

Sec. 1—The President

Clause 1—Powers and Term of the President

Congress in the wake of the Civil War has not stemmed. Perhaps the point of no return in this area was reached in 1801 when the Jefferson-Madison “strict constructionists” came to power and, instead of diminishing executive power and federal power in general, acted rather to enlarge both, notably by the latitudinarian construction of implied federal powers to justify the Louisiana Purchase.⁴¹ After a brief lapse into Cabinet government, the executive in the hands of Andrew Jackson stamped upon the presidency the outstanding features of its final character, thereby reviving, in the opinion of Henry Jones Ford, “the oldest political institution of the race, the elective Kingship.”⁴² Although the modern theory of presidential power was conceived primarily by Alexander Hamilton, the modern conception of the presidential office was the contribution primarily of Andrew Jackson.⁴³

Executive Power: Separation-of-Powers Judicial Protection

In recent cases, the Supreme Court has pronouncedly protected the Executive Branch, applying separation-of-powers principles to invalidate what it perceived to be congressional usurpation of executive power, but its mode of analysis has lately shifted to permit Congress a greater degree of discretion.⁴⁴

Significant change in the position of the Executive Branch respecting its position on separation of powers may be discerned in two briefs of the Department of Justice’s Office of Legal Counsel, which may spell some measure of judicial modification of the formalist doctrine of separation and adoption of the functionalist approach to the doctrine.⁴⁵ The two opinions withdraw from the De-

⁴¹ For the debates on the constitutionality of the Purchase, see E. BROWN, *THE CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE, 1803–1812* (1920). The differences and similarities between the Jeffersonians and the Federalists can be seen by comparing L. WHITE, *THE JEFFERSONIANS: A STUDY IN ADMINISTRATIVE HISTORY 1801–1829* (1951), with L. WHITE, *THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY* (1948). That the responsibilities of office did not turn the Jeffersonians into Hamiltonians may be gleaned from Madison’s veto of an internal improvements bill. 2 *MESSAGES AND PAPERS OF THE PRESIDENTS* 569 (J. Richardson comp., 1897).

⁴² H. FORD, *THE RISE AND GROWTH OF AMERICAN POLITICS* 293 (1898).

⁴³ E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787–1957*, ch. 1 (4th ed. 1957).

⁴⁴ Some cases also did so prior to the present period. See *Myers v. United States*, 272 U.S. 52 (1926). But a hallmark of previous disputes between President and Congress has been the use of political combat to resolve them, rather than a resort to the courts. The beginning of the present period was *Buckley v. Valeo*, 424 U.S. 1, 109–43 (1976).

⁴⁵ Memorandum for John Schmidt, Associate Attorney General, from Assistant Attorney General Walter Dellinger, re: Constitutional Limitations on Federal Government Participation in Binding Arbitration (Sept. 7, 1995); *Memorandum for the General Counsels of the Federal Government*, from Assistant Attorney General Walter Dellinger, re: The Constitutional Separation of Powers Between the President and Congress (May 7, 1996). The principles laid down in the memoranda depart