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## Presidential War Powers

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## Introduction

Even before the framing of the Constitution, the Framers feared an executive power that would grow too strong. This fear was reflected throughout debates held before, during, and after the American Revolution. Even today, debate still continues as to what the executive power entails when it comes to acts of war and treaties. The United States Constitution was framed with the purpose of dividing power between the branches of government in order to avoid abuse and tyranny. “The Constitution bestows enormous power and responsibility on the President to protect the nation’s security and safeguard the people’s liberty” (Matheson 1). Throughout the history of the United States, the President has had to find the delicate and important balance between liberty and security. That balance is most fully manifested through the President’s interpretation and carrying out of the executive power during national security crises. This thesis will examine in-depth the Framers’ giving the President the power of prerogative during national security crises as outlined in Article I Section 8 and Article II Section II of the Constitution. It will focus on the works of Locke, Montesquieu, and Blackstone, as well as on the British system of government and the Framers’ decision to give prerogative to the President of the United States. The British model had a tremendous influence on the framing of the 18<sup>th</sup> century Anglo-American Constitution and what the Framers understood as the powers of the Commander-in-Chief. Locke, Montesquieu, and Blackstone argued in favor of separation of powers, a federative power, and the executive having absolute power on issues of war. These three men in particular would have a tremendous influence on the Framers and their view on executive war powers.

My thesis will also examine the important change in the Constitution's Declare War Clause, specifically the change in the wording from "make" to "declare war." I contend that although Congress was given the power in Article I, section 8(11) to declare war, by changing the language from "make" to "declare" in that provision, the Framers of the Constitution intended to give the President the power to engage the country in war without the consent of Congress. I will provide evidence for this argument by reviewing three significant episodes in the exercise of national security power by the President: President George Washington's Neutrality Proclamation, as discussed in the Pacificus-Helvidius debates, Abraham Lincoln's suspension of the writ of habeas corpus and use of military tribunals during the Civil War, and President George W. Bush's invasion of Iraq with the approval of Congress through the Authorized Use of Military Force, as well as surveillance and detainee programs. These three case studies are important examples of the President using his executive power to protect the nation from threats both at home and abroad. They were crucial moments in American history which have been criticized by many as an abuse of Presidential power. However, when examined, these critical events demonstrate the Framers' intent to give the President the power of prerogative and the Presidents' correct use of that power. I will argue that from *The Federalist Papers* to the actions of President Bush, there has been support for giving the President the power of prerogative to go to war without Congress's consent.

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## The Framers, the Constitution, and the Power of Prerogative

The Framers of the Constitution were highly influenced by the British system of government, having been subjects of the crown themselves before their independence. Despite wanting to break apart from Great Britain, many Federalists, including Alexander Hamilton, praised England's system of government as the model to follow in America. The main argument against the Crown however was the abusive powers of the king of England and how much power would be given to Congress or one single man in America's new system. In *Federalist No.1*, Hamilton argued for the necessity of a new constitutional union. His principal argument was the need for an energetic government to preserve liberty.

An enlightened zeal for the energy and efficiency of government will be stigmatized as the offspring of a temper fond of despotic power and hostile to the principles of liberty. An over-scrupulous jealousy of danger to the rights of the people, which is more commonly the fault of the head than of the heart, will be represented as mere pretense and artifice, the stale bait for popularity at the expense of public good (Kesler 29).

Security and adequate forces needed to uphold liberty were of utmost importance to a newly formed nation. To protect one's rights as outlined in the Constitution, one needs an energetic government. Hamilton and Madison go on to argue that a well administered federal government will win the support of the people. The people's ties will then be more connected to the country than their state.

In *Federalist No. 23*, Hamilton continues to argue that unlimited powers are paramount when it comes to national security. But how do you create a more energetic government?

This inquiry will naturally divide itself into three branches- the objects to be provided for by a federal government, the quantity of power necessary to the accomplishment of those objects, the persons upon whom that power ought to operate. Its distribution and organization will more properly claim our attention under the succeeding head. The principal purposes to be answered by union are these- the common defense of the members; the preservation of the public peace, as well against internal convulsions as external attacks; the regulation of commerce with other nations and between the States; the superintendence of our intercourse, political and commercial with foreign countries (Kesler 148-149).

Power without limitations is necessary since events cannot be foreseen. War policies can't be restricted by law; self preservation is paramount. Power must be able to apply the law to citizens and not to states as a whole, replacing the people's attachment from states to the country.

Republics must be energetic, for as Hamilton concludes in *Federalist* No. 23, "This, at all events, must be evident, that the very difficulty itself, drawn from the extent of the country, is the strongest argument in favor of an energetic government; for any other can certainly never preserve the Union of so large an empire" (Kesler 153). An energetic government requires giving the power of prerogative to the President.

### **The Power of Prerogative**

Critics of unilateral Presidential war-making powers argue that the power to declare war is an issue of collective judgment. The legislature should be the principle body in initiating war, not the executive. The executive, with one man at its head could not possibly assess correctly a situation of going to war like the collective body of Congress. The power to go to war is too important to be left in the hands of a single person. Louis Fisher in particular argues that the President can only act at the behest of Congress. Congress is the principal agent in foreign powers and only Congress can authorize war.

Evidence which trumps Fisher's criticisms is the writings of Locke and Blackstone, which assisted the Framers in drafting the Constitution. The main contention between critics

who believe the President will abuse his war powers if allowed to act unilaterally and those who support unilateral Presidential action centers on Locke's concept of prerogative, which he defined in *The Second Treatise of Government*:

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 law-making power is not always in being, and is usually too numerous, and so too slow, for the dispatch requisite to execution; and because also it is impossible to foresee, and so by laws to provide for, all accidents and necessities that may concern the public, or to make such laws as will do no harm if they are executed with an inflexible rigour on all occasions and upon all person that may come in their way; therefore there is latitude left to the executive power to do many things of choice which the laws do not prescribe (Locke 74).

Congress with its vast body of members cannot act quickly enough in moments of national crises. Giving the executive the power of prerogative would eliminate slow deliberations in Congress, and grant the President the power to execute more quickly for the public good. The idea however of the execution of prerogative in legislative affairs over foreign policy took centuries to develop in England. As Fisher summarizes this development:

The English Parliament gained the power of the purse in the 1660s to restrain the king, but the power to initiate war remained a monarchical prerogative. In his *Second Treatise on Civil Government* (1690), John Locke identified three functions of government: legislative, executive, and "federative." The last embraced "the power of war and peace, leagues and alliances, and all the transactions with the persons and communities without the commonwealth. To Locke, the federative power (what today we call foreign policy) was "always almost united" with the Executive. Any effort to separate the executive and federative powers, he counseled, would invite "disorder and ruin (Fisher 2011, 236).

The king was to make unilateral decisions when it came to war or peace. England's parliamentary system at the time was so slow and indecisive in taking action that it forced the king to take the prerogative in foreign affairs. Peter Irons, in *War Powers*, argues that Locke's idea of prerogative and the executive's power to act against the law has led American Presidents to have "repeatedly asserted their 'inherent' powers to employ military force without legislative sanction and even *against* the clear declarations of Congress. In this sense, Locke's notion of



executive prerogative remains alive, more than two centuries after the Philadelphia delegates rejected that notion” (Irons 18).

William Blackstone continued Locke’s argument by defining the king’s powers as those which he can exercise alone. “Some of those powers he called *direct*- that is, powers that are ‘rooted in and spring from the king’s political person,’ including the right to send and receive ambassadors and the power of ‘making war or peace’” (Fisher 2011, 236). The power to deploy and command military and naval forces and to make treaties and alliances were the king’s mandate but also subject to limitations by Parliament which controlled the purse strings (Irons 18).

When the Constitution was complete, the delegates had included many of Locke’s federative powers and Blackstone’s royal prerogatives. What remained unclear to the delegates and a topic of debate today is who initiates war. The first step was to establish which level of government had power to initiate war. The Framers included the Declare War Clause “to facilitate the federal government’s representation of the nation in international affairs, and to make clear that the declaration of war was a power of the national government, not the state governments” (Yoo 2005, 19). The Framers clearly explained how going to war was a national decision in Section 10 of Article I in the Constitution.

Authority over national wars is expressly stated in Articles I and II. Section 10 of Article I provides: “No States shall, without the Consent of Congress...engage in war, unless actually invaded, or in such imminent Danger as will not admit of delay.” Other war-related authorities are withheld from the states by Section 10, including letters of marque and reprisal (Fisher 2011, 242).

Critics of Presidential prerogative claim that the Framers rejected the British system. In doing so the power to declare war was not to be a national decision made by the executive, but by

Congress. Fisher argues that, “The purpose of the Declare War Clause is to preserve republican government by keeping the power to initiate war in the legislative branch (Fisher 2011, 243).

A contributing factor to the ongoing debate over Presidential war powers and the use of prerogative is the semantic change in the Constitution changing the power of Congress from “making” to “declaring” war.

The term “declare” was synonymous with “commence,” and, in this context, they both referred to the initiation of hostilities, not to their subsequent acknowledgment or ratification by Congress. The Framers agreed that the president could act without a congressional declaration of war to repel an invasion but that only Congress could authorize the deployment of forces outside the nation’s territory in combat against foreign troops (Irons 21).

Congress had the right to declare war while the President had the right to command the troops at both the civilian and military levels. Additional support towards the powers granted to Congress are contained in the issuing of “letters of marque and reprisal.”

The letters were a form of contract between the sovereign and the private force. Over time, such reprisals were generally conducted by public armies and navies, and the phrase “letters of marquee and reprisal” was considered, by the Framers, to include armed hostilities short of declared war. Sending military forces to protect American citizens in foreign countries, or to retrieve property that had been unlawfully seized, was an example of such congressional power (Irons 22).

Thomas Jefferson later wrote that the authority required in conducting a reprisal was that “Congress must be called upon to take it; the right or reprisal expressly lodged with them by the Constitution, and not with the executive” (Fisher 2011, 249; Irons 22). Collective judgment, including reprisals and especially declaring war according to critics of Presidential prerogative belong to the legislative, which is superior to that of one, the executive.

Fisher states in *Presidential War Powers* that there are seven clauses of the Constitution which vest war powers in Congress (Fisher 2004, 7). There are no such similar powers given to

the President, therefore if there is not any attack on the United States, the President cannot attack and/or act on his own. “The President never received a general power to deploy troops whenever and wherever he thought best, and the framers did not authorize him to take the country into full-scale war or to mount an offensive attack against another nation” (Fisher 2004, 9). Such a claim is supported, according to Fisher and Irons in the separating of purse and sword with the President as Commander-in-Chief and Congress as the financier of military operations. The “sole organ”<sup>1</sup> doctrine giving the President prerogative is a gross misinterpretation of the Constitution. Critics state that the President can only act at the behest of Congress as Congress is the principal agent in foreign affairs.

Perhaps the most authoritative statement on the primacy of legislative over executive powers in this field comes from Madison, who initiated the effort to draft a new Constitution and who insisted on the separation of powers among the branches of the federal government. Madison argued that “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. They are barred from the latter functions by a great principle in free government, analogous to that which separates the sword from the purse, or the power of executing from the power of enacting laws.

Madison’s emphatic statement, and the entire record of the Constitutional Convention, leaves no doubt that the Framers agreed that Congress, the body elected by the people, should hold the awesome power to commit the nation to war. The president, and the military forces under his command, could employ troops and ships only in cases of emergency, to repel foreign invasion as a defensive measure or to protect American citizens and property abroad” (Irons 26-27).

The management of foreign affairs was not vested in the President as the “sole organ” doctrine states, but given to Congress who held the power to declare war. It was the legislative not executive, which was the primary decision maker in foreign affairs.

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<sup>1</sup> The “sole organ” doctrine originated from the Pacificus-Helvidius debates where Hamilton as “Pacificus” argued that “the management of foreign affairs was vested in the President, who is the ‘sole organ of intercourse between the nation and foreign nations [and] the interpreter of the national treaties’ (Fisher 2004, 27).

## The Court's Role

Critics of Presidential prerogative have made clear the role Congress should take, but what action should the courts take? Critics agree they must protect Congress' institutional powers by reducing Presidential power. Courts should step in, they argue, and rescue or resolve war powers issues at their own discretion. The Supreme Court in 1800 and 1801 recognized that Congress could authorize hostilities in two ways: "either by a formal declaration of war or by statutes that authorized an undeclared war, as had been done against France. Military conflicts could be 'limited,' 'partial,' and 'imperfect' without requiring Congress to make a formal declaration" (Fisher 2004, 25). It is Congress, not the President who authorizes war, regardless if it is declared formally or not. The President according to the Supreme Court ruling<sup>2</sup> must have any authorized hostilities first recognized by Congress. The court felt that Presidential orders and military actions could be inconsistent and unclear, especially when dealing with hostilities where war has not officially been declared. The court's ruling in regards to the "Quasi-War" with France clarified that Congress held the prerogative or authority to initiate war and military deployment. However, according to Fisher, a better solution than court intervention is Congress not relying on the courts but checking the President itself. "Congress cannot go to the courts, hat in hand, asking judges to do what legislators are fully capable of doing: Check the President. Congress should not entrust to the judiciary the duty of protecting legislative prerogatives" (Fisher 2004, 274).

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<sup>2</sup> The Quasi- War Cases ruling made regarding the President's authority to engage a country in an undeclared war during the "Quasi-War" with France in 1798-1800. Court ruled that Congress could authorize hostilities through a formal declaration of war or through statutes authorizing an undeclared war.

The Supreme Court ruling however was not definitive evidence that Congress, not the President, held prerogative war powers. The issue should never have been left to be decided by the courts. Scott Matheson writes that although the Supreme Court has ruled certain executive or legislative action unconstitutional like *Marbury v. Madison*, the courts have over history upheld both branches infringement of individual rights during times of war in most cases. Such infringements during national crises include the suspension of habeas corpus during the Civil War, Japanese-American internment camps during World War II, and wiretapping during the War on Terror.

The Supreme Court generally has acquiesced in violations of civil liberties during times of crisis, at least until the crisis has ended, raising the question of whether courts can effectively protect individual liberties in wartime. Courts tend to avoid direct examination of individual rights claims in favor of focusing on the extent of congressional authorization of the executive action under review (Matheson 24).

John Yoo would argue that the courts have stayed out of most cases because they do not belong there in the first place. There is no legal process when necessity beckons. Non-judicial intervention involves the courts having no power, relying more on the practical interaction between the executive and legislature.

### **Defenders of Prerogative**

The unforeseen circumstances surrounding national security issues and the importance of Presidential prerogative are what the Framers had in mind when they drafted the Constitution. Presidential prerogative does not give the President carte blanche powers when deciding to go to war. The Constitution, however, does grant the President prerogative to go to war without the consent of Congress. John Yoo and to an extent Scott Matheson are advocates of Presidential prerogative when it comes to war. Presidents favor a strong executive. They are also the primary responders to national security issues. Matheson in *Presidential Constitutionalism in Perilous*

*Times* argues that “Executive constitutionalism calls for presidents to meet their responsibilities within the separation of powers framework and to meet national security threats with commitment to constitutional principles, especially when individual liberties must be reconciled with security needs” (Matheson 3). The use of prerogative by the President is dictated in the Constitution in Article 2 Section II, and is there for the purpose of the President protecting individual rights. The President’s role in the separation of powers is critical in redeeming liberty (Matheson 4). National emergencies differ in so many ways requiring rapid Presidential action to assess the emergency. Matheson differentiates between emergencies of a lesser kind and emergencies requiring immediate Presidential action known as “chronic emergencies.”

A chronic emergency, may initially call for immediate executive measures but over time require the joint attention of the political branches to address the crisis with greater democratic accountability. If an emergency calls for the exercise of extraordinary government powers, the transition back to relative normalcy may need recalibration of the security-liberty balance (Matheson 10).

Clearly the actions by President Lincoln during the Civil War and President George W. Bush after September 11, 2001, are strong cases in support of a chronic emergency where executive constitutionalism was required. Slow deliberations and actions by Congress immediately following the threats in both cases would have jeopardized the safety and security of the nation. Ann Thomas argues that “The President can negotiate and act secretly, and such secrecy is often demanded by the necessities of a challenge as to whether or not resort should be had to the use of the military. The President also has superior sources of information which permit him to act with full knowledge of the situation” (Thomas *xi*). The branches of government cooperate and interact on many issues, yet the Framers envisioned the executive to be the first responder to a threat.

Although the constitution text delegates numerous foreign powers to Congress, the President is better positioned to act and react quickly. Congress, as a bicameral multi-member body that responds to the complexities of diverse political constituencies and interest group politics, reacts more slowly and tentatively on issues of national security and foreign affairs. Congress often defers to the executive at first because it lacks both the resources and information with which to act and sometimes lacks the political fortitude (Matheson 13).

John Yoo in *Crises and Command* argues that the writers of the Constitution feared Congress, not the Presidency, as the principal threat to people's liberty.

In a democracy, James Madison wrote in *Federalist 48*, "the legislative authority, necessarily, predominates," because it has access to the "pockets of the people." He warned, "it is against the enterprising ambition" of Congress "that people ought to indulge all their jealousy and exhaust all their precautions." It was against the "impetuous vortex" of Congress that the Framers established the Presidency as a counterbalance. Following Madison, Alexander Hamilton wrote in *Federalist 70* that a vigorous executive would protect against those "irregular and high-handed combinations which sometimes interrupt the ordinary course of justice" and provide security against "enterprises and assaults of ambition, of faction, and of anarchy" that would emanate from "humours of the legislature." The great threat to the Constitution, Hamilton wrote, was not the President but the "legislature's propensity to intrude upon the rights and to absorb the powers of other departments," such as the executive branch, the courts, or the states (Yoo 2011, x).

Balancing security and liberty during national security crises has been an ongoing challenge for American Presidents. That delicate line between the two is a matter of interpretation to those who are in the executive. The most aggressive stance on emergency Presidential authority argues that "the Constitution includes an implied executive power of self-preservation, a rule of necessity that overcomes statutory law and perhaps even constitutional provisions" (Matheson 17). The "sole organ" doctrine before mentioned vests in the President the sole power of the nation in its foreign affairs. "This position envisions the President taking whatever measures are necessary that do not invade powers allocated to the other branches or that otherwise are not prohibited by specific constitutional provisions" (Matheson 18). Article II of the Constitution does not grant unlimited power to the President. Matheson, Yoo, and other supporters of

Presidential prerogative would agree. However, Article II does make a general delegation of authority “above and beyond the subsequent roster of enumerated presidential powers” (Matheson 18). Such authority not clearly designated to the President in the Constitution was exactly the Framers intent. The President does not have unlimited powers yet his power of prerogative during national security issues are granted to him in Article II if not written explicitly. Matheson argues for “executive constitutionalism” which “expects presidents to accept their calling to implement the Constitution during perilous times, including vigorous and prompt action to protect both the nation and also individual liberties” (Matheson 31). The Framers in drafting the Constitution agreed upon “executive constitutionalism” by making one man the head of the executive office. His power through quick and efficient responses in moments of crises, although checked and balanced by Congress, would serve a more efficient purpose than the larger and much slower legislative branch.

The need for an energetic executive was addressed by Machiavelli, Hugo Grotius, Emmerich Vattel, Locke, Montesquieu, and Blackstone, and influenced the writers of the Constitution who were in favor of an energetic executive. Hugo Grotius and Emmerich Vattel were highly influential in shaping the British Constitution and the Framers’ minds on issues of international law. Yoo in *The Powers of War and Peace* writes that in executive and legislative roles, the British constitution first

set out the formal roles that the Crown and Parliament were to play in war and treaty-making. In short, the English system gave the executive leadership in the initiation and conduct of war and the making of treaties, while the legislature primarily played a role by funding the wars, enacting and implementing legislation, and impeaching ministers. Second, within these boundaries, the British constitution provided the two branches with substantial leeway to shape a dense network of “subconstitutional” understandings, relationships, and practices governing foreign affairs. This network provided Parliament with a way to gain a substantial role in decisions on war and treaties, even though its formal powers extended only to appropriations and legislation. Both of



these elements- formal power and real life practice- would make a substantial impression on England's colonists in North America (Yoo 2005, 32).

Grotius and Vattel argued that it was unnecessary to need a formal declaration of war to commence hostilities. All a declaration of war did was two things: one, it notified the enemy that war existed and, two, it served the role of informing citizens of a country of the alteration of their legal rights (Yoo 2005, 33-34).

Machiavelli saw the role of the executive as "the servant of necessity, bound to act in accordance with, in the absence of, or in extraordinary emergencies, in defense of the republic, even contrary to regularly constituted law" (Yoo 2010, 4). Princes were to act quickly, executing the public good decisively and secretly, when necessary. They were also to be held accountable for their failures (Machiavelli 61). "Hamilton's description of the Presidency as able to act with 'decision, activity, secrecy, and dispatch' echoes Machiavelli" (Yoo 2010, 4).

Unanticipated events were requisite for the power of prerogative. Locke argued that the executive in an emergency had the power and duty to use his own discretion for the public good. "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 executive power in his hands... Unlike the royal prerogative, the executive's authority had to be exercised in the public interest and for the common good" (Yoo 2010, 5).

Supporting Locke's argument with a bit of a twist was Montesquieu, who argued that the executive power should enforce laws and conduct foreign policy. However, Montesquieu added a third branch of government, an independent judiciary. Locke and Montesquieu's arguments and rationale were accepted by Blackstone, who was quite adamant about granting the executive absolute power on issues of war.

He defined the executive's primary job as prosecution of the laws and praised the British constitution's concentration of executive authority in a "sole magistrate of the nation" because it produced "unanimity, strength and dispatch." In words that would be repeated during the Philadelphia Convention (though often without attribution), Blackstone criticized the idea of dispersing the executive power among different officials. "Were it placed in many hands, it would be subject to many wills: many wills, if disunited and drawing different ways, create weakness in government." For that reason, Blackstone concluded the British constitution made the King of England "not only the chief, but properly the sole, magistrate of the nation; all others acting by commission from, and due subordination to him (Yoo 2010, 6-7).

What must be made clear is that both proponents and critics of Presidential prerogative understand the importance of political thinkers influencing the framing of the Constitution. The Framers were highly influenced by the British constitution as they were subjects to the crown before independence and understood the British system of government. They did have obvious grievances against the King but wanted to form a system of government in America similar to that of England. For that purpose, the Framers eventually decided on a strong, energetic executive that would be checked by the purse of Congress.

Fisher and Irons strongly criticize Yoo, Matheson, and Thomas for their understanding of the Declare War Clause. Yoo in particular, although heavily criticized, provides the correct interpretation of the Declare War Clause. The Declare War Clause does not vest in Congress authority to initiate war. The change in the Constitutional text from "make" to "declare" war is the Framers rationale for a flexible approach to foreign affairs and constitutional provisions.

The unamended Constitution was drafted at one time and ratified at one time and so it is not unreasonable to expect words, used on the same subject to convey a common meaning throughout. Article I, Section 10 states: No state shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay. The Constitution's creation of a specific, detailed war powers process at the state level, but its silence at the federal level, shows that the Constitution does not establish any specific procedure for going to war (Yoo 2005, 146-147).

Proponents of Congressional war powers have also misunderstood the *marque* and *reprisal* clause through their misinterpretation of historical context. Yoo argues that at the time of the framing, letters of *marque* and *reprisal* referred to a technical term of international *reprisal*, giving government permission to an injured private party to recover, through military operations, certain compensation from citizens of a foreign nation (Yoo 2005, 147-148). Without such a letter, any actions taken at sea would constitute piracy. The letter was intended during the American Revolution to deal with commercial warfare. “What seems fairly clear is that *marque* and *reprisal* did not refer to all forms of undeclared war, especially those with purely military and political goals, but rather with the legal implications of one species of commercial warfare” (Yoo 2005, 148). A decisive point to Yoo’s argument is that if the Framers intended to grant Congress “sole and exclusive” authority to wage war, they would have used the same phrase from the Articles of Confederation. “Instead, they changed Congress’s power to ‘declare war’ from ‘determining on peace and war.’ For the pro-Congress position to be correct, the Framers would have had to be clumsy draftsmen indeed” (Yoo 2005, 148).

### **Pacificus-Helvidius Debate**

Foreign affairs and law making were the basis for the Pacificus-Helvidius debate. Much of what was debated and discussed originated from earlier political thinkers, particularly Blackstone’s understanding of Locke and Montesquieu’s writings.

Locke and Montesquieu pursued a pure separation of powers scheme, one in which each governmental function was classified as either legislative, executive, or judicial, and then allocated to that branch. Blackstone, on the other hand, adapted the separation of powers to fit a more traditional checks and balances framework, in which different functions were distributed so that each organ of government could restrain the other. In the former, maintaining a line between war and treaties on the one hand, and domestic lawmaking and funding on the other, fits the distinction between executive power in foreign affairs and legislative control over domestic regulation. Limiting wars and treaties

to matters of international affairs, however, and requiring parliamentary participation for any war or treaty undertakings of a domestic nature also provided Parliament with a check on the royal prerogative over international agreements (Yoo 2005, 45).

In the Pacificus-Helvidius debate there is a difference of opinion as to the nature and extent of the President's power in foreign policy and in times of war. Pacificus (Alexander Hamilton) and Helvidius (James Madison) differ in their beliefs about whether the executive or legislative branch holds the power to declare neutrality. The Pacificus –Helvidius debate is highly significant because it was one of the first instances after the nation was formed when the use of Presidential prerogative came into question. News of war in Europe and the beheading of King Louis XVI in 1793 placed the United States in a difficult position relating to the treaties America had made with France in 1778. Rather than become involved in Europe's affairs, Washington without the consent of Congress issued a proclamation stating that America would remain neutral in the war. Hamilton and Madison, who wrote under the pseudonym "Publius" in *The Federalist Papers* in favor of ratifying the Constitution, later differed in their debate as to the correct use of Washington's executive prerogative when dealing with treaties. Their differences however did not nullify their concurring arguments in *The Federalist Papers*. It only was concerned with the authorization of treaties and proclamations of neutrality.

Pacificus defends George Washington's proclamation of neutrality with France stating that any dissenting opinions are direct attacks on the Constitution itself. The proclamation declaring neutrality, according to Pacificus, is a power given to the executive branch and in doing so is "a usual and proper measure" (Pacificus 53). The whole design of declaring neutrality is to preserve peace with foreign nations which only the executive can authorize. Pacificus states that "The legislative department is not the organ of intercourse between the United States and foreign nations. It is charged neither with making nor interpreting treaties"

(Pacifcus 54). It would seem highly illogical and impractical for the legislative body to control issues of neutrality with foreign nations when that is not their purpose. Pacifcus continues to push his argument toward executive authority by stating how obvious it would be for the judicial branch not to have the power. “That department is to decide litigations in particular cases...It is not concerned with pronouncing upon the external political relations of treaties between government and government” (Pacifcus 54). Alexander Hamilton in *Federalist* No. 74 as well as in his debate with Helvidius maintains that the powers of the Commander in Chief are connected with the federative power in foreign affairs. Both are connected,

in various capacities: As the organ of intercourse between the nation and foreign nations; as the interpreter of the national treaties, in those cases in which the judiciary is not competent, that is, between government and government; as the power, which is charged with the execution of laws, of which treaties form a part: as that which is charged with the command and disposition of the public force (Pacifcus 54).

Pacifcus makes clear why the executive and federative powers are connected in their responsibilities in foreign affairs and therefore should deal with matters of neutrality and war. The President as Commander in Chief of the army and navy should be in charge of establishing treaties with other countries. The Constitution does grant Congress in Article I, Section 8 the power to raise and support the army and navy. Pacifcus however argues that the executive, with the President as the head of the military, holds overriding power in foreign affairs in how the military should be used. If the legislative has the right to declare war then it would be the

duty of the executive to preserve peace, till the declaration is made; and in fulfilling this duty, it must necessarily possess a right of judging what is the nature of the obligations which the treaties of the country impose on the government: and when it has concluded that there is nothing in them inconsistent with neutrality, it becomes both its province and its duty to enforce the laws incident to that state of the nation. It is consequently bound, by executing faithfully the laws of neutrality when the country is in a neutral position, to avoid giving a cause of war to foreign powers (Pacifcus 56).

Pacificus observes that many opponents to the neutrality proclamation do understand that the executive retains the right to interpret the articles of the treaty with France. He mentions that further analysis of the treaty would have opponents raising the question of how the executive power would judge and interpret its limitations. The executive in its efforts to determine the “condition of the nation” might affect the legislature in its exercise of power to declare war.

Pacificus responds stating that “The legislature is still free to perform its duties, according to its own sense of them; though the executive, in the exercise of its constitutional powers, may establish an antecedent state of things, which ought to weigh in the legislative decisions”

(Pacificus 57). There is cooperation with the President and Senate when making treaties but they can only be continued or suspended by the President.

Pacificus concludes his argument by stating once again the power of the President to execute the laws of the nation and judge the laws of other nations in order to create a proclamation of neutrality. “In this distribution of authority, the wisdom of our Constitution is manifested. It is the province and duty of the executive to preserve to the nation the blessings of peace. The legislature alone can interpret them by placing the nation in a state of war” (Pacificus 58).

Helvidius counters Pacificus contending that the power to make treaties is not an executive power. He says that the powers of the executive and legislative are both distinct in how they execute and make the laws.

The natural province of the executive magistrate is to execute laws, as that of the legislative is to make laws. A treaty is not an execution of laws: it does not presuppose the existence of laws. It is, on the contrary, to have itself the force of a law, and to be carried into execution, like all other laws by the executive magistrate. To say then that the power of making treaties, which are confessedly laws, belongs naturally to the department which is to execute laws, is to say, that the executive department naturally

includes legislative power. In theory this is an absurdity-in practice a tyranny (Pacifcus 61).

These strong words by Helvidius clearly make the argument that the executive in making treaties is making laws, not executing them, and therefore violates the sole purpose of its creation. He argues throughout his debate that “treaties, when formed according to the constitutional mode, are confessedly to have the force and operation of laws, and are to be a rule for the courts in controversies between man and man, as much as any other laws. They are even emphatically declared by the Constitution to be ‘supreme law of the land’” (Pacifcus 63). Helvidius continues to warn against the executive trying to make exceptions to the powers of the legislative to - declare wars and make treaties. Any such exceptions should be narrowed instead of enlarged as to not give more power to the executive.

In order to make his point more clearly, Helvidius provides an example of why the powers of making treaties and declaring war should not fall into the hands of the executive. “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. They are barred from the latter functions by a great principle in free government, analogous to that which separates the sword from the purse, or the power of executing from the power of enacting laws”(Pacifcus 63). In *The Powers of War and Peace*, John Yoo mentions this same principle as Madison compared America’s system to that of England.

The sword is in the hands of the British king; the purse in the hands of the Parliament. It is so in America, as far as any analogy can exist. A similar approach governed treaties. The Framers maintained the distinction between treaty-making and legislation that characterized British practice and their own thinking during the Revolution and the Critical Period. The Constitution reflects this understanding by allocating treaty making to the executive branch and lawmaking to Congress (Yoo 2005, 89).

Just as the founders of the Constitution created a government based on branches being subject to checks, the powers of the executive must be subject to control. According to Helvidius, the ability of the executive to make treaties and declare war would create an unchecked system contrary to the Constitution of the United States. Helvidius concludes his remarks by clearly asserting that “whatever doubts may be stated as to the correctness of its reasoning against the legislative nature of power to make treaties; it is clear, consistent, and confident, in deciding that the power is plainly and evidently not an executive power” (Pacificus 65).

## **Conclusion**

The Pacificus-Helvidius debate raises important arguments about the powers of the executive and legislative branches. Both Hamilton and Madison saw the nature and extent of the President’s power in foreign policy and in times of war very differently. Even though these powers to some are clearly understood, the debates on the extent and control of governmental powers continue today.

The threats to national security have put to test the Framers intent in the Constitution of granting the President the power of prerogative.

In *McCulloch v. Maryland*, Chief Justice Marshall declared that ours is “a constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.” In a national security crisis that calls for decisive executive action to prevent serious and irreparable harm to the nation, the restraints on presidential power are generally considered to be more flexible in relation to individual rights and liberties (Matheson 8).

This flexibility in rights and liberties led to the National Emergency Act and the International Emergency Economic Powers Act passed after World War I by Congress. Each act has “delegated to the President emergency powers in a wide spectrum of areas” (Matheson 10). The



United States has suffered and endured many threats from natural disasters to wars. Wars, especially after World War I have been a serious national security threat. National security threats such as the Civil War and September 11<sup>th</sup> have “persuaded” the President to exercise his emergency powers.

We truly live in a time where an energetic executive prerogative is paramount for the preservation of America’s liberty and freedom. The next two chapters will examine two important national security circumstances, the Civil War and the aftermath of September 11, 2001, and how each President correctly exercised his constitutional duty of Presidential prerogative as the Framers intended to protect this nation.

-3-

## Abraham Lincoln and the Civil War

The Framers intent on giving the President the power of prerogative and exercising his war powers came to the forefront in the presidency of Abraham Lincoln during the Civil War. The events and years following America's independence from Britain, to the outbreak of the Civil War resulted in increased polarization and separation between the North and South, primarily over slavery and state's rights. One of the greatest examples, if not the greatest example, of a national threat occurred during the Lincoln presidency. Without Lincoln, the South might have won the war resulting in 11 of the 36 states leaving the Union. Lincoln freed the slaves and helped usher in a dynamic market economy. "He interpreted the Constitution as serving a single nation, rather than existing to protect slavery" (Yoo 2011, 199). Preserving the Union was of utmost important to Lincoln. What made Lincoln great was his understanding and vision of Presidential power. "He invoked his authority as Commander-in-Chief and Chief Executive to conduct war, initially without congressional permission, when many were unsure whether secession meant war. Only Lincoln's broad interpretation of his Commander-in-Chief authority made that step of freeing the slaves possible" (Yoo 2011, 200).

### **Prelude to War**

The actions taken by Lincoln in response to southern threats of secession and then the firing on Fort Sumter on April 12, 1861, were not impulsive and irrational. The years following the framing of the Constitution before the Civil War heavily affected Lincoln's campaign platform for President and his action once elected.

The “Great Compromise” over slavery at the Constitutional Convention, which papered over the chasm between opponents and defenders of slavery, had proved to be neither great nor lasting. Their hand forced by southern delegates who threatened to bolt the convention and destroy James Madison’s plan for a strong federal government, northern delegates capitulated and agreed to legitimize the institution of slavery in three clauses that protected the human “property” of southern slave owners. Within three decades of the Constitution’s ratification, in 1788, the growing abolitionist movement had created fear among southerners that Congress might restrict the expansion of slavery into the territories west of the Mississippi which lured many slave owners who sought cheap land. With the Missouri Compromise of 1820, Congress did, in fact, limit the reach of slavery, admitting Missouri to the Union as a slave state but banning the practice in territories north of that state’s southern border (Irons 67).

The Missouri Compromise resulted in heated debates in Congress for the next thirty years on the slavery issue leading to the precursor of the Civil War fought in Kansas in 1854. The controversial Supreme Court decision in the *Dred Scott* case became the central issue in the 1858 Illinois senate campaign. According to Lincoln in his debate against Democratic senator Stephen Douglas, “the *Dred Scott* decision was erroneous,” and Douglas was complicit in a “conspiracy to perpetuate and nationalize slavery.” Douglas, in turn, accused Lincoln of conducting “warfare on the Supreme Court” (Irons 68). Lincoln’s loss of confidence in the courts after the case’s decision was a defining moment for the Republican Party. Lincoln further argued that

the Supreme Court’s decisions could not bind the President or Congress, who had the right to interpret the Constitution too, or most importantly, the people. But “if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of the eminent tribunal (Yoo 2011, 204).

Lincoln’s approach contrasted with that of his predecessor James Buchanan, who believed that secession was illegal but that he lacked the constitutional authority to stop it. The Attorney General at the end of Buchanan’s administration concluded that “The Constitution gave neither the President nor Congress, the power to “make war” against seceding states to restore the

Union” (Yoo 2011, 206). Buchanan blamed the North for the South’s threats to secede and pleaded for Congress to take action.

### **Lincoln Takes Action**

Lincoln understood that the Constitution granted him the power to take strong action against the South. “Secession, however, was an unconstitutional response to his election by the democratic process. Echoing Jackson, Lincoln declared that the Union, as a nation, was perpetual. It preexisted the Constitution; it preexisted the Articles of Confederation. Even the Constitution recognized this fact by providing in its Preamble, for a more perfect Union” (Yoo 2011, 207). The Constitution called for the President to use force when any threat was impeding the laws of the country being carried out. Lincoln had no choice but to put down the rebellion as this was his Constitutional duty. “You have an oath registered in Heaven to destroy the government,” Lincoln told the South, “while I shall have the most solemn one to ‘preserve, protect, and defend’ it” (Yoo 2011, 207).

However, Lincoln’s actions to save the Union have been argued by many as unconstitutional. Arthur Schlesinger called Lincoln a “despot” and Edward Corwin and Clinton Rossiter considered Lincoln a “dictator.” (Schlesinger 59). While Congress was not in session, Lincoln acted by calling up army and navy troops to quell the rebellion. Although this was his right as President in times of national crises, Rossiter claimed that Lincoln was “the sole possessor of the indefinite grant of executive power in Article II of the Constitution” (Fisher 2011, 250).

Lincoln however was no dictator. Irons argues that Lincoln explained his actions to Congress when it returned to session in 1861. “Whether strictly legal or not,” those actions

“were ventured upon under what appeared to be a popular demand and a public necessity, trusting then, as now, that Congress would ratify them” (Irons 70). Fisher in his book *Defending Congress and the Constitution*, concurs with Irons and states that

Through that language he made clear he did not act fully within the law, stating frankly he had exceeded his Article II powers. That point came through plainly when he told lawmakers that he believed his actions were not “beyond the constitutional competency of Congress.” With those words he admitted he had exercised both Article I and Article II powers. Instead of claiming unchecked inherent powers, Lincoln understood that the only branch of government capable of making his acts legal was Congress. Lawmakers debated his request for retroactive authority and granted it, with the explicit understanding that his acts had been illegal. Congress passed legislation “approving, legalizing, and making valid all the acts, proclamations, and orders of the President, etc., as if they had been issued and done under the previous express authority and direction of the Congress of the United States (Fisher 2011, 251).

Despite Lincoln justifying his actions to Congress, his actions were not illegal. His response to the firing on Fort Sumter was out of Constitutional duty and obligation to the nation. “To him, the crisis required emergency power that could be accommodated under our constitutional framework. His interpretation was that the President must have the authority ‘to respond to attacks and other urgent threats’ when prior authorization from Congress was not feasible. He acted based on ‘popular demand, and a public necessity’” (Matheson 37). What some viewed as unconstitutional acts were to the President necessary to preserve the Union. Yoo paraphrasing Lincoln wrote

Was it possible to lose the nation, and yet preserve the Constitution? By general law life and limb must be protected; yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb. Necessity could justify unconstitutional acts. I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation (Yoo 2011, 201).

Lincoln’s Constitutional power to use force was imperative in this moment of national crisis and was not unconstitutional. His role as Commander-in-Chief was to execute the laws and use force against those who opposed the nation’s authority. “ ‘My oath to preserve the Constitution to the

best of my ability, imposed upon me the duty of preserving, by every indispensable means, that government- that nation- of which that Constitution was the organic law” (Yoo 2011, 201-202).

The idea of self-preservation was the Constitution’s purpose. Lincoln’s suspension of the writ of habeas corpus, the *Prize Cases*, military tribunals and *Ex parte Milligan* all demonstrate the proper and necessary measures Lincoln took to preserve the Union. “Lincoln consistently maintained that he had not sought the prerogative, but that the Constitution gave him unique powers to respond to the threat to the nation’s security. Lincoln’s political rhetoric invoked Jefferson, but his constitutional logic followed Hamilton” (Yoo 2011, 202). Lincoln understood throughout the war that Congress controlled the power of the purse. He did not rule as a dictator, but rather as a humble servant who understood and valued the leadership and power of Congress.

Lincoln could not rule out all congressional participation in the war. Congress’s cooperation was critical to any sustained war effort, for it alone controlled taxing and spending, the size and shape of the military, economic mobilization, and the regulation of domestic society. Lincoln did not refuse to obey any congressional laws, but he maintained his independent right to act in areas of executive competence, such as the management of the war, and to act concurrently with Congress in areas that might usually be thought to rest within the legislature’s purview. Lincoln, not Congress decided the goals of the war, the terms of the peace, and the means to win both (Yoo 2011, 203).

### **Suspension of Habeas Corpus**

An issue of great controversy during the Civil War was Lincoln’s unilateral suspension of the writ of habeas corpus on April 27, 1861. He suspended the writ “on the route from Philadelphia to Washington and replaced civilian law enforcement with military detention without trial. Suspension prevented rebel spies and operatives detained by the military from petitioning rebel spies” (Yoo 2011, 209). The Constitution states that the writ shall not be suspended “unless when in cases of rebellion or invasion the public safety may require it”

(Kesler 548). Located in Article I, the phrase clearly gave certain powers and limitations to Congress, however Congress was not in session when Lincoln suspended the writ.

Lincoln viewed his action between the fall of Fort Sumter on April 14, 1861, and the convening of Congress on July 4, 1861, as necessary responses to save the nation. To him, the crisis required emergency power that could be accommodated under our constitutional framework. His interpretation was that the President must have the authority, including power to suspend the writ of habeas corpus, “to respond to attacks and other urgent threats” when prior authorization from Congress is not feasible. He acted based on “popular demand, and public necessity” (Matheson 37).

The writ of habeas corpus had deep roots in English law. “The Latin words mean ‘you should have the body,’ and the writ commands an official- usually a sheriff or a prison warden- to bring the ‘body’ of a prisoner before a judge, to decide the legality of his or her detention. The writ is designed to protect individuals from arbitrary arrest and detention” (Irons 76). The law however was not enforced in the American colonies and often abused by British officials. For that reason, the Framers provided in Section 9 of Article I the provision dealing with the powers of Congress.

### *Ex parte Merryman*

Several weeks after the suspension of the writ, John Merryman, an officer in a secessionist militia was arrested and held for treason in raising an attack against the government and burning railroad bridges to stop the movement of Union troops.

Lincoln extended [the suspension of the writ] geographically to reach nationwide coverage of draft resisters and disloyal providers of aid to the rebels by the summer of 1862. Congress later ratified these actions in the Habeas Corpus Act of March 3, 1863, which gave approval of the President’s suspension. Military tribunals, created by the executive branch and later recognized by Congress, multiplied and “often took jurisdiction over ordinary crimes, war crimes, and breaches of military orders alike” (Matheson 35).

At this time, judicial procedure was considered not capable of handling such high threats to national security. Martial law in fact had been implemented during the American Revolution and War of 1812. “In 1849 the Supreme Court in *Luther v. Borden* had upheld its use during the Dorr’s Rebellion in Rhode Island, describing the power to put down an insurrection as ‘essential to the existence of every government’” (Matheson 35).

Chief Justice Roger B. Taney, and Merryman’s lawyer, objected to the suspension power claiming the power was vested in Congress, not the President.

If military detention without trial were permitted to continue, Taney wrote, “the people of the United States are no longer living under a government of laws.” Under presidential suspension, “every citizen holds life, liberty, and property at the will and pleasure of the army officer in whose military district he may happen to be found” (Yoo 2011, 210).

Taney’s attack on the President’s decision questioned Lincoln’s ability to interpret the Constitution. Lincoln responded to Taney’s accusations by ignoring Taney’s ruling in *Ex parte Merryman*, making his case to the July 4 session of Congress, rather than the Supreme Court. The Confederacy’s initiation of the war gave the President and the government no other alternative but to respond by resisting force with the use of force. Lincoln’s actions he stressed were done with the support of public opinion. “These measures, 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” (Yoo 2011, 211). Lincoln sought justification from Congress for his action, never directly answering the question of whether his actions were unconstitutional. His actions he believed did not surpass the authority of Congress.

Congress enacted a statute that did not explicitly authorize war against the South, but declared that Lincoln’s actions “respecting the army and navy of the United States, and calling out or relating to the militia or volunteers from the States, are hereby approved and in all respects legalized and made valid,” as if “they had been issued and done” by Congress. Congress gave approval through its explicit control over the size and funding



of the military but did not seek to direct Lincoln's war aims or the conduct of hostilities (Yoo 2011, 211).

The acts of the Confederate states seceding from the Union forfeited their rights of captured Confederate soldiers to be tried by a civilian jury. Confederates could not wish to be subject to a rule of law under the Constitution which they sought to overthrow.

The whole of the laws which were required to be faithfully executed, were being resisted, and failing of execution, in nearly one-third of the States." Saving the Union from a mortal threat, Lincoln suggested, could justify a violation of the Constitution and the laws, and certainly a single provision of them. "Must they be allowed to finally fail of execution, even had it been perfectly clear, that by the use of the means necessary to their execution, some single law, made in such extreme tenderness of the citizen's liberty, that practically it relieves more of the guilty, than of the innocent, should, to a very limited extent, be violated? Are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?" He suggested that painstaking attention to the habeas corpus provision would come at the expense of his ultimate constitutional duty-saving the Union. "Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it (Yoo 2011, 226-227)?"

Attorney General Edward Bates followed Taney and Lincoln's opinions agreeing with the President suspending habeas corpus under the Oath Clause and the Take Care Clause. It was the President, not Congress who was the sole judge and guardian of the Constitution. "Bates contended that the President's power as 'the sole judge' of exigency 'to suppress insurrection' is a 'great power...capable of being perverted to evil ends' but a 'power necessary to the peace and safety of the country'" (Matheson 38). Bates continued his attack on judicial supremacy in *Ex parte Merryman* arguing that the separation of powers clearly indicated that the President had no obligation to obey the courts on the case. "He observed that the Suspension Clause was vague and did not specify whether Congress alone, or the President too could suspend habeas. He argued that it was absurd to allow habeas to benefit enemies in wartime" (Yoo 2011, 228).

Lincoln's use of military courts spread in the fall of 1862 as military jurisdiction was extended beyond the battlefield to any persons aiding the enemy behind the lines. Detainees

therefore had no right to seek a writ of habeas corpus and were tried by military tribunals. Lincoln's initial suspension of the writ and his extension of authority over detainees have been criticized by Rossiter, arguing that Lincoln ran the country like a constitutional dictatorship. "If Lincoln was a great dictator, he was a greater democrat. Lincoln regarded the suspension of the writ as exceptional and temporary, and even during the emergency did not claim unchecked executive power when Congress could intervene" (Matheson 38). Lincoln believed the Framers could not have intended to withhold the Presidential power of suspending habeas corpus simply because Congress was not in session. In March of 1863, Congress specifically authorized the President to suspend the writ of habeas corpus during the course of a rebellion.

However, the Habeas Corpus Act of 1863 placed limitations on the President's authority to hold detainees who were not prisoners of war in military custody in states where the war had not impaired civil authority and if a grand jury had failed to indict them after their detention. The wording of the Act did not itself claim that Congress had exclusive power to suspend, but the weight of contemporary legal opinion supported that view. The retroactive ratification and further authorization of government measures were not seriously challenged as beyond the concurrent power of the President and Congress (Matheson 39).

Lincoln further supported his decision of detention without trial as the protection of individual liberties and upholding the peace.

Lincoln defended his suspension of the writ on the ground that the Constitution did not specify which branch held the authority to suspend. He turned to the basic difference between crime and war. The nature of war required detentions without trial, which "have been for *prevention*, and not for *punishment*- as injunctions to stay injury, as proceedings to keep the peace" (Yoo 2011, 232).

### *Ex parte Milligan*

A landmark Supreme Court case which followed *Merryman* addressed the use of military tribunals trying civilians outside of war areas. In *Ex parte Milligan*, Lambdin P. Milligan was

tried in 1864 before a military commission for conspiracy to overthrow the government and release rebel prisoners. Milligan in December 1864 was convicted by a military commission and sentenced to death, which was later changed to life imprisonment. Milligan argued before the commission that he was a civilian and Indiana was not a part of the theatre of war. Milligan's attorneys argued that military tribunals had no jurisdiction over Indiana and that martial law had not been imposed. They did not, however, deny the President "any power to declare martial law in areas of actual combat, or even in those that were threatened by hostile invasion" (Irons 84). In 1866, the Supreme Court overturned the military commission and Milligan was released. The court decided that Milligan was not a resident of a Confederate state, a prisoner of war, or a member of the rebel army and therefore could not be tried by the military. The court ruled that if Indiana had been under attack and the judicial system closed then Milligan would have been subject to military courts.

Four justices concurred stating that Congress could have issued the use of military commissions. The five justice majority declared that the Constitution "is a law for rulers and people, equally in war and in peace" and that "the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence" (Matheson 42). The President according to the majority lacks the constitutional power to try American citizens in a military tribunal when civilian courts are not suspended. Justice David Davis's majority opinion was directed towards individual rights during wartime. Peter Irons argued that the *Milligan* decision, "with its warning against presidential claims of 'unlimited power' during times of national crisis, should have foreclosed any further assaults on the Constitution" (Irons 85). Chief Justice Salmon Chase wrote for the concurring justices that the President's use of military tribunals was illegal and that he acted outside the powers which Congress had authorized. The

Court's decision in *Ex parte Milligan* had large ramifications in Reconstruction politics after the Civil War. Continuation of military occupation in the South was unconstitutional. Yoo argues that *Milligan* was the only clear example of congressional jurisdiction-stripping in the Court's history. The decision may be remembered as resistance to Lincoln and his wartime measures, but it "embroiled the Court in national politics of the highest order, and ultimately it led to a severe counterstroke against judicial review" (Yoo 2011, 235). Despite the Court's unanimous ruling for *Milligan*, the justices were closely split on the issue of due process violations and congressional limits of authorization for the executive to act. Nor did the ruling diminish active executive and legislative involvement in post-war tribunals.

### ***The Prize Cases***

*The Prize Cases* were another important and influential Supreme Court decision on executive power. Following the attack on Fort Sumter, Lincoln ordered the immediate blockade of Southern ports. A British vessel, the *Haiwatha*, and a Mexican vessel, the *Brillante*, were soon seized for violating the blockade. However, the plaintiffs argued that the seizure of their vessels had been carried out before there was a congressional declaration of war as Congress had yet to ratify the President's blockade orders. Two other ships, the *Crenshaw* and the *Amy Warwick* belonged to Virginian residents, seized by the Union under the rationale that they belonged to citizens of a state in rebellion against the Union. Justice Robert Grier in his majority opinion stated that the *Prize Cases* dealt with two questions, "Had the President a right to institute a blockade of ports in possession of persons in armed rebellion against the Government, on the principles of international law, as known and acknowledged among civilized States?" (Irons 71). The second question dealt with the Virginian vessels seized: "Was the property of persons domiciled or residing within those States a proper subject of capture on the sea as

‘enemies’ property?’” (Irons 71-72). Peter Irons notes that the two legal questions presented to the Supreme Court addressed a much larger constitutional question which the Court had not faced yet before: “Can a civil war, begun as a domestic insurrection by states in the Union, become an ‘actual’ war that authorizes the president to exercise his powers as commander in chief of the armed forces, even though Congress had not formally declared war against the rebellious states?” (Irons 72). Ultimately the Court ruled 5-4, stating that Lincoln’s use of Presidential power to repel sudden attacks before Congress can be assembled was constitutional. The Court explained that “Congress alone has the power to declare a national or foreign war...but if a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority” (Matheson 40).

Lincoln, Congress, and the international community viewed the Civil War as a Southern insurrection raised against the North rather than an actual war between two separate countries. The issue of whether an insurrection can become an actual war was addressed by the Supreme Court majority by first making clear that only Congress had the power to declare war. However, “when the party in rebellion have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war” (Irons 72). Justice Grier who wrote for the majority believed that Lincoln did not have the Constitutional power and authority to blockade southern ports on neutral countries before war had been declared. Congress held that power yet it was up to Lincoln to determine whether the South was to be treated as a belligerent nation.

The second issue raised in the *Prize Cases* regarding the Virginian vessels seized as enemy property was decided in favor of Lincoln as well. The Court concurred that the South was to be treated as a belligerent power whose property and possessions could be used to increase the rebel's power. The two ships seized were considered "legitimate prize" to the North in defense of the Union.

Peter Irons along with Louis Fisher argue that the end result of the *Prize Cases* was a lack of judicial oversight on the other branches of government exceeding their power. The Supreme Court failed to "say what the law is" and exempted Lincoln from any judicial scrutiny. I however, argue that Lincoln's actions did not overstep his Presidential powers, but were necessary to protect the Union in a time of crisis. National security matters which threaten the safety of the country require the President to act at times before Congress can fully assemble and agree upon and ratify what measures should be taken. As the Court stated in the *Prize Cases* and the start of the Civil War, "However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of war. The President was bound to meet it in the shape it presents itself, without waiting for Congress to baptize it with a name; and no name given to it by him or then could change that fact" (Thomas & Thomas 54). The President is fully authorized and permitted to decide what amounts to war and what measures should be taken to protect the nation from future attacks. Lincoln's actions in self-defense taken to preserve the Union were exactly what the Framers envisioned when they spoke about repelling sudden attacks. The Framers and the court's ruling in *The Prize Cases* illustrate their understanding that it is the President's responsibility as Commander-in-Chief to protect this nation against any direct assault. "It is also assumed that the President would not be forced to wait until the blow fell, but would be constitutionally empowered to defend against an imminent

attack by a preemptive strike” (Thomas & Thomas 56). The issue on preemptive strike will be covered in more detail in Chapter 3, however, the right to self-defense as the Framers intended it has caused debate as to where the line must be drawn in limiting the President to defensive actions only.

Hamilton’s position, as declared in answer to what some have interpreted as Jefferson’s overly cautious defense stance in the Tripoli situation, has been interpreted broadly to mean that once the country is made subject to an attack, the executive may respond with all the force he sees fit to make use of. And even though his measures become measures of offense, they in effect remain defensive, so no declaration of war by the Congress is required. This position would regard the President as having power not merely to take measures to meet the invasion, but to wage in full the war imposed upon the United States (Thomas & Thomas 60).

Those in disagreement would argue that the President has no offensive but only defensive powers. The Framers however, and the decision taken by the Supreme Court in the *Prize Case*, make evident that any attack on this nation requires the President to take the necessary actions, including armed force, to defend this country.

## **Conclusion**

Lincoln’s actions during the Civil War and the *Prize Cases* demonstrate the importance of the President using his prerogative to act during a national crisis. Lincoln understood what his Constitutional responsibilities were and he carried them out to the best of his abilities. Without abusing his powers, he recognized that Congress ultimately had the power to declare war, yet his far more important responsibility was to preserve the Union. That meant acting without Congressional approval while it was not in session which he later defended to Congress. Lincoln’s actions were Constitutional, fitting squarely within his prerogative powers as Commander-in-Chief. His suspension of habeas corpus and the use of military tribunals were well within his Presidential powers to help protect and preserve a nation in crisis. As will be

studied in the next chapter, the line between the President's use of defensive and offensive power in self-defense and preservation of the nation continues long after Lincoln into the 21<sup>st</sup> century with George W. Bush and his response to September 11<sup>th</sup>.



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## George W. Bush

At the end of the Cold War, the United States found itself as a hegemonic power. The military threat of the Soviet Union was gone, giving the United States unquestioned military supremacy in the world. Unlike other great powers earlier in history, the United States initially sought to form a multilateral world at the end of the Cold War. The administrations of both George H.W. Bush and Bill Clinton sought to increase international relations through trade and limited military involvement abroad. The decrease of the Soviet military threat soon gave way to terrorist threats, specifically al Qaeda and Osama bin Laden. In February of 1998, Osama bin Laden and Ayman al Zawahiri issued a fatwa against the United States. A fatwa is an interpretation of Islamic law which both men twisted to declare war against the United States. They claimed that “America had declared war against God and his messenger, they called for the murder of any American, anywhere on earth, as the individual duty for every Muslim who can do it in any country in which it is possible to do it”(9/11 Commission Report, 47). This fatwa in 1998 was only one of many such declarations issued against the United States since 1992. In 1996, bin Laden issued a fatwa against U.S. soldiers in Saudi Arabia. He praised the 1983 suicide bombing in Beirut that killed 241 U.S. Marines and the withdrawal of U.S. troops in Somalia in 1993. The subsequent bombings in Tanzania, Kenya, and against the USS *Cole*, were all precursors to September 11, 2001. After the smoke had cleared, nearly 3,000 people were dead, with al Qaeda and Osama bin Laden taking responsibility. The newly named “war on terrorism” by President Bush saw the President’s views of U.S. power radically change. George W. Bush and his administration decided to take the United States into a unilateral direction,

creating the Bush Doctrine to promote preventive wars and disregarding international legal norms. “The war on terror planned by the Bush administration, although directed initially against al Qaeda bases in Afghanistan and the Taliban regime, was conceived, from the beginning, as worldwide in scope and indefinite in duration” (Irons 218). The Bush Doctrine, according to one interpretation, was formed through the ideals and beliefs of Republicans in Washington. Such Republicans like Donald Rumsfeld and Dick Cheney felt that there was an erosion of executive authority. Their views broke down the Bush Doctrine into four main parts. The first was the reaction against international law and the international war crimes committee. The second was the rejection of international agreements such as the Kyoto agreements, the Comprehensive Test Ban Theory, and the banning of anti-personnel mines. The third was the assertion of U.S. power unilaterally through preemptive or preventive wars. The fourth was the expansion of executive power. The Bush administration coined the phrase “weapons of mass destruction” which were a direct threat to the United States if held by political extremists.

Under the Bush Doctrine, there would be no distinction between terrorist groups and the nations that harbored them. As stated in *After Iraq*, “The United States has the legal right on the grounds of anticipatory self-defense to take ‘preemptive’ action against these networks and their accomplices; and because the United States may have to act unilaterally when it engages in ‘preemption,’ it will keep its military strength beyond challenge” (Kegley 78). The Bush Doctrine creates a permissive world order, circumventing many international legal norms, through its unilateral stance on foreign policy. The use of military force is for preventive war and anticipatory self-defense. The view of politics on an international scale is seen only to benefit your country’s power and position. On this view the national leaders are given “considerable latitude to do whatever they believe must be done to protect the state and advance

its position within the global hierarchy, no matter how repugnant such acts might seem in the light of those moral dictates that guide the behavior of people in their private interpersonal lives” (Kegley 93). Bush was taking a strong executive stance on terrorists, which after 9/11 was widely supported by the public and Congress. The War Powers Resolution of 1973 was passed in Congress to limit the Presidents’ war -making powers in dealing with Vietnam and future American wars. Despite Congress’ attempts to limit executive authority, on September 18, 2001, Congress passed a joint resolution: The Authorization for Use of Military Force (AUMF) Joint Resolution. It stated that,

the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nation, organization, or person (Ball 11).

The subsequent threat posed by Iraq toward the United States led Congress to pass the Iraq Resolution, granting the President to use force against Iraq. Louis Fisher, a critic of the ensuing Iraq war, argues that “the decision to go from a state of peace to a state of war, a fundamental step reserved to Congress under the Constitution, was left with President Bush” (Fisher 2011, 263). The resolution however was not left to President Bush, but rather was an example of his prerogative powers as Commander-in-Chief to protect the safety of the United States from external and internal threats. The decision to go to war with Iraq and President Bush’s use of executive power in that decision will be discussed in more detail later in this chapter.

The Foreign Intelligence Surveillance Act (FISA) required Presidents to obtain a warrant before the government could wiretap domestic lines in the name of public safety. John Yoo argues that the act was passed with the best intentions, but “it also blocked the executive branch from taking the swift action necessary to prevent a devastating attack on the American

homeland” (Yoo 2011, 423). However, after 9/11, President Bush circumvented the act and had the NSA secretly conduct wiretapping and surveillance on suspected domestic threats to the United States. Bush’s decision known as the Patriot Act “allowed searches of and seizures from citizens and persons suspected of criminal activities without a search warrant or any showing of probable cause” (Ball 13). The act also gave federal law enforcement and intelligence agencies the power to freeze assets and detain and deport foreign nationals. “Congress (as opposed by some of its members) then stood mostly silent in the face of the executive’s unilateral assertion of powers without legislative approval” (Matheson 89). Bush received large scrutiny for the NSA warrantless wiretapping program that was implemented from 2001-2007. Bush later went to Congress to discuss the purpose and logistics of the program but it was too late, the damage was done and Congress and many of the American people had lost faith in trusting the Bush administration.

9/11 and its immediate aftereffects have been seen by many as a usurpation of executive power. Critics of George W. Bush and his policies argue that the President abused his powers through the Bush Doctrine, invading Iraq, and implementing domestic acts which infringed upon our civil liberties as Americans. The Iraq Resolution, FISA, the Patriot Act, AUMF, and others were essential stepping stones in shaping future decisions and policies in America. The effects of such decisions and actions taken by George W. Bush were not however an abuse of executive power. His decisions were well within his power of prerogative to protect this nation from another 9/11.

### **The Geneva Convention**

Soon after America and its allies entered Afghanistan in pursuit of destroying al Qaeda and Osama bin Laden, coalition forces took Afghan prisoners. The Third Geneva Convention states that there are two types of combatants in war: lawful and unlawful (Ball 7). Lawful combatants are treated as prisoners of war while unlawful combatants are spies and saboteurs.

...a lawful combatant is a person who is waging war and who (1) is in uniform, (2) is openly carrying arms, (3) is waging war under a structured military hierarchy, and (4) is waging war according to the customs and laws of war. A combatant not wearing a uniform, captured carrying concealed weapons or engaged in spying or sabotage, is an unlawful combatant, or an unlawful belligerent, is not considered a POW, and is not protected by the laws of war (Ball 41).

Early in 2002, arguments in the administration soon arose as to whether captured Taliban and al Qaeda fighters fell under the protections of the Third Geneva Convention. White House Counsel Alberto Gonzalez in a memo to President Bush stated that the Office of Legal Counsel in the Department of Justice had come to the opinion that the Third Geneva Convention and the treatment of POWs did not apply to the conflict in Afghanistan. Colin Powell argued against the OLC's ruling stating that such a decision would weaken the support of our allies and cause retaliation against U.S. and allied forces captured by al Qaeda and the Taliban. Gonzalez in response stated that "terrorist actions in recent years represented a 'new type of warfare,' one not contemplated in 1949 when the Third Geneva Convention was framed" (Fisher 2005, 194). Despite President Bush suspending Geneva protections to al Qaeda and the Taliban detainees, he continued to assert that such detainees would be treated humanely. Despite the Department of Defense asserting that "there were no innocents and no prisoners of war in the war on terror," many in the international community and domestically argued that "In a war, whether civil, regional, or worldwide, according to the customary international laws of war, there are only lawful and unlawful combatants, not 'enemy combatants'"(Ball 43).

## Enemy Combatants

Among the many issues dealing with the war on terror, the legal rights of enemy combatants and military tribunals were at the forefront. As mentioned earlier, the ‘new type of warfare’ was to treat enemy detainees as unlawful enemy combatants and not prisoners of war or innocent civilians. Categorizing a detainee as an unlawful enemy combatant implied that such detainees would not be granted the rights to due process. Counsel from the Department of Justice stated that the laws of war would not be applicable to members of al Qaeda and the Taliban since Afghanistan “was a ‘failed state’ whose territory had been largely overrun and held by violence by a militia or faction rather than by a government” (Ball 49). The memo also included the President as the constitutional authority in ultimately determining whether al Qaeda and the Taliban would be subject to international law and congressional statutes. President Bush in November 2001, issued a military order that called for military commissions of any detainee “not a U.S. citizen who the president determines that there is a reason to believe (i) is or was a member of ...al Qaeda, (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism,...or (iii) has knowingly harbored one or more individuals described in (i) and (ii)” (Ball 51).

Many advocates of Bush’s order understood and approved of the President as Commander-in-Chief having the power and authority in determining that constitutional rights did not apply to foreign terrorists. Ruth Wedgwood, a former federal prosecutor and professor of international law spoke in favor of military courts as “the traditional venue for enforcing violations of the law of war” (Fisher 2005, 171). Civilian courts had several limitations, primarily what evidence could be heard by a jury, which limitations did not exist in military court. In 2004, the Pentagon issued an order “Establishing Combatant Status Review Tribunals.”

Enemy combatants held at Guantanamo Bay were issued the order which stated that “a detainee’s status review hearing was to be conducted by three military officers not involved with his capture or interrogation or any subsequent reviews of his status” (Ball 129). The order came in response to several Guantanamo detainees filing habeas corpus petitions in federal court.

### **Military Tribunals**

The President’s assertion of Presidential prerogative in determining how the detainees would be tried was widely contested and criticized. The primary sources of contempt towards the President’s assertion of his prerogative authority stemmed from the AUMF and the Iraq Resolution. Both orders granted the President the power to use force as he saw “necessary and appropriate” (Ball 11-12). The State Department criticizes secret military courts in foreign countries which deal with verdicts not subject to appeals and the military judges appointed by the President. Many saw the U.S. system of military trials closely mirroring foreign courts which the U.S. openly denounced. Senator Arlen Specter (R-Pa) called for hearings arguing that the President had abused his Commander-in-Chief powers by side-stepping Congress, which under the Constitution, “has the authority to establish the parameters and the proceedings under such courts” (Fisher 2005, 174). Attorney General John Ashcroft testified at the hearings making clear that military tribunals arise “out of his power as Commander-in-Chief. For centuries, Congress has recognized this authority, and the Supreme Court has never held that any Congress may limit it” (Fisher 2005, 175). The Bush Administrations primary defense of the President’s actions came from Bush’s specific power emanating from Article II. Additional support of the administration asserting prerogative for any of its post- 9/11 powers came through the AUMF and the Iraq Resolution. Both orders passed were further confirmation to the administration that the President held the power of prerogative. Fisher however argues that the Supreme Court has

held that it is Congress and not the President who has the Constitutional authority to form tribunals and set checks and limits on the President's unilateral decision. Several bills were proposed to preserve detainee's rights to petition for habeas corpus, yet none were passed. Fisher claims that Congress' lack of action failed to get the bills passed.

In 2002, a Task Force on Terrorism and the Law issued a report on military commissions addressing the Constitutional and legal policies the President had taken. The President's wide reach in the study indicated dealt with an issue for which there was "no clear, controlling precedent" and the power "to act alone with respect to military commissions has not been developed in case law" (Fisher 2005, 178). The study also concluded that Bush's order did not completely restrict a detainee from obtaining a writ of habeas corpus. Detainees who should not be tried by military tribunals included "persons lawfully present in the United States; persons in the United States suspected or accused of offenses unconnected with the September 11 attacks; and persons not suspected or accused of violations of the law of war" (Fisher 2005, 179). The Department of Defense in response to the study cited the Supreme Court decision in *Quirin* as precedent for Bush's actions (Fisher 2005, 179). Bush's legal team asserted that the Supreme Court's decision had set a precedent in case law which recognized the President's prerogative power in forming military tribunals.

### **Yaser Esam Hamdi**

The controversy and dilemma over Presidential powers and enemy combatants soon came under judicial scrutiny in the *Hamdi* and *Hamdan* Supreme Court cases. The Constitution states that "the Writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it" (Kesler 548). Critics of President Bush's pursuit of



suspending habeas corpus rights to detain enemy combatants argued that such power was only given to Congress. They, not the President could suspend habeas corpus and only through the courts approval. "Public safety" however is in question when dealing with terrorists and terrorist organizations. If the President therefore was correct in his decision, could enemy combatants be held indefinitely? Does the Executive have authority under Article II to detain citizens who qualify as "enemy combatants" without explicit congressional authorization? Such questions Bush's supporters would argue, were not in clear violation of the suspension clause.

The case of Yaser Esam Hamdi involved a Saudi national who had been born in the United States and was captured in Afghanistan fighting with the Taliban. Hamdi was sent to Guantanamo Bay, but after information about his American citizenship was obtained, Hamdi was sent to the United States and housed in a Navy brig. Hamdi was interrogated and detained without any charges being given against him or without a legal hearing. Hamdi's right to an attorney was repeatedly put down by the Fourth Circuit which had to rule between "the judiciary's duty to protect constitutional rights versus the judiciary's decision to defer military decisions by the President- and came squarely down in favor of presidential power" (Fisher 2005, 223). Lawyers for Hamdi argued that the power of indefinite detention of citizens was given to Congress, not the President, and the executive had no authority in claiming such power.

The Bush administration's lawyers in response argued four main points for the legality of Hamdi's detention. "First, the government's brief held that the petitioners' legal challenges to Hamdi's wartime detention were without merit because the challenged wartime detention fell squarely with the commander in chief's war powers;" (Ball 104). Congress in fact through the 2001 AUMF supported Bush's power to capture and detain combatants, agreeing that it fell in line with Article 5 of the Geneva Conventions. "Second, under any constitutionally appropriate

standard, the record demonstrates that Hamdi was an ‘enemy combatant’” (Ball 104). Hamdi had surrendered to American forces while with an enemy unit carrying an AK-47. “Third, the necessarily limited scope of review in this extraordinary context with the constitution and the federal habeas corpus statutes; neither the suspension clause, the habeas statutes, nor the common law required additional proceedings for Hamdi” (Ball 105). An enemy combatant who had been detained without any charges against him had no right to legal counsel. “Finally, the government held that the alternative proceeding envisioned by the district court and petitioners could not have been supported constitutionally” (Ball 105). Bush’s administration argued that any attempts to recreate the scene of Hamdi’s capture were impossible and out of the question. Hamdi’s lawyers responded by reasserting that Congress has the power to limit executive authority in detaining enemy combatants. Congress authorizes the President if he can detain combatants which it had not done (Ball 105).

The appeal from the Fourth Circuit was then brought before the Supreme Court, making the Hamdi case the first federal judicial case against the Bush administration. After reasserting their cases before the court, Justice O’Connor in writing for the plurality stated 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” (Fisher 2005, 226; Irons 258). The court however did not reach the question of whether Article II allows the President to detain citizen enemy combatants without explicit congressional authorization. The plurality’s opinion stated that the case should be remanded back to the lower federal court where Hamdi could argue through evidence that he was not an enemy combatant. The plurality also

stated that due to the 2001 AUMF, if Hamdi's detention as an enemy combatant was correct, it was authorized by Congress. The "Use of Force" act had indeed given the President the leeway to detain enemy combatants. However, "The Constitution afforded Hamdi the right to challenge his detention before a neutral decision-maker" (Irons 258). Irons argues that the *Merryman*, *Milligan*, and *Hamdi* cases, although separated by time, have many parallels. "Presidential subversion of the Constitution was emphatically rejected by justices who recognized that both Confederate sympathizers and suspected 'enemy combatants' are protected, by the Great Writ, from indefinite detention at the will of any president" (Irons 86).

### **Salim Ahmed Hamdan**

The *Hamdan* case was another important case brought before the Supreme Court concerning due process rights and military commissions. Hamdan was Osama bin Laden's chauffeur between 1996-2001. He was captured by Afghani militia in November 2001, given to the U.S. military, and shipped to Guantanamo Bay. Hamdan was charged with being an al Qaeda member or connected in terrorist operations against the United States. He was the first enemy combatant to be tried by a military commission and received legal counsel. The trial however was halted part way through by the U.S. District Court for the District of Columbia. "Because Hamdan has not been determined by a competent tribunal to be an offender triable under the law of war, and because in any event the procedures established [creating the military commissions] by the President's order are 'contrary to or inconsistent' with those applicable to courts-martial, Hamdan's petition will be granted in part" (Ball 146). The President they ruled had abused his authority in establishing military commissions and never granted Article 5 of the Third Geneva Convention hearings to Hamdan to determine his status.

In 2005, Hamdan's lawyers filed for a writ of certiorari in the Supreme Court posing the question, "Was the military commission process created by the president duly authorized under Congress's Authorization for the Use of Military Force (AUMF); the Uniform Code of Military Justice (UCMJ); or the inherent powers of the President" (Ball 148). The Bush administration lawyers argued that granting a writ of certiorari would intrude upon separation of powers and the President's prerogative to create military commissions. After the case was brought before the Supreme Court, Justice Stevens wrote for a 5-3 majority rejecting the President's plan for military tribunals. "Stevens objected to the administration's proposal partly on the grounds that military tribunals would violate the Geneva Conventions, thereby applying these protections to captured terrorists for the first time under U.S. law" (Knott 78). Stevens argued that military commissions throughout American history have served three purposes:

(1) They have substituted for civilian courts at times and in places where martial law has been declared. (2) Commissions have been established to try civilians as part of a temporary military government over occupied enemy territory or territory regained from an enemy where civilian government cannot and does not function. (3) When the commission was convened as an 'incident to the conduct of war' when there is a need to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war (Ball 164).

The Courts decision supported Congress' denial of granting the President legislative authority to create military commissions. The Court noted that the President, despite the ruling, still had the power to go to Congress and receive the authority he desired. Justice Breyer observed that "where no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine-through democratic means- how best to do so" (Knott 79).

Critics of Bush saw the court's decision in *Hamdan* as a harsh rebuke regarding the President's policies and abusive power. Critics further argued that the Military Commissions Act (MCA) of 2006 was legislation passed to circumvent the court's decision. The MCA "withdrew federal court jurisdiction to hear or even consider hearing habeas corpus petitions filed by any alien detained by the government as an enemy combatant- or under investigation for being an enemy combatant" (Ball 178). The act however was overturned in *Boumediene v. Bush*, which stated that habeas corpus rights applied to enemy combatants held on U.S. territory. Heralded by many as the court getting it right, Justice Roberts in a dissenting opinion stated that this was a clear example of judicial activism resulting in American's losing "a bit more control over the conduct of this nation's foreign policy to unelected, politically unaccountable judges" (Knott 80).

The *Hamdi* and *Hamdan* cases opened a new era in judicial activism. Despite the court's ruling granting both men the right to attorneys and trial by civilian court, it was not a clear defeat for the Bush administration. President Bush had rightfully exercised his executive powers in detaining both men who were either an enemy combatant or associated with a terrorist organization.

### **Torture and Interrogation**

The question of the legality of President Bush's detention program also dealt with the manner in which the detainees were being treated. The Bush administration had enacted interrogation policies that critics claimed were torture. Torture, the critics maintained, was being used to gather information from the enemy through the use of executive power. The most definitive statement regarding interrogation techniques came in what critics called the "Torture

Memo” that was written by John Yoo. Yoo was part of the Office of Legal Counsel to the President. The memo stated that the President “has the constitutional authority to determine that neither international laws of war nor congressional statutes have any bearing on the treatment of al Qaeda and Taliban detainees” (Ball 49). According to Yoo, the President’s constitutional power gave him the authority to use whatever actions were necessary and appropriate to preempt or respond to terrorist threats. In another memorandum written by Jay Bybee, who headed the office of Legal Counsel, torture was defined in these terms:

Certain acts may be cruel, inhuman, or degrading, but still not produce pain and suffering of the requisite intensity to fall within a [legal] proscription against torture...We conclude that for an act to constitute torture, it must inflict pain that is difficult to endure. 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 (Ball 57).

Those critical of this new definition of torture claimed that it had several harsh, underlying meanings. Severe mental pain which did not have any lasting effects would not be classified as torture as well as beating a prisoner unconscious or breaking their bones. “In his memo, Bybee explained to Bush that his purpose was to ‘negate any claims that certain interrogation methods violate the statute’ making torture a crime. He was, in effect, preparing a brief for lawyers defending U.S. soldiers or CIA agents charged with torturing prisoners” (Irons 251). Critics including Irons, Fisher, and Ball argue that the United States’ “new definition” on torture was a slippery slope, comparing the treatment of prisoners to that of Russian “gulags” (Ball 61).

Interrogating the enemy through questions and examinations, would therefore become lawful under the Bybee memo, implementing severe and harsh tactics to obtain intelligence. In 2002, Donald Rumsfeld approved counter resistance techniques including “prolonged standing, removal of detainees’ clothing, sensory deprivation, being hooded during interrogations, prolonged interrogations of up to twenty hours, exposure to detainees’ phobias (dogs, women) to

induce stress, shaving of beards, good cop/bad cop routines, rapid-fire questioning, grabbing, poking, pushing, and exposure to unpleasant smells” (Ball 65).

The torture question raised further questions as to what was legal according to the Third Geneva Convention. It states that “No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever” (Matheson 91). Jack Goldsmith, who was head of the Justice Department’s Office of Legal Counsel in 2003, writes in his book *The Terror Presidency* how he was a legal check on the President’s interrogation programs. The main concern was how the Third Geneva Convention applied to a POW who did not belong to a nation-state.

The President’s special wartime powers to detain Taliban and al Qaeda soldiers at GTMO and try some of them by military commission brought with them potential restrictions embodied in the laws of war, the congeries of international treaties and customs that govern conduct during warfare. The most immediately relevant treaty was the Third Geneva Convention, which conferred legal protection on a captured enemy fighter who complied with certain minimal requirements of the laws of war, such as distinguishing himself from civilians and carrying his arms openly. The bottom line was that none of the detainees in the war on terrorism would receive POW status or any legal protection under the laws of war (Goldsmith 109-110).

Goldsmith came to the conclusion that many of the legal opinions on interrogation after 9/11 needed to be revised or withdrawn. The Bush presidency’s firm commitment and assertion to thwart terrorism through any means necessary, including going “right to the edge of what torture law prohibited,” was a contradictory message that President Bush issued in June of 2004 (Goldsmith 2007, 146). He said that “the United States reaffirms its commitment to the world-wide elimination of torture” (Matheson 93). Soon after, the Torture Memo was revised to declare that torture violates domestic law and international norms. However, there were still strong suspicions that the Bush administration felt executive power overruled what was considered a violation of domestic and international norms. The memo made references to the

President's "complete discretion," "complete authority," and "executive constitutional authorities." "The Torture Memo's emphasis on unfettered executive power and indifference to constitutional restraint points to the need for a more institutionalized voice for individual restraint within the executive branch" (Matheson 106).

The assault on President Bush and his administration for abusing his executive powers to redefine what the statutes of torture and interrogation entailed were unwarranted. Inflicting pain on another human being for information is indeed a grisly task and one that should never be welcomed. However, America had just suffered its greatest attack on its home soil, not knowing when or how another one would occur. President Bush astutely exercised his executive powers legally and constitutionally in developing new interrogation techniques. Granted, there were many critics of Bush's actions, particularly in the Office of Legal Counsel and Colin Powell himself. Yet the President's controversial move was made not to sidestep Congress and the law, but to protect American lives. In May 2011 it became known that the operation which killed Osama bin Laden had been in part accomplished through "enhanced interrogation techniques." "Former CIA director Porter Gross openly admitted, 'KSM [Khalid Sheikh Muhammed] was waterboarded...That was the first time he broke. He gave us a treasure trove of information. It's all true.' The information obtained from waterboarding and using other 'enhanced interrogation techniques' disclosed the name, the nickname, of bin Laden's courier" (Knott 161-162).

### **Invasion of Iraq**

One of the greatest controversies during the Bush presidency involved the U.S. invasion of Iraq. When it became evident after the invasion that hostilities in Iraq were not ceasing, Congress accused the President of overstepping his executive authority, bypassing Congress, and



invading Iraq solely on Presidential prerogative. After the first Gulf War, many politicians in Washington regretted not taking Saddam Hussein out of power when they had the chance. “Because of recent intelligence reports that Iraq had evaded UN resolutions requiring it to destroy all stocks of weapons of mass destruction, including chemical and biological weapons...There were also reports that Iraq had not abandoned its efforts to develop nuclear weapons, another violation of UN resolutions” (Irons 222). The George W. Bush administration knew that Hussein posed a threat to national security and to the lives of his fellow Iraqis whom he was testing his biological weapons on. Through several attempts by the UN, the Bush administration warned Hussein that denying UN inspectors into the country to search for chemical and biological weapons would have serious repercussions. “In October 2002, Congress passed the Iraq Resolution to empower President Bush to use military force against Iraq. The administration told lawmakers and the public that Iraq possessed weapons of mass destruction and had the capacity to inflict even greater damage on the United States than the 9/11 terrorist attacks” (Fisher 2011, 262). Louis Fisher in *Defending Congress and the Constitution* argues that the claims the Bush administration made to the public and Congress were far-fetched and driven by the administration preying upon the fears of the public (Fisher 2011, 223). Contained in the Iraq Resolution were assertions that the President’s constitutional power was

to take action in order to deter and prevent acts of international terrorism against the United States. Once again, Congress was being asked to authorize the president to begin a war, without a formal declaration. Whether such an authorization met the constitutional standard had become a moot point, since Congress had long ago abdicated its war-declaring power to the executive branch (Irons 234).

Irons correctly states that the war-declaring power belongs to the executive. It was not however abdicated by Congress, but rather part of the executive’s power which the Framers had granted the President in the Constitution. President Bush in preparing for war with Iraq did not side-step

the Constitution as his critics claimed through the aid of “compliant federal judges.” Several lawsuits were filed against the administration by active-duty soldiers and army reservists “who claimed they faced duty in a war that Congress had not declared” (Irons 236). The press after the start of the invasion wrote in several newspaper articles that the war in Iraq was pushed and planned primarily by Secretary of Defense Donald Rumsfeld and Deputy Secretary Paul Wolfowitz (Isikoff Newsweek). Months into the invasion and no WMD’s helped fuel Bush’s critics, who claimed he had acted unilaterally without Congress’s consent and with some ulterior motive in mind. Irons and Fisher conclude in their criticisms of President Bush that his actions to abuse his executive authority in invading Iraq did not rest squarely on his shoulders. Congress in passing the Iraq Resolution and not probing far enough into the claims of WMD’s were equally to blame. Congress failed to “perform its role as a coequal branch and exercising independent judgment. The Iraq Resolution deferred to President Bush on the need to use force, leaving to his determination whether the United States would rely ‘on further diplomatic or other peaceful means’ to resolve the threat” (Fisher 2011, 263).

## **Conclusion**

The decisions and legislation President Bush enacted came under severe scrutiny both during and after his tenure as President. The resolutions and acts passed after 9/11 were constitutionally sound decisions which the President had the authority to make as Commander-in-Chief in order to protect America from further terrorist attacks. The President acted because there was a specific threat to the nation’s defense; words which the Framers wrote in the Constitution to specifically grant the President, not Congress, the power of prerogative in the time of national crisis. Although the Supreme Court incorrectly overruled some of the President’s decisions in the *Hamdi* and *Hamdan* cases, specifically Hamdi’s status as an enemy

combatant and the use of military commissions to try Hamdan, they were regardless the right decisions made by the President. In *Rush to Judgment* by Stephen Knott, McGill University history professor Gil Troy noted that, “one of the biggest challenges in assessing Bush’s presidency is the fact that his greatest achievement may have been a negative one-preventing a repeat of 9/11-how do you prove that? How do you characterize that? This is an important methodological challenge to historians and politicians, and an important substantive question in evaluating George W. Bush” (Knott 161). President Bush has drawn so much disdain in recent years, much in terms of his executive war power decisions. President Bush acted constitutionally through his executive authority of prerogative to take the necessary steps and actions to protect America. Congress itself approved legislation and passed laws in concurrence with the President’s policies while the Supreme Court, in the view of its critics, abused the separation-of-powers and engaged in judicial activism. Only history will tell just how President Bush’s policies helped prevent another attack and helped stabilize the once oppressed country of Iraq. His actions however were consistent with the principles and practices of the Framers.

-5-

## Barack Obama and Beyond

The election of Barack Obama was for many a milestone in American history. President Obama had promised change in his campaign, specifically change from many of the Bush policies in the areas of detainee detention, torture, surveillance, and military commissions. President Obama had promised to reverse many of the so-called executive abuses the Bush administration had enacted in their 8 years in office. “Within hours of his inaugural address, he suspended military commissions and reversed some Bush-era secrecy rules. Two days later, and to greater fanfare, he signed executive orders that banned torture, closed CIA black sites, pledged adherence to the Geneva Conventions, and promised to close the detention center at Guantanamo Bay” (Goldsmith 4). Jack Goldsmith in *Power and Constraint* writes that despite many of Obama’s efforts and promises to change Bush’s policies, little was actually changed in terms of counterterrorism policies. Bush claimed that his power as Commander-in-Chief granted him the executive authority to take the necessary precautions to protect America from further attacks. Obama criticized Bush’s war powers authority yet within months of his election, Obama’s legal team asserted that Congress could not hinder the President’s authority to use the necessary force to protect the nation, concluding that the courts “should defer to the President’s judgment about the meaning of congressional authorization” (Goldsmith 2012, 4).

Military detentions and commissions during the Obama campaign were criticized by Obama asserting that they did not give detainees the adequate rights which they deserved. Many within the campaign thought Obama would abolish this practice, however he never did. “The justification for military detention without trial, President Obama explained, is that some terrorist detainees who cannot be prosecuted ‘nonetheless pose a threat to the security of the United

States.’ This was the same policy rationale the Bush administration gave for military detention” (Goldsmith 2012, 7). The AUMF had granted the President the authorization to detain detainees indefinitely. Detainees tried through military commissions had been opposed by Senator Obama in 2006, yet that stance changed dramatically in 2008 after his election.

The administration concluded that commissions were a necessary legal weapon in the Commander in Chief’s arsenal. Commissions allow for the protection of sensitive sources and methods of intelligence gathering; they allow for the safety and security of participants; and for the presentation of evidence gathered from the battlefield that cannot always be effectively presented in federal courts. This was precisely the Bush rationale (Goldsmith 2012, 9).

The trial of KSM and his transfer between civilian court, military commissions, or military detention was an executive right the Bush administration argued. President Obama’s administration agreed that the option of choosing a legal system helped ensure the swiftest and fairest trial.

President Obama in the areas of global targeted killings, rendition, and black sites has claimed executive authority, even surpassing many of the Bush administration policies. President Obama has been consistent with his campaign pledge in targeting and pursuing al Qaeda and other terrorist members and affiliates. The Obama administration was successful in killing “al-Awlaki and another American citizen, Samir Khan, with a drone attack in Yemen on September 30, 2011. The legal justification for this attack was provided by prominent law school professors...who were critics of the Bush administrations ‘radical attempt to remake the constitutional law of war powers’” (Knott 83). The Obama administration also continued rendition of detainees who were taken from one country to another and interrogated. Many of these “black sites” were criticized by Senator Obama but deemed as “an acceptable practice” by President Obama.

Finally, surveillance and warrantless wiretapping programs were to candidate Obama an abuse of Presidential power. However, surveillance programs have not been narrowed by the Obama administration. Obama “successfully urged Congress to extend the PATRIOT Act and failed to take any steps to fulfill his campaign pledge to strengthen the Privacy and Civil Liberties Oversight Board, which oversees and protects civil liberties in intelligence gathering” (Goldsmith 2012, 17).

This analysis of President Obama’s continuation and intensification of many of President Bush’s policies is not to be taken wholly as criticism. Many if not all Presidents promise one thing on the campaign trail, only to find that once in office, their promises cannot be so easily carried out. President Obama has realized this and understood that many of President Bush’s policies were not an abuse of executive power. They were correct measures taken to protect national security both at home and abroad. It would be unfair to neglect Obama changing some of Bush’s policies, particularly in interrogation techniques, small reforms to military commissions, and raising detention standards. However, President Obama’s position has remained almost the same as the Bush administration. Goldsmith states that

We want the President to abide by the law except in truly exigent circumstances of national danger. But in many contexts the law is unsettled or flexible and thus subject to multiple interpretations. How far the government is permitted to go under law depends to a great extent on context and the timing of judgment and the happenstance of who the interpreter is. And even if all of the factual and legal questions were resolved, the assessment of proper counterterrorism policies and accountability mechanisms would still be guided by moral intuitions that are more diverse than we like to admit (Goldsmith 2012, 211).

We live in a time when terrorist threats are greater than ever and as a consequence increased dependence on the President to make correct executive decisions is necessary. President Lincoln, Bush, and even Obama to an extent correctly exercised their executive war powers as

fully intended by the Framers of the Constitution. Presidential prerogative is paramount to the preservation of America's liberty and freedom. The history and evolution of Presidential war powers is an issue that was debated before the framing of the Constitution and continues to this day. Specific instances with Lincoln, Bush, and Obama show just how delicate the balance is between executing the mandates and responsibilities of the Constitution and exercising executive authority. This then raises the question as to how much power is appropriate and necessary for the President to use and how much is too much? The case studies examined in this thesis revealed that the measures taken by the Presidents in each case were necessary as well as legally and politically appropriate. Their decisions were not unconstitutional or an abuse of power granted to Congress. Our forefathers envisioned a world where an energetic President would need the authority and have the prerogative to make important decisions when the nation's security was threatened.

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