

2011

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Recommended Citation

Nicol, Amanda, "Back to Basics: A New Approach to the Unitary Executive Theory" (2011). *Summer Research*. Paper 91.
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Back to Basics:
A New Approach to the Unitary Executive Theory

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2011 Summer Humanities Research Grant
September 23, 2011

Back to Basics: A New Approach to the Unitary Executive Theory

Post-9/11 politics saw an unprecedented rise in presidential power, what Arthur Schlesinger, Jr. once called ‘the imperial presidency’. Presidential power was manifest in a number of highly publicized national security measures, including the detention and trial of enemy combatants, extraordinary rendition for matters of torture, and the warrantless wiretapping program. These measures, though not completely unprecedented in and of themselves, drew strong criticism when the Bush Administration used a particularly strong form of the unitary executive theory to justify these tactics. Bush Administration lawyers argued that the unorthodox nature of post-9/11 threats to national security and the war on terror required that the President have absolute authority to execute his Article II duties, without legislative and judicial interference. Critics, however, accused the Administration of abuse of separation of powers and the subversion of American democracy. The controversy ultimately led to the passage of several landmark Supreme Court cases ostensibly limiting the ability of the President to prosecute the war on terror, while also marking the reemergence of the unitary executive theory and the question of presidential prerogative in present-day American political discourse.

The unitary executive theory, at its most basic level, is almost obvious in its simplicity. The theory, at its most basic level, maintains that control of the executive branch of the national government should rest solely with the President of the United States, concurrent with his vested powers under Article II of the U.S. Constitution. While the exact origin of the theory is unknown, it appears to have arisen somewhere within the Justice Department under President Ronald Reagan. There are two forms of the theory: domestic and foreign. The domestic form asserts that the unitary nature of the executive power prohibits Congress from limiting

presidential discretion in controlling executive branch officials. The foreign form of the theory argues that because the Constitution does not establish a precise legal method for waging war, it may accommodate presidential discretion in changing the state of the nation from peace to war without congressional approval. The recent controversy surrounding the concept of the unitary executive arises less from the specifics of the theory – most political and legal scholars agree that executive power in the modern era requires at least some degree of prerogative – and more from the applied strength of the doctrine, particularly in times of crisis.

Despite the current debate, the unitary executive theory has its roots in a strong philosophical tradition of executive prerogative. This tradition rests on the foundational and sovereign purpose of the state to perpetuate its existence for the well-being of its citizenry. Because a democratic state derives its sovereign power from the people, it has a basic duty to protect them from harm, safeguard their individual liberty, and preserve the constitutional values upon which the government rests. Time and time again, constitutional scholars have been led to assess the following question: how does one create a framework for presidential prerogative in the competing contexts of a constitution that specifically separates powers and emerging crises that challenge the conventional understanding of those powers? An appropriate answer to this question must be guided by the principle of *salus populi suprema lex*: the public welfare as the highest law. As such, I will argue in this paper that the unitary executive theory and a modern understanding of presidential prerogative must be evaluated through the foundational principle of preservation, whereby all acts of presidential prerogative are intended for the continued existence of the state and the welfare of its citizens.

Many scholars have addressed the question of prerogative from a legal standpoint: what the Constitution prescribes versus what it proscribes. This approach inevitably leads back to the

same tired conflict between presidential prerogative and separation of powers. The purpose of this paper is to avoid a constitutional analysis of prerogative and instead focus on the underlying political philosophy from which prerogative and the unitary executive theory can be legitimized. More specifically, is there a way to reconcile the unitary executive theory with the philosophical underpinnings of the American constitutional order? To answer this question, this paper will examine the idea of prerogative in three key texts of political theory: Thomas Hobbes's *Leviathan*, John Locke's *Two Treatises of Government*, and the *Federalist Papers*. Before beginning this textual examination, though, it is necessary to ponder the following question: is executive prerogative incompatible with liberal political systems?

Executive Prerogative and Liberalism

Prerogative has its political genesis in the concept of sovereignty, or the supreme power of a ruler/government over its subjects/citizens, unrestrained by law. Sovereignty was originally derived philosophically from the supreme power of God; the ruler or government was thought to be divinely imbued with this same supreme power. Supreme power was understood to transcend all other kinds of power, and thus be absolute. Nonetheless, the identification of sovereignty with absolutism has led many political theorists to believe that it is incompatible with democracy, which prizes individual autonomy above absolute authority. They argue that not only does absolutism violate the principle of individual autonomy, but that it is also impossible for a people to govern apart from and above themselves in the same way that an absolute ruler governs apart from and above his subjects. This argument, however, makes the assumption that self-government is truly possible. As Stankiewicz points out, "It is absurd to talk of anyone governing himself or of any group ruling itself, for there cannot then be any 'government'" (8). As such, the necessity of government, whether in the form of an absolute ruler or a legislative

body, is demonstrated; furthermore, this government is understood to be sovereign, whereby it governs apart from and above the people.

Once the necessity of government is established, the problem becomes from where and to what extent this government draws its power. Machiavelli theorized that the power of a prince was legitimized solely by the threat of force, meaning that the government establishes and maintains absolute power by coercing its citizens with the threat of violence. Later, Bodin and Rousseau, both of whom denied Machiavelli's theory that 'might is right', combined sovereignty with the idea of the social contract, whereby the government draws its power from a contract with the people. Through this marriage of sovereignty and social contract theory, sovereignty, once defined solely by absolutism, became more compatible with democracy.

Two new theories emerged. The first, which the theorist Paul-Louis Courier called the Coach-Driver Theory, emphasized the sovereignty of the people. Courier equated the government to a coach-driver, hired to drive the coach, or the state. Much like the coach-driver exists to serve his employer, the government exists to serve the people; although it is delegated power by the people, it is still subordinate to them. Simon explains that because the coach driver,

is, in a way, leader, he seems to have the power of direction, judgment and wills, of binding consciences – in short, he seems to exercise authority...In truth, however, authority remains in the hands of the governed, since it is only by virtue of their will and of the missions given to persons of their own choice that the government exercises leadership (243-244).

Thus it is the people that are sovereign and maintain ultimate authority, and it is only 'by virtue of their will' and a handing over of this authority that the government exercises power over the people. The Coach-Driver Theory was later re-articulated as the Transmission Theory, which states that the people transmit their sovereign power to a distinct person who substitutes for the people while still retaining this power. The Transmission Theory of sovereignty is more

compatible with democracy than the Coach-Driver Theory because it allows the people to retain their sovereign power instead of transferring complete control and judgment to the government. As Simon explains, “What characterizes the democratic condition of sovereignty is that, in a democracy, sovereignty is never completely transmitted” (260).

A cursory examination of these two theories of sovereignty makes the case that sovereignty, and its derivative, prerogative, are not entirely incompatible with liberal democracies. The problem with prerogative, though, is that it is an inherently extra-legal power, which is difficult to reconcile with liberal constitutionalism specifically, a theory of government that mandates that government operate within the boundaries of the law. The U.S. Constitution specifically attempts to tame presidential prerogative by confining executives to written law, even in the face of emergencies. In a message to Congress on July 4, 1861, Abraham Lincoln pondered the following: “Is there in all republics this fatal and inherent weakness? Must a government of necessity be too *strong* for the liberties of its people, or too *weak* to maintain its own existence?” (Rossiter 3). This paper answers no; the inherent conflict between executive prerogative in times of crisis and the values of liberal constitutionalism need not be fatal to a democracy. The answer to the problem lies in the principle of preservation. The remainder of this paper will examine the philosophical development of this principle and its implications for executive power.

The Constitutional Dictatorship

At the outset, the term constitutional dictatorship appears contradictory. However, constitutional dictatorships have existed as long as constitutional governments have and have been used by every constitutional government throughout history. Rossiter writes that the constitutional dictatorship is “coeval and coextensive with constitutional government itself” (8). The most frequently cited example of a constitutional dictatorship is that which existed during

the early and middle Roman Republic. During a period of crisis, autocratic powers were legally bestowed on a single man, the Dictator, who used these powers to restore the republic to a state of normalcy; after the crisis passed, the Dictator would relinquish his powers back to the people. Thus, the Dictator's powers were used solely for the protection and preservation of the republic.

Rossiter conceives of three principles that govern the constitutional dictatorship. The first is that governments in democratic, constitutional states are designed to function under normal, peaceful conditions and are not constructed for the special demands of national crises. Free government is fragile. "Civil liberties, free enterprise, constitutionalism, government by debate and compromise – these are strictly luxury products..." Rossiter writes (5). These liberties can by no means exist without the preservation of the state. The second principle of constitutional dictatorships, then, is that in times of crisis democratic and constitutional governments must be altered to meet the demands of the crisis. Often such an alteration means more government power and less individual liberty. Finally, the third principle of constitutional dictatorships is that the constitutional dictatorship has no other purpose than the preservation of society. Just like the Roman Dictator, the constitutional dictatorship relinquishes its extraordinary power at the conclusion of the crisis. It restores the state to the *status quo ante bellum*, making "no [permanent] alteration in the political, social, and economic structure of the nation" (Rossiter 7). Thus a constitutional dictatorship, unlike a conventional dictatorship, is "temporary and self-destructive" (Rossiter 8).

All constitutional dictatorships understand that the preservation of the state is ultimately supreme to the law. Rossiter refers to this understanding as the theory of *Not kennt kein Gebot*, or necessity knows no law (12). While he acknowledges that it is just as easy for a Hitler as it is for Lincoln to claim necessity as the rationale for his actions, the responsible statesman will

always break the law in order to protect the nation during times of national crises. Constitutional dictatorships are primarily and almost exclusively found in the realm of executive power. This is because only the executive branch contains the unified and flexible nature in order to exercise prerogative wisely during times of necessity. Even Locke, the great champion of legislative supremacy, admitted that it was the Crown's prerogative to act with discretion because the Crown "was the ultimate repository of the nation's will and power to survive" (Rossiter 13).

While the construction of the United States government makes its adherence to peacetime constitutional principles particularly tenacious, constitutional dictatorships have been evident in the U.S. during four historical periods of crisis: the Civil War, World War I, the Great Depression, and World War II. The most obvious example of an American constitutional dictatorship is a declaration of martial law, specifically Lincoln's suspension of habeas corpus during the South's rebellion. While some in the North argued that Lincoln's actions were unconstitutional, Lincoln responded that application of constitutional law changes during periods of rebellion or invasion involving the public safety. To adhere categorically to the Constitution would have jeopardized the survival of the Union.

Lincoln's emphasis on preserving the nation was rearticulated in Theodore Roosevelt's Stewardship Theory. Roosevelt argued that the president has the power to act in almost any way he sees fit to preserve the Constitution during periods of national emergency, so long as his actions are not explicitly forbidden by the Constitution or an act of Congress. While Roosevelt drew the line of prerogative at existing law, his theory still encapsulates the same spirit of preservation expressed by Lincoln. Consequently, the doctrine "converts the Presidency into a mighty reservoir of crisis authority" (Rossiter 218-219). By 1939, the president had the emergency power to prohibit foreign transactions; seize power houses and dams; increase the

army and navy; devalue the dollar; forbid Federal Reserve transactions; seize factories refusing governmental contracts in times of war; requisition any American vessel; and exercise complete control over all U.S. communications. Many of these powers were left over from congressional grants of power to previous presidents during periods of crisis, and while they were all legally granted powers, they nevertheless reflected the spirit of a strong executive and the prerogative to decide when to use these powers.

Executive Power in Hobbes's *Leviathan*

The foundation of Hobbes's theory of government, and thus his theory of executive power, is his theory of motivation. Hobbes conjectures that prior to living in society, men existed in the State of Nature, where they were moved by either their appetites or their fears. In the State of Nature, man exists without the aid of the law, lawmakers, or law enforcement. The State of Nature is thus a state of war, what Hobbes's describes as "every man, against every man" (185).¹ Men are locked in a constant struggle for power over each other, if only to assure their own survival. This struggle for power ceases only with death (161). Hobbes describes the State of Nature as a state in which

...there is no place for Industry; because the fruit thereof is uncertain: and consequently no Culture of the Earth; no Navigation, nor use of the commodities that may be imported by Sea; no commodious Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short" (186).

It is the civilized man's desire to escape this state of war which leads to death – to avoid a life that is "solitary, poore, nasty, brutish, and short" – that prompts him to seek peace in the form of civil society. Thus, man begins to construct a commonwealth.

¹ All references to Thomas Hobbes's *Leviathan* will hereafter refer to page numbers in the Penguin Books edition (1985), edited by C.B. MacPherson.

The construction of a commonwealth involves the creation of a single will among men, or the agreement of every man with every man. In order to reach this agreement, man must be compelled to give up what Hobbes calls the Right of Nature. The Right of Nature is the liberty each man possesses to use his own power for his self-preservation (Hobbes 64). This right exists only in the State of Nature. Because men are still driven by their appetites, even in civil society, they must be compelled to transmit their right to self-preservation to someone else who can enforce the agreement between men necessary for the survival of the commonwealth. Hobbes calls this person the Sovereign: “And he that carryeth this Person, is called Sovereigne, and said to have *Sovereigne Power*; and every one besides, his Subject” (228). Hobbes’s social contract theory requires that the Sovereign be authorized with the sovereign power of the people in order to have power. This authorization must involve a translation of right. When an individual translates his right to the Sovereign, Gauthier explains, he neither renounces the right nor completely transfers it, but instead enables the sovereign to act in his place with his sovereign right (124). In this way the Sovereign becomes the representative of every man in society.

The role of the Sovereign is twofold. First, he exists to make his subjects secure from each other by preserving the commonwealth and preventing civil society from crumbling back into the State of Nature. He does this by wielding the Sword of Justice, which is the power to coerce and punish citizens of the commonwealth. The Sovereign’s second duty is to secure his subjects and the commonwealth against external threats by wielding the Sword of War. Thus, as Hobbes describes it,

...in him consisteth the Essence of Commonwealth: which (to define it,) is *One Person, of whose Acts a great Multitude, by mutuall Covenants one with another, have made themselves every one the Author, to the end he may use the strength and means of them all, as he shall see expedient, for their Peace and Common Defence* (227-228).

The ultimate role of the Sovereign, then, is to ensure the peace and defense of the commonwealth.

Hobbes argues that in order for the Sovereign to execute this role, he must have absolute power, because an absolute sovereign is a condition necessary for the maintenance of peace; this is because the commonwealth is in constant danger, primarily by way of civil unrest, of sliding back into the State of Nature, which is a state of absolute war. Hobbes believes that civil war and the dissolution of the commonwealth are far worse than a totalitarian government. As such, the Sovereign may censor, create laws, decide controversies between men, make war, reward or punish the people, and keep order by whatever means he deems necessary.

Many scholars claim that Hobbes's argument for a sovereign with absolute power makes his theory of government incompatible with liberalism. They see Hobbesian absolutism as an avenue for tyranny. While it is true that absolute rule may be perverted in a tyrannous way, such an argument ignores the reality that the Sovereign cannot act unjustly against his subjects because his absolute and sovereign power is derived from them. Always the Sovereign is bound by what Hobbes identifies as the Law of Nature. The Law of Nature states first that every man has the duty to preserve his right to life and "endeavour Peace" (Hobbes 190); and second, that every man seek a better way of preserving his life than invading the rights of others – that he "lay down his right to all things; and be contented with so much liberty against other men, as he would allow other men against himself" (190). The Law of Nature is based on the principle of preservation and undergirds the idea of the commonwealth, from which the Sovereign draws his absolute power. If the Sovereign were to violate the social contract with his subjects by harboring motives other than the preservation of the commonwealth, he would violate the contract and it would become void. Furthermore, the Sovereign as an individual is bound by the Law of Nature, which means his own interest in self-preservation creates an incentive for not violating the social contract.

Accordingly, the supreme law governing Hobbes's theory of government is the safety and preservation of the people. This is the essential qualification placed on the Sovereign's power, meaning it is not absolute in and of itself, but exists solely for securing the commonwealth against domestic and foreign disturbances. The only pure absolutism in Hobbes's theory exists in the Law of Nature. For this reason, Hobbes's theory of sovereign authority is not entirely antithetical to the rule of law found in modern republican governments: the sovereign is bound by the Law of Nature, which emphasizes the principle of preservation. It is via this emphasis on preserving the state that Hobbes's Sovereign encapsulates modern prerogative. As Arnold states, "The limit of a sovereign's worth always comes down to preservation and security: that is, the threat of death"; in this way, Hobbes's theories "conceptualized modern power and its basis – bare life – as no other theorist previously had" (8).

Locke's Two Treatises of Government

The principle that primarily separates Locke's theory of government from Hobbes's is Locke's emphasis on the rule of law. Locke's fundamental premise that freedom requires a law to define it is the foundation of not only the U.S. Constitution but democracies all over the modern world. Locke contends that the definition of freedom is rooted in natural law and grounded on man's reason (327).² Simply put, it is man's ability to reason that makes him free to govern himself through the creation of laws. As such, man's reason in the form of laws are sovereign, not a monarch or government.

Locke's theory of government, like Hobbes's, also presupposes a State of Nature, which is assumed to be man's original condition prior to his entering into civil society. The State of Nature once again encapsulates a state of war, where men are ruled by self-love and violence.

² All references to John Locke's *Two Treatises of Government* will hereafter refer to page numbers in the Cambridge University Press, third edition (1988), edited by Peter Laslett.

However, Locke distinguishes his State of Nature from Hobbes's by claiming that men do not seek power over each other, but instead seek after each other's property. Locke's definition of property includes both material claims and man's right to freedom and equality. The implication is that property is not sufficiently regulated in the State of Nature, and thus men are obliged to leave the State of Nature and establish civil society in order to maintain their property rights. "The great and *chief end* therefore, of Mens uniting into Commonwealths, and putting themselves under Government," Locke writes in his *Second Treatise*, "*is the preservation of their Property*" (368-369). Political society is therefore created as a way to preserve property rights and punish those who transgress these rights.

In order for this commonwealth to come into being, Locke conceives of a social compact where men mutually consent to government. This mutual consent is what affords the government authority, being "society's will regarding law, order, and national defense" (Corbett 4). Unlike Hobbes's Sovereign, who is afforded absolute power due to the every-present threat of absolute war and is only limited by the Law of Nature, Locke's government is limited by the consent of the people and thus can never possess arbitrary power. Although man resigns to the government his natural right to defend his property and punish transgressors, in doing so he only gives up his power over other men; he does not give up his power over himself. This is a fundamental difference from Hobbes's theory of government, where men transmit their individual sovereign power to the Sovereign. Furthermore, Hobbes's theory posits that men have no choice but to be governed out of fear for their lives; in contrast, Locke's theory argues that men rationally consent to be governed.

Locke's theory of government centers on the legislative power, which acts as a judge on earth - sanctioning laws, managing disputes, and redressing injuries. Unlike Hobbes's Sovereign, who

has the power to create laws as well as execute them, Locke separates the legislative and executive powers into separate bodies. The legislature has the duty of creating laws; the executive has the duty of executing the laws created by the legislature. Furthermore, Locke imagines the legislature, not the executive, as supreme. In his theory, because the executive exists solely to execute the law, he cannot exist where there is not the law or legislature, and thus must be subordinate to the legislative power. This narrow definition of the executive seems to leave little room for the idea of prerogative. Opponents of the unitary executive theory often point to Locke's emphasis on the rule of law as support for a limited interpretation of executive power in the United States.

This claim, however, ignores the actuality that even Locke understood that the rule of law is insufficient for securing all political ends. Locke believed the law was limited in two basic ways. First, it is impossible to write the law in a way that provides for every exigency in society; second, if the executive is required to comply strictly with the letter of the law, this previously mentioned lack of foresight hinders the execution of the law. Corbett writes that this second reason "marks a turning point in the *Second Treatise* away from an almost naïve fixation on the logic of consent to a more urbane concern with the public's well-being" (8). In order to compensate for these two limitations of the law, Locke conceives of an extralegal power vested in the executive which he calls prerogative. This prerogative would supplement the rule of law, specifically in situations where the law is silent or when the legislature is not in session and therefore cannot account for the peoples' will. Ironically, an extralegal power becomes the solution to the deficiencies of the law.

Locke argues that the public good requires executive discretion in the form of prerogative (392). He redefines prerogative from its original monarchical conception to the following: "For

Prerogative is nothing but the Power of doing publick good without a Rule” (Locke 396). There are two constants in this definition. The first is that prerogative requires that the executive always act for the public good in a way that is limited by the public good. Every act of discretion must have the public good in mind. The second constant is that prerogative is not bound by positive law, meaning that executive discretion exists above and beyond the rule of law, and therefore can act in the absence of the law or even sometimes against it. By allowing the executive to act “without a Rule”, he has the flexibility to respond to unforeseen circumstances, in particular emergencies that threaten the well-being of the commonwealth.

Locke’s idea of prerogative draws its legitimacy from the concept of the public good. The question remains though: how do we define the public good? In order to do so, we must examine Locke’s conception of the Law of Nature. Much like Hobbes, Locke’s Law of Nature is based on the principle of preservation. Every man is “*bound to preserve himself*” and “so by the like reason when his own Preservation comes not in competition, ought he, as much as he can, *to preserve the rest of Mankind*” (Locke 289). Because man is governed by reason, he can neither harm his own life, health, liberty, or property, nor those of another. Government is understood by Locke to flow from this Law of Nature; it is created for the “mutual *Preservation* of [man’s] Lives, Liberties and Estates, which I call by the general Name, *Property*” (Locke 368-369). The public good is understood as the preservation of property. Because the preservation of property depends on the preservation of the commonwealth, then the chief end of executive prerogative is the preservation of civil society.

Although Locke’s emphasis on the rule of law initially distinguishes him from Hobbes and appears to make his theory more compatible with liberal constitutionalism, both theories rest on an underlying principle of preservation, which governs their conceptions of prerogative. Critics

of executive prerogative in the United States argue that Locke's theory of prerogative does not work in the context of American constitutionalism because his conception of prerogative is extralegal and therefore extraconstitutional. This is not necessarily true. Lockean prerogative is indeed extralegal; however, as Ward points out, it is not in the most basic sense extraconstitutional (721). This is because Locke conceived of prerogative as "a *constitutionally authorized* discretionary power delegated by the people" within the legitimizing framework of a constitutional order (Ward 721; italics mine). Lockean prerogative was meant to be explicitly included in the constitution. In the American context, then, the question reverts back to the old debate over how much executive power the U.S. Constitution prescribes. An analysis of the emphasis in Lockean prerogative on the principle of preservation might actually bolster the constitutional arguments of unitary executive theorists by providing evidence of an inherent limitation on executive power that preceded the writing of the Constitution. The next section will explore this idea by examining how three of the Founding Fathers understood of executive power and prerogative.

The Founding Fathers and Executive Power

Unlike in Europe, where absolute monarchies existed for centuries prior to the advent of parliamentary democracy, the United States does not possess a long history in support of executive power. From the nation's very beginning, its citizens have been distrustful of executive power. The American colonists established this suspicious tone for future generations following their experience with the British monarchy prior to and during the American Revolution. So strong was this distrust that the Articles of Confederation, which preceded the Constitution, lacked an executive branch altogether (which was, ironically, one of the chief reasons it failed so miserably as a means of American government). Even many of the early

state constitutions severely limited executive power by making their chief magistrates strongly dependent on the state legislatures. The Founding Fathers were divided over the issue; many favored the creation of an ‘energetic’ executive who could withstand the vices of legislative power, but others worried about the creation of an ‘elected monarchy’.

By and large, the American presidency is understood to encapsulate a strong executive. Presidential power, as it is outlined in the Constitution today, was meted out during the Constitutional Convention of 1787 in Philadelphia. There the founders gave future presidents the executive powers all students of American government are familiar with: the veto power; the power to issue pardons and reprieves; the power to receive foreign diplomats; and the power to convene Congress and even adjourn the legislature in the event the two houses could not decide when to. With the advice and consent of the Senate, the president is granted the power to make treaties, as well as appoint judges, ambassadors, and other high federal officials. He is also made Commander in Chief of the military, with the power to call state militias into national service. Finally, more broadly, he is exhorted to faithfully execute the laws of the government and to ‘preserve, protect, and defend the Constitution of the United States’.

Scholars today may disagree on the practical extent of these powers; certainly the Founding Fathers did as well, which is why the Constitution is particularly vague in regards to executive power compared with constitutions in other liberal democracies. The founders were tasked with the difficult assignment of crafting an executive that was not so weak as incapable of executing national law, but not so strong as to endanger democratic principles. The Article II clauses that point most obviously to executive prerogative – to faithfully execute the laws of the government, and to ‘preserve, protect, and defend’ the Constitution – are intentionally vague because the founders recognized that, just as society is not a static entity, so government must also not be.

They purposefully left room in the Constitution that would allow for political exigencies and emergencies. At the same time, they sought to prevent the president from morphing into an absolute executive by inserting into the Constitution what is arguably the greatest check on presidential power: the ability to remove the president by means of impeachment and trial.

Still, the Constitution's provision of a strong executive was a point of extreme contention when the document went to the thirteen states for ratification. The *Federalist Papers* were a response to this contention. Addressed to the people of New York, they were written in response to objections made to the Constitution proposed by the 1787 Philadelphia Convention. The idea was originally proposed by Alexander Hamilton, who was later joined by James Madison and John Jay. Hamilton wrote the first essay under the pseudonym 'Publius', which appeared in New York newspapers, followed by subsequent essays which were published serially. Many of the essays lack a clear authorship, which can make distinguishing between the views of Hamilton and Madison, in particular, especially difficult, considering the two men sometimes held very different opinions of how democratic government should function. Nevertheless, the *Federalist Papers* remain the classic interpretation of the Constitution to this day, which makes it an ideal source for examining early American thought on executive power.

Alexander Hamilton

Hamilton is the Founding Father best known for his ardent support of executive power. Contrary to standard founding philosophy of limited government, he did not believe that precise limits on government – on the executive, in particular – were always conducive to the protection of individual rights. Fatovic writes that “Acknowledging the tension between vigilance and responsibility, Hamilton was unique in emphasizing that sufficient power is necessary – indeed indispensable – to the preservation of liberty” (436). For Hamilton, liberty was sacrosanct, so

much so that he doubted the ability of the legislative branch to preserve it without the aid of a strong, unitary executive.

It is for this reason that Hamilton's opinions are frequently cited by unitary executive theorists. The problem with the Articles of Confederation, Hamilton believed, was that the national government lacked sufficient energy. He argued that energy, specifically in the form of prerogative, were necessary for the operation of good government, and that these qualities were most naturally endowed in the executive. As he wrote in *Federalist No. 70*,

Energy in the executive is a leading character of good government. It is not less essential to the steady administration of the laws, to the protection of property...to the security of liberty against the enterprises and assaults of ambition, of faction and of anarchy. A feeble executive implies a feeble execution of the government...And a government ill executed, whatever it may be in theory, must be in practice a good government (471-472).³

Hamilton's support of a sufficiently 'energetic' executive largely had its roots in practical concerns. He worried, much as Hobbes did, that a government lacking a strong executive might allow the society to devolve into a state of chaos, where individual liberties would become null and void. As such, American government, with the express duty of upholding individual liberty, required a strong executive.

A strong executive, in Hamilton's mind, consisted of three key ingredients: unity, duration, and competent powers. Unity was the most important of the three. As he wrote, "Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man, in a much more eminent degree than the proceedings of any great number" (474). Supporters of the unitary executive point to this quote from *Federalist No. 70* as evidence for unitary power in the executive branch. They argue, in the same vein as Hamilton, that only a unitary executive independent of the legislative branch has the flexibility, characterized by 'decision, activity,

³ All references to *The Federalist* will refer to page numbers from the Wesleyan University Press edition (1961), edited by Jacob E. Cooke.

secrecy, and dispatch', to respond appropriately in times of national crisis. As a large body consisting of many separate voices and opinions, Congress is more likely to encounter gridlock, which would hamper a time-sensitive response.

Underlying this belief in a unitary executive with sufficient power is Hamilton's opinion of prerogative. Hamilton believed that executive energy embodied presidential prerogative, and because executive energy is 'essential to the steady administration of the laws', prerogative is thus an indispensable element of executive power. Much like Locke, he conceived of prerogative as extraconstitutional, but not necessarily extralegal. Rather, Hamilton believed that "the powers of prerogative are contained in the very idea of a viable constitution" (Fatovic 436). Hamilton's opinion echoes the Lockean belief that a constitution acts as the formal rendering of power by the people to the government. Because a constitution is essentially a compact between the people and the government, and because this compact is not viable without the power of prerogative, the people necessarily and implicitly grant the executive prerogative power and therefore legally legitimize it, even though it is technically extraconstitutional. Hamilton thus believed that prerogative was indispensable to the preservation and operation of good government.

James Madison

James Madison is often portrayed by historians and American political scholars as the ideological opposite of Alexander Hamilton. While Hamilton doubted the efficacy of republican politics without a strong executive, Madison was a staunch believer in popular sovereignty and worried that too much executive power would violate this sovereignty. Opponents of the unitary executive theory will often point to disagreements between Madison and Hamilton as proof that the Founding Fathers were not of one opinion on the nature of executive power. However, a

closer look at Madison's thought-process during the drafting of the U.S. Constitution reveals that he did indeed leave room for prerogative in his formulation of executive power.

When Madison drafted the Constitution, it was widely believed that republican politics worked best in small, sovereign communities; hence the emphasis in the Articles of Confederation on the states serving as the primary vassals of the people, rather than the national government. During this time period, though, a new science of politics had become to take form, one which conceived of a diversity of interests as being not necessarily hazardous, but rather beneficial to the health of a republic. This diversity was thought to be desirable because the multiplicity of causes emerging out of this diversity would engender compromise and moderation when constructing an electoral majority. Because this majority would be made up of a multitude of minority interests, it was expected to be more sympathetic to minority interests and thus provide a measure of protection against the tyranny of the majority, which the founders feared as much as executive tyranny. Unfortunately, this new science of politics created complications in conceiving a republican executive. As Sedgwick explains, "While increasing the size of the nation and promoting social diversity...reduced the probability of an immoderate majority seizing the reins of power, it increased the need for a powerful executive who might become arbitrary and tyrannical himself" (9). As the new constitution was crafted and the balance of power began to shift from the smaller, homogenous states to the larger, diverse national government, the need for a strong executive became more apparent. Still, the founders were confronted with the problem of how to empower the executive without risking the creation of an absolute monarchy.

Because Madison authored the plan presented before the Constitutional Convention in May of 1787, it can be reasonably assumed that this plan represents his personal views on the subject of

executive power. Still, many scholars debate how clear of an idea Madison possessed of how the executive was to be constructed and whether he feared it would be too weak or too strong in relation to the legislature. Madison seems to have largely conceived of the executive as a clerkship, responsible solely for the administration of the laws. This conception appears to leave little room for presidential prerogative.

However, the historical record proves that Madison also heard Alexander Hamilton present his plan for the executive branch to the Convention. Hamilton's plan was very similar to what would later be written into the final draft of Article II, including the veto power and the power to direct the military in times of war. For a time, Madison appears to have disappeared from the debates on the executive; the records of the Convention show little activity on his part. In the later stages of the Convention, though, he is known to have reentered the debates, this time arguing for a strong executive. It is unclear whether Hamilton's plan for the presidency is what altered Madison's vision for the presidency, but it is clear that he came back with a strong argument for executive power. In a speech to the Convention, he argued that

Experience had proved a tendency in our governments to throw all power in the Legislative vortex. The Executives of the States are in general little more than Cyphers; the legislatures omnipotent. If no effectual check be devised for restraining the instability and encroachments of the latter, a revolution of some kind or other would be inevitable. The preservation of Republican Government therefore required some expedient for the purpose, but required evidently at the same time in devising it, the genuine principles that form should be kept in view (Sedgwick 17).⁴

Madison believed in a strong executive for the purpose of preserving the republic. Although he feared the excesses of a too-strong executive, he feared the excesses of a too-strong legislature more. As Madison later articulated in *Federalist 51*, a strong executive would oblige the government to control itself by providing a means for the executive branch to check the legislative branch.

⁴ Notes of Debates, p. 312-313

In the end, Madison understood executive power to be a necessary evil in the face of greater threats to the existence of republican government. So long as this power was wielded in the name of preservation, it would have legitimacy. While Madison did not speak to the legality of prerogative, his understanding of executive power provides historical evidence for modern arguments in support of presidential prerogative, particularly those situations which involve the use of prerogative as justification for violating certain civil rights, examples of which have been abundant since the beginning of the war on terror.

Thomas Jefferson

Although Thomas Jefferson did not help author the *Federalist Papers*, he did write on the topic of presidential prerogative, which makes his opinions indispensable to the argument of this paper. Like Madison, Jefferson was a strong believer in the supremacy of the people. His strict constructionist interpretation of the Constitution was based on his pure democratic belief that the Constitution represents a contract between the government and the people, a belief which obviously has its roots in the Lockean theories of popular sovereignty and self-government. In Jefferson's view, any deviation from the enumerated powers listed in the Constitution represents an undemocratic usurpation of authority from the people. As such, the president may only possess those powers specifically enumerated to him by the Constitution. This approach appears to belie any notion of presidential prerogative.

Jefferson did admit, though, that sometimes the laws are inadequate for their own preservation, which leaves space, in Jefferson's otherwise limited conception of executive power, for the existence of prerogative. Jefferson felt that in situations where the law could not sustain itself, either martial law or a constitutional dictator might be appropriate. He understood that the law existed only as a manner of framing specific values that transcend the law. And Jefferson

believed that the highest value a republic may hold is the value of self-preservation. As he wrote in a letter to John B. Calvin on September 10, 1810,

A strict observance of the written laws is doubtless *one* of the high duties of a good citizen, but it is not *the highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, and property and all those who are enjoying them with us; thus absurdly sacrificing the ends to the means (Fatovic 434).

The law, therefore, is no longer an end in itself, but the means to an end, which is the preservation of the republic. Jefferson is careful to qualify, though, that in a situation that requires prerogative, this prerogative would be extraconstitutional, as Hamilton concedes, but also extralegal. A Hamiltonian executive would invoke extra-legal prerogative as implicit in the Constitution. A Jeffersonian executive would admit violation of the laws and instead seek *post hoc* approval from the public; thus, his use of prerogative would be both extraconstitutional and extralegal. Jefferson was able to legitimize executive prerogative from a strict constructionist viewpoint by insisting on the extraconstitutionality of executive prerogative. Furthermore, by arguing that prerogative also is extralegal, he was able to ensure that the people alone would be the final judge of executive prerogative. In this way, executive prerogative is made compatible with liberal constitutionalism.

Most importantly, though, prerogative is compatible with liberal constitutionalism because, in Jefferson's estimation, it seeks to preserve a higher end than written law. As Fatovic points out, while the Constitution does not give the executive power to transgress the law, it does not demand that the executive capitulate to extemporaneous circumstances, either. Instead, Jefferson understood that the law is merely a framework for higher ends. "The Constitution," Fatovic writes, "intimates at these ends but is not always capable of adequately providing for them" (434). In such a scenario where the enumerated powers in the Constitution cannot provide for

the preservation of the state, it is incumbent on the executive to take the necessary action to preserve the republic, even if the action taken is ultimately illegal.

Conclusion

The title of this paper might more appropriately be ‘Back to Basics: A New *Old* Approach to the Unitary Executive Theory’. This paper has sought to prove through an examination of the philosophical underpinnings of the American constitutional order that a case may be made for presidential prerogative and the unitary executive theory beyond the prescriptions and proscriptions of the U.S. Constitution. The ideas of prerogative and executive power have deep roots in a philosophical tradition of preservation that stretches from the constitutional dictatorships of the Roman Republic, through the political theories of Hobbes and Locke, to the constitutional arguments of the Founding Fathers and historical American interpretations of prerogative. Not only is prerogative compatible with liberal government, but it is also a precondition for liberal government, whether in checking the power of the legislature, preserving the state, or giving viability to a constitution.

When addressing the problem of executive power in the modern era, ultimately we must remember that the law is merely a construct for a higher value, which is the preservation of the individual. We value the rule of law not because it is intrinsically valuable, but because it provides a means to a greater end. There is room for the unitary executive theory and presidential prerogative in American democracy, so long as executive power is always checked by the principle of preservation. When confronted with a situation that might require extraconstitutional power, the president ought to ask himself to what extent the welfare of the people depends on the use of this power and whether or not that welfare can be maintained through other means. How to establish a framework for judging the necessity of prerogative is a

question that still lacks a firm answer and has clear implications for executive power today and in the future. Still, the post-9/11 era is likely to see continued growth in presidential power and continued reevaluation of prerogative and the unitary executive theory. As we go forward, it is crucial that we always keep in mind *salus populi suprema lex*: the public welfare as the highest law.

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