

South Dakota Newspapers, #41
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"We the People"
June 13, 2023

"Trump Trial Tests the Framers' Constitution and the Rule of Law"

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"What are the implications of the trial of Donald Trump for the Constitution, presidential power and the rule of law?" a reader asks, adding another important question: "Did the Framers of the Constitution adequately limit presidential power?"

These enormously important questions have been and will continue to be discussed and debated for months and years to come, and they require more than a single column to offer a summary explanation. We focus this week on the adequacy of constitutional limitations, turning next week to the questions about the impact of the trial.

The short answer is that the Framers, who lived in dread fear of a powerful executive, were committed to closely confining presidential power as a means of protecting the nation from the kind of arbitrary actions of chief executives—kings, despots, and tyrants—occurring in other nations. The Framers' design of Article II—the Executive Article—cannot be blamed for the expansive claims of power by presidents of both parties. Certainly, there is no basis in the Constitution for presidential domination of foreign affairs and national security, including the claim of unilateral power to take the nation to war. And, to say the least, the president does not have absolute, but indeed merely limited, authority.

The emergence of the Imperial Presidency in the 1960s, under Richard Nixon and Lyndon Johnson, reflected high-flying claims of power not grounded in the text of the Constitution or the purposes of the Framers. This new viewpoint was combined with a lethal cocktail of congressional abdication of power, judicial acquiescence, and demands by the citizenry for the Chief Executive to become the Problem-Solver-in-Chief, regardless of the lack of constitutional authority to assume such sweeping responsibilities.

For the founders—keen students of history—executive abuse of power was an article of faith, for it represented an abiding threat to liberty. Their experience under King George III, whom they regarded as a tyrant, confirmed their historical concerns. They were particularly influenced by the 17th Century English Civil Wars, in which parliamentarians went to war against the Royal Prerogative and arbitrary pretensions of a series of monarchs.

Those experiences led delegates in the Constitutional Convention, in James Madison's words, "to confine and define" presidential power. Fear, not confidence in the exercise of executive power, shaped their thinking. The Framers granted the president, in contrast to the wide scope of congressional authority, sharply limited powers in both domestic and foreign affairs. The Constitutional Convention subordinated the president to the rule of law, the first time such control of executive power had been achieved in the world.

The subordination of the president to the law was, the Framers believed, insured by the availability of judicial review, which empowered the federal judiciary to overturn presidential actions in violation of the Constitution, the active interplay of the doctrine of checks and balances and, ultimately, the power of

impeachment, capable of bringing errant executives to heel.

Consider the limited scope of the president's authority derived from Article II, the sole source of presidential power. The president has the duty to take care to faithfully enforce the law, but failure to do so, the Framers believed, represented an impeachable offense. The president is commander in chief of the nation's armed forces, when called into service. Congress, however, does the calling. This means, as James Madison and Alexander Hamilton, among others, said in the Convention, that Congress enjoys under the War Clause the exclusive authority to take the nation to war. The president may grant pardons for offenses against the nation, but the Framers provided that the abuse of power is subject to judicial review and the impeachment power.

The president, readers will be surprised to learn, has no unilateral power in the realm of foreign affairs and national security apart from the authority to receive ambassadors and foreign ministers. But this "power" is better understood as a "duty" to receive visiting ministers, what Hamilton called a mere "administrative function" often performed in other countries by a ceremonial head of state. The president shares with the Senate the authority to make treaties and appoint officials, including judges. The president may veto bills, but this power is subject to a congressional override.

The reality of this limited grant of presidential authority under the Constitution, replete with guardrails and checks at every turn, reflects two key factors. First, the Framers' fears of the Royal Prerogative and arbitrary executive actions which, historically, exploited subjects, persuaded them to keep the president on a short leash. Second, as Madison wrote in Federalist No. 51, in a republic, the

"legislature necessarily predominates," which meant that Congress, not the executive, was intended to be the first branch of government, and the most powerful.

That the Framers' design for the presidency has been ignored by presidents of both parties, sometimes with encouragement and applause, is telling at this juncture in our history when Americans wonder how they can restore a constitutional presidency. A first step would be an informed and conscientious citizenry willing to criticize presidential acts that violate the Constitution and the laws of the land, irrespective of party affiliation and partisan goals.