



THE CULT-IVATION OF EXECUTIVE POWER

Nelson Lund

Reviewing

GENE HEALY, *THE CULT OF THE PRESIDENCY* (Cato 2008)

THE FEDERAL GOVERNMENT is a lot bigger and more powerful than it once was, and so are its principal constituent parts. Gene Healy of the Cato Institute has written a provocative libertarian analysis that focuses on one aspect of this development. *The Cult of the Presidency* argues that the executive office has been radically perverted over time. Originally one of limited powers and modest goals, the modern presidency has become for Healy a monstrosity. It is characterized by enormous and dangerous powers, but even these are insufficient for the superhuman feats that presidents fecklessly promise to perform for a foolish public.

Increasingly, moreover, Healy sees the office being captured by warped personalities who possess the obsessive ambition, the soul-numbing stamina, and the ruthless malleability needed to prevail in modern presidential campaigns. A kind of adverse selection thus

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magnifies the likelihood that presidents will abuse the powers they have sacrificed so much to obtain.

This literate and well-researched book makes three main arguments. First, Healy argues that the Constitution established a very limited and highly constrained executive. Legally, the president was largely subordinated to Congress, which was meant to be the principal source of national political leadership. For more than a century, this relationship remained basically stable and unchallenged. Second, the Progressives and their descendants transformed the presidency into a restless engine of political activism and military adventurism. Third, this Superman conception of the presidency has proved quite durable: efforts to cut back its powers in response to abuses – like those that transpired in the 1970s – have largely sputtered out.

Healy doesn't hold out much hope for a legal fix to the ills he identifies, but he is cheered by polls showing increased levels of popular distrust in government, and by young people's attraction to comedians who mock and deride incumbent presidents. "The Spirit of '76 lives on – even if it manifests itself in thoroughly modern ways." (p. 288)

Healy is right that American presidents are more powerful, and therefore more dangerous, than they used to be. Extravagant claims of executive authority have at times been made by and for ambitious presidents, many of whom have taken actions that test and sometimes exceed any reasonable conception of their rightful powers. Even if one does not concur with each count in Healy's lengthy indictment, as I do not, no one should be complacent about the threat such a powerful office poses to our liberties. Nevertheless, the analysis presented in *The Cult of the Presidency* is open to serious question in several respects.

First, Healy's focus on the presidency causes him to underemphasize the extent to which the growth of presidential power is an incident of expanded federal power generally, and perhaps not the most important one. Demands for a bigger and more aggressive government have often come more from the legislature than from the executive, and largely in response to political pressures originat-

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ing outside the government. Furthermore, much of the vast and problematic power that has accumulated in the federal government actually resides in a gigantic executive bureaucracy over which presidents have very little control as a practical matter.

Would Congress have given us a smaller or less intrusive government if presidents had maintained a strong tradition of passivity and deference to the legislature? Not likely. Nor should one assume that the framers of our Constitution, to whom Healy appeals so often, would agree with his diagnosis of our modern ills. They had seen how democratic governments work with strong legislatures and weak executives, and few things worried them more. As Madison put it in *Federalist No. 48*: “The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex. . . . it is against the enterprising ambition of this department, that the people ought to indulge all their jealousy, and exhaust all their precautions.”

Healy assumes that strict subordination of presidents to Congress would have prevented many bad things from happening. At least in the realm of foreign affairs, there may be some truth to this, if only because legislatures are by nature less prone than executives to pursue ill-advised foreign adventures. Had Congress been in charge of foreign policy, for example, we might not have had the Bay of Pigs or the war in Viet Nam.

But Congress is also by nature less equipped to recognize and respond adequately to real threats to our national security. Would congressional leadership have been able to maintain a credible deterrent to Soviet expansionism during the long and trying Cold War? Passivity in the face of Japanese and German aggression, to which Congress contributed more than President Roosevelt, did not avert war or contribute in the end to limited government here at home. Had presidential deference to the natural inconstancy and myopia of Congress produced a repeat of that experience, a war with the Soviets might have been costly beyond calculation. And such a war could well have given us a federal government that would make the one we have today look almost like a libertarian’s dream.

Healy also underestimates the beneficial direct effects of presidential assertiveness on the size of government, especially during periods of divided government. If one really wants a weak executive and a domineering legislature, a parliamentary system should be the preferred model. In that system, moreover, the executive is a party leader who need not have the peculiar personal qualities required to prevail in a modern presidential campaign. But it is no accident that it was big government liberals, not conservatives or libertarians, who were strongly attracted to parliamentary government during the second half of the twentieth century. This was a period during which the Democratic party dominated Congress, and Republican presidents were rightly seen as obstacles to the expansion of government. These presidents were less successful than Healy (and I) would wish. But without their resistance, would Healy's preference for small government have been better served? Not a chance.

Just as Healy underestimates the threat that a relatively more powerful Congress would pose to our liberties and our security, he overstates the constitutional argument for a weak presidency:

As our early constitutional history makes clear, the Founding Generation did not see the president as [political scientist Clinton] Rossiter's Protector of the Peace, except perhaps in the narrow, constitutional sense that they expected him to respond to sudden attacks by hostile powers. Neither was he the Voice of the People, the Manager of Prosperity, nor the Chief Legislator. His main duty, as Article II, Section 3, explains, was faithful execution of the laws. (p. 18)

It is certainly possible to interpret Article II this way, and it is easy to find important voices from the founding generation who articulated an understanding that resembles Healy's. But it is at least as easy to read Article II as a grant of very broad executive power to the president, with the execution of the laws merely one of several examples of this power. And one doesn't have to look very far to find respectable authority for this alternative view among the founders. In fact, this is exactly the issue at the center of the debate be-

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tween Madison and Hamilton that was sparked by President Washington's so-called neutrality proclamation in 1793.

Besides overstating the degree to which the founding generation agreed with his interpretation of the Constitution, Healy understates the judicial role in constraining executive power. While denouncing what he views as the horrible usurpations of power by modern presidents, and what he considers irresponsible acquiescence by Congress, Healy has very little to say about the Supreme Court. Mostly he just notes that the Court has not seemed very interested in addressing the problem he perceives.

This is not a sufficient analysis. The courts have frequently decided that presidents have exceeded their constitutional authority with respect to both foreign and domestic actions. It's true that the Justices have never issued an injunction to stop a war, and that sometimes they've waited until the fighting stopped before ruling that a president went out of bounds in prosecuting a war. But it's also true that courts have rejected presidential claims of authority, and voided national security measures, even in the midst of war. Recently, the Court has been especially aggressive in this respect, and there are of course countless examples of judicial checks on executive power outside the area of national security.

At least one important reason that the Justices have not enforced Healy's interpretation of the Constitution is that they don't agree with it. Maybe the Supreme Court's jurisprudence is disgracefully tolerant of constitutional abuses by the executive. Maybe the Court has been crippled by cowardice or institutional impotence. Or maybe not. *The Cult of the Presidency* doesn't come to grips with the large body of judicial opinions in this field, which at least attempt to give reasons for what the Court has done and declined to do. One cannot refute those opinions by ignoring them.



One of the many arresting suggestions in this book is its praise for men who always “lose” in polls that rank presidential greatness. For Healy, the list of great presidents should include

Cleveland, Taft, Harding, and Coolidge, precisely because they stayed out of trouble and helped give Americans space to live their own lives and build their own dreams. (p. 294) I think there's a great deal to be said for this, and I might even add one more name to the list.

President George H.W. Bush – hardly an ambition freak in the mold of Nixon or Clinton – disliked the degrading rituals of presidential campaigning, and minimized his participation in them. Bush also declined to employ the kind of grandiose speechifying and emotional public displays that Healy denounces as an affront to America's republican character. Bush was quite deferential to Congress in the area of domestic affairs, and pushed hard for very few (if any) major expansions of government. Indeed, his most controversial decision was *submitting* to congressional leadership by relenting in his opposition to new taxes. Bush's domestic record may be open to criticism, but not for the kind of aggressive ambition that Healy condemns.

In foreign affairs, Bush handled the delicate challenge of the Soviet Union's collapse with skill and restraint. He did fight a war, but it wasn't one he went looking for, or one peripheral to our vital national interests. And when he found it necessary to fight, he sought and received congressional approval for the war (whether or not he believed such approval was legally required). After he and Secretary of State James Baker assembled an extraordinarily broad alliance of other nations – which paid almost all of the monetary costs of the expedition – Bush and his military subordinates defeated the enemy with minimal American casualties.

Bush also resisted the natural temptation to seek an even bigger victory, which might have led either to a power vacuum ripe for Iranian exploitation or to an American occupation of Iraq and a morass of costly nation building efforts. The historical verdict on the wisdom of this decision remains to be rendered, but we can safely exonerate Bush from charges of recklessness or hubris.

How has Bush been rewarded? The voters denied him a second term. He is widely disdained by conservatives and liberals alike. And he seems headed for a low ranking by the historians who assess

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presidential “greatness.” All of this is consistent with Healy’s analysis of the pathologies of modern political dynamics. Oddly, however, Healy himself seems to *share* the conventional view, for he makes no mention at all of Bush’s successes or his self-restraint.

Instead, Healy ridicules Bush for a lack of rhetorical polish in responding to a goofball question during a campaign debate; denounces him for shutting down Manuel Noriega’s career as a cocaine trafficker; and accuses him of stampeding Congress into authorizing the Gulf War. It is awfully hard for me to see how any of these supposed sins made America worse off.

The Cult of the Presidency ends with a stirring call to action:

True political heroism rarely pounds its chest or pounds the pulpit, preaching rainbows and uplift, and promising to redeem the world through military force. A truly heroic president is one who appreciates the virtues of restraint – who is bold enough to act when action is necessary, yet wise enough, humble enough to refuse powers he ought not have. That is the sort of presidency we need, now more than ever.

And we won’t get that kind of presidency until we demand it.

Amen. But it won’t do much good to demand such a presidency unless we can recognize it when we get it.

