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EXECUTIVE POWER IN THE U.S. CONSTITUTION: AN OVERVIEW

Stephen M. Griffin[1]

Despite the sparse text of Article II and the relative lack of Supreme Court precedent, the development of executive power has been influenced as much by these legal markers as by historical practice. Yet both have been mediated through state institutions and capacities on which the "supreme law of the land" was unavoidably imprinted.

Many scholars have given historical practice a central place in understanding presidential power. They take it for granted that the powers, duties and institutional framework of the presidency are vastly different from those that existed in the eighteenth and nineteenth centuries.[2] Two standard examples are the creation of "independent" regulatory agencies and the president's unilateral power to use military force. It is no accident that the two longest-running disputes over executive power relate to the president's influence over these agencies and presidential war powers.[3] Understanding the law of executive power thus involves coming to terms with constitutional change outside the formal process of amendment in Article V.

At the same time, the text of the Constitution inevitably shapes the twenty-first century executive branch, however different that branch may be from its eighteenth-century counterpart.[4] Contemporary legal scholarship has emphasized the role of the text, usually interpreted through an originalist lens. The tension created by an unchanging text and the reality of informal constitutional change gives separation of powers jurisprudence a serious baseline problem.[5] Legal analysis is often an odd blend of highly selective eighteenth century evidence and subsequent history along with intuitions about the proper balance of power between the branches of government.

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[2] Posner and Vermeule (2010), 62-83; Strauss (2010), 120-23.

[3] For a review of the former, see Calabresi and Yoo (2008). For the latter, see Griffin (2013).

[4] See Pildes (2012).

[5] Magill (2001), 623-24, 633-34.

The result is that executive power features some of the most contentious debates in constitutional law. This suggests issues of methodology must be confronted, and Part I therefore focuses on them. I then identify and discuss the central problem of the law of executive power in Part II, consider the issue of presidential war powers in Part III and analyze questions concerning the outer limits of presidential power in Part IV.

I. Understanding Executive Power: Methodological Considerations

How should we understand the power of the president from a legal perspective? Like Justice Black in the famous *Youngstown* decision, we might confine our attention to the text of the Constitution and the power delegated to the president by Congress.[6] Many commentators, however, have been dissatisfied with the overly simple methodology implied in Black's opinion. The specific powers granted by the Constitution seem inadequate to explain and justify the contemporary power of the president.

Further, the meaning of the clauses that relate to the president are contested. The vesting clause of Article II grants "[t]he executive power"[7] to the president, but whether this is a source of substantive power is hotly disputed. The president is "Commander in Chief of the Army and Navy of the United States,"[8] but does this confer the power to order troops into armed conflict? We should also note that the president is given a duty to "take Care that the Laws be faithfully executed"[9] and that Article I adds a qualified veto power over legislation, thus making the president a key player in the legislative process.[10]

Accounting for the contemporary power of the president requires that we go beyond the text and come to grips with the reality of informal constitutional change. Because of the significance of the changes that have occurred in American government, including the presidency, since the founding era, it is plausible that some of them are of constitutional dimension. That is, they are the practical and normative equivalent of constitutional amendments because they so significantly affect the structure of the government and have endured over time. We need a more systematic approach to constitutional change because disputes about presidential power are heavily influenced by historical bookkeeping, in which episodes of the use of power are variously accounted as precedents, success stories,

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[6] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
[7] U.S. Const., Art.. II, sec. 1, cl. 1.
[8] Id. at Art. II, sec. 2, cl. 1.
[9] Id. at Art. II, sec. 3.
[10] Id. at Art. I, sec. 7.

deviations, usurpations or abuses. Theories of change can help us distinguish between episodes that truly influenced the contemporary power of the presidency and those that did not.

The intuition that underlies my account of constitutional change is that constitutional orders are crucial to the implementation of the Constitution.[11] Orders (some scholars prefer the term "regimes") are relatively stable patterns of institutional interaction with respect to basic aspects of the Constitution such as governmental powers and individual rights. These orders are constructed from the actions and norms of multiple institutions, all of which mediate the meaning of the Constitution. The working elements of our constitutional order are the text of the Constitution; how society organizes itself for politics, such as through political parties and interest groups; the political and policy objectives of government officials, elites and the public; and, crucially, the structure and capacity for action of state institutions.

The critical point is that each element of our constitutional order stands in a reciprocal relationship to the others. Thus a change in any one can cause a change in the others. Because all of these elements mediate the meaning of the Constitution, this creates the possibility that the legal order established by the text can change without formal amendment and also, importantly, without judicial interpretation. Notice, however, that this model preserves the essential tension between the undoubted "supreme law" of the text and changing historical circumstances.

Focusing attention on constitutional orders helps bring to the surface a complex historical, political and legal calculus that might otherwise remain hidden. Sometimes uses of presidential power are regarded as changes in "practice" without consideration of how they relate to a constitutional order. So, for example, President John Adams did not have the ability to change the reigning order with respect to war powers in the 1798 Quasi-War with France because there was no prior military or state capacity on which he could draw. Contrary to its undeserved reputation as an "undeclared" war, it became one of the most authorized in history because Congress had to be consulted at every step.[12] By contrast, in contemplating war with Mexico in 1846, President Polk knew he could take the initiative given that the U.S. already had a trained army in Texas. Similarly, President Truman relied on a preexisting military capacity when he faced the crisis caused by North Korea's invasion of South Korea in 1950.[13] These differences in state capacity enabled a meaningful change in presidential power – in Truman's case, one that proved to

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[11] Griffin n 2 above, 14-17.

[12] See Barron and Lederman, The Commander in Chief at the Lowest Ebb – A Constitutional History (2008), 964-72.

[13] See Griffin n 2 above, 71-77.

be permanent and continues to influence the contemporary constitutional order in foreign affairs and national security.

Understanding how the Constitution has changed informally through a theory of constitutional orders offers advantages beyond organizing our intuitions and providing a heuristic guide. The study of constitutional orders encourages us to adopt a salutary historicist perspective.[14] Consistent with the foundational scholarship of scholars working within the field of American political development, it enables us to comprehend presidential action within a particular institutional framework and historical period.[15]

This approach avoids two extremes. On the one hand, the unavoidable relevance of the commands of our "supreme law" are evaded by accounts that insist the powers of the presidency have been determined entirely by historical practice. Unsystematic reliance on practice, as if every exercise of presidential power had the same weight and relevance to the formation of the current constitutional order, is more likely to mislead than enlighten. On the other hand, the very real difference made by political parties, divided government, and the capacity of state institutions to take action are obscured by accounts that insist that the text answer every important question. The most welcome development in separation of powers scholarship in recent years is accounts which take these considerations seriously.[16]

II. The Central Problem and the Supreme Court's Perspective

Arguably the central problem of the law of executive power is the relationship between the president's powers and those of Congress. Because of its law-creating function and control over appropriations, Congress in many respects still occupies the central position in American government. The many departments and agencies of the executive branch as well as the Executive Office of the President would not exist but for Congress, although we should balance that observation with the president's ability, apparent from the first administration of George Washington, to propose legislation, advise Congress on pending matters and exercise the veto if necessary.

The specific question is to what extent can Congress, in the otherwise constitutional exercise of its Article I powers, regulate the president's powers?[17] The necessary and proper clause appears to provide firm ground for Congress to enact laws to execute "all other Powers vested by this Constitution in the Government of the United

[14] See, e.g., Flaherty (1995) .
[15] See, e.g., Ackerman (1991); Skowronek (1993); Tushnet (2010).
[16] See Tushnet (2010); Levinson (2005); Levinson and Pildes (2006).
[17] For a useful exchange, see Prakash (2005) and Krent (2006).

States, or in any Department or Officer thereof."[18] Nonetheless, justices and scholars alike have struggled to find a defensible and principled middle ground between two unpalatable alternatives – allowing Congress to, in effect, alter the president's "central prerogatives"[19] without formal amendment or allowing the president to exercise his powers free of any effective congressional check.

Many significant issues relate to this problem. The George W. Bush administration famously claimed that the president's Article II authority, especially when exercised in wartime, allowed it to operate free of statutory constraints such as the 1978 Foreign Intelligence Surveillance Act. The infamous "torture memo" was based on this premise.[20] Creating a zone of indefeasible power around the presidency also vindicates President Nixon's objection that the 1973 War Powers Resolution (WPR) was an unconstitutional restriction on the president's commander in chief power. Do the same for the president's implied power to remove principal officers, and the constitutionality of "independent" regulatory agencies is thrown into doubt.[21] On the other hand, allow Congress to restrict presidential power as it wishes and we are potentially back in the dubious world of the Tenure of Office Act of 1867, which restricted President Andrew Johnson's ability to fire members of his Cabinet.

The Supreme Court's executive power jurisprudence is notable for two prominent reversals of field which created the terrain for future debate. With respect to the president's implied power to remove executive officials, the Court issued a broad statement of support in *Myers v. United States*[22] that was restricted during the New Deal in *Humphrey's Executor*.[23]

With respect to foreign affairs and national security, the Court again first issued a broad statement favoring presidential power in *Curtiss-Wright*,[24] only to alter the doctrinal landscape significantly during the Korean War in *Youngstown Sheet & Tube v. Sawyer*,[25] the Steel Seizure case. It is noteworthy that significant cases decided by the Court after 9/11 confirmed the continuing relevance of *Youngstown*, especially Justice Jackson's seminal concurrence, while the status of the broad statements supporting presidential power in

[18] U.S. Const., Art. I, sec 8, cl 18.
[19] Loving v. U.S., 517 U.S. 748, 757 (1996).
[20] On the torture memo, see Cole (2009).
[21] Recent scholarship complicates the picture of agencies as either independent of presidential control or not. See Datla and Revesz (2013).
[22] 272 U.S. 52 (1926).
[23] Humphrey's Executor v. United States, 295 U.S. 602 (1935).
[24] United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).
[25] 343 U.S. 579 (1952).

Curtiss-Wright is more uncertain.[26] The remainder of this Part elaborates on these points.

Chief Justice Taft's lengthy opinion in *Myers* could be regarded as an attempt to exorcise the demons of the Tenure of Office Act. Most commentators have agreed that the act was unconstitutional and Andrew Johnson's successors strove to convince Congress to repeal it, a task accomplished in 1887. In later decisions, the Court ratified Taft's specific judgment that "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment."[27]

Yet Taft, who had been President from 1909 to 1913, went well beyond this point in an all-out effort to block any avenue by which Congress could restrict the president's removal power. Taft's undifferentiated analysis gave Justice Sutherland a basis for distinguishing the Federal Trade Commission (FTC) in *Humphrey's Executor* by saying that "the character of the office," should determine "[w]hether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause."[28] Sutherland confined the *Myers* rule to "purely executive officers,"[29] though few commentators have been happy with his position that the FTC was outside the executive branch.[30]

It is likely, however, that given Sutherland's expressed concerns over the FTC's adjudicative role[31] and the Court's later consistent decision in *Wiener v. United States*[32] that when presidents staked their claim to a "unitary" executive under their complete control, the Court perceived a threat to the adjudicative function of administrative agencies. Because this function was so similar to the Court's and highlighted the values of independent and impartial judgment, it is understandable that the justices resisted the idea that every executive branch official must always be responsive first and foremost to the president no matter what duties had been specified by Congress.

The Court altered the *Humphrey's Executor* formula significantly in *Morrison v. Olson*, which upheld the constitutionality of the now-defunct independent counsel law.[33] In a decision notable for its functionalist and consequentialist approach, the Court abandoned drawing a bright line between "purely executive officers" and other

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[26] See Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004); Hamdan v. Rumsfeld, 548 U.S. 557, 593 n. 23 (2006); Medellin v. Texas, 552 U.S. 491, 524-30 (2008).
[27] Bowsher v. Synar, 478 U.S. 714, 726 (1986). See also Morrison v. Olson, 487 U.S. 654, 685-86 (1988).
[28] 295 U.S. at 631.
[29] Id. at 632.
[30] Id. at 628.
[31] 295 U.S. at 628-30.
[32] 357 U.S. 349 (1958).
[33] 487 U.S. 654 (1988).

officials, saying "the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty."[34] *Morrison* thus preserved Congress's power to establish such restrictions, a holding that has endured essentially unaltered from the New Deal to this day.[35]

If what worried Taft was protecting future presidents from another Tenure of Office Act, it is worth noting that the nineteenth century permanently cured Congress of this idea. The president's power to remove Cabinet officers and most principal officers of the executive branch is now unquestioned. If the relevant contemporary issue is control over "independent" agencies, it is doubtful whether any recent presidential administration was frustrated in one of its major policy initiatives by their contrary judgment.[36]

The real issue behind the prolonged fencing over the status of independent agencies that began in the Reagan administration was the drive by Justice Antonin Scalia, Attorney General Edwin Meese and their acolytes to assert the primacy of the "unitary executive" and thus assure the broadest possible zone of presidential decisionmaking free of congressional checks in an era of divided government.[37] They argued that the Article II vesting clause gave the president alone all executive power.[38] This meant not only the broad removal authority sought by Taft in *Myers*, but also supervisory authority over the entire executive branch, including longstanding independent agencies such as the FTC and Federal Reserve Board.[39]

In the foreign affairs arena, the Reagan administration used *Curtiss-Wright* as a basis for a zone of indefeasible power.[40] According to recent historical scholarship, it appears Chief Justice Hughes (who had been Secretary of State from 1921 to 1925) was the moving force behind an opinion, again written by Justice Sutherland, intended to signal support for President Roosevelt's foreign policy at a time when the justices were increasingly concerned about the international situation.[41] At one and the same time, the Court appeared to be trying to limit the presidency in domestic policy in decisions such as *Humphrey's Executor* while giving it enormous leeway in foreign affairs.[42] Just as Justice Sutherland removed the FTC from the executive branch, he appeared to remove the

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[34] Id. at 691.
[35] A holding unaltered by the Court's recent decision in Free Enterprise Fund v. Public Company Accounting Oversight Board, 130 S. Ct. 3138 (2010). See Bellia (2012).
[36] See generally Kagan (2001).
[37] Fried (1991), 133-60. See also Scalia (1989).
[38] Morrison v. Olson, 487 U.S. 654, 705 (Scalia, J., dissenting).
[39] See Calabresi and Yoo, n 2 above, 6.
[40] Griffin, note 2 above, 190.
[41] Purcell (2013).
[42] See Silverstein (1996).

presidency from the Constitution itself by contending that the doctrine of enumerated powers did not apply in the realm of foreign affairs.[43] Although the Court gave a ringing endorsement of presidential leadership, referring to "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations,"[44] close inspection showed that the Court had not abandoned checks and balances. It could hardly do otherwise given the facts of the case, which involved a delegation of power from Congress to the President.[45]

Nevertheless, when *Curtiss-Wright* was combined with the enormous expansion in state capacities in World War II and the Cold War, it appeared that not only was the president preeminent in foreign affairs but was beyond any effective congressional check, especially in matters of war and national security. This assumption received a reality check in 1952 when President Truman ordered the seizure of steel mills to avert a threatened strike and so avoid harming the war effort in Korea. Many observers expected Truman to prevail, but the Supreme Court heard *Youngstown* in a matter of weeks and ruled the seizure unconstitutional.

Justice Jackson's concurrence has won the respect of history and remains fascinating for his attempt to integrate his prior experience in the Roosevelt administration into a wide-ranging exploration of the nature of executive power. After observing that the Constitution "contemplates that practice will integrate the dispersed powers into a workable government,"[46] Jackson set forth his famous three categories of presidential power. Category One is "president plus," as the president is acting with the approval of Congress and Jackson thought such action "would be supported by the strongest of presumptions and the widest latitude of judicial interpretation."[47] In Category Two, Congress is silent and thus the president "can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."[48] Jackson could not articulate a doctrinally satisfying test to provide guidance as to what should happen in Category Two. Category Three was "president minus" in the sense that when the president acts against Congress "his power is at its lowest ebb."[49] Such a claim of exclusive power "must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."[50]

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[43] 299 U.S. 315-16.
[44] Id. at 320.
[45] Id. at 319-22.
[46] 343 U.S. 635.
[47] Id. at 637.
[48] Id.
[49] Id.
[50] Id. at 638.

Jackson's tests implied that presidential action would be upheld in Category One and denied in Category Three.[51] In *Youngstown* itself, Jackson found Truman's unconstitutional action to be in Category Three.[52] When Jackson examined the Article II powers cited to justify Truman's action, he either rejected or expressed considerable skepticism about the standard arguments used to justify broad executive power.[53] Jackson did suggest that the judiciary should defer to the president's judgment as commander in chief, "at least when turned against the outside world for the security of our society."[54] The force of this statement was diminished by the implicit conditions that the commander in chief power could not be used to initiate a war or as a source of emergency powers.[55]

The decidedly uncertain status of Category Two meant that those challenging and defending presidential action tended to argue between Categories One and Three. Jackson's concurrence thus probably had the effect of giving an additional incentive to presidents and their lawyers to secure a statutory foundation for presidential action. But it also meant that if a president violated a statute, the executive branch was in dangerous territory.

By assuming that at least some legislative and executive powers were shared, Jackson established a strong doctrinal basis for saying that in exercising its Article I powers, Congress could regulate presidential power. This standard reading of Jackson's concurrence was endorsed by the Court in *Hamdan v. Rumsfeld*,[56] concerning the military commissions President Bush created to try detainees. In speaking of restrictions Congress had placed on the president's commander in chief power, the Court stated pointedly that the president "may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers."[57]

Youngstown was also the source of Justice Frankfurter's influential observation that historical practice could inform the interpretation of the president's Article II powers, at least in circumstances which involved "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned."[58] This suggestive comment created the somewhat questionable form of analysis which looks for

[51] This has been the pattern in lower federal courts that have relied on Jackson's concurrence. See Swaine (2010), 311.
[52] 343 U.S. 640.
[53] Id. at 640-647.
[54] Id. at 645.
[55] Id. at 642-643, 649-653.
[56] 548 U.S. 557 (2006).
[57] Id. at 593 n. 23.
[58] 343 U.S. 610.

congressional "acquiescence" to exercises of executive power.[59] By contrast, the theory of constitutional orders looks to how all three branches affirmatively construct their powers and institutions amid changing political circumstances.

In the aftermath of the legal controversies that attended the George W. Bush administration, scholars who favored the unitary executive concept as applied to the administrative state attempted to distinguish it from the unilateral or exclusive authority asserted in the "torture memo."[60] But the unitary executive and the "exclusive executive," the idea that Congress cannot, for example, regulate the commander in chief power, are in fact related. We should notice that both rely in part on attributing significant substantive meaning to Article II's vesting clause. However, the key claim that unites them is that Article II creates a zone of indefeasible power that Congress cannot regulate.[61] After all, that was the bottom line Taft was trying to establish with respect to presidential removal power in *Myers*. Although *Curtiss-Wright* did not speak directly to this issue, the Reagan administration used the decision to support this claim.

In recent decades, scholars favoring the unitary executive and exclusive presidential authority have built their arguments on the scaffolding of the theory of "original public meaning." As the debate has unfolded, it has become evident that this theory, at least as used by executive power enthusiasts, involves a deliberately selective approach to the use of historical evidence. It is not a historicist theory and thus does not employ the methods historians use to assure appropriate consideration of historical context.[62] The highly questionable consequence of employing original public meaning methodology is to create an alternate version of eighteenth-century history seemingly designed to bypass the most insightful and learned scholarship on the founding period.[63] Yet consulting that scholarship would complicate considerably the arguments of the promoters of executive power. At the same time, there is no doubt that the kernel of the idea of the unitary executive originated in the founding era. The framers of the Constitution created a single-person executive with significant powers. Yet the question of the relationship of Congress's Article I powers to the president's Article II powers was left open. Further, the challenges of the administrative state and the reasons that led Congress to create agencies with varying degrees of independence lay in the future. These issues were therefore not resolved in the founding era or the early republic.

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[59] This analysis was employed by the Court in Dames & Moore v. Regan, 453 U.S. 654, 686 (1981).

[60] Calabresi and Yoo, n 2 above, 18-21.

[61] See Nourse and Figura (2011), 285-89.

[62] See, e.g., the discussions in Griffin (2013), n 2 above, 41-45; Bradley and Flaherty (2004); Flaherty (1995); Mortensen (2011).

[63] See, e.g., Rakove (1996); Wood (1969).

III. Shining the Lamp of Experience on War Powers and Foreign Affairs

The founding generation followed the "lamp of experience," – the teachings of history. No other area of executive power has been as strongly influenced by the lessons of history as war powers and foreign affairs. These felt lessons have structured the debate in ways sometimes unacknowledged by the participants.

It is now common for constitutional scholars to hold, based on the "declare war" clause in Article I, that the Constitution not only gives Congress exclusive authority to initiate "war," but that military actions short of war must be legislatively authorized. Yet in the first half of the twentieth century such views were identified with an isolationist foreign policy and the senators who defeated Woodrow Wilson's grand project of the League of Nations. Constitutional scholars of the time looked to the Mexican War as a practical example of how a president could initiate war and put Congress in a position where it had to go along. This was an oversimplified reading of history, but it pointed up the influence of a perspective in which war powers were determined by historical practice, not governed in any strong sense by the text.

A telling lacuna in the practice-based view of war powers was the absence of an account of the role of the many undoubted legislative authorizations and declarations of war in American history. After all, if "practice" consisted of significant government actions, these authorizations and declarations were part of the story. Here a theory of constitutional change which gives a prominent role to the text as well as state capacities is useful in making sense of history.

Consider that presidents such as John Adams, Woodrow Wilson and Franklin Roosevelt had a very limited ability to address significant threats to national security because they lacked the necessary state capacities to address, respectively, the challenges of the Quasi-War with France, World War I and World War II. In these circumstances presidents had no choice but to go to Congress. It also mattered that, contrary to the practice-based view of war powers, there had been widespread agreement throughout American history that Congress's role was constitutionally mandated.

A new chapter in war powers opened when American elites fought a prolonged battle over isolationism and presidential power in the years before Pearl Harbor.[64] As we saw in Part II, *Curtiss-Wright* was part of that story. Once the United States went to war, elites favoring an internationalist foreign policy took it for granted that

[64] The next few paragraphs summarize the argument in Griffin, n 2 above.

greater presidential power in foreign affairs, including the use of military force, was justified by events. Moreover, as the war ended and the United States ratified the UN Charter, there was renewed questioning of the relevance of declared wars and corresponding attention to the practice-based view. The Charter arguably had the effect of making war obsolete under international law and substituting the concept of the justified (or not) use of armed force. Some executive officials drew the inference that declarations of war and thus the "declare war" clause were also obsolete. Another relevant factor was that the United States did not fully demobilize as it had done in the past. Once the Cold War began, many argued that the country was in a new era where the presidency should be dominant.

Thus a new constitutional order in foreign affairs and national security was already emerging by the time Truman made the decision to intervene in Korea. With vast resources flowing to the Pentagon and the intelligence agencies and the development of new capacities for action such as the ability to project power globally on a round the clock basis, presidents now had the permanent status of first mover in chief. Yet it would be a mistake to analyze this development in terms of presidential usurpation and congressional acquiescence. Although there was some dissent, many members of Congress actively supported the president's new powers and argued that the traditional distinction between wartime and peacetime had been erased by the Cold War.[65] This showed that constitutional orders cannot be created by one branch working alone.[66]

At the same time, the text remained relevant, although in an altered fashion. Because the president was the first mover, the critical question for the Cold War constitutional order was whether the "declare war" clause could serve as an effective check on presidential action. In other words, instead of presidents such as Adams, Wilson, and Roosevelt knowing in advance that they had to obtain *congressional* approval, the issue now was once the *president* decided for war, could Congress say no? It is telling that one of the characteristic features of executive branch legal arguments in the Cold War was that *whatever* the meaning of the "declare war" clause, it was *not* a check on the president.

After Truman received substantial criticism for not asking for a declaration or authorization resolution from Congress, his successors were careful to obtain them. Yet the consistent position of presidents after Eisenhower that these authorizations were not constitutionally required has been generally overlooked. The maximal presidential claim that they could initiate war on their own authority is easier to understand once we situate it within the Cold War constitutional order. That order made presidents solely responsible for the security

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[65] On the concept of "war time" see Dudziak (2012).
[66] See Zeisberg (2013).

of the country. All presidents since 1945 have understood this and have structured their constitutional claims accordingly. Those claims were based not only on the commander in chief clause, but were located within the broader power presidents have traditionally enjoyed in foreign affairs. Indeed under the Cold War constitutional order the executive branch claimed that the use of military force including war, while certainly always momentous, could be regarded as simply one instrument among others in the pursuit of U.S. foreign policy goals. In short, a foreign war no longer required a special national decision.

Constitutional scholars continue to discuss whether the framers made their intentions fully evident in the "declare war" clause. But it is not necessary to resolve this debate to appreciate that the Cold War constitutional order involved a marked deviation from the constitutional order of the early republic. In that earlier order, government officials were well aware that only Congress could initiate war and no one advocated a position analogous to the maximal claims of contemporary presidents. The Cold War constitutional order thus involved a historic change equivalent to a formal amendment.

In the Cold War and post-Cold War periods, presidents were reluctant to take Congress seriously from a constitutional point of view. This pattern was exemplified by the Vietnam War and the 2003 Iraq War. This reality requires some rethinking of the standard war powers debate. The debate is said to be about whether the president can initiate war unilaterally. A debate this long and intense surely implies that presidents have been initiating wars on a regular basis without congressional approval. Yet one of the signal features of our constitutional order has been the consistent use of congressional authorizations to underwrite each major war since Korea – Vietnam, the 1991 Gulf War, the actions against al Qaeda in Afghanistan and elsewhere authorized in September 2001 and the Iraq War. Although there have been many minor military actions that were not authorized, the obvious existence of authorizations for major wars has not stilled the debate, despite a consensus among scholars that they are the constitutional equivalent of declarations of war.

The war powers debate is best understood as concerning the quality of interbranch deliberation on decisions for war, including major covert operations.[67] Further, it is about the relationship of this deliberation to perceived policy failures with respect to the major wars the U.S. has fought since 1945. At its least productive, the debate involves the blanket condemnation (or approval) of these "presidential wars," without considering whether they were supported by Congress and the public or the validity of the foreign policy and national security strategy of which they were a part. More profitably,

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[67] See Griffin (2013) n 2 above; Zeisberg (2013).

the debate should be a meaningful exchange on the legacy of the Cold War constitutional order for the present.

One fruitful line of inquiry is studying the relationship of the constitutional order to executive branch decisionmaking for war. Because post-1945 presidents believe they have sole responsibility for protecting the country, they never regard Congress as a true partner and thus treat authorizations for war as politically convenient rather than constitutionally required. This means that the only decisionmaking process that matters occurs inside the executive branch. Analysis of the historical record reveals serious systematic and ongoing flaws in that process. These flaws are not policy or political happenstance, but relate directly to the president's constitutional status as chief executive. For example, no effective interagency process could develop after 1945 because the president and his White House advisers dominated decisionmaking. To be sure, under the National Security Act of 1947, the National Security Council (NSC) was supposed to perform the task of policy coordination. Experience has shown, however, that each president established his own unique NSC process.

The consequence was that no major war after 1945 was approved through a true collaborative (or, for that matter, conflictual) process of interbranch deliberation. The executive branch took the entire burden of deciding for war on itself. Although the circumstances of each decision for war were complex, in general the executive branch tried to dominate Congress politically rather than hazarding a meaningful public debate. From the perspective of the executive branch, Congress could not say no. When President Obama decided in fall 2013 to submit the question of a military intervention in Syria to Congress without being assured of the result, his decision stood out as a novel departure from the Cold War constitutional order, although likely one without a lasting effect.

Concentrating the complexities and tensions inherent to decisions for war inside the White House led to recurrent dysfunctional patterns of decisionmaking, including a lack of realistic war planning and failure to settle on war aims. President Johnson deliberately avoided a public debate on the key decision to Americanize the war in Vietnam in 1965, thereby arguably poisoning the well for his successors for decades. Strikingly, the available evidence concerning President George W. Bush's decisionmaking process with respect to the Iraq War suggests that little has changed. In Bush's case, he avoided any interagency process and structured the request for congressional authorization in fall 2002 so that Congress would have minimal time and distorted information. The experience of the post-1945 era thus suggests strongly that only a suitably reformed Congress can provide the political quality control checks necessary for the executive branch to formulate sound policy.

Congress responded to the deceptive way Presidents Johnson and Nixon conducted the Vietnam War by passing the 1973 War Powers Resolution (WPR), specifically invoking the necessary and proper clause. The most significant provision of the WPR attempted to short-circuit the president's status as first mover by requiring him to remove troops sixty or ninety days after the initiation of "hostilities" if Congress did not authorize the operation. Thus a lack of congressional action would be sufficient to say no. Although the public favored the WPR overwhelmingly, President Nixon exercised his veto, sounding the theme that interfering with presidential war powers was equivalent to interfering with the president's power to conduct foreign affairs. Congress overrode Nixon's veto, making the WPR the law of the land.[68]

It has been difficult for scholars to keep the WPR in focus, probably because it was the product of a unique historical moment. It becomes easier to gauge the WPR's effectiveness if we keep in mind that it was mainly about preventing another Vietnam. There is a common misunderstanding that its authors were trying to regulate every use of force. In fact, some disappointed liberals voted against the WPR because it in effect allowed presidents to do as they saw fit within the sixty day period. This unsurprising interpretation was eventually adopted by executive branch lawyers.

In evaluating the WPR, it is important to appreciate that it was much more of an effect of the post-Vietnam period than a cause of subsequent presidential conduct. Presidents were relatively restrained in the use of force after Vietnam, not primarily because of the WPR but due to the "Vietnam syndrome" – the consensus in public opinion that compelled presidents of both parties to forgo any major military ventures for nearly two decades.

It is noteworthy that although the WPR evolved over a period of years, Nixon was never willing to engage meaningfully with Congress on designing a better process. Despite occasional complaints, subsequent presidents never offered an alternative. This is an important clue that the main elements of the Cold War constitutional order outlasted its end. The most likely reason for presidents refusing to engage was that they believed there was already an order with respect to war powers that served their interests.

Nevertheless, the parties did disagree about the status of the WPR. By the 1990s, it was commonly accepted that every president had refused to concede its constitutionality. The relevance of this observation was rarely explained, but it was also untrue. The Reagan administration was in fact the first to object in 1983 during a conflict with Congress over an ill-fated deployment of Marines to Lebanon. From that point, lawyers associated with the Reagan and both Bush administrations asserted the unconstitutionality of the WPR. David

[68] Codified at 50 USC §§ 1541-1548.

Barron and Martin Lederman have established that these lawyers overlooked an earlier Office of Legal Counsel (OLC) opinion in the Carter administration upholding the WPR's constitutionality. Similarly, the Clinton and Obama administrations avoided contesting the WPR's constitutionality.

Many commentators believe the WPR is defunct. The principal reason is that no president has ever triggered the sixty day limit by filing a report under the proper section of the law. Nevertheless, the Clinton and Obama administrations were both criticized for exceeding the deadline for their interventions in Kosovo and Libya respectively. This suggests that the WPR has a somewhat zombie-like existence, not quite alive, but far from dead.

Although criticism of the exercise of presidential war powers is widely heard, it is arguably the structure of Congress that is in most need of an overhaul in order to provide a reliable partner for the executive. Such reform would necessarily have to include foreign policy and national security generally, not simply decisions for war.[69] After the 1975 intelligence investigations, Congress eventually came up with an improved system of oversight by concentrating expertise in a single committee in each house. Considering something similar for foreign affairs and war powers would be a step forward.

What is especially troubling about the exercise of presidential war powers after 1945 is that lengthy foreign wars appeared to reverse just those qualities that Alexander Hamilton promoted as characteristic of the executive branch in *The Federalist*.[70] Instead of making them vigorous, energetic and decisive, long wars turned presidents from Truman to Johnson to Nixon to George W. Bush into myopic, indecisive and morose bitter-enders.[71] This was a compelling and tragic demonstration of the wisdom of the founding generation – that wars are unique sorts of policies and decisions for war require special constitutional consideration.

IV. The Outer Limits of Executive Power: Non-Enforcement, Emergencies, and "Prerogative Power"

As scholars continue to reflect on the record of the Bush and Obama administrations in the aftermath of 9/11, they have increasingly probed the outer limits of executive power. The controversy on the legitimacy of presidential signing statements in the Bush administration, for example, was part of a larger debate over presidential power to "disregard" or not enforce laws. In addition,

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[69] See Waxman (2014), 1687-1688.
[70] The Federalist No. 70 (Jacob E. Cooke ed. 1961).
[71] See generally Griffin, n 2 above.

there was much discussion of presidential power in emergencies, including the "prerogative power."

The positions scholars take on these highly contested and abstract issues are influenced strongly by whether they regard the Cold War experience and constitutional crises linked to executive wrongdoing, such as Watergate and Iran-contra, as part of the constitutional "canon," so to speak. Scholars like myself who regard such episodes as having informed our constitutional tradition are more likely to be skeptical of doctrines that potentially grant unchecked power to the president, even in genuine "emergencies." While fears of executive "tyranny" or "dictatorship" are overblown in American history, concerns about abuse of power and violations of civil liberties are not. More important, the case of presidential war powers suggests that the real problem is that the executive branch has a hard time formulating sound policy in the absence of Congress.

1. Non-Enforcement of the Law

Many distinguished scholars, including some who have served as executive branch lawyers in administrations of both parties, have claimed that there are circumstances in which a president can decide not to enforce a law on the ground that it is unconstitutional. It is easy to make sense of this position when it is taken against the backdrop of litigation or the implementation of Supreme Court doctrine. In the case of a conflict between a state and the Court or Congress and the Court, the president must follow judicial doctrine as all three branches have over time come to accept that the Court's rulings are authoritative as a matter of law.

However this position becomes puzzling and even dangerous when it involves a conflict between the president and Congress in which the president determines solely on his own authority that a law already on the books is unconstitutional. It is no accident that 9/11 highlighted this problem latent in our constitutional order as judicial precedent is scant in the area of foreign affairs and national security. Prior to 9/11, scholars had justified this position by citing the venerable concept of departmentalism, which holds that each branch of government is entitled to decide the issue of constitutionality independently.[72] But the relevance of departmentalism to presidential non-enforcement is actually quite limited. No one disputes that the president must interpret the Constitution simply to carry out his responsibilities, including vetoing laws he believes unconstitutional. Further, few dispute that the president must follow relevant rulings by

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[72] See, e.g., Easterbrook (1989-90); Paulsen (1994).

the Supreme Court in deciding how to carry out the duty to faithfully execute the laws.[73]

The real issue is whether the president should have a power limited only by impeachment to refuse to enforce laws based on an interpretation of the Constitution inevitably influenced by his political interests and policy agenda. The routine invocation of departmentalism ignores that the executive branch does not have the same structure or role as the Supreme Court. In particular, because this power can be exercised after a law is passed over a presidential veto, it would give the president the practical equivalent of an absolute veto. It is not often that scholars advocate a position that is closely analogous to a proposal that the framers specifically considered and rejected. Because the framers rejected giving the president an absolute veto, any practice that is substantially similar is similarly disfavored.[74]

The problems with presidential non-enforcement have been underestimated partly because of reliance on a flawed set of historical examples. It is possible that the dispute begun by the Reagan administration over the constitutionality of the WPR had the effect of making presidential non-enforcement appear more plausible. When scholars began advocating strong forms of departmentalism in the 1990s, they cited the supposed uniform rejection of the WPR as an example of independent presidential interpretation that had been widely accepted. Yet this position had been taken only by Republican presidents. Further, the presidential non-enforcement position had been strongly criticized during the Iran-contra affair after it was advocated in the joint congressional committee's Minority Report.[75] Presidential non-enforcement based solely on the ground that the law in question is unconstitutional and without support from judicial doctrine is very rare.

The most troubling historical flaw in the scholarship on presidential non-enforcement is its heavy reliance on the impeachment of President Andrew Johnson. This is cited as an example of justified non-enforcement because of Johnson's violation of the Tenure of Office Act, the formal basis for his impeachment and, as noted in Part II, a law no one today regards as constitutional. Yet the Johnson impeachment in fact shows the deep difficulties with non-enforcement. As historians have appreciated for some time, the real and justified basis for Johnson's impeachment was his deliberate failure to faithfully execute the laws.

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[73] Departmentalists have been unable to solve the problem of what to do in the case of a conflict between the branches. See Alexander and Solum (2005), 1609-15.
[74] See, e.g., May (1998).
[75] See Griffin, n 2 above, 188-91.

Eric Foner, the leading historian of Reconstruction, describes Johnson as "a deeply racist, inflexible political leader"[76] who used his constitutional powers to undermine and frustrate Congress's policy toward the defeated South. These policies were enacted over Johnson's repeated vetoes, yet he refused to enforce them. The consequences for the newly freed African American citizens were tragic. Until Johnson reversed course after his near-conviction by the Senate, they were left to the brutal treatment exacted by those who had so recently enslaved them.[77]

The Johnson impeachment contains several vital lessons that undermine the theory of non-enforcement. It demonstrates the paralyzing consequences of a president wielding what amounted to an absolute veto. The result was a prolonged constitutional crisis. To be sure, Johnson acted partly out of a belief that the laws establishing congressional Reconstruction were unconstitutional. But Johnson's intransigence was also calculated to damage the Republican party and so secure his own political future. This showed the inherent difficulty of supposing that we can separate considerations of constitutional principle from the president's policy agenda and political interests.

The controversies that attended the Bush administration post-9/11 showed that what was really at stake in the scholarly debates about non-enforcement was an end-run around Justice Jackson's Category Three. Instead of presidential power being at its "lowest ebb" when confronted by a conflicting statute, the president could simply disregard it as unconstitutional. This possibility is not simply theoretical. In substance, this was the bad advice Attorney General Meese gave to President Reagan that paved the way to the disastrous Iran-contra affair.[78]

Because the contemporary theory of non-enforcement is a creation of lawyers, it is understandable that its advocates believe it would be implemented in a judicious way. Yet our historical experience is to the contrary. Presidential non-enforcement is linked to some of the most regrettable uses of executive power in American history. None of this experience recommends non-enforcement as a way to exercise presidential power.

2. Emergencies and Prerogative Power

The disorienting events of 9/11 inspired a substantial literature on presidential power in emergencies and the abstract idea of prerogative power. Scholars repeatedly invoked Lincoln's leadership

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[76] Eric Foner, "Liberated and Unfree," N.Y. Times Book Review, Feb. 2, 2014 at BR11.
[77] See, e.g., Benedict (2006), 32-43; Foner (1988), 176-280, 333-45. See generally Castel (1979).
[78] Griffin n 2 above, 186.

in the 1861 secession crisis as an example. We can thus usefully begin by considering Lincoln's decisions in context in light of the constitutional order that structured them.[79]

Lincoln knew as he was inaugurated that the public favored action to defend the Union and the Constitution. He cannily acquired the leeway to take his later bold moves by *first* taking the unquestionably proper decision to resupply Fort Sumter. This meant that the Confederacy was in the position of having to make the first move for war.[80] As historian James McPherson describes, in the wake of the attack on Fort Sumter there was a massive "Eagle-scream" for Union and Constitution throughout the North.[81] This gave Lincoln's subsequent actions, such as the blockade of southern ports and suspension of habeas corpus all the constitutional legitimacy required by the immediate situation, especially given the practical unavailability of Congress.[82] By then submitting his actions to Congress for its approval, Lincoln avoided creating a precedent in favor of an undefined unilateral power to act in an emergency.[83]

As Daniel Farber has argued, Lincoln's actions were taken in a context that differed substantially from that faced by contemporary presidents because of the undeveloped structure of the American state.[84] Lincoln had to use the military to enforce domestic order, for example, because there was no civilian agency such as the Federal Bureau of Investigation on which he could rely. The Civil War experience suggested strongly that what is required over the long run to cope with emergencies is state-building and the systematic acquisition of expertise, not licensing off-the-cuff decisions.

After 9/11, scholars made little progress in defining the concept of an emergency. Yet given the examples usually cited, it appears that discussions of "emergency" are really about government power in wartime. Framing the debate around war rather than emergency would alter it considerably, as the twentieth century convinced many Americans that significant sacrifices of civil liberties and civil rights during war were unjustified.[85] These lessons are so well-known that in the aftermath of 9/11, one of the episodes President Bush

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[79] For a reliable legal account of these actions, see Barron and Lederman, n 11 above, 996-1004.
[80] McPherson (1988), 246-48, 264-74.
[81] Id. at 274.
[82] McPherson states that in spring 1861 members of Congress were still being elected for the next regular session in December. This meant that Lincoln could not have called a special session of Congress before he did in July. McPherson (2008), 23-24.
[83] The leading scholarly work is Farber (2003).
[84] Farber (2003), 144-46.
[85] For an eloquent argument to this effect, see Stone (2004).

consciously wanted to avoid was the Japanese-American internment in World War II.[86]

Episodes such as the internment fueled a profound critique of government power in time of war and emergency that was advanced most extensively after the McCarthy era.[87] Amid the rights revolution of the 1960s, the argument that was absorbed by citizens and government officials was that if the ordinary institutions of government were functioning, there was no reason to employ the kind of rule by decree that Lincoln occasionally had to resort to in the Civil War.[88] It is therefore all the more puzzling that the post-9/11 literature emphasized the Civil War to the near exclusion of the far more relevant Cold War experience.

The secession crisis is central to scholarship on "prerogative power." Although "prerogative" has a number of meanings, the most distinctive claim made by scholars advocating its relevance is that executive power inherently involves the Lockean prerogative to violate the Constitution in a time of emergency in order to preserve it in a larger sense.

As legal scholars have noted, no president has ever officially claimed the Lockean prerogative.[89] It is therefore difficult to evaluate this theory because of the telling lack of contemporary examples. Lincoln's use of power during the Civil War is the only instance discussed in any detail. Yet many scholars have argued that Lincoln's actions were consistent with the Constitution. Moreover, detailed historical studies have discredited the idea that the prerogative theory is useful in understanding the constitutional problems of the Civil War. Lincoln never claimed extra-constitutional power and was always conscious of the need to justify his policies to Congress and the public.[90]

It is likely that the true ground of the prerogative theory is not found within our constitutional tradition but lies rather in abstract reflection on the nature of executive power and the limits of law in coping with emergencies, as informed by important political theorists of the seventeenth and eighteenth centuries. Scholars who argue that the prerogative power is useful in understanding executive power are less interested in advocating its use than in maintaining that we cannot escape its necessity. But the claim that the prerogative is an inherent element of executive power has the doubtful virtue of being impervious to contrary evidence. If this claim can be judged on the

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[86] See Bush (2010), 141-42.
[87] See generally Stone (2004).
[88] An argument inspired in part by Ex parte Milligan, 71 U.S. 2 (1866).
[89] See Stone (2004), 133-34; Barron and Lederman (2008), The Commander in Chief at the Lowest Ebb – Framing the Problem, Doctrine, and Original Understanding, 745-48; Bradley and Morrison (2013), 1120-21 n.88.
[90] See Barron and Lederman n 78 above; Farber (2003), 144-46; Kent (2010), 1885-87; Stone (2004), 133-34.

basis of experience, then we have ample reason for thinking that it is a poor way to understand executive power under the Constitution.

Scholars favoring prerogative power as a tool of analysis appear to have never considered the question of whether it is possible to design and maintain a constitutional system without it. This consideration is highly relevant given the complete lack of support for the Lockean prerogative in the founding era.[91] This point as well as the dearth of contemporary examples of the use of the prerogative power counts against the plausibility of this view as a way of understanding executive power.

What appears to have gone wrong is that advocates of prerogative confuse exercises of executive discretion under the Constitution with the power to step outside the "supreme law" entirely. As legal scholars have argued plausibly, the latter move would not only be obviously unconstitutional but politically self-defeating for any president.[92] This is probably why it is so difficult for proponents of this theory to find examples of its use in American history.

More generally, the prerogative view is simply inconsistent with our contemporary experience with executive power, including the lessons of Watergate and Iran-contra. It is in considerable tension with the near-universal criticism of *Curtiss-Wright* as well as the praise for Jackson's concurrence in *Youngstown*. The entire course of the Steel Seizure crisis is directly relevant. Before the Supreme Court the Truman administration conceded that it would follow whatever Congress decided as well as, of course, any Court ruling. Truman clearly believed that the prospect of a steel strike was an emergency, yet it never occurred to him that he could trump the Court by invoking prerogative power.

Because theories of non-enforcement and prerogative power place the president beyond the law of the Constitution, implementing them would necessarily undermine the only legal source of legitimate executive power. On balance, our historical experience shows that presidents have instinctively understood this point and acted accordingly.

V. Conclusion

In his dissent in *Youngstown*, Chief Justice Vinson expressed frustration with the majority's vision of executive power, calling it a "messenger-boy concept of the Office."[93] This is a traditional worry of scholars who believe a "rule of law" approach to executive power is too narrow. Yet save perhaps for Justice Black, the majority did

[91] See, e.g., Adler (2012).
[92] See Farber (2003), 127-28.
[93] 343 U.S. 708-709.

not cast doubt on any of the practices established by President Washington and his successors in the early republic, including leadership in foreign policy and executive orders. For his part, Vinson carefully avoided saying whether the president could violate a law, clearly one of the majority's concerns.

As we do today, in *Youngstown* the justices confronted a jumble of past executive "precedents" and claims of congressional intervention or "acquiescence." What was the constitutional relevance of Theodore Roosevelt's "stewardship" theory of the presidency and Taft's repudiation of that theory? Why wasn't Truman justified in thinking that he acted properly in an emergency, as he and Franklin Roosevelt had done so many times since Pearl Harbor? Did it matter that the Korean War had not been authorized by Congress or did the UN Charter provide such authorization?

Theories of constitutional change enable us to make progress on this longstanding difficulty with the analysis of executive power. The theory of constitutional orders encourages us to evaluate these conflicting claims in their institutional, political and historical context and ask whether they provided a secure template for the future. Yet this theory also gives the authoritative text of the Constitution a central role. Understanding the tension between the unchanging text and changing historical circumstances remains the central challenge for analysis of the law of executive power.

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