

President George W. Bush and Executive Emergency Power: A Hyper Approach to the Unitary Executive Theory

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In this article, I examine the theory of executive emergency power, proffered by George W. Bush, following the attacks of September 11, 2001. In particular, I examine the administration's interpretation of the Unitary Executive Theory and the misguided interpretation of emergency power proffered by former Asst. Attorney General John Yoo. I analyze primary source documents from the administration, including Office of Legal Counsel (OLC) memos, Presidential Signing Statements, and email exchanges between the officers of the executive branch. Further, I analyze principle *Federalist Papers*, mostly those of Alexander Hamilton to contest the Bush Administration's conclusions regarding the Unitary Executive Theory. The findings indicate that the Bush Administration violated the Constitution, created a new Unitary Executive Theory, and moreover, devised a new interpretation of presidential emergency power. The implications from the research are very strikingly clear that the Bush Administration created not just an imperial presidency during the crisis, but a whole new presidency not bound by the law, or the Constitution.

Keywords: President George W. Bush's use of executive emergency powers

Introduction

In this article, I explore the theory of executive emergency power in modern America, following the attacks of September 11, 2001, to determine: (1) President George W. Bush's interpretation of emergency power following the attacks; and (2) how Bush's interpretation of executive emergency power either agreed or disagreed philosophically with previous thinkers and presidents.

In order to understand President Bush's interpretation of emergency power, I will examine three key areas of thought: The Unitary Executive Theory; the Office of Legal Counsel Opinions following the attacks of September 11, 2001; and Presidential Signing Statements. An understanding of the Unitary Executive Theory is important, because President Bush will support the theory, but offer a nuanced interpretation, favoring a strong presidency and a vigorous use of all presidential power unconstrained by congressional oversight or consultation (Calabresi & Yoo, 2008).¹ Such an interpretation of presidential authority is similar to an imperialist president, and is very critical in times of emergency.

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¹ By reviewing the history of the republic and its corresponding theory, we find that modern interpretations have become more "extreme"; hence, previous presidents adopted a more nuanced interpretation.

The central questions concerning the Unitary Executive Theory are: (1) Is the theory a correct interpretation of Hamilton's words in the *Federalist Papers*; and (2) does the theory suggest that a president may do whatever he wants in time of emergency?

Bush sought advice from his Office of Legal Counsel (OLC) for legal justification of emergency power. In the OLC opinions, Bush advisors relied on Hamilton's interpretation of executive emergency power, drawn from the *Federalist Papers*, to define and justify Bush's use of emergency power following the attacks of September 11, 2001.

The Unitary Executive Theory

According to the proponents of the Unitary Executive Theory, the concept is rooted in the writings of Alexander Hamilton, particularly the *Federalist Papers* (Calabresi & Yoo, 2008). The *Federalist Papers* were composed and distributed shortly after the Constitutional Convention, during which the founders discussed and ultimately drafted the new constitution. The papers were distributed for the purpose of debating central issues of the convention concerning the federal government. Hamilton, Madison, and Jay wrote the papers with the hope of persuading readers to support the Constitution.

Federalist No. 70 is the primary source of evidence for the Unitary Executive Theory. In Federalist No. 70, Hamilton addressed the question of how the executive branch of government should be conceived, especially the primary debate at the time: How many people would comprise the executive branch? Should there be one person as president, creating a unitary executive? Or should multiple people comprise the executive? Unlike the anti-federalist opposition, Hamilton was in favor of a singular, that is, unitary, presidency.

In Federalist No. 70, Hamilton's primary reason for a singular presidency is the need for energy in the executive. Hamilton (1982e) argued that an executive with energy is "a leading character in the definition of good government". He stated that a single "magistrate is essential to the protection of the community against foreign attacks"; and

it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy. (p. 116)

Proponents of the Unitary Executive Theory use this short passage from Federalist No. 70 as a primary source to suggest that Hamilton favored a strong, imperial, and independent executive, especially in times of crisis (Yoo, 2001b).

Hamilton (1982e) claimed that unity is essential for sufficient energy in the executive and "that unity is conducive to energy will not be disputed". Unity in the executive will lead to "decision, activity, secrecy, and dispatch" and these actions "will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished" (p. 116).

According to Hamilton (1982e), "vesting the power in two or more magistrates of equal dignity and authority" destroys unity in the executive. This loss of unity will harm the executive because

wherever two or more persons are engaged in any common enterprise or pursuit, there is always danger of difference of opinion.... Whenever these happen, they lessen the respectability, weaken the authority, and distract the plans and operation of those whom they divide. (p. 117)

Varying opinions may “assail the supreme executive magistracy of a country, consisting of a plurality of persons, they might impede or frustrate the most important measures of the government, in the most critical emergencies of the state” (p. 117).

In contrast to Hamilton, the anti-federalists favored a plural presidency. George Mason of Virginia advocated a plural presidency, because he wanted to diffuse presidential power, and feared the rise of an American monarchy. This committee-style presidency would consist of at least two men chosen from the Congress from different sections of the country, who would jointly constitute the executive (Farrand, 1911).

At the Constitutional Convention, the committee on detail was responsible for negotiating the details of the executive branch. James Wilson led the committee and conceded that the pluralist executive would be useless, ineffective, and fail to unify the nation. Wilson suggested that a single authority would be more accountable (Farrand, 1911). After all, who would you impeach if there were several people comprising executive authority?

Hamilton (1982e) built his argument against a plural presidency upon three distinct and important claims. In Federalist No. 70, Hamilton argued that “the president must be unitary in order to effectively lead, execute the laws, and command the army” (p. 117). Hamilton suggested that a plural president would not be “decisive, would not be swift to respond, and would not be accountable” (p. 117). Dissent and criticism of the presidential office would become problematic; how can you criticize five different heads of one body? Which head is most to blame? Hamilton suggested that a unitary executive would have greater autonomy than a plural leader (Hamilton, 1982e). According to Hamilton, greater autonomy in the executive would give the public a clear path for expressing their dissatisfaction with the presidency, resulting in greater accountability in the executive.²

A straight-forward reading of Hamilton’s argument indicates that he favored a singular presidency, that is, a unitary executive rather than a committee-style executive. The executive would be responsible to execute the laws, command the army, and respond to emergencies. Hamilton (1982e) did not suggest in any of his writings that the president will be above “any magistrates” or that the presidency would not coordinate with the other branches of government (p. 118).

However, supporters of the modern Unitary Executive Theory propose a different interpretation of Federalist No. 70, which posits a strong, unitary executive unconstrained by the supervision of other branches of government. In other words, advocates of the Unitary Executive Theory, especially those who would cite it during the Bush presidency in support of his authority, suggest an interpretation of presidential power similar to an “imperial presidency” (Meese, 1992, p. 118; Yoo, 2001b).

The Unitary Executive Theory claims that the executive has the lawful right to completely control and administer the duties of his office. In administering his duties, the president does not require congressional oversight or consultation (Calabresi & Yoo, 2008). This is especially critical in relation to presidents’ execution of laws. Sometimes presidents will object to certain provisions in a law and simply not execute a particular provision of the statute, because they claim a constitutional prerogative or discretion to administer the laws as

² All of Hamilton’s claims are drawn from Hamilton (1982e). For an Anti-Federalist response, see Clinton (1981).

they see fit.³ Such logic is congruent with a modern interpretation of the Unitary Executive, and will be explored in the following section.

Steven Calabresi and Christopher Yoo (2008) had launched an ambitious project exploring the Unitary Executive Theory in American history, both in practice and rhetoric. They break down the theory into three distinct components: (1) the president's powers to remove subordinate policy-making officials at will; (2) the president's power to direct the manner in which subordinate officials exercise discretionary executive power; and (3) the president's power to veto or nullify such officials' exercises of discretionary executive power.

The first component of the theory, "the president's power to remove subordinate policy making officials at will" (Calabresi & Yoo, 2008, pp. 3-5), was mostly resolved in 1926 with the Supreme Court decision in *Myers v. U.S.* (272 U.S. 52, 1926). President Andrew Johnson and Congress struggled over the *Tenure in Office Act* of 1867, which required the president to formally receive approval from Congress to remove an official of the executive branch. In *Myers v. U.S.*, the Court first considered the original debate of the first Congress in 1789, and held that the power to remove appointed officers is vested in the president alone. According to Chief Justice Taft, to deny the president that power would not allow him to "discharge his own constitutional duty of seeing that the laws be faithfully executed".⁴

Dealing with the two remaining components of the theory—the president's power to direct the manner in which subordinate officials exercise discretionary executive power and the president's power to veto or nullify such officials' exercises of discretionary executive power (Calabresi & Yoo, 2008)—scholar Michael Herz, along with Calabresi and Yoo, cited the Take Care clause of the Constitution as evidence to support the president's legal responsibility to oversee the executive branch. Herz (1993) argued, "the 'Take Care' clause insures that the president will not only execute the law personally, but also it obligates him to oversee the executive branch agencies to insure that they are faithfully executing the laws" (pp. 252-253). Herz's interpretation of the Take Care clause explicitly means that the executive agencies are "executing the law according to the president's wishes, as opposed to some independent policy goal" (pp. 252-253).

Justice Elena Kagan (2001) reinforced the point that the president has the authority to direct subordinate officials within the executive branch because "when Congress delegates discretionary authority to an agency official, since that official is subordinate of the President, it is so granting discretionary authority (unless otherwise specified) to the President" (p. 2327). Here, Kagan suggested that Congress lacks the ability of oversight once it passes a bill, thus leaving the president to ensure the law is faithfully executed.

Calabresi and Yoo (2008) offered a general schematic outline that suggests that the "rise of the modern presidency", or the imperial presidency, has resulted in more presidents favoring the Unitary Executive Theory (pp. 4-6). Calabresi and Yoo (2008) conceded that, following the Watergate scandal and the insidious Vietnam era, presidents were "reeled" in by congressional oversight (pp. 5-8). The War Powers Resolutions are a classic example of congressional oversight.⁵

³ I will explore constitutional objections to laws when I review presidential signing statements.

⁴ *Myers v. United States* (272 U.S. 52, 1926).

⁵ *War Powers Resolution of 1973* (50 U.S.C. 1541-1548).

Following President Jimmy Carter's soft diplomatic approaches and failures in the wake of the Iran hostage crisis and the oil embargos, scholars have suggested a resurrection of the theory.⁶ Carter's predecessor Gerald Ford expressed frustration dealing with an overzealous Congress bent on reducing presidential authority as a consequence of Watergate and the Vietnam War. Ford went as far as to state that the presidency was "imperiled" (Cronin, 1980, pp. 137-139).

The Reagan Administration is closely associated with the revival of the Unitary Executive Theory. The Reagan Administration "created a two-prong strategy of appointing Reagan loyalists and boosting the authority of the Office of Management and Budget to insure the executive branch agency heads made decisions with the president's preferences in mind" (Kelley, 2006, pp. 45-46).

First, Ed. Meese, Reagan's attorney general and principal advocate of the Unitary Executive Theory, supervised the hiring process to ensure that Reagan loyalists would comprise the executive branch. Meese (1992) stated,

We sought to ensure that all political appointees in the agencies were vetted through the White House personnel process, and to have a series of orientation seminars for all high-ranking officials on the various aspects of the Reagan program ... we wanted our appointees to be the President's ambassadors to the agencies, not the other way around. (p. 77)

Based on this evidence, the Reagan Administration appears to have explicitly intended to recruit, employ, and instruct executive branch officials under the president's wishes and orders.

The second strategy involved increasing the Office of Management and Budget's (OMB) role in overseeing the administration of policy orders within the executive branch. The OMB acted as a "gatekeeper to insure that the executive branch was following the president's lead and not, for example, being led astray by external forces such as powerful members of Congress or particularized interest groups" (Kelley, 2006, pp. 45-46).

In order to gain greater oversight of administration officials, Reagan created the Task Force on Regulatory Relief, chaired by Vice President George H. W. Bush. Reagan instructed this task force to oversee and review the regulatory process. In addition, he issued Executive Order 12,291⁷ to create the Office of Information and Regulatory Affairs, which was designed to oversee all regulatory processes within the federal government (Gattuso, 2008).

The executive order required "major" rules (defined as those having a projected economic impact in excess of one hundred million dollars per year) to be submitted to the OMB's Office of Information and Regulatory Affairs (OIRA) 60 days before the publication of the notice in the Federal Register, and again 30 days before their publication, as a final rule (Gattuso, 2008). The second component of the order, which dealt with non-major rules (which cost less than one hundred million dollars per year), required their submission to the OMB 10 days prior to notice in the Federal Register and 10 days prior to final publication.⁸ This empowered the OMB

to stay the publication of notice of proposed rule making or the promulgation of a final regulation by requiring that agencies respond to criticisms, and ultimately it may recommend the withdrawal of regulations which cannot be reformulated to meet its objections. (Cooper & West, 1988, pp. 873-875)

⁶ Ibid.

⁷ Executive Order, signed March 13, 1937, 2 FR 619, March 16, 1937, revoked by Public Land Order 5887, May 18, 1981 (46 FR 28414), 46 Federal Register 131937, February 1981.

⁸ Executive Order, signed March 13, 1937.

The principle that the president controls the entire executive branch was originally innocuous—based solely on a literal reading of the Article II of the Constitution, but extreme forms of the Unitary Executive Theory have developed. As John Dean (2005) stated, “In its most extreme form, Unitary Executive Theory can mean that neither Congress nor the federal courts can tell the President what to do or how to do it, particularly regarding national security matters” (p. 119). Does scholar Dean’s interpretation of emergency power mean that the president can do whatever he deems necessary during crisis? In order to answer this question, a review of Hamilton’s writings is necessary, because it may be possible that modern scholars are exaggerating Hamilton’s words in order to favor a more robust interpretation of executive emergency power.

What Hamilton meant by “unity” is plainly not the same as what Yoo and others (Meese, 1992; Calabresi & Yoo, 2008; Yoo, 2001b) understood by the “unitary executive”. Hamilton (1982e) wrote that the “unity of the executive” was to be understood as the opposite of a “plurality of magistrates”: “The faithful exercise of any delegated power” should rest with one man, the president, not only for the purpose of executing power swiftly and decisively, but also so that the public would know exactly who was accountable for “a series of pernicious measures”, and that the right man might be punished for such measures.

Furthermore, Hamilton understood the power of the executive as “any delegated power”, that is, the power delegated to the president by the people, through Congress. Hamilton (1982e) did not think that the “unitary executive” meant unbridled power, since he wrote that the executive might commit “misconduct,” which should lead to “punishment” (p. 119). If the president were above the law, his behavior could not possibly be considered “misconduct”. In *Federalist No. 77*, Hamilton (1982h) wrote that the executive is to be understood as “faithfully executing the laws ... of the United States” (pp. 388-392). Hamilton clearly never intended or supported an interpretation of executive power to go beyond the scope of law, or to exist without oversight from the other branches of government. The president has the responsibility to command the army, but commanding the army does not grant the president the power to make war. Congress must first declare war; the president may command the army into war only after Congress’s declaration.

The Office of Legal Counsel and President George W. Bush’s Interpretation of Executive Emergency Powers

In this section, I analyze President Bush’s philosophy of executive emergency powers by examining the OLC and the opinions it drafted following the attacks of September 11, 2001. While Bush did not offer many comments or writings on emergency power, since leaving office he has often stated that the “lawyers” advised him on his constitutional authority regarding emergency power (Condon, 2010). Therefore, the OLC memos are significant in determining Bush’s interpretation of executive emergency power.

What advice did the OLC give President Bush following the attacks of September 11, 2001? How did the OLC argue that executive emergency powers were constitutional? Did the advice support the Unitary Executive Theory? Did the OLC provide an appropriate interpretation of executive emergency power? Is the interpretation of Alexander Hamilton’s writings correct, or did John Yoo overstate Hamilton’s ideas to zealously promote a misleading interpretation of the power of the presidency during crisis? To answer these questions, I will first review Yoo’s argument in an OLC memo dated October 23, 2001. Second, I will review the appropriate *Federalist Papers* that Yoo cited and examined them carefully to consider the validity of his argument.

Office of Legal Counsel

The OLC was created in 1953 with the explicit intent to “maintain the constitutional protections of the President” (Baker, 1995, pp. 31-59). The OLC provides constitutional legal advice to all the departments within the executive branch and “both written and oral advice in response to requests from the Counsel of the President”.⁹ Over the course of the 20th century, the OLC “came to present themselves as agents of the Constitution itself and as guardians of an office whose significance to our nation far outstrips the petty political disputes that consume the daily life of most of those around the president” (Lund, 1995, pp. 209-257).

Although the OLC has undertaken the primary responsibility of protecting the president from Congress encroaching upon the constitutional powers of the office, this does not mean that the OLC is the ultimate authority. Political expedience has occasionally overruled the opinion of the OLC.¹⁰ For instance, in the late 1980s, the bill to bail out failed savings and loans institutions reached the first President Bush’s desk, and the OLC found some constitutional problems regarding the appointment of the director of the Office of Thrift Supervision. The OLC argued that the bill should be vetoed on that defect alone. Many members of Congress and the executive branch found the bill to be too politically important to allow a minor constitutional defect to derail it, and consequently overruled the OLC opinion (Barr, 1996). In other words, the OLC is not the final say on the constitutionality of a piece of legislation, but as evidenced, it is a clear defender of the president’s authority and latitudes of constitutional power.

Furthermore, the president shields his office from encroachments upon his prerogatives by relying upon the Oath clause of the Constitution. As noted, the Department of Justice is the primary protector of the president’s prerogatives, particularly the OLC. All enrolled bills that go to the president’s desk for signature flow through the OLC, “which reviews them for constitutional problems and makes a recommendation to the President whether to sign or to veto”.¹¹

The OLC may also play a role in drafting the veto message. If the president chooses to veto a bill, then the OLC may assist in writing the signing statement if constitutional objections need to be made. In addition, if the president is concerned or curious about the latitudes of his power, he may seek legal advice from the OLC to determine the constitutionality of his possible actions in relation to an event, such as the attacks of September 11, 2001.¹²

Office of Legal Counsel Opinions

Table 1 outlines all of the OLC memos drafted after September 11, 2001 that were pertinent in addressing the Bush Administration’s executive emergency power philosophy.

⁹ Obtained from the U.S.D.O.J OLC index.

¹⁰ This is in addition to the Court overturning, in short, some of the OLC opinions regarding the removal and detainment of enemy combatants. See *Hamdi v. Rumsfeld* (542 U.S. 507 2004), and *Hamdan v. Rumsfeld 2006* (548 U.S. 557, 2006), (542 U.S. 507, 2004).

¹¹ Those bills that the administration advances are circulated to all interested agencies for comment. The OLC will get a bill only if the Office of Legislative Affairs seeks a legal review. Statement of Robert B. Shanks, Deputy Assistant Attorney General, Office of Legal Counsel, Before the Committee on Energy and Natural Resources, Subcommittee on Energy Conservation and Supply, U.S. Senate, Concerning Revised Constitution of American Samoa on May 8, 1984, 1-43.

¹² Department of Justice, Office of Legal Counsel, <http://www.justice.gov/olc/index.html>.

Table 1

Office of Legal Counsel Opinions, Department of Justice, Drafted Following the Aftermath of the Terrorist Attacks of September 11, 2001

OLC Memo	Author	Date
Authority for use of military force to combat terrorist activities within the United States of America	John Yoo, deputy assistant attorney general, and Robert Delahunty, special counsel	October 23, 2001
Authority of the president to suspend certain provisions of the ABM (Anti-Ballistic Missiles) Treaty	John Yoo and Robert Delahunty	November 15, 2001
Applicability of 18 U.S.C. 4001(a) to Military Detention of United States Citizens	Unsigned	June 27, 2002
Determination of enemy belligerence and military detention	Jay Bybee, assistant attorney general	June 8, 2002
The president's power as commander in chief to transfer captured terrorists to the control and custody of foreign nations	Jay Bybee	March 13, 2002
Constitutionality of amending foreign surveillance act to change the purpose standard searches	John Yoo	September 25, 2001
Swift Justice Act	Patrick Philbin	April 8, 2002
Status of Certain OLC Opinions issued in the aftermath of the terrorists attacks of September 11, 2001	Stephen Bradbury, principal deputy assistant attorney general, President Obama's administration	January 15, 2009

The OLC first drafted an advisory memo regarding the president's authority to use emergency powers following the attacks of September 11, 2001, on October 23, 2001. Assistant Attorney Generals John Yoo and Robert Delahunty authored the memo in response to a request from Vice President Cheney, on behalf of President George W. Bush, concerning how to handle the emerging war on terrorism. The president sought advice on the extent of his emergency power in the wake of the attacks. The president desired to know the extent of his authority to respond to the initial attack, and at that time was still concerned about subsequent attacks, even an insurrection or an invasion.¹³

Moreover, the White House needed thorough legal advice on how to respond to the attacks because, according to the OLC, "The situation in which these issues arise is unprecedented in recent American history" (Yoo, 2001b). The OLC suggested that the attacks of September 11, 2001 were unprecedented because "the attacks took place in rapid succession, aimed at critical American government buildings, on American soil ... and caused more than five thousand deaths, and thousands more were injured" (p. 45). President Bush agreed that the actions of September 11, 2001, were exceptional when he addressed a joint session of Congress on September 20, 2001, stating, "on September 11th, enemies of freedom committed an act of war against our country" (Yoo, 2001b, p. 2).

Yoo (2001b) claimed it was "vital to grasp that attacks on this scale and with these consequences are more akin to war than terrorism ... and that the events of September 11, 2001, reach a different scale of destructiveness than earlier terrorist episodes" (p. 2). He stated that

the operatives responsible for the attacks, Al-Qaeda, had a history of attacks aimed at the United States [suicide bombing attack in Yemen on the U.S.S. *Cole* in 2000, the bombings of the United States embassies in Kenya and in

¹³ Ibid.

Tanzania in 1998, a truck bomb attack on U.S. military housing complexes in Saudi Arabia in 1996, an attempt to destroy the World Trade Center in 1993, and an ambush to kill U.S. servicemen in Somalia in 1993]. (Yoo, 2001b, p. 2)

Yoo (2001b) concluded that this “pattern of terrorist activity of this scale, duration, extent, and intensity ... can readily be described as a war” (p. 3). As a consequence of the concerns over terrorist activity the OLC drafted a memo to discuss the president’s authority to wage war against the terrorists, to discuss the president’s constitutional boundaries in taking military action, and his legal authority to combat the possibility of an additional insurrection or invasion (Yoo, 2001b).

What advice did the OLC give President Bush following the attacks of September 11, 2001? How did the OLC argue that executive emergency powers were constitutional? Did the advice support the Unitary Executive Theory? The following areas of the OLC memos will be outlined and analyzed: (1) The presence of an emergency; and (2) Text and structure of the Constitution that support the power of the executive to combat emergencies.

Did the OLC provide an appropriate interpretation of executive emergency power? Did John Yoo understand Hamilton correctly or overstate his ideas to zealously promote a misleading interpretation of the power of the presidency during crisis? To answer these questions, I will review the appropriate *Federalist Papers* that Yoo cited and examine them carefully to address the validity of his argument.

First, Yoo argued that the attacks of September 11, 2001, were actions of “war against the United States of America”, an emergency and a clear danger to the civilian population. He distinguished the attacks from past wars in two ways. Yoo observed that, unlike past wars like Vietnam and the Gulf War, “this conflict may take part on the soil of the United States”, and because the war may be “waged on the home front” distinguishing the “appropriate application of civil law and constitutional law” will be difficult. When the war front is “abroad ... there is a clear distinction between the theatre of war and the homeland ... making the actions of the military commanders bound only by the laws of war and martial law” (Yoo, 2001b, p. 3).

Second, Yoo (2001b) suggested that the current crisis differed from previous wars because

the belligerent parties in a war are traditionally nation-states ... however, Al-Qaeda is not a nation ... and its forces do not bear a distinctive uniform, do not carry arms openly, and do not represent the regular or even irregular military personal of a nation. (p. 135)

Because Al-Qaeda is not a “traditional” army, Yoo (2001b) posited that the “rules of engagement designed for the protection of non-combatant civilian populations come under extreme pressure when an attempt is made to apply them in a conflict with terrorism” (p. 3). He concluded that America is in an “armed conflict with an elusive, clandestine group striking unpredictably at civilian and military targets both inside and outside of the United States” (p. 134). Because Al-Qaeda is not a traditional army and is elusive and very dangerous, Yoo (2001b) suggested that “the scale of violence involved in this conflict removes it from the sphere of operations designed to enforce the criminal laws; legal and constitutional rules regulating law enforcement activity are *not* applicable” (p. 4).

Yoo suggested that the Constitution grants the executive branch power to deal with the crisis of September 11, 2001, and the battle to be waged against Al-Qaeda. Yoo (2001b) stated,

we [the Office of Legal Counsel] believe that Article II of the Constitution, which vests the President with the power to respond to emergency threats to the national security, directly authorizes use of the Armed Forces in domestic operations against terrorists. (p. 4)

He based the argument on the founders' explanation of the federal government's power to respond to an emergency. Yoo also relied on an interpretation of Article II of the Constitution to support executive emergency power.

First, Yoo (2001b) suggested that the framers were aware of the possibilities of emergencies, invasions, and insurrections, and this led the framers to understand that "some cases such emergencies could only be met by the use of the federal military force" (p. 3). Although Yoo used the word *framers*, he referred only to Alexander Hamilton in the memo, constructing his entire argument solely on Hamilton's remarks. Yoo suggested that the framers (i.e., Hamilton) understood the Constitution to "amply provide the federal government with the authority to respond to such exigencies" (Hamilton, 1982a, pp. 111-115).

Yoo relied on Hamilton's writings in the *Federalist Papers* to support and develop his argument for a strong response to combat the crisis by any means necessary. Yoo (2001b) cited Federalist No. 36 to evidence the government's power to combat a crisis: "there are certain emergencies of nations in which expedients that in the ordinary state of things ought to be forborne become essential to the public weal" (p. 136). Yoo (2001b) continued, citing Hamilton from Federalist No. 23 to argue that the framers afforded the federal government with broad power to combat an emergency:

the circumstances which may affect the public safety are not reducible within certain determinate limits ... as a necessary consequence that there can be no limitation of that authority which is to provide for the defense and protection of the community. (p. 5)

Yoo's interpretation of Hamilton's words in Federalist No. 23 is a bit concerning, because he construed from Hamilton's last point "that there can be no limitation of that authority which is to provide for the defense and protection of the community" to mean that the executive can do whatever he deems necessary during a crisis. However, as I will discuss during an examination of each Federalist Paper that Yoo cited, Yoo's interpretation of Federalist No. 23 is simply exaggerated. Hamilton was not making the argument that an executive can act alone, with indefinite powers to defend the country; instead, as will be discussed shortly, Hamilton was asserting that the branches of government "coextensively" will combat the crisis and do whatever is necessary to combat the crisis.

Yoo (2001b) cited Federalist No. 34 to claim that the federal government possesses "an indefinite power of providing for emergencies as they might arise" (p. 137). According to Yoo (2001b), this power "includes the authority to use force to protect the nation, whether at home, or abroad" (p. 5). Yoo (2001b) defended his advice that the president may do whatever is necessary within the president's discretion to combat the crisis, with Hamilton's words from Federalist No. 28:

there may happen cases in which the national government may be necessitated to use force ... and insurrections are unhappily, maladies as inseparable from the body politic as tumors and eruptions from the natural body ... should such emergencies at any time happen under the national government, there could be no remedy but force. (p. 6)

Yoo (2001b) argued that, in order to address the concerns of dealing with emergencies, the framers granted that

Article II vests in the President the Chief Executive and Commander-in-Chief Powers. The framers' understanding of the meaning of executive power confirms that by vesting that power in the President, they granted him the broad powers necessary to the proper functioning of the government and to the security of the nation. (p. 6)

The distinguishing feature between Article I and Article II's vesting clauses is Article II's lack of the word "herein". Yoo (2009) suggested that the framers "intentionally" left out the "herein" wording in Article II's Vesting clause because they wanted the executive to have more power than what the Article explicitly states (Chapter 1).

Yoo (2001b) concluded that "an executive power, such as the power to use force in response to attacks upon the nation, not specifically detailed in Article II, section II must remain with the President" (p. 6). Hence, Yoo (2001b) argued that executive emergency power is an un-enumerated power. Yoo cited Hamilton's comment that Article II "ought ... to be considered as intended by way of greater caution to specify and regulate the principal articles implied in the definition of Executive power; leaving the rest to flow from the general grant of that power" (Pacifcus, 1981, pp. 23-27).

Furthermore, Yoo (2001b) claimed that

such enumerated power [commander in chief] includes the authority to use military force, whether at home or abroad, in response to a direct attack upon the United States. There can be little doubt that the decision to deploy military force is executive in nature, and was traditionally regarded as so. (p. 138)

Citing Hamilton's argument in Federalist No. 70 that an executive must have energy to respond to a crisis, Yoo agreed with Hamilton that "using the military to defend the nation requires action and execution, rather than deliberative formulation of rules to govern private conduct" (p. 7). As Hamilton (1982f) posited, "the direction of war implies the direction of the common strength ... and the power of directing and employing the common strength forms a usual and essential part in the definition of the executive authority" (pp. 374-376).

According to Yoo (2001b),

Congress has the authority to raise and support an army, Article I, section 8, clauses 12-13, and once Congress has provided the President with armed forces, he has the discretion to deploy them both defensively and offensively to protect the nation's security. (p. 9)

Yoo's argument that the president has discretion to use the armed forces, "both defensively and offensively to protect the nation's security", is based on Yoo's interpretation of the Commander-in-Chief clause of Article II. Yoo (2001b) asserted that the president has sole discretion to command the army in time of crisis because the Commander-in-Chief clause names the president as the sole commander of the army, and according to Yoo the Congress provides the army to the commander in chief who then has the sole responsibility of carrying out the actions to combat the crisis.

Furthermore, Yoo cited Hamilton's words as evidence to support Yoo's interpretation of the Commander-in-Chief clause. Yoo (2001b) claimed that, without a strong federal force, the United States would be "a nation incapacitated by its Constitution to prepare for defense before it was actually invaded ... we must receive the blow before we could even prepare for it" (p. 137). Yoo's argument that the framers envisioned the Federal government being capable and prepared to combat a crisis is drawn from Hamilton's remarks in Federalist No. 26 as Hamilton argued for a standing army because "a certain number of troops for guards and

garrisons were indispensable; that no precise bounds could be set to the national exigencies; that a power equal to every possible emergency must exist somewhere in the government” (p. 137). According to Yoo (2001b), “the power equal to every possible emergency [that] must exist somewhere in the government”, is the executive (p. 9).

Yoo (2001b) drew from Hamilton’s argument to claim that

a fundamental purpose of a standing army and a permanent navy was that they be used in such emergencies ... and by creating such forces and placing them under the president’s command, Congress is necessarily authorizing him to deploy those forces. (p. 9)

Yoo (2001b) understood the president’s power as commander in chief to “necessarily possess ample direction to decide how to deploy the forces committed to him. He could decide it was safer to preempt an imminent attack rather than to wait for a hostile power to strike first” (p. 9).

Based on Yoo’s assessment of Hamilton’s argument, this book argues that Yoo overemphasized Hamilton’s words and therefore overestimated Hamilton’s relevance to executive emergency power.

Yoo cited Federalist Nos. 23, 24, 25, and 26 to support his argument that in time of emergency a president may combat the crisis by using the executive powers explicitly and implicitly outlined in Article II of the Constitution. These *Federalist Papers* do not fully support Yoo’s argument, however. Just looking at the titles shows evidence of how Yoo selectively chose passages from unrelated papers to construct an interpretation of Hamilton’s words to favor Yoo’s argument that the executive is all powerful during a crisis. Here are the titles of the papers Yoo used to construct his argument based on Hamilton’s remarks: Federalist No. 23 is entitled, “The necessity of a government as energetic as the one proposed to the preservation of the union”, and Federalist No. 24 is entitled, “The powers necessary to the common defense reconsidered further”. Federalist No. 25 is entitled, “The powers necessary to the common defense further considered (continued)” and Federalist No. 26 is entitled, “Idea of restraining the legislative authority in regard to the common defense reconsidered”.

In Federalist No. 23, Hamilton (1982a) argued for a standing army:

the Union ought to be invested with full power to levy troops; to build and equip fleets; and to raise the revenues which will be required for the formation and support of an army and navy, in the customary and ordinary modes practiced in other governments. (p. 139)

Hamilton (1982a) claimed that an army is necessary so that the government may respond to crises as needed:

there can be no limitation of that authority which is to provide for the defense and protection of the community, in any matter essential to its efficacy that is, in any matter essential to the *formation, direction, or support* of the NATIONAL FORCES. (p. 139)

He did not assert that the president may use the army unilaterally to preemptively deal with crisis, as Yoo suggested.

Rather, Hamilton (1982a) stated that an army is crucial to the longevity and preservation of the Union and that

These powers [emergency powers as the military uses them] ought to exist without limitation, because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them, both of which is necessary to preserve the Union. (p. 139)

Hamilton was simply stating that a military presence is necessary for the preservation of the Union from potential threats or national emergencies. He did not make clear in Federalist No. 23 that the executive, simply because he commands the army (as Yoo asserted), has expanded authority (unstated constitutional powers), during a crisis.

Yoo incorrectly read Hamilton as suggesting “that there can be no limitation of that authority which is to provide for the defense and protection of the community” (p. 140) and that power rests solely with the executive. Hamilton never made such a proposition in Federalist No. 23. Instead, Hamilton (1982a) wrote, “This power ought to be *coextensive* with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defense” (p. 140). According to the Constitution, both Congress and the presidency are responsible for the oversight and administration of war. Hamilton did not explicitly state that a president may use the army without prior consent from Congress. Such a reading of an inherent power to use the army in time of crisis¹⁴ is possible, but Hamilton never suggested that executive emergency power is absolutely unilateral or that other branches of government may not constrain this power.

In Federalist No. 24, Hamilton (1982b) argued for a standing army even during peacetime. He warned of potential enemies: “Though a wide ocean separates the United States from Europe, yet there are various considerations that warn us against an excess of confidence or security” (pp. 116-120). He identified the Indian tribes as threats to the nation:

Previous to the Revolution, and ever since the peace, there has been a constant necessity for keeping small garrisons on our Western frontier. No person can doubt that these will continue to be indispensable, if it should only be against the ravages and depredations of the Indians. (pp. 116-120)

In examining Federalist No. 24, this book suggests that Yoo exaggerated the purpose of Federalist No. 24. The primary purpose Hamilton outlined in this Federalist Paper was to explain why the country needs a standing army. According to Hamilton, the need is to protect the nation from external enemies, because the nation will never know the time, nor place of a sudden attack. Yoo construed Hamilton’s reasons for a standing army to mean that Hamilton favored an aggressive executive in time of emergency; however, nothing in Federalist No. 24 addresses the executive’s role in commanding the army, or combating an external threat. The paper does not address an interpretation of executive emergency power, only the need for a standing army.

Hamilton (1982c) continued to argue for a standing army in peacetime in Federalist No. 25, claiming that the United States would be foolish not to have a standing army:

If, to obviate this consequence, it should be resolved to extend the prohibition to the *raising* of armies in time of peace, the United States would then exhibit the most extraordinary spectacle which the world has yet seen, that of a nation incapacitated by its Constitution to prepare for defense, before it was actually invaded. (pp. 120-125)

Yoo (2001b) cited Federalist No. 25 to suggest that the framers favored an executive able to combat an insurrection and that the Constitution grants him such power. However, Hamilton never referred to the executive in the paper, only the government. In fact, Hamilton’s statement, “We must receive the blow, before we could even prepare to return it” (p. 121), simply supports an inherent power to combat emergency. Yoo, however, cited this line most frequently to support his argument that an executive may combat an insurrection or invasion

¹⁴ This is demonstrated most notably in Hamilton (1982e).

without cooperation or consent from Congress. Federalist No. 25 never asserts that an inherent power to combat emergency is the executive's providence alone. Rather, Hamilton suggested that such power may rest with all rulers, "because we are afraid that *rulers*, created by our choice, dependent on our will, might endanger that liberty, by an abuse of the means necessary to its preservation" (p. 121). Again, Hamilton's remarks seem to suggest he had a grave concern over the power of the executive, as it related to the military, hence he supported a shared venture between the executive and the legislature when using the military.

In Federalist No. 26, Hamilton (1982c) argued that the legislature will have the power to raise and support a military:

The legislature of the United States will be *obliged*, by this provision, once at least in every two years, to deliberate upon the propriety of keeping a military force on foot; to come to a new resolution on the point; and to declare their sense of the matter, by a formal vote in the face of their constituents. (p. 140)

He even went on to state that the legislature is not at "*liberty* to vest in the executive department permanent funds for the support of an army, if they were even incautious enough to be willing to repose in it so improper a confidence" (p. 123). Hamilton (1982d) apparently supported a coordinated venture between the executive and legislature on matters pertaining to the military. He went on to state that any "subversion of liberty" that may arise due to the size of a standing army may occur "not merely as a temporary combination between the legislature and executive, but a continued conspiracy for a series of time" (pp. 125-130). Hamilton appeared to assert that the use of an army over time should be a grave concern to Congress, because with a prolonged use of the military, the chances of subverting liberty will increase. Yoo seemed to read Federalist No. 26 as evidence of Hamilton urging an executive to deal solely with crisis and ignores Hamilton's specific comments showing Hamilton's support for sharing the power of the military between the executive and Congress. I wish to convey here that Hamilton did consistently speak to the shared venture between the Congress and the executive when using the military.

Yoo's interpretation of Hamilton is peculiar. I think Yoo drew broad conclusions from Hamilton's remarks to support his theory of executive emergency power. Did Hamilton advocate emergency power as an inherent power? Possibly, but Hamilton's writings do not support such a reading beyond a doubt. Hamilton's only writing in the *Federalist Paper* that shows evidence of him supporting executive emergency power as an inherent power is availed in Federalist No. 70. In this *Federalist Paper*, one may infer from Hamilton's words that he would assert that emergency power may rest with the executive, because the executive will be sufficiently strong, decisive, and, as a singular entity, energetic to respond to the emergency swiftly. Hamilton's energetic executive theory was used early in the republic as Washington combated the Whiskey Rebellion; however, Yoo never cited the rebellion or Federalist No. 70 to support his argument.

I would agree with Yoo that Hamilton made the case that an executive should have emergency power, but I would suggest that the evidence to discern Hamilton's theory for executive emergency power is in Federalist No. 70 and the advice Hamilton gave Washington during the Whiskey Rebellion. In both pieces, Hamilton did argue for a swift, energetic response to the crisis and asserted that the executive may act boldly and singularly to the crisis, because the power to do so is inherent in Article II of the Constitution.

Furthermore, in an OLC memo dated October 6, 2008, Stephen Bradbury (2008) issued a reversal of opinion against Yoo's interpretation of emergency power as stated in the October 23, 2001, memo:

The October 23, 2001 memo should not be treated as authoritative for any purpose ... the context of the memo was the product of extraordinary, indeed we hope, a unique period in the history of the Nation ... the memo did not address specific and concrete policy proposals; rather it addressed in general terms and broad contours of hypothetical scenarios involving possible domestic military contingencies. (pp. 1-2)

Bradbury (2008) concluded that

the October 23, 2001 memo represented a departure from the preferred practice of the OLC to render formal opinions only with respect to specific and concrete policy proposals, not to undertake a general survey of a broad area of the law or to address general or amorphous hypothetical scenarios that implicate difficult questions of law. (p. 2)

Bradbury's comments, which suggest that Yoo has broadly interpreted emergency power, support this book's argument. Bradbury clearly scolded Yoo for using the OLC in a way that created hypotheticals and undertook broad theories of law, which goes against the intent and purpose of the OLC. Furthermore, and most important, Bradbury made clear in the October 6, 2008, memo that Yoo was creating theories not expressly based on law or related to "concrete policy proposals" (p. 47). Bradbury's comment reinforces my concern over Yoo's interpretation of executive emergency power, which was exaggerating Hamilton's words and arguments throughout specified *Federalist Papers*.

In the October 23, 2001, memo, Yoo reasoned that the president has broadened authority due to an emergency. Based on the declassified OLC memos produced following the attacks of September 11, 2001, the following actions were advised to be constitutional in order to respond to the crisis of the war against Al-Qaeda: military tribunals, suspending habeas corpus for enemy combatants, extraordinary rendition, warrantless surveillance of citizens' homes, abrogation of the Geneva Conventions, unilateral dispensation from treaties, and interrogation methods.

A memo from the OLC, dated November 6, 2001, advised the president that he may use military commissions to try enemy combatants (terrorists). The OLC concluded that the president has such authority because of "his inherent powers as Commander in Chief, the President may establish military commissions to try and punish terrorists apprehended as part of the investigation into, or the military and intelligence operations in response to, the September 11 attacks" (Philbin, 2001). The OLC stated that "The Uniform Code of Military Justice (UCMJ) expressly addresses the use of military commissions in article 21. 10 U.S.C. § 821, supported the president's authority to detain and try enemy combatants in military tribunals" (Philbin, 2001).

Regarding the detainment, arrest of enemy combatants, abrogation of Geneva Convention treaties, and extraordinary rendition, the OLC in a memo drafted March 13, 2002 advised that the president "has full discretion to transfer Al-Qaeda and Taliban prisoners capture overseas and detained outside of the United States to third countries" (Bybee, 2002, p. 31). The memo went on to state that the president is not restrained by the Geneva Convention Relative to the Treatment of Prisoners of War, because "the President has determined that the Al-Qaeda detainees are not legally entitled prisoner of war status within the meaning of the Conventions" (Bybee, 2002, pp. 2-3). The OLC concluded that as part of the

President's power as Commander-in-Chief he may dispose of the liberty of prisoners captured during military engagements ... treaties regarding the transfer or detainment of enemy combatants do not restrict the president's commander in chief power ... the president since the founding of the country has had an unfettered control over the disposition of enemy soldiers captured during a time of war. (Bybee, 2002, pp. 2-4)

In a memo dated August 1, 2002, the OLC advised that “certain interrogation methods” are not prohibited by Section 2340A of Title 18. The memo advised the CIA to continue interrogation because the Al-Qaeda operative “is withholding information regarding terrorist attacks in the United States and information regarding plans to conduct attacks within the United States” (Bybee, 2002, pp. 2-3).

In a memo dated September 25, 2001, the OLC advised that

amending the Foreign Surveillance Act to include the collection of foreign information as a purpose of the search would not violate the 4th Amendment warrant requirements ... the amendment would simply allow the department to apply FISA warrants up to the limit permitted by the Constitution. (Yoo, 2001a, pp. 2-4)

The OLC advice partly comprised a response to the potential threat of continued terrorist attacks on the country. Fortunately, such attacks did not occur. Therefore, the armed forces were never deployed domestically, and the suspension of *Posse Comitatus* did not occur. In light of the OLC advice, what actions did President George W. Bush deploy to combat the emergency? In this section, I review the use of executive emergency power following the attacks of September 11, 2001.

I will explore the actions President Bush took following the September 11 attacks, which exhibited his use and interpretation of executive emergency power. The nation was in shock after the attacks. News agencies began nonstop coverage of the horrific event as it unfolded. Early reports assumed that the plane crashes were a major accident, only to learn shortly thereafter that the event was terrorism—coordinated hatred against the United States.

War power is possibly the most immediate and obvious example of executive emergency power. Following the attacks of September 11, 2001, many Americans wanted some sort of retribution against the terrorists responsible for the violence.¹⁵ President Bush had to act in response to these demands. Like presidents before him, Bush claimed the authority to use force to defend the nation’s security (Yoo, 2001b). In the wake of the September 11, 2001, attacks, President Bush sought and received an Authorization to Use Military Force (AUMF) from Congress on September 18, 2001.¹⁶ Scholars have suggested the AUMF was “sweeping”, perhaps the “broadest” grant of war power by Congress since WWII (Fisher, 1995; Wills, 2010). The AUMF formally authorized the president “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attack”.¹⁷ Therefore, the AUMF constitutes the statutory permission for President Bush to launch war in Afghanistan, where the administration deemed Al Qaeda was located. The administration relied on legal advice from OLC and from the Congressional statute to assert that it would “deal with terrorism wherever it is being harbored” (Yoo, 2001b, p. 55).

In addition, the AUMF recognized that the “President has the authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States”.¹⁸ As a consequence of the legislation, some scholars suggest the power granted was “unlimited as to time and to geography”.¹⁹

¹⁵ NBC/Washington Post Poll, *Wall Street Journal*, September 17, 2001.

¹⁶ Authorization for Use of Military Force, September 18, 2001, Public Law 107-40 (S. J. RES. 23) 107th Congress.

¹⁷ Authorization for Use of Military Force, September 18, 2001.

¹⁸ *Ibid.*, p. 5.

¹⁹ *Ibid.*

This book suggests that Bush espoused three distinct applications of executive emergency powers: (1) military campaign in Afghanistan; (2) interning enemy combatants; and (3) broadening the military use of Rendition against enemy combatants.

Afghanistan War

At Camp David on September 16, 2001, President George W. Bush used the phrase “war on terror” for the first time: “This crusade—this war on terrorism—is going to take a while.... And the American people must be patient. I’m going to be patient. But I can assure the American people I am determined” (Bush, 2001a). On September 20, 2001, Bush launched the war on terror during a televised address to a joint session of Congress, stating, “Our ‘war on terror’ begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated” (Bush, 2001).

As Bush announced a war on terror to the public, his operatives began pursuing authorizations from Congress to combat the enemies. Some scholars suggest that Bush’s ability to obtain authorizations easily from Congress was due to Congress’s “acquiescent” nature (Fisher, 1995; Wills, 2010). Bush’s argument that the United States of America was in a “constant and under continuing threats from the enemies” and that “the war the nation faced was unprecedented and of uncertain duration” (Bush, 2001b), aided him in his pursuit of authorizations.

On September 18, 2001, Congress passed a joint resolution without any substantive input into the drafting of the legislation. The resolution, known as the Authorization for Use of Military Force (hereafter AUMF), Public Law 107-40, was drafted by the White House and granted Bush the broadest authority to combat any nation, organization, or person “determined to have been involved in the 9/11 terrorist attacks against the United States”.²⁰ Section 2(a) of the AUMF stated,

In general, 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 nations, organizations, or persons.²¹

Scholars agree that the AUMF granted unprecedented authority to the president (Fisher, 1995; Wills, 2010). In particular, David Currie (2000) suggested that the president was granted “all necessary and appropriate force against nations harboring or aiding terrorists” and that “the president may use force in order to prevent any future acts of international terrorism” (pp. 1-40). Armed with the AUMF, President Bush initiated what later would be known as the Bush Doctrine, which argued for a worldwide pursuit of terrorism aimed at the United States. President Bush sought the authority to invade Afghanistan from Congress.

Operation Enduring Freedom

On September 20, 2001, George W. Bush delivered an ultimatum to the Taliban government of Afghanistan to turn over Osama bin Laden and al-Qaeda leaders operating in the country, or else face attack (Woodward, 2002). The Taliban demanded evidence of bin Laden’s link to the September 11 attacks and, if such evidence

²⁰ Ibid.

²¹ Ibid.

warranted a trial, they offered to try him in an Islamic court (Woodward, 2002). The United States refused to provide any evidence.

Subsequently, in October 2001 United States forces (with United Kingdom and coalition allies) invaded Afghanistan to topple the Taliban regime. The official invasion began on October 7, 2001, with air strike campaigns from British and American forces.

Waging war in Afghanistan had been of a lower priority than the war in Iraq for the U.S. government. Admiral Mike Mullen, staff chairman of the Joint Chiefs of Staff, said that while the situation in Afghanistan was

precarious and urgent, the 10,000 additional troops needed there would be unavailable “in any significant manner” without withdrawals from Iraq. Mullen stated that “my priorities ... given to me by the commander in chief are: Focus on Iraq first. It’s been that way for some time. Focus on Afghanistan second.” (Woodward, 2002, pp. 15-30)

Patriot Act

The Patriot Act is another example of Bush’s use of emergency power. Led by Attorney General Ashcroft (MO) and Dep. Attorney General Dinh, the Bush Administration pursued legislation from Congress to empower the federal government in responding to potential threats within the homeland. The government sought a measure to protect citizens from potential terrorist attacks. The 2001 Patriot Act was 342 pages of legislation drafted by the White House and pushed through Congress without any formal drafts from congressional leadership (Ball, 2004). There were no hearings on the legislation in the House of Representatives and only about one legislative day of debate in the Senate before it was passed (Barbash, 2004). In typical Washington legislative fashion, the bill was submitted the morning of the vote, replaying a common scenario in which possibly many members of Congress never read the entirety of the bill before voting.

The Patriot Act (Public Law 107-56) gave the executive branch extensive and secret power, especially the administration’s intelligence-gathering agencies—the Federal Bureau of Investigation (FBI), the National Security Administration (NSA), the Central Intelligence Agency (CIA), and the Defense Intelligence Agency (DIA)—to fight terrorists worldwide. Some scholars suggest that the Patriot Act’s broad powers of gathering foreign information made the agencies “too powerful” and endowed them with “unchecked powers” (Lynch, 2002, Policy Analysis 443).

This act clearly follows the precedent of earlier legislation, the Foreign Intelligence Surveillance Act of 1978 (Public Law 95-511). FISA originally authorized federal agencies to gather intelligence on foreign entities or persons suspected of criminal activities with the Soviet Union or conspiring against the United States. FISA authorized federal agents to pursue “the collection of foreign intelligence in furtherance of U.S. counterintelligence” (Risen, 2006, pp. 42-44). FISA made clear that authorities had to acquire a warrant before wire-tapping a suspected perpetrator. However, under the Patriot Act, Bush officials secured provisions enabling the federal agents to act without warrants in the pursuit of terrorist counterintelligence (Risen, 2006).²²

Title II of the Act, “Enhanced Surveillance Procedures”, grants the executive another emergency power. It authorizes federal agencies to intercept wire, oral, and electronic communications relating to terrorism or

²² See Patriot Act, Title II, Section 215, under “sneak and peek” and “roving wiretaps” provisions, both of which allow federal agents to secure the gathering of terrorist information without first requesting a specified warrant.

computer fraud and abuse. Scholars suggest that this provision allows law enforcement and counterintelligence agencies to share “information and to conduct sneak-and-peek searches” (Yoo, 2001b, p. 6).

Within days of the September 11, 2001, attacks, FBI and Immigration and Naturalization Service (INS) agents began a secret roundup and “unprecedented” detention of thousands of people across the United States. The people who garnered the interest of the FBI and INS were “mostly of Muslim or bearing Arabic names” (Martin, 2004, pp. 6-7). According to Kate Martin, contributing scholar from the Center for National Security Studies, the “gathering of individuals was a perpetrated effort by the government to arrest people in secret. We have 200 years of law and tradition saying that arrests are public.... We do not have secret arrests” (Yoo, 2001b, p. 6).

Critics have observed that, following the passage of the Patriot Act, a

domestic reign of terror visited the U.S. immigrant community because the Act authorized the INS to detain immigrants without charge for up to seven days. But as a belated report by the Justice Department’s inspector general revealed, many captives were in fact held illegally without charge for as long as eight months, denied access to attorneys, and then, after secret hearings, deported. (U.S. Department of Justice, 2003)

According to a Department of Justice’s own report by the Office of the Inspector General, released in June 2003, only one person was ultimately convicted of “supporting” terrorism out of the thousands of immigrants detained. The report criticized the Department of Justice and the INS for using

the Patriot Act and federal immigration statutes to detain, in the federal detention center in New York City more than 1,100 aliens for months without their families knowing where they were and what crimes they may have committed.... It was not until the second half of 2002 that the detainees were investigated and released. (U.S. Department of Justice, 2003)

Extraordinary Rendition

Following the attacks of September 11, 2001, rendition, or the outsourcing of high-value detainees to third party states, such as Egypt or Syria, that use torture for “aggressive interrogation”, occurred regularly (Mayer, 2005). Formally,

rendition transfers individuals from one country to another, by means that bypass all judicial and administrative due process ... in order to have these high level valued detainees questioned by the intelligence and military communities of the receiving nation.²³

Egypt, Syria, Thailand, Morocco, Saudi Arabia, South Africa, Jordan, and Pakistan receive detainees from the Central Intelligence Agency for questioning. These nations, among others, use torture as one of the mechanisms to gather intelligence information (Mayer, 2005). After the attacks of September 11, 2001, the CIA secretly began sending high-valued detainees to their home nations for further questioning, that is, according to some, for “torture heavy” interrogations (Risen, 2006, p. 28).

President George W. Bush’s Signing Statements

The signing statement provides additional evidence of President Bush’s support for the Unitary Executive Theory and his theory of executive emergency power. A signing statement is the president’s acknowledgement of

²³ *Amnesty International*, “Below the Radar”, 2008.

supporting or disagreeing with all or parts of a piece of congressional legislation that while the president may disagree in part, still signs the bill into law. Furthermore, Presidential Signing Statements are official pronouncements issued by the president contemporaneously with signing a bill into law. These pronouncements have been used to forward the president's interpretation of the statutory language. In the presidential signing statement, a president may assert constitutional objections to the provisions contained therein, and concordantly, to announce that the provisions of the law will be administered in a manner that concurs with the administration's conception of presidential prerogatives (Cooper, 2005).

While the history of presidential issuance of signing statements dates to the early nineteenth century, the practice has become a source of significant controversy in the modern era as presidents have increasingly asserted constitutional objections to congressional enactments in the statements (May, 1994).²⁴ Presidents also provide evidence of their particular philosophies towards executive power in their use of signing statements.

To assess whether President Bush supported the Unitary Executive Theory and to evidence his interpretation of executive emergency powers, I examine the signing statements issued during his presidency. The signing statements might shed light on President Bush's interpretation of his executive power during a crisis and may evidence his support for the Unitary Executive Theory. If so, then I can examine his use of presidential prerogative following the attacks of September 11, 2001. Later, I will explore in greater detail the president's use of emergency powers.

Like his predecessors, George W. Bush has employed the signing statement to voice constitutional objections to and concerns with congressional enactments, and, more importantly, to enunciate a particular interpretation of an ambiguous enactment. While the nature and scope of the objections raised during the Bush presidency are similar to prior administrations, they differ in the sheer number of constitutional challenges contained in the signing statements, which reflect a strong executive prerogative in relation to Congress and the judiciary.

The quantity of Presidential Signing Statements has strayed approximately 50 percent during the Bush presidency versus previous administrations. President Bush issued 152 signing statements, compared to 382 during the Clinton administration. However, the qualitative difference in Bush's approach becomes apparent upon consideration of the number of individual challenges or objections to statutory provisions contained in the statements (Halstead, 2007). Of President Bush's 152 signing statements, 118 (78%) contain some type of constitutional challenge or objection, compared to only 70 (18%) during the Clinton administration (Kinkopf, 2007).

Which of President Bush's signing statements corroborates his support for a unitary executive and illuminates his interpretation of emergency power? According to scholars Charles Savage, Garry Wills, and a study conducted by the Congressional Research Service, of his 152 signing statements, Bush "cited the Unitary Executive Theory eighty-two times to explain reasons for rejecting some aspect of a bill ... he rejected aspects of a bill based on his role as Commander in Chief, thirty seven times" (Wills, 2010, p. 219; Savage, 2007, p. 35; Halstead, 2007).

²⁴ President Jackson was the first to issue a signing statement, and John Tyler was first to use the statement to question the constitutionality of the statute submitted to him. Letter from John Tyler to the House of Representatives, June 25, 1842, in Richardson (2012).

The following examples from the 152 signing statements clearly indicate the president's support for the Unitary Executive Theory and his interpretation of emergency power. In the signing statement accompanying the U.S.A Patriot Improvement and Reauthorization Act of 2005, President Bush declared that the provisions requiring the executive branch to submit reports and audits to Congress would be constructed

in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to withhold information which, if disclosed, could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties.²⁵

He demonstrated an interpretation of his emergency power, stating that "Congress is limited in intervening with the President's handling of 'national security' matters". The national security matter in 2001 was the "war on terror", a significant national emergency, according to President Bush (2001).

Similarly, in the signing statement accompanying the law that contained the McCain Amendment (as part of the Detainee Treatment Act), prohibiting the use of torture, or cruel, inhuman, or degrading treatment of prisoners, the president declared that the executive branch would construe that provision "in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander-In-Chief ... [in order to protect] the American people from further terrorist attacks" (Yoo, 2001b, p. 6).

Recent scholars also acknowledge that Bush's signing statements provide evidence of his interpretation of executive emergency power (Cooper, 2005). Scholars have organized Bush's constitutional objections into several categories. Most importantly, they suggest that the objections assert presidential authority to supervise the "unitary executive branch" and to assert command over the army as it relates to emergency (Bradley & Posner, 2006, pp. 307, 323). Scholars go on to state that the Bush administration was

particularly prolific in issuing signing statements that object to provisions that it claims infringe on the President's power over foreign affairs, provisions that require the submission of proposals or recommendations to Congress; provisions imposing disclosure or reporting requirements; conditions and qualifications on executive appointments; and legislative veto provisions. (Cooper, 2005, p. 522)

In a signing statement attached to P.L. 107-77, Department of Commerce, Justice, State, Judiciary, and Related Agencies Act, President Bush clearly endorsed the Unitary Executive Theory:

I note that Section 612 of the bill sets forth certain requirements regarding the organization of the Department of Justice's efforts to combat terrorism. This provision raises separation of powers concerns by improperly and unnecessarily *impinging upon my authority as President to direct the actions of the Executive Branch and its employees*. I therefore will construe the provision to avoid constitutional difficulties and preserve the separation of powers required by the Constitution.²⁶

In a signing statement attached to the Enhanced Border Security and Visa Entry Reform Act of 2002, Bush again asserted executive autonomy, and rejected legislative mandates for coordination or consultation from Congress. He stated that such provisions would be treated as advisory only:

Several actions of the Act raise constitutional concerns. Sections 2(6), 201 (c), and 202 (a) (3) purport to require the President to act through a specified assistant to the President in coordination or consultation with specified officers of the

²⁵ U.S.A. Patriot Improvement and Reauthorization Act of 2005, P/L 109-177; George W. Bush, Statement upon Signing H.R. 3199, March 9, 2006.

²⁶ Presidential Signing Statement, P.L. 107-77, *Weekly Compilation of Presidential Documents* 37(2001), 1724.

United States, agencies, or congressional committees. *The President's constitutional authority to supervise the unitary executive branch and take care that the laws be faithfully executed cannot be made by law subject to requirements to exercise those constitutional authorities through a particular member of the President's staff or in coordination or consultation with specified officers or elements of the Government.* Accordingly, the executive branch shall treat the purported requirements as precatory.²⁷

In a signing statement attached to the Military Construction Appropriation Act of 2002, Bush asserted his constitutional authority to use emergency power:

The U.S. Supreme Court has stated that the President's authority to classify and control access to information bearing on national security flows from the Constitution and does not depend upon a legislative grant of authority. Although the notice can be provided to Congress in most situations as a matter of comity, situations arise, especially in wartime, in which the President must act promptly under his constitutional grants of executive power and authority as Commander in Chief while protecting sensitive national security information. The executive branch shall construe these sections in a manner consistent with the President's constitutional authority.²⁸

Bush's use of signing statements diverged from the historical precedent in the nature and sheer number of provisions challenged or objected to (Cooper, 2005; Yoo, Calabresi, & Colangelo, 2005). The key qualitative difference was President Bush's use of the signing statement to "emphatically endorse the unitariness of the executive branch" (Yoo et al., 2005, p. 722). He took very clear steps to assert sole presidential authority over the executive branch and the administration of policy initiatives, in particular, to assert his constitutional authority to prosecute the War on Terror.

The following signing statements further evidence Bush's logic regarding his constitutional authority to prosecute the war on terror and his support for the Unitary Executive Theory. In a statement attached to the Homeland Security Act, Bush stated,

The executive branch shall construe and carry out these provisions, as well as other provisions of the Act, including those in title II of the Act, in a manner consistent with the President's constitutional and statutory authorities to control access to and protect classified information, intelligence sources and methods, sensitive law enforcement information, and information the disclosure of which could otherwise harm the foreign relations or national security of the United States.²⁹

In a signing statement attached to the Intelligence Reform and Terrorism Prevention Act of 2004, Bush objected to provisions requiring the executive branch to consult congressional committees prior to executing the provision:

Many provisions of the Act deal with the conduct of United States intelligence activities and the defense of the Nation, which are two of the most important functions of the Presidency. The executive branch shall construe the Act, including amendments made by the Act, in a manner consistent with the constitutional authority of the President to conduct the Nation's foreign relations, as Commander in Chief of the Armed Forces, and to supervise the unitary executive branch, which encompasses the authority to conduct intelligence operations.³⁰

As suggested earlier, foreign affairs and points of executive emergency power are two of the primary areas

²⁷ Enhanced Border Security and Visa Entry Form Act of 2002, P.L. 107-173, signed June 2002, *Weekly Compilation of Presidential Documents* 38(2002), 822.

²⁸ Military Construction Appropriation Act of 2002, P.L. 106-52, *Weekly Compilation of Presidential Documents* 38(2002), 1836.

²⁹ Homeland Security Act, P.L. 107-296, *Weekly Compilation of Presidential Documents* (2002), 2093.

³⁰ Intelligence Reform and Terrorism Prevention Act of 2004, P.L. 108-458, *Weekly Compilation of Presidential Documents* (2004), 2993.

in which President Bush has repeatedly raised constitutional objections and or challenges. For example, Bush remarked on provisions of the Syria accountability and Lebanese Sovereignty Restoration Act of 2003, which required the imposition of sanctions against Syria absent a presidential determination and certification that Syria had met certain conditions or that a determination of national security concerns justified a waiver of sanctions. The president declared,

A law cannot burden or infringe the President's exercise of a core constitutional power by attaching conditions precedent to the use of that power. The executive branch shall construe and implement in a manner consistent with the President's constitutional authority to conduct the Nation's foreign affairs as the Commander in Chief, in particular with respect to the conduct of foreign diplomats in the United States, the conduct of United States diplomats abroad, and the exportation of items and provisions of services necessary to the performance of official functions by United States government personnel abroad. (Bush, 2003)

Bush advocated the president's unilateral control over powers under Article II of the Constitution, in which he declared, "a law cannot burden or infringe upon the President's exercise of a core constitutional power". This constitutional power includes executive emergency power. Second, Bush advocated unilateral control over the execution of combating the emergency. He stated, "the executive branch shall construe and implement in a manner consistent with the President's constitutional authority to conduct the Nation's foreign affairs as the Commander in Chief".³¹

These signing statements imply that President Bush advocated both the Unitary Executive Theory and an interpretation of emergency power that suggests that a president may take any necessary actions to combat and dispel the crisis. Apparently, the president endorsed a theory of emergency power that suggests his powers during crisis were strong, swift, aggressive and necessary when dealing with the crisis. Furthermore the president seemed to suggest he was not bound solely by the Constitution, but was instead emboldened to protect, defend and use all the power granted in the Constitution to deal with the crisis.

Discussion

Indubitably, the attacks of September 11, 2001, were an unprecedented emergency, and as such, President Bush bore the responsibility to respond to the crisis. He was confronted with determining the scope and magnitude of his authority to combat the crisis. I suggest President Bush fashioned Hamilton's theory of emergency power and Lincoln's necessity theory of executive power in time of crisis—making a new theory, a theory of an imperial presidency during time of crisis.

I think the most surprising conclusion about President Bush's actions and interpretation of executive emergency power is that they were limited, and consistent with the precedent of emergency power. Moreover, most of the anger or disagreement with Bush's use of such power is overstated primarily because it had been so long since a president had used emergency powers. Would the same critics of President Bush's use of emergency power, who declared Bush was an "American Monarch", have made the same insinuation about Abraham Lincoln during the Civil War? (Wills, 2010, pp. 145-163)

³¹ George W. Bush, Statement upon Signing U.S.A. Patriot Improvement and Reauthorization Act of 2005, P/L. 109-177, H.R. 3199, March 9, 2006.

Contemporary Americans are so far removed from the observation of emergency power, that we forget the potency and vigor of emergency power. The question remains, however; did President Bush have legal justification to use emergency power? A reassessment of the OLC's advice to the president will answer this question. According to the OLC, the lawyers concluded that President Bush had authority to act and repel the crisis based on an interpretation of Hamilton's writings. The OLC suggested that executive emergency powers are un-enumerated, derived from an interpretation of clauses within Article II of the Constitution.

The evidence suggests that Bush's interpretation of emergency power favored a strong, decisive executive, responsible for preserving the nation, and doing whatever was necessary to combat any threat posed towards the nation. Is this theory congruent with Hamilton's argument for executive emergency power as implicit within Article II of the Constitution?

In Federalist No. 70, Hamilton (1982e) argued for swift, energetic, singular responses to crisis. He asserted that an executive must have the power to repel insurrection and invasions. Hamilton further suggested that an executive may have to act with "secrecy" and with "appropriate dispatch" to deal with the "insurrection" (p. 155). With regard to responsiveness to the crisis, Bush advocated Hamilton's arguments in Federalist No. 70. Bush acted swiftly; the invasion of Afghanistan took place on September 23, 2001, just twelve days after the attacks. Bush authorized "secretive" investigations into potential terrorist activity both at home and abroad through the use of the Patriot Act and the detainment of enemy combatants at Guantanamo Bay. Both actions took effect by October 26, 2001, just forty-five days after the September 11, 2001, attacks.

However, as evidenced through the analysis of the Federalist documents presented in this chapter, Hamilton never suggested that a president may act in discordance with Congress and never advocated presidential authority to necessarily make war, or further still, to not seek consultation or oversight from Congress while he was using executive emergency power.

The OLC argued that the attacks of September 11, 2001, constituted an invasion, hence warranting an executive response to the attack. The OLC argument further promoted that an executive may do whatever is necessary to deal with the crisis; implicitly, the executive may act without receiving Congressional approval (Yoo, 2001b). The OLC further argued that the executive may act without seeking any Congressional consultation, or oversight in responding to the crisis (Yoo, 2001b). This level of prerogative was not congruent with Hamilton's ideas. Hamilton (1982g) was consistent in his argument that, even though an executive may have "broadened" power and responsibility during a crisis, the executive was not above any "magistrate" within the shared system of powers that is the federal government (p. 156).

Analysis of President Bush's signing statements produces a clear picture of his theory of emergency power, which asserted presidential dominance over dealing with the crisis. Furthermore, Bush objected to any congressional restraint or requirements placed on his actions, prior to his acting. Bush's assertion to act singularly, was consistent with Hamilton, but as evidenced in the signing statements Bush exceeded Hamilton's argument to suggest a complete disregard for congressional consultation or oversight. Bush apparently believed he was "above magistrates" during a time of crisis, and was thus not consistent with Hamilton's argument.

The theorists detailed in this book I provide a solid framework to understand the intellectual history and theory of executive emergency power. Although the OLC concluded that Bush had authority to take actions after

the terrorist attacks, the question becomes whether his interpretation was congruent with political thinkers on the subject.

How did Bush's lawyers' theory of executive emergency powers align with political philosophers? In light of the OLC opinions, it would appear that Bush supported Locke's prerogative, cloaked in the implicit power argument of Hamilton. This is similar to Lincoln's interpretation of emergency power. Bush supported the idea that the president, while acting as commander in chief, must protect, defend, and preserve the Constitution, or what Bush called the "homeland". This logic recalls Locke's argument that emergency power, or prerogative, must be aimed at preserving the public good.

Bush strayed from the intellectual history of executive emergency power, and I think strayed from Lincoln, on the matter of separation of powers. According to the OLC opinions, the Bush administration advocated a Unitary Executive argument, that is, that the executive has unilateral control over the executive branch. This means the other branches have no oversight over the executive's prerogatives, and so support for a unitary executive makes the executive, in times of emergency, nothing less of an imperial president.

The OLC opinion argued for an interpretation of emergency power which supported a strong president in times of emergency. The power of commander in chief is the most critical. Accordingly, the OLC argued that in time of emergency, the president may respond to the crisis with whatever strength necessary because he has the power to command the army (Yoo, 2001b). The president may conduct his actions without consultation or oversight from Congress because he alone is responsible for protecting, preserving and defending the Union. This logic is congruent with modern interpretation of the Unitary Executive Theory, which suggests that presidents are inherently powerful, especially in times of emergency, and are not subject to other branches of government's constraints or limitations on presidential prerogative. This advice supports a theory of executive emergency power favoring a centralization of power during a crisis—an imperial presidency based on the Hamiltonian American model. Therefore, Bush appears to have adopted an interpretation of executive emergency power very close to Lincoln's interpretation—of course outlined in Yoo's OLC argument, suggesting a president is imperialistic during a crisis.

Such an assertion conflicts with Montesquieu's theory of separation of powers, even during an emergency. Montesquieu (1992) suggested that an executive may have to use emergency power, but still must respect the boundaries of separated powers. Even in times of emergency, the executive should respect the other branches of government.

Was the "war on terror" as much of a crisis as the Civil War? In terms of magnitude, the answer is obviously no. However, the OLC suggested that the potential "insurrection" of enemy combatants was unquantifiable, and therefore led the OLC to conclude that Bush's power was similar to Lincoln's necessary actions of emergency power during the Civil War (Yoo, 2001b, p. 13). But was the landscape similar enough to the Civil War circumstances to warrant broad authority, at least philosophically, after the attacks of September 11, 2001?

Unlike the early days of the Civil War, Congress was in session during the attacks. Bush initially sought congressional authority for his actions, unlike Lincoln,³² and received congressional approval for his actions. The Military Authorization Act was passed in late September 2001, along with the Patriot Act. Did Bush use any

³² Initially Lincoln could not seek congressional authority because Congress was out of session. However, in his message to Congress on July 4, 1861, he made clear that he felt that Congress would support all his actions, which they did.

power comparable to Lincoln's? The extraordinary renditions, and the detainment of enemy combatants at Guantanamo Bay may constitute a kind of habeas corpus suspension; the detainees are enemies of the state, however. The more important point to consider is that the OLC advised the president that he had broad authority if an "insurrection" actually occurred or intensified (Yoo, 2001b).

However, the insurrection did not happen, which prevented broader use of power during the Bush presidency. If a greater insurrection had occurred, then I do think Bush would have embarked on a broader use of power that probably would have appeared similar to Lincoln's actions during the Civil War. Luckily that is not the case, though the unlucky ones are the enemy combatants.

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