Inherent War and Executive Powers and Prerogative Politics

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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

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

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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. 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. 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 *In re Neagle*, which rested on statutory interpretation. 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.” Consider the famous exchange in federal district court during the *Steel Seizure* case, when a Justice Department attorney had the following exchange with Judge David Pine:

> The Court: So you contend the Executive has unlimited power in time of an emergency?
> Mr. Holmes Baldridge: He has the power to take such action as is necessary to meet the emergency.
> The Court: If the emergency is great, it is unlimited, is it?
> 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. . . .
> The Court: And that the Executive determines the emergencies and the Courts cannot even review whether it is an emergency.
> 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).

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. 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. 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.

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,
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

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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.”23 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 Act24 (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

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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


