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Federalist No. 70: Is the President Too Powerful?

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Federalist *No. 70 sets the stage for a powerful chief executive through its emphasis on energy in the executive. This essay reviews the challenges of holding this energy accountable in a republican form of government and concludes that recent presidents have stretched their authorities beyond even the most aggressive defense of the concept. Comparing presidents Abraham Lincoln and George W. Bush, the author concludes that the founders never intended to give any president authority to suspend the law during emergencies. His appendix to* Federalist *No. 70 is designed to both restate and reset the debate about just how far presidents may go in pursuit of national goals.*

Occasionally, the United States is confronted with the dilemma that, in emergencies, presidents may find it necessary to take actions that ignore constitutional restraints and break the law. In such cases, a strict adherence to the law might prevent the president from acting quickly to protect national security. Some have argued that the president has the constitutional authority to take whatever actions are deemed necessary, regardless of the law, and that this authority is available indefinitely as long as it is exercised when the president cites the commander in chief authority conferred in Article II of the U.S. Constitution (Bybee 2002; Yoo 2005, 2006, 2010).

This essay, however, argues that the only circumstances under which the president can take actions not granted in the Constitution are those during genuine emergencies. In such extraordinary circumstances, the president explicitly must acknowledge that the actions are extraconstitutional and must seek congressional sanction as soon as the immediate emergency has passed.

Advocates of granting increased national security authority to the president often refer to the *Federalist Papers,* particularly Alexander Hamilton's *Federalist* No. 70, to support their goals. In opposition to those arguments, this article maintains that the Constitution provides sufficient authority for the president to act expeditiously in an emergency and still respect the principles of separation of powers. It first will consider the ambiguity of executive authority in the Constitution and then examine the defense of the institution of the presidency set forth in the *Federalist Papers.*

The essay will illustrate different approaches to prerogative power (defined as power not sanctioned by the Constitution) by contrasting President Abraham Lincoln's actions at the beginning of the Civil War with President George W. Bush's extraordinary claims to executive power during the war on terror. It will argue that the exercise of prerogative power is legitimate in emergencies insofar as such actions are taken with transparency and congressional authority is respected after the emergency has passed.

The Ambiguity of Executive Power

In creating the presidency, the framers had to design an executive that was appropriate for a republic. Although Alexander Hamilton favored a strong executive, drawing lessons from what he saw as the positive aspects of European monarchs, his vision seemed too monarchical for most framers to accept, having just fought a war to throw off the yoke of King George III and the colonial governors. Hamilton laid out his vision of the office of president in a long speech to the Constitutional Convention on June 18, 1787. Hamilton's ideal executive would serve "during good behavior," that is, for life, barring impeachment. He would be able to exercise an absolute veto, as the British monarch did. He would be elected by "Electors chosen by the people" and able to avoid Senate confirmation for the heads of "Finance, War and Foreign Affairs" (Farrand 1:282–93). The Senate would have the "sole power of declaring war" and approving all treaties.

Many framers still feared arbitrary rule by an overweening executive, and at the beginning of the convention, Benjamin Franklin and Edmund Randolph favored a plural executive in order to limit its power.

But on June 1, James Wilson of Pennsylvania proposed that "a single person" would provide the "most energy, dispatch, and responsibility to the office" (Farrand 1966, 1:65). The first reaction of the convention to his proposal was not enthusiasm but a "considerable pause." George Mason objected because "[i]f strong and extensive powers are vested in the Executive, and that Executive consists only of one person; the Government will of course degenerate … into a Monarchy" (Farrand 1966, 1:113). Edmund Randolph of Virginia saw Wilson's plan as "the Foetus of Monarchy" (Farrand 1966, 1:66). Nevertheless, on June 4, the proposal for a single executive was approved by a vote of 7–3 (Farrand 1966, 1:93).

Those who feared arbitrary rule by a powerful executive preferred a more ministerial administrator who merely would carry out the wishes of the legislature. In Roger Sherman's words, the executive would be "nothing more than an institution for carrying the will of the Legislature into effect" (Farrand 1966, 1:65). Most of the framers, however, hoped for a "patriot king" who would be above partisan faction, with their ideal being George Washington (Rakove 1997, 268).

In contrast to the models of the president as a republican monarch (Hamilton) and the president as clerk (Sherman), the deliberations of the framers in 1787 resulted in an original model of a republican executive that was strong enough to act decisively but checked by means of constitutional constraints from the other two branches. Even Washington, after his first term, realized that he could not play the role of a patriot king who was above politics, but would have to defend his administration's policies from political attacks by Thomas Jefferson's Republicans.

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After the Revolutionary War, the state constitutions created weak executives with limited terms of office who were heavily dependent on the state legislatures. The experience with weak executives demonstrated to the framers that executives were not the only source of abuse of power. With the colonial experience in mind, James Madison feared that the popular branch of the legislature might be subject to the whims of the people. As he observed in *Federalist* No. 48, "The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex."

Despite Madison's concern, his Virginia Plan, which served as the starting point for debate in the summer of 1787, was quite vague about how the executive would fit into the broader scheme of government. Well into August, the Constitutional Convention continued to endorse the formula of an executive selected by the legislature for a single term of seven years. The framers finally concluded that if the executive were selected by the legislature, the president would be merely its tool and authority would be too concentrated. The executive had to have sufficient independence and power to be able to resist encroachments by the legislature. Up until then, the Senate was to have the powers of negotiating treaties and making appointments (Rakove 1997, 262). It was only in September that the convention, fearful of concentrating too much power in the Senate (treaty making and appointments), decided to give the president those two powers, though still subject to Senate approval (Rakove 1997, 265).

Having decided that the legislature would have too much power if it selected the president, Madison and some others favored direct election of the president. The main problem with this was not a distrust of the judgment of qualified voters to choose men of good character, but rather that the country was too large for most voters to become familiar with the major candidates. Even more important, the larger states would have a numerical advantage over the small and slave-owning states. This problem was solved by creating a set of electors separate from Congress based on the representational scheme of the Connecticut Compromise that reduced the effect of the numerical superiority of the more populous states in representation in Congress (Pfiffner and Hartke 2005).

As a result of the complex calculations that went into creating the presidency, the authority of the executive was ambiguous. The president would exercise the "executive power," make appointments, negotiate treaties, conduct war, and recommend issues for congressional consideration. Congress, on the other hand, would possess all legislative powers, fund and set rules for the military, and declare war; Senate consent would be necessary for appointments and treaties.

The ambiguity of executive power was a reflection of the ambivalence of the framers (Rakove 2010). They wanted an executive that was independent of Congress and capable of effectively administering the laws. But they feared replicating the absolute monarch of Great Britain and the overbearing colonial governors. As Gouverneur Morris said during the constitutional debates, "We first form a strong man to protect us, and at the same time wish to tie his hands behind him" (Farrand 1966, 2:317).

Similarly, over the past two centuries, the American people have been ambivalent about presidential power. They want a president who can act quickly and effectively in responding to and anticipating threats to national security. But they also want to protect civil liberties and keep presidential power within the constraints of the Constitution. That ambivalence has been most evident concerning the making of national security policy, particularly the war power and commander in chief authority. The next section will consider the light thrown on these issues by the arguments in the *Federalist Papers.*

The Federalist Defense of the Presidency

Alexander Hamilton's conviction that any government must be directed by a powerful executive grew in part from his experience as Washington's aide during the Revolutionary War. He considered interference from the Continental Congress and the lack of adequate executive power to be major impediments to effective administration. Hamilton decried the inability of Congress to deal with its obligations to the military (e.g., adequate pay and provisions) or exercise the powers of sovereignty (Hamilton 1780).

Thus, well before the Annapolis Convention, Hamilton proposed that the Articles of Confederation be revised to give Congress adequate sovereign authority. But he also argued that the government suffered from "want of a proper executive." "Congress have kept the power too much into their own hands and have meddled too much with details of every sort. Congress is properly a deliberative corps and it forgets itself when it attempts to play the executive. It is impossible [that] such a body, numerous as it is, constantly fluctuating, can ever act with sufficient decision, or with system" (Hamilton 1780, 151).

In *Federalist* No. 70, Hamilton again took up the importance of the executive and why unity in the executive was necessary for effective administration. *Federalist* No. 70 is primarily an argument against a plural executive or an executive required to consult with a council, as some of the state constitutions mandated. In making this argument, Hamilton laid out his ideas about the proper functioning of the executive, but he did not explicitly address the division of constitutional authority between the two branches.

He asserted in *Federalist* No. 70 that a "feeble Executive implies a feeble execution of the government. … a government ill executed, whatever it may be in theory, must be, in practice, a bad government." He took issue with those (such as George Mason) who favored a plural executive and those who favored attaching a constitutional council to advise the executive. Hamilton was making a functional argument about the nature of the executive power in any government; in order to perform effectively as a chief executive, the president needed "unity" (a single leader), "duration" (length of term long enough to provide stability), "support" (financial and personnel resources), and "competent powers" (necessary constitutional authority).

He contrasted the administrative function of the executive, and its need for unity, with the proper function of Congress, which was to provide "deliberation and wisdom" in the making of laws. In the decision about whether to go to war, the slow deliberation and wisdom of the many people in the legislature were beneficial. To conduct war, however, a single leader who could act quickly and decisively, with "[d]ecision, activity, secrecy, and dispatch," was necessary. Thus, hierarchical control and discipline are the marks of effective administration, particularly in national security.

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Unitary control is also necessary for accountability, and with a plural executive, "there would be no responsibility whatever in the executive department an idea inadmissible in a free government." Any council would be a "clog upon" the executive and a "cloak to his faults." Hamilton concluded *Federalist* No. 70 by asserting that "the UNITY of the executive of this State was one of the best of the distinguishing features of our constitution."

In *Federalist* No. 69, Hamilton addressed the convictions of the Anti-Federalists (particularly Governor George Clinton and his followers in New York) that the presidency as defined in the Constitution would be a danger to liberty and tantamount to a monarchy. Hamilton tried to reassure them that the Constitution limited presidential power and that presidential powers were not equivalent to the monarchical powers of the king of Great Britain. The British king could prorogue or dissolve Parliament, whereas the president can only adjourn Congress when there is a disagreement between the houses over time of adjournment. The president's pardon power does not reach cases of impeachment. While the British king had sole power to make treaties, any treaties the president negotiates must be agreed to by two-thirds of the Senate.

Hamilton made the starkest contrast between the two types of executives with respect to war and foreign relations in *Federalist* No. 69. The appointment of ambassadors must be confirmed by the Senate, and the president cannot confer titles of nobility or make religious decisions. The most striking contrast with respect to national security was Hamilton's characterization of the war power, which "would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the DECLARING of war and to the RAISING and REGULATING of fleets and armies, all which, by the Constitution under consideration, would appertain to the legislature." Contrary to subsequent experience, however, Hamilton argued that the president's right to receive ambassadors "is more a matter of dignity than of authority. It is a circumstance which will be without consequence in the administration of government." The authority to "receive ambassadors" and thus determine which foreign governments are legitimate has turned out to give the president significant foreign policy authority.

Whatever Hamilton's preferences were for the U.S. presidency, his arguments in the *Federalist Papers* were in favor of the executive as defined in the Constitution. He fully endorsed the formulation of the framers in 1787 in his arguments for the ratification of the Constitution. Later, in the Pacificus-Helvidius debates, Hamilton took issue with Madison and argued for a more expansive interpretation of the vesting clause (Frish 2007). The articles in the *Federalist Papers,* however, are more authoritative expressions of the framers' intent because they contain the arguments presented to the state conventions in order to win their ratification of the Constitution.

Applying the Constitution: Presidents Lincoln and Bush

In order to illustrate the difficulty of making constitutional decisions under extreme duress, we can compare President Lincoln's actions at the beginning of the Civil War with President Bush's actions during the years after 9/11. Each was faced with an extreme crisis calling for strong executive action, and each felt compelled to violate provisions of the Constitution. At the beginning of the Civil War, Lincoln suspended habeas corpus, imposed martial law, established a blockade, and increased the size of the army (Fisher 2005, 41–45). After the atrocities of 9/11, President Bush immediately shut down the national air transportation system. Over the next several years, he also asserted executive power to create military commissions, to suspend the Geneva Conventions, to deny habeas corpus to captives in the war on terror, and to use harsh interrogation methods, arguably a violation of the torture act (18 U.S.C. 2340).

President Lincoln

On the face of it, in April 1861, Lincoln violated the Constitution in taking actions at the beginning of the Civil War when Congress was not in session. When it met in July 1861, Lincoln explained the circumstances of his decisions and defended his need to act quickly without waiting for congressional authorization. "These measures, whether strictly legal or not, were ventured upon, under what appeared to be a popular demand, and a public necessity; trusting, then as now, that Congress would readily ratify them. " He added, "It is believed that nothing has been done beyond the *constitutional competency of Congress*" (Lincoln 1861; emphasis added).

Thus, Lincoln admitted the questionable legality of his actions and the primacy of Congress governing the spending of funds from the Treasury and suspending habeas corpus. He did not claim that, as president, he had the authority to take such actions unilaterally; he acted out of necessity. He invoked the suspension clause of Article I, which authorizes Congress to suspend habeas corpus only in certain circumstances: "The Privilege of the Writ of Habeas Corpus, shall not be suspended, unless when in cases of Rebellion or Invasion, the public Safety may require it." The beginning of the Civil War was clearly a case of "rebellion," and thus an appropriate justification for suspension by Congress.

Lincoln admitted that in suspending habeas corpus, he was usurping the role of Congress, but he justified breaking the law by arguing that obeying one part of the law might jeopardize the Union, and he asked rhetorically, "are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?. … It was decided that we have a case of rebellion, and that the public safety does require the qualified suspension of the privilege of the writ which was authorized to be made." He continued, "It is now recommended *that you give the legal means* for making this contest [the Civil War] a short, and a decisive one" (Lincoln 1861; emphasis added). Thus, Lincoln admitted that he had acted beyond his authority as president and asked Congress to ratify retroactively his actions, which it did.

President Bush and Presidential Prerogative

President George W. Bush's assertions of executive authority were arguably the broadest of any president.[1] Like President Lincoln, after 9/11, President Bush decided that the safety of the nation required quick, decisive actions. He shut down all air travel in the United States for more than a week—an emergency action taken without the authorization of Congress. The immediate actions taken by Presidents Lincoln and Bush seem to be covered by John Locke's definition of prerogative—executive action taken of necessity and without the concurrence of the legislature (Pfiffner 2008, 25–28). President Bush's immediate actions were not challenged by Congress or the opposition party.

President Bush took other actions, however, that were constitutionally more questionable. Over the course of several years, he

- refused to acknowledge writs of habeas corpus from captives in the war on terror
- refused to comply with the legal requirement to seek warrants from the Foreign Intelligence Surveillance Court before American communications could be intercepted (He kept this assertion of authority secret, and only after exposure by the *New York Times* did he publicly acknowledge his extraordinary claim to constitutional authority.)
- asserted that he could authorize harsh interrogation techniques, tantamount to torture, despite the prohibitions in U.S. law and the Geneva Conventions.
- claimed, in hundreds of signing statements, not to be bound by the provisions of the laws that he was signing when they, in his judgment, conflicted with his prerogatives as president and head of the "unitary executive" branch.

In each of these cases, President Bush argued that, as president, he had the unilateral authority to take the actions (Pfiffner 2008). Rather than arguing that his actions were an expedient necessity, President Bush asserted that he was acting with the inherent authority of the presidency. Thus, any future president could use his precedent to claim the same authority. In contrast, President Lincoln acknowledged that he was acting temporarily and that congressional authorization for his extraordinary actions was constitutionally necessary.

President Bush initiated several of these actions shortly after the trauma of 9/11, and few would quibble with his immediate decision to stop all air traffic. Similarly, denying habeas corpus to suspects arrested in the first several months after 9/11 would be understandable. Ordering the National Security Agency to intercept electronic communications within the United States also would likely be seen as reasonable.

But President Bush did not limit his actions to the immediate aftermath of 9/11. The denial of habeas corpus to suspects of terrorism was applied to a few suspects within the United States and to hundreds of suspects brought from Afghanistan to the prison at Guantánamo over several years, beginning in 2002. Though a few suspects were citizens or within the continental United States, it would be difficult to argue that they constituted a case of "rebellion or invasion." And there was no reason that President Bush could not ask Congress to suspend the writ, were it deemed necessary.

Presidential authority to order the monitoring of communications within the United States was allowed by the Foreign Intelligence Surveillance Act, provided that appropriate warrants were obtained from the special courts set up for that purpose. President Bush could have obtained the warrants, prospectively or retroactively (as provided by the law), or he could have asked Congress to change the law to take into account recent changes in communication technology.

But President Bush did not follow these constitutionally sanctioned paths. He claimed that he had the prerogative to deny habeas corpus to suspects of terrorism and continued to do so until he was reversed by the U.S. Supreme Court. In the case of electronic surveillance without warrants, President Bush undertook his actions secretly and modified his Terrorist Surveillance Program only after his attorney general, John Ashcroft, and several other high-level political appointees in the Justice Department threatened to resign.

In the immediate aftermath of 9/11, if the president had authorized the torture of several suspects who were thought to have knowledge of follow-on attacks, his decision might have been considered regrettable but understandable. But the Bush administration's policy of

harsh interrogations (often amounting to torture) was based on the president's decision on February 7, 2002, to suspend the Geneva Conventions with regard to al-Qaeda. This initial policy decision led to a series of implementation actions that resulted in the torture and abuse of hundreds of captives over the following several years (Pfiffner 2010). President Bush did not defend his actions by merely claiming necessity in an extreme situation (i.e., the 9/11 attacks). Rather, his lawyers argued that, as president in a time of war, he had the prerogative to override the antitorture statute.

President Bush's claims of executive power also were asserted in a series of hundreds of signing statements in which he argued that he was not bound to carry out the laws that he was signing when he deemed that they conflicted with his constitutional authority as president. Admittedly, some bills passed by Congress actually might impinge on the prerogatives of the president, and the president has the right to veto those bills or challenge them in court. But in his signing statements, Bush was claiming the prerogative to merely ignore the provisions of the laws with which he disagreed. Thus, President Bush's claims to executive power extended well beyond the issues of habeas corpus, warrantless surveillance, and harsh interrogations.

In contrast to President Bush, President Lincoln did not claim the unilateral authority to suspend habeas corpus, expand the army, and call up the state militias; he recognized that those powers were given to Congress alone. But he had to act with dispatch because of military exigency, and, after taking the necessary actions, he went to Congress for approval, recognizing that he had taken actions that the Constitution allocates to Congress. Lincoln's approach was much different than the assertion by President Bush that, as president, he had the constitutional authority to act unilaterally in these areas.

Conclusion

The framers explicitly chose not to give the president any authority to suspend the law during emergencies (Farrand 1966, 1:103).[2] They understood that national security crises, such as sudden attacks, would occur that would compel the executive to act quickly and without congressional warrant. The Constitution as it stands is able to handle the exigencies of national security emergencies as long as each branch recognizes its own limits and acts in good faith to restore the constitutional balance once the immediate emergency has passed. In such cases, as illustrated by Lincoln's actions at the beginning of the Civil War, the president may be forced to act in ways that are contrary to the law. But such acts must be taken openly and with the recognition that they are extraordinary and that the normal constitutional and legal processes will be resumed after the passing of the immediate crisis.

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Federalist No. 70 Appended

What might Publius say today in light of more than two centuries of American history and experience with the presidency? Are the principles embodied in the Constitution and the ideas of *The Federalist* capable of guiding the United States during an era characterized by threats of terrorism by nonstate actors and potential threats from nuclear powers? Publius might answer as follows:

During the two centuries of experience with the American Constitution, it has often been argued that the division of authority between the executive and legislature has worked to the detriment of good public policy, especially in the domain of national security.

Some have argued that the executive has been too feeble in its duty to protect the nation from foreign attack and internal foes. They argue that Congress and courts have ensnared the president in fetters that have hobbled effective policy making in defense of the nation. Although some legislative measures have constrained the executive with ill-conceived requirements and constraints, the experience of U.S. history, particularly the Cold War of the second half of the twentieth century and the "war on terror" of the early twenty-first century has shown the executive quite capable of and willing to dominate national security policy making. The more pressing question for the twenty-first century is, how can the necessary energy of the executive be preserved so that the president can protect the country but still be limited enough to preserve liberty and constitutional balance in the making of national security policy?

Despite our 1788 expectation that "in republican government, the legislative authority necessarily predominates," American history and experience have demonstrated the wisdom of Thomas Jefferson's prescient observation that "The TYRANNY of the legislature is really the danger most to be feared, and will continue to be so for many years to come. The tyranny of the executive power will come in its turn, but at a more distant period."

Having also argued that "that all people of sense will agree in the necessity of an energetic Executive," we remain certain that this energy can be constrained in ways that allow vigorous defense of the public safety yet ensure that the energy of the executive is balanced by "the deliberation and wisdom" that only the legislature can provide.

It was clearly established in the Constitutional Convention that the executive must be granted the flexibility to repel sudden attacks and put down dangerous insurrections and rebellions. But how can the executive be prevented from inventing pretexts to provoke a war, and by fait accompli, forcing the legislature to endorse his decision, "whether from calculations of policy or from provocations or injuries received"?

The separation of powers will only work if each branch systematically (but not unreasonably) protects its own constitutional prerogatives. Our expectation was that the ambition of those in the legislature would counteract any encroachments by an overly ambitious executive. Any overstepping by presidents would be countered by measures designed to protect the institutional prerogatives of the legislature. Such a reaction has occasionally occurred over the past two centuries, sometimes to the benefit of the national security, sometimes to its detriment. But it must be remembered that the Constitution was not intended to ensure wise policy—only the wisdom in choosing those selected for governing can ensure the wisdom of public policy. The balance in the separation of powers was designed not to ensure

wisdom, but rather to prevent the concentration of power in any one department. That is, the genius of the Constitution rests in its ability to prevent the accumulation of power, not in its ability to ensure the creation of wise laws and policies (which cannot be guaranteed by any institutional design).

More often than not over the past two centuries, the balance of power in national security policy has shifted toward the executive—for obvious reasons. The natural advantage of executive power (necessarily singular) is the ability of the executive to act with "decision, activity, secrecy, and despatch." In addition, the development of the United States has evolved to allow more power to gravitate to the modern presidency: the growth of the U.S. economy, with the consequent growth of its government; the threat of imminent attack due to the technology of modern warfare; the reality of instant communication making quick decisions of the essence. These realities of a globalized world have all allowed executives to accumulate power in ways that we did not anticipate two centuries ago

But even more important than the above factors in giving a great advantage to the executive has been the growth of modern factions in the guise of political parties. We warned about the "pestilential influence of party animosities," and we hoped that our designs to prevent the tyranny of majority factions (extending the sphere, separation of powers, checks and balances) would effectively thwart the growth of parties. Nevertheless, the ties of party affiliation have allowed willful presidents, bent on the glories or perceived necessity of war, to demand support from their co-partisans in Congress. Thus the ambition of institutional pride in Congress has at times been subordinated to the demands of party loyalty. Members of Congress see the political success of presidents of their own party as more important than wise public policy or protecting congressional institutional prerogatives.

Similarly, the civil liberties of citizens, protected by the Bill of Rights (wisely forced upon us by the opposition Anti-Federalists) have been repeatedly threatened by the fears generated by executives seeking more power for themselves. The genuinely patriotic motives of these executives do not mitigate (and even increase) the danger to the rights and liberties of the citizenry.

Given the dangers inherent in the natural inclination of executives to believe that they have a true understanding of the national security and that any opposition to their will is unfounded and ill-conceived, how can the separation of power retain the balance among government departments intended by the Constitution? The answer must lie in the genius of republican government and in the character of the people; the separation of powers in itself cannot guarantee wise governance. The citizenry must send and return to office men and women of the appropriate republican character and possessing the republican virtues of wisdom, restraint, and deliberation.

Thus, we observed that the parchment barriers of the constitutional separation of powers will only work as intended if the character of the officers of the three departments, particularly the executive, retain the true republican virtues of restraint and moderation.

Executives will always control the physical means of violence and power: police, army, and executive agencies are at their command. Without the restraint commanded by republican virtue, executives can do as they please, as they so often have during much of human history. Just as a certain reasonable restraint is necessary in the executive, a certain assertiveness is necessary in the legislature and judiciary. This delicate balance can be maintained only with the vigilance of an educated and concerned citizenry which avoids the dangers of mob mentality yet is willing to exercise its own prerogatives of demanding accountability from its government—in each of its three branches.

—PUBLIUS

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Notes

1. One possible exception might be Richard Nixon's claim that "when the president does it, that means that it is not illegal." Nixon's assertions of presidential power, however, were not justified with the breadth of constitutional arguments that were made by Vice President Dick Cheney, David Addington, and John Yoo in the Bush administration.
2. During the Constitutional Convention, Mr. Butler moved that "Resolved that the National Executive have a power to suspend any legislative act for the term of _____." The motion was unanimously rejected (Farrand 1966, 1:103).

References

Bybee, Jay S. 2002. Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A. August 1. http://www.npr.org/documents/2005/nov/torture/torturebybee.pdf [accessed August 27, 2011].

Farrand, Max, ed. 1966. *The Records of the Federal Convention of 1787.* New Haven, CT: Yale University Press.

Fisher, Louis. 2005. *Military Tribunals and Presidential Power: American Revolution to the War on Terror.* Lawrence: University Press of Kansas.

Frish, Morton J. 2007. *The Pacificus-Helvidius Debates of 1793–1794.* Indianapolis, IN: Liberty Fund.

Hamilton, Alexander. 1780. Letter to James Duane. In *Papers of Alexander Hamilton,* vol. 1, chap. 5, doc. 2, edited by Harold C. Syrett et al. New York: Columbia University Press, 1961–1979.

Lincoln, Abraham. 1861. Message to Congress in Special Session. July 4. http://www.presidency.ucsb.edu/ws/index.php?pid=69802#axzz1WG4EXDvj [accessed August 27, 2011].

Locke, John. 1690. *Second Treatise of Government.* Ed. C. B. Macpherson. Cambridge, UK: Hackett, 1980.

Pfiffner, James P. 2008. *Power Play: The Bush Presidency and the Constitution.* Washington, DC: Brookings Institution Press.

———. 2010. *Torture as Public Policy.* Boulder, CO: Paradigm Publishers.

Pfiffner, James P., and Jason Hartke. 2003. The Electoral College and the Framers' Distrust of Democracy. *White House Studies* 3(3): 261–72.

Rakove, Jack N. 1997. *Original Meanings: Politics and Ideas in the Making of the Constitution.* New York: Vintage.

———. 2010. *Revolutionaries: A New History of the Invention of America.* Boston: Houghton Mifflin Harcourt.

Syrett, Harold C., ed. 1961–1987. *The Papers of Alexander Hamilton.* 27 vols. New York: Columbia University Press.

Yoo, John. 2005. *The Powers of War and Peace.* Chicago: University of Chicago Press.

———. 2006. *War by Other Means.* New York: Atlantic Monthly Press.

———. 2010. *Crisis and Command.* New York: Kaplan.