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Presidential Studies Quarterly (ISSN 0360-4918 [print]; 1741-5705 [online]) is published quarterly on behalf of the Center for the Study of the Presidency by Blackwell Publishing with offices at 350 Main St, Malden, MA 02148 USA; 9600 Garsington Road, Oxford, OX4 2ZG UK; and 600 North Bridge Rd, 05-01 Parkview Square, 18878 Singapore.

Subscriptions: Institutional Premium Rate (Includes online access to full-text articles from 1997 to present where available), The Americas $355, Rest of World, £266; Print and online-only rates are also available (see below). Customers in Canada should add 6% GST to ‘The Americas’ price or provide evidence of entitlement to exemption. Customers in the UK and EU should add VAT at 6% to the Rest of World rates or provide a VAT registration number or evidence of entitlement to exemption. Other print and online only rates are also available. See the journal homepage for more information: www.blackwellpublishing.com/PSQ.

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Electronic Access: For information on full-text electronic access, see the journal homepage: www.blackwellpublishing.com/PSQ.

Mailing: Periodical postage paid at Boston, MA and additional offices. Mailing to rest of world by DHL Smart & Global Mail. Canadian mail is sent by Canadian publications mail agreement number 40573520. Postmaster: Send all address changes to Presidential Studies Quarterly, Blackwell Publishing Inc., Journals Subscription Department, 350 Main St., Malden, MA 02148-5020.

Abstracting/Indexing: Presidential Studies Quarterly is abstracted or indexed in: Academic Abstracts; Academic Search; America: History and Life; Communication Abstracts; Corporate ResourceNET; Current Citation Express; Historical Abstracts; International Bibliography of the Social Sciences; IBZ (International Bibliography of Periodical Literature on the Humanities and Social Sciences); International Political Science Abstracts; MAS FullTEXT; MasterFILE FullTEXT; PAIS International; Peace Research Abstracts; Periodical Abstracts; Periodical Abstracts Research II; Political Science Abstracts; Public Library FullTEXT; Sage Public Administration Abstracts; Social Sciences Source; Social Sciences Index Full Text; TOPIcalSearch; Wilson OmniFile V; Wilson Social Sciences Index/Abstracts; and Worldwide Political Science Abstracts.

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INTRODUCTION

Invoking Inherent Powers: A Primer

LOUIS FISHER
Library of Congress

This special issue was organized to give scholars of different disciplines and persuasions an opportunity to analyze the nature and scope of the president’s power to exercise inherent authorities. What is the origin and legitimacy of this type of authority? Is it drawn solely from Article II of the Constitution or also located outside as an extraconstitutional power? What checks from the other branches operate against it? How does the assertion and exercise of this power by President George W. Bush compare to and differ from those of his predecessors? How compatible is presidential inherent power with the U.S. system of republican government and constitutional limits?

Across a broad front, the presidency of George W. Bush claims inherent powers to create military commissions and determine their rules and procedures; designate U.S. citizens as “enemy combatants” and hold them indefinitely without being charged, given counsel, or ever tried; engage in “extraordinary rendition” to take a suspect from the United States to another country for interrogation and possible torture; and authorize the National Security Agency to listen to phone conversations between the United States and a foreign country involving suspected terrorists.

This is not the first time that an American president has invoked inherent powers under Article II and the Commander-in-Chief Clause. Other precedents exist. Some are poorly understood and taken out of context to promote a scope of executive power that was never originally intended. In other cases, there are clear examples of presidents who invoked inherent, extraconstitutional, and exclusive power. Still, at no time in America’s history have inherent powers been claimed with as much frequency and breadth as the presidency of George W. Bush.

How much power fits under the umbrella of “inherent”? We are familiar with express and implied powers used by presidents to discharge their constitutional duties. Express powers are clearly stated in the text of the Constitution; implied powers are those

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AUTHOR’S NOTE: The views expressed here are my own.
that can be reasonably drawn from express powers. “Inherent” is sometimes used as synonymous with “implied,” but they differ fundamentally. Inherent power has been defined in this manner: “An authority possessed without its being derived from another. . . . Powers over and beyond those explicitly granted in the Constitution or reasonably to be implied from express powers” (Black 1979, 703). That definition remained in the sixth edition of Black’s Law Dictionary (1990) but dropped out of the current eighth edition (2004), which contains this definition of inherent power: “A power that necessarily derives from an office, position, or status” (Black 2004, 1208).

The purpose of a constitution is to specify and confine governmental powers to protect individual rights and liberties. That objective is undermined by claims of open-ended authorities that are not easily defined or circumscribed. The assertion of “inherent” powers ushers in a range of vague and abstruse sources. What “inheres” in the president? The standard collegiate dictionary explains that “inherent” describes the “essential character of something: belonging by nature or habit” (Merriam 1993, 601). How do we know what is essential or part of nature? The dictionary cross-references to “intrinsic,” which can mean within a body or organ (as distinct from extrinsic) but also something “belonging to the essential nature or constitution of a thing,” such as the “intrinsic worth of a gem” or the “intrinsic brightness of a star” (ibid., 614). Such words as inherent, essential, nature, and intrinsic are so nebulous that they invite political abuse and endanger individual liberties.

“Inherent” can introduce other properties, including attributes that suggest being superior, exclusive, and enduring. The verb “inhere” is used to describe a fixed element, such as the belief that “all virtue inhered in the farmer” or “the excellence inhering in the democratic faith” (Merriam 1965, 1163). “Inherence” may imply a power that has “permanent existence as an attribute” (ibid.). “Inherent” is associated with a quality that is settled or established, as “belonging by nature or settled habit” (ibid.).

The difficulty in understanding inherent power poses serious risks to constitutional government. The claim and exercise of inherent powers move a nation from one of limited powers to boundless and ill-defined authority. The assertion of inherent power in the president threatens the doctrine of separated powers and the system of checks and balances. Sovereignty moves from the constitutional principles of self-government, popular control, and republican government to the White House.

**Abraham Lincoln**

Those who argue for inherent powers for the president frequently cite the extraordinary actions by President Abraham Lincoln at the start of the Civil War. In April 1861, he suspended the writ of habeas corpus, withdrew funds from the Treasury, called forth the state militia, and placed a blockade on the rebellious states without legislative authority. In responding to the greatest crisis the United States has ever faced, he did not invoke exclusive or inherent authority. He claimed the right in time of emergency to act in the absence of law and sometimes against it, for the public good, and to come to
Congress later to explain what he had done (and why) and request from the legislative body the authority he needed. He understood that the superior lawmaker authority was Congress, not the president.

Admitting that he exceeded the constitutional boundaries established for the president, Lincoln knew he needed the sanction of Congress. He told lawmakers that his actions, “whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity, trusting then, as now, that Congress would readily ratify them” (Richardson 1897, 7, 3225). Lincoln never claimed authority to act outside the Constitution. He acted under his Article II powers plus those of Congress, believing that his actions (especially suspending the writ of habeas corpus) were not “beyond the constitutional competency of Congress” (ibid.). In so doing, he combined Article I and Article II powers.

Congress debated his request at length, with members supporting Lincoln with the explicit understanding that his emergency actions lacked legal support.1 Congress passed legislation approving, legalizing, and making valid all of Lincoln’s acts, proclamations, and orders issued after March 4, 1861 regarding U.S. forces “as if they had been issued and done under the previous express authority and direction of the Congress of the United States.”2 Unlike President Harry Truman in 1950 with the Korean War and President Bush from 2001 to 2006, Lincoln took emergency action but then sought statutory authority from Congress. He worked with Congress, not around it.

It is true that Lincoln had a face-off with the federal judiciary on a habeas petition and refused to be limited initially by judicial authority. His suspension of the writ of habeas corpus was opposed by Chief Justice Roger Taney, sitting as circuit judge. Taney ruled that, because the president had no authority under the Constitution to suspend the writ, a prisoner (John Merryman) should be set free. Merryman was suspected of being the captain of a secession troop and of having assisted in destroying railroads and bridges to prevent federal troops from reaching Washington, DC. When Taney attempted to serve a paper to free Merryman, prison officials refused to let Taney’s marshal carry out his duty. Sidestepping a direct confrontation with Lincoln he could not win, Taney merely noted that he had exercised all the power that the Constitution and federal law had conferred upon him, “but that power has been resisted by a force too strong for me to overcome.” He directed that his opinion be transmitted to Lincoln, after which it would “remain for that high officer, in fulfillment of his constitutional obligation to ‘take care that the laws be faithfully executed,’ to determine what measures he will take to cause the civil process of the United States to be respected and enforced.”3

Under Lincoln’s interpretation, emergency conditions enabled him to suspend the writ but only temporarily. Afterwards, he needed to work jointly with the legislative and judicial branches. Attorney General Edward Bates understood the limits on Lincoln’s power. If the constitutional language in Article I meant “a repeal of all power to issue the writ, then I freely admit that none but Congress can do it.” In the circumstances of “a

2. 12 Stat. 326, ch. 63, sec. 3 (1861).
great and dangerous rebellion, like the present,” the president’s power to suspend the privilege for a period of time was “temporary and exceptional, and was intended only to meet a pressing emergency.”

Lincoln and Bates accepted the power of Congress to pass legislation to define when and how a president may suspend the writ of habeas corpus during a rebellion. On March 3, 1863, Congress enacted a bill authorizing the president, during a rebellion, to suspend the privilege of the writ of habeas corpus “whenever, in his judgment, the public safety may require it.” If suspended, no military or other officer could be compelled to answer any writ and return to the court the person detained under presidential authority. Under these statutory terms, a judicial order would lack force.

The 1863 statute included an important restriction on the president. It directed the secretary of state and the secretary of war, “as soon as may be practicable,” to furnish federal judges with a list of the names of all persons, “citizens of states in which the administration of the laws has continued unimpaired in the said Federal courts,” who are held as prisoners by order of the president or executive officers. Submitting the list was not discretionary; it was mandatory. Failure to furnish the list could result in the discharge of the prisoner. The legislative history of this statute contains several statements that Lincoln did not possess independent authority to suspend the writ and that Lincoln and other executive officials might have committed illegal acts (Fisher 2005a, 44).

One other point needs to be emphasized about Lincoln’s war initiatives. They were directed to domestic, not foreign, conditions. Lincoln and his advisors never argued that he could take unilateral military actions against other nations without prior approval by Congress. In 1863, the Supreme Court upheld Lincoln’s authority to place a blockade on the South, but Justice Robert Grier denied that the president as commander in chief had authority to initiate war against another country. Lincoln had acted defensively, not offensively. Grier specifically limited the president’s power to take defensive actions, noting that he “has no power to initiate or declare a war either against a foreign nation or a domestic State.” The executive branch agreed. During oral argument, Richard Henry Dana, Jr., who represented the president, acknowledged that Lincoln’s actions had nothing to do with “the right to initiate a war, as a voluntary act of sovereignty. That is vested only in Congress.”

**The Curtiss-Wright Case**

Arguments in favor of inherent and extraconstitutional presidential power rely heavily on Justice George Sutherland’s decision in *United States v. Curtiss-Wright* (1936).

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4. Opinions of the Attorneys General, 10: 90 (1861).
6. Ibid., sec. 2.
7. Ibid., 756, sec. 3.
8. The *Prize* cases, 67 U.S. 635, 668 (1863).
9. Ibid., 660 (emphasis in original).
He cited this statement by John Marshall during debate in the House of Representatives in 1800: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." From this "sole organ" doctrine, the executive branch lays claim to numerous powers, including the power to conduct warrantless electronic surveillance and take other actions that supposedly override conflicting statutes and treaties. Those arguments depend not only on dicta in Sutherland’s decision but dicta that wrench Marshall’s statement from context to present a position he never held. Marshall never advocated an independent, inherent presidential power over external affairs, either in his positions as secretary of state, member of Congress, or chief justice of the Supreme Court. The specific frailties of Sutherland’s analysis are examined in my article in the Law section of this issue (Fisher 2007).

Harry Truman

In June 1950, President Harry Truman sent U.S. troops to South Korea without ever coming to Congress for authority. His action violated the Constitution, the legislative history of the UN Charter, and the UN Participation Act of 1945, all of which required the president to come to Congress first and obtain legislative authority before venturing into foreign wars (Fisher 2004, 81-104). He even violated his pledge to the Senate while it debated the UN Charter. He stated that when any agreements are negotiated to participate in a UN military action, “it will be my purpose to ask the Congress for appropriate legislation to approve them” (ibid., 91). His initiative marked the first time that an American president initiated a major war without a declaration or authorization from Congress. Part of Truman’s defense was the claim that his action in Korea did not constitute a “war” but rather a “police action” (ibid., 99-100).

Full articulation of the inherent-power theory came two years later when the Justice Department defended Truman’s seizure of the steel mills to prosecute the war in Korea. Although he based the seizure order on authority under “the Constitution and laws of the United States, and as President of the United States and Commander-in-Chief of the armed forces of the United States” (Executive Order 10340), the Justice Department argued in court that Truman had acted solely on inherent executive power without any statutory support. Assistant Attorney General Holmes Baldridge told District Judge David A. Pine that courts were powerless to control the exercise of presidential power when directed toward emergency conditions. It seemed to Baldridge that “there is enough residual power in the executive to meet an emergency situation of this type when it comes up.” Pine’s reaction was chilling: “I think that whatever decision I reach, Mr. Baldridge, I shall not adopt the view that there is anyone in this Government whose power is unlimited, as you seem to indicate” (U.S. Congress 1952, 258).

Baldridge told Pine that only two limitations operated on executive power: “One is the ballot box and the other is impeachment.” When Pine inquired whether Baldridge was arguing that, when a “sovereign people” granted powers to the federal government, “it limited Congress, it limited the judiciary, but did not limit the executive,” Baldridge cheerfully replied: “That’s our conception, Your Honor” (Loftus 1952, 1; Paull 1952, 1).
Pine asked whether once the president determines that an emergency exists, “the Courts cannot even review whether it is an emergency.” Baldridge responded: “That is correct” (U.S. Congress 1952, 371-72).

At a news conference on April 17, 1952, Truman was asked, if he could seize the steel mills under his inherent powers, could he “also seize the newspapers and/or radio stations.” Truman answered: “Under similar circumstances the President of the United States has to act for whatever is for the best of the country” (Public Papers 1952, 273). He insisted that the president “has very great inherent powers to meet great national emergencies” (ibid., 290). On April 29, Judge Pine wrote a blistering opinion denouncing the Justice Department’s analysis of inherent presidential power. He flatly rejected the theory of an emergency power for the president that is not subject to judicial review: “To my mind this [theory] spells a form of government alien to our Constitutional government of limited powers.” To recognize it “would undermine public confidence in the very edifice of government as it is known under the Constitution.”10 In holding Truman’s seizure of the steel mills to be unconstitutional, he acknowledged that a nationwide strike might do extensive damage to the country but believed that a strike “would be less injurious to the public than the injury which would flow from a timorous judicial recognition that there is some basis for this claim to unlimited and unrestrained Executive power, which would be implicit in a failure to grant the injunction.”11

Gallup polls reflected growing public disapproval of Truman’s action. The administration decided to jettison the sweeping arguments for executive power it had presented in district court. Instead of relying on inherent powers, the Justice Department switched gears to argue that the president was simply putting into effect the defense programs authorized by Congress (U.S. Justice Department 1952, 144-72). This shift in legal strategy came too late and could not erase the taste left from district court presentations. The Supreme Court, divided 6 to 3, sustained Judge Pine’s decision.12

The district court and the Supreme Court were driven by a hostile public reaction to the steel seizure. The great majority of newspapers rejected Truman’s sweeping definition of executive power. An editorial in the New York Times rebuked him for creating “a new regime of government by executive decree,” a system of government that was inconsistent “with our own democratic principle of government by laws and not by men” (Editorial 1952, 28). The Washington Post predicted that Truman’s action “will probably go down in history as one of the most high-handed acts committed by an American President.”13 Other newspapers weighed in with various forms of denunciation, excoriating Truman for trying to exercise “dictatorial powers.”14

11. Ibid., 577.
One of the law clerks on the Supreme Court in 1952 was William Rehnquist. He and his associates expected Truman to win. The Court comprised Roosevelt and Truman appointees and “the entire decisional trend for fifteen years [1937-1952] had been in the direction of the aggrandizement of the powers of the president and Congress” (Rehnquist 2001, 171). What would account for the Court deciding against presidential power in the middle of the Korean War? Years later, Rehnquist described the impact of public opinion on the judiciary: “I think that this is one of those celebrated constitutional cases where what might be called the tide of public opinion suddenly began to run against the government, for a number of reasons, and that this tide of public opinion had a considerable influence on the Court” (ibid., 192).

The Influence of Scholars

For the past half-century, political scientists, historians, and law professors have offered intellectual support for the claim of inherent presidential power. They regularly look to the president as the branch of government best equipped to provide expertise, good intentions, and a commitment to the “national interest.” By placing their trust in the presidency, they necessarily gave short shrift to legal boundaries and constitutional principles, including checks and balances and separation of powers (Fisher 2005b).

Although some of the scholars identify themselves as “originalists,” their framework for government departs markedly from the values that shaped the Constitution. The Framers knew that British precedents assigned all of external affairs, including the war power, to the king. Equally clear is that the Framers did not trust concentrating power in an executive, and that was especially so with the war power. In their effort to create a republican government, they understood from their study of history that executives, in their search for fame and glory, had a dangerous appetite for war. John Jay in *Federalist no. 4* warned that monarchs in other nations “will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans.” Those motives prompted executives to engage in wars “not sanctified by justice or the voice and interests of his people” (Wright 1961, 101).

Commager and Schlesinger

When Truman went to war against North Korea in 1950, the academic community had an opportunity to challenge the legality of his actions. Instead, prominent professors and scholars rushed to his defense. The historian Henry Steele Commager rebuked Senator Robert Taft and other critics of Truman’s intervention, briskly stating that their objections “have no support in law or in history.” He found the historical pattern so clear and obvious and “so hackneyed a theme that even politicians might reasonably be expected to be familiar with it” (Commager 1951a, 11). Commager cited precedents from the time of George Washington, John Adams, Thomas Jefferson, John Quincy
Adams, Abraham Lincoln, and the UN Charter, but none of those presidential actions came close to justifying Truman’s action in Korea (Fisher 2005b, 593-95). Commager argued that strong presidents can use executive power boldly without threatening democracy or impairing the constitutional system: “There is, in fact, no basis in our own history for the distrust of the Executive authority” (Commager 1951b, 15).

By the 1960s, with the nation mired in a bitter war in Vietnam, Commager changed his tune and publicly apologized for his earlier unreserved endorsement of presidential war power. Commager told the Senate Foreign Relations Committee in 1967 that there should be a reconsideration of executive-legislative relations in the conduct of foreign relations (U.S. Congress 1967, 21). He returned to the committee in 1971 to testify that “it is very dangerous to allow the president to, in effect, commit us to a war from which we cannot withdraw, because the warmaking power is lodged and was intended to be lodged in the Congress” (U.S. Congress 1971, 62).

Arthur M. Schlesinger, Jr. also stepped forward to defend Truman’s military actions in Korea. In a letter to the New York Times, he rejected Senator Taft’s position that Truman “had no authority whatever to commit American troops to Korea without consulting Congress and without Congressional approval.” He similarly dismissed Taft’s claim that, by sending troops to Korea, Truman had “simply usurped authority, in violation of the laws and the Constitution.” Calling Taft’s analysis “demonstrably irresponsible,” Schlesinger ended with this admonition: “Until Senator Taft and his friends succeed in rewriting American history according to their own specifications these facts must stand as obstacles to their efforts to foist off their current political prejudices as eternal American verities” (Schlesinger 1951, 28).

Years later, Schlesinger admitted that it was he, not Taft, who tried to rewrite American history and foist off political prejudices. The historical examples Schlesinger identified had no bearing on Truman’s claim that he could go to war against another country without first coming to Congress for authority. Edward S. Corwin responded to Commager and Schlesinger by challenging the “course of constitutional development, practical and polemical, which ascribes to the President a truly royal prerogative in the field of foreign relations, and does so without indicating any correlative legal or constitutional control to which he is answerable.” Corwin remarked: “Our high-flying prerogative men appear to resent the very idea that the only possible source of such control, Congress to wit, has any effective power in the premises at all” (Corwin 1951, 15).

After witnessing the Vietnam War and Watergate, Schlesinger expressed regret for calling Taft’s statement “demonstrably irresponsible.” He explained that he had responded with “a flourish of historical documentation and, alas, hyperbole” (Schlesinger 1973, 139). The problem went beyond flourishes and hyperbole. Schlesinger decided to remove his professional and academic hat in the early 1950s and endorse a presidential war for political and partisan objectives. By 1966, he counseled that “something must be done to assure the Congress a more authoritative and continuing voice in fundamental decisions in foreign policy” (Schlesinger and de Grazia, 1967, 27-28). In his 1973 book, The Imperial Presidency, Schlesinger wrote about the domestic and international pressures that helped concentrate power in the presidency: “It must be said that historians and
political scientists, this writer among them, contributed to the presidential mystique” (Schlesinger 1973, ix). Reconsideration is always valuable and needs to be encouraged, but independent scholarly checks are needed at the time of constitutional violations, not two decades later.

Richard Neustadt

Probably no presidential study has had the impact of Richard Neustadt’s *Presidential Power*, published in 1960 and reissued as a paperback four years later. By concentrating on case studies and practical politics, Neustadt ignored or downgraded institutional, legal, and constitutional values. His emphasis on influence and persuasion overshadowed the fundamental constraints of public law (Moe 1999, 266-67; Moe 2004, 24-25). Starting with the modest theme of presidential power being “the power to persuade” (Neustadt 1964, 23) within a system of “give-and-take” (ibid., 47), a different side emerged as the book progressed. Neustadt now began to urge presidents to take power, not give it or share it. Power was something to be acquired and concentrated in the presidency, and the power was to be used for personal use. His model president was Franklin D. Roosevelt, not Dwight D. Eisenhower: “The politics of self-aggrandizement as Roosevelt practiced it affronted Eisenhower’s sense of personal propriety” (ibid., 157). Was it just Eisenhower’s “personal propriety” or his understanding of what the Constitution allowed, both in terms of separation of powers and federalism? To Neustadt it did not matter. FDR had every right to seek power for his own use and enjoyment: “Roosevelt was a politician seeking personal power; Eisenhower was a hero seeking national unity” (ibid.). Because Eisenhower cared more for national unity than personal power, Neustadt dismissed him as an “amateur” (ibid., 170, 171, 182).

Neustadt’s book included a case study of the Korean War. He describes how Truman gave General Douglas MacArthur too much latitude and had to fire him. He also discussed the Supreme Court’s decision to strike down the steel seizure. But there is not a word on whether Truman had the constitutional or legal authority to go to war against North Korea, nor did Neustadt explore Truman’s inflated definitions of executive emergency power that the country and the judiciary found offensive. Certainly Truman never used the power of “persuasion” to convince Congress and the public about the war. Instead of examining the claims of emergency or inherent presidential power, Neustadt was satisfied that Truman had made decisions, taken initiatives, and was the “man-in-charge” (ibid., 166). Neustadt wrote: “The more determinedly a President seeks power, the more he will be likely to bring vigor to his clerkship. As he does so he contributes to the energy of government” (ibid., 174). Neustadt measured presidential success by action, vigor, decisiveness, initiative, energy, and personal power.

Wholly absent from his analysis were constitutional checks, sources of authority, or the ends to which power is put. Alexander Hamilton and other Framers emphasized the need for “energy” in the executive, but it was energy within the law, not outside it. It was energy to see that the laws are faithfully executed. In *Federalist no. 70*, Hamilton argued that energy was necessary to protect “the community against foreign attacks” (defensive,
not offensive, wars) and for “the steady administration of the laws.” Energy was needed to carry out the laws, not to make or break them, and certainly not to undermine or threaten republican government.

John Yoo

Over the past decade, John Yoo has emerged as the leading academic voice to press for broad definitions of presidential power in foreign affairs. Unlike the liberal framework of Commager, Schlesinger, and Neustadt, Yoo approaches his work from a distinctly conservative orientation. He has been active with the Federalist Society, which endorses the doctrine of the unitary executive. This theory places all executive power directly under the control of the president, leaving no room for independent commissions, independent counsels, congressional involvement in administrative details, or statutory limitations on the president’s power to remove executive officials (Fisher 2006, 1233).

An intellectual tension exists within the Federalist Society. It is generally comfortable in placing foreign policy and the war power with the president. At the same time, it promotes Original Intent, the belief that constitutional analysis needs to adhere to the intent of the Constitution as expressed through the Founding Fathers. Yet the record is overwhelmingly clear that the Framers consciously and deliberately broke with the British model of John Locke and William Blackstone, who placed all of external power and military decisions with the executive (Fisher 2004, 1-16). Yoo, however, wrote a lengthy 1996 article for the California Law Review, concluding on the basis of English history that “the Framers created a framework designed to encourage presidential initiative in war. Congress was given a role in war-making decisions not by the Declare War Clause, but by its power over funding and impeachment.” Moreover, federal courts “were to have no role at all” (Yoo 1996, 170).

A law review was an ideal place for Yoo’s article. Law students, usually without the assistance of peer review by outside scholars, decide which of many submitted manuscripts merit publication. Looking for originality, articles editors are interested in publishing a manuscript that can stimulate debate, draw the attention of other law reviews, and perhaps be mentioned in decisions issued by federal or state courts. Even if articles editors are unprepared to match the intellectual depth and experience of law professors who submit manuscripts, it is surprising that the students at the California Law Review could not have asked Yoo: “If the Framers created a framework designed to encourage presidents to initiate war, limited Congress to decisions of funding and impeachment, and prohibited a role for the U.S. courts, why is the Constitution written as it is? Why are so many war and military powers placed in Article I under Congress?”

Moreover, it should have been within the competence of an articles editor to check Yoo’s claim that the Constitution provides “no role at all” for the courts in war power disputes. Limiting a review to the first two decades, it would have been easy for law students to locate the Supreme Court decisions of Bas v. Tingy (1800), Talbot v. Seeman (1801), and Little v. Barreme (1804). Not only did the Court take those cases and decide
them, they looked exclusively to Congress for the meaning of the war power. In the last case, the Court decided that, when a collision occurs in time of war between a presidential proclamation and a congressional statute, the statute trumps the proclamation.

The students could have found the Smith case in 1806, where a federal circuit court forcefully rejected the argument that the president could ignore and countermand the Neutrality Act of 1794. The court clearly understood the difference between the defensive powers of the president and the offensive powers of Congress. There was “a manifest distinction between our going to war with a nation at peace, and a war being made against us by an actual invasion, or a formal declaration. In the former case, it is the exclusive province of congress to change a state of peace into a state of war.”

In Ex parte Bollman (1807), Chief Justice Marshall decided the case of two men charged with treason for levying war against the United States. A habeas petition had been filed to bring the men before the Court. Marshall looked to Congress as possessing plenary prerogative over suspending the writ: “If at any time the public safety should require the suspension of the powers vested by this act [Section 14 of the Judiciary Act of 1789] in the courts of the United States, it is for the legislature to say so.” The two prisoners were brought before the Court, where it was decided that there was insufficient evidence to justify the commitment of either one on the charge of treason in levying war against the United States.

Of these five cases, Yoo mentions three. He cites Little but makes no mention of how the Court decided that a federal statute in time of war is superior to a presidential proclamation (Yoo 1996, 245, n.379). Yoo discusses Talbot (ibid., 294), but omits Chief Justice Marshall’s statement that the “whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this inquiry.”

Yoo claims that the Supreme Court in Little “never reached questions concerning the justiciability of inter-branch war powers disputes, or the President’s inherent authority to order captures going beyond Congress’ commands” (ibid., 295, n.584). Obviously the Court did reach questions concerning the justiciability of interbranch war powers disputes. The Court upheld a congressional statute over a conflicting presidential proclamation. Moreover, the Court did reach the question of the president’s inherent authority to order captures going beyond the statutory authority of Congress. In deciding in favor of the statute, the Court dismissed any possible claim of the president possessing inherent authority in the dispute being adjudicated. As to some other invocation of inherent presidential authority in a different dispute, there was no reason for the Court—or for any court—to decide questions not placed before it. For other commentary on Yoo’s analysis, see Fisher (2006, 1234-40) and Fisher (2000, 1658-68).

15. Little v. Barreme, 6 U.S. (2 Cr.) 170, 179 (1804); Talbot v. Seaman, 5 U.S. (1 Cr.) 1, 28 (1801); Bas v. Tingy, 4 U.S. (4 Dall.) 37, 39–46 (1800).
17. 8 U.S. (4 Cr.) 75, 101 (1807).
18. Ibid., 135.
George W. Bush

Shortly after the terrorist attacks of 9/11, officials in the Bush administration began to advance a broad theory of presidential inherent power to create military commissions, designate U.S. citizens as “enemy combatants,” condone torture as an interrogation technique, engage in “extraordinary rendition,” and conduct warrantless National Security Agency (NSA) eavesdropping. The administration also cited statutes and court cases to justify these initiatives, but the primary source of authority consisted of Article II and inherent powers that the government argued were not subject to constraints from other branches.

Military Commissions

On November 13, 2001, President Bush issued a military order for the detention, treatment, and trial of noncitizens who belonged to al Qaeda, engaged in international terrorism, or harbored such individuals (Bush 2001). He relied upon “the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force [AUMF] Joint Resolution (Public Law 107-40, 11 Stat. 224) and sections 821 and 836 of title 10, United States Code.” The joint resolution authorized war against Afghanistan; the two sections of Title 10 include references to military commissions.

In litigation challenging the president’s authority to establish and operate commissions, the Justice Department argued that Bush “had ample authority” to convene them, relying on both the AUMF and Sections 821 and 836 (U.S. Justice Department 2006a, 7). If congressional support for the military order “were not so clear, the President has the inherent authority to convene military commissions to try and punish captured enemy combatants in wartime—even in the absence of any statutory authorization” (ibid., 8). The determination by President Bush that members and affiliates of al Qaeda are not covered by the Geneva Conventions “represents a core exercise of the President’s Commander-in-Chief and foreign affairs powers during wartime and is entitled to be given effect by the courts” (ibid., 9). The department referred to “Congress’s traditional hands-off approach to military commissions (in contrast to courts-martial)” (ibid., 10). Further, the department claimed that the Supreme Court “has recognized that courts are not competent to second-guess judgments of the political branches regarding the extent of force necessary to prosecute a war” (ibid., 19).

On June 29, 2006, in *Hamdan v. Rumsfeld*, the Supreme Court found those arguments to be meritless. Writing for a 5-3 majority, Justice John Paul Stevens held that President Bush could not use the military commissions he had created. He needed statutory authority from Congress. The commission convened to try Salim Ahmed Hamdan and other suspected terrorists “lacks power to proceed because its structure and procedures violate both the UCMJ [Uniform Code of Military Justice, Sections 821 and
and the Geneva Conventions.\textsuperscript{19} The administration attempted to discount the importance of this decision by calling it merely a statutory, not a constitutional, question. Testifying on July 11, 2006 before the Senate Judiciary Committee, Acting Assistant Attorney General Steven G. Bradbury said in his prepared statement: “The Court did not address the President’s constitutional authority and did not reach any constitutional question” (U.S. Justice Department 2006b, 1).

This position is shallow for two reasons. The administration had argued that the president had independent inherent powers under Article II to create the commissions and determine their procedures. To that proposition the Court gave a flat No. Second, the Court directed Bush to seek legislation from Congress that would comply with Sections 821 and 836 of the Uniform Code of Military Justice. The Court’s judgment is anchored in the determination that the constitutional authority over military commissions lies fundamentally in Congress, flowing from Article I authority, and does not derive from any core presidential power.

After the \textit{Hamdan} decision, the military commission bill drafted by the Bush administration continued to argue for inherent power under Article II. As placed in the \textit{Congressional Record} on September 7, 2006, the section on “Findings” asserted: “The President’s authority to convene military commissions arises from the Constitution’s vesting in the President of the executive power and the power of Commander in Chief of the Armed Forces.”\textsuperscript{20} If that were true, the administration would have won \textit{Hamdan} and the Court would not have directed Bush to come to Congress to seek statutory authority. The substitute bill (S. 3901), reported by the Senate Armed Services Committee on September 14, drew entirely on the Article I powers of Congress. The compromise bill later agreed to by the administration also deleted the Article II argument but deferred heavily to the president.

\section*{Enemy Combatants}

The military commissions created by President Bush on November 13, 2001 applied to any individual “not a United States citizen.” A number of suspected alien terrorists were prosecuted in civil court or taken before a military tribunal. Others were designated “enemy combatant” and held incommunicado without access to an attorney. Two U.S. citizens, Yaser Esam Hamdi and Jose Padilla, were treated in that fashion by being placed in military confinement without ever being charged or tried.

Regarding Hamdi, the Justice Department argued that, whenever the president designates a U.S. citizen an enemy combatant, federal judges may not interfere with his judgment. According to a government brief in the Fourth Circuit, the Constitution vests the president “with exclusive authority to act as Commander in Chief and as the Nation’s sole organ in foreign affairs” (U.S. Justice Department 2002a, 14). As a consequence, courts “may not second-guess the military’s determination that an individual is an enemy combatant and should be detained as such. . . . Going beyond that determination would

\textsuperscript{20} \textit{Congressional Record}, 152: S9113 (daily ed., September 7, 2006).
require the courts to enter an area in which they have no competence, much less institutional expertise, intrude upon the constitutional prerogative of the Commander in Chief (and military authorities acting at his control), and possibly create “a conflict between judicial and military opinion highly comforting to enemies of the United States” (ibid., 29-30, 31).

American citizens designated as enemy combatants can cite this provision in the U.S. Code: “No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress” (18 U.S.C. § 4001(a)). The Bush administration argued that it was not limited by this statute because “Article II alone gives the President the power to detain enemies during wartime, regardless of congressional action” (Haynes 2002, 2). Alternatively, the administration concluded that the AUMF, authorizing military action against Afghanistan, represented an act of Congress that satisfied the statutory requirement of Title 18.

Padilla was another U.S. citizen designated as an enemy combatant. He was kept in a Navy brig in Charleston, SC, without access to an attorney, never formally charged, and with no expectation of a trial. Unlike Hamdi, who was captured in Afghanistan, Padilla was arrested in Chicago on a material witness warrant before being designated as an enemy combatant a month later. Although it could not be argued that Padilla engaged as a “combatant” on a battlefield, the government decided that one can be an enemy combatant without ever fighting on a battlefield: “In a time of war, an enemy combatant is subject to capture and detention wherever found, whether on a battlefield or elsewhere abroad or within the United States” (U.S. Justice Department 2002b, 23).

On June 28, 2004, eight justices of the Supreme Court rejected the government’s central argument that Hamdi’s detention was quintessentially a presidential decision, not to be reevaluated and second-guessed by the judiciary. Writing for the plurality, Justice Sandra Day O’Connor announced: “We necessarily reject the Government’s assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. . . . We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens. . . . Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.”21 On the same day, the Court ducked Padilla’s case by deciding that his habeas petition had been filed with the wrong court.22

The Torture Memos

After 9/11, a series of Justice Department memos argued for broad and independent presidential authority to determine the methods used to interrogate suspected terrorists. A memo of December 28, 2001, written by John Yoo and Patrick F. Philbin, serving as deputies in the Office of Legal Counsel (OLC), concluded that “the great weight of legal

authority indicates that a federal district court could not properly exercise habeas juris-
diction over an alien detained at GBC [Guantánamo Bay, Cuba]” (U.S. Justice Depart-
ment 2001, 1). That line of analysis, rejected by the Supreme Court in Rasul v. Bush,23
would have allowed executive officials to conduct interrogations and operate military
commissions without any interference from federal courts.

Yoo teamed up with another OLC attorney, Robert J. Delahunty, to write a memo
dated January 9, 2002. They concluded that such treaties as the Geneva Conventions
and various statutes “do not protect members of the al Qaeda organization, which as a
non-State actor cannot be a party to the international agreements governing war. We
further conclude that these treaties do not apply to the Taliban militia” (U.S. Justice
Department 2002c, 1). Treaty provisions, including prohibitions on physical or mental
torture, coercive interrogations, acts of violence, inhumane treatment, and any form of
cruelty, would not apply. Nor could Congress, by statute, interfere with the president’s
authority over detainees: “Any congressional effort to restrict presidential authority by
subjecting the conduct of the U.S. Armed Forces to a broad construction of the Geneva
Convention, one that is not clearly borne by its text, would represent a possible infringe-
ment on presidential discretion to direct the military” (ibid., 11).

The legal and constitutional analyses by Yoo and other OLC attorneys led directly
to a fifty-page memo by OLC head Jay S. Bybee, prepared for White House Counsel
Alberto Gonzales and dated August 1, 2002. Physical pain amounting to torture “must
be equivalent in intensity to the pain accompanying serious physical injury, such as organ
failure, impairment of bodily function, or even death” (U.S. Justice Department 2002d,
1). Bybee incorporated Yoo’s definition of presidential power in time of war: “[A] statute
would be unconstitutional if it impermissibly encroached on the President’s constitu-
tional power to conduct a military campaign. As Commander-in-Chief, the President has
the constitutional authority to order interrogations of enemy combatants to gain intel-
ligence information concerning the military plans of the enemy” (ibid., 31). Because this
power, as read by Bybee and Yoo, comes from the Constitution, no statute, treaty, or court
decision could limit it.

The OLC memos greatly influenced the working group that Defense Secretary
Donald Rumsfeld established on January 15, 2003. When its report was released, first
as a draft on March 6, 2003, and later as a final report on April 4, 2003, they showed
the marked impact of OLC analysis on presidential power, treaties, statutes, and court
rulings. Both reports state that the torture statute “does not apply to the conduct of
U.S. personnel at Guantanamo,” and both interpret the torture statute as not applying
“to the President’s detention and interrogation of enemy combatants pursuant to his
Commander-in-Chief authority” (Fisher 2005a, 207-08). From these legal memos it was
a short step to the torture of detainees at Guantánamo, Afghanistan, and Iraq, including
the notorious prison at Abu Ghraib (ibid., 198-209).

The stunning content of the administration’s memos, eventually made available on
the Internet, forced the White House into a partial retreat. At a press briefing on June 22,
2004, White House Counsel Gonzales explained that, to the extent that some of the

documents “in the context of interrogations, explored broad legal theories, including legal theories about the scope of the President’s power as Commander-in-Chief, some of their discussion, quite frankly, is irrelevant and unnecessary to support any action taken by the President” (White House 2004). He announced that the memos were under review and might be replaced.

At the end of 2004, the OLC released a memo that called torture “abhorrent both to American law and values and to international norms” (U.S. Justice Department 2004, 1). This document, superceding the Bybee August 2002 memo, concluded that the discussion in Bybee’s memo “concerning the President’s Commander-in-Chief power and the potential defenses to liability was—and remains—unnecessary, [and] has been eliminated from the analysis that follows” (ibid., 2). However, “elimination” did not mean disappearance or even repudiation. In the June 22, 2004 meeting with reporters, Gonzales explained that the briefing “does not include CIA activities” (White House 2004, 4).

When a reporter asked whether they were “wrong to assume then, that the CIA is not subject to these categories of interrogation technique,” Gonzales replied that he was not going “to get into questions related to the CIA” (ibid., 21). The White House clearly intended to maintain two standards: one for interrogations conducted by the Defense Department and a separate procedure for the CIA. That distinction was openly discussed in the military commission bill debated during the fall of 2006 (Baker 2006, A1).

**Extraordinary Rendition**

Broad interpretations of the president’s power as commander in chief in time of war bore fruit in another area: “extraordinary rendition,” which allows detainees to be sent to another country for interrogation and possible torture. In previous years, attorneys general had concluded that presidents may not act under some form of implied, inherent, or extraconstitutional authority. They needed authority granted either by treaty or a law passed by Congress. As recently as 1979, the OLC decided that the president “cannot order any person extradited unless a treaty or statute authorizes him to do so.”

Use of the adjective “extraordinary” is a clue that the procedure has entered the realm of executive law, where the president acts not only in the absence of statutory or treaty law but even in the face of them. Officials in the Bush administration defended the need to detain and interrogate suspected terrorists outside the country. James L. Pavitt, after retiring from the CIA in August 2004, claimed that the policy of extraordinary rendition had been done in consultation with the National Security Council and disclosed to the appropriate congressional oversight committees (Priest 2004, A21). Of course, the process of consultation and reporting lies wholly outside treaty or statutory law. Critical stories about extraordinary rendition appeared with increasing frequency and intensity (Priest 2005, A1; Kessler 2005, A1; Whitlock 2005, A22; Priest and White 2005, A2).

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24. For example, 3 Ops. Att’y Gen. 661 (1841) (the president depends on authority by a law or treaty to surrender someone to a foreign jurisdiction); 2 Ops. Att’y Gen. 559 (1833) (requiring a law or treaty for extradition); 1 Ops. Att’y Gen. 68, 69-70 (1797) (“[H]aving omitted to make a law directing the mode of proceeding, I know not how, according to the present system, a delivery of such offender could be effected. . . . This defect appears to me to require a particular law”).

In court, the Bush administration argued that individuals subject to extraordinary rendition are barred from litigating their grievances because a lawsuit would risk the disclosure of state secrets and encroach on independent presidential authority: “The state secrets privilege is based on the President’s Article II power to conduct foreign affairs and to provide for the national defense, and therefore has constitutional underpinnings” (U.S. Justice Department 2005, 3-4).

In an effort to rebut criticism of extraordinary rendition, Secretary of State Condoleezza Rice issued a detailed statement on December 5, 2005. She maintained that “[f]or decades, the United States and other countries have used ‘renditions’ to transport terrorist suspects from the country where they were captured to their home country or to other countries where they can be questioned, held, or brought to justice” (Rice 2005). Those renditions were authorized by statute or by treaty, not by independent presidential assertions of authority, and the renditions were subject to traditional judicial procedures. Not so under the Bush administration.

Rice claimed that rendition “is not unique to the United States, or to the current administration,” and offered two examples where suspected terrorists were transferred from one country to another. Ramzi Youssef was brought to the United States after being charged with the 1993 bombing of the World Trade Center and plotting to blow up airlines over the Pacific Ocean. “Carlos the Jackal,” captured in Sudan, was brought to France (ibid.). Those examples had nothing to do with extraordinary rendition. The two men were not taken to a secret interrogation center, outside the judicial process, and subjected to torture. They were brought to court to face public charges, trial, conviction, and sentence.

On September 6, 2006, President Bush confirmed the existence and operation of CIA prisons abroad for the purpose of interrogating terrorist suspects (Smith and Fletcher 2006, A1; Stolberg 2006, A1). During debate on the military commission bill, which Congress enacted to comply with *Hamdan*, the White House and Republican senators insisted on language that “would provide for continued tough interrogations of terrorism suspects by the CIA at secret detention sites” (Smith and Babbington 2006, A1).

**NSA Eavesdropping**

On December 16, 2005, the *New York Times* reported that, in the months following the 9/11 attacks, President Bush secretly authorized the NSA to listen to Americans and others inside the United States without a court-approved warrant. The agency had been monitoring the international telephone calls and international e-mail messages “of hundreds, perhaps thousands” of people over the previous three years in an effort to obtain evidence about terrorist activity (Risen and Lichtblau 2005, A1). On December 17, in a weekly radio address, President Bush acknowledged that he had authorized the NSA, “consistent with U.S. law and the Constitution, to intercept the international communications of people with known links to Al Qaeda and related terrorist organizations” (Bush 2005a, 30).

In a news conference on December 19, Bush stated: “As President and Commander in Chief, I have the constitutional responsibility and the constitutional authority to
protect our country. Article II of the Constitution gives me that responsibility and the authority necessary to fulfill it.” He noted that Congress after 9/11 had passed the AUMF granting him “additional authority to use military force against Al Qaida” (Bush 2005b, 1885). Also on December 19, Attorney General Gonzales held a press briefing on the NSA program, claiming that “the President has the inherent authority under the Constitution, as Commander-in-Chief, to engage in this kind of activity” (Gonzales 2005, 2). When asked why the administration did not seek a warrant from the Foreign Intelligence Surveillance Act (FISA) Court, which Congress created in 1978 to be the exclusive means of authorizing national security eavesdropping, Gonzales replied that the administration continued to seek warrants from the FISA Court but was not “legally required” to do that in every case if another statute granted the president additional authority (ibid.). It was the administration’s position that the AUMF statute provided that additional authority.

Gonzales emphasized the need for “the speed and the agility” that the FISA process lacked: “You have to remember that FISA was passed by the Congress in 1978. There have been tremendous advances in technology” since that time (ibid., 2). Why did the administration not ask Congress to amend FISA to grant the president greater flexibility, as was done several times after 1978 and even after 9/11? Gonzales replied he was advised “that would be difficult, if not impossible” (ibid., 4).

On January 19, 2006, the OLC produced a forty-two-page white paper defending the legality of the NSA program. It concluded that the NSA activities “are supported by the President’s well-recognized inherent constitutional authority as Commander in Chief and sole organ for the Nation in foreign affairs to conduct warrantless surveillance of enemy forces for intelligence purposes to detect and disrupt armed attacks on the United States. The President has the chief responsibility under the Constitution to protect America from attack, and the Constitution gives the President the authority necessary to fulfill that solemn responsibility” (U.S. Justice Department 2006c, 1). Later in the paper, the OLC linked “sole organ” to the 1936 Supreme Court decision of United States v. Curtiss-Wright (ibid., 6-7).

In addition to these constitutional arguments, the OLC argued that “Congress by statute has confirmed and supplemented the President’s recognized authority under Article II of the Constitution to conduct such warrantless surveillance to prevent catastrophic attacks on the homeland.” In responding to the 9/11 attacks, Congress enacted the AUMF to authorize the president to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks” of September 11 in order to prevent “any future acts of international terrorism against the United States” (ibid., 2). Moreover, although FISA “generally requires judicial approval of electronic surveillance, FISA also contemplates that Congress may authorize such surveillance by a statute other than FISA,” and the AUMF, the OLC said, met that requirement (ibid., 2-3). Any congressional statute interpreted to impede the president’s ability to use electronic surveillance to detect and prevent future attacks by an enemy “would be called into very serious doubt” as to its constitutionality. If this constitutional question “had to be addressed, FISA would be unconstitutional as applied to this narrow context” (ibid., 3). According to this reading, statutory law could not restrict what the president decided to do under his Article II powers.
When Michael Hayden appeared before the Senate Select Committee on Intelligence on May 18, 2006 to testify on his nomination to be CIA director, he defended the legality of the NSA program on constitutional, not statutory, grounds. He did not attempt to use the AUMF as legal justification. In recalling his service as NSA director after 9/11, he told the committee that, when he talked to NSA lawyers, “they were very comfortable with the Article II arguments and the president’s inherent authorities” (Hayden 2006, 35). When they came to him and discussed the lawfulness of the NSA program, “our discussion anchored itself on Article II” (ibid.). The NSA attorneys “came back with a real comfort level that this was within the president’s authority [i.e., Article II]” (ibid., 69). This legal advice was not put in writing and Hayden “did not ask for it” (ibid.). Instead, “they talked to me about Article II” (ibid.).

Hayden repeatedly claimed that the NSA program was legal and that the CIA “will obey the laws of the United States and will respond to our treaty obligations” (ibid., 74). What did Hayden mean by “law”? National policy decided by statute or treaty? Or a policy purely executive-made? During the hearing, he treated “law” as the latter, something that can be derived from Article II or inherent powers. “I had two lawful programs in front of me, one authorized by the president, the other one would have been conducted under FISA as currently crafted and implemented” (ibid., 88). He told one senator: “I did not believe—still don’t believe—that I was acting unlawfully. I was acting under a lawful authorization” (ibid., 138). He meant a presidential directive issued under Article II.

Hearing him insist that he acted legally in implementing the NSA program, a senator said: “I assume that the basis for that was the Article II powers, the inherent powers of the president to protect the country in time of danger and war.” Hayden replied: “Yes, sir, commander in chief powers” (ibid., 144). Hayden implied that he was willing to violate statutory law in order to carry out presidential law. CIA Director George Tenet asked whether as NSA director he could “do more” to combat terrorism with surveillance. Hayden answered: “Not within current law” (ibid., 68). In short, the NSA eavesdropping program he conducted was illegal under FISA.

Conclusions

The purpose of this introduction is to identify claims of presidential power based on inherent authority under (or outside of) Article II. The scholars invited to write for this special issue occupy a range of political positions: liberal, moderate, and conservative. All of them have rich and informed experience with national security. At the outset they were asked these questions: (1) Did the Framers adopt the British war model of Blackstone and Locke? (2) Does the theory of executive prerogative operate without limits imposed by the legislative and executive branches? (3) What role did the Framers anticipate for the courts in matters of war and national security? (4) What role did the Framers anticipate for Congress in matters of war and national security? (5) What is the scope of the president’s power as commander in chief? That title provides unity of command and also assures civilian supremacy over the military. What else? What are the limits, if any? The overall goal of
this special issue is to better understand the relationship between inherent powers for the president and the continued vitality of republican government, popular sovereignty, and the traditional checks and balances that channel political power and limit its abuse.

References


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President George W. Bush has claimed inherent constitutional authority to collect foreign intelligence on his say-so alone in contravention of the warrant requirements stipulated in the Foreign Intelligence Surveillance Act of 1978 (FISA), as amended six times since 9/11. The constitutionality of FISA, however, is incontestable. It is justified by the Necessary and Proper Clause of Article I, section 8, clause 18 in light of the massive foreign intelligence abuses compiled during forty years of absolute executive power. FISA leaves the separation of powers undisturbed. It regulates only a microscopic percentage of foreign intelligence collection. To sustain President Bush’s constitutional claims would “trust me” the measure of our civil liberties, not the checks and balances intended by the Constitution’s architects.

President George W. Bush has claimed inherent constitutional power to target American citizens on American soil for warrantless electronic surveillance or physical searches by the National Security Agency (NSA) in defiance of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1801 et seq. (FISA). The statute has been amended six times since 9/11 to accommodate the heightened danger and new stratagems for communicating without detection.¹ Why has President Bush’s nonsense on stilts garnered nontrivial homage?

Conflict summons fear.
Fear breeds imbalanced judgments.
Imbalanced judgments manufacture constitutional interpretations from trifles light as air to exploit and to placate exaggerated popular alarm.

9/11 fits the historical pattern. The aftermath of that abomination resembles Pearl Harbor, one of its most execrable ancestors. Five months elapsed after the Japanese attack

¹. 50 U.S.C. § 1801 et seq.

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with no evidence of internal disloyalty or sabotage in the United States by citizens or permanent resident aliens sporting Japanese ancestry. Yet 120,000 were interned until the closing months of World War II, a duration that was extended to avoid antagonizing bigoted voters in the November 1944 elections. The professed justification was national security. The genuine reason was racism, as Congress found in the Civil Liberties Act of 1988.2

President Bush has chosen to flout FISA for more than five years with no evidence that its mild restraints on foreign intelligence collection impair the defeat of international terrorism. His motivations have been fivefold: to gather political intelligence against his domestic critics, to chill dissent by creating an aura of intimidation, to cripple Congress as a check on presidential power, to warn courts against second-guessing national security decisions of the commander in chief, and to concoct an appearance of toughness on terrorism.

FISA did not facilitate the success of the 9/11 hijackers. The 9/11 Commission did not find that the hijackings would have been averted if the president had enjoyed unchecked power to spy. On July 31, 2002, the Bush administration testified to the Senate Intelligence Committee that FISA was nimble, flexible, and impeccable as an instrument for nipping terrorist plots in the bud.3

The NSA’s circumvention of FISA has yielded no demonstrable national security benefits. President Bush has not identified even one terrorist attack that was frustrated by warrantless spying on American citizens. In contrast, the White House has described in some detail the terrorism that was allegedly frustrated by the CIA’s secret imprisonments and interrogations of the “Al Qaeda 14.” In signing the Military Commissions Act of 2006, President Bush elaborated: “The CIA program helped us identify terrorists who were sent to case targets inside the United States, including financial buildings in major cities on the East Coast. And the CIA program helped us stop the planned strike on U.S. Marines in Djibouti, a planned attack on the U.S. consulate in Karachi, and a plot to hijack airplanes and fly them into Heathrow Airport and Canary Wharf in London.”4

Bush has conspicuously remained as silent as the Sphinx about the NSA’s warrantless surveillance success stories because there are none to tell. If there were, they would have been leaked and declassified long ago.

Pearl Harbor and 9/11 have in common the cynical assertions of power to advance a partisan political agenda at the expense of the Constitution and the rule of law. To borrow from Madam Roland about the French Revolution: “O National Security! O National Security! What crimes are committed in thy name!”

Congressional Power to Enact FISA

There may be statutes with even more solid constitutional foundations than FISA, but if there are, they do not readily come to mind.

2. Public Law 100-383; 50 U.S.C. App. 1989 (b-3(e)).
Article I, section 8, clause 18 empowers Congress "to make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof" (Necessary and Proper Clause). Chief Justice John Marshall, in *McCulloch v. Maryland*, 17 U.S. 316 (1819), explained the breadth of authority it confers:

A constitution, to contain an accurate detail of the subdivisions of which its great powers will admit, and of all the means by which they shall be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves. . . . [W]e must never forget that it is a constitution we are expounding. . . . [The Necessary and Proper Clause] is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises in human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can best be provided for as they occur. To have declared, that the best means shall not be used, but those alone, without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise reason, and to accommodate its legislation to circumstances. . . . [W]e think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional. (emphasis added)

It may be conceded that Article II of the Constitution vests in the president authority to gather foreign intelligence, that is, intelligence useful to the foreign policy or national security of the United States. FISA, nevertheless, is a “necessary and proper” law regulating the execution of that authority. Its legitimate goals are to fortify the Fourth Amendment’s protection of privacy and the First Amendment’s protection of free speech and association. Both were chronically abused during forty years of unchecked executive power over intelligence collection. The Constitution did not require Congress to blind itself to this experience. Absolute power corrupts absolutely in all times and places. Human nature does not change.

U.S. Circuit Judge Richard A. Posner has written: “FISA was a legislative reaction (indeed overreaction) to executive branch abuses” (Posner 2006, 149). But he insists that a changed cultural environment more adulatory of civil liberties has antiquated the statute: “The point is not that human nature has changed, since the days when J. Edgar Hoover ran roughshod over civil liberties; it hasn’t. It’s the environment in which law enforcement and intelligence personnel work that has changed reducing the risk of abuse of private information by its governmental custodians at the same time that the menace of terrorism has increased” (ibid., 145). Posner adds: “Although there is a history of
misuse by the FBI, the CIA, and local police forces of personal information collected ostensibly for law enforcement and intelligence purposes, it is not a recent history. The legal and bureaucratic controls over such misuse are much tighter today than they used to be” (ibid., 144). The judge’s argument is unconvincing.

As chronicled hereafter, intelligence abuses are frequently orchestrated by the president or his political appointees, not by trained bureaucrats. Ambassador Joseph Wilson and Valery Plame, for example, were defamed through intelligence leaks from President Bush’s inner circle, including Vice President Dick Cheney, his Chief of Staff Scooter Libby, and Karl Rove, President Bush’s Rasputin. Further, the incentives for law enforcement and intelligence personnel since 9/11 is to spy more and pay less heed to civil liberties under the patriotic marquee, “No more 9/11’s.” Even before that infamous date, Wen Ho Lee’s life had been ruined by government leaks falsely identifying him as a Chinese Communist spy. Ditto for Stephen Hatfill, a so-called person of interest in the FBI anthrax villain investigation. On November 3, 2006, the New York Times reported that FBI Director Robert S. Mueller had issued a stern message to the bureau’s thirty thousand employees against leaking confidential information after recent news articles disclosed criminal investigations involving congressional incumbents, especially House Republicans. The leaks could have affected the Democratic capture of the 110th Congress.

The state secrets doctrine protects wrongdoers who abuse foreign intelligence from civil liability. And criminal liability will be averted or absolved by presidential pardons or retroactive immunity enacted by Congress. Think of President Ronald Reagan’s pardons of Ed Miller and Mark Felt for illegal burglaries, President George H. W. Bush’s pardons of Elliot Abrams and Caspar Weinberger for Iran-Contra deceptions, and President Bill Clinton’s pardon of CIA Director John Deutsch for his mishandling of classified information. The Military Commissions Act also exonerated violations of the War Crimes Act of 1987. The Civil Liberties Board created by the Patriot Act is a nonfunctioning joke.

Posner also undercuts his own “changed environment” thesis by proposing a qualified “good faith” immunity defense to shield national security officials who violate a constitutional right (ibid., 155). But the defense would be unnecessary if officials were scrupulous in obeying the law.

Finally, the FBI’s and CIA’s intelligence wrongdoings receded from their historical high watermark because of statutes like FISA. That understanding is a reason for retaining the laws, not for their relaxation.

A special committee of the U.S. Senate dubbed the “Church committee” held lengthy and televised hearings beginning in 1975. The Church committee was complemented by a less responsible and professional committee in the House of Representatives styled the “Pike committee.” Both committees surveyed forty years of unchecked executive spying for intelligence purposes from President Franklin D. Roosevelt through President Richard M. Nixon. The examination revealed decades of illegal mail openings, decades of illegal interceptions of international telegrams, a history of illegal burglaries,

misuse of the NSA for non-foreign intelligence purposes, spying to gather political intelligence and embarrassing personal information on political opponents and dossiers on political dissenters.

The FBI’s investigation of the leak to the New York Times of President Nixon’s secret bombing of Cambodia in 1970 was emblematic (Gentry 1991, 632). It began with wiretaps on Morton Halperin, an aide to National Security Adviser Henry Kissinger. It expanded to persons whom Kissinger suspected were undermining his White House influence. Two months of wiretaps and bugs yielded nothing, but Kissinger insisted on their continuance to enable the suspects to establish a “pattern of innocence,” a concept worthy of Franz Kafka’s The Trial.

Identifying the leaker soon degenerated into collecting political intelligence, for example, a planned magazine article by Clark Clifford critical of Nixon’s Vietnam War policy. In all, the FBI employed technical means against seventeen individuals. The information retained concerned sex lives, drug use, drinking habits, mental problems, marital disputes, vacation plans, and social contacts.

FISA was a “necessary and proper” answer to this long train of presidential spying abuses. It requires the attorney general to obtain a warrant from a FISA judge to conduct electronic surveillance or physical searches that target American citizens on American soil for foreign intelligence purposes. An application must demonstrate probable cause to believe the American target is implicated in international terrorism or is otherwise acting as an agent of a foreign power. That threshold is not difficult to satisfy. Since the inception of FISA, approximately twenty thousand warrant applications have been granted. A handful have been denied.

FISA accommodates the special needs of emergencies or wartime. It authorizes electronic surveillance or physical searches in such circumstances without a warrant for seventy-two hours and fifteen days, respectively.

Probably 99 percent or more of foreign intelligence is gathered outside the constraints of FISA. As the NSA has testified, its targets are typically aliens abroad, who enjoy neither Fourth Amendment nor FISA protection. In other words, FISA regulates but a tiny crumb of foreign intelligence collection. Even in that domain, the statute is not unworkable, as the Department of Justice has testified after 9/11. Moreover, the NSA’s warrantless surveillance program excludes domestic-to-domestic communications, which remain governed by FISA. The latter statute is circumvented only where one communicator is abroad. But FISA’s warrant rules are identical in both situations. If warrants are workable for domestic-to-domestic interceptions, the same is true for domestic-to-foreign communications.

11. Testimony to the Judiciary Committee of the U.S. Senate by General Michael V. Hayden, Director, CIA, July 26, 2006.
The Bush administration sophomorically contends that FISA unconstitutionally encroaches on executive power. James Madison explained in *Federalist no. 47* that the Constitution’s separation of powers is violated only when one branch exercises a decisive or predominating influence over a power assigned to another. FISA’s regulation of the president’s foreign intelligence authority, however, is narrow and measured. It was born not of flagrant and persistent presidential spying violations of the First and Fourth Amendments. In addition, the statute does not aggrandize Congress at the expense of the White House, but simply subjects foreign intelligence surveillances and physical searches to independent judicial scrutiny. If FISA falls short of the “necessary and proper” benchmark, then the clause is meaningless, and *McCulloch* has been de facto overruled.

9/11 neither diminished FISA’s constitutional standing nor required rethinking its application to a world beset by terrorism. Al Qaeda is but a shadow of the Soviet Union as it then stood when FISA was enacted in 1978. The Soviet invasion of Afghanistan was but one year away. The Cuban missile crisis was in recent memory. The USSR brandished thousands of nuclear warheads and delivery vehicles, MIRVs, submarines, long-range bombers, and a formidable Red Army. It enjoyed a vast industrial base, oil supplies, and sister resources to support a prolonged hot war. The USSR also sported first-rate scientists capable of developing sophisticated chemical and biological weapons. The United States’ need for instant and reliable foreign intelligence to thwart a nuclear attack by the Soviet Union was of the highest order. If FISA did not handcuff the president in meeting the Soviet danger, a fortiori, the statute does not encumber the president in foiling Al Qaeda’s loathsome aims.

To be sure, technologies for communicating have advanced since 1978. But Congress has amended FISA six times since 9/11 to insure against technological obsolescence.

Historical uses of the power of the purse to curb the president’s war powers as commander in chief have been far more intrusive than FISA constraints in foreign intelligence collection. (The power of the purse is subject to constitutional limits. It is not invincible, as in *United States v. Lovett*, 328 U.S. 303 [1946], where the Supreme Court invalidated an appropriations measure as an unconstitutional bill of attainder.) As part of a strategy to force President Nixon to scale back or end the U.S. military presence in Indochina, Congress enacted four major appropriations measures. In late December 1970, Congress passed the Supplemental Foreign Assistance Appropriations Act. It prohibited the use of funds to introduce U.S. ground combat troops into Cambodia or to provide U.S. advisors to or for Cambodian military forces in Cambodia.

In late June 1973, Congress approved the second Supplemental Appropriations Act for FY1973. It declared: “None of the funds herein appropriated under this act may be expended to support directly or indirectly combat activities in or over Cambodia, Laos, North Vietnam, and South Vietnam by United States forces, and after August 15, 1973, no other funds heretofore appropriated under any other act may be expended for such purpose.”

That prohibition was carried forth in the June 30, 1973 Continuing Appropriations Resolution for FY1974. In December 1974, Congress passed the Foreign Assistance Act of 1974, which capped American personnel in Vietnam at 4,000 within six months of enactment and 3,000 after one year.
In late September 1994, Congress passed the Department of Defense Appropriations Act for FY1995. It stipulated: “None of the funds appropriated by this Act may be used for the continuous presence in Somalia of United States military personnel after September 30, 1994.” Congress similarly decreed through Title IX of the Department of Defense Appropriations Act for FY1995 that “no funds provided in this Act are available for United States military participation to continue Operation Support Hope in or around Rwanda after October 7, 1994, except for any action that is necessary to protect the lives of United States citizens.”

Both Attorney General Alberto Gonzales in testimony before the Senate Judiciary Committee and former Deputy Assistant Attorney General John Yoo in his book *War by Other Means* have affirmed that Congress could constitutionally terminate the NSA’s warrantless surveillance program through the power of the purse (Yoo 2006, 125). The text of such a statute would provide: “No funds of the United States may be expended to gather foreign intelligence except pursuant to the Foreign Intelligence Surveillance Act.”

The encroachment on the president’s foreign intelligence authority is the same whether effectuated through the power of the purse or through FISA. An encroachment by any other name is still an encroachment. To argue, as do Attorney General Gonzales and former Deputy Assistant Attorney General Yoo, that the Constitution makes a distinction between the two is to exalt form over substance.

**Constitutional Philosophy**

President Bush’s claim of supreme authority to gather foreign intelligence contrary to FISA also wars with the constitutional philosophy of the Founding Fathers. They understood that men were not angels, that human nature and the corrupting influence of absolute power do not change, that “trust me” was no substitute for making ambition to counteract ambition, and that a separation of powers was essential to avoiding tyranny. Not a single word in either the Constitution or the *Federalist Papers* indicates that, in contemplating necessary restraints on the three branches of government, proper deductions should be made for the ordinary depravity of human nature, except for the executive branch. Indeed, the Founders were further especially fearful of executive abuses or megalomania. The Declaration of Independence indicted King George III, not the British Parliament: “The History of the present King of Great Britain is a History of repeated Injuries and Usurpations, all having in direct Object the Establishment of an absolute Tyranny over these States.” The congressional power of the purse, the president’s obligation to take care that the laws be faithfully executed, and the Fourth Amendment’s prohibition of unreasonable searches and seizures responded to the excesses of King Charles I, King James II, and King George III, respectively.

It is inconceivable that the Constitution’s makers would have frowned on FISA’s narrow and modest regulation of the president’s authority to spy on American citizens on American soil under the banner of foreign intelligence. To paraphrase Chief Justice Marshall, the Necessary and Proper Clause aimed to enable Congress to avail itself of
experience. Forty years of flagrant illegalities in violation of the Fourth and First Amendment rights of U.S. citizens occasioned by unchecked presidential power was enough.

The Founding Fathers, nevertheless, understood that situations could arise when a president might find it necessary to flout the law to rescue the nation from peril. They were versed in John Locke’s Second Treatise of Civil Government, which addressed the matter in explaining executive prerogative. The gist of Locke was that laws might be violated by the executive to preserve society, but at the risk of repudiation or overthrow by the people or legislature. Their approvals were necessary to make what was illegal legal.

Following Locke and the Founding Fathers, if President Bush thought it necessary to violate FISA in the wake of 9/11, he should have informed Congress and the people of his transgression and pleaded for statutory ratification of his actions, just as President Abraham Lincoln did after unilaterally suspending the Great Writ of habeas corpus in the Civil War.12

In seeming anticipation of 9/11, Locke elaborated:

Many things there are, which the law can by no means provide for; and those must necessarily be left to the discretion of him that has the executive power in his hands, to be ordered by him as the public good and advantage shall require: nay, it is fit that the laws themselves should in some cases give way to executive power, or rather to this fundamental law of nature and government, viz. That as much as may be, all members are to be preserved. . . . This power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it, is that which is called prerogative: for since in some governments the lawmaking power is not always in being, and is usually too numerous and too slow, for the dispatch requisite to execution. . . . This power, whilst employed for the benefit of the community, and suitability to the trust and ends of government, is undoubted prerogative, and never is questioned: for the people are very seldom or never scrupulous or nice in the point; they are far from examining prerogative, whilst it is in any tolerable degree employed for the use it was meant . . . but if there comes to be a question between the executive power and the people, about a thing claimed as a prerogative; the tendency of the exercise of such prerogative to the good or hurt of the people, will easily decide the question. . . . And therefore they have a very wrong notion of government, who say, that the people have encroached upon the prerogative, when they have got any part of it to be defined by positive law: for in so doing they have not pulled from the prince any thing that of right belonged to him, but only declared, that that power which they indefinitely left in his or his ancestors hands, to be exercised for their good, was not a thing which they intended him when he used it otherwise. (1690, §§ 161-63)

**Controlling Supreme Court Decisions**

The Supreme Court’s decision in *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952), further fortifies the constitutionality of FISA. There Congress rejected an amendment to the 1947 Taft-Hartley Act that would have authorized the president to seize private businesses to resolve labor disputes. Five years later, in the midst of the Korean War, President Harry Truman seized private steel mills to avert a threatened

strike that could have upset the supply of steel used in weapons manufacture. The Supreme Court rebuked the president’s claim of inherent constitutional power as commander in chief to justify a seizure that Congress had declined to authorize. Writing for the majority, Justice Hugo Black amplified: “It is said that other Presidents without congressional authority have taken possession of private business enterprises in order to settle labor disputes.” But even if this be true, Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution “in the Government of the United States, or any Department or Officer thereof.”

Four features of Youngstown deserve emphasis. First, Congress did not find that there had been presidential abuses of the power to seize private businesses for partisan political purposes. Second, the congressional prohibition on seizures was absolute. There were no exceptions or alternatives. Third, Congress had not affirmatively declared that the president enjoyed no seizure power, but simply failed to authorize the same, a less vigorous expression of legislative sentiment. Fourth, the president’s seizure of a private business violated the constitutional injunction against the taking of property without just compensation. The right to operate a private business enterprise is less central to a democratic dispensation than the Fourth or First Amendments, which safeguard rights most cherished by civilized peoples.

FISA is a much easier case than Youngstown. Congress was provoked to act by decades of widespread presidential abuses. In addition, the statute does not prohibit the president’s collection of foreign intelligence through electronic surveillance or physical searches of American citizens, but simply lightly regulates the techniques by requiring a FISA warrant. Moreover, FISA leaves completely undisturbed the collection of 99 percent or more of foreign intelligence, which is derived from targeting aliens located abroad. And unlike the Taft-Hartley Act on presidential seizures, FISA explicitly declares that gathering foreign intelligence on Americans in contravention of FISA is criminal, the highest octave of legislative intent to restrain the executive. Finally, FISA protects against violations of the Fourth and First Amendments, which stand atop the Constitution’s hierarchy of values.

Youngstown is not distinguishable from FISA on the theory that the former involved nonbattlefield actions in the domestic arena whereas the latter regulates battlefield intelligence. FISA leaves the president uncircumscribed in targeting aliens or Americans abroad for electronic surveillance or physical searches, whether in Afghanistan, Iraq, Indonesia, or otherwise. It is confined to Americans on American soil and who command a reasonable expectation of privacy within the Fourth Amendment. President Bush has unpersuasively argued that all the world’s a battlefield because Al Qaeda is eager to kill Americans at any time in any place. But if that theory were accepted, then the U.S. military could employ rockets or firearms to kill any person in the country suspected of Al Qaeda sympathies without asking questions, such as American citizen Jose Padilla when he landed in Chicago. (Padilla was first detained as a material witness, further detained as an illegal enemy combatant, and then indicted for providing material assistance to an international terrorist organization.) The theory would sound the death knell for the Bill of Rights and the rule of law.
The Supreme Court’s decision in *Morrison v. Olson*, 487 U.S. 654 (1988), also discredits the argument that FISA unconstitutionally undermines the president’s authority over foreign intelligence. Article II entrusts the president with responsibility for faithfully executing the laws. Criminal law enforcement lies at the core of that authority. Congress may not limit the president’s choice of the attorney general to ensure that law enforcement marches to a presidential drummer, according to the rationale of the Supreme Court in *Myers v. United States*, 272 U.S. 52 (1926). Yet in *Morrison*, the Court sustained the Independent Counsel Act, which removed from the president’s complete control a certain category of criminal law enforcement.

The act provided for the appointment of an independent counsel by a special three-judge court on the application of the attorney general. An application was required when nontrivial evidence surfaced justifying a criminal investigation of one or more of the president’s men or his party’s bigwigs. After appointment, an independent counsel could be removed only for “good cause.” In sum, an independent counsel encroached on the president’s Article II power to enforce the criminal law.

Writing for the Court in *Morrison*, Chief Justice William Rehnquist denied that the “good cause” removal limitation impermissibly interfered with the president’s exercise of his constitutionally appointed functions. He reasoned: “There is no real dispute that the functions performed by the independent counsel are ‘executive’ in the sense that they are law enforcement functions that have been typically undertaken by officials within the executive branch.” But the independent counsel exercised limited criminal jurisdiction and enjoyed a limited tenure. Accordingly, the chief justice concluded: “Although the counsel exercises no small amount of discretion and judgment in deciding how to carry out his or her duties under the Act, we simply do not see how the President’s need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President.” In addition, the independent counsel did not confound the president’s duty to faithfully execute the laws because incompetence or misbehavior would justify a “good cause” dismissal. Chief Justice Rehnquist added that “the congressional determination to limit the removal power of the Attorney General was essential, in the view of Congress, to establish the necessary independence of the office [to conduct politically sensitive investigations]. We do not think that this limitation as it presently stands sufficiently deprives the President of control over the independent counsel to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws.”

The Constitution’s separation of powers was undisturbed by the Independent Counsel Act because the principle does not require the three branches of government to operate with absolute independence. While separation of powers does prohibit Congress from preventing the executive branch from accomplishing its constitutionally assigned functions, the independent counsel was subject to sufficient control by the attorney general and the policies of the Department of Justice to ensure that the president was not sidelined in his law enforcement duties.

The *Morrison* rationale clearly sustains FISA against a separation of powers attack. It does not prevent the president from gathering foreign intelligence. Indeed, it regulates less than 1 percent of foreign intelligence activities. Further, the regulation is measured,
not draconian. The president is obligated to obtain a FISA warrant based on probable cause to believe an American target on American soil is a foreign agent before conducting electronic surveillance or physical searches. The threshold for a FISA warrant is undemanding, which explains why virtually every warrant application has been granted. In addition, Congress did not enact FISA to aggrandize its own powers, but to confer on the judiciary a checking function to prevent Fourth and First Amendment abuses by the executive. As Morrison expressly holds, the fact that a function has been constitutionally assigned to the executive does not, ipso facto, shield it from congressional regulation under the Necessary and Proper Clause or otherwise.

The Supreme Court’s decision in United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), is not to the contrary. In upholding a broad delegation of legislative power to the president in the field of foreign affairs, Justice George Sutherland amateurishly ruminated about the primacy of the executive in fashioning the external relations of the United States. He observed (ibid., 320):

Moreover, he, not Congress, has the opportunity of knowing conditions which prevail in foreign countries, and especially is this true in times of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular, and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.

Sutherland’s paean to the executive in foreign affairs misleads by omission. Presidents regularly lie to Congress and the American people by misrepresenting foreign intelligence. Falsehoods were told about Spain’s responsibility for the explosion on the USS Maine to push the nation toward the Spanish-American War. President Franklin Roosevelt lied about a Nazi attack on the USS Greer to propel the nation into World War II (Kimball 2004, 83). President Lyndon Johnson lied about the North Vietnamese attacks on the USS Mattox and USS Turner Joy to justify the Tonkin Gulf Resolution. President George W. Bush lied about Iraq’s weapons of mass destruction, including attempts to purchase uranium in Niger, to defend his invasion of Iraq. In sum, Justice Sutherland neglected completely presidential abuses of foreign intelligence, which easily establishes the constitutionality of congressional checks like FISA.

Curtiss-Wright did not canonize the White House as the sole organ of the nation in foreign policy or national security. If it had, the many neutrality acts of Congress in the 1930s would have been unconstitutional. Decided at the zenith of neutrality fever in Congress, Curtiss-Wright did not even insinuate a doubt as to the constitutionality of the neutrality laws.

**FISA’s Chief Critics**

FISA’s critics, like Attorney General Gonzales and former Deputy Assistant Attorney General Yoo, argue that the Constitution grants the president the leading role in

foreign affairs. Assuming the truth of that proposition, FISA leaves the primacy of the president in gathering foreign intelligence intact. As amplified above, the statute regulates less than 1 percent of foreign intelligence collection, and even in that tiny universe the president is authorized to conduct electronic surveillance or physical searches against American citizens on American soil with a FISA warrant.

The major critics also bemoan that establishing probable cause to obtain a FISA warrant is too difficult. Mr. Yoo complains in his book that Al Qaeda does not advertise its membership or wear pictures of Osama bin Laden on their shirts. He observes: “Our best information about Al Qaeda will be scattered and tough to gather, and our agents need to be able to follow many leads quickly, and to move fast on hunches and educated guesses” (Yoo 2006, 105). He also maintains: “FISA operates within a framework that assumes foreign intelligence agents are relatively simple to detect” (ibid., 104-5).

But Yoo’s indictments are misconceived. FISA does not assume that foreign agents are easy to detect. Its probable cause threshold is routinely satisfied, as noted above. What FISA does assume, based on forty years of experience, is that unchecked executive power to gather foreign intelligence as championed by Yoo will degenerate into political spying and rampant violations of the Fourth and First Amendments to harass or to deter political dissent. Yoo naïvely insinuates that President Bush, unlike Nixon and other predecessors, is a saint who would never stoop to spy for partisan objectives. He can be trusted with supreme power. Yoo forgot to interview Ambassador Joseph Wilson and his wife Valery Plame about Bush’s saintliness. Indeed, any president who asserts that “trust me” should be the measure of civil liberties in the United States should not be trusted.

Yoo also neglects to remember that virtually all Al Qaeda intelligence is gathered outside of FISA because the NSA’s electronic surveillance and physical searches generally target persons in foreign countries. Intelligence experts estimate the number of genuine Al Qaeda members in the United States at one to two dozen. They pose less of a threat to the people of the United States than do the perpetrators of the approximately twenty thousand murders committed annually here.¹⁵ The latter criminals do not make known their antisocial propensities to the world. It is more difficult to establish probable cause to obtain a search or arrest warrant against them than it is to obtain a FISA warrant to spy on a suspected foreign agent. Yet the Constitution does not permit abandonment of the Fourth Amendment to make foiling murder easier. It does not even permit watering down the Fourth Amendment to thwart domestic terrorism a la Timothy McVeigh. There is even less reason for relaxing the amendment’s privacy protection in targeting American citizens on American soil for electronic surveillance and physical searches in pursuit of foreign intelligence on international terrorism.

Judge Posner argues: “One reason why people don’t much mind having their bodies examined by doctors is that they know that doctors’ interest in bodies is professional rather than prurient; we can hope the same is true of intelligence professionals” (Posner 2006, 143). But the hope is naïve. Intelligence is political power. The people who control the use of foreign intelligence are political appointees. Their prime interest in intelli-

gence is not professional, but in its manipulation to cripple political opposition or dissent. Posner further maintains: “An electronic search no more invades privacy than does a dog trained to sniff out illegal drugs” (ibid., 130). The analogy seems preposterous. The privacy protected by the confidentiality of communications is essential to spontaneity, political dissent, and personal intimacies that are central to a democratic dispensation and a rewarding human existence. If all communications were known to the world, life would become guarded or rehearsed as in the former Soviet Union. A dog sniff for drugs discloses nothing about the mind or ideas of the target. It is highly accurate in identifying contraband, and false positives do not result in anything akin to political intelligence that can be retained indefinitely to intimidate or blackmail. If Posner feels no differently about a dog sniffing his luggage for drugs and the NSA’s reading all his e-mails and listening to all his phone calls, he is probably a minority of one.

The nation might be marginally safer from foreign terrorists if the Constitution crowned the president with absolute power to spy on American citizens at any time or place on his say-so alone. But it would cripple democracy. The people would be frightened from criticizing the government or undertaking anything unorthodox or nonconformist. The president would assemble a vast pool of political intelligence to intimidate or destroy his opponents. With little or no public questioning or challenge, presidential hubris would inescapably give birth to foreign follies. The Founding Fathers had a better idea in sticking with checks and balances, the worst architecture for maintaining a strong and flourishing democracy except for all others that have been attempted or conceived.

Concluding Observations

The constitutionality of FISA is indisputable according to customary canons of interpretation, especially original intent. The credence that has been afforded constitutional attacks on the statute testifies to the constitutional illiteracy of most members of Congress, the legal profession, and the public. They are unschooled in the philosophy of the Constitution, the Federalist Papers, Montesquieu’s Spirit of the Laws, John Locke, the English Bill of Rights of 1688, or Magna Charta. They do not know that the history of unchecked power is a history of tyranny, that enlightened presidents do not crave absolute power, and that a government of laws is superior to a government of men in protecting fundamental individual freedoms or otherwise.

Thomas Jefferson presciently wrote that a people cannot expect to be both free and ignorant.16 The Constitution is not self-executing. It must live in the hearts and minds of the American people to flourish. At present, that is not the case, as substantiated by the enactment of the Military Commissions Act of 2006 and a companion effort (not yet enacted) to give congressional sanction to President Bush’s warrantless domestic surveillance program.17 If the alarming trend toward ever-greater constitutional illiteracy is not

reversed, the United States is destined to become a second edition of *The Decline and Fall of the Roman Empire* as chronicled by Edward Gibbon.

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Inherent Presidential Power and Constitutional Structure

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Much current debate about presidential power revolves around the phrase “inherent power.” This phrase has a loose signification, but disputes often involve the question of whether presidential power is subject to limitation by Congress. This essay identifies four different constitutional constructions that might lead to such unchecked presidential power. The essay also assesses each of these four constructions from the standpoint of the Constitution’s structure, concluding in each case that the assertion of unchecked power is inconsistent with constitutional structure.

In introducing this volume, Louis Fisher draws a distinction between inherent presidential power and implied presidential power. By inherent power, he means “powers over and above those explicitly granted in the Constitution or reasonably to be implied from express powers” (Fisher 2007, 2). By implied power, he means power grounded in one of the expressly granted presidential authorities, such as the Commander-in-Chief Clause. Fisher means to challenge us to consider whether the president enjoys inherent powers. This is an issue that has a great deal of resonance in public discourse regarding presidential power. As Justice Robert Jackson noted in the Steel Seizure case, “the claim of inherent and unrestricted presidential powers has long been a persuasive dialectical weapon in political controversy.”1 Especially during the administration of President George W. Bush, assertions of inherent presidential power have been made frequently. Heightening the importance of the question, assertions of inherent power are accompanied by a claim, often merely assumed, that inherent presidential powers are not subject to legal limitations. Such arguments can be found, for example, in the infamous Torture Memo (Office of Legal Counsel 2002, 36-39). The most notable judicial version can be found in an opinion by the Foreign Intelligence Surveillance Court of Review. In dicta, the per curiam opinion observed that “we take for granted that the President does have

1. 343 U.S. 579, 647 (1952).

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I think it is fairly clear that the president does not have inherent power, as Fisher has carefully defined the term, but that the president certainly does hold implied powers. Despite the heat surrounding the debates about presidential power, my conclusion seems uninteresting to me, mainly because it is not apparent what if anything follows from it. The Constitution vests “the executive power . . . in a President of the United States of America” (U.S. Constitution, Article II, section 1, clause 1). Any power that might be said to be inherent in the president might just as well be said to be implicit in the vesting of “the executive power” in the president. In fact, it is not clear to me that advocates of illimitable presidential power mean to claim for the president inherent power in the sense that Fisher uses that term as opposed to what he deems to be implied power.

The question becomes interesting if it is reformulated a bit to ask whether the president holds power that is broadly or commonly beyond the authority of Congress to limit. There are four different arguments employed on behalf of this construction of presidential power. First, the president might have inherent power of the sort Fisher sets out in the introduction. Second, the president may have implied constitutional power that is properly understood as being beyond statutory limitation. Third, it may be that Congress can limit presidential power by statute where its powers overlap with the president’s, but this rarely happens as the president and Congress have power in largely exclusive spheres. Fourth, it may be that whatever power Congress has to constrain the president is as a practical matter ineffectual. In each instance, I believe that the Constitution’s structure provides a powerful refutation of the claim.

Inherent Presidential Power

I do not propose an exhaustive historical analysis of the Constitution’s framing and ratification. It is, however, worth noting that the Constitution was advertised—by Publius at least—in a way that rejects inherent presidential power. Writing as Publius, James Madison asserted that, in our republic, Congress would be the predominant, and therefore the most dangerous, branch and that the president’s power would be quite narrow: “In a representative republic, where the executive magistracy is carefully limited; both in the extent and the duration of its power. . . . The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive, and less susceptible of precise limits” (Madison, Federalist no. 48).

Chief Justice John Marshall early on established structural analysis as a crucial method for interpreting the Constitution. In a host of cases considering contentious issues of first impression, John Marshall turned to the nature and character of the Constitution as a guide to the meaning of its provisions. For Marshall, the fact of the

Constitution’s writtenness was key to resolving these questions. In *Marbury v. Madison*, for example, he emphasized that the Constitution establishes the federal government as a government of limited and enumerated powers. He then deployed his rhetorical talents: “To what purpose are powers limited, and to what purpose is that limitation committed to writing if these limits may, at any time be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed. . . . Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation. . . . This theory is essentially attached to a written constitution.” In other words, the very purpose of writing a constitution is to establish the scope and limits of the government being chartered. If the government, or any branch of it, were to hold power from alternative sources and those alternate authorizations were not subject to constitutional limitation, the constitution would not be “supreme and paramount law” and there would be little point to writing a constitution in the first place.

This structural consideration was strongly persuasive to the Court when, in *Marbury*, it considered the legal powers of the judicial branch. In reaching its conclusion regarding the power of judicial review and the scope of the Supreme Court’s original jurisdiction under Article III, Justice Marshall also construed the constitutional powers and duties of the executive branch (under the Commission Clause as well as the amenability of cabinet officers to mandamus actions) and of the legislature (specifically its power to define the jurisdiction of the federal courts under Article III). The same principle appears in Justice Marshall’s seminal efforts to interpret the extent of federal legislative power in *M’Culloch v. Maryland* and *Gibbons v. Ogden*. Structural analysis has remained a staple of constitutional interpretation (Black 1969; Bobbitt 1982; Amar 1999).

The case for the existence of inherent presidential power finds its strongest support in dicta in the Supreme Court’s opinion in *United States v. Curtiss-Wright Export Corp.*: “The Union existed before the Constitution, which was ordained and established among other things to form a more perfect union. Prior to that event, it is clear that the Union . . . was the sole possessor of external sovereignty and in the Union it remained without change, save in so far as the Constitution in express terms qualified its exercise. . . . It results that the investment of the federal government with the powers of external sovereignty did not depend on the affirmative grants of the Constitution.”

This dicta, of course, does not square with Marshall’s structural view of the Constitution as expressed in cases such as *Marbury*. Moreover, the Supreme Court has

3. 5 U.S. (1 Cranch) 137, 177 (1803).
5. 22 U.S. (9 Wheat.) 1 (1824).
6. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936). The Supreme Court has had occasional, but far more ambiguous, dalliances with the idea of inherent power. For example, in the *Chinese Exclusion* case, the Court upheld the power of the federal government to exclude foreigners. While the Court referred to this power as “an incident of independent nations,” the Court ultimately held the power to be “an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the Constitution.” *Chae Chin Ping v. United States*, 130 U.S. 581 (1889).
never adopted the *Curtiss-Wright* dicta. In fact, the Supreme Court resoundingly rejected the existence of inherent power in the *Steel Seizure* case. Writing for the Court, Justice Hugo Black said of the president’s order directing the secretary of commerce to seize and operate the nation’s steel mills, “The President’s power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.” This formulation necessarily excludes inherent power as a separate category of authority.

Justice Black’s opinion embodied the Court’s holding, but the majority did not agree as to the proper approach to resolving the validity of President Harry Truman’s order. In particular, there were two diverging views on how to understand the way the Constitution structures federal power. Justice Black’s opinion represents the formalist approach, while the concurring opinions of Justices Felix Frankfurter and Robert H. Jackson represent a functional approach (Bellia 2002, 98-106). Yet these approaches converge to agree on the rejection of inherent authority set forth in Justice Black’s formulation of presidential power as resting on either a statute or the Constitution.

Justice Black’s opinion expresses the formalist position simply. The order seizing the steel mills to keep them running was an exercise of legislative power. Congress may delegate to the president the power to seize steel mills in response to a national emergency. As Justice Antonin Scalia explained in *Loving v. United States*, this delegation of power is not a delegation of the constitutional legislative power. The constitutional legislative power, the core power that Congress may not delegate, is the authority to decide to invoke the powers of the federal government to promote goods or to protect against harms that fall within the ambit of federal power. The formalist position, then, is that President Truman’s order was invalid because the order was not authorized by a statutory delegation, nor was it authorized by a constitutional grant of power. But this analysis must reject the existence of inherent power. If the president has inherent power in addition to statutory and constitutionally expressed or implied powers, a demonstration that the president lacks statutory and constitutional power to issue an order would be necessary, but not sufficient, to show that the president lacks power, for the president might still be able to support the order on inherent power. Because Justice Black treated the absence of an affirmative grant of power as sufficient to render President Truman’s order ultra vires, Justice Black’s formalist approach precludes the claim that the president holds inherent power.

Justice Jackson’s concurring opinion is perfectly consistent with Justice Black’s rejection of inherent power. In a footnote, Justice Jackson dismisses the dicta of *Curtiss-Wright* and characterizes it as a case that upheld a broad statutory grant of power to the president. Thus, it is an example of the first of Justice Jackson’s three categories—the situation where the president acts pursuant to an express or implied authorization of

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8. “While it has become the practice in our opinions to refer to ‘unconstitutional delegations of legislative authority’ versus ‘lawful delegations of legislative authority,’ in fact the latter category does not exist. Legislative power is nondelegable. Congress can no more ‘delegate’ some of its Article I power to the Executive than it could ‘delegate’ some to one of its committees. What Congress does is to assign responsibili­ties to the Executive.” *Loving v. United States*, 517 U.S. 748, 776-77 (1996) (Scalia, J., concurring).
If the president were to hold inherent power—again, in the strong sense that the power does not derive from a specific provision of the Constitution and is not subject to limitations enacted in statutes passed pursuant to the Constitution—an assertion of such power would fall under Justice Jackson’s third category, covering cases where the president “takes measures incompatible with the expressed or implied will of Congress.” But here, according to Justice Jackson, the president “can rely only on his constitutional powers minus any constitutional powers of Congress over the matter.” Because Justice Jackson’s framework allows the president to act contra legem only if his acts are supported by constitutional powers, Justice Jackson necessarily rejects the claim of inherent presidential power in the strong sense of Fisher’s definition or as used by presidential advocates. On the specific question of inherent power to respond to an emergency, Justice Jackson offered the following view:

The appeal, however, that we declare the existence of inherent powers ex necessitate to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies. Aside from suspension of the privilege of the writ of habeas corpus in time of rebellion or invasion, when the public safety may require it, they made no express provision for exercise of extraordinary authority because of a crisis. I do not think we rightfully may so amend their work, and, if we could, I am not convinced it would be wise to do so, although many modern nations have forthrightly recognized that war and economic crises may upset the normal balance between liberty and authority.

Subsequently, the Court has embraced Justice Jackson’s framework for resolving issues of presidential power in the context of military and foreign affairs. Having sketched the reasons that the president does not hold inherent power, it remains unclear that this conclusion actually resolves anything. As Justice Jackson observed, “Loose and irresponsible use of adjectives colors all non-legal and much legal discussion of presidential powers. ‘Inherent’ powers, ‘implied’ powers, ‘incidental’ powers, ‘plenary’ powers, ‘war’ powers and ‘emergency’ powers are used, often interchangeably and without fixed or ascertainable meanings.” That is, advocates of illimitable presidential power can readily shift their claim to one of implied constitutional power.

*M’Culloch* is particularly illuminating on this point. In opposing the authority of the federal government to charter the Bank of the United States, James Madison began with precisely the structural insight that John Marshall employed in *Marbury*: the Constitution establishes a government of limited and enumerated powers. From this structural feature, Madison argued that the federal government cannot be understood to have inherent powers, “no power . . . enumerated could be inferred from the general nature of Government. Had the power of making treaties, for example, been omitted,
however necessary it might have been the defect could only have been lamented or supplied by an amendment of the Constitution” (Rakove 1999, 480-90).

Marshall did not challenge Madison’s structural point. Instead, he shifted ground, arguing that the nature of the Constitution is such that its enumerated powers must be understood broadly in order to facilitate effective action in the spheres assigned to the federal government. Because the Constitution is intended to endure for ages to come and to be adaptable to the unforeseeable crises of human affairs that would arise in the distant future, it would have been impossible for the Constitution to set forth with particularity the range of permissible responses. Such an endeavor would require a document that would “partake of the prolixity of a legal code.” 14 This led Justice Marshall to his famous dictum that “we must never forget that it is a constitution we are expounding.” 15 On this basis, Justice Marshall concluded not that Congress has inherent authority to charter a bank, but that the Necessary and Proper Clause authorizes Congress to undertake actions that are reasonably calculated to achieve the ends set forth in the Constitution. Thus, in justifying its decision to charter a bank, Congress must rely on its express powers, but those powers would be construed broadly as encompassing means appropriate to their exercise. In this way, John Marshall was able to justify action that Madison had thought justifiable under only an inherent power theory.

Implied Powers

Advocates of broad presidential power can easily follow John Marshall’s move. Rather than claiming an inherent power of ambiguous origin, these advocates tend to locate presidential power in the implications of the textual powers of the president. The Constitution vests the executive power in the president and denominates the president as commander in chief. These provisions textually permit a construction broad enough to comprehend the kind of power that the president’s advocates sometimes refer to as inherent (Martinez 2006, 2484).

As a reading of constitutional structure and history, these claims are fairly persuasive as far as they go. That is, the Constitution’s structure and history confirm that the president holds expansive powers, especially in the areas of military and foreign affairs. As Marshall emphasized in _M’Culloch_, the Constitution is meant to establish an effective national government that could respond to the various crises of human affairs for ages to come. As noted in _The Federalist_, an effective national government in the area of military and foreign affairs is marked by unity of purpose and policy, dynamism in pursuit of that policy, and the capacity for decisive and secret action (Federalist no. 70). All of these factors favor the president over Congress and were in fact seen as attributes of executive rather than legislative action at the time of ratification. As Professor H. Jefferson Powell concludes, “An impressive group of founders ... believed the president vested with de jure power to formulate and pursue United States foreign policy, in substantial measure

15. Ibid.
because they agreed with *The Federalist* that the Constitution ought to be construed to create an effective foreign-policy system" (Powell 2006, 96). As Professor Powell’s work demonstrates, presidents and congresses throughout our history have regarded the president as constitutionally authorized to exercise extensive power even in the absence of congressional authorization.

To accept the claims of broad power and even initiative power, however, does not vindicate the position taken by those who advocate inherent power. All the more this embraces a presidential power to act when Congress has been silent (Monaghan 1993). Those who have advocated inherent presidential powers have often gone a step further, claiming that such power is beyond the power of Congress to limit. In other words, the president cannot be bound by laws that would limit him in the exercise of his independent powers. (By “independent” I mean those powers that derive from the Constitution and do not require a statutory basis. Such powers would be implied rather than inherent on Fisher’s dichotomy, but are also said to be beyond the power of Congress to regulate. In this crucial respect, they would function like inherent powers.)

There is nothing innovative about this move. It is precisely the strategy that President Truman’s lawyers followed in advocating that the Supreme Court uphold his steel seizure order. Rather than relying on inherent power, the solicitor general argued that the order was within the president’s constitutional powers granted in the Executive Vesting Clause, 16 the Commander-in-Chief Clause, 17 and the Take Care Clause. 18 The Court rejected these arguments, with Justice Jackson’s concurrence providing the classic formulation:

> When the president takes measures incompatible with the expressed or implied will of Congress, his own power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system. 19

This formulation represents an emphatic rejection of the claim that the president’s constitutionally based power (whether described as inherent, implied, or independent) is not subject to limitation by statute. Indeed, there is nothing at all surprising about this conclusion. In less publicly and politically charged settings, it is a commonplace observation. For example, the president has a (pick your adjective: inherent, implied, independent) constitutionally based power to terminate the administration’s constitutional officers—those appointed under the Appointments Clause of Article II. Yet Congress

17. “The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual service of the United States.” U.S. Constitution, Article II, section 2, clause 1.
18. “He shall take Care that the Laws be faithfully executed.” U.S. Constitution, Article II, section 2, clause 3.
may enact laws limiting the president’s removal power to circumstances representing “good cause.” If the president’s constitutionally based powers were beyond Congress’s authority to limit, all removal limitations would be unconstitutional.

Exclusive Power

To review the bidding, the president does not hold inherent power in the strong sense that Louis Fisher defines the term. Moreover, the president’s broad implied powers cannot be made to function like inherent powers because they are not impervious to congressional power; the president’s implied constitutional powers must yield to statutory limits as long as Congress has affirmative power to act in the area. But those who advocate for expansive presidential power that is beyond the reach of Congress have another route to achieving this construction. They can emphasize that presidential and congressional power operate in exclusive spheres and then interpret presidential power broadly and congressional power narrowly. In this context, it will rarely be the case that Congress will have authority to legislate in an area where the president holds constitutionally based power. As a result, presidential assertions of authority under category three will frequently prevail. An excellent and important example of this approach is found in an unjustly obscure opinion from the Justice Department’s Office of Legal Counsel (OLC). In 1986, the OLC was asked to opine on the meaning of the “timely notification” requirement of Section 501 of the National Security Act. That provision required the president to notify Congress in a timely fashion of certain diplomatic contacts. In the course of interpreting the statute, the OLC made the following claim: “The President’s authority to act in the field of international relations is plenary, exclusive, and subject to no legal limitations save those derived from the applicable provisions of the Constitution itself” (Office of Legal Counsel 1986, 164). The opinion also asserted a very narrow ambit for congressional action: “The Constitution gave to Congress only those powers in the area of foreign affairs that directly involve the exercise of legal authority over American citizens,” which is to say that Congress lacks authority to limit the executive (ibid., 161).

This is precisely the interpretive strategy employed in the Torture Memo, also written by the OLC. In that memo, the OLC was asked to interpret the scope of the federal law prohibiting the use of torture by U.S. personnel. In one section of the memo, the OLC addressed the issue of whether the statutory prohibition applies to prevent the president from ordering the use of torture to interrogate enemy combatants. The OLC interpreted presidential power in the broadest possible terms. At the same time, the OLC acknowledged no congressional authority at all to address the matter of the conduct of interrogations that are carried out to gain intelligence relating to national security. The memo was strongly criticized for failing even to cite the leading case on presidential power, the Steel Seizure case. But having set up the allocation of powers as it did, the OLC would have easily concluded that the president is authorized to proceed even within category three of Justice Jackson’s framework. After all, the Constitution grants the

president broad power to act as commander in chief, with the implicit power to protect national security. If Congress has no countervailing authority, then the Constitution must authorize the president to order whatever interrogation techniques he deems appropriate.

This approach endows the president with authority that as a practical matter closely approximates the strong definition of inherent power. But it is contrary to constitutional structure, especially as that structure was described in Justice Jackson’s Steel Seizure concurrence. The Torture Memo is illuminating. If one is inclined toward the interpretive approach that emphasizes divided and exclusive power, the question is whether the Constitution assigns authority over choice or forbids torture as a method of conducting national security interrogations to Congress or the president. But that is the wrong question. The Constitution does not specifically address interrogation power at all. In the national security context, each branch has a variety of powers that has relevance. The president is vested with executive power and occupying the role of commander in chief. Congress has, among other relevant powers, the power “to make rules for the government and regulation of the land and naval forces” (U.S. Constitution, Article I, section 8, clause 14) and the power “to define and punish . . . offenses against the law of nations” (ibid., clause 10)—the statute forbidding torture implements an international treaty, the Convention against Torture. Even this cursory review demonstrates what Justice Oliver Wendell Holmes, Jr. observed long ago: “The great ordinances of the Constitution do not establish and divide fields of black and white.”

It is the Constitution’s structure that establishes the system of checks and balances. This system, according to The Federalist, self-consciously blends the powers of the branches in order to allow them to constrain one another. While the Constitution does place some actions exclusively in the presidential sphere, these are quite exceptional. A mode of constitutional interpretation that commonly finds exclusive, or to use Justice Jackson’s more precise term, “preclusive,” power cannot be squared with the Constitution’s structure. Take the classic example, the president’s pardon power. Surely the Constitution allows the president to issue pardons and Congress may not deprive or limit the president’s exercise of this power. But Congress can provide the president aid in exercising this power. In fact, within the Justice Department is located the Office of the Pardon Attorney, who assists the president in reviewing requests for pardons. This office exists, ultimately, exclusively because of statutory authorization. Congress could abolish the office and, though this would impair the president’s exercise of the pardon power compared with the way it is exercised today, the abolition would raise no serious constitutional issue. Similarly, Congress could provide that the pardon attorney may not

22. 343 U.S., 635.
facilitate bribes in exchange for the grant of a pardon, even though Congress may not actually invalidate pardons issued in exchange for a bribe. It is the extraordinary nature of preclusive power in our Constitution that explains the last sentence of Justice Jackson’s formulation of category three: “Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.”\textsuperscript{23} If the occasions for presidential action that is not subject to statutory limitation are not rare, the constitutional system would be thrown into disequilibrium.

The failure of the Torture Memo to cite \textit{Steel Seizure}, then, is no mere formality of failing to cite a relevant case. Had the OLC taken that precedent seriously, it would have been required to consider whether Congress has any power over the techniques used for national security interrogations. The answer is so plainly yes that it is difficult to imagine an analysis that forthrightly considers the question coming to a different conclusion. The Constitution allocates national security powers between Congress and the president in a way that leaves them largely overlapping. This provides each an opportunity to act as an effective check against the other, which after all is the premise of the constitutional system of checks and balances.

\textbf{Ineffectual Congressional Powers}

The above discussion forecloses three arguments to advocates of unrestrained presidential power: (1) the president does not hold inherent power in the strong sense, (2) constitutionally implied powers are not categorically impervious to statutory limitations, and (3) the president’s constitutionally based powers overwhelmingly overlap with congressional power, meaning that in all but the rarest of settings the president is subject to congressional constraints. There is a final route available to unrestrained presidential power. Even accepting that Congress holds a check over presidential power, if that check is ineffectual, then the president’s power is effectively unrestrained. This argument is often made in the context of military power. Commentators such as John Yoo claim that the president may initiate war without receiving any authorization from Congress. The congressional power to declare war is a dead letter and none of Congress’s enumerated powers allows the direct regulation of how the president might choose to conduct his wars. The only check that Congress holds against the president is the power to deny funding (Office of Legal Counsel 2001; Yoo 2005, 143-81). But this will be an ineffectual power. This point is well recognized in legal doctrine. There is a long-standing canon of statutory construction holding that appropriations statutes should not be read to contain substantive law, unless there is no other way to read the enactment. The reason for this interpretive canon is that appropriations bills fund congressional policy and that policy is enacted in authorization bills. Moreover, appropriations bills are enacted through a process that is characterized by logrolling and that does not provide a meaningful opportunity for deliberation or reflection. This form of legislation can hardly be considered an appropriate vehicle for one of the most important substantive decisions Congress can make.

\textsuperscript{23} 343 U.S., 638.
There is a variety of practical reasons to expect that funding restrictions alone represent an ineffectual mechanism for constraining military power. First, it is mainly reactive, in that Congress is denied the ability to participate in advance of the decision. Instead, Congress may only react after the fact. But the decision that will confront Congress after the fact is quite different from the one that it would have faced before the fact. To declare opposition while troops are fighting is a very tricky business politically. Moreover, the practicalities and dangers of extracting troops may make a decision to cease an ongoing war unacceptable, when an advance prohibition would have posed none of those difficulties. Finally, this funding check is one that can be evaded. The president might well look to other sources of funding. This in fact is precisely what happened in the Iran-Contra scandal, where the president sought to fund the proxy war we were fighting in Nicaragua with money that did not come directly out of the Treasury but from the proceeds of sales of arms to Iran. (Recent reports indicate that the Bush administration has considered this approach in the mundane context of appointments. UN Ambassador John Bolton holds his office through a recess appointment that is set to expire shortly. If he is given another recess appointment, federal statutes forbid him to receive a salary from the federal treasury. The administration has reportedly explored securing his salary from unspecified alternative sources [Cooper 2006, A12].) The existence of this check as the exclusive limit on presidential military power creates incentives that actually exacerbate the problem of presidential adventurism.

Because the constitutional equilibrium requires each branch to hold an effective check against the powers of the others, the Constitution’s structure itself provides a powerful argument against the narrow reading of Congress’s powers in the area of military affairs. The much more persuasive reading of the Constitution is the one that seems obvious from the Constitution’s text. Congress holds the power to initiate war (through the Declaration Clause) and holds important substantive power to regulate the conduct of military operations directly rather than as appropriations riders.

Conclusion

The question of whether the president has inherent power turns out to be quite complicated. Insofar as our interest in the question is determining whether the president has constitutional power that is broadly beyond the authority of Congress to constrain, there are four possible routes to that result. First, it may be that the president holds inherent power that derives from a source or sources other than the Constitution itself and so is not subject to Congress’s constitutional power. Second, it may be that the president holds broad powers that can be implied from specific constitutional authorities and that these powers are categorically beyond Congress’s power to regulate. Third, it may be that the president’s constitutionally based powers are subject to relevant congressional powers, but the Constitution rarely assigns the Congress and the president overlapping powers, thus Congress’s powers simply do not often authorize it to legislate in areas assigned to the president. Fourth, the president and Congress may have powers that overlap, but congressional powers are so limited and ineffectual that as a practical matter
they work no meaningful constraint on presidential power. The Constitution’s structure is designed to empower each branch to act as an effective check against the other branches. This central structural feature provides powerful support for the proposition that the Constitution closes each of the four possible roads to a president who may operate outside the law.

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The Commander in Chief and the Courts

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The Bush administration claims to have sweeping, inherent, and unchecked war powers to conduct its war against terror. These claims are inconsistent with the text of the Constitution, the Framers' intent, and the practice of the early leaders of the Republic. Judicial decisions in the first few decades after the Constitution's adoption affirmed the Framers' narrow view of executive war powers. This article will address the extent of the president's inherent powers to prosecute a war, whether Congress can regulate and limit the president's commander-in-chief power, and the role of the courts in deciding whether the president has overstepped his power in conducting warfare.

The Bush administration claims to have sweeping, inherent, and unchecked war powers to conduct its war against terror. In 2002, the Justice Department’s Office of Legal Counsel argued that “Congress could no more regulate the President’s ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield” (U.S. Department of Justice 2002b, 35). That position was later withdrawn as “unnecessary” but was never repudiated (U.S. Department of Justice 2004, 2), and the administration essentially reiterated it in the 2005 presidential signing statement stating that the executive branch would interpret the McCain Amendment’s prohibition on cruel and inhumane interrogations of detainees “in a manner consistent with the constitutional authority of the President . . . as Commander in Chief and consistent with the constitutional limitations on judicial power” (Bush 2005). As a senior administration official later explained, the signing statement was intended to reserve the president’s constitutional right to use harsh interrogation methods “in special situations involving national security” despite the congressional ban (Savage 2006).

Similarly, the Bush administration has argued that the “President has the inherent authority to convene military commissions to try and punish captured enemy combatants even in the absence of statutory authority” (U.S. Department of Justice 2006b, 8). While the administration did not claim that Congress had no power to regulate executive
use of military commissions, it claimed that the president’s inherent power “strongly counsel[ed]” against reading congressional statutes “to restrict the Commander in Chief’s ability in wartime to hold enemy fighters accountable for violating the law of war” (ibid., 8-9).

The administration has also claimed that the president’s inherent constitutional authority as commander in chief and the nation’s sole organ of foreign affairs allows him to authorize warrantless wiretapping, irrespective of the Foreign Intelligence Surveillance Act (FISA). If FISA is read to prohibit the National Security Agency’s warrantless wiretapping program (which it surely does), the administration argues that it is unconstitutional (U.S. Department of Justice 2006a, 8). High-level administration advisors similarly claim that the president has the inherent authority to violate or suspend treaty provisions in wartime (U.S. Department of Justice 2002a, 16). The clearest and most sweeping statement of the president’s authority came from the Department of Defense’s Working Group Report on Detainee Interrogation in 2003 that “in wartime it is for the President alone to decide what methods to use to best prevail against the enemy” (U.S. Department of Defense 2003, 24).

The administration has also articulated a sweeping statutory theory to support its claim of inherent authority. Boiled down to its essentials, this theory reads a declaration of war or other congressional authorization to use force as providing legislative approval for virtually all of the inherent powers that the president claims he has in the absence of such authorization. Thus the president has claimed that the 2001 Authorization of Use of Military Force Act (AUMF), which authorizes the president to use “all necessary and appropriate force” against the people, organizations, or nations involved in the September 11 attacks, provides congressional authorization to detain American citizens or other individuals indefinitely as enemy combatants, to engage in warrantless wiretapping, and to establish military commissions to try enemy combatants. In short, according to the administration, any authorization of force triggers and provides statutory authorization for the inherent powers of the president as commander in chief to take any actions he believes necessary to fight the enemy against whom force is authorized.

Finally, the administration claims that just as Congress cannot interfere in determining what methods and tactics the president can use in fighting its war against terror, neither can the courts. In a series of cases, the Justice Department has claimed that the courts have no jurisdiction to even hear the claims of alien enemy combatants detained in Guantanamo or elsewhere, that they can only provide the most limited facial review of citizens deemed enemy combatants and detained in the United States, that they cannot review challenges to extraordinary renditions or the National Security Agency spying program, and that any review of the military commissions established by the president be extremely deferential.

This article will evaluate the administration’s claims in light of the constitutional design and theory adopted by its framers and the early leaders of the Republic. It will particularly focus on the role of the courts in matters of war and national security. The questions I will address are: (1) to what extent can Congress regulate the president’s prosecution of a duly authorized war, (2) what are the president’s inherent powers in
conducting such warfare in the absence of congressional regulation, and (3) what is the role of the courts in deciding whether the president has overstepped his power in conducting such a war.

Framers and War Powers

The framers of the Constitution clearly rejected any claim that the president had inherent powers over the initiation and prosecution of wars. The Framers rejected the British model of war powers, which, as articulated by Sir William Blackstone, assigned to the king the “sole prerogative of making war and peace” and the powers “to make treaties, leagues, and alliances with foreign states and princes,” to issue letters of marque and reprisal authorizing private persons to engage in warfare, and, as the nation’s first general, to raise and regulate the army and navy (Fisher 2006, 1201-02; Keynes 1982, 22-25). None of these war powers were given to the president. Rather, Congress was given the power to declare war, to issue letters of marque and reprisal, to raise armies and navies, to make rules concerning captures on land and water, and to make rules for the regulation of the army and navy. The president also cannot enter into treaties alone, but requires the advice and consent of two thirds of the Senate.

The Framers made it clear that they rejected the British model of war powers. James Wilson argued that the “British model...was inapplicable to the situation of this Country,” a view concurred in by other Framers (Fisher 2006, 1202). Alexander Hamilton and James Iredell were even more explicit in distinguishing the powers of the British monarch and the American president (Adler 2006, 529). As Hamilton wrote in Federalist no. 69,

The President is to be commander in chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the King of Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the Confederacy, while that of the British King extends to the declaring of war and raising and regulating of fleets and armies—all which, by the Constitution under consideration, would appertain to the legislature. (Hamilton, Madison, and Jay 1937, 448; emphasis in original, cited in Adler 2006, 529)

Or as James Wilson stated, “[H]e did not consider the Prerogatives of the British Monarch as a proper guide in defining the executive powers. Some of these prerogatives were of a legislative nature, among others, that of war and peace etc. The only powers he conceived as strictly executive were those of executing the laws, and appointing officers, not (appertaining to and) appointed by the legislation” (Farrand 1996, I: 65-66). The powers of the president as commander in chief were therefore viewed by the Framers as limited and certainly subject to regulation by Congress pursuant to the broad powers Congress was given to “regulate” the army (Adler 2006, 527-29; Fisher 2006, 1203-04).

Nor was the so-called Vesting Clause of Article II, which provides that the executive power shall be vested in a president of the United States of America, viewed by the
Framers as a source of inherent presidential war powers. As Professors Curtis Bradley and Martin Flaherty demonstrate in their lengthy article on the issue, the debates at the Constitutional Convention, the Federalist Papers, and the state ratification debates all proceeded on the assumption that the president was granted only the powers specified in Article II and that no inherent power inhered in the general nature of executive power (Bradley and Flaherty 2004). The delegates at the Constitutional Convention desired, in James Madison’s words, to “fix the extent of the Executive authority,” and believed that the president’s “powers should be confined and defined,” a position at odds with the concept of amorphous inherent executive authority stemming from the vesting clause (ibid., 594-95). It would certainly have been surprising had a broad, amorphous, inherent executive power emerged from a convention extremely sensitive about limiting the president’s power and distinguishing his powers from those of the British monarchy, without anyone at the convention or ratifying debates clearly articulating that Article II’s vesting clause did provide such power.

Finally, the Framers did not incorporate John Locke’s notion of the royal prerogative to act in time of emergency or crisis into the Constitution. The early leaders of the Republic accepted Locke’s thesis that, at times, the executive had the prerogative to take emergency action “without the prescription of the law and sometimes even against it. An emergency permitted the disregard of even the ‘direct letter of the law’ ” (Locke 1960, 159-60, 392-93, 395). But for the founders of the American Republic, this prerogative power was not part of the constitutional authority provided to the president. Rather, if the president or any other military official believed he needed to react to an emergency situation, he had to act unconstitutionally and seek ratification or indemnification from Congress or accept punishment for his actions (Lobel 1989, 1392-97; Schlesinger 1973, 23-25).

For example, President Thomas Jefferson adhered to the position that the Constitution carefully limited executive emergency power and therefore openly acknowledged that certain emergency actions were unlawful, requiring public ratification by Congress (Lobel 1989, 1392). In 1806, during a congressional recess, Jefferson provided the funds for munitions needed to defend American ships, even though such action exceeded his authority under the appropriations laws (Wilmerding 1952, 323). He then made a full disclosure to Congress, admitting that he had acted without a “previous and special sanction by law,” and requested congressional approval (Richardson 1897, 428; Sofaer 1976, 22). After he left the presidency, Jefferson was asked to comment on whether there are “not periods when, in free governments, it is necessary for officers in responsible stations to exercise an authority beyond the law” (Wilmerding 1952, 328). Jefferson responded:

A strict observance of the written laws is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation . . . . The officer who is called to act on this superior ground, does indeed risk himself on the justice of the controlling powers of the Constitution, and his station makes it his duty to incur that risk . . . . The line of discrimination between cases may be difficult; but the good officer is bound to draw it at his own peril, and throw himself on the justice of his country and the rectitude of his motives. (Jefferson 1810, 148-49)
Other early leaders took similar positions (Wilmerding 1952). For example, during the debates over the Burr conspiracy, all agreed that “necessity could require a departure from regular processes, but that the constitution disallowed a deliberate substitution of another legal system” (Dennison 1974, 58). Representative Alexander White of Virginia explained to the First Congress that an executive can take actions which are admittedly illegal, and if they benefit the country in time of dire necessity, request indemnification by the legislature. According to White, this procedure “corresponds with the practice under every limited government” (Wilmerding 1952, 323).

General Andrew Jackson’s actions in the aftermath of the battle of New Orleans in 1815 further illustrate the Jeffersonian theory of emergency power. When Jackson’s decisions as commander of the army in detaining prisoners he believed dangerous were challenged in a court action, Jackson’s main justification relied on Jefferson’s view that necessity “may in some cases . . . justify a departure from the constitution” (Sofaer 1981, 245-46). President Madison, relieved that Jackson based his defense on necessity, observed that, even though a suspension of liberties “may be justified by the law of necessity,” the commander “cannot resort to the established law of the land, for the means of vindication” (ibid., 249). The federal court held Jackson’s actions to be unlawful, and it fined him $1,000. Almost thirty years later, Congress enacted legislation to repay Jackson the principal and interest on the fine (ibid., 248-51).

**Early Court Decisions**

Judicial decisions in the first few decades after the Constitution’s adoption affirmed the Framers’ narrow view of executive war powers. These early decisions reflect three broad principles. First, the judiciary upheld congressional power to regulate not only the decision to go to war but the scope and methods by which warfare would be conducted. Second, the courts took a very narrow view of the executive’s inherent powers in time of war in the absence of congressional authorization. Third, the courts were willing to scrutinize executive claims of military necessity, even on the battlefield, to determine whether executive officials had acted lawfully.

**Congress’s Power to Regulate the President’s Power to Conduct Warfare**

In a series of early cases involving the quasirivalry with France of the late 1790s, the Supreme Court clearly indicated that Congress could limit the president’s power to conduct hostilities. In *Little v. Barreme*, a unanimous Supreme Court upheld the imposition of damages on a naval commander who had acted pursuant to a presidential order to seize a ship that he believed was illegally trading with France.1 Chief Justice John Marshall’s opinion for the Court recognized that the president might have inherent power as commander in chief to seize such vessels illegally trading with the enemy in time of war. Yet Congress had at least implicitly prohibited such military action when it

provided that the president was authorized to seize ships traveling to French ports and did not provide similar authority for ships bound from a French port, as was the ship involved in this case. Marshall recognized that President John Adams’s construction of that statute—authorizing naval commanders to seize ships both going to and coming from French ports—was undoubtedly preferable from a military standpoint and would provide more effective enforcement of the embargo against France. Nonetheless, the Court enforced the law’s limitation of the president’s power to conduct military operations and imposed individual liability on the naval commander for following President Adams’s illegal instructions.

The court’s opinion in *Little v. Barreme* enforcing a legislative circumscription of the president’s commander-in-chief powers in wartime is supported by several other cases arising out of the undeclared war with France. In *Bas v. Tingy*, the Court unanimously held that France was an enemy for purposes of a law that permitted the salvage of enemy ships, despite the absence of a declaration of war. Three of the four justices who wrote seriatim opinions agreed that in the words of Justice Samuel Chase, “Congress is empowered to declare a general war, or Congress may wage a limited war, limited in place, in objects and in time.” As Justice Bushrod Washington stated, a limited, undeclared war is known as an imperfect war, and “those who are authorized to commit hostilities, act under special authority, and can go no further than to the extent of their commission.” Justice William Patterson also agreed that an undeclared or imperfect war was nonetheless war, in which “as far as Congress tolerated and authorized the war on our part, so far may we proceed in hostile actions.”

The next year, Justice John Marshall reiterated the basic principle articulated by Justices Chase, Washington, and Patterson in *Talbot v. Seeman*. Marshall wrote that “the whole powers of war being, by the constitution of the United States, vested in Congress, the acts of that body can alone be resorted to as our guides” in determining whether Captain Silas Talbot had a lawful right to seize an armed vessel commanded and manned by Frenchmen. Marshall, writing for a unanimous Court, recognized, as had Patterson, Chase, and Washington in *Bas*, that Congress may authorize either a general war or a limited partial war.

Similarly, in the 1806 case of *United States v. Smith*, Justice Patterson, a participant in the Constitutional Convention, addressed Congress’s power to regulate what today would be considered covert action. In that case, two defendants indicted for attempting a military expedition against Spanish America claimed that their acts had been authorized by President Jefferson and his cabinet and subpoenaed members of the cabinet as part of their defense. Patterson, presiding at the trial with District Judge Matthias Tallmadge, held that the testimony of the cabinet members was irrelevant because the president did not have the constitutional authority to violate the statute forbidding such private military expeditions:

3. Ibid., 40 (emphasis added).
4. Ibid., 45.
6. Ibid., 28.
“The President of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids.”

These early cases contradict the Bush administration’s claim of inherent power over the conduct of warfare that Congress cannot interfere with. If Congress can proscribe the capture of vessels believed to be trading with the enemy in time of war, surely Congress can also regulate the detention and interrogation of enemy combatants in time of war. That Congress can proscribe certain military tactics in enforcing a trade embargo in time of war certainly means that it has the power to preclude certain methods of interrogating prisoners. As Marshall suggests, the commander-in-chief power would normally extend to capturing such vessels. Indeed, the “battlefield” of the 1790s war with France was the high seas. Nonetheless, Congress could limit the commander-in-chief power, even if the president believed such limitations interfered with his prosecution of the war.

More generally, the justices viewed Congress as having the power to authorize limited, undeclared war in which the president’s normal power as commander in chief would be limited. In such limited wars, the commander in chief’s power would extend no further than Congress had authorized. Given that generally accepted principle, there seems little constitutional question that Congress can limit the weapons, the interrogation tactics, the detention procedures, or the trial procedures for alleged war criminals in the current hostilities against al Qaeda.

Presidential Power Flowing from a Declaration of War

The early Supreme Court decisions also contradict the administration’s assertions that the president has the inherent power, pursuant to either a declaration of war or the more limited statutory authorization, to take all measures necessary to prosecute the war successfully. Nor did the courts defer to the president’s judgment of what measures are necessary. In *Brown v. United States*, the government argued that enemy property located within the United States could be seized and condemned by the executive pursuant to a declaration of war. Chief Justice Marshall conceded that a sovereign had a right both to detain enemy aliens and confiscate the property of the enemy—wherever found—in time of war. Yet he nonetheless held that Congress, by declaring war, had not authorized the president to seize enemy property in the United States. Marshall held that the congressional power “to make rules concerning captures on land and water” was an “independent substantive power, not included in the declaration of war.” Therefore, the declaration did not authorize the president to seize enemy property in the United States. Indeed, Marshall notes that Congress’s independent authorization for the detention of enemy aliens, and for “the safe keeping and

accommodation of prisoners of war,” “authorizations that were separate from its declaration of war, affords a strong implication that [the president] did not possess those powers by virtue of the declaration of war.”

Marshall rejected the government’s argument that a declaration of war should give the president the power to execute all of the laws of war, and that therefore the government could take all actions that the laws of war allow. Because the laws of war only permitted the seizure of enemy property but did not require it, Marshall held that it was a question of policy “proper for the consideration of the legislature, not the executive or judiciary.”

Justice Joseph Story, in dissent, would have held that “by the act declaring war, the executive may authorize all captures which, by the modern law of nations, are permitted and approved.” Interestingly, the majority, the dissent, and even the government suggested that the president did not have the commander-in-chief power to seize property which international law did not permit to be confiscated.

The Courts and Military Necessity

The early Supreme Court had no difficulty in reviewing executive claims that unilateral action in wartime was required by military necessity. The Court generally followed two strategies. Where the law was violated, the Court held that even perceived military necessity did not render the executive action constitutional. Rather, the official was required to pay damages—as in the Little v. Barreme case. As the Little case demonstrated, Congress could decide later to indemnify the officer if it felt his actions were really necessary (Wilmerding 1952, 324 n.6). Similarly, in the Apollon case, the Court found an executive official liable for damages for the seizure of a ship and cargo, even though the official had been motivated by perceived necessity. Justice Story wrote for a unanimous Court:

It may be fit and proper for the government, in the exercise of the high discretion confided to the executive, for great public purposes, to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures, which are not found in the text of the laws. Such measures are properly matters of state, and if the responsibility is taken, under justifiable circumstances, the legislature will doubtless apply a proper indemnity. But this Court can only look to the questions, whether the laws have been violated; and if they were, justice demands, that the injured party should receive a suitable redress.

Alternatively, the courts reviewed the lawfulness of executive actions by adjudicating whether the claimed military necessity did in fact exist. In Mitchell v. Harmony, for instance, the Supreme Court upheld a damage award against a commander for the improper seizure of property during the Mexican War, ruling that the question of

9. Ibid. (emphasis added).
10. Ibid., 129.
11. Ibid., 145.
12. Ibid., 128-29.
whether an emergency had been present was for the jury to determine. 14 While the Mitchell Court did permit a very narrow area of lawful executive emergency power to seize property during wartime, its main emphasis was on limiting that power by defining emergency narrowly. The standard utilized by the Court was that the danger must be “immediate and impending,” and “such as will not admit of delay.” That the officer honestly believed such emergency to exist and took the property to promote the public service was deemed insufficient if there were no reasonable grounds for the officer’s belief that the peril was “immediate and menacing.” 15

The early Supreme Court was not reluctant to review executive claims of emergency power during wartime. In none of these cases did the Court decide either that the dispute was nonjusticiable or that broad, inherent, executive constitutional powers over war and foreign affairs authorized the acts. 16 As Professor Christopher May has written in discussing this early period, “Where the executive had proceeded on its own, the judiciary displayed a remarkable willingness to analyze the relationship between its conduct and the war emergency” (May 1989, 18).

The Judiciary and Military Necessity in the Current Conflict with Al Qaeda

An underlying motif of the Supreme Court’s recent decisions involving the administration’s war on terror has been the tension between judicial review and the executive’s articulation of claimed military necessity. As we have seen, the early Supreme Court generally did not defer to such claims. The modern judiciary’s record has been decidedly more mixed, most infamously in Korematsu v. United States, where the Court deferred to the judgment of the military authorities that the exclusion of Japanese Americans from the West Coast was a necessary war measure. 17 Moreover, in some cases, such as Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., the Court has employed broad language suggesting that executive foreign-policy decisions are political, not judicial decisions. 18 However, in the recent enemy combatant cases—Hamdan v. Rumsfeld, Rasul v. Bush, and Hamdi v. Rumsfeld—that Court has refused to defer to claims of broad, unreviewable executive decisions based on claimed military necessity and inherent executive power.

The Court’s jurisprudence in the trilogy of recent enemy combatant cases rests critically on a distinction between military necessity on the actual battlefield in the midst

15. Ibid., 134-35.
16. In Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827), the Supreme Court did refuse to decide whether an emergency existed justifying the president’s calling the militia into actual service, thus illustrating that the Court was, at times, reluctant to adjudicate executive use of emergency power. In Martin, however, the issue was not the executive’s independent power: Congress had clearly authorized the president’s actions. Instead, the issue was whether a soldier could refuse an executive order because he did not believe an emergency existed.
of combat and claimed necessity to detain or try a detainee several years after their removal from the battlefield. In each of these cases, the Court either explicitly or implicitly found that a generalized claim of military necessity could not negate the Court’s obligation to review the detainee’s claims.

Most recently, in *Hamdan*, the Court struck down the administration’s attempt to unilaterally establish military commissions to try alleged terrorists. Justice John Paul Stevens’s opinion, much of which represented the Court majority and part of which was the opinion of the plurality of four justices, rested heavily on the Court’s rejection of the argument that any military or practical necessity required these commissions.

Justice Stevens and the plurality framed the basic question in the case as “whether the preconditions designed to ensure that a military necessity exists to justify the use of this extraordinary tribunal have been satisfied here.” For the plurality, military commissions to try enemies who violate the laws of war—the type the Bush administration sought to implement—were premised on the “need to dispense swift justice, often in the form of execution, to illegal belligerents captured on the battlefield.” The administration, however, had failed “to satisfy the most basic precondition” for its establishment of military commissions—“military necessity.”

Justice Stevens noted that Hamdan’s tribunal was not “appointed by a commander in the field of battle, but by a retired major general stationed away from any active hostilities, . . . [and] he was not being tried for any act committed in the theatre of war.”

Justice Stevens, writing for the Court, returned to the theme of military necessity when discussing the statutory requirement that procedures for military commissions must be the same as those used to try American soldiers in courts-martial (which they clearly were not) unless the administration could demonstrate that the court-martial procedures would not be “practicable.” The Court emphasized the military necessity that comes from battlefield exigencies, stating that the statute “did not transform the military commission from a tribunal of true exigency into a more convenient adjudicatory tool.”

The requirement that any deviation be necessitated by a showing of impracticability of court-martial procedures “strikes a careful balance between uniform procedure and the need to accommodate exigencies that may sometimes arise in the theatre of war.” In short, the justices both reviewed and decisively rejected the claim of military necessity upon which the lawfulness of the military commissions rested.

Similarly, Justice Anthony Kennedy, in his concurrence, emphasized the Court’s finding that no exigency, practical need, or military necessity required the deviation from the normal procedures followed by courts-martial. For Justice Kennedy, as with the other justices in the majority, the term “‘practicable’ cannot be construed to permit deviations

20. Ibid., 2777.
21. Ibid., 2782.
22. Ibid., 2785.
23. Ibid.
24. Ibid., 2793.
based on mere convenience or expedience.”25 Hamdan had been detained for four years and the government had demonstrated no exigency or evident practical need for departure from court-martial procedures.26

In contrast, the theme that runs throughout Justice Clarence Thomas’s dissent is that the Court’s decision constituted an unprecedented departure from the traditionally limited role of the courts with respect to warfare.27 For the dissenters, the Court’s determination that Hamdan’s trial before a military commission that deviated from court-martial procedures and was not warranted by practical need or military necessity constituted an impermissible intrusion into the executive’s power to take appropriate military measures pursuant to the congressional authorization of the use of force against those who aided the terrorist attacks that occurred on September 11, 2001. The dissenters believed that “the plurality has appointed itself the ultimate arbiter of what is quintessentially a policy and military judgment.”28 For the dissenters, the president has the power to appoint military commissions in exigent and nonexigent circumstances, and the Court should not determine whether such actions are necessary. Nor should the Court decide whether the regular court-martial procedures are “practicable,” for “that determination is precisely the kind for which the ‘judiciary has neither the aptitude, facilities nor responsibility.’ ” For Thomas, that decision is reserved to the president by Congress’s authorization “to use all necessary and appropriate force against our enemies.”29 Or, as Justice Antonin Scalia’s dissent argues, an order enjoining ongoing military commission proceedings “brings the Judicial Branch into direct conflict with the Executive in an area where the Executive’s competence is maximal and ours is virtually nonexistent.”30

There seems absolutely no reason why the judiciary’s competence to evaluate the legality of a military commission is “virtually nonexistent.” One would think that the federal judiciary would have a great deal of expertise in analyzing whether deviations from basic principles of judicial procedure are necessary. For example, as Justice Kennedy asks, why should it be necessary to allow the secretary of defense or his political designee to make dispositive decisions during the middle of the trial or appoint the presiding officer at trial—powers which raise concerns about the commission’s neutrality? The judiciary is certainly capable of evaluating whether a fair trial is compromised when the government can introduce into evidence statements obtained through the use of coercive interrogation methods prohibited by the Geneva Conventions and U.S. law. Nor is a court incompetent to evaluate the competing claims of fair process and necessity. Moreover, questions such as the scope and interpretation of Common Article 3 of the Geneva Conventions, the historical practice of military commissions, or whether conspiracy is a war crime all seem to be quintessential legal issues of the type courts generally grapple with. Decisions made in the heat of battle may require speed, secrecy, discretionary

25. Ibid., 2801 (Kennedy, J., concurring in part).
26. Ibid., 2805, 2807-08.
27. Ibid., 2826 (Thomas, J., dissenting).
28. Ibid., 2838.
29. Ibid., 2843 (citing Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103 (1948)).
30. Ibid., 2822 (Scalia, J., dissenting) (emphasis added).
judgment, and immediate access to information that military commanders, and not courts, are qualified to make. But none of those attributes characterize the determination of whether military trials undertaken four years after the capture of a prisoner utilize fair, lawful, or necessary procedures. Neither Scalia nor Thomas argues that the administration’s military commissions were militarily necessary or that the regular court-martial procedures were impractical, but simply claim that that decision was not for the Court to make.

Similarly, in *Hamdi v. Rumsfeld*, the Court also distinguished between judicial review of detentions on the battlefield and review over indefinite detentions of citizens once they had been removed from the theater of war. The plurality opinion rejected the government’s argument that any significant judicial review of a citizen detained as an enemy combatant would have a dire impact on the central functions of warmaking:

> While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.

Of course, the phrase “actual prosecution of the war” is somewhat vague—and the president argues that virtually everything he does to fight terrorism—electronic surveillance, indefinite detention of prisoners at Guantanamo and elsewhere, or extraordinary rendition—are matters relating to the actual prosecution of the war. But in the context of the opinion, it is clear that the plurality distinguishes military actions taken on or near the battlefield and military decisions about individuals detained far from the actual fighting. The plurality distinguished between “initial captures on the battlefield,” which the parties agreed need not receive due process, and the process required “when the determination is made to *continue* to hold those who have been seized.” In the latter circumstances, the Court rejected the government’s assertion that the Court’s role must be “heavily circumscribed.” The *Hamdi* plurality made clear that “what are the allowable limits of military discretion, and whether they have been overstepped in a particular case, are judicial questions.” In ringing words it proclaimed that “we have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”

The Court’s decreasing deference to executive wartime determinations made away from the battlefield can also be seen in the *Hamdi*’s plurality emphasis on the narrow “context” of that case: “A United States citizen captured in a foreign combat zone.” The plurality’s emphasis on Hamdi’s battlefield capture came in response to the four dissent-

32. Ibid., 535 (plurality opinion).
33. Ibid., 534 (emphasis in original).
34. Ibid., 535.
35. Ibid. (quoting *Sterling v. Constantin*, 287 U.S. 378, 401 [1932]).
36. Ibid., 536.
37. Ibid., 523.
ers who argued that the president has no power at all—either under the Non-Detention Act or the Constitution—to detain an American citizen as an enemy combatant and suggests that at least some justices in the plurality might have agreed with the dissenters in the case of Jose Padilla, an American citizen who was not captured on a foreign battlefield but rather detained at the Chicago airport. The administration claims that the “battlefield” in its global war against terrorism is worldwide, including the United States, but the Hamdi plurality defined the battlefield in that case as the armed conflict taking place in Afghanistan. While the Fourth Circuit Court of Appeals later concluded that Padilla could be detained as an enemy combatant even though he was detained in the United States because he was at one time “armed and present in a combat zone during armed conflict,” the Second Circuit had reached the contrary conclusion prior to the Hamdi decision.\(^\text{38}\) Apparently the government was sufficiently concerned that the Supreme Court would reverse the Fourth Circuit that they avoided Supreme Court review of Padilla’s case by releasing him from detention as an enemy combatant and charging him with a crime—one having nothing to do with the enemy combatant charge—prior to the Supreme Court’s taking up Padilla’s appeal from the Fourth Circuit ruling.

Finally, in Rasul v. Bush, Justice Kennedy’s concurrence again articulates the theme of the absence of direct military necessity which underlies much of the opinions in both Hamdi and Hamdan. Kennedy argued that the Court’s assertion of habeas jurisdiction over the Guantanamo detainees in that case was warranted in part because the government’s indefinite detention without trial or other legal proceedings of the detainees presented a “weaker case of military necessity. . . . Perhaps, where detainees are taken from a zone of hostilities, detention without proceedings or trial would be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker.”\(^\text{39}\) Similar, but unarticulated, reasoning undoubtedly motivated the majority to reject the government’s claim that the assertion of habeas jurisdiction would impermissibly interfere with the president’s ability to wage the war against terrorism.

**War and Judicial Competence**

Scholars such as John Yoo or Richard Posner argue for “a light judicial hand in national security matters,” or for the judiciary to abstain altogether in wartime challenges to executive policies (Posner 2006, 35-37; Yoo 1996). Yoo views the Hamdi and Rasul decisions “as an unprecedented formal and functional intrusion by the federal courts into the executive’s traditional powers” that will take the courts “far beyond their normal areas of expertise” (Yoo 2006, 574-75).

These scholars emphasize the judiciary’s institutional deficiencies in addressing war or national security matters. Judges are generalists, unlike congressional committees or executive bureaucracies that focus on national security issues. The judiciary, unlike the

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Defense Department or the Senate Foreign Relations Committee, has no machinery for the systematic study of an issue. And Yoo argues that the federal judiciary is a decentralized, slow, deliberate body which erects substantial doctrinal and resource barriers on parties seeking access and whose ability to acquire and process information is more limited than the political branches (Yoo 2006, 592-600).

These critiques of judicial competence in war, national security, or foreign affairs matters ignore central and critical functions of the judiciary that are important both in wartime and times of peace. The judiciary is the one branch uniquely situated to police the legal limits imposed on executive discretion over military or national security matters. While the executive clearly has greater discretion in times of war, its power is not unbounded and still is limited by law. Determining what those legal limits are and how they apply in particular cases are often issues that involve the judiciary’s expertise and experience. Issues such as whether the president has the power to detain American citizens as enemy combatants, can hold detainees indefinitely without according them fair hearings, can try detainees by means of military commissions that permit evidence obtained by torture or other coercive means to be admitted, or whether detainees can be subjected to torture or other cruel and inhumane methods of interrogation are not matters beyond the competence of judges.

Moreover, war as well as peace requires structural checks on executive overreaching, perhaps even more so because of the greater dangers of executive aggrandizement of power during wartime. Despite the arguments of those such as Yoo and Posner that either the Congress or executive branch itself can provide adequate checks, this safeguard certainly has not proven adequate during the current conflict against terrorism. Congress has been quiescent, providing virtually no check or oversight of the president’s treatment, detention, or proposed military trials of enemy combatants until the Supreme Court entered the fray. Nor has Congress challenged the president’s policy of extraordinary rendition, in which the executive sends suspected terrorists to countries where they will be tortured and detained indefinitely without judicial process. Indeed, even after the Supreme Court forced Congress to grapple with the defects of the administration’s proposed military commissions, Congress enacted a statute that many senators believed was unconstitutional. The chairman of the Senate Judiciary Committee voted for the statute and justified his vote by stating that “the court will clean it up” (Lithwick and Schragger 2006; Los Angeles Times 2006).

Moreover, institutional, legal, and political checks within the executive branch have been even less effective. The Office of Legal Counsel, an institutional check within the Justice Department which is supposed to provide independent legal advice, produced secret memos written by handpicked political appointees providing advice that conformed to the bottom line their superiors desired (Pillard 2006, 1297). When the Bybee Torture Memo, which was never intended to be publicly disclosed, was leaked to the press, the resulting firestorm of criticism caused it to be withdrawn.

This problem is not limited to this administration; for decades the executive branch has sought to keep the legal advising process confidential (Pillard 2006, 1302). Moreover, the administration’s discussions of legal strategy after September 11 largely excluded the military lawyers and foreign-policy officials who presumably had the expertise that Yoo
or Posner believe places the executive at a comparative advantage over judges in national security matters (Golden 2004, § 1, 1; Mayer 2006). For example, when some of the military lawyers protested the administration’s detainee policies, they were generally ignored by the small coterie of high-level officials who were driving the policies (Mayer 2006). The public deliberation and rational argumentation of differing opinions that characterize judicial proceedings are an institutional strength of the judiciary that has been sorely lacking in the administration’s determination of legal strategy in fighting terrorism. While troop movements, battle plans, and military strategies ought to be kept secret and out of the Court’s purview, legal issues and strategies, such as the definition of torture, the constitutional authority of the president to violate or suspend treaties or authorize torture, and the applicability of the Geneva Conventions in the current fight against terrorism, are matters best resolved in the course of open dialogue and debate that the judiciary, not the executive, is most institutionally attuned to.

Conclusion

The Supreme Court’s assertion of judicial power to review the president’s enemy combatant policies is consistent with the constitutional design to limit and provide checks on executive power, both in wartime and in peace. It is also consistent with the early judiciary’s assertiveness in deciding cases challenging executive wartime decisions. But the Court’s decisions nonetheless surprised many observers, perhaps because of the all too often tendency of the modern judiciary to defer to executive wartime decisions.

Commentators have offered various theories to explain the Court’s muscular approach to the enemy combatant cases. Perhaps the Court has learned from the lessons of the past; maybe the Court’s prior wartime precedents restraining executive power such as Milligan or Youngstown Sheet & Tube played a role in the Court’s reaching the conclusions it did. Or it may be that these decisions are the result of the very slowness of the judicial process that Yoo describes—namely that the delay of three to five years between September 11 and these Court decisions meant that the Court could decide these cases when the sense of crisis had already somewhat passed. It could also be that these decisions are the product of the more general assertiveness of the late-twentieth-century judiciary. Such explanations have been proffered by various commentators (Waxman 2005, 1).

But perhaps these Court decisions are a reaction to the executive’s claim that, in this new kind of war against terror, no law applies to the treatment of enemy combatants. The administration claims that we are at war and that neither the Constitution nor the normal human rights law applicable to peace time governs the treatment of enemy combatants. But at the same time, the administration also argues that the normal laws of war—the Geneva Conventions, the rules governing prisoners of war—do not apply because these prisoners are unlawful enemy combatants and the normal rules of war do not apply to our fight against al Qaeda. According to the administration’s assertions, no law governs and whatever treatment is accorded to these prisoners is purely a matter of administration discretion. These prisoners were in what amounted to a legal black hole.
The Court pushed back against the executive’s argument that these prisoners could be held totally outside of the rule of law and that there could be no review, or only extremely deferential reviews, of their detention. The administration’s argument that this was a new kind of war against a nontraditional enemy ironically suggests that more robust review of the administration’s detention policies is required. This new kind of war is likely to drag on for many years, decades, or generations. In this conflict, the traditional boundary lines separating war and peace, civilian and combatant, battlefield and home front have been blurred, perhaps beyond recognition, leading to both a higher chance of military error in deciding who to detain and the possibility of lifetime detention for innocent people erroneously detained. In these circumstances, the need for judicial review is greater than in past wars.

A guiding principle of the U.S. Constitution is that the government is one of limited powers. President Bush claimed virtually unlimited, unchecked power to detain and try people the government believed to be enemy combatants. It fell to the Court to tell the president that he was wrong.

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Executive power in the Constitution was left ambiguous and underdefined. Commentators have questioned presidential claims of inherent executive and war powers. Have the president and his subordinates obeyed the Constitution and adhered to the letter and spirit of the law? Have legal commentators and courts properly construed constitutional clauses, especially those dealing with war powers? I start with the idea that the Constitution is a power base for government officials and that construing the Constitution is a political act. As political scientists, we can observe presidents and their counsel substitute novel interpretations of presidential prerogatives when they claim the president has inherent war powers and related diplomatic and national security powers that override statute law or bypass the constitutional prerogatives of Congress, and we can analyze the conditions under which their substitution of executive prerogative power will succeed or fail.

When delegates discussed executive power at the Constitutional Convention and at state ratifying conventions, they talked about senatorial conspiracies with the president to weaken the House, or of presidential usurpations, or of the "vortex" of legislative power that might infringe upon executive and judicial powers. Although delegates intended to create a more efficient government, their debates reveal ambivalent feelings about executive power (Fisher 1971; Best 1987; Riccards 1977). They seem never to have defined executive power itself, other than by comparing the power of the president to that of the discredited British monarch. Yet from the first days of the presidency, commentators have questioned presidential claims of inherent executive and war powers. The most recent debates have involved those who warn of an "imperial" presidency (Schlesinger 1973) taking on those who warn of an "imperiled" one, and in the aftermath of the War on Terror, those who argue for a "unitary executive" (Yoo 1996, 2006).
The questions posed by Louis Fisher for the contributors to this volume involve the legitimacy of executive action based on claims of inherent power. Have the president and his subordinates obeyed the Constitution and adhered to the letter and spirit of the law? Have legal commentators and courts properly construed constitutional clauses, especially those dealing with war powers? I do not intend to address doctrinal questions, but rather prefer to start with the idea that the Constitution is a power base for government officials and that construing the Constitution is a political act. As political scientists, we can observe presidents and their counsel substitute novel interpretations of presidential prerogatives when they claim the president has inherent war powers and related diplomatic and national security powers that override statute law or bypass the constitutional prerogatives of Congress, and we can analyze the conditions under which their substitution of executive prerogative power will succeed. This approach is not a substitute for, but rather a useful complement to doctrinal analysis (Pious 2006a, 11-36).

Scholarship about claims of inherent executive, war, and diplomatic powers (Adler 1988, 2000; Corwin 1957; Firmage and Wormuth 1989; Fisher 2004; Glennon 1990; Henkin 1996; Koh 1990; Sofaer 1976; among others) makes it clear that presidents do not possess a monopoly of prerogative power in war and foreign affairs, and in fact they cannot even claim all “executive” powers, as the Constitution has always had, in the words of delegates at the ratifying conventions, “blended” executive powers shared by president and Senate. And yet presidential practice, congressional legislation, and judicial case law have all moved us far toward a “unitary executive” that possesses, if not a monopoly of prerogative in theory, the actual control of warmaking and foreign affairs in fact. If, as Corwin says, the Constitution provides “an invitation to struggle” for control over the conduct of foreign affairs (Corwin 1957, 171), there is a question political scientists must answer: why have presidents since Nixon (King and Meernik 1998, Table 15.1) almost always won in courts and usually gained support in Congress, irrespective of the weight of constitutional scholarship that undermines their more extravagant claims of prerogative?

The Framers’ Conceptions of Executive Power

The Framers did not adopt a British war model theory of “Crown Prerogative.” They certainly could not have done so publicly, because the very idea of Crown Prerogative was anathema to the American people after the Revolutionary War. An examination of the constitutional and ratifying debates makes it clear that, in warmaking and foreign affairs, Federalists contrasted the limited constitutional powers of the president with that of the unlimited and unchecked prerogatives of the British Crown. They had an incentive to minimize the powers granted by the Constitution to the president in order to win ratification, even as they trumpeted the advantages in foreign affairs that a strong national government might bring (Marks 1971).

The majority of delegates at the national convention and the ratifying conventions never conceived of executive power as plenary, especially not in the most important
matters of war, peace, and the conduct of foreign relations. The assumption of the Framers was that the president would need the consent of the Senate to conduct foreign relations (appointments and treaties), the consent of Congress for any military action other than one of self-defense, and would require appropriations granted by Congress to make war. “This system will not hurry us into war,” James Wilson observed, for “it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large” (Elliot 1837, II: 528).

Although conceding that there were limits to executive power, delegates never got around to specifying what they were. A group centered around Washington, including Alexander Hamilton, James Wilson, and Gouverneur Morris, pushed for strong executive powers and controlled the Committee on Style, which drafted the final language that left limits undetermined (Holcombe 1956; Mitchell 1987; Huff 1987; McCarthy 1987; Robinson 1987) and avoided many important issues. In foreign affairs there is no mention of a power to declare neutrality, no mention of a power to abrogate treaties, no determination as to which institution reinterprets treaty obligations, no answer to the question of how nations are to be recognized (only the implied power of recognition from the power to appoint ministers to other nations, which after all is a blended power, and the power to receive ambassadors). The precise powers of the president as commander in chief are not defined and enumerated.

Yet to argue that there were no limits to inherent executive and war powers or that the president was the sole organ in these matters, one would have to ignore Article I of the Constitution, which provided Congress with many specific powers involving foreign affairs and the military. These involved concomitants of sovereignty, as Congress was granted the power to legislate based on the laws and customs of war (Article I, section 8, paragraph 10). The “Rules for the Government and Regulation of the Land and Naval Forces” were to be established by Congress, which also was to make “Rules Concerning Captures on Land and Water” and deal with piracy and brigandage by issuing letters of marque and reprisal (Article I, section 8, paragraphs 11, 14). Under the Define and Punish Clause, Congress was to incorporate international law and conventions, the laws and customs of war, and treaty obligations into its domestic law governing the use of the armed forces.

Contrary to the common interpretation of Article I, section 8, paragraph 18, the Necessary and Proper Clause not only allows Congress to pass laws extending its own powers in Section 8 (thus the Elastic Clause) but also gives Congress the power to pass laws to carry into execution “all other Powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof.” Congress legislates on “the Executive Power” of the president and it legislates on the powers of officers of the United States, including the political appointees of the administration in the departments as well as career civil, military, and foreign service officers. A black-letter textual analysis of the Constitution itself, even without considering the supporting evidence from convention and ratifying debates, is enough to demolish the pretensions of those who claim that a “unitary executive” possesses a monopoly of power to direct officers of the United States. For officers acting under presidential authority as com-
mander in chief, the supremacy of statute law over executive fiat was explicitly pronounced by the Supreme Court in the early war powers case *Little v. Barreme.*

But executive power remained ambiguous and unconfined, particularly during Andrew Jackson's presidency. Abel Upshur pointed out in 1840 in one of the first treatises on executive power:

The most defective part of the Federal Constitution, beyond all question, is that which relates to the executive department. It is impossible to read that instrument without being forcibly struck with the loose and unguarded terms in which the powers and duties of the president are pointed out. . . . The convention appears to have studiously selected such loose and general expressions as would enable the President, by implication and construction, either to neglect his duties or to enlarge his powers. (Upshur 1971, 116)

If the executive department was defective, the blame can be assigned the constitutional draftsmen whose loose and unguarded language allowed for contradictory interpretations of executive power. The terms "executive power" and "commander in chief" could be interpreted through two different rules of construction: one, the "rule of the general term," which was a standard approach to constitutional construction at the time, interpreted a general term restrictively, to include only those specific powers which followed it. As put by Daniel Webster, arguing the Whig position in the 1840s: "Enumeration, specification, particularization, was evidently the design of the Framers of the Constitution. . . . I do not, therefore, regard the declaration that the executive power shall be vested in a President as being any grant at all" (Webster 1903, VII: 1888).

Throughout the nineteenth century, discussions of the president's executive power in constitutional law treatises tended to follow this rule—to the extent there was any discussion of the power at all, which was rare (Burgess 1890-1891, 188-89; Cooley 1880, 100; Wilson 1892, 281). But a contrary rule of construction would take a general term such as "executive power" as an independent grant of power and consider as presidential powers all that is inherent in the term or may be fairly implied from it. In other words, the president using this rule of construction converts the term "executive power" into the power of serving as "chief executive" of the nation.

Consider Hamilton's discussion in *Federalist no. 70,* in which he first warned that "a feeble Executive implies a feeble execution of government" and then continued with claims that the president must, as a unitary executive, take responsibility for the "plans and operations" of government. In place of the forbidden term "prerogative," Hamilton substituted "administration," and so he described the powers of the president in the following terms in *Federalist no. 72:*

The actual conduct of foreign negotiations, the preparatory plans of finance, the application and disbursement of the public moneys in conformity to the general appropriations of the legislature, the arrangement of the Army and Navy, these, and other measures of like nature, constitute what seems to be most properly understood by the administration of government.

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Hamilton defines presidential war power as an adjunct of inherent executive power in *Federalist no. 74*: “The direction of war implies the direction of the common strength; and the power of directing and employing the common strength forms a usual and essential part in the definition of the executive authority.”

Presidents insist that their powers in foreign affairs and warmaking are superior and anterior to those of Congress—an argument first made systematically by Hamilton writing as Pacificus in 1792 (Hamilton 1851, VII: 76-85). War and foreign affairs powers are inherently executive in nature and assigned to the president unless the Constitution explicitly forbids the exercise of a power; the president’s prerogative extends to sovereign and emergency powers, as well as routine decision making. According to Pacificus, inherent executive power in foreign affairs contains the full set of all sovereign powers and constitutional powers minus the subset assigned by the Constitution to Congress, with all silences and ambiguities resolved in favor of the executive. Such claims are always advanced by presidential counsel. In the early stages of the “war on terror,” John C. Yoo wrote a memorandum concluding that “the Constitution vests the President with the plenary authority, as Commander in Chief and the sole organ of the Nation in its foreign relations, to use military force abroad—especially in response to grave national emergencies created by sudden, unforeseen attacks on the people and territory of the United States.”

James Madison, writing as Helvidius, took the opposite tack: he claimed that the Constitution assigned all war and foreign affairs powers to the legislature, with only such exceptions as were explicitly assigned by the Constitution to the executive (Hunt 1900, I: 611-21).

Hamilton intended the president to set events in motion, with the legislature later exercising a “perfecting” power to authorize executive policy and appropriate necessary funds. So it was with George Washington’s Declaration of Neutrality, subsequently legitimized by congressional legislation. And so it was with Abraham Lincoln’s actions at the start of the Civil War, subsequently given retroactive legality through a congressional statute. In practice, the Jeffersonians themselves settled the issue in favor of Hamilton’s position about superior and anterior executive action. After Thomas Jefferson and James Madison decided to purchase the Louisiana Territory, the transaction faced objections in Congress because the Constitution contained no explicit provision for the acquisition of territory. Jefferson instructed his attorney general that “the less said about any constitutional difficulties the better; it will be desirable for Congress to do what is necessary in silence. I find but one opinion as to the necessity of shutting up the country for some time” (Ford 1897, VIII: 246).

Presidents claim that their administration has confidential sources of information and greater competence than Congress in foreign affairs and national security matters—a position accepted by the Supreme Court in the Japanese relocation case *Korematsu v. United States*, when it observed that “Congress is reposing its confidence in this time of war in our military leaders—as inevitably it must.” Senator J. William Fulbright

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advanced similar arguments as late as 1960 (Fulbright 1961). Their academic defenders argue that it is irresponsible for Congress to attempt to tie the hands of the executive or micromanage foreign affairs with narrow delegations (Rossiter 1949; Crovitz and Rabkin 1989). National security policy, we are told, should be bipartisan, and politics should “stop at the water’s edge,” statements revealing ignorance of partisan conflicts over foreign affairs that created the American party system and have fueled it ever since. At best, the high-flying prerogative men of the Cold War were willing to consider a reversal of roles: the executive acts as a super-legislature, integrating all the diverse viewpoints of the nation into the president’s power stakes (Neustadt 1960, 173; Fisher 2005), while Congress exercises the equivalent of a presidential veto in the rare cases in which it refuses to go along (Huntington 1965).

The Constitution never decided between the Hamiltonian and Madisonian approaches (Grant and Grant 1981; Flaumenhaft 1981). Just as the term “president” has always had within it two separate connotations (a presider, such as the president of the United Nations General Assembly, versus an executive officer, such as the president of the World Bank), the term “executive power” may either denote the power to decide among alternatives, to make policy, or to set events in motion, or alternatively, it denotes the power to administer that which already has been decided by others; as political scientist Woodrow Wilson put it, the executive power involved the president “simply presiding over and controlling by a general oversight the execution of the laws; which is doubtless all that the sagacious framers of the Constitution expected” (Wilson 1892, 281).

Yet it cannot be that simple. The Constitution provides for discretionary executive acts: the president negotiates treaties, nominates people to office, recommends measures to Congress, exercises a veto, grants reprieves and pardons, calls the legislature into special session, makes recess appointments, and so on. In the exercise of these powers the president is exercising his will, making judgments, setting events in motion, and the courts have recognized his prerogative to do so. As Chief Justice John Marshall had put it in *Marbury v. Madison*, there is a distinction between the “political powers” of the president, “in the exercise of which he is to use his own discretion, and is accountable only to his country,” and the position of presidential subordinates, who must carry out their duties according to law.5 But how much discretionary executive power does a president have? And how is executive discretionary power reconciled with statutory delegations of power?

Presidents assume that the term “executive power” is a general term and therefore a grant of power in itself (thus Jackson claimed that executive power comprehends such powers as giving direction to cabinet secretaries). They then assert that this constitutional clause may be combined with other clauses to develop “resulting powers” such as the power of removal of subordinates (by combining the executive power, the oath, the Take Care Clause, and even the possibility of impeachment). They go even further, to assert that some powers (war and emergency powers) must be considered in the aggregate: the president must be able to utilize all the powers of the Union, including those that are

assigned to other departments. Consider Lincoln’s July 4, 1861 special session address to Congress about his military actions against the South: “These measures, whether strictly legal or not, were ventured upon, under what appeared to be popular demand and a public necessity, trusting . . . that Congress would readily ratify them. It is believed that nothing has been done beyond the constitutional competency of Congress” (Richardson 1900, VI: 24). In emergencies a president could use, in Lincoln’s terms, “the war power of the Government” (Richardson 1900, VI: 23), even if the powers had been constitutionally assigned to Congress. During the Vietnam War and thereafter, federal courts were often reluctant to consider the question of whether a president had overstepped his Article II powers, holding instead that the question was whether the government had overstepped the aggregate of war powers granted by the Constitution.6 As a federal district court put it prior to the 2003 war in Iraq in Doe v. Bush, in discussing the “amalgam” of war powers, “courts are rightly hesitant to second-guess the form or means by which the coequal political branches choose to exercise their textually committed constitutional powers.” Courts often hold that these are political questions.8

Presidents combine their constitutional responsibilities with delegated powers from Congress. This combination enables the president to (1) exercise broad delegations in foreign affairs that, in domestic legislation until the late 1930s, had been struck down under the nondelegation doctrine9; (2) interpret statutes in ways that defy common sense, as President Franklin Roosevelt did in construing two statutes that seemed to forbid transfer of destroyers to the British in 194010; and (3) treat narrow delegations broadly (once combined with executive power) in ways that go far beyond statutory wording, as the Supreme Court allowed the Reagan administration to do in the Iran hostage crisis.11 Executive power, when combined with a statute, may even permit a president to take action that is not authorized by the direct terms of the law, but which involves “joint concord” of executive and Congress. The Supreme Court held in Hirabayashi v. United States that an executive order followed by congressional authorization would constitute such joint concord.12 Lower federal courts have used the doctrine since the 1970s to uphold presidential warmaking absent a declaration of war and absent specific congressional authorization.13

The president may claim that his duty to take care that the “mass of legislation” is executed allows him to act, even absent a specific provision of law: such claims were made by President Grover Cleveland after he put down the Pullman strike and by President

8. Luftig v. McNamara, 373 F.2d 664 (D.C. Cir. 1967) assumed powers must be considered in toto; note that Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990), held that the presidential war power can be isolated.
13. Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971); Massachusetts v. Laird, 451 F.2d 26 (1st Cir. 1971); Da Costa v. Laird I, 448 F.2d 368 (2d Cir. 1973).
Harry Truman after he seized the steel mills.\textsuperscript{14} They were used (unsuccessfully) by the Nixon administration to defend what it argued was an inherent presidential impoundment power and a refusal to report to Congress on a federal pay increase required by the Federal Pay Comparability Act.\textsuperscript{15} Presidents have insisted that there is a “peace of the United States” that they may enforce absent specific statutory authority, a claim sidestepped by the Supreme Court in \textit{In re Neagle}, which rested on statutory interpretation.\textsuperscript{16} All of this seems to turn the original constitutional architecture on its head: the executive initiates policy in his role as “decider in chief,” relying on a combination of prerogative power and expansive interpretation of legislative authority, and Congress then exercises a “perfecting power” by legislating on the details (which could be considered implementation of policy). Alternatively, Congress exercises the functional equivalent of a veto, either through passing contradictory legislation or failing to provide authorization and funding for the president’s policy.

According to unitary executive theory, while the Constitution explicitly assigns to Congress some emergency powers (the Article I provision suspending the privilege of the writ of habeas corpus), it does not thereby preclude the executive from exercising either sovereign or emergency powers, including the emergency powers assigned to Congress, provided such power is not denied to the executive through a specific constitutional provision. But how far does “executive power” in emergencies extend? For presidentialists propounding “unitary executive” claims it extends as far as the emergency extends, as an excessively doctrinaire concern with civil liberties, if not tempered with “a little practical wisdom,” would, in Justice Robert Jackson’s warning, “convert the Constitutional Bill of Rights into a suicide pact.”\textsuperscript{17} Consider the famous exchange in federal district court during the \textit{Steel Seizure} case, when a Justice Department attorney had the following exchange with Judge David Pine:

\textit{The Court}: So you contend the Executive has unlimited power in time of an emergency?
\textit{Mr. Holmes Baldridge}: He has the power to take such action as is necessary to meet the emergency.
\textit{The Court}: If the emergency is great, it is unlimited, is it?
\textit{Mr. Baldridge}: I suppose if you carry it to its logical conclusion, that is true. But I do want to point out that there are two limitations on the Executive Power. One is the ballot box and the other is impeachment. . . .
\textit{The Court}: And that the Executive determines the emergencies and the Courts cannot even review whether it is an emergency.
\textit{Mr. Baldridge}: That is correct. (quoted in Westin 1958, 62)

Some federal judges, such as Richard Posner, are sympathetic to this reasoning, but argue that in considering claims of executive power, judges must weigh the costs of executive infringement on constitutional rights against the gains in security provided by the state (Posner 2006).

\textsuperscript{14} \textit{In re Debs}, 158 U.S. 564 (1895); \textit{Youngstown v. Sawyer}, 343 U.S. 579 (1952).
\textsuperscript{16} \textit{In re Neagle}, 135 U.S. 1 (1890).
\textsuperscript{17} \textit{Terminiello v. Chicago}, 337 U.S. 1, 37 (1949).
The relationship between the oath of office (requiring the president to execute the office and preserve, protect, and defend the Constitution, but not mentioning execution of the law) and the clause that requires the president to “take care that the laws be faithfully executed” leaves open the possibility that a president, in fulfilling his oath, may decide that specific laws need not or cannot be executed, especially in emergency situations. This extends not only to municipal law (Lincoln during the Civil War) but to international commitments as well. Post-9/11, President George W. Bush relied upon his commander-in-chief authority to reinterpret the reach of Common Article III provisions of the Geneva Conventions regarding torture and inhumane treatment of unlawful combatants detained by American forces (Pious 2006b, Chapter 9).

The Unitary Executive and Parallel Governance

Constitutional lawyers and political scientists have studied three different patterns of presidential-legislative and presidential-judicial interaction. The first involves anterior and superior presidential decision making with subsequent and subordinate actions by Congress and the courts. The second involves congressional leadership and executive acquiescence, usually seen in the distributive politics controlled by congressional committees and cabinet secretaries—what Woodrow Wilson in the late nineteenth century referred to as “congressional government” (Wilson 1885). The third involves interbranch policy codetermination, through passage of framework laws involving war powers, budgeting, arms sales, technology exports, trade negotiations, covert operations, and surveillance activities (Franck and Weisband 1979). Provisions require the president to report and wait, to ask for judicial warrant or congressional committee clearance, or to submit to a deadline for congressional concurrence and authorization or legislative veto—this last mechanism weakened by the Supreme Court’s ruling in *INS v. Chadha*.18 Sometimes presidents themselves are in favor of framework laws, because Congress may thereby be willing to delegate more power to the president, as was the case with the Lend-Lease Act of 1941, presidential reorganization powers in the 1960s, deployment of observers to the Sinai Peninsula in the 1970s, fast-track trade legislation in the 1990s, and the deal to sell nuclear technology to India in 2005.

Often presidents attack the constitutionality of such legislation, however, as Nixon did with his veto (overridden) of the War Powers Resolution (WPR). They avoid compliance or interpret provisions narrowly—the tack taken by presidents from Gerald Ford through George W. Bush with the WPR and by President Ronald Reagan with the Intelligence Oversight Act of 1980. Alternatively, presidents may claim a “soft” prerogative: they do not concede the constitutional validity of framework mechanisms, but they seemingly adhere to their provisions, even as they reserve their prerogative to act unilaterally. President Reagan signed the “Beirut Resolution,” which Congress had passed to authorize the continued presence of peacekeeping troops in Lebanon after they

had come under fire.\(^{19}\) Seemingly, this was acknowledgment of the constitutionality of the WPR—yet at the signing ceremony the White House distributed a “signing statement,” indicating that the White House did not believe that provisions of the law could interfere with his powers as commander in chief in making decisions about deploying forces in Lebanon.\(^{20}\) President George H. W. Bush made similar claims about the WPR prior to congressional authorization of the Gulf War of 1991, although he then proceeded to ask Congress to pass a resolution authorizing hostilities, which it did (Pious 1996, 468). Presidents may provide Congress with incorrect information, so that a legislative authorization itself is tainted. This was the tactic used by President George W. Bush when he exaggerated the weapons of mass destruction threat from Iraq and the links of the Baathist regime to al Qaeda prior to the Iraq War of 2003 (Prados 2004). Or they may simply not follow through with their obligations to keep Congress informed, as happened with the sabotage of foreign ships in the Nicaraguan port of Corinto in the mid-1980s, when CIA Director William Casey reneged on the “Casey Accords” he had signed with the Senate Intelligence Committee which had provided that the administration would give the committee advance notice of any covert operations conducted against Nicaragua.\(^{21}\)

So one may conclude about framework legislation that for the most part these laws (and related informal understandings between executive officials and congressional committees) have failed to create interbranch policy codetermination. Much of the fault lies with presidents, who do what they can to subvert these laws, but much of the fault also lies with legislators, for not vigorously defending their own prerogatives.

There is a fourth, less studied pattern of presidential-congressional relations, in which presidents claim concurrent powers that circumvent the powers of Congress and the courts based on their commander-in-chief powers, their inherent and implied executive powers, or their responsibilities stemming from the oath of office. When taken to its extreme, the result is not merely a “unitary executive” in which all executive powers are to be exercised by the president and his subordinates, but rather parallel governance, akin to a “state within the state,” in which the executive also exercises legislative and judicial powers sufficient to control policy without the possibility of effective checks and balances.

The irony is that the opening for such assertions of power comes not just from the Hamiltonian conception of “energy in the executive” but also from a Madisonian reformulation of separation of powers doctrine. Madison in *Federalist no. 47* observed, according to separation of powers theory (following Montesquieu), that the “accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.” He pointed out, however, that if a complete separation of power were achieved (so that Congress exercised all legislative power and only legislative power,

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the president exercised all executive power and only executive power, and the Supreme Court and lower courts exercised all judicial powers and only judicial powers), the institution assigned all legislative power would be so powerful it would suck the other institutions into the “legislative vortex.” This is what the Framers believed had already happened in many of the states after constitutions were written incorporating complete separation clauses: legislatures were dominant and the postcolonial governors and courts were too weak to keep legislative power in check. How to prevent the erosion of separation of powers? Madison’s answer, developed in Federalist no. 47 and Federalist no. 51, involved three principles: first, provide the politicians in the three departments the motivation to protect their prerogatives; second, provide “interior contrivances” such as a council of state for the executive (never adopted) and bicameralism in the Congress; and third, replace complete with partial separation of powers.

Some powers would overlap and some would blend, and in some instances one department could exercise powers considered to be a part of another department. And so, in spite of the fact that the Constitution assigned “the judicial power” to a Supreme Court, Congress has a power of subpoena, it may hold witnesses at hearings in contempt, and it conducts impeachments as a trial, and the president has a power to issue reprieves and pardons for offenses against the United States. Similarly, Congress does not exercise all legislative powers: executive orders, executive agreements, military orders, and proclamations all can have the force of law.

John C. Yoo has written, “It is clear that the Constitution secures all federal executive power in the President to ensure a unity in purpose and energy in action,” but if anything is clear, it is that not all executive power in foreign affairs and war is exercised by the president. Congress has powers that overlap and sometimes supersede presidential powers. In the 1820s, Congress did what it could to establish commercial and consular relations with newly independent Latin American states, in spite of the opposition of President James Monroe. Similarly, at the end of the 1970s, the Taiwan Relations Act established “people to people” relationships with Taiwan in the aftermath of presidential recognition of the People’s Republic of China (Pious 1985). Diplomacy is conducted not only by the executive but also by legislative leaders: senators negotiated directly with Panamanian President Omar Torrijos in the 1970s after President Jimmy Carter presented the Senate with what they considered to be a flawed Panama Canal Treaty; in the 1980s, Speaker Jim Wright pursued the Contadora diplomatic track in Central America and attempted to subvert the confrontational approach the Reagan administration took toward the Sandinista regime in Nicaragua. Congressional committees rely on “report and wait,” “fully and currently inform,” and “concurrence” or “clearance” mechanisms to control activities and reprogramming of funds in activities involving foreign aid and transfer of technologies abroad.

But partial separation works both ways: it helps the president to legitimize his claims of concurrent powers and helps him counter claims that he is confined to exercising solely executive powers and that he is required to conform to the provisions of

authorizing statutes or framework laws once passed by Congress under the Necessary and Proper Clause. In practice this means that the executive can cobble together a set of concurrent powers and institutional practices, first to set policy, then to implement it, and finally to pass judgment on it. Although Madison was a strong proponent of checks and balances and partial separation of powers, the president can fashion his own line of argument from partial separation to produce and legitimize just that outcome—creating a situation in which it is possible that all significant war powers will, in practice, fall into an “executive vortex.”

And so presidents substitute executive agreements for the legislation or treaties they cannot get, as Franklin Roosevelt did with the Destroyer Deal (Borchard 1940; Briggs 1940). They superimpose their own version of law through signing statements (May 1998), as George W. Bush did when he signaled he would enforce a provision in an appropriations measure regarding background checks of Homeland Security Department officials “in a manner consistent with the President’s constitutional authority to supervise the unitary executive branch.” Such a statement may even assert a dispensing power if they decide they will not enforce a provision of law that they have signed, as the president did when he indicated he would disregard a provision of law requiring that the director of the Federal Emergency Management Agency would have to have five years of experience in emergency management and homeland security. They supplement diplomats consented to by the Senate with an “invisible presidency” of unofficial envoys who convey presidential messages “under the radar” (Koenig 1960). They bypass the congressional power of the purse, as Reagan did in the Iran-Contra affair through Colonel Oliver North’s “Enterprise,” self-funded through receipts from arms sales and solicitations to private citizens and foreign governments (Draper 1991). They bypass the Declaration of War Clause with congressional resolutions of support, UN resolutions, NATO resolutions, congressional authorizations, and what they consider to be self-executing treaty provisions, relying on whatever is at hand (Adler 2000). They ignore the requirements of the Foreign Intelligence Surveillance Act of 1978 (FISA) that require the Foreign Intelligence Surveillance Court to issue a special court order (the equivalent of a warrant) for surveillance of foreigners who communicate from abroad into the United States and instead direct the National Security Agency (NSA) to conduct surveillance on the president’s authority (Burton 2006). They bypass military courts-martial established by Congress through a military order establishing military tribunals with far fewer due process guarantees (Pious 2007a). They delegate power through the military’s chain of command to establish interrogation procedures that violate international law commitments, and authorize intelligence agents to exercise the power of extraordinary rendition so that detainees in the War on Terror can be interrogated in other nations, without direct participation by Americans, and in ways that directly violate Geneva Convention Common Article III and the Anti-Torture Act (Pious 2007b).

Congressional and Judicial Responses

Congress has suffered from a lack of institutional confidence, and this has led to responses that over time have vastly expanded delegated powers to the executive and legitimized presidential prerogatives. First, Congress may do nothing, which may be taken by the courts to indicate consent. Second, it may delegate power before or after the exercise of presidential prerogative and by passing reorganization bills, providing appropriations, passing resolutions of support, or directly authorizing the activity prospectively. Third, it may provide retroactive authorizations or appropriations. Fourth, it may pass provisions immunizing or indemnifying officials for previous acts ordered by the president in the absence of statutory authorization. (Absent such legislation, courts have ruled that the scope of presidential immunity extends to the outer reaches of their office, but have given lower-level officials narrower immunities.25) Fifth, it may strip courts of jurisdiction or modify their rules of procedure and evidence so that challenges based on statutory law or international law, treaties, or conventions will not be adjudicated.

When the president’s party holds together, when public opinion is favorable, and when the opposition party is split and lacks the will to confront the president, there is usually a “frontlash” effect that tends to legitimize the expansion of presidential prerogative as well as parallel governance. And so Congress, in S. 3930, the Military Commissions Act of 2006, seemingly exercising checks and balances on presidential war powers, authorized the military commissions initially promulgated by Bush’s military order to try noncitizen detainees in the War on Terror; granted vast delegation of power to the president to determine their rules of procedure; delegated to the president the power to determine by executive order what interrogation techniques would be used on detainees (with the exception of a set of limited techniques defined to constitute torture that would be prohibited, such as sleep deprivation and waterboarding); allowed the president to “interpret the meaning and application” of international conventions involving treatment of prisoners; permitted information acquired through harsh interrogations (prior to passage of the Detainee Treatment Act of 2005) to be used in trials if the commission found the statements reliable and in the “interests of justice”; and stripped federal courts of pending habeas corpus petitions filed by detainees (as of October 2006 numbering 196).

Similarly, after President Bush called on Congress to provide him with “additional” surveillance authority, the Senate Judiciary Committee reported out a measure (S. 2453, National Security Surveillance Act of 2006) authorizing a program of warrantless wiretapping after the Bush administration admitted that the NSA had bypassed the procedures of a framework law, FISA. The measure reported by the committee provided retroactive immunity for officials engaged in the NSA program and any other surveillance program authorized by the president. It then amended FISA by adding: “Nothing in this Act shall be construed to limit the constitutional authority of the President to collect intelligence with respect to foreign powers and agents of

foreign powers.” But it did not specify the scope of presidential surveillance authority. It authorized the president to order any surveillance program for a year, after which the Foreign Intelligence Surveillance Court of Review could review its constitutionality. FISA standards (under 50 U.S.C. § 1805 (a)(3)) for surveillance requiring “probable cause” that the target is a foreign power or agent of a foreign power would no longer apply; under the revised bill, surveillance would be broadened to include not only foreign powers or agents of foreign powers but extends to “a person reasonably believed to have communication with or be associated with such a foreign power or agent thereof.” Any claim by the attorney general that a private lawsuit challenging surveillance would harm national security would transfer the case to the FISA appeals court. All existing lawsuits in federal district courts would be channeled into the FISA court, which “may dismiss a challenge to the legality of an electronic surveillance program for any reason.” But even so, the bill (if it passed Congress) would leave open the possibility that the president would continue to bypass FISA altogether, by repealing a section of law (50 U.S.C. § 1805 (a)(1)) that had made FISA the “exclusive means” governing the authorization of intelligence programs. (The House acted on a similar measure but Congress did not complete action prior to the November 2006 elections.)

Congress has the power to respond in ways that are much less helpful to the president, but in the course of American history these powers usually remain untapped. Congress can pass obstructive or prohibitory legislation about war powers and diplomatic initiatives, but rarely does. It could cut off funds for presidential warmaking, but it does not, at least not until a war is almost over, as it did in 1973 when it cut off funding for hostilities in Indochina (ending the bombing of Cambodia). This cutoff went into effect seven months after the Paris Peace Accords projected an end to American involvement in hostilities in Vietnam. It could censure executive acts, but the Senate has done so only once (against Andrew Jackson) and the motion was later expunged. Congress may conduct investigations to determine accountability for decision making, but it focuses rather on lower-level officials for infractions (arms dealers in the Iran-Contra affair, lower-ranking officers in the scandals involving mistreatment of prisoners), or outside contractors for the attendant corruption in the military-industrial complex or the intelligence community. The White House attempts to contain a legitimacy crisis with its own investigations, shake-ups of key staffers, concessions to Congress on new framework legislation (which later may be subverted), and presidential statements distancing the chief executive from “rogue elephant” agencies.

Those who have counseled the president may try to distance themselves in such crises, as Alberto Gonzales did when he later characterized the memorandums he had prepared in 2002 as White House counsel dealing with treatment of detainees as merely efforts “to explore the limits of the legal landscape as to what the Executive Branch can do within the law and the Constitution as an abstract matter.” The memorandums, he later claimed, were mere “legal theory,” which he contrasted with “the actual policy guidance that the President and his team directed.” He claimed “the policies ultimately adopted by the President are more narrowly tailored than advised by his lawyers, and are consistent with our treaty obligations, our Constitution and our laws.” He referred to
some of the theoretical conclusions as “irrelevant and unnecessary to support any action taken by the President.” He characterized his own work as “unnecessary, over-broad discussions in some of these memos that address abstract legal theories, or discussions subject to misinterpretation, but not relied upon by decision-makers.” He observed that the memorandums circulated only among government lawyers and that they never “made it into the hands” of soldiers in the field “nor to the President.”

Federal courts have utilized procedural dodges to avoid dealing with executive power. They find that some taxpayer suits lack standing; that suits brought by individual members of Congress usually lack standing (based on the doctrine of equitable discretion, which would require a suit backed by the entire chamber); that on certain issues there is no case or controversy; that the issue is not ripe for adjudication; that the case is not justiciable, lacks manageable standards, or is not fit for adjudication; or that it is a political question. They hesitate to rule definitively against the president, calling their abstention from decision respect for a coordinate branch. Whenever they can, federal courts will convert the issue from the constitutionality of a presidential directive into the question of whether or not a subordinate official has obeyed the law, as it did with impoundment cases. Courts may deny certiorari without specifying why, or even dismiss a case per curium without any opinion, as the Supreme Court did with the question of whether President Carter had the constitutional power to abrogate the Mutual Defense Treaty of 1954 with Taiwan.

Courts are most likely to check and limit executive power when it infringes upon their own judicial powers, especially when government lawyers claim that courts have no jurisdiction or competence in these matters. Even so, by the time the Supreme Court deals with such a case, the crisis is likely to have passed. Thus, in the 1866 case of Ex Parte Milligan involving military commissions, the Supreme Court read Lincoln a lecture on due process of law—after the war was over and after he had been assassinated. When the Supreme Court upheld the Japanese internments in Korematsu v. United States, it did so after the tide of war had turned and as part of a “package deal” involving a case decided the same day, Ex Parte Endo, in which the Court held that continuing detention by the military of manifestly loyal detainees was illegal, as it went beyond the terms of existing

military orders and legislation. A year after the Second World War ended, the Court reaffirmed its holding in *Milligan* and declared that martial law in Hawaii had been unconstitutional in *Duncan v. Kahanamoku*.

More than half a century after these cases, the Supreme Court (in *Rasul, Hamdi*, and *Hamdan*, involving military tribunals and treatment of unlawful combatants) preserved the principle of judicial review of executive action, reiterated that commitments of international agreements could not be violated, required elements of due process in various pretrial proceedings, and required congressional authorization for some of the procedures of the military commission trials. But checks on executive power were more illusory than real, given the congressional response. The Supreme Court in *Hamdan* held that Congress had authority to establish guidelines for the operation of military commissions established under a presidential military order (allowing the president to depart from statutory courts-martial in the event it was “impracticable” to follow statutory procedures for courts-martial), and so the Bush administration then submitted legislation—which Congress passed—eliminating habeas corpus jurisdiction of federal courts and allowing the president to do under color of law most of what he had already been doing by military order. A seeming judicial check on the president was followed by congressional action to bolster executive policy and check the courts, not the president.

And sometimes the courts will bow to what they perceive to be necessity and acquiesce in a court-stripping action. Consider *Dames and Moore v. Regan*, involving a 1980 executive agreement with Iran providing that certain claims filed by parties in each nation against parties from the other be adjudicated by an International Claims Commission (ICC) in London. The Supreme Court claimed that cases removed from federal district court jurisdiction might “revive” in the courts after the ICC’s rulings, but the Court did not really expect any of the claimants to fall for this nonsense. In a later part of the decision, it advised plaintiffs to file suit in the U.S. Court of Claims so that they might be compensated for damages suffered to them based on the “possibility that the President’s actions with respect to the suspension of the claims may effect a taking of petitioner’s property in violation of the Fifth Amendment.”

**Conclusion**

There is no question that the weight of scholarship favors doctrines that limit executive power and provide for both interbranch policy codetermination and checks and balances. The scholars have won the battle of constitutional analysis, but they have lost the war over executive powers. Presidents substitute general terms for specific enumerated powers, claim broad delegations (even when Congress has delegated narrowly), and

use the mass of legislation and joint concord arguments to bolster their claims of prerogative power. Congress passes framework laws but includes loopholes and then fails to follow through when presidents bypass interbranch policy codetermination. It immunizes or indemnifies officials who carry out presidential orders. Its investigations (Iran-contra and Abu Ghraib abuses most notably) focus on lower-ranking officials rather than move up the chain of command to fix accountability at the top. Situational constitutionalism (Piper 1994) infects all the analysis and rhetoric, which too often substitute partisan attempts to gain advantage for serious statesmanship. Judges in the federal courts (chosen by the president in part for their sympathetic stance on presidential prerogative) are loath to rule definitively on executive power and will do what they can to avoid decision or to transmute issues of inherent presidential power into questions of ministerial responsibility of lower-level officials to execute the laws.

Partial separation of powers has produced a de facto unitary executive, and a dysfunctional one at that. The exercise of inherent executive power usually is not checked by Congress or courts, but at best under some circumstances is constrained by the party system and public opinion when issues of legitimacy are trumped by doubts about authority (in the sense that there are questions about the viability of policy). In such a case either the president changes course because of his own political calculations, or else a successor in the White House makes the changes. Where the weight of constitutional scholarship and the mechanisms of institutional checks and balances have failed, public opinion and the sentiments of the electorate—the “auxiliary precautions”—sometimes succeed.

References


Taking the Prerogative out of the Presidency: An Originalist Perspective

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Claims for the inherent authority of the executive over issues of national security imply that the adopters of the Constitution relied on prior British definitions equating executive power and royal prerogative. These claims cannot survive the scrutiny of key sources, including Locke's treatment of the federative power in his Second Treatise, the Federal Convention's debates over the presidency, and the famous 1793 exchange between Hamilton and Madison over the nature and sources of presidential power. When Hamilton relied on the Vesting Clause to stake his claim, he was engaging in interpretive innovatio, not providing a historically faithful account of how the presidency had been contrived.

On Bastille Day, 2005, the Personnel Subcommittee of the Senate Armed Services Committee held hearings on the subject of “Military Justice and Detention Policy in the War on Terror.” Senator Lindsey Graham (R-SC) chaired, and witnesses for the administration included Daniel Dell’Orto, principal deputy general counsel, Department of Defense, and six high-ranking legal officers from all branches of the military services. In the course of these hearings—which presumably were not scheduled with the symbolism of the day in mind—Graham and Dell’Orto engaged in a remarkable exchange. It began with the senator asking, “Do you believe that if congressional action were taken where the president could agree about enemy combatant status and military tribunal make up, that it would enhance the status of Gitmo [Guantanamo] because you have congressional buy in?” In reply, Dell’Orto briefly referred to the president’s “powers under the Constitution”—presumably the Commander-in-Chief Clause, particularly as triggered by the congressional Authorization for the Use of Military Force of September 18, 2001, and “Supreme Court precedent that gives him an awful lot of authority to run this war”—as sources of presidential authority. An impatient Graham then broke in to restate his question in a new form: “Do you believe we have authority as Congress to regulate...
captures on land and sea?” Graham was, of course, citing the Article I, section 8 enumeration of the legislative powers of Congress. His question might be regarded as the congressional equivalent of a high school civics test, which is what makes the answer it received all the more astounding: “I’d have to take a look at that particular constitutional provision,” Dell’Orto replied. “I haven’t examined that one of late. But if that’s what it says, I suspect you have that authority to attempt to legislate” (U.S. Congress 2005).

At this point, the concerned constitutionalist does not know whether to laugh or weep. On the face of it, it defies belief, not to say political common sense, to send a senior lawyer to a serious congressional hearing, to confess that the only part of the Constitution with which he is familiar is Article II. Yet Dell’Orto’s admission was of a piece with the position the Bush administration had taken on its inherent authority to conduct the war on terror with minimal oversight, supervision, checking, or restraint from the two other branches of government. By the summer of 2005, appeals to the Commander-in-Chief Clause in particular had become something of an administration mantra, the equivalent of former presidential candidate Al Gore’s reference to the Social Security “lock-box,” albeit without the humor. The plain text of the rest of the Constitution, notably including the numerous specific clauses relating to national security contained in Article I, section 8, had grown sorely conspicuous by its very absence. If these clauses existed at all (and Dell’Orto did not deny their existence, though his conditional “if that’s what it says” betrayed a vestigial Cartesian skepticism), they seemed to lack either interpretative bite or constitutional weight.

A year after this accidental homage to Bastille Day, the lay of the constitutional landscape noticeably shifted. At the end of its 2005-2006 term, the Supreme Court issued its potentially landmark decision in *Hamdan v. Rumsfeld*, which we might colloquially label the Gitmo detainee case. Although the *Hamdan* majority did not directly address the administration’s broad constitutional claims, its opinion effectively repudiated the idea that the president’s discretionary authority as commander in chief was an elastic source of executive power. In the aftermath of *Hamdan*, the administration had to concede, however grudgingly, that the military tribunals it had established for the trial of enemy combatants required congressional authorization. At this point, Congress could no longer avoid exercising its constitutional authority—or duty—under the relevant clause with which Senator Graham had tried to jog counselor Dell’Orto’s constitutional memory. With the 2006 midterm elections drawing nigh, Congress adopted a Military Commission Act (M.C.A.) granting the administration virtually all of the authority it sought. Its legislative victory was so complete, in fact, that the administration felt no need to issue one of the famous signing statements whose interpretive throw-weight had recently become so controversial. The substance of the M.C.A. dismayed civil libertarians, who wondered whether the show of congressional initiative taken by Senators Graham, John McCain, and John Warner on the specific question of torture was just that—a show.

These concerns and reservations do not diminish the constitutional significance of *Hamdan* and the M.C.A. When the constitutional history of the War on Terror is written—at some indefinite point in the future, given the indefinite nature of the war itself—it is likely that these two developments will mark the close of its first long
chapter. What form the next chapter will take remains among what James Madison called the “arcana of futurity” (Rakove 1999, 62). The M.C.A. itself will inevitably engender additional litigation, especially over those habeas-denying and jurisdiction-stripping provisions that alarm civil libertarians. It is also uncertain whether any future administration will cling to the high-watermark claims of executive authority that the Bush administration, reflecting the long-held views of its eminence grise, Vice President Dick Cheney, has propounded. Perhaps 2001-2006 will be seen as an aberration, a period when the dogmatism of an ideologically driven administration swamped the doctrinal nuance of Justice Robert H. Jackson’s celebrated concurrence in the Steel Seizure case, only to have its own positions fatally undermined by the scandal of Abu Ghraib, controversies over “extraordinary rendition” and unauthorized surveillance of electronic communications and its incompetence in conducting the war in Iraq. Then again, another attack on the scale of September 11, or worse, a catastrophe going far beyond it, could just as easily produce the opposite result, vindicating the Bush administration’s position and leaving little room for the congressional oversight and authorization and the judicial review of constitutionally dubious actions that again became plausible in 2006. Only a naif would deny the likelihood that the War on Terror, like every other major issue in American history, will produce ongoing constitutional wrangling. As the distinguished scholar E. S. Corwin long ago remarked, in the realm of foreign affairs (or national security more generally), the Constitution is an invitation to struggle. For all its terrible gravity, there is no reason to think that the War on Terror will be immune to that aspect of our politics.

Under these conditions, it seems equally improbable that Americans will ever attain closure or consensus on what the Constitution ought to mean, or even the narrower historical question of what it did originally mean to its adopters. Some level of ambiguity and uncertainty will always remain. For one thing, because the adopters of the Constitution had concerns of their own, not identical with ours, they were not thoughtful enough to answer all the questions we would like to put to them (or rather, to the records of their debates). Strange and uncaring as it seems to us, in the realm of national security, it was more important in 1787-1788 to establish the superiority of national decisions over the interfering claims of the states than to work out the nuances of checks and balances within the national government alone (Reveley 1974, 82). Federalism considerations, in other words, trumped separation of powers. Then there is the awkward fact that our leading original interpreters of the Constitution, the coauthors of The Federalist, soon came to disagree so profoundly over its allocation of authority in matters of war and peace. The locus classicus of our modern debate remains the Pacificus-Helvidius exchanges of 1793 between presidentialist Alexander Hamilton and legislative suprema-cist James Madison. As I will shortly argue, there are ways, consistent with the premises of originalism, to resolve that debate in favor of Madison, while recognizing that Hamilton better grasped and predicted the real advantages that would work to the benefit of the executive. Still, it is a bit awkward to find these two luminaries disagreeing so sharply on so important and profound an issue as the nature of executive power under the Constitution.

There is one final reason why an appeal to historical evidence might seem inadequate to the task of seeking constitutional closure on the profoundly important subject
of executive power. The presidency was arguably the most novel of all the institutions the Framers created. It was also the one for which principles and precedents derived from various forms of monarchy, even the limited constitutional kingship of Britain, seemed least useful or most problematic. Executive power in the eighteenth century remained monarchical, and it was no easy matter to determine how to give it a suitably republican form. The dominant bias in American constitutionalism, circa 1776, was deeply anti-executive. When preparations for the Federal Convention began a decade later, that prejudice had abated enough to make the national presidency a far more potent office than the corresponding governorships in the states.

But had the pendulum really swung so far back as to restore to the presidency the prerogative powers of the British crown? To reach that conclusion, one would have to adduce strong evidence of the Framers’ explicit intentions and not rely on inferences drawn from their presumed uncritical acceptance of prior British understandings. Such explicit evidence seems all the more essential when a plain-text reading of the Constitution supports a quite different conclusion. For no casual reader of the text could readily or plausibly conclude that the Vesting Clause, the Commander-in-Chief Clause, and the Treaty Clause of Article II form a trinity of interpretive trumps that relegate the salient clauses of Article I, section 8, to some secondary status. Adopting the conventional rule that requires according meaning to all the provisions of a legal document, a casual but fair reader would naturally conclude that the Constitution divided powers and duties relevant to national security between the political departments. Such a reading would be consistent with the best evidence we have from the debates of the Founding era, and especially from those immediately surrounding the adoption of the Constitution. These support the idea that the Framers adopted a distinctively American solution that reinvigorated executive power without restoring the reprobated concept of prerogative, best defined as an inherent body of executive power insulated from the oversight and control of a supreme legislature.

Hedging the Prerogative

With these general observations in mind, let us now turn to the broad question that the contributors to this issue of Presidential Studies Quarterly have been asked to address. The starting point should be the concession that orthodox constitutional doctrine in the middle of the eighteenth century did indeed treat decisions about war and peace, as well as the command of the army and navy, as major elements of the prerogative. The king did not need to ask Parliament for permission to go to war. Nor would he have to submit a treaty of alliance or peace (or any other kind of international agreement) to Parliament for its approval. A parliament that wished to challenge an unpopular treaty could do so only indirectly, as it did by impeaching the handful of advisors who had supported King George I in the matter of the highly unpopular Partition Treaty of 1715. But impeachment was a crude, highly politicized, and generally ineffective weapon, and its use lapsed after 1715 (though it would be revived with the celebrated trial of Warren Hastings, just getting under its interminable way as the American Framers were meeting in 1787) (Roberts 1966, 305-15, 407-20, 435-36).
There were more effective restraints on the prerogative. The power of the purse was the most important. Its application to security matters had shifted significantly with the Glorious Revolution. At the restoration of Charles II, Parliament enacted the Disbanding Act of 1660 to retire from active service the troops who had maintained the Cromwellian regime over the previous decade. Under its terms, the king could henceforth “raise as many soldiers as he wished so long as he paid for them” (Schwoerer 1974, 75). A generation later, however, that doctrine was annulled with the adoption of the Declaration of Rights in February 1689 (n.s.). Its sixth article affirmed “that the raising or keeping a standing army within the kingdom in time of peace, unless it be with the consent of Parliament, is against law.” As the leading historian of the declaration has observed, this was new law and arguably “the most important clause in the Bill of Rights” (Schwoerer 1981, 72). It marked a significant shrinkage in what had previously been regarded as a vital area of the prerogative. Its constitutional force was multiplied by other aspects of the Glorious Revolution settlement. To assure its own institutional vitality, Parliament initiated the practice of voting “supplies” for the army for a single year at a time. Given Britain’s increasing military and political commitments on the Continent, this innovation guaranteed that the king would have to assent to annual meetings of Parliament. A parallel development occurred with the adoption of the first Mutiny Act in April 1689. The issuance of articles of war setting down military law had also long been part of the prerogative. Henceforth the crown’s ability to administer the army, including the enforcement of discipline through military law, legally depended on the prior enactment of the Mutiny Act. Like annual supplies, each Mutiny Act lapsed after a year. Moreover, far from being limited to the enforcement of military law, these acts evolved into “a comprehensive statute covering the discipline, recruitment, housing, and movement of the army”—in effect, a law that “touched on virtually every significant aspect of army administration” (Shy 1965, 164; Anderson 2000, 648).

Taken together, these constitutional innovations have a dual significance for our inquiry. They establish, first, that the broad claims of prerogative embodied in the crown’s power over war and treaties came hedged with legislative constraints of a substantial nature. Of course, in the exercise of these powers the crown retained the political advantage, for the simple reason that the form of ministerial government that prevailed from the era of Sir Robert Walpole on vested decision-making authority in ministers who enjoyed both the favor of the king and the capacity to control a working majority in the House of Commons—albeit by using all the techniques of influence and corruption. That does not alter the essential constitutional principle, however. Vital aspects of prerogative had been diminished in favor of legislative involvement and oversight. Moreover, as John Brewer has argued, the success of the eighteenth-century British state depended on the general confidence in Parliament that these procedures promoted (see generally Brewer 1988).

From an American vantage point, however, a second point is equally noteworthy. While British practice set a baseline for thinking about the allocation of duties and powers, the colonists hardly treated these precedents uncritically. Much as they admired the principles of the British constitution, they proved highly receptive to the criticisms heaped upon its current operation and practice, especially all those forms of influence and
corruption which were said to be sapping Parliament of its boasted independence. No right-thinking colonist would have said that the great challenge of eighteenth-century Anglo-American constitutionalism was to revive a Stuart-era conception of prerogative along with the absolutist pretensions it supported. The real imperative was to preserve the legacy of 1688 and the principle of legislative supremacy.

Justification for that commitment could be found in any of a number of contemporary sources. One of the most famous was John Locke’s *Two Treatises of Government*. Whether Locke is better read as an advocate for a revolution yet to occur or an apologist for one that just has is beside the point. Whether he was read more as a theorist of resistance than as a constitutionalist might be more pertinent. In either case, familiarity with Locke’s treatment of both the separation of powers and prerogative in the *Second Treatise* would have required serious readers to engage the distinctions on which his argument on these matters rested. Writing a good half-century before Montesquieu proposed the modern separation of the *domestic* functions of governance into their three forms of executive, legislative, and judicial power, Locke deployed a different tripartite scheme. His three forms of power were legislative, executive, and federative, the last embracing “the Power of War and Peace, Leagues and Alliances, and all the Transactions, with all Persons and Communities without the Commonwealth” (Locke 1690, 365). Locke was careful to note that executive and federative power were “really distinct in themselves . . . yet they are almost always united.” The former “comprehend[ed] the *Execution* of the Municipal Laws of the Society within its self.” Federative power, by contrast, was “much less capable to be directed by antecedent, standing, positive Laws, than the *Executive*.” It had to respond to the unpredictable actions of “*Foreigners*,” and thus required a greater measure of “Prudence and Wisdom” to manage (ibid., 365–66). Locke thus provided two basic ways to distinguish executive and federative power: the objects upon whom each acted and their susceptibility to be governed by “antecedent, standing, positive Laws” (ibid., 366). When it came to explaining why the two powers were customarily lodged in one set of hands—that is, why executive and federative power were institutionally united—Locke again emphasized a prudential calculation. Because both powers “requir[e] the force of Society for their exercise,” it was simply too risky to place them “under different Commands: which would be apt sometime or other to cause disorder and ruine.” It is difficult not to perceive memories of the English Civil War, fought by rival royalist and parliamentary armies, percolating through this concern (ibid.).

Locke pursued the relationship among the different powers in Chapter XIII, “Of the Subordination of the Powers of the Commonwealth.” Here he argued that “in a Constituted Commonwealth,” the legislature was necessarily supreme, while “all other Powers in any Members or parts of the Society” were “derived from and subordinate to it” (ibid., 368). Lest there be any confusion, Locke specifically noted that such a supreme legislature retained the right to “resume” unto itself the authority it had vested in the executive and federative, those two powers “being both *Ministerial and subordinate to the Legislative*” (ibid., 369). In insisting upon this point, Locke did not overlook the value of allowing the hands in which executive and federative power were placed to exercise significant discretion, especially over matters (such as foreign relations) where antecedent laws could
not “foresee” or “provide for, all Accidents and Necessities, that may concern the publick” (ibid., 375). This was Locke’s justification for the necessity of prerogative, which he defined not as the customary rights of the executive, but rather as a “Power to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it” (ibid.). For Locke, prerogative in the executive (or federative) was necessary and convenient but not, strictly speaking, inherent. “They have a very wrong Notion of Government, who say, that the People have incroach’d upon the Preroga-tive, when they have got any part of it to be defined by positive Laws,” Locke observed. “For in so doing, they have not pulled from the Prince any thing, that of right belong’d to him” (ibid., 376). Rather, they have simply made a fresh determination of what the public good required.

Much more could be said about the nuances of Locke’s ideas. Here it suffices to note their implications for locating the baseline of American thinking circa 1776. If the colonists were indeed Lockean, as scholars often suggest, they would have subscribed to a normative view in which executive-federative power in the external realm of national security was both valued and circumscribed. Locke was both a realist and a constitution-alist. He understood that there was a limit to a legislature’s ability to foresee all dangers and contingencies in an international realm whose very lack of settled rules confirmed that the concept of the state of nature was not a mere figment of the philosophical imagination (ibid., 276-77). Space had to be left for those wielding power to exercise discretion in the name of the public good and safety. When those ends were met, the people would not be too scrupulous about the exercise of discretionary power. But when those ends were not met, the wielders of power could not shield themselves behind claims of prerogative. Their authority was subordinate and therefore subject to revision and even revocation.

American Departures, 1776-1787

Nearly a century after Locke wrote, independence and the constitution-writing experiment it brought enabled Americans to begin reconstituting executive power on republican principles. The bulk of this reconstitution necessarily took place at the state level of government. Here the dominant animus was Lockean, with a vengeance. That is, it looked backward to the repeated disputes between royal prerogative and legislative privilege that had roiled colonial politics. Under the early state constitutions, executive power became merely that: an agency for carrying out the will of a supreme and dominant legislature. Governors were typically elected by the legislature for a term of a single year. Their appointment powers were limited, and, with the exception of the second-generation New York constitution of 1777 and Massachusetts constitution of 1780, they were deprived of a legislative veto—arguably the most offensive prerogative the royal governors had wielded. In general, the early constitutions implemented the adage of John Adams, whose influential Thoughts on Government, published in April 1776, called for a governorship “stripped of most of those badges of domination called prerogatives” (Adams 1776, 109).
While the early state constitutions illustrate the anti-executive animus of American political culture, they are less helpful when it comes to assessing questions relating to the conduct of war and diplomacy. From its inception in 1774 the exercise of these powers fell to the Continental Congress, the first national government. By some accounts, Congress was the immediate successor to the crown, assuming many (though not all) of the responsibilities and powers it had exercised during the colonial era (see generally Marston 1987). In appearance, however, Congress resembled and acted much like a representative assembly, following standard rules of parliamentary procedure. It did much of its work in committees, spent interminable hours in protracted debates, recorded roll call votes on disputed issues, and published its journals (Rakove 1979, 190-215). It was for these reasons that the North Carolina delegate Thomas Burke described Congress as “a deliberating executive assembly,” a body that could neither wholly abandon nor wholly implement “the rules of order Established for deliberating Legislative assemblies” (Burnett 1936, 367-68). It was not the deviance from normal rules that made Congress an executive assembly, but the substance of what it was deliberating about: conducting a war and managing an alliance, powers associated in Anglo-American thinking with the crown. Some years later, James Madison had the same usage in mind when, in his first sustained analysis of republican constitutionalism, he suggested that the executive departments in the states merited less critical attention than the judiciaries, “all the great powers which are properly executive being transferd to the Fœderal Government” (Rakove 1999, 41). Once again the “great powers” referenced seem unmistakably to be those of war and diplomacy.

On this basis, we can plausibly conclude that, prior to 1787, American thinkers followed British practice in classifying war and diplomacy as executive functions. But that classification was casual and conventional rather than critical or contemplative. As a government, the Continental Congress remained an anomaly, even after ratification of the Articles of Confederation in 1781 clarified its constitutional status. Most of the creative political thinking that Americans did in the decade after they declared independence focused on the state level of government. That was where the process of “conceptual change” was most fertile. By contrast, at the national level of governance, the principal concern, down through 1787, lay with securing the adoption of a limited set of amendments giving Congress independent sources of revenue and the authority to regulate foreign commerce.

The great transposition in the agenda of constitutional reform came in the spring of 1787, with the preparations for the Federal Convention. The preparations that mattered most were those of James Madison, as they were distilled in the plan that he and his Virginia colleagues drafted while waiting for other delegations to straggle into Philadelphia. Article 7 of the Virginia Plan proposed “that a National Executive be instituted . . . and that besides a general authority to execute the National laws, it ought to enjoy the Executive rights vested in Congress by the Confederation” (Farrand 1966, I: 21). As the ensuing debate of June 1 makes clear, the delegates understood “executive rights” to embrace matters of war and peace—and that was the problem. James Wilson, though the proponent of a strong and popularly elected executive, objected to this article, noting that “the Prerogatives of a British Monarch” were not “a proper guide in defining
the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace &c” (ibid., 65-66). Notwithstanding his own role in framing the Virginia Plan, Madison then endorsed Wilson’s point, observing that “executive powers ex vi termini, do not include the Rights of war & peace &c” (ibid., 70). Madison further moved, and the committee of the whole promptly agreed, to delete the reference to “the executive rights” under the Confederation (ibid., 67).

At that point, one of two things must have happened to the powers of “war & peace &c.” Either those powers were now subsumed under the “legislative rights” that Article 6 of the Virginia Plan transferred from Congress to the proposed national legislature, or else those powers had disappeared into some constitutional limbo. The former hypothesis is far more persuasive than the latter, especially as the omission of these essential powers from the core duties of any national government would be completely implausible. By Wilson’s reading, and Madison’s, the powers that Locke had labeled federative were not inherently executive in nature, and certainly not to be allocated on the basis of some conception of prerogative inherited from a British constitutional tradition that Americans had repudiated.

This single passage from the early debates at Philadelphia carries enormous significance. While a conventional or uncritical resort to standard eighteenth-century usage might support the idea that war and diplomacy were executive functions and duties, that casual association could not withstand critical scrutiny. If there had been no occasion prior to 1787 to consider or resolve this puzzle, there certainly was one now. Wilson had called the question, so to speak, and both Madison (most notably) and the Convention (more generally) had concurred in his objection. In doing so, they also acted in conformity with the principle Locke had laid down. Even in a well “constituted commonwealth,” some room had to remain for a power to do what was necessary for the public good. But the prudential considerations that justified lodging federative and executive power in the same set of hands were a matter for deliberation and judgment—and perhaps never more so than when a new commonwealth was being constituted.

That the convention was willing to restore some measure of prerogative became evident a few days later, when it vested the executive with the most offensive prerogative of all, a veto over legislation. Then discussion of the office lapsed for the next six weeks, a casualty of the greater priority of questions of representation. During this period, however, the mid-June interlude devoted to the New Jersey Plan did offer additional insight into the Framers’ thinking. As introduced by William Paterson, the New Jersey Plan would create a plural executive whose duties included the power to “direct all military operations”—though never in person (ibid., 244). The power to make war would remain with Congress (still a unicameral assembly where each state would have one vote). Though silent on diplomacy and treaties, the plan presumably left these among the existing congressional powers carried over from the Confederation.

It was in response to the New Jersey Plan that Alexander Hamilton in turn delivered his famous speech of June 18, noteworthy among other things for the praise bestowed on the British constitution and also for proposing an executive “Governour” to serve for life. The fourth article of Hamilton’s proposed plan anticipated key features of the eventual presidency. The governor would be commander in chief of the armed forces,
and “have the direction of war, when authorised or begun.” He would also have “the power of making all treaties.” But that authority would be exercised with “the advice and approbation” of a senate, which would also “have the sole power of declaring war” (ibid., 292). If this last phrase is read as synonymous with “authorizing war,” it strongly implied that a unilateral executive decision to initiate hostilities, as opposed to a full-scale formal declaration of war, would be suspect. By allocating war and treaty making between two institutions, Hamilton, his admiration for the British constitution notwithstanding, deviated from its treatment of these two major components of the federative power.

Well into the summer of 1787, the Framers’ uncertainty about the executive—particularly its mode of election—inhibited further sustained discussion of its power. During these weeks, they assumed that the Senate would be the repository of the federative powers of war and diplomacy. That assumption was reflected in the report that the Committee of Detail presented on August 6. While recognizing the president as commander in chief, it vested all other powers relating to the military, including the power “to make war,” in Congress, while giving the treaty power to the Senate (Farrand 1966, II: 183). Over the next few weeks, however, debates on several discrete clauses found the delegates developing and expressing misgivings about the allocation of the federative power.

The critical debates took place on August 17 and 23. The former, much scrutinized by scholars, led the convention to make a significant alteration in the war power of Congress by replacing the verb “make” with “declare.” This debate began with two of the South Carolina delegates alternatively suggesting that the power to decide on war should be given either to the Senate or the president. Madison and Elbridge Gerry then proposed a different change: leaving the power in Congress while replacing “make” with “declare” and implicitly “leaving to the Executive the power to repel sudden attacks.” Roger Sherman, Gerry, and George Mason—solid republicans all—commented that the executive should not be free to initiate war; no one argued the contrary position. To overcome residual doubts expressed by Oliver Ellsworth, Rufus King noted “that ‘make’ war might be understood to ‘conduct’ it, which was an Executive function.” On this basis, the amendment passed with only New Hampshire in dissent (ibid., 318-19).

Six days later, the issue was the treaty power. Although this debate was less conclusive than the earlier discussion of the war power, it did indicate that the delegates were nervous about vesting the treaty clause solely in the Senate and willing to make the president, in Madison’s words, “an agent in treaties” (ibid., 540-41). The debate ended with the power in question being referred to the Committee on Postponed Parts, which in turn produced the key report of September 4 that gave the presidency its final shape. In addition to endorsing appointment by a system of presidential electors, the committee placed the power of making treaties and appointments in the president, acting with the advice and consent of the Senate. These changes were extensively debated during the week of September 4-10. But in the resulting discussions, the new role given the president received little attention. Controversy focused instead on the Senate, and particularly on the merits of the two-thirds vote required for treaty ratification. This emphasis again suggests that the Framers regarded the distribution of the treaty power between two branches in pragmatic terms (see generally Rakove 1984, 275-80).
Reviewing these aspects of what Madison called the “tedious and reiterated discussions” (Rakove 1999, 144) from which the presidency emerged is essential to establishing one critical point. The convention may have begun its deliberations with the Virginia Plan’s casual assumption that “war & peace &c” were properly classified as “executive rights,” in the British mode. That assumption did not survive the initial debate of June 1, however. Nor was it revived in the later debates that shaped the federative power under the Constitution. These debates were admittedly far more elliptical than we would desire. The Framers were certainly not being very considerate by saying far less on this subject than we wish they could have, as Justice Jackson lamented when he compared the task of recovering their ideas of executive power to the challenge Joseph faced in interpreting the dreams of Pharaoh (in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634-35 [1952]). Even so, the record is full enough to support strong inferences about the basic thrust of their actions. It indicates, first, that as a matter of definition, the Framers regarded war and peace as being as much if not more a legislative responsibility as an executive one. The conduct of war—its administration—was executive. But all the other powers relating to the care and feeding of armed forces, or to the creation of a legal framework for certain aspects of foreign relations (e.g., defining offenses against the law of nations), were assigned to the new Congress, acting with the consent of the president, if possible, or over his veto, if necessary. Nothing was left to prerogative but the president’s implicit power “to repel sudden attacks.” And that conception of prerogative owed far more to Locke’s principled distinctions than to Blackstone’s customary definitions of royal authority. That is, it assumed that decisions as to which powers or how much discretionary authority could be regarded as prerogative were just that: decisions to be made after deliberations of the kind that the Framers were initiating and the ratifiers would soon pursue. They were not concessions of some inherent power. Pace Justice George Sutherland and his fabulous, fantastic line of reasoning in Curtiss-Wright, there were no inherent executive powers of the presidency that the deliberations of 1787 could not have altered or erased. Had the Constitution explicitly retained the Senate as the chief organ of foreign relations and treaty making, and left the president only as its agent, neither George Washington nor his successors could have pled or played Blackstone as proof or trump that some fundamental category error had been made.

The Curious History of the Vesting Clause

It might be argued, however, that this clause-bound approach to mapping how the Constitution executed the Lockean concept of the federative power overlooks one key clause of potentially greater import than the specific provisions of Article I, section 8. Did not the opening sentence of Article II create an independent basis for assuming that the Constitution infused a substantial dose of prerogative in the presidency when it asserted that “the executive power shall be vested in a President of the United States”? In conspicuous contrast to the “legislative Powers herein granted” in Article I, the Vesting Clause of Article II implies that some known plenum of power, denoted by use of the
definite article “the,” was being deposited in the presidency. If “the executive power” was simply equated with a prior understanding of royal prerogative, then it follows that the presidency was the direct successor to the powers of the crown.

This presumption was the basis of the charge that James Madison leveled against Alexander Hamilton in 1793, during their debate over the constitutional implications of President Washington’s issuance of a proclamation of American neutrality in the war between reactionary Britain and revolutionary France. Writing as Pacificus, Hamilton treated the congressional power to declare war and issue letters of marque and reprisal and the Senate’s role in treaty making as “exceptions and qualifications” from the general grant of executive power in Article II (Freeman 2001, 805). In reply, Madison explicitly accused Hamilton of seeking to import into American thinking and practice monarchical ideas inconsistent with the republican principles of 1776 and 1787. The most likely source for Pacificus’s claims, Madison noted at the close of his first Helvidius essay, was to be found in the “royal prerogatives in the British government,” which were “accordingly treated as Executive prerogatives by British commentators” (Rakove 1999, 545).

This debate continues to inform the controversy over executive power that bedevils us still. Within the political context of the 1790s, a good case can be made that it was Hamilton who enjoyed the upper hand, not only because he was defending the fait accompli of a proclamation already issued but because he better grasped the political advantages that generally favor the executive when circumstances require or permit the kind of prompt action that Washington was able to take. But on the merits of the underlying claims about the nature and extent of the constitutional authority, it was Madison who was far more faithful to the original meaning, intention, and understanding of the Constitution, and Hamilton who was engaged in a brazen act of interpretive innovatio. Indeed, it was precisely because Hamilton’s mode of reading the Constitution seemed so novel and inventive that Madison found himself being driven to develop an alternative, explicitly originalist way of reading the text. The culmination of that development would not occur for another three years, during the debate over the Jay Treaty (Rakove 1996, 355-65). But the emergence of an originalist interpretive ethos was evident in the way in which Madison refuted the position of Hamilton-Pacificus by quoting from Hamilton-Publius.

Madison’s rebuttal developed along three lines of attack. The first should interest us because it challenges the supposition that the vocabulary and grammar of American constitutional thinking after 1776 still bore the heavy imprint of prior European authorities. Madison cautioned his readers against placing too great a reliance on the views “of the most received jurists, who wrote before a critical attention was paid to those objects, and with their eyes too much on monarchical governments, where all powers are confounded in the sovereignty of the prince.” Making specific reference to Locke and Montesquieu, he noted that they labored under the “disadvantage, of having written before these subjects were illuminated by the events and discussions which distinguish a very recent period” (Rakove 1999, 539-40). That is, they did not have the benefit of recent American constitutional experience, much less the text of the Constitution, to draw upon. Deeply and justifiably conscious, as so many of his contemporaries also were, of the novelty of American constitutionalism, Madison bridled against the idea that
uncritical references to prior European authorities could elucidate silences or obscurities in an American constitutional text.

Madison’s second argument built upon the seminal convention debate of June 1, 1787. On the merits, it was wrong to classify matters of war and peace as being essentially executive in nature. Both treaties and declarations of war, Madison argued, were acts with substantive legal effects and obligations. Even if the line between the legislative and executive dimensions of war and treaty making could not be drawn with perfect clarity, each was “substantially” more of a legislative than an executive nature. That in turn reversed the presumption of Pacificus by indicating that “the rule of interpreting exceptions strictly must narrow, instead of enlarging, executive pretensions on those subjects” (ibid., 540-42).

Madison then asked “whether there be any thing in the constitution itself, which shows, that the powers of making war and peace are considered as of an executive nature, and as comprehended within a general grant of executive power.” The short answer was, obviously not, for if such a statement could be found, there would be no need for interpretive casuistry. Madison then reviewed the relevant powers of Article II to see whether any of them warranted the broad inference Pacificus had drawn. The Commander-in-Chief Clause merited particular scrutiny. Reasoning from “a great principle in free government,” he argued that this power could not be read as embracing an independent authority to determine when war should be initiated. “Those who are to conduct a war cannot in the nature of things, be proper or safe judges, whether a war ought to be commenced, continued, or concluded.” To argue otherwise would be as great a violation of fundamental norms of liberty as “that which separates the sword from the purse, or the power of executing from the power of enacting laws” (ibid., 542-44).

By 1793, Madison knew better than to try to sustain that point by reference to the debates at the Federal Convention. He had tried such a move two years earlier, during the congressional debates over chartering a national bank and been burnt for the effort; and in any case, writing pseudonymously, he could not pretend to possess any special knowledge of the convention. But in his own mind, and consulting his own notes, he knew that the claims made for the interpretive import of the Vesting Clause of Article II could not be sustained by its legislative history. In its original form, as reported by the Committee of Detail, it read: “The Executive Power of the United States shall be vested in a single person. His stile shall be, ‘The President of the United States;’ and his title shall be, ‘His Excellency’ ” (Farrand 1966, II: 185). In that form, the clause was also transmitted on September 10 to the Committee on Style (ibid., 572). From there it emerged in its final form, elegantly stating that “the executive power shall be vested in a president of the United States of America.” One could hypothesize that this change was fraught with meaning, transforming a distinctly American notion of executive power (“of the United States”) into a more generic, quasi-monarchical version. If that were the case, however—if any delegate recognized that so momentous a change was being made—it seems remarkable that the committee’s work failed to elicit a single comment. The obvious explanation is that the change made by the Committee of Style was merely stylistic, eliminating the superfluous trivia about “stile” and “title” and condensing two sentences into one. Nor is there any other
evidence that any member of the convention ascribed or perceived any significance in either this last-minute editorial change or its putative difference with the comparable formula of Article I.

At least one prominent historian, however, has professed to think that the Framers did perceive the significance in the Vesting Clause that Hamilton and his latter-day acolytes have ascribed to it. That is the suggestion of Forrest McDonald, who shares the dual credentials of being a political conservative and Hamilton’s best scholarly biographer (McDonald 1994, 181). In the absence of evidence, however, McDonald’s claim seems more of an intuition than anything else. It becomes even more problematic when extended to the Constitution’s Anti-Federalist opponents. McDonald argues that they viewed the Vesting Clause “not as an abstract general statement, given substance only by the specified enumerated powers that follow, but as a positive, comprehensive, unspecified, and ominous grant of authority” (ibid., 193). Again, McDonald cites no evidence in support of this reading—and in the case of the ratification debates, that defect is fatal to the claim being advanced. For if we know anything about the public discussions of 1787-1788, it was that when it came to identifying potential sources of tyranny and misrule in the Constitution’s numerous clauses, Anti-Federalists wrote with promiscuous abandon. Here is one case where the inability to produce a single source positively falsifies the claim being made.

In 1793, Madison labored under no such evidentiary disadvantage when he came to explaining how the constitutional version of the federative power had been presented to the ratifiers of 1787-1788. He had only to turn to Hamilton’s *Federalist no. 75* to find a passage that carried a strong echo of Locke. Here Hamilton had been rebutting the standard Anti-Federalist charge that the most egregious offense the Constitution committed against the separation of powers was to combine legislative, executive, and judicial power in the Senate. Some of this criticism extended to the Senate’s role in treaty making. Hamilton’s response on this point followed Locke’s treatment of federative power in suggesting that treaty making was a distinct category in itself:

Though several writers on the subject of government place that power in the class of executive authorities, yet this is evidently an arbitrary disposition. For if we attend carefully to its operation, it will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them. . . . The power in question seems therefore to form a distinct department, and to belong properly neither to the legislative nor to the executive. The qualities elsewhere detailed as indispensable in the management of foreign negotiations, point out the executive as the most fit agent in those transactions; whilst the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a part of the legislative body, in the office of making them. (Freeman 2001, 403-04)

Hamilton went on to note that the Constitution could have vested the treaty power in the Senate alone, leaving it “the option of employing the president” in negotiations (ibid., 405). On the whole, including the president made more sense than excluding him. This again was a matter of prudence, that is, of a specific calculation of the safety and security to be gained by combining two institutions in the exercise of one power.
Conclusion

In quoting Hamilton-Publius against Hamilton-Pacificus, Madison was engaged in more than a game of intellectual gotcha. The deeper point was that Hamilton, as either a Federalist or The Federalist, could not have said in 1788 what he was saying now. Not only would his new theory of executive power have misrepresented what had happened at Philadelphia, it would also have confirmed, rather than allayed, familiar Anti-Federalist fears. True, a major part of the Federalist (and Federalist) project had been to defend the fortified version of executive power that the convention had produced—a presidency that promised to possess far more political puissance than its counterparts in the states. The candor and vigor with which Hamilton set out to remind his countrymen of the value of an active independent executive were of a piece with his political convictions. But to recognize the merits and utility of executive power was not the same thing as making a case for the independent or inherent sources of its authority. To have made such a claim in 1787-1788 would have been to play directly into Anti-Federalist hands by confirming rather than assuaging the fears and doubts of those whom Publius hoped to persuade. The genius of Madison’s developing theory of originalism was to imply that ambiguities or gaps in the constitutional text could not be resolved by making up definitions that its adopters (and not its framers) would have rejected.

Does this mean that Madison was right about what the Constitution really, truly, and certainly originally meant, while Hamilton was innovating on the spot like the good lawyer he was? The short answer is yes; the longer one (and the one historians professionally prefer) is that the story is more complicated than that. Hamilton may have been playing fast and loose with the facts of the late 1780s, but his eye was on an ever-advancing present and the future that awaited, and he may have better grasped the conditions and circumstances that usually favor the executive who acts first and allows Congress to question later. He was our keenest original student of executive power, which is why its most zealous modern (or post-September 11) proponents, like the celebrated Professor John Yoo, can be called neo-Hamiltonians. But recognizing the inherent advantages of executive power is not the same thing as proving that the idea of inherent executive power was part of the original constitutional understanding. It was not, and there is no credible historical story one could tell that would make it so.

References


Presidential Power and National Security

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Recent claims of unilateral, independent executive power have renewed the debate over presidential authority. The Framers, however, adopted a system of separate branches with predominantly mixed rather than independent powers. President George Washington's proclamation of 1793 demonstrated how the system works. The system's inherent ambiguities led Justice Robert H. Jackson to describe executive power by the standards used to evaluate its exercise. Jackson's description remains accurate, and the system of concurrent authorities remains necessary to protect against tyranny while enabling the president to lead.

This issue of Presidential Studies Quarterly examines the powers of the president of the United States to deal with issues of national security. The attacks on the United States of September 11, 2001 led to claims and actions concerning presidential power that reignited this enduring debate. Participants in this symposium have been asked to answer the following questions:

1. Did the Framers adopt the British war model theory (Blackstone, Locke)?
2. Does the theory of executive prerogative operate without limits from the legislative and judicial branches?
3. What role did the Framers anticipate for the courts in matters of war and national security?
4. What role did the Framers anticipate for Congress in matters of war and national security?
5. What is the scope of the president's power as commander in chief? That title provides unity of command and also assures civilian supremacy over the military. What else? What are the limits, if any?

These are good questions. But abstract questions about the powers allocated by the Constitution to the president, or to the other branches of government, are by their nature inadequate vehicles for understanding the meaning of the powers at issue. Abstract
questions lead to abstract answers, and to the unproductive tradition of cutting and pasting parts of the Constitution and quotes from other sources while ignoring others, to prove one position regarding presidential power or another. As Justice Robert H. Jackson wrote in his famous concurring opinion in the Steel Seizure case (Youngstown): “A century and a half of partisan debate and scholarly speculation [concerning the Constitution’s separation of powers] yields no net result but only supplies more or less apt quotations from respected resources on each side of any question.”1 Attempts to explain executive power without at the same time seeking to understand it in the context of legislative and judicial power is an inherently flawed method for understanding how the U.S. government works and was intended to work.

The Framers did not adopt any specific model of executive power in shaping the presidency. They created an office with many though not all the powers considered “executive” in the Blackstone model, including the powers to interpret and execute laws and treaties, handle the country’s international relations, and act as commander in chief. They gave other “executive” powers to Congress, however, including the powers to declare war, issue letters of marque and reprisal, confirm executive appointments, and suspend the writ of habeas corpus. At the same time, the Framers gave the president the legislative power to veto laws, and they gave powers to both the Congress and (less explicitly) to the courts which enable those branches as well to approve, disapprove, or check the exercise of executive authority over national security issues.

The resulting overlap of authority in the Constitution stems from the Framers’ acceptance of the British view that liberty can only be effectively preserved by having not only separate branches (as recommended by Montesquieu, Locke, and Blackstone, among others) but also by mixing in each branch aspects of all the forms of power—legislative, executive, and judicial (Bailyn 1968, 20-23). What this meant in terms of British constitutional history is that the king could be criticized or impeached for conduct that fell within the Royal Prerogative, because Parliament had its own, independent powers over the same subjects on which the king had power to act. On the other hand, it also meant that the king could act unilaterally in areas of his authority, despite the fact that Parliament had the power to prevent his action but had failed to do so.

The Framers explicitly relied on the mixing of powers in the Constitution as a substitute for what James Madison in Federalist nos. 48 and 51 cited as the inadequate “parchment barriers” of constitutional prohibitions or enumerations. As opposed to “exterior” means, an effective or “interior structure” could be created in several ways, he noted, but the “great security” was to give each branch the constitutional means and the personal motives to resist encroachments on its functions by the others. It is in making this point—the need for overlapping authority to enhance the capacity in each branch to resist the others—that Madison wrote: “Ambition must be made to counteract ambition. The interests of the man must be connected to the rights of the place.” The Framers deliberately used conflicting grants of authority as a supplement to their use of prohibitions and limitations in the Constitution in order to create separate branches that would be capable of defending their respective roles (Sofaer 1976, 41-43).

The system that resulted cannot effectively be described through abstract pro-
nouncements about the powers of particular branches over particular functions. The
powers at issue are properly understood as they relate to each other, as part of a system of
deliberately mixed authorities.

The principal advantage in understanding executive power within its intended
constitutional context is that it undermines the extravagant claims that abstract defini-
tions of the powers of any particular branch facilitate. Claims that the Framers intended
to create a “unitary” executive underlie the recent wave of assertions that the president
has all the inherent and exclusive powers he and his lawyers consider necessary to win the
War on Terror. These claims have often been baseless. But the practice of advancing
claims of inherent and “exclusive” executive powers should be no surprise given the
durability of equally baseless arguments that favor legislative power. Among these is the
assertion that the president can only engage in military actions with the prior approval
of Congress expressed in the particular form of a declaration of war or in the specific form
required by the War Powers Resolution. The situations are highly analogous. Both sets
of claims are based on abstract definitions of powers assigned to one branch or the other.
Both disregard the mixed nature of the constitutional system. Both ignore authoritative
precedents established and repeatedly reaffirmed over two hundred years. Both would
unravel the Framers’ scheme to prevent absolute control by any one branch over the
others. Thankfully, neither has been taken seriously enough to pose a threat to the
constitutional system.

The mixed system of government intended by the Framers is instructively reflected
in the handling of a national security crisis during the earliest times of our constitutional
government, when President George Washington declared and attempted to enforce
neutrality in 1793. Some 160 years later, Justice Jackson explained how this scheme is
best applied in evaluating the exercise of executive authority. These precedents explain
how the Constitution assigns all three branches powers that can lawfully be exercised in
a manner that affects the exercise by the other branches of all their assigned powers, even
exclusive ones.

George Washington’s Proclamation

The proclamation issued by President Washington in 1793, commonly known as
the “neutrality” proclamation, demonstrated that overlapping powers were assigned by
the Constitution to all the branches that bear upon war-related matters. It is rich in issues
that remain relevant, and its participants were among the principal Framers of the
Constitution.2

2. A group of distinguished scholars—Jack N. Rakove, Fred Anderson, Caroline Cox, R. Don
Higgenbotham, Charles A. Loefgren, Robert L. Middlekauf, Lois G. Schwoerer, and John Shy—filed an
amicus brief in *Hamdan v. Rumsfeld*, U.S. Supreme Court, no. 05-184, supporting the position that the
president lacks inherent power of the sort claimed by the Bush administration. In the brief, they rely on their
view of the background and history of the U.S. Constitution and the aversion to the notion of royal
prerogatives. They properly conclude that the Framers would have rejected the notion that the president has
extensive powers over national security that are not subject to legislative control. Louis Fisher, in a separate
President Washington learned by April 12, 1793 that France had declared war on
England and other states. He left Mt. Vernon immediately for Philadelphia, then the
nation’s capital, to deal with the crisis this situation created. The United States had
treaties with France that could be construed to require actions that would give
England grounds for declaring war. The Treaty of Amity and Commerce provided for
the reciprocal use by the parties of each other’s ports to carry in prizes, and each party
was to deny this privilege to an enemy of the other. In addition, the parties agreed to
disallow the use by an enemy of either party of its ports for fitting out privateers,
selling prizes, or routine purchase of food. Many Americans had already begun to help
France by getting their vessels designated as French privateers or by preparing French
vessels for naval action.

The United States had several options, including siding with France or England,
remaining neutral, or doing nothing. The president wanted to keep the United States out
of the war. When he arrived in Philadelphia, he sent a list of questions to his cabinet,
including whether a proclamation of neutrality should issue, the meaning and applica-
bility of the French-American treaties, and whether to call Congress back into special
session. At the same time, he instructed Secretary of State Thomas Jefferson and Secretary
of the Treasury Alexander Hamilton to prepare measures to keep American citizens from
embroiling the United States with either France or England.

Jefferson urged the president not to declare “neutrality,” as such an act could be
considered legislation and therefore in violation of the lawmaking power exclusively
assigned to Congress. At a cabinet meeting on April 19, the president decided with the
unanimous support of his cabinet to issue a proclamation establishing neutrality as
national policy, but without using the word “neutrality” in it. This nuanced action
reflected the fact that the word “neutrality” had specific meaning in international law,
and therefore that its inclusion would have more clearly resembled lawmaking. The
cabinet also voted unanimously against calling Congress back early; Jefferson concurred
despite having earlier written to James Madison, then in the House of Representatives,
that he supposed “Congress would be called, because it [complying with prohibitions
against supplying the French] is a justifiable cause of war & as the Executive cannot
. . . decide the question of war on the affirmative side, neither ought it to do so on the
negative side, by preventing the competent body from deliberating on the question”
(Ford 1895, 6: 192). All members of the cabinet supported the president’s exercise of

amicus brief in Hamdan v. Rumsfeld, also argued against an inherent power for the president to establish
military commissions. This point may seem important today, given the Bush administration’s claims, but it
is not the issue on which most executive power controversies turn. The Bush administration in fact did not
even claim that it could disregard legislation found by the Court to apply to persons in Hamdan’s position.
126 S. Ct. 2749, 2774 n.23. Hamilton advanced two versions of executive power in his debate with Madison,
and neither supported the view that Congress lacked the power to set national policy. The pivotal issue
between Hamilton and Madison had nothing to do with Congress’s ultimate authority and everything to do
with the president’s power in the absence of legislative direction. The issue was not whether the president was
supreme, but whether he was powerless to use his own authorities, because his actions might prejudice
Congress’s power over war. The actions of all three branches make clear that Hamilton, not Madison,
correctly described executive power in this regard. Madison’s arguments on this point disregarded the reasons
he had given in the Federalist Papers for the fact that the Constitution had “mixed” powers in both the
political branches.
discretion in deciding not to call Congress into special session, despite the fact that Congress could exercise its assigned powers only after it returned.

The president issued “A Proclamation” on April 22, 1793. It did not use the word “neutrality,” but it declared that it was the “duty and interest” of the United States to “pursue a conduct friendly and impartial toward the belligerent Powers.” In addition, the proclamation warned Americans to refrain from conduct that violated the national policy that had been declared and specified two remedial measures. First, those who rendered themselves “liable to punishment under the law of nations” for violating duties associated with U.S. policy “will not receive the protection of the United States, against such punishment or forfeiture.” This remedy went unchallenged as being within the president’s power to implement. The proclamation also stated that the president had authorized criminal prosecutions against those who violated “the laws of nations”: “I have given instructions to those officers to whom it belongs, to cause prosecutions to be instituted against all persons, who shall, within the cognizance of the Courts of the United States, violate the laws of nations, with respect to the powers at war, or any of them” (Fitzpatrick 1939, 32: 430-31). This remedy rested on the claimed power to prosecute individuals in the federal courts for crimes not created by legislation.

The president possessed the exclusive power to receive ambassadors and Hamilton proposed that France’s new ambassador, Edmund Charles Genet, be received with a warning that the U.S.-French treaties might be temporarily or provisionally suspended, in order to avoid suggesting to England that the United States regarded France as an ally. Jefferson urged, however, that receiving Genet only meant that his government was recognized and that the treaties could be interpreted in a manner consistent with neutrality. To withhold compliance with the treaties without just cause or compensation, he argued, would “give to France a cause of war, and so become associated in it on the other side.” Washington accepted Jefferson’s position, ordering that neither England nor France was to fit out privateers in U.S. ports.

Particularly difficult issues in enforcing the proclamation concerned an English merchant vessel, Little Sarah, which was seized in early May 1793 by a French privateer outfitted in Charleston, South Carolina in violation of neutrality, brought into Philadelphia, fitted out as a privateer, and renamed Little Democrat. England demanded that the vessel be returned. Hamilton favored restitution, but Jefferson urged that an apology should suffice. If the commission given the commander of the privateer that seized the vessel was illegal, Jefferson argued, then the courts would order restitution; and if the case were important enough to require reprisal, “Congress must be called on to take it; the right of reprisal being expressly lodged with them by the constitution, not with the executive.” Washington agreed not to order restitution, but ordered that all illegally equipped privateers “should depart from the ports of the United States” (Ford 1895, 6: 257-59, 282). Minister Genet ignored this order, and the Little Democrat was transformed into a fourteen-gun warship, with equipment purchased in the United States and a partially U.S. crew.

On July 8, Hamilton and Secretary of War Henry Knox voted at a cabinet meeting at which Washington was absent to establish a battery at a point between Philadelphia and the sea, in order to stop Little Democrat if it should attempt to depart before the
Jefferson opposed the use of force without the president's approval, though he agreed the U.S. attorney for the district should be informed that Americans might be serving on the vessel so he could “take measures for apprehending and bringing them to trial” (Ford 1895, 6: 340-44). Washington was angered at Genet’s defiance of the administration’s orders and disappointed that Jefferson had not taken action. Jefferson at that point agreed the vessel should be stopped in order to remove improperly installed armaments, but by then it was beyond effective detention. Jefferson later claimed that, in authorizing the use of force to stop vessels from arming in or entering U.S. ports, Washington had not contemplated major uses of force, but rather early detection and occasional use of small parties of militia.

On July 18, the administration turned to the Supreme Court for guidance with regard to the duties of neutrality and the meaning of the French-American treaties. A list of twenty-nine questions was submitted to the justices, who declined to answer. The Court would soon play an active role on issues of international law and the use of force, but the Court’s guidance would only be available when cases or controversies arose. On August 3, the cabinet issued a set of “Rules Governing Belligerents,” after considering whether such actions were “within the competence of the President to prohibit.” “An administrative law of neutrality had been forged” (Freeman 1957, 7: 111).

Washington and his cabinet were soon made aware, however, that serious uncertainties existed with regard to the orders they had issued. On May 22, 1793, Chief Justice John Jay instructed a grand jury in Richmond that they could properly indict Gideon Henfield for violating neutrality, based on the proclamation, on the theory that the federal courts had jurisdiction at common law to try individuals for violating international law. At the urging of Attorney General Edmund Randolph, Justices James Wilson, James Iredell, and District Judge Richard Peters issued the same instruction in July 1793 to the jury that tried Henfield for serving on a French privateer. The jury, however, refused to convict. The administration realized that prosecutions based on a presidential proclamation were likely to end in acquittals and decided against bringing any further prosecutions on the theory that the federal courts had jurisdiction over crimes not adopted by law (which the Supreme Court rejected in 1812). When Congress reconvened in December, the president called on them “to extend the legal code and the jurisdiction of the Courts of the United States to many cases which, though dependent on principles already recognized, demand some further provisions.” The statute he proposed incorporated the “Rules Governing Belligerents” drawn up after the Henfield prosecution (Hamilton 1850, 4: 455-62).

The president also realized he lacked authority unilaterally to effectuate Jefferson’s proposal that it would be better to pay England compensation for vessels that the United

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3. The Court assumed that necessity may imply “powers to the general Government,” but concluded that it did not follow that the courts could thereby be “vested with jurisdiction over any particular act done by an individual in supposed violation of the peace and dignity of the sovereign power. The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction over the offence.” United States v. Hudson, 11 U.S. 32, 34 (1812).
States was obliged by neutrality to return than to attempt to seize them from the French. The Constitution assigns to Congress exclusively the power to raise and spend funds. The president therefore insisted that the decision to pay compensation be communicated to the French and British ambassadors in a manner “so guarded as to convey nothing more than an opinion of the executive.” When Congress reconvened, the president sent a message advising that “rather than employ force for the restitution of certain vessels, which I deemed the United States bound to restore, I thought it more advisable to satisfy the parties by avowing it to be my opinion, that, if restitution were not made, it would be incumbent on the United States to make compensation” (Ford 1891, 12: 357). The president felt empowered to decide against seizing vessels from the French and to opine that the United States was obliged to pay, but not to make a promise to do so. Seeking to increase the likelihood that compensation would in fact be paid, Hamilton (with the president’s knowledge) urged Jay to make the issue of compensation part of the Jay Treaty with England, then under negotiation, because it could be ratified without approval by the pro-French, Republican-controlled House of Representatives (Sofaer 1976, 110-11).

The Pacificus-Helvidius Exchange

During this crisis, while Congress was still out of session, the proclamation and related issues were debated in print by Hamilton and Madison, the joint authors of the Federalist Papers that pertain most directly to the purposes of the Framers in separating and mixing the powers of the branches of government. On June 13, 1793, after the proclamation was issued, Madison wrote to Jefferson expressing his chagrin that the president had gone beyond declaring that the United States was at peace and enjoining Americans to behave accordingly. “The right to decide the question whether the duty & interest of the U.S. require war or peace under any given circumstances, and whether their disposition be towards the one or the other seems to be essentially & exclusively involved in the right vested in the Legislature, of declaring war in time of peace; and in the P. & S. [President and Senate] of making peace in time of war. Did no such view present itself in the discussions of the Cabinet?” (Hunt 1906, 6: 131-32). In responding on June 23, Jefferson took credit for having succeeded in deleting the word “neutrality” from the proclamation, but he explained that he did not want to oppose it altogether for fear that he would then be ineffective at ensuring that the French minister was received (Ford 1895, 6: 315-16).

Hamilton publicly defended the administration in an article under the pseudonym “Pacificus” on June 29, 1793. A proclamation of neutrality was, he wrote, the usual and proper manner for a state to make its position known to other states at war with each other, and the executive is the proper branch to make such a declaration, being “the organ of intercourse between the nation and foreign nations,” the “interpreter of the national treaties,” the branch charged with enforcing the laws, including treaties, and the official “in command and disposition of the public force.” He advanced two theories of “executive” power to support this position: one encompassing all the powers normally considered executive except those specifically withheld; and one limited to the duty to “take care that the laws be faithfully executed.” Under his
narrow theory, Hamilton argued the proclamation was not a “law,” but merely the statement of a “fact” with regard to the state of the nation. Under his broad theory, Hamilton assumed that Congress’s power to declare war “includes the right of judging, whether the nation is or is not under obligations to make war.” But he believed the president could also act, because the Constitution often gives the branches concurrent authority over the same functions. The executive had the authority in the exercise of his powers to judge the nation’s obligations, even “though it may, in its consequences, affect the exercise of the power of the legislature to declare war.” Significantly, however, even under his expansive view of executive power, Hamilton acknowledged that “the legislature is still free to perform its duties, according to its own sense of them” (Hamilton 1851, 7: 76-83).

Jefferson sent the Pacificus article to Madison, identifying the author as Hamilton and complaining that no one had answered Hamilton’s “heresies.” He later sent Madison two more articles by Pacificus, urging him to “take up your pen, select the most striking heresies, and cut him to pieces in the face of the public” (Ford 1895, 6: 38). Madison obliged, responding as Helvidius in articles appearing between August 24 and September 14. He claimed that the powers to make treaties and declare war are not properly considered by their nature “executive.” But the gist of his attack was on Hamilton’s claim of concurrent power. If, as Hamilton assumed, the power to declare war includes the power to judge whether the nation is under an obligation to make war, then all judgments concerning war were necessarily and exclusively part of the legislative function. Whenever the issue arises whether war should be declared or was required by a treaty, Madison wrote, “the question necessarily belongs to the department to which those functions belong—and no other department can be in the execution of its proper functions, if it should undertake to decide such a question.” He rejected the notion that two branches could both have the power to judge the state of the nation; the executive was bound to enforce neutrality only because it was duty bound to preserve the peace in all cases, until war is declared. He insisted on “a rigid adherence to the simple, the received, and the fundamental doctrine of the constitution, that the power to declare war, including the power of judging of the causes of war, is fully and exclusively vested in the legislature.” Madison dismissed the concern that war might result if the president could not act in Congress’s absence, stating that the president was “not responsible for the consequences” (Hunt 1906, 6: 154-82).

Congressional Reaction

The president explained his actions to Congress on December 3, 1793. When war erupted, he said, it became “my duty to admonish our citizens against hostile acts,” and to obtain “by a declaration of the existing legal state of things, an easier admission of our right to the immunities belonging to our situation.” Now, he said, “it rests with the wisdom of Congress to correct, improve, or enforce the plan he had announced to preserve neutrality,” noting especially the need to confer jurisdiction on the courts to interpret and enforce the rules (Ford 1891, 12: 352). Jefferson later wrote that the president “never had
an idea that he could bind Congress against declaring war, or that anything contained in
his proclamation could look beyond the first day of their meeting” (Washington 1853-
1854, 9: 179).

Both houses of Congress adopted resolutions praising the president for his handling
of the crisis.5 No support for Madison’s views was expressed in the resolutions or
discussion. After considerable debate, on June 5, 1794, Congress provided financing and
other authority for enforcing neutrality, including the power to use force to seize or expel
offending vessels.6

The issues raised by Washington’s proclamation demonstrate that the process of
decision making under the Constitution from the very beginning has involved the
exercise by all three branches of concurrent powers over foreign and military affairs. The
incident illustrates how the conduct and claims of officials who were responsible for
drafting the Constitution, in exercising various powers, took into account other related
and potentially conflicting powers. In this sense, the process generated by overlapping
powers was even more instructive than the specific acts and statements, in that the
participants might have expressed other views or taken other measures, but the dynamic
created by a divided but mixed government would nevertheless have presented itself at
every significant point. The existence of powers in one branch that could support a given
action or statement led neither branch to treat those powers as exclusive, nor to treat
them as insignificant because of the existence of other, countervailing powers in another
branch. The president had strong arguments to support issuing and enforcing a procla-
mation aimed at keeping the United States out of a war, and Congress approved his
having done so. Congress’s powers did not prevent the president from performing his
functions. At the same time, both Washington and Hamilton acknowledged that
Congress could authoritatively establish the national policy by accepting, rejecting, or
modifying the president’s positions, and only Congress could provide for full enforce-
ment (though even those decisions were subject to the president’s veto). By inviting
Congress to “correct, improve, or enforce” his proclamation, Washington recognized that
he was operating, not on the basis of independent or exclusive powers, but rather as one
branch involved in a process with another branch possessing its own concurrent powers.

It also became clear during that period that the powers of both branches were
subject to possible judicial review, by courts that were themselves dependent on Congress
and the president for funds, jurisdictional allocations, appointments, and the means to
enforce their judgments. While the Supreme Court justices refused to answer abstract
questions posed by the president, they addressed (even if incorrectly) the power of federal
courts to prosecute crimes not legislatively approved by Congress. After neutrality with
France became impossible to maintain, the Court passed on several legal issues that
established important principles regarding power over national security. It upheld Con-
gress’s power to authorize and control a “Quasi War” based on legislation rather than a
declaration of war.7 It also ruled that, although the president as commander in chief

6. Ibid., 4: 1461-64, 743-57.
normally may seize any enemy vessel in an authorized war, Congress may limit this authority by specifying the circumstances in which ships can be seized.  

The events surrounding the neutrality proclamation make clear that the meaning of executive power cannot accurately be described without at the same time taking into account that every power vested in any branch (even “exclusive” powers) is limited by the existence of other, related powers, vested in the other branches. The ambiguities created by this complex and dynamic system are nowhere dealt with more effectively than in Justice Jackson’s concurring opinion in Youngstown. Jackson’s opinion has received widespread attention and respect, not because he succeeded in defining the meaning of executive power. He did not even attempt to do so. Rather, he succeeded in providing instead a practical method for reviewing the exercise of executive power within a system of predominantly concurrent rather than exclusive authorities.

The Youngstown Method

In its 1952 decision in Youngstown, the Supreme Court invalidated President Harry Truman’s seizure of steel mills in order to prevent them from being shut down in a labor dispute during the Korean War. Justice Hugo Black’s opinion for the Court characterized as “legislative” the issue of whether the government ought to seize steel mills and therefore beyond the president’s “executive” power. “In the framework of our Constitution,” Justice Black wrote, “the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the law-making process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.”

Justices Felix Frankfurter and Jackson, among other justices, rejected this “formal” approach to separation of powers decisions, based on the nature of the power of each branch. Justice Jackson doubted that Justice Black’s attempted bifurcation of authority between what is “legislative” and what is “executive” could be successfully applied. Justice Frankfurter made the same point, quoting Justice Oliver Wendell Holmes in Springer v. Government of Philippine Islands: “The great ordinances of the Constitution do not establish and divide fields of black and white.” Both Frankfurter and Jackson espoused a more functional view. Jackson wrote:

The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but
reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.\(^{11}\)

Frankfurter and Jackson agreed that acts of the president may sometimes violate specifically assigned powers or prohibitions in the Constitution. Absent a sufficiently clear prohibition on certain conduct, however, they regarded the president’s powers as potentially extending to actions that could be considered “legislative” or that otherwise fall within the scope of powers of the other branches. Jackson concluded, therefore, that the most effective way to evaluate the legality of executive conduct that did not violate specific provisions in the Constitution was to determine whether Congress had approved or disapproved that conduct. Thus, Justice Jackson wrote: “When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.”\(^{12}\) On the other hand: “When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”\(^{13}\) Under this view, Congress’s approval or disapproval of an executive action is a controlling factor in determining the action’s legality, absent some independent and overriding executive authority. Both Jackson and Frankfurter found the seizure in *Youngstown* invalid, because even if not unconstitutional by its nature, it was inconsistent with Congress’s decision against conferring such authority, which they found on the facts implied its disapproval.

Jackson also suggested an approach, not a rule, where Congress fails to express its support or opposition to an executive action not clearly precluded by the Constitution. In such situations, the president’s conduct is in a “zone of twilight,” he wrote, in which both branches may have concurrent authority, and legislative inaction will not preclude determinations upholding the executive action at issue:

> *When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.*\(^{14}\)

The categories in Jackson’s opinion provide a roadmap for dealing with the legality of executive actions. Applying those categories to contemporary issues illustrates the parameters of presidential power and its relationship to the powers of Congress and of the courts.

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11. 343 U.S. 635.
12. Ibid.
13. Ibid., 637.
14. Ibid.
Actions that Violate Constitutional Limitations

The principle that executive actions may violate specific provisions in the Constitution, though seldom controlling in actual controversies, is a fundamental aspect of the constitutional plan which the Supreme Court regards its duty to maintain. The Court has found unconstitutional legislative schemes, executive actions, and judicial assertions of power because they were inconsistent with limitations expressed in or implied from constitutional language or may represent or allow aggrandizement or encroachment of one branch’s authority by another. The Court ruled, for example, that Congress may not authorize one-House vetoes of decisions of the attorney general to suspend the deportation of aliens. One-House vetoes are legislative actions, the Court found, in a form inconsistent with the unambiguous presentment and bicameral requirements of the Constitution: “Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process.”15 The two-House vetoes in the Federal Trade Commission Improvements Act of 1980 met a similar fate,16 as did an effort to move the nation toward a balanced budget through cuts in spending supervised by the comptroller general, an officer removable by Congress. Even the dissenters to the latter decision agreed that “the constitutional scheme of separated powers does prevent Congress from reserving an executive role for itself or for its ‘agents,’” but argued that it had done neither in that particular case.17 The line item veto was invalidated, because it was inconsistent with the specific plan of the Constitution for the passage of legislation.18

The Court enforces the language and structure of the Constitution,19 recognizing that the Framers’ overarching purpose was to achieve a balance of power between the political branches, even though that objective may be inconsistent with efficiency or other claims of improved government.20 On the other hand, the Court has upheld novel provisions or practices not clearly proscribed, where they pose no threat of “aggrandizement” or “encroachment” by one branch upon another.21

Some executive powers are so specific and exclusive that Congress may not regulate their exercise. The pardon power, for example, may not be limited or otherwise restricted by legislation. How far this principle goes is uncertain. It certainly does not extend to the point that it would interfere with specifically assigned legislative powers, but rather

19. For example, Reid v. Covert, 354 U.S. 1, 8 (1957).
20. “[I]t would be mistaken and mischievous for the political branches to forget that the sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance.” United States v. Lopez, 514 U.S. 549, 577 (1995) (Kennedy, J., concurring).
21. For example, Mistretta v. United States, 488 U.S. 361 (1989) (upholding sentencing commission which included judges and which limited the president’s removal power to ‘good cause’).
seems to restrict Congress’s use of the general power to pass “necessary and proper” laws. It is inapplicable to Congress’s power over spending, so Congress could probably influence as a practical matter the exercise even of exclusively held executive powers (Prakash 2005, 91: 215).

The Constitution also by its terms precludes some forms of executive conduct as inconsistent with powers assigned to Congress. Congress has the exclusive power to raise funds for all purposes under the Constitution. This is a major restraint on executive power, so long as Congress has not provided funds that are within the president’s discretion to spend. The scheme by some officials in the Reagan administration to sell arms owned by the United States for a profit in order to raise money to support the Contras in Nicaragua violated this principle.22 President Abraham Lincoln’s suspension of habeas corpus was also illegal, because the Constitution is understood to assign the power to suspend habeas corpus in emergencies to Congress.23 Lincoln claimed his unconstitutional act was necessary to save the Constitution and expected Congress to approve the suspension (Cox 1984, 218).

Another category of restraints based on constitutional provisions is less predictable but important. The Court has often refused to uphold civil liberties claims in the face of executive decisions during times of crisis. It has in general accepted executive branch positions in emergencies without careful scrutiny. Even though, for example, the Court requires a clear and present danger to justify the prohibition of protected speech, it applied that test during World War I in a highly deferential manner. This tendency may be altered to some extent, due to the widespread recognition that executive claims in support of civil liberty deprivations are often unsubstantiated in retrospect (Brennan 1988). The Supreme Court in 2004 (Hamdi and Rasul) accepted the proposition that the president may hold prisoners of war until the end of an authorized military conflict, but held that the Due Process Clause requires that any such prisoner who is a U.S. national on U.S. territory must be given notice of the government’s claim regarding his status and an opportunity to challenge the factual assumptions underlying that claim before a neutral decision maker. Citing Youngstown, the Court stated: “We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”24

Many types of executive conduct have been accepted as being consistent with the Constitution, despite the claim that the functions at issue are exclusively assigned to Congress. Presidents since Washington have exercised their powers, despite the fact that doing so might cause a military conflict. Congress’s power to declare war includes the power to determine when and how the nation should fight undeclared wars. But the fact that Congress is empowered to decide such issues does not preclude presidents from using assigned powers despite the possibility that their exercise might result in conflict. The

22. Both the majority and minority of the Joint Committee agreed that, if the funds from the arms sales to Iran were property of the United States, the surplus realized should have gone into the U.S. Treasury. S. Report no. 100-216; H. Report no. 100-433. 100th Cong., 1st sess. (November 1987).

23. The provision allowing suspension “when in Cases of Rebellion or Invasion the public Safety may require it” appears in Article I, section 9, which deals with the powers of Congress.

president may also use force without legislative approval to defend the nation, despite Congress’s power to declare war. Notes of the Constitutional Convention debates recite that Congress was given the power to “declare” war, rather than to “make” war, in order to permit the president to defend against “sudden attacks” (Farrand 1937, 2: 318), but self-defense is not so restricted in practice. Presidents are widely regarded as vested with the power of the nation to act consistent with international law for such purposes as defending U.S. nationals, armed forces, or property from attacks, or rescuing nationals in danger. Presidents have often used limited force in a variety of situations, and the War Powers Resolution implicitly condones some uses of force for limited times without legislative approval.

While the Constitution contains no provision that precludes executive uses of force without legislative approval, presidents have rarely claimed the power unilaterally to take the nation into a major military conflict and (though sometimes asserting they can act unilaterally) have only done so with Congress’s approval in the form at least of knowing financial support. The manner in which Washington and his cabinet handled the crisis caused by the war between France and England indicates that, while the president could use his explicit powers despite the danger of causing war, these actions were to be taken with a view to avoiding war. Other clear examples exist, including President James Monroe’s decision to give up attempting to take control of West Florida by force, after Congress refused repeated requests for such authority (Sofaer 1976, 378). Absent legislative approval in some adequate form, the president lacks authority to engage in major military actions that cannot be justified on the basis of self-defense.

Legislative Approval of Executive Actions

So long as Congress acts consistently with the Constitution, its support of the president maximizes the president’s authority and its opposition leaves the president to rely on his exclusive powers for authority. Justice Jackson assumed in advancing this generalization that Congress’s will with regard to national policy in general prevails, as it is vested with the legislative power of the nation. This assumption is consistent with the views of the Framers, executive practice, and authoritative Supreme Court decisions. Where Congress expresses a view, therefore, even implicitly by denying a requested authority, as in Youngstown, the second principle of separation of powers decision making applies, and Congress’s intent generally prevails.

The Supreme Court has ruled that Congress controls the extent of legislatively approved (“limited”) wars, and any limit established by legislation restricts the president’s power to use force even where he could lawfully have done so in the absence of the limitation. In Little v. Barreme, Chief Justice John Marshall construed a legislative grant of power to seize vessels engaged in trade to any French port to prevent the president from authorizing the seizure of vessels engaged in trade from any French port. When Congress has ordered that funds may not be used for a particular use of force or other national

27. 6 U.S. 170 (1804).
security purpose, presidents have complied, despite having opposed such legislation. Congress has passed legislation requiring, for example, that funds not be used after a specified date for the support of combat troops in Cambodia (1970), for the support of any combat activities related to the war in Vietnam (1974), and for the use of armed forces in Somalia (1994) or in Rwanda (1994) (Grimmett 2001). Limitations on the use of funds to support the contras in Nicaragua varied from year to year, and such spending as occurred in violation of the few clear limits that were adopted was done secretly in order to avoid Congress’s legal mandate. Congress is able to control the president’s use of appropriated funds even in situations where, but for Congress’s limitation, the president would have authority to act. When, despite the president’s long-established power to decide not to spend monies appropriated by Congress, Congress required the president to spend monies that it appropriated, that decision was controlling.28

Advocates of executive power have claimed in recent years that the president has inherent and exclusive powers in the national security area that are beyond Congress’s power to limit or regulate. Some executive powers, as noted above, are exclusive and beyond Congress’s power to regulate directly. In general, however, the claim to powers over national security that are beyond Congress’s capacity to regulate is baseless.29 Justice Jackson dismissed the Truman administration’s reliance on “nebulous, inherent powers never expressly granted but said to have accrued to the office from the customs and claims of preceding administrations.” What he said then about executive power claims based on these vague phrases remains true today: “Loose and irresponsible use of adjectives colors all nonlegal and much legal discussion of presidential powers. ‘Inherent’ powers, ‘implied’ powers, ‘plenary’ powers, ‘war’ powers, ‘emergency’ powers, are used, often interchangeably and without fixed or ascertainable meanings.”30 So inadequate is the argument that the president may disregard a law applicable to his conduct that it was not even advanced by the Bush administration in Hamdan, and would in any event have been rejected. The Court concluded: “Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 519, 637 (1952) Jackson, J., concurring. The Government does not argue otherwise.”31

Anti-executive power advocates, however, have their own exaggerated claims. They often fail to acknowledge that, just as Congress can control and limit the president, it can empower the president by broadly delegating authority to him over national security issues, including the use of force. Congress has frequently approved the use of force in sweeping delegations of power, as in the Gulf of Tonkin Resolution of 1964 and the 2001

29. The weaknesses of the arguments made by Professor John Yoo and others have been thoroughly addressed by Louis Fisher (Fisher 2006, 1230-47). Professor Yoo is correct, however, in arguing that the president has the power to act without prior legislative approval to protect the United States, its nationals, and even its interests; and he properly recognizes that Congress is entitled to use its power over funds to stop executive actions (Yoo 2005, 294).
30. 343 U.S. 646-47.
31. 126 S. Ct. 2749, 2774 n.23.
resolution authorizing force against those responsible for the attacks of 9/11. And just as the Court in *Youngstown* found that Congress can implicitly deny the president power to take a given action, Congress can implicitly grant power to the president. When Congress authorized the building of vessels intended for use against piracy in the Mediterranean, for example, it was understood to convey authority to use the vessels for that or any other defensive purpose (Sofaer 1976, 156-58). An argument for implied authority exists whenever Congress puts a military capacity at the disposal of the president that is likely to require prompt and secret action, ranging from the missiles and bombs needed for a retaliatory nuclear strike to a special force intended for the rescue of hostages.

In some instances, a failure by Congress to legislate may be seen as approval, rather than as disapproval, of presidential action, depending on the context and circumstances. In *Dames & Moore v. Regan*, the Court upheld an executive agreement establishing a method for settling claims with Iran and suspending pursuit of such claims in the federal courts. The Supreme Court concluded that "Congress has implicitly approved the practice of claim settlement by executive agreement" by arranging and paying to implement such arrangements.32

Congress can also approve military actions by paying for them. Early in the Vietnam War, before Congress began acting to express its disapproval, the Second Circuit found that the war was lawful, in part because Congress had paid for its operation:

> [T]he test [for mutual congressional participation in the prosecution of war] is whether there is any action by the Congress sufficient to authorize or ratify the military activity in question. . . . Congress has ratified the executive’s initiatives by appropriating billions of dollars to carry out military operations in Southeast Asia and by extending the Military Selective Service Act with full knowledge that persons conscripted under the Act had been, and would continue to be, sent to Vietnam.33

A more recent example is Congress’s approval of the military action in Kosovo, to prevent the ethnic cleansing of Muslims. Congress failed explicitly to approve or to disapprove the operation, but the Senate clearly signaled its approval for air operations before March 24, 1999 (the House votes were more ambiguous), when President Bill Clinton ordered the bombing to begin, and on May 20, while the bombing continued, Congress paid for “Operation Allied Force,” knowing that the funds were intended to pay the bill for bombing Kosovo (Sofaer 2000, 74-75).

The major action that is most difficult to justify in terms of legislative approval is President Truman’s decision to authorize the use of armed force to defend South Korea from an attack by North Korea that commenced on Sunday, June 25, 1950. Later that day, the United Nations Security Council voted to order North Korea to withdraw, and Truman ordered the use of air and naval power to evacuate Americans and transport ammunition and supplies to the South. The president did not seek legislation authorizing the action, though he would certainly have obtained that support. Instead, he consulted with Senator Tom

Connally, chairman of the Senate Foreign Relations Committee, on Monday, June 26, who said he did not believe legislative approval was necessary for what he regarded as a defensive war. That evening, Truman authorized the use of air and naval power to support South Korea. He later consulted with other legislators who supported the initiative, but he never sought explicit legislative approval and claimed the right to use the armed forces without such approval (Crabb and Holt 1989, 127-32). After the war was underway, however, Congress supported it by extending the draft and with special appropriations intended to pay for the military operation. These actions constituted retroactive approval, much as President Lincoln had secured retroactive approval for some of his actions during the Civil War. As Professor Ely commented: “Hornbook law seems generally to be that programs unauthorized at the time can constitutionally be authorized retroactively by Congress, nunc pro tunc (thus rendering them legal not simply ‘from now on’ but ‘from the outset’ as well). E.g., Swayne & Hoyt, Ltd. v. United States, 300 U.S. 297 (1937)” (Ely 1993, 10-11, 198 n.55). Truman was wrong that he had the power to act unilaterally. He correctly judged Congress’s position, however, and therefore never faced a true test of his exaggerated claims. Had Congress indicated its disapproval, he would have suffered two defeats in the Supreme Court over Korea, not just the decision in Youngstown.

Congress adopted the War Powers Resolution (WPR) in an attempt to prevent the executive and the courts from relying upon the traditional bases for ascertaining legislative approval. Section 8 provides that an inference of approval of a particular military action may be found in legislation (or in a law implementing a treaty) only if the law “specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization with the meaning of this chapter.” The WPR seeks to require the executive and the courts to disregard evidence of approval (including resolutions approving the conduct at issue and appropriations specifically passed to pay for it), unless Congress states specifically that the legislation relied upon is intended as approval under the WPR.

This effort to restrict the form of approval is inconsistent with universally accepted standards for determining civil or criminal responsibility under national law, or state responsibility under international law. No criminal group, no corporation, no individual, could avoid responsibility for conduct that it knowingly supported or paid for. It is irresponsible for Congress to claim otherwise. Furthermore, the Supreme Court has invalidated an effort by one Congress to limit the definition of a word in an unreasonably restrictive manner, and the doctrine against entrenched legislation precludes the application of such formulae in a manner that controls all future Congresses (Eule 1987, 379). How could one law forever restrict the legal significance of what Congress does under subsequent law, especially when the law that is earlier in time seeks artificially to limit the legal consequences of subsequent legislative conduct? Section 8 of the WPR is an effort to modify the Framers’ plan by encroaching on the president’s potential claims to authority in interbranch disputes. It would, if valid, enable Congress to disclaim the

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intended consequences of its actions in order to place sole responsibility on the president for acts Congress knowingly made possible. It is hardly surprising that Congress has failed to enforce this provision, and that the courts have refused to intervene (Sofaer 2000).

A treaty may provide support for an executive use of force, without further legislative action, though the House of Representative retains the power to deny funding for even such uses of force. But the language and intent of Congress with regard to the treaties most often claimed to justify this claim—the UN Charter and the treaty establishing NATO—do not confer legislative approval. These treaties provide that uses of force contemplated pursuant to their provisions will be approved in accordance with the constitutional process of each member state. Resolutions of the United Nations Security Council establish the legality of uses of force under international law, but they are insufficient to provide authority under the U.S. Constitution for actions that would otherwise be illegal (Stromseth 1995). The legal process required by the Constitution to approve a use of force is made no less complicated because of a reference to it in a treaty. The president would still be empowered to act in self-defense and within the full scope of his powers, and Congress would still be empowered to approve, disapprove, or limit what the president proposes or does. But a treaty calling for approval under the U.S. legal system cannot itself tenably be relied upon as proof of legislative approval.

Executive Power in the Zone of Twilight

It is difficult to know precisely what Justice Jackson meant by executive actions that fall within the zone of twilight. Chief Justice William Rehnquist construed what Jackson acknowledged was “a somewhat over-simplified grouping” as representing points on “a spectrum running from explicit congressional authorization to explicit congressional prohibition.”36 It seems that Jackson meant that in some cases the Court will be able to find Congress had approved an executive action (increasing the likelihood that it is lawful), in some cases the Court will be able to conclude that Congress had disapproved (increasing the likelihood of its illegality), but that in some cases neither of these conclusions might be possible. The latter situations, Jackson wrote, are those in which the president and Congress “may have concurrent authority, or in which its distribution is uncertain.” By failing to act decisively in such instances, Congress could “enable, if not invite, measures on independent presidential responsibility.”37

The scope of this principle can be seen in the rule that Congress’s mere acquiescence to a course of executive conduct, even if not amounting to approval, may in some circumstances be treated as sufficient to justify its continuity. Justice Frankfurter, in criticizing Justice Black’s formalistic approach in Youngstown, wrote: “It is an inadmissible narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. A systematic,
unbroken, Executive practice, long pursued with the knowledge of Congress and never before questioned, may be treated as a gloss on the meaning of ‘executive Power’ as vested in the President.”38 Justice Jackson understood this principle to extend, not just to situations in which Congress makes a deliberate decision to acquiesce in an executive practice, but also to those in which Congress expresses neither approval nor disapproval but simply allows the conduct to continue unchecked. “We may say,” he wrote, “that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.”39 The Supreme Court has applied this principle to uphold the legality (and supremacy over state law) of executive agreements, even when not authorized by Congress.40

An example of executive action within Jackson’s zone of twilight might be the Gulf of Sidra exercise during the Reagan administration. Congress had at least implicitly approved the U.S. Navy’s program of ensuring freedom of the high seas by knowingly funding its operation. President Ronald Reagan knew that he could cause a military confrontation when he used this authority in 1986 to challenge Libya’s claims by sailing U.S. public vessels across the Gulf of Sidra. The president may even have welcomed an effort by Libya to block the exercise, so he could use force to punish Libya for supporting terrorism. The president regarded himself as legally entitled to engage in the operation despite the heightened risk of military action (which did in fact occur), and he reported the incident to Congress without any reference to the WPR. Congress took no action to indicate approval or disapproval of this activity, thereby leaving the conduct within the zone contemplated by Justice Jackson, in which the president remains free to act on the basis of executive authority, because the Congress has not attempted to establish limits on the degree of risk involved.

Advocates of “interbranch dialogue and bipartisan consensus,” like Professors Koh (1990) and Ely (1993), may condemn this principle as condoning “legislative inactivity.” But this principle neither condones nor condemns Congress’s failure to act. The power to set national policy is not a device for ensuring that Congress will in fact exercise control in all situations, or that it will do so explicitly and unambiguously.

The concept of a zone of twilight, in which authority may be concurrent and therefore uncertain, is part of Jackson’s insightful description of how the American constitutional system works and was intended to work. Where Congress does nothing definitive in situations of concurrent authority or where the distribution of authority is uncertain, the outcome “is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law by political circumstances.” This result suggests not only the propriety of resorting in such cases to judicial abstention based on the political question, standing, or other doctrines but the necessity of doing so in order to preserve the Constitution’s plan.

Executive actions that fall within the zone of twilight do so because of uncertainties that result from the deliberate assignment to the branches of overlapping

38. Ibid., 610-11.
39. Ibid., 654.
powers designed to enable each to make legitimate claims to authority in the anticipated battles over governmental power. To clarify powers in this context would narrow uncertainty and end conflicting claims in situations where the Framers vested powers concurrently in order to enable both branches to act and thereby to ensure the capacity for enduring conflict. The Framers anticipated that the branches would clash in situations where both have legitimate claims to authority, and the courts should no more decide such conflicts on behalf of one branch or the other than they should allow the branches acting alone or together to alter other intended parts of the constitutional scheme.

The Framers wanted the political branches to have the means—which in the U.S. system means the legally supportable measures of opposition—to contest each other’s claims. Every clarification and limitation issued by the courts in such situations would reduce the type and scope of available measures for legitimate conflict. This, in turn, could tend to make it more likely over time that one branch would be able to control the other on these fundamental issues. The courts should avoid “clarifications” of authority that could facilitate such a development.

Conclusion

Bush administration attorneys have triggered a new round of debate over the scope of executive power. Their claim to executive authority over the use of force and other national security issues that is beyond the control of Congress is no more meritorious today than it would have been in 1793, when Washington issued his proclamation, or in 1952, when the Court and Justice Jackson rejected the argument.

The Constitution allocates powers over national security to all the branches that enable each to affect national policy. Concurrent authority is the general rule of constitutional allocations, because the Framers wanted to mix powers, not merely to separate them. This means that the executive may use his powers on national security issues with initiative, but that the president’s authority is subject to the exercise of Congress’s powers, and to the Supreme Court’s decisions on conflicting interpretations. Where Congress disapproves of the president’s action, the president’s authority depends on the existence of some separate and independent power to overcome Congress’s legislative authorities. Congress is also empowered, however, to authorize executive actions in any form sufficient to constitute approval. The power of Congress to delegate authority to use force is clearly established, and courts have uniformly held that Congress approves an action by knowingly funding it. In addition, the fact that the president has concurrent powers over many aspects of national security explains why the president can sometimes act lawfully on such issues when Congress has neither approved nor disapproved his conduct.

This set of rules makes clear why executive authority can only be properly understood in light of the powers assigned to the other branches, in a system of concurrent, rather than exclusive, authorities.
More fundamentally, the system of mixed government intended by the Framers, and still the most tenable explanation of the U.S. system, remains essential to prevent tyranny while enabling each branch of the government to be active and effective in dealing with national security challenges. Recent arguments of executive power advocates against this system of mixed powers have been authoritatively rejected or abandoned. Yet, the fact that such claims were so vigorously advanced by such high-ranking executive officials makes it clear that the Framers’ concerns remain valid. Of particular concern is the fact that several policies having a direct relationship to tyranny (including indefinite detention, harsh if not illegal interrogation, and unsupervised electronic surveillance) were implemented secretly with the intention that they would remain—indeed with the claim that they were entitled to remain—beyond the control of Congress or the courts. The U.S. system of mixed government was designed by the Framers to provoke appropriate, corrective rulings and practices to check executive initiatives, whether or not they violate the Constitution. Secret operations could preclude the system from functioning in its intended manner.

It is equally important to remember, however, that the system of mixed government was designed to enable the president to be active and effective in protecting and advancing U.S. interests. It also contemplates that Congress is able to approve and fund national security programs and military actions, and that such decisions are constitutionally valid however unhappy the consequences. Efforts to improve the quality of executive or legislative or judicial decision making on national security issues should continue. But it is neither constitutionally proper nor likely to be functionally effective to expect that one change or another in procedures or legal requirements will lead to a system that produces better national security outcomes.

It is difficult to understand, for example, the basis upon which some assume that the more involved Congress becomes on use of force issues the better off the United States will be. Congress certainly knows it has the power to prevent or to terminate uses of force. Given this reality, why would anyone expect that additional rules that purport to limit the president’s power by redefining the meaning of approval, for example, will lead to more responsible and effective legislative action? The nature of Congress cannot so easily be altered. If the objective is to put pressure on Congress to accept responsibility for its decisions, why is not the better rule to deem Congress to have approved all the actions Congress supports or otherwise knowingly makes possible? If Congress has the power to act and fails to do so, why is it more likely to act and take responsibility if the courts were available to stop the president from acting? Moreover, what gives supporters of a rule requiring legislative approval in advance of all uses of force the confidence to believe that the nation will be best served by a more active Congress, and particularly one that disallows executive actions? It is a matter of intense dispute whether the nation’s interests were better served when Congress has funded military operations supported by the executive, or when Congress has acted to constrain them. Secretary of State George P. Shultz concluded, for example, that the limitation placed by Congress on the use of troops in Lebanon in 1983 undermined the credibility of U.S. efforts there, and was regarded by Syria as a clear sign that the United States lacked resolve (Shultz 1993, 230-31). Among the most definitive legislative
directions that funds not be used to support a military action was a September 1994 law that prevented the U.S. armed forces from preventing the Rwandan genocide.\footnote{P.L. 103-335, preventing use of funds in the Department of Defense Appropriations Act for FY 1995 for U.S. forces in Operation Support Hope after October 7, 1994, except as necessary to protect the lives of U.S. citizens.} There simply is no basis to believe that better decisions about war and peace will be made merely because Congress is required rather than merely empowered to act.

The Constitution and its history support the view that situations in which the branches have concurrent—and hence uncertain—authority reflect the intended functioning of the Framers' design. It would be wrong, and likely do far more harm than good, to alter this plan, either in a quest for effective executive authority to win a “war on terror” or for the purpose of depriving the executive of authorities to act when Congress is unable or unwilling to do so. The Supreme Court should continue to ensure that no branch is successful in preventing the others from exercising the full range of their powers, including those that are concurrently held and therefore likely to cause controversy and competition. The authority of each branch has limits. But the system was intended to provide capacities to all the branches that enabled and were expected to lead them to compete with and thereby constrain the others. The rules for such a system should aim to allow the full range of disputes to remain unregulated, as a symptom of constitutional well-being. In sum, my answer to the questions posed for this exercise remains that:

The Framers expected the branches to battle each other to acquire and to defend power. To prevent the supremacy of one branch over any other in these battles, powers were mixed; each branch was granted important powers over the same area of activity. The British and Confederation experiences had led the Framers to avoid regarding controversy between the branches as a conflict between good and evil or right and wrong, requiring definitive, institutionally permanent resolution. Rather they viewed such conflict as an expression of the aggressive and perverse part of human nature that demanded outlet but had to be kept from finding lasting resolution so that liberty could be preserved. (Sofaer 1976, 60)

References


The Contemporary Presidency: The Greats and the Great Debate: President William J. Clinton’s Use of Presidential Exemplars

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This article examines President William J. Clinton’s use of presidential exemplars from 1991 to 2001. While many observers have called attention to the fact that Clinton made efforts to connect his presidency to Democratic “greats” Thomas Jefferson and Franklin Roosevelt, his rhetoric reveals a more complex pattern of identification and use of his predecessors. Not only did he reference Abraham Lincoln and Theodore Roosevelt—Republican “greats”—as often as Thomas Jefferson and Franklin Roosevelt, but he appears to have used them to talk across party lines and move his fellow partisans to the center. This rhetorical pattern became more prominent after the 1994 midterm election, when the Republicans won majority control of Congress. Hence, this article asserts that Clinton used his predecessors to help him carry out his political agenda and his constitutional duties. Further, he learned from his predecessors about how they had used ideological and partisan constructs during their administrations, and this led to his reconsid-ering the “great debate” between Jefferson and Hamilton. This research concludes that President William J. Clinton left a Hamiltonian—not Jeffersonian—legacy for the Democratic party.

On January 23, 2006, a person at a town hall meeting asked President George W. Bush:

What’s the best way that you go about preparing yourself for attacks on your character, and how do you deal with others in those matters?

President George W. Bush responded:

Yes, I appreciate that. I would summarize it: faith, family and friends. . . . I believe in what I’m doing. And I understand politics, and it can get rough. I read a lot of history, by the way, and Abraham Lincoln had it rough. I’m not comparing myself to Abraham Lincoln, nor should you think just because I mentioned his name in the context of my presidency—I would never do that. He was a great President. But, boy, they mistreated him. He did what he thought was right.

ABC News-The Note’s summary and analysis of President Bush’s response:

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AUTHOR’S NOTE: I wish to thank Ronald Hatzenbuehler, Philip Abbott, Charles Walcott, and James P. Pfeiffer for their comments and suggestions. An earlier version of this paper was presented at the Western Political Science Association annual conference, March 16-20, 2006, Albuquerque, New Mexico.
In short: faith, family, friends; daughters and dogs; Lincoln had it rough and—but I’m no Lincoln; change the tone; . . . priorities and perspective. That is the kind of answer and vision that will get a man’s approval rating back over 53% any day now.¹

When presidents reference other presidents it is important, even when they say it is not. These references are rhetorical ploys that invite comparisons, offer justifications, and provide gravitas to the president on the subject matter that he is addressing. They are political symbols that “persuade through identification.”² Further, they link “cultural beliefs to potential common courses of action, . . . [provide] a president with an expression of an ideal behavior to be imitated, . . . [and offer] a means by which presidents can hope to achieve some measure of self-understanding” (Abbott 1990, 10-13). Presidential exemplars, therefore, help presidents understand their place in history, discover what opportunities exist in the political system, and connect with their audience. They might be thought of as tools which help presidents “ordershatter, order-affirm, and order-create” (Skowronek 1993, 19-21). Thoughtfully employed, they become part of a larger political strategy which leads to presidential success: “Successful political leaders do not necessarily do more than other leaders; successful leaders control the political definition of their actions, the terms in which their places in history are understood” (Skowronek 1993, 17). Thus, presidents use their predecessors in their attempts to control symbolically the political definitions of their presidency.

Generally, this article focuses on presidential rhetoric and does not provide much in the way of commentary on the rhetorical presidency (Medhurst 1996). It does suggest, however, that exemplary rhetoric is part of the institution of the presidency, which traces back to John Adams—the first president to contend with a predecessor’s legacy—and the Constitution. Because there is always only an n of one in office at any one time, presidents have no equal in the political system. All of their discussions and consultations are either with subordinates in the executive, institutional competitors (Congressional members, justices, governors, or foreign heads of state), and/or private citizens with their own sets of interests.³ It is for this reason that presidents turn to their predecessors for answers about wielding executive power and governing in a separated political system. Contributing to this inclination is the fact that presidents are aware that they are regularly compared with their predecessors (i.e., deemed “better or worse than x”) by journalists, scholars, and the public. Hence, the constitutional design of the executive encourages sitting presidents to seek out information about

². Aristotle explained in Rhetoric, “That is good which has been distinguished by the favour of a discerning or virtuous man or woman” (Roberts [1954] 1984, 45, Section 1363a). By identifying with a policy or issue that a virtuous man or woman has also identified with, a speaker gains a virtuous reputation. This behavior, according to John Llewellyn (1994), is also one of Clinton’s strong suits.
³. While family is often thought to be a refuge for presidents, they do not come without their own complications (i.e., imprudent siblings and/or children, ambitious spouses, and intrusive parents).
past presidents and use their legacies to assist them in carrying out their constitutional duties and their political agendas.4

More specifically, this article traces the evolution of Clinton’s use of presidential exemplars, asserting that there were four distinct periods of his presidency (1991-1992, 1993-1994, 1995-1997, and 1998-2001) during which he relied on varying ideological and partisan traditions in his rhetoric. In the campaign period (1991-1992), Clinton cited presidents from both political parties, but his references tended to be superficial and/or stereotypical. During his first few years in office (1993-1994), when the Democrats controlled Congress, Clinton invoked mostly his Democratic predecessors, but used them only as authoritative citations. After the Democrats lost control of Congress in 1994 and for the next few years (1995-1997), Clinton returned to referencing past presidents from both parties and began discussing their legacies in more ideological ways. By the end of his presidency (1998-2001), Clinton’s “favorite” exemplar was Theodore Roosevelt. Throughout his time in office, Clinton raised the ghosts of past presidents to buttress his authority, lend him credibility, and justify his actions.5 He also appears to have reinterpreted the liberal-egalitarian philosophy of the Democratic party—Franklin Roosevelt’s legacy—by incorporating into his rhetoric Republican presidential exemplars who espoused a Hamiltonian philosophy.6 Together, these actions helped him construct a theory of meritocratic progressivism, which has since become his legacy to his party.

The Roller Coaster Ride: Ten Years of Clinton’s Wrestling with Exemplars

Beginning in 1991, Clinton presented himself as a new kind of Democrat—an Ivy League-educated baby boomer who plays the saxophone, listens to rock music, and hails from a post-Civil Rights South—and told the people that, if they elected him, he would grow the economy, reignite opportunity, and restore the American dream (Smith 1994). He said that he wanted to develop national leadership that was different from the “old”

4. Though some presidents have sought out living predecessors for advice, this study does not examine the “presidents’ club,” as some have referred to the typically small group of former presidents who are alive.

5. While some may argue that speechwriters are responsible for these presidential references, it is fair to say that this was not necessarily true with Clinton. At Hofstra University’s Eleventh Presidential Conference, “William Jefferson Clinton: A New Democrat from Hope,” a panel of former Clinton speechwriters acknowledged that they were “lucky” if one of their lines was retained by the ever-editing president. As Chief Speechwriter Michael Waldman notes: “We give him Hemingway. He’ll turn it into Faulkner” (2000, 17).

6. Hamilton did not believe in promoting a “big, national” government, nor did he believe in promoting a “laissez-faire, elitist” economy. Many fail to understand the complexity of the economic-political system Hamilton established in the 1790s (Brown 2005; Knott 2002). Hamilton believed in “the intrinsic value of work” and he felt that there were “spiritual benefits” brought to a society from a more diverse economy. He also worked to create meritocratic institutions that reward energy, initiative, discipline, and commitment (some notable exceptions in the literature are Chernow 2004, Lind 1997, and McDonald 1979).
Democratic mix of government entitlements and egalitarian distributions, where merit counted for nothing. He said that he intended to create a “new and improved” government (Smith 1996, 85).

Clinton sought to implement policies that would promote and reward the middle class. He did not believe that the federal government should be a “welfare state,” which was largely how it had developed since the New Deal, nor did he believe it was morally right for the federal government to neglect its obligation to serve the people and leave governing to the states, as the Reagan and Bush presidencies had advocated (Baer 2000; Clinton 2004, 326-30; Durant 2006). He believed government should help members of the lower class become middle class and it should require more from those members of the upper class (taxes and/or public service). In his announcement speech, he said: “I was raised to believe in the American dream, in family values, in individual responsibility, and in the obligation of government to help people who were doing the best they could” (Smith 1996, 86).

This was a winning message because it aligned the interests of the middle class with those of members from the lower class who possessed aspirations of their own. The only people who were against his ideas from a self-interested standpoint were those who did not care to give back—wealthy individuals who wanted to keep their money and poor people who did not want to work—and neither of these groups was likely to vote for him. Hence, Clinton was not asking people to be charitable, only to be responsible. This value—responsibility—became one of the main pillars of his 1992 campaign and he applied it to government, corporations, communities, and citizens. When he combined it with opportunity, community, and security, his “New Covenant” platform sounded unlike anything either the Republicans or the Democrats had offered the electorate in quite some time (Baer 2000; Durant 2006).

During his campaign, Clinton used a variety of presidential exemplars, yet he seems to have touched on these presidents’ legacies rather superficially. In the ten-week period which included his official announcement and his three major policy speeches on the “New Covenant,” he invoked six presidents, two of them Republicans and four Democrats. However, one Democrat—Truman—“is fondly cited by both Democrats and Republicans but for the relatively simple purpose of establishing a folksy combative and foreign policy aggressiveness” (Abbott 1990, 13). Still, he did not appear to be drawing on any specific ideological strain or constitutional construct from these presidents. He was just citing “the greats.” For example, he mentioned Lincoln in the context of a discussion about “class and race wars,” saying: “The politics of division which the Republicans have parlayed into the presidency will turn on them. George Bush has forgotten the warning of our greatest Republican president, Abraham Lincoln: A house divided cannot stand. Lincoln gave his life for the American community. The Republicans have squandered his legacy” (Smith 1996, 109).

7. By “welfare state,” I mean to connote the social welfare entitlement programs, which grew federal bureaucracies and operated with little accountability or efficiency. These programs were often cash disbursements, which required little responsibility or work from grant recipients.

8. The six presidents were Thomas Jefferson, Abraham Lincoln, Theodore Roosevelt, Franklin Roosevelt, Harry Truman, and John Kennedy.
As the campaign progressed, his rhetoric followed a series of predictable partisan turns. During the primaries, he referenced not only Democratic presidents John Kennedy, Lyndon Johnson, and Jimmy Carter, but presidential aspirant Adlai Stevenson. Once he secured the nomination, he returned to citing both Lincoln (“government of, by, and for the American people”) and Theodore Roosevelt (on the power of the bully pulpit), along with Thomas Jefferson (“like a firebell in the night”) and John Kennedy (“a call to service”). His references reinforced his message: “In a way, many of the decisions we must make are those which go beyond the traditional labels that we normally judge politics by. They really go beyond Democrat and Republican, and left and right, and liberal and conservative” (Smith 1996, 256).

Clinton won the White House in November with over 68 percent of the electoral votes (370), carrying thirty-two states and the District of Columbia. Though he had not earned a majority of the national popular vote (43 percent), when his vote share was combined with that of Reform party candidate Ross Perot, the total was over 62 percent and most interpreted this to mean that the voters preferred change to the status quo. Clinton also thought that the electorate wanted something new (Clinton 2004, 446). The voters, however, were not looking for a new Franklin Roosevelt nor did they want a new Thomas Jefferson, but Clinton—perhaps believing that he needed to establish his Democratic presidential lineage—reached back to those exemplars during his first few years in office.9

On January 17, 1993, Clinton started his presidency—three days before he was sworn into office—with a series of speeches beginning in Charlottesville, Virginia, at Monticello (Thomas Jefferson’s home) and ending at the Lincoln Memorial. At the Lincoln Memorial, Clinton explained that Lincoln “gave new life to Jefferson’s dream that we are all created free and equal” (Clinton 2004, 471). A few days later, Clinton cited both Franklin Roosevelt and Thomas Jefferson in his inaugural address.10

Clinton’s first hundred days were almost as eventful as Franklin Roosevelt’s though they were not nearly as successful, nor as well received. He made a misstep with the appointment of Zoe Baird, and the issue of gays in the military received significant negative media attention. He appointed First Lady Hillary Clinton chair of his health care reform efforts and planned to give her a West Wing office, but then that created controversy among Washingtonians. In April, the FBI raid on the Branch Davidians in Waco, Texas became a fiasco and brought on more criticism. Clinton, however, managed to get two of his major policies—the Family and Medical Leave Act and his budget proposal to reduce the deficit—through Congress.

Meanwhile, he tried to rise above the frenzied politics with soaring rhetoric and symbolic events, which did not match reality and appear to have fallen flat. Clinton cited Franklin Roosevelt and Thomas Jefferson a total of twenty-two times, and he mentioned

9. Clinton had recently read both Willard Sterne Randall’s biography of Thomas Jefferson and Geoffrey C. Ward’s biography of Franklin D. Roosevelt and it is likely that these presidents were “top of mind” (Brownstein 2006).
10. For a detailed discussion of these events and an analysis of his speech, see Hatzenbuehler (1997) and Brown (2006a).
Abraham Lincoln and Theodore Roosevelt four times each. As evidenced in Table 1 below, this meant that 50 percent of his references to these four presidential exemplars for that year came before the end of April (30 out of 60). Further, he tended to mention them at either ceremonial occasions (i.e., holidays, anniversary commemorations, and diplomatic events), or in press conferences (part of the “other” category), making use of them mostly as authoritative citations and historical symbols.

In February he gave an address on his economic program at Hyde Park, New York (Franklin Roosevelt’s home) and commented: “Some people thought he [Thomas Jefferson] was crazy when he ponied up $15 million to buy something then called the Louisiana Purchase, which most Americans could not even imagine and hardly anyone had ever seen. And if he hadn’t done it, since I live on the edge of the Louisiana Purchase, you’d be listening to somebody from somewhere else give this speech today” (Public Papers of the Presidents [PPP] 1993, 1: 138). He gave a speech in April at the Jefferson Memorial, celebrating the 250th anniversary of Jefferson’s birth, and noted that Franklin Roosevelt (“a worthy heir”) had pushed for the monument’s construction. Along with this ceremony, the White House announced a year-long celebration of Jefferson that would include conferences and more events. In May, during the ceremony for the 50th anniversary of World War II, Clinton referenced Franklin Roosevelt and announced the issuance of a commemorative coin, whose sale would be used to fund the construction of a memorial on the National Mall. By the time his first Fourth of July came around—a day when all presidents pay homage to Jefferson—Clinton had already mentioned him eighteen times. Coupling this with his Franklin Roosevelt citations (fourteen by then), he was averaging two presidential references a week.

This first year in office, Clinton did almost exactly what he had done on the campaign trail with regard to past presidents, except that his references to Republicans had declined substantially. He cited Lyndon Johnson (8), Jimmy Carter (11), John Kennedy (12), Harry Truman (17), Franklin Roosevelt (19), and Thomas Jefferson (25). Together, these dwarfed his typical Republican references to Abraham Lincoln (11), Theodore Roosevelt (5), Dwight Eisenhower (4), and Richard Nixon (3).11 While he invoked Ronald Reagan and George H. W. Bush over ten times each, his comments were seldom complimentary. Hence, Clinton’s presidential rhetoric made him sound more like a “New Liberal” than a “New Democrat.”

This pattern continued in 1994, despite Clinton having secured policy wins on the North American Free Trade Agreement (NAFTA) and the Brady bill (gun control). Rhetorically, Clinton made only one significant change from 1993 to 1994. He referenced Harry Truman in nearly every speech he made on health care.12 At one point in late July, he gave a long speech from the Truman Courthouse in Independence, Missouri, pointing out Truman’s position on health care from fifty years before. He began with: “I believe that most people here who disagree with me about national health reform do

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11. For a summary table of all of Clinton’s presidential references, see Appendix B.

12. Clinton made over 100 references to Truman in 1994.
TABLE 1
Number of Presidential Mentions Made by President Clinton by Event, 1993-2001*

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Source: Public Papers of the Presidents, published by the Office of the Federal Register, National Archives and Records Administration, Washington, DC. The number of mentions for each president was obtained through an electronic search of the eight volumes on the Government Printing Office website (http://www.gpoaccess.gov/pubpapers/index.html), using both the first and last name of the president. Only those mentions where the president discussed the past president were included. For example, a presidential event on the USS Theodore Roosevelt that included no mention in the text of President Theodore Roosevelt was omitted.

*Events were categorized by type, which was determined by the venue and the audience: Political, Ceremonial, Economic, Environmental, Racial/Religious, Education, Health Care/Safety, Military, and Other. For further coding information, see Appendix A.
admire Harry Truman. They probably think he ought to be on Mount Rushmore” (PPP 1994, 1: 1342). His numerous Truman references likely reinforced his “new” image as an “old” Democrat.\(^\text{13}\)

When the 1994 midterm elections occurred and the Republicans gained control of Congress, Clinton seemed to know that he needed a new approach. According to John Harris:

As 1994 reached its end, he [Clinton] was asking himself basic questions about his leadership style and values. In the search for answers, he was reorienting himself intellectually and emotionally. . . . Around this same time, he immersed himself in a subject that had fascinated him since boyhood: the history of the presidency. He read August Heckscher on Woodrow Wilson, for instance, and Benjamin Thomas on Abraham Lincoln. He did not restrict himself to famous presidencies; he studied the obscure ones, too, looking for insight. This was a sober exercise, not the vainglorious emulation of JFK and FDR that marked his early days in office. He was now in a position to really understand the office, and to think anew about how predecessors had dealt with their own challenges and limitations. (2005, 156)

From this point on, Clinton began citing Abraham Lincoln and Theodore Roosevelt more frequently, which was likely the result of his learning more about these and other presidents. His research also led him back to “New Democratic” ideas and the themes of his 1992 campaign. Hence, his movement to the center was not just some strategy dreamt up by Dick Morris or David Gergen. Clinton is the one responsible for rediscovering his roots (Clinton 2004, 632).

In 1995, Clinton was confronted with a series of governing challenges, which gave him an opportunity to flex his executive muscle. And he jumped in. He led the effort to keep Mexico from financial collapse with a loan from the U.S. Treasury (devised by then-Treasury Secretary Robert Rubin); reacted commendably to the tragic bombing in Oklahoma City; sent military forces to assist with the conflict in Bosnia; and beat then-House Speaker Newt Gingrich in a budget showdown over the summer.

As mentioned, his use of exemplars during the year changed dramatically. Not only did he incorporate more presidents into his rhetoric, but he also appears to have begun examining more closely his predecessors’ legacies. While his references to Thomas Jefferson (14) and Franklin Roosevelt (23) remained high, his citations of Harry Truman dropped to seventeen, which may have been part of his desire to move away from “FDR-linked” Democrats.\(^\text{14}\) He mentioned Abraham Lincoln (22) and Theodore Roosevelt (14) more often. He cited George Washington and Woodrow Wilson eleven times each in 1995 (the former was mentioned seven times in 1993 and the latter only three times). Overall, his bipartisan references increased, along with the distribution of his references across the presidents (from eighteen presidents in 1993 to twenty-five presidents in 1995). Thus, Clinton’s repertoire of presidential symbols was expanding.

\(^{13}\) For further discussion of the Truman exemplar and Clinton’s efforts in 1994, see Brown (2006a).
\(^{14}\) For more discussion about Truman, see Brown (2006a).
Looking more closely, this was the start of Clinton’s Hamiltonian shift. His reading about Wilson seems to have sparked an interest in Theodore Roosevelt and the dialectic between them (the New Freedom versus the New Nationalism, respectively). At a commencement, he said: “Theodore Roosevelt and the Americans of his generation made the right choices at the right moment. They met the challenges of the present, paved the way for a better future, and redeemed the promise of America” (PPP 1995, 1: 642). In August, he explained: “We haven’t had a debate like this since the industrial revolution changed America and Theodore Roosevelt and Woodrow Wilson. . . . We reached the right kind of decisions then, and we preserved the free enterprise system and broadened freedom and opportunity throughout the 20th century steadily” (PPP 1995, 2: 1234).

In short, Clinton was sifting through his own interpretations of the Jefferson-Hamilton debate. He was undergoing a process of “walking back in time,” attempting to learn and unlearn knowledge as it was constructed. As he studied Wilson, he found himself engaged in “the great debate” as it took place in the early twentieth century before Franklin Roosevelt. Ever curious, Clinton continued this historical quest and by the end of his second term, he delved into the debate between Jefferson and Hamilton as it had played out during their time. This pursuit gave him the opportunity to revisit the constructions of several of his predecessors and consider how he might “order-shatter, order-affirm, and order-create” within the institution itself. Before moving on, describing Roosevelt’s construction of “the great debate” is necessary in order to perceive the context within which Clinton found himself (see also Knott 2002; Lind 1997).

As I have argued elsewhere, Franklin Roosevelt constructed a philosophy of government which might be termed egalitarian nationalism (Brown 2005, 2006a, 2006b). It was not a small feat and it took years, but he started this process in 1919, when he was positioning himself for a presidential run in 1924 (polio interfered with his plans in 1921). Taking ideas from both Woodrow Wilson and Theodore Roosevelt, he redefined “liberal” and “conservative” in political discourse. He then used his new definitions to force open a class-based cleavage in American society. As a result, few individuals today understand the Jefferson-Hamilton debate, except as it has been described as one about class (“laborers” versus “money-men”). Further, the phrase “liberal businessman” tends to sound like a contradiction in terms.15

Alexander Hamilton and Theodore Roosevelt would have had problems with this because they believed that (1) business could be progressive, bringing change and innovation to society and (2) individuals could be conservative (even regressive), desiring only the status quo or the past. They also knew that the reverse was equally likely, which was why their philosophies of government emphasized alignment of interests and meritocratic systems, not absolutes or ideals.

By 1995, Clinton was clearly wrestling with these ideas. In January, he described the Lincoln-Douglas debates as those “about the course of our country and the proper role of government in a time of great change” (PPP 1995, 1: 24). He went on: “The

15. For a more complete description of how Franklin Roosevelt performed these sleights of hand, see Brown (2005, 2006a, 2006b).
Republican Party was born out of a conviction that even though we are a country deeply devoted to limited government, there are some things that the times demand national action on and that at that moment the times demanded, first, national action to stop the spread of slavery, and then, national action to stop slavery” (PPP 1995, 1: 24). By October, Clinton seems to have been working on a synthesis. At a Jefferson-Jackson Day dinner in Des Moines, Iowa, he said: “If you think about the sharp differences in values being expressed in Washington today, we would be historically accurate to call this the Jefferson-Jackson-Abraham Lincoln-Theodore Roosevelt dinner. They were all on our side” (PPP 1995, 2: 1641).

Throughout his 1996 reelection campaign Clinton continued this “stealth articulation,” identifying the progressive strains in Lincoln and Theodore Roosevelt. He framed the welfare reform bill and the reinventing government initiative in this context, talking about them as policies that would excite, energize, and liberate people, rather than oppress them. While he may not have realized it, this understanding of government is Hamiltonian.16 He won the election in November, carrying 379 electoral votes.

As 1997 unfolded, Clinton’s use of presidential exemplars declined somewhat because his campaigning slowed. Thomas Jefferson was the exception because he was a Clinton “favorite” at ceremonial functions, especially those that occurred overseas with foreign heads of state. Still, Clinton was working to bring together national progressivism and limited government into his own theory of governing (for example, see PPP 1997, 2: 1516-17).

Shortly after 1998 began, Clinton found himself once again on the defensive—only this time in front of Prosecutor Kenneth Starr who alleged that Clinton had had an affair with Monica Lewinsky while in office and lied about it in a civil deposition (Clinton 2004, 773). Though Clinton’s denials and evasive actions likely made things worse, he believed he was engaged in a fight that had breached the boundaries of the Constitution.17 Despite this turmoil, the budget was on track toward a surplus and all of the statistics were heading in the “right” direction (crime was down, unemployment was down, GDP was up, inflation was under control, productivity was up, etc.). When Clinton proposed to “save Social Security first” in his 1998 State of the Union message, he did not mention Franklin Roosevelt, nor did he reference Jefferson, Lincoln, or Theodore Roosevelt. He likely knew that it was time for him to sound presidential, rather than to defer his authority to presidential ghosts. Nonetheless, his interpretation...

16. Hamilton’s intent was to use the “government to bring about economic changes, which in turn would alter society for its own benefit” (McDonald 1979, 234). The economic system Hamilton encouraged—manufacturing and trade—was progressive at the time. He helped establish the notion of credit (which is really no more than an economic device that allows one to “bet” on one’s future and by extension on one’s abilities) because it was a way for those without land or savings to compete and prove themselves meritorious. As McDonald wrote, “Hamilton believed that the greatest benefits of a system of government-encouraged private enterprise were spiritual—the enlargement of the scope of human freedom and the enrichment of the opportunities for human endeavor” (1979, 234). Although some have argued that Hamilton only sought to assist the wealthy, “in Hamilton’s own experience, privilege and distinction were earned by brilliance and diligence, not conferred by birth” (McDonald 1979, 235, citing Jacob Cooke 1982).

of “the great debate” had crystallized and what is more, it was basically a rearticulation of the principles that he had helped the Democratic Leadership Council forge ten years earlier. He said:

We have met the challenge of these changes, as Americans have at every turning point in our history, by renewing the very idea of America: widening the circle of opportunity, deepening the meaning of our freedom, forging a more perfect Union. . . . We have moved past the sterile debate between those who say government is the enemy and those who say government is the answer. My fellow Americans, we have found a third way. (PPP 1998, 1: 112-13)

Even though Clinton did not mention these presidents in his State of the Union message, his use of exemplars in 1998 was frequent and bipartisan (see Figure 1).

In Clinton’s first five years in office, he averaged a combined 61 mentions of Jefferson, Lincoln, Theodore Roosevelt, and Franklin Roosevelt each year. In 1998, however, he mentioned these presidents a total of 112 times. Further, 1998 seems to have set the trend for the volume of references during Clinton’s last two years—1999 and 2000—in office. His rhetoric also reveals that Theodore Roosevelt—an outright admirer of Hamilton—became Clinton’s “favorite” exemplar.18 He even referenced Hamilton (in his first five years, he cited him twice, but in his last three years, he cited him eight times). In November, at an e-commerce event, Clinton said:

18. Philip Abbott (2006) discussed Clinton’s relationship to another president, Richard M. Nixon. While it might seem that Abbott’s conclusions are contradictory to much of this argument, I would assert that the two studies are complementary. For further discussion, see Brown (2006a).
Our nation was founded at the dawn of a period not so very unlike this one—a period of enormous economic upheaval when the world was beginning to move from an agrarian to an industrial economy. Alexander Hamilton, our first Secretary of the Treasury, understood these changes well. In his remarkable Report on Manufacturers and other of his writings, Hamilton identified new ways to harness the changes then going on so that our nation could advance. Listen to this. He proposed what many thought were radical ideas at the time: a central bank, a common currency, a national system of roads and canals, a crackdown on fraud so that American products would be known all over the world for quality. He created the blueprint that made possible America’s Industrial Age and, many of us believe, the preservation of the American union. Today we are drawing up the blueprints for a new economic age, not for starting big institutions, but for freeing small entrepreneurs. We have the honor of designing the architecture for a global economic marketplace, with stable laws, strong protections for consumers, serious incentives for competition—a marketplace to include all people and all nations. (PPP 1998, 2: 2097)

Clinton appears to have arrived at a synthesis—a progressive globalist philosophy that uses energetic, albeit efficient government to promote a meritocratic and entrepreneurial society. It was a Hamiltonian interpretation of government for the twenty-first century.19

The one change that characterized Clinton’s last year was that he went “president-crazy.” Thinking about his legacy and helping on the campaign trail, he continually referenced his predecessors. The total number of occasions where he cited a president was 540—more than double from the year before which was 259, and more than triple the number of citations (152) from his first year in office. Even when the number is reduced to include only Jefferson, Lincoln, and both Roosevelts, the pattern remains (see Table 1).

Importantly, Clinton worked to persuade his fellow partisans to carry on his ideological construction. Whereas at the beginning of his presidency he cited his predecessors mostly at ceremonial or educational events, by the end he cited them mostly at political events. Further, he referenced Theodore Roosevelt more than any other exemplar in these political venues (102 times over the eight years and most occurred in the last three years). These behaviors suggest that he was using his political opportunities to try (1) to articulate a new vision for the Democratic party and (2) to move his fellow partisans more toward his centrist philosophy. Clinton’s rhetoric likely helped the Democratic party frame its policy positions and become competitive in the 1996, 1998, and 2000 elections after their losses in 1994. In fact, it may have been former Vice President Al Gore’s distancing of himself from Clinton and his Hamiltonian construction of the Democratic party which contributed to his presidential loss in 2000.20

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19. Recall that in Hamilton’s time, agriculture and plantation life (with its dependence on slave labor) were the conservative economic system (dating back centuries), while manufacturing was the new, progressive (and potentially liberating) “technologies.” For further discussion, see McDonald (1979, 215-17).

20. For a discussion on how these ideas continued past Clinton and into the 2000 campaign, see Brown (2005, 2006a). For a rhetorical analysis tracking a similar phenomenon, see Dunn (2002).
Overall, past presidents are the means through which sitting presidents learn about their institution and their own place in political time. Tracing their use of exemplars reveals their learning process. Though Clinton was likely an extreme case, both in terms of his desire to learn and in how he incorporated these lessons into his rhetoric, it does not seem farfetched to believe that a study of other presidents’ rhetoric would reveal similar patterns of learning and incorporation, if different conclusions. Although causation is difficult with this type of study—events likely drive presidents to learn about their predecessors and presidential actions likely shape events—it would be worthwhile to develop a model that investigates patterns of exemplary use and popular reactions to them. The institution of the presidency must be remade with every occupant and rhetoric is central to that occupant’s efforts in reshaping the office. Thus, presidential exemplars are institutional mechanisms which assist the current occupant to make the office his own and leave a partisan legacy.

### Appendix A

**Type of Event Coding of Speeches, Remarks, Addresses, and Memorandums**

<table>
<thead>
<tr>
<th>Type</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Political</td>
<td>Before party groups (e.g., DNC, DLC), with candidates, or at public rallies or events, “whistle-stop tours.”</td>
</tr>
<tr>
<td>Ceremonial</td>
<td>Obligatory (e.g., inaugural, Presidential Medal of Freedom awards, radio addresses), commemorative (e.g., holidays), or diplomatic or foreign travel events (e.g., remarks with King Juan Carlos of Spain).</td>
</tr>
<tr>
<td>Economic</td>
<td>Before business leaders or labor groups or at economic events (e.g., WTO event, signing legislation, visiting factory).</td>
</tr>
<tr>
<td>Environmental</td>
<td>Before conservation groups or at environmental events (e.g., signing legislation, visiting a national park).</td>
</tr>
<tr>
<td>Race-Religion</td>
<td>Before racial, ethnic, or religious groups or at an event where one of those topics is the focus (e.g., National Prayer Breakfast or Kennedy-King Dinner).</td>
</tr>
<tr>
<td>Education</td>
<td>Before education groups or at education events (e.g., commencement speeches, signing legislation, visiting a school).</td>
</tr>
<tr>
<td>Health-Safety</td>
<td>At events focused on health care and/or public safety (e.g., signing legislation, speaking before a group of police officers or at the FDA).</td>
</tr>
<tr>
<td>Military</td>
<td>Before military groups (e.g., veterans, soldiers, Pentagon personnel) or at military events (e.g., visiting a base, an aircraft carrier).</td>
</tr>
<tr>
<td>Other</td>
<td>Press conferences, special events (e.g., Millennium Series Luncheon, screening of the “American President” PBS series), or television interviews.</td>
</tr>
</tbody>
</table>
Appendix B

President Clinton’s Total Number of Mentions of Former Presidents

<table>
<thead>
<tr>
<th>Number</th>
<th>Name</th>
</tr>
</thead>
<tbody>
<tr>
<td>1-10</td>
<td>Martin Van Buren, William Henry Harrison, John Tyler, Zachary Taylor,</td>
</tr>
<tr>
<td></td>
<td>Rutherford Hayes, James Garfield, Chester Arthur, Grover Cleveland,</td>
</tr>
<tr>
<td></td>
<td>Benjamin Harrison, William McKinley, William Taft, Warren Harding</td>
</tr>
<tr>
<td>11-25</td>
<td>James Madison, James Monroe, John Q. Adams, Calvin Coolidge, Herbert</td>
</tr>
<tr>
<td></td>
<td>Hoover, Gerald Ford</td>
</tr>
<tr>
<td>26-50</td>
<td>John Adams, John F. Kennedy, George H. W. Bush</td>
</tr>
<tr>
<td>51-75</td>
<td>Woodrow Wilson, Dwight Eisenhower, Richard Nixon, Jimmy Carter,</td>
</tr>
<tr>
<td></td>
<td>Ronald Reagan</td>
</tr>
<tr>
<td>76-100</td>
<td>Andrew Jackson</td>
</tr>
<tr>
<td>101-125</td>
<td>George Washington, Lyndon Johnson</td>
</tr>
<tr>
<td>126-150</td>
<td>—</td>
</tr>
<tr>
<td>151-175</td>
<td>Thomas Jefferson, Abraham Lincoln</td>
</tr>
<tr>
<td>176-200</td>
<td>Theodore Roosevelt, Franklin Roosevelt</td>
</tr>
<tr>
<td>200+</td>
<td>Harry Truman</td>
</tr>
</tbody>
</table>

Source: Public Papers of the Presidents, published by the Office of the Federal Register, National Archives and Records Administration, Washington, DC. The number of mentions for each president was obtained through an electronic search of the eight volumes on the Government Printing Office website (http://www.gpoaccess.gov/pubpapers/index.html), using both the first and last name of the president. The two presidents who Clinton did not mention during his eight years in office were James Polk and James Buchanan.

a. Kennedy and Bush posed more of a difficulty with respect to their searches because they each had a son who carried on their name. Their totals may be lower because their middle initials were utilized in their searches. Similarly, John Q. Adams was likely to be confused with his father unless his middle initial was employed in his search.
b. While Clinton mentioned Truman over 200 times during the course of his presidency, more than 100 of those mentions came in 1994 alone—nearly all relating to the health care initiative. Had that policy proposal not been part of Clinton’s agenda, the total number of Truman’s mentions would be near the higher end of the 126-50 range.

References


Dunn, Josh. 2002. Rhetorical pantheism and the Clinton legacy. Paper presented at the Southern Political Science Association annual conference, November 6 to 9, in Savannah, GA.


The Law: Presidential Inherent Power: The “Sole Organ” Doctrine

LOUIS FISHER
Library of Congress

The executive branch relies in part on the “sole organ” doctrine to define presidential power broadly in foreign relations and national security, including assertions of an inherent executive power that is not subject to legislative or judicial constraints. The doctrine draws from a statement by John Marshall as a member of the House of Representatives in 1800: “The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.” In dicta, the Supreme Court, in United States v. Curtiss-Wright (1936), cited Marshall’s speech to support an independent, extra-constitutional, or exclusive power of the president. When read in context, however, Marshall made no such claim.

In a series of confidential memos written after 9/11, later released to the public, the Justice Department wrote: “We conclude that the Constitution vests the President with the plenary authority, as Commander in Chief and the sole organ of the Nation in its foreign relations, to use military force abroad—especially in response to grave national emergencies created by sudden, unforeseen attacks on the people and territory of the United States” (U.S. Justice Department 2001, 1). On January 19, 2006, the Justice Department defended the authority of the National Security Agency (NSA) to intercept international communications coming into and going out of the United States of persons allegedly linked to al Qaeda or related terrorist organizations. The department pointed to “the President’s well-recognized inherent constitutional authority as Commander in Chief and sole organ for the Nation in foreign affairs” (U.S. Justice Department 2006a, 1). In cases challenging NSA eavesdropping, the government argued in court that the state secrets privilege “embodies central aspects of the Nation’s responsibilities under Article II of the Constitution as Commander-in-Chief and as the Nation’s organ for foreign affairs” (U.S. Justice Department 2006b, 4).

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AUTHOR’S NOTE: The views expressed here are my own. Many thanks to Charles Lofgren for constructive comments on the draft.
Referred to in this manner, the “sole organ” doctrine seems to support a plenary, exclusive, and inherent authority of the president in foreign relations and national security, an authority that overrides conflicting statutes and treaties. The theory appears to carry special weight because its author is John Marshall, a member of the House in 1800 and later chief justice of the Supreme Court. The theory is developed in an important foreign affairs case, *United States v. Curtiss-Wright*. However, when Marshall’s speech is read in context, he did not advocate an independent, inherent presidential power over external affairs. That scope of power did exist in foreign constitutions and precedents, such as in British law, but the Framers rejected the model of an executive empowered to exercise exclusive control over external relations (Fisher 2004, 1-16).

Marshall’s Speech

On March 7, 1800, in the House of Representatives, John Marshall called the president “the sole organ of the nation in its external relations, and its sole representative with foreign nations.” The context of his speech demonstrates that his intent was not to advocate inherent or exclusive executive power, much less the powers of a British monarch. As shown below, Marshall’s objective was to defend the authority of President John Adams to carry out an extradition treaty. The president was not the sole organ in formulating the treaty. He was the sole organ in implementing it. Article II of the Constitution specifies that it is the president’s duty to “take Care that the Laws be faithfully executed,” and in Article VI, all treaties made “shall be the supreme Law of the Land.”

During the debate, opponents of President Adams insisted that he should be impeached or censured for turning over to England someone charged with murder. Because the case was already pending in an American court, some lawmakers urged that action be taken against him for encroaching upon the judiciary and thus violating the doctrine of separation of powers. Yet Adams had operated under the extradition article (Article 27) of the Jay Treaty, which provided that the United States and Great Britain would deliver up to each other “all persons” charged with murder or forgery. The debate began with a member of the House requesting that President Adams provide documents “relative to, the apprehension and delivering of Jonathan Robbins, under the twenty-seventh article” of the treaty (10 Annals of Cong. 511). Although critics of Adams claimed that Robbins was “a citizen of the United States” (ibid., Representative Edward Livingston), Secretary of State Timothy Pickering regarded Robbins as an assumed name for Thomas Nash, a native Irishman (ibid., 515). U.S. District Judge Thomas Bee, who was asked to turn the prisoner over to the British, considered the individual to be Thomas

2. By the 1600s, the British Parliament had begun to exercise some foreign affairs power through the withholding and conditioning of funds, investigations, and impeachment of cabinet officials (Sofaer 1976, 6-15).
4. Article 27 of the Treaty with Great Britain, November 19, 1794, 8 Stat. 129.
Nash. A House resolution described President Adams’s decision to turn the accused over to the British as “a dangerous interference of the Executive with Judicial decisions” (ibid., 533). Some members questioned whether the House had authority “to censure or to approbate the conduct of the Executive” (ibid., 551, statement by Representative William Craik). Others saw the debate heading in the direction of impeachment (ibid., statement by Representative Robert Harper).

Five months before the House debate, Marshall wrote an article for the *Virginia Federalist* (Richmond) on September 7, 1799, setting forth his analysis of the dispute over what he called “the case of Robbins” (Cullen 1984, 23). He explained that on matters of extradition, nationals communicate with each other “through the channel of their governments,” and the “natural, and obvious and the proper mode is an application on the part of the government (requiring the fugitive) to the executive of the nation to which he has fled, to secure and cause him to be delivered up” (ibid., 25). The concept of sole organ, then, included this capacity of the president to act as the channel for communicating with other nations. In carrying out Article 27 of the Jay Treaty, Marshall said that President Adams “[u]pon the whole . . . appears to have done no more than his duty” (ibid., 28). By implementing this treaty provision, Adams had “execute[d] one of the supreme laws of the land, which he was bound to observe and have carried into effect” (ibid.). Nothing in this analysis suggested an inherent or extraconstitutional role for the president. Once the president and the Senate had agreed on a treaty, it was the president’s duty to see that the treaty was faithfully executed, as with any other law.

Having honed his major arguments, Marshall was fully prepared to respond to the House resolutions of possible censure or impeachment. After listening to preceding speakers, he took the floor to say that there were no grounds to rebuke the president. In matters such as carrying out an extradition provision in a treaty, “a case like that of Thomas Nash is a case for Executive and not Judicial decision” (10 Annals of Cong. 611).

Here is the sole-organ comment in full:

> The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. Of consequence, the demand of a foreign nation can only be made on him.
>
> He possesses the whole Executive power. He holds and directs the force of the nation. Of consequence, any act to be performed by the force of the nation is to be performed through him.
>
> He is charged to execute the laws. A treaty is declared to be a law. He must then execute a treaty, where he, and he alone, possesses the means of executing it.
>
> The treaty, which is a law, enjoins the performance of a particular object. The person who is to perform this object is marked out by the Constitution, since the person is named who conducts the foreign intercourse, and is to take care that the laws be faithfully executed. The means by which it is to be performed, the force of the nation, are in the hands of this person. Ought not this person to perform the object, although the particular mode of using the means has not been prescribed? Congress, unquestionably, may prescribe the mode, and

5. 10 Annals of Cong. 515; see United States v. Robins [sic], 27 Fed. Cas. 825, 832 (1799) (Case no. 16, 175). The proceedings before Judge Bee are also reprinted in Wharton (1849, 392-457).
Congress may devolve on others the whole execution of the contract; but, till this be done, it seems the duty of the executive department to execute the contract by any means it possesses. (ibid., 613-14)

Marshall emphasized that President Adams had not attempted to make foreign policy single-handedly. He was carrying out a policy made jointly by the president and the Senate (for treaties). Only after the policy had been formulated through the collective effort of the executive and legislative branches, either by treaty or by statute, did the president emerge as the sole organ in implementing national policy. Although it was the president’s constitutional duty to carry out the law, including treaties, “Congress, unquestionably, may prescribe the mode.” For example, legislation in 1848 provided that in all cases of treaties of extradition between the United States and another country, federal and state judges were authorized to determine whether the evidence was sufficient to sustain the charge against the individual to be extradited.6

Marshall also recognized that there were limits on the president’s authority to make law where Congress had not provided it: “And although the Executive cannot supply a total Legislative omission, yet it is not admitted or believed that there is such a total omission in this case” (ibid., 614). What if Thomas Nash had been an American and pressed into service on the British ship *Hermione*, where he committed murder? Could he have been transferred to England and tried and executed there? Marshall denied it could be so: “Had Thomas Nash been an impressed American, the homicide on board the Hermione would, most certainly, not have been a murder. The act of impressing an American is an act of lawless violence. The confinement on board a vessel is a continuation of the violence, and an additional outrage” (ibid., 617).

Edward S. Corwin, in his classic work *The President*, said that what Marshall had “foremost in mind” in describing the president as the sole organ “was simply the President’s role as instrument of communication with other governments” (Corwin 1957, 178, emphasis in original). He concluded: “There is no more securely established principle of constitutional practice than the exclusive right of the President to be the nation’s intermediary in its dealing with other nations” (ibid., 184, emphasis in original). This emphasis on communication of national policy with other countries did not include a form of inherent power incapable of being checked by other branches of government.

In his capacity as chief justice of the Supreme Court, Marshall held to his position that the making of foreign policy is a joint exercise by the executive and legislative branches (through treaties and statutes), not a unilateral or exclusive authority of the president. Blackstone’s theory of external relations, the British royal prerogative, and the concept of inherent executive power in foreign affairs do not appear in Marshall’s decisions. With the war power, for example, Marshall looked solely to Congress—not the president—for the authority to take the country to war. Marshall had no difficulty in identifying the branch that possessed the war power: “The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone

6. 9 Stat. 320 (1848); *In re Kaine*, 55 U.S. 103, 111-14 (1852).
be resorted to as our guides in this enquiry.” In an 1804 case, Marshall ruled that, when a presidential proclamation issued in time of war conflicts with a statute enacted by Congress, the statute prevails.8

In Marbury v. Madison (1803), Chief Justice Marshall recognized a field of presidential actions that was political, exclusive in nature, and not subject to checks from the judiciary. Those actions, however, did not create a privileged area for the president with regard to foreign affairs, external affairs, or national security. Congress can impose on executive officers a range of statutory duties that trump presidential preferences: “Where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.”9 Courts are available to interpret statutory duties and the individual rights attached to them. Marshall said that, if the head of an executive department “commits any illegal act, under colour of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law.”10 That principle applied to both domestic and external affairs, as can be seen in the 1804 case of Little v. Barreme.

The Curtiss-Wright Case

Although the Court’s decision in Curtiss-Wright is a standard citation for the sole-organ doctrine and the existence of inherent executive power in the field of foreign affairs, the case itself did not concern independent presidential power. The issue before the judiciary was whether Congress had delegated legislative power too broadly when it authorized the president to declare an arms embargo in South America. A joint resolution by Congress allowed the president to prohibit the sale of arms in the Chaco region whenever he found that it “may contribute to the reestablishment of peace” between belligerents.11

In imposing the embargo, President Franklin D. Roosevelt relied solely on statutory—not inherent—authority. His proclamation prohibiting the sale of arms and munitions to countries engaged in armed conflict in the Chaco begins: “NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, acting under and by virtue of the authority conferred in me by the said joint resolution of Congress.”12 Nowhere in that proclamation is there any assertion of inherent, independent, extraconstitutional, or exclusive presidential power.

Litigation on the proclamation focused on legislative power because, during the previous year, the court twice struck down the delegation by Congress of domestic power

7. Talbot v. Seeman, 5 U.S. 1, 28 (1801); see also Bas v. Tingy, 4 U.S. 37 (1800).
10. Ibid., 170.
12. Ibid., 1745.
to the president. The issue in *Curtiss-Wright* was whether Congress could delegate legislative power more broadly in international affairs than it could in domestic affairs. A district court, holding that the joint resolution impermissibly delegated legislative authority, said nothing about any reservoir of inherent presidential power. It acknowledged the “traditional practice of Congress in reposing the widest discretion in the Executive Department of the government in the conduct of the delicate and nicely posed issues of international relations.” Recognizing that need, however, did not save the delegation.

The district court decision was taken directly to the Supreme Court, where none of the briefs on either side discussed the availability of independent, inherent, or extraconstitutional powers for the president. As to the issue of jurisdiction, the Justice Department advised that the question for the Court went to “the very power of Congress to delegate to the Executive authority to investigate and make findings in order to implement a legislative purpose” (U.S. Justice Department 1936, 7). The joint resolution passed by Congress, said the government, contained adequate standards to guide the president and did not fall prey to the “unfettered discretion” found by the Court in the two 1935 decisions (ibid., 16).

The brief for the private company, Curtiss-Wright, also focused on the issue of delegated legislative power and did not explore the existence of independent or inherent presidential power (Brief for Appellees 1936, 3). A separate brief, prepared for other private parties, concentrated on the delegation of legislative power and did not attempt to locate any freestanding executive authority (Brief for Appellees Allard 1936). Given Roosevelt’s stated dependence on statutory authority and the lack of anything in the briefs about inherent presidential power, there was no need for the Supreme Court to explore the existence of independent sources of executive authority.

Nevertheless, in extensive dicta, the decision by Justice George Sutherland went far beyond the specific issue before the Court and discussed extraconstitutional powers of the president. Many of the themes in this decision were drawn from his writings as a U.S. senator from Utah. According to his biographer, Sutherland “had long been the advocate of a vigorous diplomacy which strongly, even belligerently, called always for an assertion of American rights. It was therefore to be expected that [Woodrow] Wilson’s cautious, sometimes pacifistic, approach excited in him only contempt and disgust” (Paschal 1951, 93).

### Sutherland’s Preparation

Justice Sutherland had been a two-term senator from Utah, serving from March 4, 1905 to March 3, 1917, and a member of the Senate Foreign Relations Committee. His opinion in *Curtiss-Wright* closely tracks his article, “The Internal and External Powers of

15. Ibid., 240.
the National Government,” printed as a Senate document in 1910 (S. Doc. No. 417, 61st Cong., 2d sess.). The article began with this fundamental principle: “That this Government is one of limited powers, and that absolute power resides nowhere except in the people, no one whose judgment is of any value has ever seriously denied” (ibid., 1, emphasis in original).

Yet subsequent analysis in the article moved in the direction of independent presidential power that could not be checked or limited by the other branches, even by the people’s representatives in Congress. He first faulted other studies for failing “to distinguish between our internal and our external relations” (ibid., emphasis in original). As to the first category, he said the states possessed “every power not delegated to the General Government, or prohibited by the Constitution of the United States or the state constitution” (ibid., 3). With regard to external relations, however, Sutherland argued that, after the Declaration of Independence, the American colonies lost their character as free and independent political bodies and national sovereignty passed then to the central government. He offered this argument: “The Declaration of Independence asserted it when that great instrument declared that the United Colonies as free and independent States (that is, as United States, not as separate States) ‘have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent States may of right do.’ And so national sovereignty inhered in the United States from the beginning. Neither the Colonies nor the States which succeeded them ever separately exercised authority over foreign affairs” (ibid.). As will be noted, this theory has been repudiated by scholars.

In his article, Sutherland connected external matters with the national government: “Over external matters, however, no residuary powers do or can exist in the several States, and from the necessity of the case all necessary authority must be found in the National Government” (ibid., 12, emphasis in original). In Curtiss-Wright, he would associate national sovereignty and external affairs with the president, greatly expanding executive power. In addition to identifying express and implied constitutional powers in the article, Sutherland spoke of “inherent” and “extra-constitutional” powers (ibid., 8-9).

The same themes appear in Sutherland’s book, Constitutional Power and World Affairs (1919). He again distinguishes between external and internal affairs (Sutherland 1919, 26). When Great Britain entered into a peace treaty with America following the war for independence, “it is impossible to escape the conclusion that all powers of external sovereignty finally passed from the Kingdom of Great Britain to the people of the thirteen colonies as one political unit, and not to the people separately as thirteen political units” (ibid., 38). In carrying out military operations, the president “must be given a free, as well as a strong hand. The contingencies of war are limitless—beyond the wit of man to foresee. . . . To rely on the slow and deliberate processes of legislation, after the situation and dangers and problems have arisen, may be to court danger—perhaps overwhelming disaster” (ibid., 111). As explained later in this article, scholars have overwhelmingly rejected his analysis of the Declaration of Independence, national sovereignty, and the sources and scope of presidential authority.

As to popular sovereignty, Sutherland was as inconsistent in his book as he was in his article. Early passages in the book state that “sovereignty—the plenary power to
determine all questions of government without accountability to any one—is in the
people and nowhere else” (ibid., 2). The American Revolution “proceeded upon the
principle that sovereignty belongs to the people, and it is by their consent, either express
or implied, that the governing agency acts in any particular way, or acts at all. This is the
animating principle of the Declaration of Independence. It is the very soul of the
Constitution” (ibid., 10). In an apparent rejection of inherent or extraconstitutional
powers, Sutherland wrote about the Constitution: “One of its great virtues is that it fixes
the rules by which we are to govern” (ibid., 13, emphasis in original). He warned against
“the danger of centralizing irrevocable and absolute power in the hands of a single ruler”
(ibid., 25). On “all matters of external sovereignty” and the general government, the
“result does not flow from a claim of inherent power” (ibid., 47).

Further into the book, however, Sutherland begins to flesh out the concepts of
inherent and extraconstitutional power as applied to external affairs and presidential
authority. He described the Louisiana Purchase “as an exercise of the inherent right of the
United States as a Nation” (ibid., 52, emphasis in original). What he attributed here to
national power (exercised by both elected branches) he later attributed solely to inde-
pendent presidential power. He acknowledged that the Framers broke with Blackstone
by placing many powers of external affairs with Congress in Article I (ibid., 71). Yet once
war is declared or waged, he saw in the president as commander in chief a power that is
supreme: “Whatever any Commander-in-Chief may do under the laws and practices of
war as recognized and followed by civilized nations, may be done by the President as
Commander-in-Chief. In carrying on hostilities he possesses sole authority, and is charged
with sole responsibility, and Congress is excluded from any direct interference” (ibid.,
75).

In time of war, Sutherland argued that traditional rights and liberties had to be
relinquished: “Individual privilege and individual right, however dear or sacred, or
however potent in normal times, must be surrendered by the citizen to strengthen the
hand of the government lifted in the supreme gesture of war. Everything that he has, or
is, or hopes to be—property, liberty, life—may be required” (ibid., 98). Freedom of
speech “may be curtailed or denied,” along with freedom of the press (ibid.). Congress
“has no power to directly interfere with, or curtail the war powers of the Commander-
in-Chief” (ibid., 109). Statutes enacted during World War I invested President Wilson
“with virtual dictatorship over an exceedingly wide range of subjects and activities”
(ibid., 115). Sutherland spoke of the need to define the powers of external sovereignty as
“unimpaired” and “unquestioned” (ibid., 171).

The Decision

Writing for the Court, Justice Sutherland reversed the district court and upheld the
delegation of legislative power to the president to place an embargo on arms or munitions
to the Chaco. Whether the joint resolution “had related solely to internal affairs” would
be open to the challenge of unlawful delegation he found “unnecessary to determine.”
The “whole aim of the resolution is to affect a situation entirely external to the United
States, and falling within the category of foreign affairs.” Sutherland argued that the two categories of external and internal affairs are different “both in respect of their origin and their nature.” The principle that the federal government is limited to either enumerated or implied powers “is categorically true only in respect of our internal affairs.” The purpose, he said, was “to carve from the general mass of legislative powers then possessed by the states such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states.” But that doctrine, Sutherland insisted, “applies only to powers which the states had . . . since the states severally never possessed international powers.” Although the states may not have possessed “international powers,” they did, as will be explained, possess and exercise sovereign powers.

To reach his conclusion, Sutherland said that, after the Declaration of Independence, “the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America.” “Even before the Declaration,” he said, “the colonies were a unit in foreign affairs, acting through a common agency—namely the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence.” By transferring external or foreign affairs directly to the national government, and then associating foreign affairs with the executive, Sutherland put himself in a position to argue for a broad definition of inherent presidential power.

There are two problems with his analysis. First, external sovereignty did not circumvent the colonies and the independent states and pass directly to the national government. When Great Britain entered into a peace treaty with America, the provisional articles of November 30, 1782 were not entered into with a national government. Instead, “His Brittanic Majesty acknowledges the said United States, viz. New-Hampshire, Massachusetts-Bay, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia,” and referred to them as “free, sovereign and independent States.” The colonies formed a Continental Congress in 1774 and it provided for a form of national government until passage of the Articles of Confederation (ratified in 1781) and the U.S. Constitution. Until that time, the states operated as sovereign entities in making treaties and exercising other powers that would eventually pass to the new national government in 1789.

Second, sovereignty and external affairs did not pass from Great Britain to the U.S. president. In 1776, as the time of America’s break with England, there was no president.

17. Ibid.
18. Ibid., 316.
19. Ibid. (emphasis in original).
20. Ibid.
21. Ibid.
22. Ibid.
23. 8 Stat. 55 (1782).
and no separate executive branch. Only one branch of government, the Continental Congress, functioned at the national level. It carried out all governmental powers, including legislative, executive, and judicial (Fisher 1972, 1-27, 253-70). When the new national government under the U.S. Constitution was established in 1789, sovereign powers at the national level were not placed solely in the president. They were divided between Congress and the president, with ultimate sovereignty vested in the people.

Much of Curtiss-Wright is devoted to Sutherland’s discussion about independent and inherent presidential powers, but this part of the decision is entirely dicta and wholly extraneous to the question before the Court: the delegation of legislative power. Having distinguished between external and internal affairs, Sutherland wrote: “In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.”

In his book, Sutherland took a less rigid view. He recognized that senators did in fact participate in the negotiation phase and presidents often acceded to this “practical construction” (Sutherland 1919, 122-24). It was at this point in his decision that Sutherland quoted John Marshall’s sole-organ remark out of context, implying a scope of presidential power that Marshall never embraced. Sutherland proceeded to develop for the president a source of power in foreign affairs that was not grounded in authority delegated by Congress:

> It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an assertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.

In freeing the president from statutory grants of power and legislative restrictions, Sutherland did not explain how the exercise of presidential power would be constrained by requiring that it “be exercised in subordination to the applicable provisions of the Constitution.” Which provisions in the Constitution could check or override presidential initiatives? On that point he was silent. Justice James McReynolds’s dissent was brief: “He is of opinion that the court below reached the right conclusion and its judgment ought to be affirmed.”

24. 299 U.S. 319 (emphasis in original).
25. Ibid., 319-20.
26. Ibid., 333.
Justice Harlan Fiske Stone did not participate. He later wrote to Edwin M. Borchard, a prominent law professor: “I have always regarded it as something of a misfortune that I was foreclosed from expressing my views in... Curtiss-Wright... because I was ill and away from the Court when it was decided” (Stone 1942). In another letter to Borchard, Stone said he “should be glad to be disassociated” with Sutherland’s opinion (Stone 1937). Borchard later advised Stone that the Court, in such cases as Curtiss-Wright, “has attributed to the Executive far more power than he had ever undertaken to claim” (Borchard 1942).

Scholarly Evaluations

Most of the scholarly studies of Curtiss-Wright in professional journals and books have been highly critical of Sutherland’s decision. An article by Julius Goebel in 1938 attacked the principal tenets of the opinion, concluding that Sutherland’s view of sovereignty “passing from the British crown to the union appears to be a perversion of the dictum of Jay, C. J. in Chisholm’s Executors v. Georgia, 3 Dall. 419, 470 (U.S. 1799) to the effect that sovereignty passed from the crown to the people” (Goebel 1938, 572, Note 46). As to Sutherland’s comment that the president “alone negotiates” treaties and that into this field the Senate “cannot intrude,” Goebel regarded such views as “a somewhat misleading description of presidential authority in foreign affairs,” citing earlier examples of presidents consulting the Senate before negotiation (ibid., 47). To Goebel, Sutherland chose “to frame an opinion in language closely parallel to the description of royal prerogative in foreign affairs in the Ship Money Case” of 1637 (ibid., 572-73). This British case is considered a landmark decision in defending the exercise of the royal prerogative to raise revenues against perceived dangers, notwithstanding statutory limitations.27

Writing in 1944, C. Perry Patterson regarded Sutherland’s position on the existence of inherent presidential powers to be “(1) contrary to American history, (2) violative of our political theory, (3) unconstitutional, and (4) unnecessary, undemocratic, and dangerous” (Patterson 1944, 297). The doctrine of Curtiss-Wright “that Congress acquired power over the entire field of foreign affairs as a result of the issue of the Declaration is contrary to the facts of American history” (ibid., 308). Also writing in 1944, James Quarles objected to Sutherland’s reasoning that foreign affairs, as distinguished from domestic affairs, invests the federal government with “powers which do not stem from the Constitution, are not granted, but are inherent” (Quarles 1944, 376-77). He noted that the question of inherent presidential power was not “raised by counsel for either side, either in the District Court or in the Supreme Court; nor is there any allusion to any issue of that sort in the opinion of the District Judge. Indeed, the pages of Mr. Justice Sutherland’s opinion devoted to a discussion of that question appear to the present writer as being little, if any, more than so much interesting yet discursive obiter” (ibid., 378).

David M. Levitan, in 1946, not only found fault with Sutherland’s distinction between internal and external affairs and the belief that sovereignty flowed from the

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27. 3 St. Tr. 825, 1125-1243 (1816) (State Trials, 21 vol. series, edited by T. B. Howell. London: T. C. Hansard).
British crown directly to the national government, but expressed alarm about the implications for democratic government. Sutherland’s theory marked “the furthest departure from the theory that [the] United States is a constitutionally limited democracy. It introduces the notion that national government possesses a secret reservoir of unaccountable power” (Levitan 1946, 493). Levitan’s review of the political and constitutional ideas at the time of the American Revolution and the Constitutional Convention left “little room for the acceptance of Mr. Justice Sutherland’s ‘inherent’ powers, or, in fact, ‘extra-constitutional’ powers theory” (ibid., 496). The Sutherland doctrine “makes shambles out of the very idea of a constitutionally limited government. It destroys even the symbol” (ibid., 497).

Charles Lofgren and other scholars have pointed out that sovereignty in 1776 lay with the people and the states, which operated as independent bodies and not as part of a collective union, as Justice Sutherland claimed. The creation of a Continental Congress did not disturb the sovereign power of the states to make treaties, borrow money, solicit arms, lay embargoes, collect tariff duties, and conduct separate military campaigns (Lofgren 1973; Levitan 1946; Van Tyne 1907). The Supreme Court has recognized that the American colonies, upon their separation from England, exercised the powers of a sovereign and independent government. To Lofgren, the historical evidence did not support Sutherland’s reliance on inherent or extraconstitutional sources: “Federal power in foreign affairs rests on explicit and implicit constitutional grants and derives from the ordinary constitutive authority” (Lofgren 1973, 29-30). Further: John Marshall in 1800 “evidently did not believe that because the President was the sole organ of communication and negotiation with other nations, he became the sole foreign policy-maker” (ibid., 30).

Even if sovereignty had somehow passed intact from the British crown to the national government, the U.S. Constitution allocates that power both to Congress and the president. The president and the Senate share the treaty power and the House of Representatives has discretion in deciding whether to appropriate funds to enforce treaties. The president receives ambassadors from other countries but the Senate must approve U.S. ambassadors as part of the confirmation process. Congress has the power to declare war, issue letters of marque and reprisal, raise and support military forces, make rules for their regulation, provide for the calling up of the militia to suppress insurrections and repel invasions, and provide for the organization and disciplining of the militia. The Constitution explicitly grants to Congress the power to lay and collect duties on foreign trade, regulate commerce with other nations, and establish a uniform rule of naturalization.

Conclusions

Other scholars have taken exception to the line of reasoning found in the dicta prepared by Justice Sutherland in Curtiss-Wright (Glennon 1988, 13; Ramsey 2000, 382; United States v. California, 332 U.S. 19, 31 (1947); Texas v. White, 74 U.S. 700, 725 (1869); M’Ilvaine v. Coxe’s Lessee, 8 U.S. (4 Cr.) 209, 212 (1808); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 222-24 (1796).
Brownell 2000, 40-41). Anthony Simones, after reviewing the academic literature and judicial decisions flowing from Sutherland’s opinion, concluded that “for every scholar who hates Curtiss-Wright, there seems to exist a judge who loves it” (Simones 1996, 415). Robert Jackson, as attorney general, relied on Curtiss-Wright to defend the destroyers bases agreement entered into by President Franklin D. Roosevelt in 1940. At the same time, he drew some boundaries to cabin executive power: “The President’s power over foreign relations while ‘delicate, plenary, and exclusive’ is not unlimited. Some negotiations involve commitments as to the future which would carry an obligation to exercise powers vested in the Congress.”29 In a number of cases, the Supreme Court has cited Curtiss-Wright to limit the role of the judiciary—but not of Congress—in the field of foreign affairs.30

In the Steel Seizure Case of 1952, Justice Jackson observed that the most that can be drawn from Curtiss-Wright is the intimation that the president “might act in external affairs without congressional authority, but not that he might act contrary to an act of Congress.”31 He noted that “much of the [Justice Sutherland] opinion is dictum.”32 In 1981, a federal appellate court cautioned against placing undue reliance on “certain dicta” in Justice Sutherland’s opinion: “To the extent that denominating the President as the ‘sole organ’ of the United States in international affairs constitutes a blanket endorsement of plenary Presidential power over any matter extending beyond the borders of this country, we reject that characterization.”33 Curtiss-Wright remains a frequent citation used by the judiciary to support not only broad delegations of legislative power to the executive branch, but also the existence of independent, implied, inherent, and extra-constitutional powers for the president. Although some justices of the Supreme Court have described the president’s foreign relations power as “exclusive,” the Court itself has not denied to Congress its constitutional authority to enter the field and reverse or modify presidential decisions in the area of national security and foreign affairs.

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The Polls: Cabinet Member and Presidential Approval

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Are presidential approval and the level of approval of key administration officials linked? Previous findings reveal scant evidence of such a relationship and suggest presidential and subordinate approval are independently derived. This article examines this question further by assessing Americans' attitudes toward the secretaries of state during the George W. Bush presidency. I find no evidence of a causal connection between impressions of presidential performance and approval of the secretary of state or vice versa. Cabinet member approval appears to be driven by media coverage of their activities rather than the macropartisanship or economic performance that influence presidential approval.

The choosing of ministers is a matter of no little importance for a prince; and their worth depends on the sagacity of the prince himself.

To what extent are performance evaluations of the president and of key subordinates related? Despite vast literatures that comment both on the growth of the administrative presidency and on the determinants and dynamics of presidential approval, empirical studies of the relationship between presidential approval and approval of other key executive branch officials are surprisingly scarce. Recent studies (Panagopoulos 2006) seek to fill this void, and this article aims to proceed in a similar vein.

Links between presidential and cabinet-level approval can have important behavioral consequences. We may expect, for example, that presidents, as rational actors, may act to maximize their own popularity by replacing unpopular cabinet members. Conversely, presidents lacking in approval may seek to boost their own popularity by tapping popular subordinates for key administrative posts. These arguments are reasonable if a clear and direct relationship between cabinet member performance ratings and presidential approval exists.

Machiavelli suggests in The Prince that such a connection may exist: “The first opinion that is formed of a ruler’s intelligence is based on the quality of the men he has
around him” (quoted in Keohane 2005). In a recent essay on leadership traits, Nannerl Keohane similarly argues that “subordinates who are both competent and loyal reflect well on the leader because observers assume that the leader knows how to judge their competence and acts so as to deserve their loyalty” (Keohane 2005). Yet there is no scholarly consensus about such a direct link. In his seminal work on the presidency, *Presidential Power*, Neustadt (1980) suggests presidents determine their reputations alone. “The professional reputation of a President in Washington is made or altered by the man himself,” Neustadt argues. “No one can guard it for him; no one saves him from himself” (1980, 60). Neustadt goes on to argue: “In a government where Secretaries of the Treasury may go astray at press conferences, where Secretaries of Defense may choose the poorest time to make announcements, where Presidents may not be briefed on legislative drafts—and ours is such a Government no matter who is President—the fact that his own conduct will decide what others think of him is precious for the man inside the White House” (1980, 61).

Is the president, in fact, so insulated politically from the actions of his subordinates? Recent studies suggest this is empirically plausible. In a study that examined the relationship between President George W. Bush’s approval ratings and those of Secretary of Defense Donald Rumsfeld (Panagopoulos 2006), I found no relationship between the two. My 2006 study suggests presidents and senior-level advisors derive levels of job approval independently. Although I observed similarities in overall patterns of opinions, causal relationships between presidential approval and assessments of Rumsfeld’s job performance were not detected (Panagopoulos 2006).

Lacking evidence of such a direct link, it is not clear that presidents stand to benefit much from dismissing cabinet secretaries, even if they are unpopular. An alternative possibility is that presidents will not mind unpopular subordinates, as their lack of popularity may deflect criticism away from the president and onto the subordinate, distancing the president from direct fallout. In both of these scenarios, however, unpopular subordinates are not, at a minimum, adversely affecting public evaluations of presidential performance. Under such circumstances subordinates are expected to survive, whereas a president may have incentives to dismiss unpopular administration officials whose poor approval ratings hurt the president’s directly. A growing literature reflects on conditions under which principals (prime ministers, presidents) may sack agents (cabinet members) (Palmer 1995), and this study aims to present an examination of the U.S. case by examining presidential approval and approval ratings for the president’s secretary of state during the presidency of George W. Bush.

As chief diplomat for presidential administrations, secretaries of state are central, high-profile members of the cabinet. The events following the terrorist attacks on September 11, 2001, including the wars in Afghanistan and Iraq that ensued, have heightened the profile of the secretary of state and sensitized Americans to issues of diplomatic significance, arguably catapulting Secretary Colin Powell and, subsequently, Secretary Condoleezza Rice, into the national spotlight. After all, it fell upon Secretary Powell to make the case for the invasion of Iraq to members of the Security Council at the United Nations in February 2003, a presentation that received widespread national media coverage. This attention has enabled Americans to monitor and assess their
performance as secretary of state. This article investigates the public’s evaluations of the secretary of state’s job performance over time. It seeks to explain the patterns in opinion that are observed. More generally, this study assesses the degree to which the public’s evaluations of key cabinet members, such as the secretary of state, impact the public evaluations of the president and vice versa.

Public Opinion and Secretaries of State

The American public’s attitudes about secretaries of state are routinely assessed by polling organizations. This article examines the dynamics of public opinion toward secretaries of state in the Bush administrations between October 2001 and December 2005 (no data are available for the Bush administration prior to October 2001).1 Quarterly data on secretary of state job approval ratings are displayed in Figure 1. The data were compiled by author. Data presented in Figure 1 represent quarterly aggregations of “relative approval” (see Stimson 1976 and Burden and Mughan 1999 for a discussion of this operationalization). Approval is measured as percent approve/(percent approve + percent disapprove). In three cases, job approval data were unavailable (1st quarter 2004, 3rd quarter 2004, and 3rd quarter 2005). In cases where Powell’s or Rice’s approval data were missing for a particular quarter (at time $t$), the value was imputed with the mean of the observations at $t - 1$ and $t + 1$ (see Burden and Mughan 1999). When the approval question is asked multiple times within a single quarter, the observations are averaged to create quarterly observations.

FIGURE 1. Presidential and Secretary of State Approval, 2001-2005.
Note: Quarterly data were compiled by author.
presented reveal variation in job approval between 2001 and 2005 and also show that the public’s evaluation of the performance of secretaries of state declined steadily during this period. Job approval ratings, which exceeded 90 percent in the immediate aftermath of the September 11, 2001 attacks, have hovered around 72 percent in the four most recent quarters included in the analysis. Approval ratings have ranged from a minimum of 70 percent to a maximum of 95 percent over this time period, and the average quarterly job approval rating has been 83.1 percent. Regressing approval ratings on time and a constant, the data indicate job approval for Bush’s secretaries of state has declined by almost 6 percentage points every year between 2001 and 2005 (ordinary least squares [OLS] regression coefficient $=-1.44$; standard error $=.13$; $p < .01$; R-squared $=.88$; $N = 17$). The empirical evidence confirms the American public’s confidence in the ability of secretaries of state to handle the duties of the office has deteriorated significantly in recent years.

During this time period, President Bush was served by two secretaries of state, General Colin Powell and former National Security Adviser Condoleezza Rice. An examination of the data presented in Figure 1 reveals Secretary Powell’s job approval ratings were higher on average than Secretary Rice’s; the mean level of approval for Powell was 86.6 percent ($N = 13$), compared to 71.8 percent ($N = 4$) for Rice. Both Powell’s and Rice’s approval ratings show signs of deterioration over the duration of their respective tenures as State Department leaders.

**Presidential and Secretary of State Approval**

Given the public’s weakening assessments of presidential performance over this period, many analysts suggested the president’s popular secretaries of state were an asset for the administration. This was especially true during the tenure of Secretary Powell, who was perceived as pragmatic, effective, and moderate and who consistently emerged as the most popular political figure in the nation in opinion surveys early during President Bush’s administration (Burns 2002). To what extent does public sentiment about top diplomats’ job performance impact assessments of presidential job performance? To determine whether public evaluations of the president and his State Department secretary are interdependent or independent, I have assembled quarterly approval measures for President Bush for the same period spanning 2001 to 2005. Presidential approval was determined using data collected by the Gallup organization.

In addition to quarterly job approval ratings for secretary of state, Figure 1 displays job approval ratings for President Bush for the corresponding quarterly periods between 2001 and 2005. The data show that the public’s approval of secretary of state job performance has consistently exceeded the president’s job approval for most of this period.

2. Presidential job approval data are determined exactly as Powell’s and Rice’s job approval ratings are, thereby making these two measures comparable over the complete time period. There were no missing data for presidential approval.
Figure 1 also suggests a close association between the approval measures for the two political actors over this period. An analysis of the data reveals a high instantaneous (bivariate) correlation between the two series (Pearson’s R correlation coefficient = 0.86; \( p < .01 \)). This initial evidence suggests a strong interdependent relationship between secretary of state job approval and President Bush’s performance evaluations.

Correlation does not necessarily signify causation, however, and the relationship we observe may not be causal. Moreover, causality, if it exists, can flow in either direction. In other words, President Bush’s job approval rating may influence assessments of the secretary of state or vice versa. To investigate these possibilities and to determine causality, I use Granger (1969) causality tests. Granger causality tests whether lagged information on a variable \( Y \) provides any statistically significant information about a variable \( X \) in the presence of lagged \( X \). If not, then \( Y \) does not Granger-cause \( X \). I estimate regressions with one lag to determine whether secretary of state approval Granger-causes Bush approval and vice versa. Given that approval is measured quarterly, I did not extend the analysis beyond one lag.

Table 1 presents the results of the causality tests. The findings indicate no causal relationship between secretary of state approval and presidential approval. In both equations, only the lagged dependent variable influences the dependent variable and is statistically significant at conventional levels. The inclusion of lagged secretary of state approval does not help to predict Bush approval, for instance, and lagged Bush approval is similarly unrelated to secretary of state approval ratings. In other words, secretary of state job approval appears to be independently derived from President Bush’s approval, and President Bush’s approval is not affected directly by secretary of state approval ratings. The results of this analysis suggest each of these two political actors derive their job approval measures independently.

### Explaining Secretary of State Approval

The task remains to explain the variation we observe in approval ratings for secretaries of state over this period. What forces influence the public’s assessment of

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<th>Secretary of State Approval</th>
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<tr>
<td>Secretary of state approval ( t-1 )</td>
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<tr>
<td>Presidential approval ( t-1 )</td>
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OLS regression. Standard errors are in parentheses.

* \( p < .10 \); ** \( p < .05 \); *** \( p < .01 \).

Scholars have demonstrated that media coverage influences presidential approval (Burden and Mughan 1999; Ragsdale 1997). I expect that the impact of media coverage, both quantity and tone, extends to the secretary of state. I consider two measures of media coverage: newspaper stories and network television stories. My measure of the amount of newspaper coverage is the quarterly count of stories that explicitly mention the secretary of state that appeared in three national newspapers over the period of this study. To measure the amount of media coverage of the secretary of state on network television, I measure the total number of stories that explicitly mention the secretary of state that appeared on the three networks (ABC, CBS, or NBC) or on CNN.

Figure 2 displays the quarterly counts of each of the two categories of media coverage. The data presented in Figure 2 show that the number of newspaper stories that explicitly mention the secretary of state ranged from a low of 88 to a high of 677 during the period of the study. An analysis of the data shows that newspaper coverage of the chief diplomat increased consistently over this period, by an average of 22 stories per quarter. The total number of stories on network television that mention the secretary of state ranged from a quarterly low of 269 to a high of 1,686, but no discernible trend in the amount of network television coverage can be detected. One clearly notices the spike in

the total number of stories about Powell that follows his presentation to the United Nations Security Council during the first quarter of 2003.

The second set of explanatory variables is economic. I consider two measures of macroeconomic performance: quarterly change in unemployment and inflation. Economic performance has been shown to influence presidential evaluations, and it is conceivable that economic indicators, viewed through the prism of war and diplomacy, may be conflated with evaluations about diplomatic performance and spill over to affect approval ratings for the secretary of state.

The main attitudinal variable in the analysis is macropartisanship. MacKuen, Erikson, and Stimson (1989) have demonstrated that partisan identification can be dynamic and can affect—and be affected by—changes in the political surroundings. Following Burden and Mughan (1999, 243) it is measured as the proportion of partisan (Republican) identifiers, and it is included to take account of long-standing partisan predispositions in the electorate that may influence secretary of state approval.

Variables to capture the effect of each of these factors in explaining performance evaluations of the secretary of state are included in a multivariate model I estimate below. In addition, I include two additional dummy variables which I expect to be relevant as controls in the empirical analysis. One variable captures the effect of the Iraq conflict, coded 1 if the Iraqi invasion was ongoing during the quarter in the analysis and 0 otherwise. I include a second dummy variable coded 1 if the secretary of state was Condoleezza Rice and 0 for quarters during the tenure of Secretary Powell.

Table 2 presents the descriptive statistics on the range of variables included in the analysis that follows.

To estimate the linear model while correcting for serial correlation, I use the Prais-Winsten regression technique. The results of the estimation are presented in Table 3. The findings indicate that the secretary of state’s job performance evaluations are not influenced by the economic or attitudinal variables, sets of indicators routinely shown to affect presidential approval. Only media coverage influences the public’s assessment of the secretary of state’s job performance. Interestingly, the results suggest newspaper coverage and network television coverage exert opposite effects: newspaper coverage
bolsters approval while network television coverage depresses approval. Additional research would be required to discern whether the nature of coverage across media is qualitatively different, but such an exercise is beyond the scope of this study. I speculate, however, that the difference in media effects I observe may be partly driven by the characteristics of coverage in the two media. Scholars have claimed that television coverage focuses heavily and increasingly on controversy and conflict and, to a lesser extent, on substance. Newspaper coverage, by contrast, may focus more on substantive matters and less on contentiousness. If these characterizations are accurate, this may help us to understand why television coverage may damage perceptions of Secretary of State performance while newspaper coverage strengthens these assessments. The results also show that overall levels of approval are comparatively lower during Rice’s tenure at the helm of the State Department (compared to Powell) and that approval is lower during the period of the Iraqi invasion.

**Conclusions**

The results of this analysis suggest that secretary of state job approval ratings are independent of President Bush’s performance evaluations and vice versa. Secretary of state job approval is driven by media coverage and not by the forces of macropartisanship and national economic performance.

On a more general note, the results of these analyses suggest that Americans are quite sophisticated with respect to ascribing accountability for government performance.
to specific political actors. Americans appear to hold the secretary of state responsible for matters within his or her purview or domain, but not necessarily beyond that. The condition of the economy, for example, does not appear to affect Americans’ assessments of the performance of the secretary of state. Additional research may reveal similar patterns for other members of a president’s cabinet, lending additional support for the notion that Americans attribute responsibility for specific failures or accomplishments within specific policy domains to the appropriate executive branch official.

References


Appendix

Secretary of state approval. Job approval ratings for secretary of state were collected from nationally representative opinion surveys conducted between October 1, 2001 and December 31, 2005. Survey organizations included: Gallup/CNN/USA Today, Fox News/Opinion Dynamics, Los Angeles Times, NBC/Wall Street Journal, Quinnipiac University Poll, Time/SRBI, and Time/CNN/Harris. Details are available upon request. In most surveys, the wording for the job approval question was consistently: “Do you approve or disapprove of the way [Colin Powell/Condoleezza Rice] is handling [his/her] job as Secretary of State?” Responses other than “approve” and “disapprove” were excluded before computing overall percentages. The measure of “relative approval” is akin to Stimson’s (1976) indicator. Data are aggregated quarterly.

Bush approval. Job approval data for President Bush are computed in the same manner as approval for secretary of state (aggregated quarterly) as indicators of “relative approval” in order to be comparable. Data are compiled from surveys conducted by the
Gallup organization. Question wording is: “Do you approve or disapprove of the way President Bush is handling his job as President?”

Economic variables: Unemployment/inflation. Data for these variables were obtained from the Bureau of Labor Statistics. Measures represent quarterly change in overall levels of unemployment and inflation during the period of the study.

Macropartisanship. Proportion of all party identifiers in CBS News/New York Times polls or Gallup surveys who are Republican: % Republican/(% Republican + % Democrat). Independents were excluded.

Media coverage (newspaper). The total number of stories (aggregated quarterly) that mention Secretary Powell (2001-2004) or Secretary Rice (2005) that appeared in the New York Times, Los Angeles Times, or Washington Post. These data were acquired from Lexis/Nexis.

Media coverage (television). The total number of stories (aggregated quarterly) that mention Secretary Powell (2001-2004) or Secretary Rice (2005) that appeared on network news transmissions on ABC, CBS, NBC, or CNN. These data were acquired from news transcripts available from Lexis/Nexis.

Iraq War. Dummy variable indicating the U.S. invasion of Iraq was ongoing (coded 1, 0 otherwise).

Condoleezza Rice. Dummy variable indicating the secretary of state was Rice (coded 1, 0 otherwise).

One week after Hurricane Katrina overwhelmed the coasts of Mississippi and Alabama and led to the evacuation of millions of Americans, Mrs. Barbara Bush—former First Lady and mother of the current president—uttered an observation that departed from the distressing tone of most of the media coverage of this disaster. While touring the makeshift shelter in the Houston Astrodome sports complex, she told one American Public Media radio program interviewer the following:

What I’m hearing, which is sort of scary, is they all want to stay in Texas. Everyone is so overwhelmed by the hospitality. And so many of the people in the arena here, you know, were underprivileged anyway, so this—this is working very well for them.

Her remarks provoked responses from all over the globe. White House Press Secretary Scott McClelland regarded the statement as a “personal observation.” Fox News conservative media personality Bill O’Reilly stated, “Madam, with all due respect, you have been wealthy too long.” The tabloid New York Daily News commented that this statement must have been uttered by “the most chipper visitor to the Astrodome” who thought everything was going “honky-dory” for the evacuees. And foreign newspapers considered her remarks as “elitist,” “hurtful,” “inaccurate,” and “insensitive.”

How are Mrs. Bush’s comments germane to a review of Mary Stuckey’s Defining Americans? At first blush, they appear tangential to Stuckey’s project. Mrs. Bush is the spouse of a former president, and Stuckey’s book focuses on presidential rhetoric (speeches delivered by nine presidents with commentary on the two most recent presidents). Mrs. Bush was specifically discussing a subset of Americans, and Stuckey’s book focuses on discussions of “all Americans.” Mrs. Bush was “on stage” (talking to a reporter) but she clearly was not prepared for this speaking situation; Stuckey’s book, in contrast, addresses carefully crafted public remarks. In these ways, Mrs. Bush’s interview is somewhat removed from Defining Americans: The Presidency and National Identity.

Upon deeper reflection, however, Mrs. Bush’s words call attention to many of the central assumptions about presidential rhetoric undergirding Stuckey’s analysis. First, the voice of the White House is visible and commands domestic and international attention. Second, that voice can define power relations, identifying those who are included and excluded through grand statements, subtle pronoun choices, and scripted and offhand comments. Third, this voice is conservative, tied to the forces and institutional arrangements that propelled its electoral coalitions. Fourth, the voice acknowledges and honors static power arrangements; often the simple act of verbalizing that which is taken for granted (particularly with regard to sensitive issues of race, class, and
majority and minority coalitions) may make individuals and groups nervous when such realities are addressed. And fifth, this voice helps to make some sets of citizens visible and other groups invisible, defining certain peoples and groups, simultaneously negating others.

Stuckey’s approach focuses primarily on a series of snapshots of the language of nine presidents (Andrew Jackson, Millard Fillmore, Franklin Pierce, James Buchanan, Grover Cleveland, Woodrow Wilson, Franklin Delano Roosevelt, Dwight Eisenhower, and George H. W. Bush), concluding with connections to Bill Clinton and George W. Bush. The larger themes of her project address how presidents use language to (1) balance competing interests and claims, (2) advance cultural prescriptions as to what constitutes citizenship, and (3) render certain groups visible (and actionable) while other groups are left unmentioned (and, in a sense, rhetorically erased). Specifically, balance is addressed in the speeches of Jackson (who discussed land, citizenship, and democracy in the 1830s); Fillmore, Pierce, and Buchanan (who spoke about conceptions of citizenship in the prewar period); and Cleveland (who discussed government through the metaphor of business). Notions of citizenship and visibility appear in analyses of Roosevelt's discussions of the American dream during the 1930s, Eisenhower’s discussions of containment during the Cold War, and George H. W. Bush’s discussions of America as a lone superpower after the end of the Cold War. In the conclusion, Stuckey extends the analysis of the first Bush’s rhetoric to examine notions of democracy, diversity, inclusion, and national identity in the presidencies of Bill Clinton and George W. Bush.

Stuckey’s project is bold, detailed, and sweeping and should be commended as such. That stated, Defining Americans will not please everyone (and, naturally, no book should try to). Some readers might crave a type of historical overview to complement the analyses; several chapters presume a detailed sense of history that may limit the book’s appeal and usefulness to a broad audience. Others might value more detail about the methodological choices and limitations of the design, including the benefits and limitations of studying certain voices in particular ways, greater transparency about the types of speeches included and discarded in this project, and the types of audiences that heard the speeches and the amount of press attention that these texts inspired. Although an exciting part of the analysis is that Stuckey presents themes regarding balance and definitions that transcend time, still other readers may be curious about examples or cases that depart from or question the themes described here; the inclusion of such instances could serve to sharpen the trends described and underscore the strength of the themes detailed.

Overall, however, it is laudable that the foci and the breadth of the book open up as many questions as Stuckey set out to answer—two characteristics of this project that make it a valuable contribution to historical and contemporary rhetoric. Indeed, Defining Americans will likely be relevant to special topics seminars and graduate courses for years to come because of the fundamental questions that it inspires, including: How do discussions of balance and definitions make their ways to audiences? What types of statements are attended to and ignored? How do audiences respond to the speeches? Are the reactions shared? Do reactions contribute to future constructions? And, ultimately, do constructions shape future constructions? How? When? Why?
Not all statements uttered by the president, or associated with the White House, inspire the attention that Mrs. Bush’s did. Yet Stuckey’s powerful and detailed analysis reminds us that both prominent and more private proclamations made by the White House are not without consequence. To have a better understanding of how Americans are encouraged to understand their identities today, and into the future, those interested in presidential rhetoric should listen closely to such statements.

—Sharon E. Jarvis

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In The Failure of the Founding Fathers, Bruce Ackerman makes a powerful and convincing argument for revising the conventional wisdom about the “third act” of “the Founding drama,” which tends to consider Marbury v. Madison (1803) as the final piece in a nationalizing “constitutional puzzle” (p. 12). He contends that the third act should begin at 1800 and end with the War of 1812, encompassing “the great phase” of “the Republicans against the Federalists over the future of constitutional development” (p. 242). Ackerman’s understanding, therefore, does not rest on a discrete event, nor does it assume that the “great debate between the centralizers and decentralizers” was settled in 1803 (p. 13). Although he states that his “revision is less harmonious” than the traditional account because it emphasizes “continuing institutional crises and provides only a tenuous sense of resolution,” it also comes across as a more intuitively accurate picture of America’s political development (p. 13).

Once Ackerman lays out his intentions, he asserts that the presidential selection method in the Constitution contains serious, often overlooked flaws. Perhaps surprising, his critique does not center on the Electoral College’s lack of democratic representation, but instead upon the procedural rules which govern the casting and counting of electoral votes and presidential ties. Along with the “alarming number of technical mistakes” that the Founders made in their last-minute compromise on the selection method, their political philosophy proved problematic because it “did not recognize that ongoing and organized political party opposition was a legitimate, indeed, an indispensable, part of democratic life” (pp. 4, 22). Although Ackerman appreciates the Founders’ intentions in devising the Electoral College as a nonpartisan selection method, he holds them liable for the structural failures, which “set the stage for many awkward moments” (p. 14). He contends that, were it not for mistakes, luck, and statesmanship, the presidential election of 1800 might have led to “armed conflict, perhaps to disunion” (p. 247). Further, he describes the ultimate outcome—the eventual vote for Thomas Jefferson by the House of Representatives in February of 1801—as having effected a transformation in the presidency. The claims made by Jefferson and his supporters of a “popular mandate” turned the presidency into a
“plebiscitarian office,” which then “generated a series of shattering challenges to the rest of the system” (p. 5). Thus, Jefferson’s ascension to the White House both initiated and legitimated “a model of presidential leadership that would coexist and compete with the Philadelphia Convention’s model of assembly leadership for the next two centuries” (pp. 5, 12).

After describing this transformation, Ackerman directs his attention to the partisan battles over the federal judiciary which occurred during Jefferson’s tenure in office. Focusing on the juxtaposition of the majority opinions in *Stuart v. Laird* (1803) and *Marbury v. Madison* (1803), he suggests that the Supreme Court “managed to sustain itself, but only by promising a creative synthesis of Republican and Federalist themes in the Constitution” (p. 242). In short, he finds that the Supreme Court integrated—rather than rejected—the plebiscitarian presidency with the constitutional traditions from 1787. Ackerman also discusses Jefferson’s failed attempt to impeach Supreme Court Justice Samuel Chase (1805) and Jefferson’s nominees for the Supreme Court. He concludes that, although neither side gained “total victory,” this struggle “inaugurated a complex institutional dance” that is, perhaps, “one of the great leitmotivs of American constitutional development” (pp. 6, 262-66).

Throughout *The Failure of the Founding Fathers*, Ackerman successfully conveys the fierceness of the partisan disputes over constitutional interpretation and the significance of a series of political decisions. His argument is not only eloquently drawn but centrally situated within the more recent scholarship that focuses on the precariousness of the early history of the United States. Further, the portraits that he paints of Thomas Jefferson and John Marshall as strategic politicians repeatedly involved in conflicts of interest (from Jefferson’s counting Georgia’s electoral votes to Marshall’s ruling on *Marbury*), shady dealings (from newspaper attacks to appointments of relatives), and public posturing (from Jefferson’s hiding behind James Madison to Marshall’s deference to his colleagues with respect to circuit riding) provide ballast to this almost unbelievable story.

Although Ackerman stays far away from idolizing any of the Founders, he regularly attributes their decisions to “pull their nation back from the brink” to “statesmanship” (pp. 15, 94). In doing this, he builds up the benevolent circumspection of the Founders and discounts the political culture in which they found themselves. Joanne Freeman’s *Affairs of Honor: National Politics in the New Republic* offers an alternative explanation:

Ambivalent about party combat and unfamiliar with the personal implications and practical logistics of national politics, they had not necessarily placed partisan demands above all else: regional loyalties, local politics, career aspirations, friendships and enmities, personal honor, even apathy all held sway... Such decisions were by no means predictable. A public man might be trustworthy on most occasions, only to leap to the opposition when a conflicting loyalty took precedence. (2001, 215)

Hence, the Founders’ retreats from “the brink” may have been motivated more by uncertainty about how to successfully navigate a partisan world than by “statesmanship.” It also would have been helpful if Ackerman had written more about Alexander
Hamilton. Although he mentions Hamilton’s “paradoxical contribution” to the presidential election of 1800 (writing to Delaware Representative James Bayard whose vote ended up being decisive), he does not discuss the extent of his efforts on behalf of Jefferson, nor does he attribute any of Hamilton’s decisions to “statesmanship” (pp. 99-100). This seems odd given that Ackerman considers Aaron Burr an “unsung hero” and “statesman” for “his refusal to take the express coach from Albany to Washington,” thereby saving “the republic from a violent lurch in the Latin American direction” (pp. 106, 108).

Aside from these minor points of emphasis, The Failure of the Founding Fathers is a lively and intriguing account of that first decade of the 1800s. It is a critically important volume for scholars of the presidency and electoral politics to consider. Ackerman deserves high praise for articulating not only a historical revision but also a model for understanding constitutional development in America.

—Lara M. Brown
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As the United States has stumbled in its attempts to contain and roll back the threat of international terrorism since 9/11, it is logical for scholars to look for historical antecedents and lessons. Thus does Professor Edwards Spaulding champion Harry Truman as the exemplary architect of Cold War containment and liberal internationalism. The author contends that Truman, far more than diplomat George F. Kennan, “conceived, enunciated, and directed” (p. 2) the policies that thwarted Soviet expansion after 1945 and brought eventual victory in the Cold War. Distinctly different from Woodrow Wilson’s universal idealism and FDR’s pragmatic hopes for Big Three cooperation, Truman’s blend of unilateralism and multilateralism rallied bipartisan support for such international institutions as the United Nations, World Bank, and International Monetary Fund, as well as collective defense through NATO and other regional pacts, all justified as necessary to defend democratic freedoms against a messianic totalitarian enemy. Like George W. Bush more than a half-century later, Harry Truman had to devise new strategies and join in creating new governmental entities such as the CIA and National Security Council to confront a global threat from an unexpected adversary, all while “putting his belief in freedom and democracy, as well as his religious faith, at the center of his foreign policy” (p. 8).

In contrast to some Cold War scholars who portray Truman as parochial putty in the hands of such veteran sophisticates as Dean Acheson, George Kennan, and George Marshall, Edwards Spaulding quite properly places the president at the center of her analysis. From the outset in April 1945 when Truman lectured Vyacheslav Molotov “in words of one syllable” (p. 25) about carrying out the Yalta agreements, through the
Iranian and Turkish crises of 1946, through the Truman Doctrine, Marshall Plan, Czech coup, Berlin Airlift, NATO, NSC 68, and finally the defense of South Korea in 1950, the peppery chief executive put his own black-and-white stamp on policy making. Historians beguiled by the Kennanesque prose style of the “Long Telegram” and the “X” article forget that the “buck” stopped in the Oval Office and that Truman relied more on the alarmist findings of the Clifford-Elsey report (which remained under lock and key lest it “blow the roof off the Kremlin”; p. 59). Similarly, Truman preferred the blunt “worst case” formulations of NSC 68 to any serious negotiations with the Soviets over halting the nuclear arms race. He launched the H-bomb project after just ten minutes of discussion. In her best and most original chapter, Edwards Spaulding draws on Truman’s lifelong reading of history and the Bible to explicate the underpinnings to his sincere commitment to “what was, essentially, a religious Campaign of Truth in 1951,” wherein the Korean War symbolized “the struggle between freedom and Communist slavery” (p. 213). An optimist who carried Tennyson’s poem “Locksley Hall” in his wallet, he was nonetheless the quintessential Cold Warrior.

Edwards Spaulding is an unabashed admirer. She approvingly quotes Winston Churchill’s 1952 accolade that Truman “more than any man . . . saved Western Civilization” (p. 228). Her one criticism is that Truman “lost” China, largely because he believed that Chiang Kai-shek’s Nationalists were little better than the Communists. She does not, however, engage the substantial revisionist literature that has indicted Truman for being too precipitate and too simplistic, for quickly reversing Roosevelt’s cooperation with Moscow, for attempting “atomic diplomacy” in August 1945, for exaggerating the Soviet threat when the United States enjoyed a preponderance of power, and for “red-baiting” political critics on the left like Henry Wallace. She dismisses revisionists as the intellectual heirs of Wallace, Kennan, and Walter Lippmann, all of whom she castigates for underestimating the implacable ideological hostility of the Soviet regime. Whenever Truman betrayed confusion or flip-flopped, as in his statement that he “like[d] old Joe [Stalin]” (p. 273n) or his proposal to send Chief Justice Fred Vinson on a peace mission to Moscow in 1948, Edwards Spaulding passes off such instances as anomalies and relegated them to a footnote. However impressive seemed Truman’s extensive readings in classical biographies, especially his admiration for moral leaders such as Cincinnatus and George Washington, the author conspicuously fails to demonstrate that the Missourian “was an astute student of world history” (p. 16). For example, Truman’s simplistic repudiation of the “Totalitarian State be it Russian, German, Spanish, Argentinian, Dago, or Japanese” (p. 26) she quotes too fulsomely. Nor does she discuss such gaffes as the president’s private assertion in 1948 that Soviet leaders “have fixed ideas and these ideas were set out in Peter the Great’s will,” a notorious historical forgery that Truman continued to cite even after he learned that it was spurious (see Clifford, *Diplomatic History* 4 [Fall 1980]: 374).

In sum, Edwards Spaulding’s laudable effort to find historical lessons for the current administration should at least note the relevance of the old saw “To Err Is Truman.” Surprisingly, she does not dwell on the successful occupations of Germany and Japan as models for what to do after toppling enemy regimes. It also is worth noting that NSC 68, despite its recommended trebling of the defense budget, emphatically ruled out preven-
tive or preemptive war as a guiding strategy. Nor did Truman, for all his demonizing of the enemy, ever repudiate the Geneva Convention.

—J. Garry Clifford
University of Connecticut


The presidency of George W. Bush has proved a boon for presidency scholars who are interested in the area of presidential unilateralism—the idea of obtaining political objectives without the reliance upon external actors, such as Congress. Recently, in the case of the current Bush presidency, some have confused this with presidential imperialism, but as Adam Warber explains, this process of unilateralism did not start with George W. Bush and in all likelihood will not end with him or his presidency.

In Executive Orders and the Modern Presidency, Warber has produced a well-written, solidly argued piece of research that is suitable for undergraduate and graduate courses on the U.S. presidency. Further, he moves presidency scholars toward developing and refining theory to explain the connections between unilateral action and presidential power.

In the first chapter (of five), Warber lays out an explanation for the use of executive orders by modern presidents (his time period covers 1936-2001) that builds upon the earlier work of Terry Moe and William Howell, who used rational actor modeling to explain why presidents choose to go solo (p. 4). The rational actor approach is used, as Warber explains, “because it [weighs] political costs and benefits when deciding how to achieve policy in order to cope with an uncertain political environment” (p. 8). Warber then lists a number of assumptions that describe how unilateralism benefits from the rational actor approach. In sum, the assumptions stipulate that, because presidents are rational, they will be able to ascertain in what areas unilateralism will enable them to push their agendas while being wary of the costs involved (p. 13).

In the remaining chapters, Warber fills in the gaps overlooked by other scholars interested in the executive order. He uses content analysis, rather than simply counting executive orders by president or sampling from different presidencies, to separate executive orders by type: symbolic, routine, and policy-making directives. Warber then tests what effect such independent variables as the party of the president, divided/unified government, scandal, and year in office (election or lame duck) have on the use of executive orders. He finds that political party matters—Democratic presidents are more likely than Republican presidents to use the executive order to push social policy (p. 45), and divided government sees less executive order activity than unified government (pp. 65-66). At the same time, the presence of scandal, albeit in an examination of just the Nixon and Clinton presidencies, does not appear to affect the use of executive orders (pp. 67-70); the presence of an election decreased the number of policy-making orders, while the president’s final year in office saw an increase in executive orders of all types when compared with previous years of a president’s term in office (pp. 71-76).
Warber wraps up *Executive Orders and the Modern Presidency* with a look at the current Bush administration and a discussion of the directions that his own research on the executive order should go in the future. Warber tempers the flurry of discussion about the Bush administration’s penchant for exercising unilateral powers in order to achieve goals not met in the course of the normal legislative process. He finds that President George W. Bush has used the executive order in a way that is not distinguishable from his predecessors—either in type or in quantity. Where President Bush has differed is his tendency to revoke or amend the executive orders of his predecessors (pp. 124-25).

Warber concludes that in the future scholars may wish to study how certain executive branch officials, such as those serving in the Office of Legal Counsel, set about the task of crafting the language in an executive order to escape detection by such outside political actors as Congress or the courts. In addition to those he lists, I would encourage him and others interested in unilateralism to study how unilateral devices are used in tandem to achieve political objectives. For instance, Warber provides cursory examination of three important executive orders, 12291 and 12498 in the Reagan administration and 12866 in the Clinton administration, used to give the president greater control over regulatory process. These three executive orders also were important in the development of the signing statement as a means to influence administrative discretion.

*Executive Orders and the Modern Presidency* will be of interest both to those interested in the bargaining and persuading powers of the president as well as to those examining times when political necessity dictates that a president go it alone.

—Christopher S. Kelley

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In *Housing Segregation in Suburban America Since 1960*, Charles Lamb opens a window into the early struggle for enforcement and interpretation of the Fair Housing Act of 1968 to explain two key outcomes. First, his detailed political history explains why enforcement of the act has been so notoriously weak. Second, he argues that the legacy of the Nixon administration directly caused the suburbs to remain segregated, despite the 1968 act. Lamb maintains that Nixon’s interpretation of the Fair Housing Act, his attitudes toward suburban autonomy, and his restructuring of presidential power toward centralized decision making laid the groundwork for three lasting impacts. First, the president interpreted the Fair Housing Act to mean that racial desegregation was not the same as integration—in his view the Fair Housing Act supported the former but not the latter. Second, Nixon centralized decision making in racial policy, strengthening the role of the president. Third, his appointees, from the
Supreme Court to the lower federal courts, issued opinions that echoed Nixon’s perspectives supporting the autonomy of the suburbs to refuse subsidized housing and limiting the Department of Housing and Urban Development’s (HUD) purview in enforcing fair housing legislation. In short, Lamb lays the blame for continued housing segregation in U.S. suburbs at the feet of Richard M. Nixon.

Lamb stakes a claim to another contribution—outlining the forces that produce suburban residential segregation up to today that move beyond simply discrimination in the housing market, which is where he says sociologists have stopped. He eloquently argues that suburban residential segregation also is the result of action and inaction in “how presidents, the bureaucracy, Congress, and the courts have responded to the issue of suburban integration” (p. 254).

At the same time, while telling the rich institutional story that is the force for the continued segregation of the suburbs, Lamb omits the changing context of and discourse over policy. He carefully details the ins and outs of the Nixon administration’s internal battles for action versus inaction regarding desegregating the suburbs. As the narrative moves forward in time, Lamb is necessarily more cursory in his treatment of the political context, and thus misses some of the changes in discourse that shaped the response of the Clinton administration in the fair housing arena. Lamb comments that the Clinton presidency is the first since the Johnson years to include economic integration as part of its policy actions. However, the reason for this more recent focus is entirely different from what it was under LBJ. The transformation of the discussion of housing desegregation from one explicitly about race to one that is explicitly about poverty arose in parallel (and in response) to the conservatism of the Reagan and George H. W. Bush presidencies.

The statements of former Secretary of Housing and Urban Development Henry Cisneros in the Clinton administration in support of economic integration represented a paradigm shift in HUD policy toward poverty dispersal (Edward Goetz, “Housing Dispersal Programs,” *Journal of Planning Literature* 18 [2003]: 3-16). This change occurred in reaction to the problem of severely troubled public housing communities and concentrated poverty, difficulties that HUD, policy makers, and academics struggled to address from the late 1980s through the 1990s (e.g., William J. Wilson, *The Truly Disadvantaged*, 1987; Christopher Jencks and Susan B. Mayer, “The Social Consequences of Growing up in a Poor Neighborhood,” in Laurence Lynn, Jr. and Michael McGeary, editors, *Inner City Poverty in the United States*, 1990; John Goering, Abdollah Haghighi, Helene Stebbins, and Michael Siewert, *A Report to Congress: Promoting Housing Choice in HUD’s Rental Assistance Programs*, 1995). The discussion of racial desegregation intertwined with the economic realities for most blacks in the 1960s transformed by the late 1980s and early 1990s to a policy discourse explicitly focused on lost economic opportunities due to living in communities of concentrated poverty and not in suburban areas.

Nonetheless, Lamb cogently and persuasively argues that the Nixon administration’s perspectives and actions set the stage for decades of inaction and blockages in both the federal executive and judicial branches of government in fair housing policy. This detailed and thoughtful retelling of the political history of the years following the Fair
Housing Act adds to our understanding of the act by placing responsibility for decades of weak enforcement on the long reach of presidential influence.

—Rachel Garshick Kleit

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Green Talk in the White House: The Rhetorical Presidency Encounters Ecology.

The issue of presidential rhetoric has been examined extensively by scholars in recent years. The issue of environmental rhetoric also has received attention. The virtue of *Green Talk in the White House* is that it is one of the first to systematically combine the two areas of study and focus on how presidents have used environmental rhetoric. This book is an important step in analyzing a process that is crucial to our understanding of the nature of environmental debates today.

The chapters draw largely from communications theory to frame the theoretical aspects of the book. The volume would have benefited from more attention being paid to political science research in the field of presidential rhetoric, although I do see the book as being a valuable contribution to research in this field. *Green Talk in the White House* is a useful resource for many areas of study, including communication studies, environmental politics and policy, and the presidency.

The Introduction provides an overview of previous research in the two fields and an argument for why they need to integrate. Peterson identifies three areas which have high potential for "productive integration" between environmental communication and presidential rhetoric: the concept of material rhetoric (from Carol Blair and Jack Selzer), the importance of science and technology issues and conflicts in presidential speech, and the public sphere of environmental decision making. All relate to the integration of the symbolic and the material, which is a central theme of rhetoric studies that have a strong policy emphasis (pp. 10-14). Chapters 1-3 focus on the Roosevelts and contain some sharp insights into their use of rhetoric on the environment. In Chapter 1, Leroy G. Dorsey discusses Theodore Roosevelt's use of religious imagery, noting that for Roosevelt, "a charitable God had provided Americans with an environmental bounty that marked it as sacred. To abuse it, as some were doing, he condemned as a sin against God" (p. 43). In the current U.S. political context, where religious arguments are increasingly important for some, Roosevelt's rhetorical strategy may bear increased attention. The religious element in environment rhetoric is also discussed in Chapter 10 by Martin Carcasson (pp. 278-81). In Chapter 2, Christine Oravec adds to our understanding of TR's environmental policies and the creation of the "conservationist public" (p. 64) by focusing on the rhetoric and ideas of W. J. McGee, a noted environmental writer and government bureaucrat of the early twentieth century. In Chapter 3, Suzanne M. Daughton and Vanessa B. Beasley's analysis of Franklin Roosevelt's economic arguments for the environment is a timely reminder that economic security and environmental protection do
not have to be posed as polar opposites, as they often are today. The authors also note that FDR’s approach was criticized by some, notably “Ding” Darling, a popular cartoonist of the time.

The political nature of President Richard Nixon’s environmental activism has been noted by many scholars (among others, see Samuel P. Hays, *Beauty, Health, and Permanence: Environmental Politics in the United States, 1955-1985*, 1987, and J. Brooks Flippen, *Nixon and the Environment*, 2000). Michael R. Vickery’s analysis provides depth to these previous studies by arguing that “Nixon’s rhetoric and his administration’s actions are internally inconsistent” (p. 120). The chapter goes on to place Nixon’s rhetoric squarely within “the deep cultural tensions that lie at the heart of these issues” (p. 128). Nixon was driven to do what was politically expedient, and he successfully managed the underlying conflicts that exist in American society regarding ecological values (p. 131).

By comparison, Ronald Reagan had a more defined environmental agenda. According to C. Brant Short in Chapter 5, he sought to bring together two powerful American myths, “the Puritan errand and the frontier thesis” and create an “ideological statement” about environmental policy in the United States (p. 135). Short demonstrates why Reagan was uniquely situated to use these myths, especially the “frontier thesis” (pp. 140-43) and shows that, although the president’s environmental policies were not an unqualified success, they did manage to symbolically reconstruct “how nature and the wilderness should be viewed in the United States” (p. 150).

Chapters 6-8 examine the Clinton years in the White House. J. Robert Cox provides an overview of environmental rhetoric and policy in Chapter 6, and Mark P. Moore examines the “ironies” in Clinton’s rhetoric and policy (with specific attention to the controversial salvage timber rider of 1995). David Henry looks at Energy Secretary Hazel O’Leary’s role in managing the public admission in 1993 of U.S. government human radiation experiments. The three authors provide excellent insights into the contradictory nature of the Clinton administration on environmental policy. The rhetoric and the policy contained gaps that existed partially because of the nature of the rhetorical strategies used. Cox, for example, argues that Clinton’s “republican style” of rhetoric was effective at bringing the political community together to discuss environmental issues (p. 158), but was rather ineffective in producing satisfactory policy solutions (pp. 173-74). Clinton’s strategies regarding the salvage timber rider (discussed in Chapter 8), and the varying levels of irony involved, also provide a solid analysis of the inconsistencies in the administration’s environmental policies.

Chapters 9 and 10 purport to analyze “Presidential Rhetoric and Environmental Governance for the 21st Century.” The inclusion of Chapter 9 in this particular volume is odd. Lawrence J. Prelli’s analysis of debates over sustainable forestry in New Hampshire is interesting, but the relationship of this topic to the other chapters and overall theme of the book is tenuous. Carcasson’s discussion of presidential rhetoric on global warming is more on target and especially interesting in terms of how the analysis relates to contemporary debates on this issue. The author’s claim that recent presidents have framed the issues of the global environment primarily in terms of politics, economics, and science is a convincing one (p. 260). Carcasson also opens up some interesting discussion about how to transform these issues, by suggesting the frames of law, education, and
religion as alternatives (pp. 278-82). As the author notes, use of religious framing, if taken out of the context of established religions, “offers possibilities similar to those exhibited by Theodore Roosevelt” (p. 279).

Overall, this volume of essays on the environmental rhetoric of presidents is a strong one, offering numerous insights into the presidents themselves, their approach to environmental issues, and environmental policy making in general. The book would be very useful as a teaching resource in a variety of courses. It also provides a good starting point for future research in this field. As environmental issues grow in importance and slowly work their way up the political agenda, an understanding of presidential rhetoric in this area becomes increasingly valuable. Green Talk in the White House goes a long way toward providing that understanding.

—Mark Kelso
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Similar to his three previous edited volumes, Robert E. Denton, Jr. seeks to help readers “better understand the role and process of communication in presidential campaigns” (p. xvi) by offering an examination of the “national conversation” that occurred during the most recent national election. Thirteen chapters and an introductory preface consider what was said (shown or written) in a variety of forums and how these messages were received. Taken as a whole, the book makes the case that George W. Bush won the election because of his campaign’s communication strategies.

Although there is some acknowledgment that the political context and geographic distribution of partisans contributed to his victory, the dominant theme is that the campaign determined the outcome. Only one chapter (by Robert V. Friedenberg) claims that John Kerry did a better job than Bush in a major communication forum (the debates). This conclusion comes as a surprise, however, after the far more extensive and virulent criticism Friedenberg offers of Kerry’s performance compared to that of Bush. The only chapter that focuses on the Democratic nomination (by Judith S. Trent) argues that the schedule (front-loaded, back-to-back primaries) made Kerry a weaker campaigner in the general election. It did not allow time for useful feedback from voters (particularly Independents) or help Kerry work out inconsistencies in his message.

Three chapters analyze elements of the national party conventions. In one, Rachel L. Holloway provides a day-to-day description of the events with a few paragraphs on their reception. She argues that the Democratic convention rallied Republicans rather than Democrats and left Kerry vulnerable to the attacks launched during his opponent’s convention. On the other hand, the Republican convention effectively focused on “Bush as an individual, standing alone, ready to make the tough decisions” (p. 69). Janis L. Edwards’s chapter examines the campaign films shown at the conventions. She contends that Bush’s films were more successful at conveying strength and intimacy and worked
well to reinforce the central messages of the convention and campaign. Meanwhile, Ashli Quesiberry Stokes’s chapter on the rhetoric of Laura Bush and Teresa Heinz Kerry relies heavily on their convention speeches. She suggests that Bush did a better job of making a case for her husband’s presidency, mobilizing the women’s vote, and “balancing the demands of traditional womanhood with women’s contemporary roles” (p. 176).

The Internet is the focus of two chapters and sections of others. In one of the strongest chapters in the book, Danielle R. Wiese and Bruce E. Gronbeck demonstrate how “cyberpolitics” came of age in 2004. After succinctly reviewing the history of the Internet and campaigns, they describe six new developments (the use of social-networking software, e-mail targeting, coproduction, Web video, standardization of Web sites, and blogs) and discuss their impact on campaigns and on communication theory. This provocative discussion precedes (and essentially eclipses) Andrew Paul Williams’s more narrowly focused and descriptive chapter on the Internet. Jeffrey P. Jones includes the Internet as one of the many locations in which a “shadow campaign” occurred. His chapter describes how popular culture served to expand civic participation to “citizen consumers.” He illustrates the various ways that activists, artists, political insiders, and media corporations used alternative media. The Web also was the location from which Lynda Lee Kaid obtained the 170 political ads that she analyzed for her chapter on Bush’s and Kerry’s video styles (the visual, verbal, and television production characteristics of their advertising). Her analysis relies on a clear (and clearly articulated) methodology that adds credibility to her conclusion that Bush was able to successfully “blend the issues voters were concerned about with positive images” of himself and negative images of his opponent (p. 297). Analyzing advertising with the same coding scheme used for those from previous presidential elections allows Kaid to show that advertising in 2004 was more negative and that Bush used more fear appeals (than Kerry in 2004 or Bush in 2000).

Four chapters deal with campaign strategies and the vote. Mary E. Stuckey presents a persuasive case for her thesis that the Bush campaign was successful for two reasons. First, it chose to mobilize supporters rather than persuade Independents. Second, it used ideology rather than demographics to identify cross-pressured voters who would be compelled by social issue appeals. She explains why the conventional wisdom of searching for swing voters did not work in 2004 and discusses the implications of this for future campaigns. Robert E. Denton, Jr.’s chapter complements Stuckey’s by showing how central religion was in the campaign (in convention speeches, debate questions, and in the voting booth). He illustrates how Bush had an advantage being able to talk about religion in a way that resonated with his image and issue positions, whereas “Kerry lacked fairly basic credibility when trying to appeal to voters on religious values” (p. 276). The “religion gap” described by Denton is just one of the approaches to breaking down the vote used by Henry C. Kenski and Kate M. Kenski in their concluding chapter. In addition to examining national exit polls, they look closely at voters in the various states to make sense of the Electoral College results. They also compare how demographic, geographic, and partisan groups voted in 2004 to show how they voted in 2000. This analysis reveals that voting patterns in the two elections were similar, but that Bush improved his standing among women, Catholics, and Hispanics.
In some ways, Craig Allen Smith presents a counterpoint to the other chapters that emphasize (or heavily imply) the skillfulness of the Bush campaign and the ineptitude of Kerry’s. Although Smith is similar to the others in his criticism of the Democratic convention, his larger argument is that as a challenger, Kerry faced a more difficult rhetorical task than Bush did as an incumbent. Rather than lambaste Kerry for the “I voted for it before I voted against it” rhetorical blunder, Smith explains how the resolution authorizing the president to invade Iraq was a strategic move by the president that put his opponents in a no-win situation and legitimized Bush as the “interpreter in chief.”

The greatest weakness of the volume is its lack of attention to the conventional news media. Although the network news shows, newspapers, and news magazines now share the job of mediating campaign communication, they certainly have not disappeared. Yet, The 2004 Presidential Campaign neglects to include a chapter focusing on their role, and there is little attention to the news media in the chapters that do appear. Only ten pages in the index refer to news; CBS has one page (the same as the musical group Green Day). The few references to the news media that are included are impressionistic and seem to assume that “bad news is biased news.”

Overall, however, the strengths of the book are many and outweigh its limitations. Unlike many edited volumes, it is well written throughout and made interesting for a lay audience, accessible for undergraduates, and useful for scholars. It nicely balances observations about 2004 with information from campaigns that came before it, helping readers make sense of this specific election and of political communication more generally.

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The Presidential Library System is composed of eleven presidential libraries and the Nixon Presidential Materials (in the process of being moved to the Nixon Library California). These facilities are overseen by the Office of Presidential Libraries, a part of the National Archives and Records Administration. Each of these unique facilities cannot be considered libraries in a traditional sense. Rather, they largely reflect the input from the former chief executives whose memory they will promote. To help us understand this transformation process, Professor Benjamin Hufbauer of the University of Louisville has produced a highly informative work exploring the material culture of presidential commemoration and how presidential memorials and libraries contribute to understanding the purpose, meanings, and accomplishments of modern U.S. presidents.

Beginning with his Introduction, Hufbauer examines how the desire to commemorate American presidents in the form of massive classical temples and obelisks has been literally transformed or replaced by presidential libraries that “enshrine our
national dreams but also our national nightmares” (p. 2). Hufbauer regards this transformation as part of a larger “American civil religion” that transcends the history of the United States.

Presidential Temples is full of anecdotes and stories of presidential commemoration, beginning with the rough drawings of Franklin D. Roosevelt to build his own library in New York, an effort to literally memorialize himself. According to Hufbauer, “never before had a president designed his own national memorial” (p. 23).

Professor Hufbauer makes the case that presidential libraries serve a variety of constituents. “For the tourist, they present an ideologically charged narrative that valorizes a presidential life, helping to incorporate it into the nation’s civil religion. They also present an ‘aura of the sacred’ by entwining an individual’s life with national history that creates a narrative circuit that concludes with a presidential grave” (p. 24). The FDR Presidential Library became the first such facility to be maintained by the National Archives. A congressional act passed in July 1939 stipulated that “the federal government would provide such funds as may be necessary . . . so that the said Library shall be at all times properly maintained” (p. 32). The cornerstone was laid on November 19, 1939.

The Harry S Truman Presidential Museum and Library in Independence, Missouri conveys a distinctive sense of transformation through its replica of the Oval Office as it existed during the Truman presidency and the mural painted and contributed by Thomas Hart Benton that depicts the historical theme of America’s Manifest Destiny, “transforming Indians into ghosts and white America’s victory on the western frontier and in the Cold War” (pp. 42-43). Hufbauer tells readers that the town of Independence was closely tied to the idea of Manifest Destiny and was considered “a jumping-off point” for American settlers heading west to Oregon and California. Truman himself described Independence as “a strategic conjunction of river and trail and at a time when American urges westward were reaching to climactic proportions, it was given to Independence to play a first and major part in the continental destiny of the United States” (p. 48).

Hufbauer also points out how presidential libraries have adapted to new technologies, at times compromising historical accuracy, to allow visitors greater access to and knowledge about modern presidents. The Truman Library is a case in point, where “the truth of history is disrupted as much as reinforced by displays that seek to verify historical reality through simulations” (p. 60).

The Lyndon Baines Johnson Library in Austin, Texas had its origins in a meeting in the Oval Office in July 1965 between LBJ and Attorney General Nicholas Katzenbach, who had just offered the name of a Harvard graduate to serve in the federal government. As Hufbauer relates the story, “Johnson could barely contain his annoyance. He said in a recorded conversation, ‘Can’t you get me somebody in the Midwest or South or West?’ ” Johnson then proceeded to lecture the attorney general on how he was going to break “this goddamned Harvard” hold on government positions through his new library by “taking a hundred people and turning them out of Texas every year and make the University of Texas finance it” (p. 73). Much of the planning for the Johnson Library was based on ideas LBJ had received as early as 1958 from his former mentor, House Speaker Sam Rayburn.
Professor Hufbauer devotes an entire chapter to the commemoration of First Ladies, an effort that began at the Smithsonian Institution as early as 1914, a full six years before women obtained the right to vote. Hufbauer notes that some of the First Ladies have been considered controversial (e.g., Edith Wilson, Eleanor Roosevelt, Nancy Reagan, and Hillary Rodham Clinton) and that what is often at stake is “the expression as well as repression of women’s power in the United States” (p. 107). It also is interesting to note that from 1914 to 1987, “the memorialization of first ladies in the Smithsonian was a problematic decision. Clothes helped to make the man in this period and clothing was considered a crucial finishing touch to acknowledged power and accomplishment” (p. 107).

*Presidential Temples* confronts the harsh truth about history and memory and their links to the American presidency. “The loss of living memory” (p. 197) often motivates presidential libraries to change exhibits, programs, and perhaps marketing efforts as well to draw in additional visitors and scholars. Furthermore, “commemoration is the intercessor between death and societal memory. As the living memory of a president and first lady passes away, those who would commemorate them must help them make the transformation into the realms of history. . . . Presidential libraries try to create the sense that their subjects, if not immortal, are still relevant” (p. 198).

—Michael E. Long

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