately elected Senate that usually does not match the party control of the House of Representatives, a clash can occur that prevents altering existing legislation. The 1975 crisis over supply shows how this could occur. Another possibility is that exigencies of time might require immediate action, for example in response to a terrorist attack.

Might an Australian Prime Minister someday decide to violate an existing statutory limit to meet a crisis for which enabling legislation cannot be obtained? If so, there would be a dearth of domestic constitutional law on the subject. In the United States, experience has shown that the executive is almost always able to accomplish what the nation needs without infringing existing statutes and no Supreme Court case has upheld a presidential action that is conceded to contravene a valid statute.

Perhaps this aspect of American history will provide some comfort to Australians considering this basic constitutional issue. For both nations, the course of wisdom may be to recognise the possibility that a realm of executive immunity from statutory control might be needed someday in the press of crisis, without articulating

an everyday version of such a doctrine in advance, an exercise that would risk its overuse. Constitutional ambiguity about the ultimate allocation of constitutional power has served the United States well so far; Australia might be no different.

As Australians consider their own government, I suggest they draw guidance from an authority well known to both the American and Australian framers, the Baron de Montesquieu, whose great book guided our constitution-makers, and through ours, yours. Montesquieu is best known as an early advocate of the separation of powers, but that is not the aspect of his work I emphasise now. Consider the title of his great book, *De L'esprit des Lois*, 'The Spirit of the Laws'. His title reflected the nature of his project. After considering many forms of government, he stressed that what matters most is that the spirit of a nation's laws match the spirit of its people. That is the question you should ask about your own Constitution, just as I constantly ask it about my own. Does your Constitution match the spirit of the Australian people today, and if not, what changes will make it do so? If changes are needed, what is the appropriate interplay of power between Parliament, the Government, the High Court and the people acting by constitutional referendum? This last question, it appears, raises issues of the separation of powers, and so I end near where I began.

