Separation Of Powers: The Constitution Of 1789 And The Founding Fathers

Whilst structuring the Constitution in 1789, the Founding Fathers were fervent in emphasising the subordination of the executive branch of the new republic to the representation of the people – Congress. This was illustrated through the Separation of Powers – a school of thought introduced by French philosopher Montesquieu to preclude a tyrannical government. The intricate system of 'checks and balances' significantly curtailed the conventional authority of the executive, inducing some arguments that the power of the President is indeed constrained within the US political system, and limited to the 'power to persuade' (Neustadt, 1991). However, to what extent is this the case? The President of the United States is arguably the most powerful politician in the world. Nonetheless, upon closer examination, this claim is too simplistic given the checks and balances inherent in the Constitution. Accordingly, on a domestic level the President remains comprehensively constrained with the separation of powers as an additional safeguard. Contrariwise, on occasion, Presidents have been seen to wield enormous power as Commander-in-Chief – exemplified by Bush's creation of the Department of Homeland Security – and in the foreign affairs arena where he/she acts as the 'Diplomat-in-Chief', as elucidated in the Trump presidency (McCaughey, 2019). This essay aims to examine the extent to which the power of the President is constrained within the US political system, noting the use of the word 'too', in the question, as a discriminator.

The extent to which presidential power is constrained can be illustrated through the formal powers laid out in Article II of the Constitution. The powers of nomination, for ambassadors, federal judges and cabinet officials sheds further light. The President has only the power to propose appointments to these offices; the final confirmation is subject to the advice and consent of the Senate. Occasionally, prolonged negotiations between the branches of government characterise these procedures, with Presidents typically employing 'pork barrel politics' in a bid to whip the votes of Senators (Hudak 2014, 35). In 1987, Reagan's nomination of Robert Bork was rejected by a Senate vote of 42 to 58, consequently Reagan could only suggest a new nominee with the prospect that they would be confirmed instead. Albeit, in its entire history, the Senate has rejected only nine of a President's Cabinet nominations and only three in the last 100 years (The Heritage Foundation, 2019). Thence, the extent to which this is a power constraint is significant in theory, but inconsequential in practice.

In some regard, the President's power is limited to the power of persuasion; the negotiation of treaties is an example. Major treaties with foreign countries are negotiated by the President, such as Carter's Panama Canal Treaty and SALT II or Bush Snr's Chemical Weapons Ban. The ratification of these treaties is the job of the Senate as they possess no legal authority until accepted by the Senate with a two-thirds majority. Therefore, the President can only persuade the Senate to accept it, arguing for its merits or exercising limited access to patronage. Success typically comes easier when advice is sought prior to, and during, the negotiations, otherwise inadequate consultations risk misjudgement (Bowles and McMahon, 2014). For instance, the rejection of the 1920 Treaty of Versailles, resulting in America being unable to join the League of Nations, a 'pet-project' of the President. Wilson's exclusion of senior Republicans proved costly. Later in the 20th century, the Senate negated the ratification of a further six treaties. More recently, Presidents have resorted to the use of executive agreements due to the

apparent cumbersome nature of treaty ratification. This further illuminates the constraints on presidential power.

Equally, the President's submission of the annual budget and proposition of legislation both require Congressional affirmation if they are to have any authority. The State of the Union address comprises key sections of legislation which the President would want to be initiated – such as green jobs and banking regulations in Obama's 2010 address. Nevertheless, this is futile unless they are introduced to and accepted by Congress, a procedure that necessitates tactful bipartisanship to sway Congressmen and Senators. The President's proposals must go through the full legislative process, placing power in the hands of Congress and less so with the President as they ultimately decide whether the proposal will be passed as law. This often sees several campaign promises delayed or not implemented at all and could be key in determining the strength and success of a presidency. Congress has the ability to reject the President's legislative proposals. This has been typified in several cases such as President Bill Clinton's healthcare reforms of 1993 failing to be passed by Congress or President Obama's DREAM Act (2010), which aimed to award citizenships to millions of children brought to the USA by illegal immigrant parents, but this was killed in the Senate due to a Republican 'filibuster'. The lengthy bargaining process between the President and Congress – which possesses the 'power of the purse' – for the approval of the annual budget is more drawn out when the presidency and Congress are controlled by different political parties, as was seen in the final years of the G. W. Bush administration – situationally constraining the power of the presidency. Congress may also use the power of the purse to defund the presidential proposals – weakening the authority of the office. Obama's 2009 executive order aimed to close Guantanamo Bay within the year, however Congress passed the Supplemental Appropriations Act (2009) to block funds for transfer or release of detainees. Conversely, if Congress is controlled by the President's party, it would be relatively straightforward with regard to vote whipping for legislative proposals. The Democrats controlled both the House and the Senate after the 2008 elections, thus President Obama was able to pass most of his legislative agenda, such as the American Recovery and Reinvestment Act of 2009 (the economic stimulus), the Patient Protection and Affordable Care Act of 2010 (Obamacare), and the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010. The occasioning of a 'trifecta' in the executive and both chambers of congress is, however, not a guarantee and more of a rarity; hence, the President conventionally finds difficulty and achieving his/her legislative agenda – limiting the power wielded by the office.

The privileges of checks and balances are not exclusive to Congress. In the case of an impeachment, proceedings are presided over by the Chief Justice of the Supreme Court – ironic as this position could also be subject to a presidential nomination; this granted power indicates the fate of an entire presidency could depend on the discretion of the judiciary. Albeit, only two U.S. presidents have been formally impeached by Congress—Andrew Johnson and Bill Clinton—and no U.S. president has ever been removed from office through impeachment. Thus, the relevance of this power and constraint is questionable. Further to this, the Supreme Court possesses the power to declare the President's actions to be 'unconstitutional'. This has been the case in a few instances such as US v Nixon (1974) where the court ruled that executive privilege cannot be used in criminal trials, Hamden v Rumsfeld (2006) denied President Bush the authority to create military commissions to try detainees and Boumediene v Bush (2008) held Bush's Military Commissions Act (2006) to be unconstitutional as it infringed on 'habeas corpus'. Yet, the Supreme Court does not customarily involve itself with Presidential actions to avoid being labelled as being judicially active, illustrated in National Federation of Independent Business v. Sebelius (2012), which upheld President Obama's policy of Obamacare (2010).

Nonetheless, the presence of these powers constrains the power of the presidency – at least in theory.

On the other side of the coin, it can be argued that the President possesses powers which subdue the shackles of constraint. Most obviously, the President has the power to veto legislation passed by Congress – a much-used presidential weapon; an example is in February 2015, when Obama vetoed the Keystone XL Pipeline Approval Act. The President can also make use of the pocket veto, which entails leaving a bill on his desk within the last 10 days of a Presidential after which it will not be signed into law – President Eisenhower used 108 pocket vetoes, though numbers are on the decline with 0 pocket vetoes between Bush, Obama and Trump. Altogether, Presidents have used 1,514 regular vetoes (Senate.gov, 2019). Congress may, due to the Separation of Powers, endeavour to override the President's veto, but this is rarely successful – only 111 have been overridden, and only 5 in the last decade (Senate.gov, 2019); such as President Bush's veto of the Medicare Improvements for Patients and Providers Act (2008) which was overridden. Overrides do fail due to two-thirds requirement – in January 2016, Congress failed to override President Obama's veto of the Restoring Americans' Healthcare Freedom Reconciliation Act (2015), which would have repealed much of Obamacare. As such, the President can be said to hold considerable powers over the Congress, evidence of checks and balances working in the President's favour, occasionally employed as a threat towards Congress (Cameron and McCarty, 2004). In this way, some may argue that it is persuasive, in that it is influencing Congress not to pass certain legislation. However, to give the veto the title of a persuasive power would seem to neglect its ability to disrupt the legislative authority of Congress.

Article II defines the President as the Commander-in-Chief of US armed forces, while it equally indicates that the President must seek the permission of Congress to declare war. The US Constitution entrusts Congress with the power to support armies, provide and maintain a navy, and to regulate the military forces. Congress can also use its budgetary powers to limit the scope and duration of troop deployments. Thus, members of Congress can sway public opinion against the President. While Presidents retain noteworthy discretion to use force as they please, Congress may be able to increase the marginal costs of doing so; and when facing particularly risky foreign conflicts, congressional antagonism may dissuade a President from deploying the military (Howell and Pevehouse, 2005). Nonetheless, Presidents can deploy soldiers at their will. This was seen in wars such as Vietnam (Kennedy) and the First Gulf (Bush Snr). Although G. W. Bush pursued ratification from Congress before deployment to Iraq in 2003, subsequent military operations have been conducted at the caprice of the President– as was observed more recently by Obama's decision to deploy a further 30,000 troops to the war in Afghanistan. As Head of State, Congress customarily shows the President vast amounts of deference. Indeed, this has been the area where at times the President has been able to wield enormous power with tactical decisions on the deployment of troops, the general running of a war, and international relations within the presidential control. This suggests that the President is indeed powerful and appears to undermine the claim that the powers of its office are 'too constrained'.

In synthesis, the power of the President is constrained to a significant extent; epitomised by limitations enforced by the principles of separation of powers and checks and balances employed by both the legislature and the judiciary. Albeit, the extent to which it is constrained is limited by the inherent and prerogative powers possessed by the office, despite the checks and balances put in place to curtail said powers, such as the veto power. Furthermore, the use of the word 'too' to characterise the nature of constraint, is perhaps a misnomer as the initial

intention of the framer’s was to constrain presidential power as much as possible, due to their fear of an aristocracy following the American Revolution that was built upon the tyranny of a king. Hence, phrasing it as ‘too’ constrained can be argued to allude to a job ‘too’ well done.