

REVIEW ESSAYS

THE AMERICAN CONSTITUTIONAL ORDER

Stephen F. Knott

Griffin, Stephen M. *Long Wars and the Constitution*. Cambridge, Mass.: Harvard Univ. Press, 2013. 362pp. \$39.95

Stephen M. Griffin, who joined the Tulane law faculty in 1989, specializes in constitutional theory and history. He contends that the propensity of American presidents to engage in war without proper authorization from Congress has “destabilized” the American constitutional system and “deranged policy making.” He rightly acknowledges that the struggle to define the limits of executive power dates back to the American founding but insists that something unique occurred in the aftermath of the Second World War.

Griffin makes a plausible case that the nation’s thirty-third president, Harry S. Truman, founded a new “constitutional order” when he chose to intervene in the Korean War without congressional authorization and rejected any serious

effort at “interbranch deliberation.” This was the moment at which the American political system began to decline, and with it sound policy making regarding the use of force. The American constitutional order “underwent a major transformation,” replaced by a flawed “jerry-built structure” that led to frequent “policy disasters and constitutional crises.” Congress abrogated its responsibilities regarding the most important decision any government can make—the decision to go to war. The legislative branch became, according to Griffin, a “junior partner whose consent was not required to take the nation to war.”

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Scholars who examine war powers tend to fall into one of two camps, either the “presidentialist” or the “congressionalist” camp, as the author puts it. One strength of Griffin’s book is that he does not fit neatly into either category, nor does he call for an increased role for the judiciary in the war-powers arena, unlike many of his fellow law professors. Additionally, Griffin impartially presents the arguments of scholars and practitioners of national security affairs, a quality frequently absent in books dealing with war powers. (See, for instance, Rachel Maddow’s *Drift: The Unmooring of American Military Power* [2012], or Andrew J. Bacevich’s *The New American Militarism: How Americans Are Seduced by War* [2013].) He also exercises a remarkable amount of restraint when offering recommendations for change, understanding as he does that reforms hatched in the academic lounge tend to disintegrate when they encounter reality.

Unfortunately, however, Griffin’s book falters at times in its questionable accounts of American history, although he is to be commended for doing what many of his fellow law professors do not—taking history seriously. Nonetheless, it is important to note that American presidents have been ignoring or manipulating Congress since the early days of the Republic: for instance, James Madison’s covert wars in East and West Florida, or James K. Polk’s machinations prior to the war with Mexico. Griffin’s interpretation of the conflict over the scope of executive power between Alexander Hamilton and Thomas Jefferson is marred by his claim that Hamilton’s position was “never implemented.” It was implemented by George Washington and arguably by Jefferson as well. The latter did not, as Griffin suggests, reject Hamilton’s broad interpretation of executive power during his war with the Barbary pirates; Jefferson in fact acted in a duplicitous manner toward Congress by providing it an incomplete account of his assertive executive actions.

Griffin makes other doubtful historical claims as well. For instance, he suggests that it was the Joint Chiefs of Staff who lobbied an apparently reluctant President John F. Kennedy to “finish off [Fidel] Castro.” The Kennedy brothers did not need any coaxing from the Joint Chiefs regarding Castro’s removal. Griffin is also somewhat dismissive of Ronald Reagan’s role in ending the Cold War, a subject that is at least open to debate, and he recoils at Reagan’s “astonishing ignorance” of Cold War history and lack of interest in “matters of governance.” Reagan in fact drove American policy toward the Soviet Union in a direction resisted by many of his closest advisers. Griffin claims that Dick Cheney was “more staffer than politician,” yet Cheney was a member of the House of Representatives for ten years, rising to the position of minority whip.

The author’s impartiality deserts him when he turns to the nation’s forty-third president, George W. Bush. While more measured than most, some of Griffin’s arguments echo those who suffer from “Bush Derangement Syndrome.” The

author accepts the notion that Bush and Vice President Cheney represented an existential threat to the constitutional order. He traces some of this back to Cheney's membership on the Iran-Contra committee, where Cheney and other conservatives promulgated a doctrine of presidential power that was one of "the most extreme and dangerous in all of constitutional law." Griffin criticizes President Bush's instructions to his attorney general in the immediate aftermath of the 9/11 attack: "Don't ever let this happen again." The author considers this to be an "impossible and dangerous order," yet it likely would have been given by any president, and it reflected the sentiment of members of Congress who approved Bush's antiterror policies through legislative action and supported the use of torture and other controversial measures, sometimes even calling for harsher methods. That Congress failed to deliberate on these issues at greater length and with a depth of understanding possessed by Griffin has been the rule rather than the exception since 1789.

Griffin claims that the Central Intelligence Agency had "substantial doubts" about Saddam Hussein's possession of weapons of mass destruction. However, prior to the invasion of Iraq that agency's director told President Bush that he had no doubts, that it was in fact a "slam dunk." According to Griffin, the Bush administration engaged in "a general failure to comply with the rule of law," a failure that was accompanied by "multiple genuine threats to civil liberties." In reality, in comparison to John Adams, Abraham Lincoln, Woodrow Wilson, and Franklin Roosevelt, George W. Bush and Dick Cheney might as well have been charter members of the American Civil Liberties Union. Also, it is simply laughable to assert that an "executive clique" led by Bush and his Svengali-like vice president "disabled" the ability of the public and the press to discern "reality."

Nevertheless, Griffin makes a credible case that something is wrong with the American constitutional order and that Congress must abandon its inclination to see itself as a junior partner to the president. But with a membership obsessed with its reelection prospects instead of its constitutional responsibilities, the likelihood of this occurring seems quite remote.