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## **Unilateral Presidential Authority: Uses and Abuses**

**James P. Pfiffner**

The authority of the president in the constitutional order can be exercised in a number of ways, from the clearly legitimate, to the arguably unconstitutional. The Framers of the Constitution rejected the British model of government by designing a separation of powers system, in which the three separate branches share governing powers. The range of presidential authority can be examined with the following distinctions in mind.

I. Explicit Constitutional authority: Presidents can negotiate treaties, appoint judges and officers of the executive branch, veto bills, and conduct wars – all with some congressional participation. They can grant pardons, without any direct congressional check.

II. Implied powers: In order to carry out their executive duties, presidents can appoint White House staff, including “policy czars;” negotiate executive agreements;<sup>1</sup> recognize foreign countries, direct regulation and rule making by executive branch agencies; and create executive branch agencies and programs.<sup>2</sup> In carrying out these duties, they can use a number of unilateral policy actions, including: executive orders, memoranda, “letters” establishing administration policy, proclamations, and national security directives.

III. Asserted powers: Presidential assertions of authority are often clearly legitimate, but they sometimes stretch executive prerogative, such as when they make executive agreements,<sup>3</sup> exercise executive privilege, write signing statements, or issue secret national security directives. These assertions of presidential prerogative can be used in legitimate ways, but they can also be used to get around congressional objections.

This chapter will first consider unilateral actions of presidential discretion in domestic policy, including executive orders, memoranda, agency rule making, policy guidance to agencies, and emergency declarations. It will then turn to assertions of presidential authority concerning national security, including, the use of military force, coercive interrogation, indefinite detention of suspects, surveillance of Americans, signing statements, and targeted killing. The overall argument of the chapter is that executive discretion in executing the laws is necessary but that unchecked executive power is dangerous.

### **Unilateral Power in Domestic Policy**

The Constitution prescribes a policy making process that includes the introduction of bills in Congress, passage by both Houses, a presidential signature or qualified veto, and possible review and interpretation by the judiciary. The president is to “take care that the Laws be faithfully executed,” by directing the executive branch of the government. But in order to execute the law, the president must necessarily use discretion for several reasons:

1) Congress does not have the expertise (or time) to specify details of administrative practice in implementing the law; 2) Laws are often vague in order to garner sufficient support in Congress; and 3) for each law, there is a myriad of specific circumstances that demand discretionary decisions by administrators who apply the law in specific cases.

In the early 21<sup>st</sup> century, with Congress polarized along partisan lines, presidents sometimes felt that they had to act alone in order to accomplish their policy priorities. For instance, in 2004 President Bush, in announcing several faith based initiatives, declared that “Congress wouldn’t act . . . I signed an executive order. That means I did it on my own.”<sup>4</sup> In 2011, facing a Congress dominated by Republicans, President Obama said that if Congress would not act on important policy issues, such as immigration reform, he would use his executive powers to act alone. “We can’t wait for an increasingly dysfunctional Congress to do its job.” “Where they won’t act, I will . . . I’ve told my administration to keep looking every single day for actions we can take without Congress.”<sup>5</sup> In 2014 he said, “I can use [this] pen to sign executive orders and take executive actions and administrative actions that move the ball forward.”<sup>6</sup> Obama’s remarks referred to his proposed immigration reforms, discussed below.

This section will examine the range of authorities and instruments that presidents can use in executing the law in domestic policy. Most presidential and other executive branch administrative directives are routine and non controversial. But some constitute policy making, and some may arguably be used to circumvent congressional intent.

### **Executive Orders and Proclamations**

Perhaps the most visible formal administrative actions are executive orders, which are not mentioned in the Constitution but which are a legitimate way for a president to execute the laws. According to a 1957 report of the House Government Operations Committee, “Executive orders and proclamation are directives or actions by the President” based on law or the president’s constitutional powers. “Executive orders are generally directed to, and govern actions by, Government officials and agencies,” and they have the force of law.<sup>7</sup>

In contrast, proclamations “in most instances affect primarily the activities of private individuals.”<sup>8</sup> Of the more than 9,000 presidential proclamations, most are symbolic or ceremonial, announcing, e.g. National Mentoring Month. But they also establish public policy, as when President Ford granted pardons to Vietnam War draft evaders.<sup>9</sup> Proclamations are also used by presidents to set aside federal lands for preservation for historic purposes, pursuant to the Antiquities Act of 1906. Presidents have created more than 150 national monuments, such as FDR’s setting aside the Jackson Hole, Wyoming area in 1943 or President Obama’s creation of the Bears Ears National Monument in 2016. In creating national monuments, presidents can act unilaterally and quickly; a number of proposals to limit presidential authority were considered by the 114<sup>th</sup> Congress, but none of them became law.<sup>10</sup> The 1957 House Report stated that, “The difference between Executive orders and proclamations is more one of form than of substance.”<sup>11</sup>

Executive orders that are firmly based in law or the president's constitutional authority have the force of law, as do proclamations and memoranda based on those grounds. Although most major governmental policies are accomplished through legislation, historically, presidents have established important policies through issuing executive orders. For instance,

FDR established the Executive Office of the President (1939)  
FDR ordered the internment of Japanese Americans (1942)  
Truman desegregated the military services (1948)  
Truman ordered the seizure of steel mills to prevent strikes (1952)  
Eisenhower enforced desegregation of Arkansas schools (1957)  
Kennedy established the Peace Corps (1961)  
LBJ ordered equal opportunity in Housing (1965)  
Reagan centralized regulatory review in OMB (1981)  
Bush established the Office of Homeland Security (2001)  
Obama prohibited US intelligence agencies from using torture (2009)<sup>12</sup>

Executive orders can be symbolic, routine, or policy formulating. Symbolic orders are often ceremonial, such as creating new military medals. Routine orders merely specify how agencies are to execute the law, as is the president's constitutional duty. But when the president issues an executive order to depart in significant ways from previously established policy or to interpret the law in ways seemingly in conflict with congressional intentions or to accomplish policy purposes that could not make it through Congress, the president, in effect, exercises law making authority.

Every president since George Washington has issued executive orders, but their systematic numbering did not begin until the Federal Register Act was passed in 1936. In addition, there were many previously unnumbered orders that have not been systematically accounted for; executive memoranda and "letters" have not been systematically numbered. The University of California, Santa Barbara American Presidency Project has compiled the number of executive orders for all presidents and calculated the average number per year for each president.<sup>13</sup> Early presidents issued orders in the double digits, though Ulysses Grant issued more than 200, and Theodore Roosevelt, in accord with his "stewardship" approach to the presidency, issued more than 1000, as did Woodrow Wilson. Franklin Roosevelt issued more executive orders than any other president, 3,721, which also made him the leader in average number of orders per year at 307.<sup>14</sup>

After World War II, the number of executive orders dropped sharply, and beginning with Eisenhower, the average number per year ranged from 33 (Obama) to 80 (Carter).<sup>15</sup> After the election of Ronald Reagan, the average number per year dropped from 68 between 1961 and 1980 to 43 per year from 1981-2012.<sup>16</sup> This decrease, however, did not signal less presidential administrative direction, because the number of policy-significant (as opposed to routine) orders tripled from the 1950s through the 1990s.<sup>17</sup> In rebutting accusations that he was using executive orders excessively, President Obama argued that

he had issued only 20 executive orders in 2013, the fewest in more than a century; in the same year, however, he issued 41 memoranda to agencies.<sup>18</sup>

## **Memoranda**

Although more recent presidents issued fewer formal executive orders than their immediate predecessors, that does not mean that they backed off using unilateral presidential directives to accomplish their priorities. Short of executive orders and proclamations, presidents can accomplish many of the same goals by issuing formal memoranda and directives to agencies (until 1978 they were called “presidential letters”). Presidential memoranda are basically instructions to an agency to take some administrative action. If the president determines that they have “general applicability and legal effect,” they are published in the Federal Register (693 from 1946 to 2013), though many more memoranda are issued that are not cited in the Federal Register.<sup>19</sup>

If they are published and issued under the president’s legal authority, memoranda have the same force of law as executive orders, and are enforceable in federal court.<sup>20</sup> The main difference between executive orders and other directives, such as memoranda, is that executive orders are (since 1935) numbered and must be published in the Federal Register, while only some memoranda are published in the Federal Register. The use of substantive policy memoranda (rather than routine or symbolic) has been increasing, and they have been used to accomplish significant policy changes.

Presidents may be tempted to use memoranda because they are less visible than executive orders, and they are not codified; thus they give presidents the opportunity to accomplish their policy goals below the radar, without public notice. On the other hand, when they want to take credit for their administrative determinations, they can publicly call attention to them to take credit for helping part of their constituencies.<sup>21</sup> President Obama issued memoranda to an unprecedented degree and (through 2014), Obama memoranda outnumbered executive orders.<sup>22</sup>

## **Agency Rules and Regulations**

In order to implement laws, federal agencies and commissions have to issue regulations to specify how the law will be administered, and presidents can make policy in executive branch agencies through the administrative process. The process for this type of policy making is formalized through the Administrative Procedure Act of 1946.

Since these rules carry out the law, they have the force of law and are enforceable in court. In order to issue a regulation, agencies must comply with the Administrative Procedure Act, which requires that proposed regulations be justified and published in the *Federal Register*, which requires at least a 30 day period during which the public can submit comments, for or against the proposed rule. Once the 30 days have passed and comments taken into consideration, the rule becomes finalized, and has the force of law.

It is difficult to reverse a rule, once it is finalized, because Courts, under the Chevron doctrine, presume the legitimacy of a rule as long as it is “reasonable.” If a president wants to reverse a rule, the agency must go through the APA procedure again and provide justification for the change. Of course, Congress can change the law in order to reverse a policy the agency is implementing, but the full legislative process is a cumbersome way to change a specific policy.

Congress also gave itself the authority to reverse individual rules or regulations within 60 days of their issuance, when it passed the Congressional Review Act in 1996. But the reversal requires a joint resolution of Congress, which can be vetoed by the president. This probably explains why only one of 72,000 final rules issued since 1996 has been reversed, since a president would likely veto a reversal by Congress of a rule issued by an agency during his administration. A new president of a different party and a like-minded Congress, however, may choose to reverse rules issued during the final six months of an administration of the other political party.<sup>23</sup>

Proposed regulations have also been required to be submitted to the Office of Information and Regulatory Affairs (OIRA) in the Executive Office of the President, for cost benefit analysis. This extra hurdle can be used by presidents to stop regulations that go against administration policy preferences.<sup>24</sup>

## **Reversing Unilateral Policy Making**

Executive orders, proclamations, and memoranda may have the force of law, but they can be nullified by courts, Congress, or a future president. A succeeding president can easily revoke or replace previous unilateral actions, which commonly happens when a president of a different political party is elected.

### *Reversal of Executive Orders*

As mentioned above, presidential authority to issue executive orders is subject to checks from the other branches. Since public law is more authoritative than presidential directives, unless the president bases his actions on clear constitutional grants of power, Congress can override them by “amending, nullifying, repealing, revoking, or terminating the authority on which it is founded.”<sup>25</sup> For instance, after George H.W. Bush issued an executive order directing the Department of Health and Human Services to create a human fetal tissue bank, for research, Congress passed a bill stating, “the provisions of Executive Order 12806 shall not have any legal effect.”<sup>26</sup> Congress can also use its fiscal authority to deny funds to certain executive branch activities, as it did when it thwarted President Obama’s 2009 Executive Order 13492 to close the US prison in Guantanamo.

Executive orders can also flip back and forth, when the presidency changes hands. For instance, in reaction to abuses of presidential power in the Nixon administration, President Carter issued Executive Order 12065 to require more open access to government policies and classification, replacing President Nixon’s order (11652). President Reagan reversed Carter’s order with his own (12356). President Clinton revoked Reagan’s order with Executive Order 12958. President George W. Bush then issued Executive Order 13233

to assert more presidential control over the release governmental records. After President Obama's first day in office, he revoked the Bush order and later replaced it with his own approach to classification (EO 13526).<sup>27</sup>

President Reagan, in order to curb federal regulations, issued executive orders 12,291 and 12,498, which required all proposed agency regulations to be submitted to the Office of Management and Budget for cost benefit analysis. Agencies could not issue the proposed regulations until OMB allowed them to, and often OMB stopped proposed regulations. President Clinton, however, reversed these orders as well as "all amendments" and "all guidelines issued under those orders" when he issued Executive Order 12,866.<sup>28</sup> When President Obama came to office, he reversed the Bush Administration policies on harsh interrogations techniques by executive Order 13,491.

Federal courts can also reverse executive orders. The quintessential example of this is the Supreme Court decision in *Youngstown Sheet & Tube v. Sawyer* (1952). President Truman had issued an executive order seizing the nation's steel mills because of a threatened strike by workers, which might have hindered US production capacity during the War in Korea. The Court declared Truman's actions to be an unconstitutional exercise of presidential discretion, because the Constitution did not authorize such actions and Congress had rejected a provision in the Taft-Hartley Act, that would have authorized such actions by the president. The Court declared, "the founders of this nation entrusted the lawmaking power to the Congress alone in both good and bad times."<sup>29</sup> Notwithstanding the declaration of the Court, presidents do exercise, in effect, lawmaking power when they issue executive orders that are not reversed in federal court or by Congress (subject to a presidential veto).<sup>30</sup>

#### *Reversal of Memoranda*

Presidential memoranda have also been reversed by presidents, for example on the issue of abortion. President Reagan issued the "Mexico City Policy" which denied US government funding for nongovernmental organizations that provided "advice, counseling, or information regarding abortion, or lobbying a foreign government to legalize or make abortion available."<sup>31</sup> As soon as President Clinton was inaugurated, he reversed Reagan's policy with a memorandum to the Secretary of Health and Human Services with instructions to lift the "gag rule." established by the GHW Bush administration.<sup>32</sup> When George W. Bush became president, he issued a memorandum to reinstate the "Mexico City" policy of the Reagan administration.<sup>33</sup> On this third day in office, President Obama subsequently reversed Bush's reinstatement of Reagan's policy by Memorandum.<sup>34</sup>

Another series of memorandum reversals by presidents concerned restrictions on foreign aid for nongovernmental organizations that allowed abortions. The restrictions were established by President Reagan, reversed by Bill Clinton, reinstated by George W. Bush, and reversed again by Obama in 2009.<sup>35</sup> Upon taking office, newly elected presidents can also delay the implementation of regulations. The incoming administrations of Presidents Clinton and George W. Bush issued memoranda instructing departments and agencies to extend for 60 days the implementation of regulations that were issued by the previous administration but had not yet gone into effect. Their purpose was to determine if

the proposed regulations were inconsistent with the new administration's policy preferences and potentially to withdraw any that were.<sup>36</sup>

### *Reversing Obama Immigration Policy Directives*

In contrast to formal administrative rules and regulations, presidents can issue general directives or policy guidance to instruct agencies how to administer their programs (e.g. agency policy statements, interpretive guidance, press releases, etc.). These directives do not have the force of law and can be easily reversed by a new administration by issuing new policy guidance.<sup>37</sup> One example of policy guidance is President Obama's controversial policy guidance to the Department of Homeland Security concerning immigration policy, and its subsequent reversal by the judiciary.

In 2013 the Senate passed an immigration reform bill (the "Dream Act"); a majority in the House of Representatives favored the bill, but Speaker John Boehner refused to bring it to the floor for a vote because Democratic votes would have been necessary for it to pass. In response, President Obama decided to use administrative action to accomplish some of the goals of the "Dream Act" by initiating a program called Delayed Action for Childhood Arrivals (DACA).

On June 15, DHA Secretary Janet Napolitano issued a directive based on "prosecutorial discretion" to prioritize deportation of persons residing in the country illegally. Under the directive, deportation would be delayed for two year periods for children who came to the US before their 16<sup>th</sup> birthday, were in school or the military, and had not been convicted of a crime. The program would not be a path to citizenship or change immigrants' legal status, though they would be allowed to work and go to school without fear of deportation for the period in which they were covered by the policy. The policy covered between one and two million children.

In November of 2014 President Obama decided to expand the DACA program to include the parents of children covered by DACA, the new directive was called Deferred Action for Parents of Americans (DAPA). This policy was directed by DHS Secretary Jeh Johnson to expand the DACA program to prioritize the deportation of criminals and grant deferred deportation status to the parents of US citizens or those with lawful permanent residency. This would have extended limited protection from immediate deportation to between four and five million people. The main legal argument of the Obama administration was that in enforcing the law, priorities had to be set, and DAPA was a legitimate exercise of prosecutorial discretion.

Texas and other states sued to block implementation of the programs, arguing that the policy directive had important substantive effects on US immigration policy as well as imposing costs on states and was thus an abuse of executive discretion. The 5<sup>th</sup> circuit court of appeals affirmed a lower court's injunction to stop implementation of the policy. It decided that President Obama exceeded his executive discretion in setting the policies in DAPA. When the Obama administration appealed, the Supreme Court voted 4 to 4, which had the effect of allowing the lower court decisions to stand.

DACA and DAPA were clear cases of a president trying to accomplish through administrative direction policies that Congress would not enact. Setting priorities for the enforcement of the law is a legitimate exercise of administrative discretion. In the case of DAPA, however, the policy implications of the administrative actions were significant, and Congress had previously rejected the policies. Thus the arguments that Obama had exceeded his executive discretion were reasonable.<sup>38</sup>

## **Emergency powers**

The Constitution did not grant any emergency authority to presidents, and the only authority to suspend the right of habeas corpus, was placed in Article I. Nevertheless, in times of genuine national security or domestic emergencies, presidents are expected to take action. Many of these actions are pursuant to the president's authority to take care that the laws be faithfully executed. In addition, Congress has over the years, provided the president with stand-by emergency authorities covering some aspects of unforeseen situations in which quick action must be taken in order to protect lives, property, or national security.

In the 20<sup>th</sup> century Presidents declared a large number of national emergencies, and in the 1970s Congress decided to examine their usage. It found that a number of national emergencies from previous decades were still in effect, despite the end of the emergencies they were declared to deal with. A Special Committee on National Emergencies found that a total of 470 delegations of emergency authority had been enacted, four of which were still in effect.<sup>39</sup> Since there were no automatic provisions for their termination after the emergency had been dealt with. In response, Congress passed the National Emergencies Act in 1976.<sup>40</sup>

The Act provided for the termination of national emergency delegations after two years, unless they were renewed by Congress. It also provided procedures by which presidents could declare national emergencies, including reporting requirements to Congress. Between the enactment of the law in 1976 and 2007, more than 40 emergency powers were invoked by executive order, many of them concerning trade restrictions regarding national security.<sup>41</sup> Generally, over the past century, emergency powers of the president have come to be circumscribed more formally in public law. Most recent actions taken by presidents under the national emergency Act have been narrowly tailored.

In a genuine national emergency, such as the 9/11 attacks, the president would have great leeway in dealing with the emergency.<sup>42</sup> In fact, the proclamation of President Bush after the 9/11 attacks (Number 7463) was still in effect more than a decade after it was issued. President Obama continued to extend the emergency proclamation annually with notices published in the Federal Register.<sup>43</sup>

## **National Security Policy**

The Framers of the Constitution, mindful of the abuses of European monarchs in the previous several centuries, designed a government that would keep executive powers in

check, particularly in war making and national security. In a letter to Thomas Jefferson, James Madison observed: "The constitution supposes, what the History of all Govts demonstrates, that the Ex. is the branch of power most interested in war, & most prone to it. It has accordingly with studied care, vested the question of war in the Legisl."<sup>44</sup> John Jay expressed the Framers' suspicions of executives in Federalist 4: "absolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans. " Madison, commenting on the dangers of executive overreach, observed, "It is in war, finally, that laurels are to be gathered; and it is the executive brow they are to encircle. The strongest passions and most dangerous weaknesses of the human breast; ambition, avarice, vanity, the honourable or venial love of fame, are all in conspiracy against the desire and duty of peace."<sup>45</sup>

Thus the Constitution in Article I, Section 8 gives most war powers to Congress, including the authority to "declare war," "make Rules concerning Captures on Land and Water," "raise and support Armies," "make Rules for the Government and Regulation of the land and navel forces," and "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Presidents can unilaterally make executive agreements with other countries; these have virtually the same effect as treaties, except that they do not have to be ratified by the Senate and are not the "supreme Law of the Land," as Article VI of the Constitution provides for treaties. Executive agreements made pursuant to a treaty or law are not constitutionally problematical. But executive agreements based on the sole authority of the president can be used to avoid congressional approval, such President Obama's joint agreement (along with other nations) with Iran to put its military nuclear development on hold. Presidents have issued executive agreements at an increasing rate. Total executive agreements since 1789 were more than 18,000, but since 1939 more than 7300 were made, in contrast to 1,100 treaties.<sup>46</sup>

The Framers left to the executive only the "commander in chief" authority. According to Alexander Hamilton, in Federalist No. 69, the commander in chief authority "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" (emphasis in original). The general interpretation of the commander in chief clause in Article II, is that once Congress has decided to go to war, the president has very broad leeway to decide how to deploy troops as well as make tactical and strategic decisions.

The reality of national security dynamics over US history, however, is that presidents in fact have gained much of the power of initiative in national security matters. The national security power of the president has continually increased since mid 20<sup>th</sup> century, and the last time Congress declared war was in World War II. A turning point came in 1950, when North Korean troops invaded the South Korea, and President Truman

sent US troops to Korea without a congressional declaration. The Cold War with the Soviet Union came to dominate national security concerns in the 1960s, and the possibility of a nuclear strike meant that the president had to be able to strike back before there was time to consult with Congress.

In 1973, in response to the “imperial” presidencies of Presidents Johnson and Nixon, Congress asserted itself and tried to rein in the president’s war making powers by passing the War Powers Resolution (overriding President Nixon’s veto), among other checks on executive power. This act called for presidential consultation with Congress and limited unilateral deployments of US forces to 60 days (with a possible 30 day extension). Presidents, however, never recognized the constitutionality of the War Powers Resolution. Even after the end of the Cold War, Presidents George H.W. Bush and Bill Clinton asserted the authority to send US troops into battle without congressional approval – Bush in Kuwait (though he did receive congressional approval) and Clinton in the Balkans. But neither fundamentally challenged congressional constitutional powers in unusual ways.

In the twenty-first century, however, President George W. Bush began to assert executive power in unprecedented ways.<sup>47</sup> At the beginning of his administration, he and Vice President Cheney felt that previous presidents had let Congress impinge on constitutional executive prerogatives, and that presidential powers had to be reasserted. The attacks of 9/11 provided the opportunity for them to greatly enhance presidential power in matters concerning national security. Senator Obama criticized some of the unilateral actions of President Bush, and reversed a few (e.g. interrogation policy), but in important areas he continued Bush’s policies. This section will examine Presidents Bush and Obama’s assertions of executive power in national security. President Obama’s exercise of Article II constitutional authority did not approach the level of assertions by President Bush, but neither did he explicitly give up much of the claimed executive power.

### **The Use Military Force**

Over the history of the United States, aside from major wars, many presidents have taken military action without gaining the agreement of Congress. These have been primarily justified by the need to protect US lives or property. Most of these interventions do not amount to wars, but some of them include significant engagements and may or may not have included congressional authorizations.

After 9/11 President Bush asked Congress for an Authorization to Use Military Force (AUMF) to invade Afghanistan to defeat the Taliban government that had harbored the al Qaeda terrorists who attacked the United States. It authorized President Bush to “use all necessary and appropriate force” against any group that “committed, or aided the terrorist attacks” on 9/11. In October 2002, Congress passed another AUMF to authorize the Bush administration to invade Iraq. Constitutionally, an AUMF fulfills the constitutional requirement that the president obtain the consent of Congress before going to war, and President Bush used these authorizations in his wars in Afghanistan and Iraq.

In 2014 after the Islamic State (ISIS or ISIL) committed many atrocities and occupied territory in Iraq, President Obama decided that the Islamic State was a threat to US security and sent several thousand US troops to aid Iraqi forces that were fighting ISIS. To justify his actions he cited the 2001 AUMF that authorized military action against al Qaeda, even though ISIS was renounced by al Qaeda and was not coordinating attacks with it. Critics argued that Obama was stretching the 2001 authorization so liberally, that it could be used to justify virtually any military intervention justified as a confrontation with terrorism.<sup>48</sup>

In the spring of 2011, President Obama decided to deploy US air power in Libya. Rebels were fighting the military forces of Libyan dictator, Maummar Gaddafi. Gaddafi's troops threatened to slaughter thousands of civilians in Benghazi. This posed a serious humanitarian threat and President Obama decided to intervene, and so the United States cooperated with several other NATO countries to impose a no-fly zone over Libya and help defeat Qaddafi's troops.

The administration justified its actions primarily on a UN Security Council resolution March 17, 2011, which authorized members to protect civilians and civilian populated areas that were under threat of attack. But the United Nations resolutions can only authorize US actions internationally, they do not supersede the U.S. Constitution with respect to the war power. The Constitution specifies that only Congress can declare war, with the recognition that the president can act unilaterally to repel sudden attacks. Obama did not seek congressional authorization for the use of force in Libya.

After US forces had been engaged in Libya for 60 days, the time limit set in the War Powers Act of 1973 expired, and the act required that the president obtain congressional approval or withdraw US forces. Rather than arguing that the War Powers Act was unconstitutional, the Obama administration, asserted that US actions in Libya did not constitute the nature of "hostilities" envisioned by the War Powers Act and thus the 60 day clock was not triggered. Obama's decision to use military power in Libya was an assertion that military power could be used unilaterally in humanitarian interventions. Future presidents will be able to refer to this precedent when they decide to deploy military forces unilaterally.

### **Coercive Interrogation**

Shortly after the 9/11 attacks, US forces in Afghanistan sent hundreds of suspected allies of al Qaeda to the US prison compound at Guantanamo Bay, Cuba for interrogation, though only five percent of them were captured by US troops.<sup>49</sup> Memoranda from Defense Secretary Rumsfeld authorized a range of harsh techniques that could be used to extract intelligence from suspects. The CIA acted under separate authorization to use "enhanced interrogation techniques (EITs)s on high value detainees at "black sites" in several countries.

In fall 2002 military leaders were under intense pressure from the White House to provide actionable intelligence on possible future terrorist attacks. High-level Bush

administration officials as well as military and CIA lawyers traveled to Guantanamo to brief its commanders on the legal aspects of using harsh interrogation techniques. According to a DOD report, 24,000 interrogations took place at Guantanamo from 2002 to 2005.<sup>50</sup> In February 2002 President Bush declared that the Geneva Conventions did not apply to how the United States treated suspected al Qaeda prisoners.

In 2002 and 2003, Secretary of Defense Rumsfeld approved a range of harsh tactics that led to: hooding, use of dogs, “prolonged solitary confinement” of detainees, “naked in totally empty concrete cells and in total darkness,” “prolonged short shackling in stress positions,” and “extreme temperatures.” The use of these techniques by US military personnel at Guantanamo, Bagram Air Force Base in Afghanistan, and the prison Abu Ghraib in Iraq were documented in formal reports of conducted by the Department of Defense.<sup>51</sup> The use of coercive interrogation techniques by the CIA, including waterboarding, was documented in the report of the Senate Select Committee on Intelligence; the executive summary was released in December 2014.<sup>52</sup>

In his campaign for the presidency Barack Obama criticized the Bush administration for its interrogation policies and promised to close the prison at Guantanamo if he were elected. After he won, he moved to keep his promises in order to make a clear break with the policies of the Bush administration. Two days after his inauguration, on January 22, he mandated the closing of the Guantanamo Bay detention facility (Executive Order 13,492) “as soon as practicable, and no later than 1 year from the date of this order.” The same day he issued Executive Order 13,491, directing the CIA to adhere to the policies specified in the Army field manual on interrogation, all of which comply with the Geneva Conventions; no “enhanced interrogation techniques” (EITs) could be used in interrogations.

In addition to the Geneva Conventions, the Convention Against Torture, the US has several laws prohibiting torture; Congress passed the Detainee Treatment Act of 2005.<sup>53</sup> After the summary of the Senate Select Committee Report was released, Congress passed and President Obama signed the National Defense Authorization Act for Fiscal Year 2016, Section 1045 of which, limited interrogation techniques to those specified in the Army Field Manual 2-22.3, which exclude torture.

Despite these laws, in his campaign for the presidency Donald Trump rejected legal prohibitions on torture and threatened to reintroduce the techniques of harsh interrogation: “Would I approve waterboarding? You bet your ass I would — in a heartbeat. . . . Believe me, it works. And you know what? If it doesn't work, they deserve it anyway, for what they're doing. It works.”<sup>54</sup> He also threatened to “take out their families, when you get these terrorists.”<sup>55</sup> The anti-torture laws might make it difficult for President Trump to reintroduce the use of torture for purposes of interrogations, but the Geneva Conventions and previous laws did not stop President Bush from authorizing their use between 2002 and 2008.

## **Indefinite Detention of Terrorist Suspects**

During the Bush presidency, more than 700 prisoners were incarcerated at Guantanamo Bay, Cuba, many of whom had been subjected to coercive interrogation. By the time he left office there was bipartisan support for closing the prison camp, which had become an international symbol of US abuse of detainees. When Obama became president about 200 detainees were left.

Early in his administration Obama issued an executive order that the prison be closed, but Congress passed several measures making it difficult or impossible for Obama to follow through on his intention. Congress also made it exceedingly difficult for Obama to transfer detainees out of Guantanamo, either into the continental United States for trial or to other countries.

Obama had determined that most of the detainees could be set free without undue risk to the United States. Some of the remaining detainees could be tried for crimes, either by military courts or Article III courts. But others had to be held indefinitely without trial, but since their prosecution was compromised by the use of evidence against them obtained by torture. At the end of his administration, Obama had been successful in resettling 179 detainees in other countries, though about 60 detainees remained in the prison.

Most problematic with respect to executive prerogative, was Obama's determination that some Guantanamo prisoners would be held indefinitely without trial. Holding persons accused of crime indefinitely without prosecuting them for crimes runs up against the Fifth Amendment to the Constitution, which states that "No person" shall be "deprived of life, liberty, or property, without due process of law." During a war, it is legitimate to capture enemy soldiers and hold them for the duration of the conflict, but there is no obvious end of terrorist threats to the United States. Before he became president, Donald Trump said that he would "load [Guantanamo] up with some bad dudes."<sup>56</sup>

## **Domestic Surveillance of Americans**

After abuses of domestic governmental surveillance by presidents of both parties were revealed by the Church Committee in 1975, Congress passed the Foreign Intelligence Surveillance Act (FISA) to ensure accountability and due process. Presidents had previously ordered domestic surveillance of American citizens based on their own interpretation of executive authority. The FISA, enacted in 1978, limited surveillance of domestic activities to cases in which there was evidence of foreign espionage. The Act created the Foreign Intelligence Surveillance Court (FISC) to review surveillance programs, judge their legality, and issue warrants (orders) to surveil individuals in the United States believed to be connected to foreign powers.

A month after 9/11, in October, 2001, President Bush secretly created the President's Surveillance Program (PSP), and authorized the National Security Agency to monitor communications related to foreign intelligence that were coming into or going out of the United States. Under FISA, communications passing into or out of the United States required a FISC order. But President Bush issued the order based on his own interpretation of his constitutional authority as president. In 2005 the *New York Times*

revealed that the National Security Agency had been collecting a broad range of communications of Americans without the required warrants by the FISC, raising the issue of the constitutional protections of the Fourth Amendment against unreasonable searches and seizures and the requirement for warrants based on probable cause.

The broader point here is that President Bush asserted the authority to ignore the law and created a program of domestic surveillance that was forbidden by FISA. When it was exposed, he argued that it was within his executive authority to do so. When that argument was not seen as compelling, he convinced Congress to grant the president authority, as interpreted by the FISC, to continue the surveillance he had initiated. President Bush established precedents for much broader surveillance of Americans without warrants than had existed before his presidency.<sup>57</sup>

When Barack Obama was a Senator he asserted that President Bush exceeded his legitimate executive authority when he ordered surveillance of Americans without warrants. Yet when he came to office, Obama continued these programs, the extent of which were secret from the public and unknown to many members of Congress. Thus despite his previous skepticism about NSA surveillance of Americans, after becoming president, Obama came to be convinced that NSA's collection of bulk communications data on all Americans was both constitutionally acceptable and necessary for national security

In June of 2013, former National Security Agency (NSA) contractor Edward Snowden released secret NSA documents demonstrating that NSA had been collecting in bulk the metadata on virtually all US telephone communications. The legal justification for the massive surveillance of millions of persons who were not suspected of crimes was based on an interpretation of the FISA that members of Congress did not foresee and did not think they had authorized in law. Thus Congress passed the USA Freedom Act in June, 2015. The Act prohibits NSA from collecting bulk metadata of US phone calls, but allows telecommunication companies to store the data in their servers. NSA can have access to the data upon the presentation of a warrant from FISC for access to a specific person or entity suspected of foreign terrorist links.

President Bush's decisions about domestic surveillance of Americans became authorized in law and were accepted by a president of the opposite party as necessary. It was only the Snowden revelations that alerted Congress of the reinterpretation of the FISA and prompted it to change the law to reflect its original intentions. American concerned about civil liberties and privacy did not claim that NSA's huge databases of domestic communications had been abused by the Bush or Obama administrations. But given precedents of abuse in American history, addressed by the Church Committee in 1975, the possibility of future abuses is troublesome.

## **Signing Statements**

A signing statement is a declaration by the president when he signs a bill into law; these statements usually thank supporters of the bill and explain how the law will benefit the country. Occasionally, however, presidents use signing statements to declare

that they do not feel bound by certain provisions of the law; these are termed constitutional signing statements. Constitutional signing statements had been used occasionally in the latter half of the 20<sup>th</sup> century, but President George W. Bush used them to an unprecedented extent. He issued more than 1000 constitutional challenges to provisions in more than 150 laws during his first six years in office. He used signing statements to assert the unilateral right of the executive to choose which provisions of laws to enforce and which to ignore. For instance, he used signing statements to indicate that he did not feel bound by all of the provisions of laws regarding: reporting to Congress pursuant to the PATRIOT Act; the physical coercion of prisoners contrary to the Detainee Treatment Act of 2006; whistle-blower protections for the Department of Energy; the number of U.S. troops in Columbia; the use of illegally gathered intelligence; and the publication of educational data gathered by the Department of Education.<sup>58</sup>

The implications of these sweeping claims to presidential authority call into question the very meaning of the rule of law. Despite the Constitution's granting lawmaking power to Congress, the use of signing statements to, in effect, nullify parts of the law, provides the president with the ability to exercise an absolute veto or an item veto, which were rejected by the Framers of the Constitution.<sup>59</sup> The "take care" clause of Article II thus can be effectively ignored.

Before he was president, Senator Obama denounced President Bush's use of signing statements and, as president, declared that "Constitutional signing statements should not be used to suggest that the President will disregard statutory requirements on the basis of policy disagreements." He promised to "act with caution and restraint, based only on interpretations of the Constitution that are well-founded."<sup>60</sup> Although President Obama did not use signing statements nearly as often as President Bush – issuing fewer than 50 objections to provisions in laws, he argued that they were occasionally necessary when there was a serious disagreement about the constitutional authority of the president and Congress.

Many presidents have issued signing statements, and some of them implied that they would not follow parts of the laws they were signing. In recent presidencies, these statements have been arguably unconstitutional. Nevertheless, occasionally Congress does pass laws that may impinge on presidential constitutional authority, so there is no clear remedy aside from self restraint on the part of the president. President Bush expanded the scope of signing statements in ways that future presidents could easily abuse. President Obama's use of constitutional signing statements, despite his comparative restraint, leaves open the possibility that future presidents will again use signing statements to achieve a veto of parts of a law with no opportunity for congressional override.

## **Drones and Targeted Killing**

In the 1970s, after several failed attempts to assassinate Fidel Castro, President Ford issued an executive order forbidding assassinations. But after 9/11 the Bush administration argued that killing selected individuals who were involved with terrorism was part of the war on terror and not covered by Ford's executive order.<sup>61</sup> Toward the end

of his administration, President Bush began to use armed, unpiloted aerial vehicles, commonly known as drones, to kill terrorists in Pakistan. When Obama became president, he greatly expanded the use of drone attacks to kill militants in Pakistan and Iraq, and extended their use to Yemen, among other nations.

Although President Bush authorized fewer than 50 drone strikes, The Obama administration made the use of armed drones, outside of hot battlefields, a major tactic for the United States in carrying out its campaign against terrorists who were believed to threaten the United States. President Obama significantly increased the use of drone attacks to more than more than 400 attacks in Pakistan and Yemen, killing between 2,000 to 4,000 militants and 300 civilians when he was in office.<sup>62</sup>

President Obama justified the US drone policy in public talks and several released documents. In May 2013 he argued that the use of drones was part of a “just war,” which is being “waged proportionally, in last resort, and in self-defense.” The targets are “highly skilled al-Qaida commanders, trainers, bomb makers, and operatives,” and “these strikes have saved lives.” He argued it is a “legal” war against “an organization that right now would kill as many Americans as they could if we did not stop them first.”<sup>63</sup>

He said that he would kill only those who presented an imminent threat to US personnel and whom it is infeasible to capture. The administration argued that there was an elaborate clearance process within the executive branch before a drone strike was authorized. But according to a white paper released by the Department of Justice, the definition of imminent threat was quite elastic.<sup>64</sup> The Obama administration even argued that a drone strike could be used to kill US citizens who were actively inciting war against the United States. This was the case when a US drone strike killed Anwar al-Aulaqi in 2011.

Despite the many advantages of drones, their use raises a number of concerns regarding their legality and strategic value. The guilt of the people targeted in US drone strikes was determined by intelligence that was not made public. Thus there is no external check on the accuracy of the intelligence or due process before executing the individuals. Killing US citizens by drones sets a dangerous precedent with respect to the Constitutional rights of due process guaranteed in the Fifth Amendment. From a policy perspective, the killing of hundreds of suspected militants as well as innocent bystanders in Pakistan has led to charges that the US is acting arbitrarily.

One of the most profound actions that governments can take is to take a person’s life. Presidents Bush and Obama have established precedents for the extra judicial killing of suspected terrorists without any congressional or due process check.

## **Conclusion**

Presidential assertions of power are understandable; they want to fulfill campaign promises and achieve policy goals within a system that deliberately limits executive power. divided government and polarization in Congress have often thwarted attempts to address important policy issues, making unilateral executive actions tempting. The Framers of the

Constitution understood the temptations to presidential aggrandizement and created a separation of powers system designed to limit executive power. The Framers expected that Congress would act to protect its own constitutional power, but they did not foresee the creation of strong political parties and debilitating partisan polarization of politics. Because of partisan loyalty and political timidity, Congress has often abdicated its rightful constitutional authority and thus has aided and abetted presidential assertions of power.

Presidential candidates encourage high expectations of policy success by blaming the other party's presidents for problems they could not prevent and promise to fix those problems if they are elected. But once in office, presidents have to deal with the high expectations they raised during their campaigns, and this encourages them to seek as much political and constitutional leverage as they can through unilateral actions. Precedents set by Presidents Bush and Obama have created more leeway for subsequent presidents to assert the same powers, and if history is any guide, they will stretch precedents to suit their own purposes.

The nation's chief executive wields much more power than the Framers of the Constitution anticipated, though in 1789 Thomas Jefferson had some intimation of the future of the office: "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"<sup>65</sup> That "more distant period" arrived 150 years after his prediction -- in the latter half of the twentieth century. Insofar as there is any threat of one branch dominating governance in the 21<sup>st</sup> century, it will be the executive branch.

James P. Pfiffner is University Professor in the Schar School of Policy and Government at George Mason University. His major areas of expertise are the U.S. Presidency, American National Government, the national security policymaking process, and public management. He has written or edited sixteen books, including *The Strategic Presidency: Hitting the Ground Running*, *Power Play: The Bush Administration and the Constitution*, and *Torture as Public Policy*. He has also published more than 100 scholarly articles and chapters in books.

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## ENDNOTES

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<sup>1</sup> Executive agreements pursuant to a statute or to implement a ratified treaty are implied by the "take care" clause in Article II. See Michael John Garcia, "International Law and Agreements: Their Effect upon U.S. Law," (Washington: Congressional Research Service, 2015), pp. 5-6.

<sup>2</sup> Presidents have authority over rule making in executive branch agencies (such as the Food and Drug Administration, the Federal Trade Commission, and the Occupational Safety

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and Health Administration), but they cannot directly control rule making by independent regulatory boards and commissions (such as the Federal Communications Commission, the Federal Energy Regulatory Commission, and the Federal Reserve Board).

<sup>3</sup> “Sole” executive agreements, not pursuant to a treaty or a law, are often made by presidents. When they are made pursuant to the president’s constitutional authority, such as recognizing the government of a foreign country, they are presumably legally binding. But if the president’s authority is ambiguous, courts may not enforce them. Michael John Garcia, “International Law and Agreements: Their Effect upon U.S. Law,” (Washington: Congressional Research Service, 2015), pp. 5-6.

<sup>4</sup> “President’s Remarks at Faith-Based and Community Initiatives Conference,” White House, (March 3, 2004), referring to Executive Orders 13199 and 13279.

<sup>5</sup> “Remarks by the President on the Economy and Housing,” White House Press Secretary (October 24, 2011).

<sup>6</sup> “Remarks by the President Before Cabinet Meeting,” (January 14, 2014) White House Press Office.

<sup>7</sup> Vanessa K. Burrows, “Executive Orders: Issuance and Revocation,” (Washington: Congressional Research Service, March 25, 2010), p. 1.

<sup>8</sup> Quotes are from Vanessa K. Burrows, “Executive Orders: Issuance and Revocation,” (Washington: Congressional Research Service, March 25, 2010), p. 1.

<sup>9</sup> Proclamation 4313. See Phillip Cooper, *By Order of the President*, 2<sup>nd</sup> ed. (Lawrence, KS: University Press of Kansas, 2014), p. 174.

<sup>10</sup> Carol Hardy Vincent, “National Monuments and the Antiquities Act,” (Washington: Congressional Research Service, 2016), p. ii.

<sup>11</sup> Quoted in Vanessa K. Burrows, “Executive Orders: Issuance and Revocation,” Congressional Research Service (March 25, 2010), p. 1.

<sup>12</sup> FDR created EOP (EO 8248, 1939); FDR internment (EO 9066, 1942); HST (EO 9981, 1948); HST seizure of steel mills (10340, 1952); DDE desegregation (EO 10730, 1957); JFK Peace Corps (EO 10924, 1961); LBJ housing (EO 11063, 1965); Reagan regulations (EO 12291, 1981); GW Bush Office of Homeland Security (EO 13228, 2001); Obama torture prohibition (EO 13491, 2009).

<sup>13</sup> Many executive orders before the Federal Register Act of 1936 were not numbered, and so the numbers reflect the best estimates of scholars.

<sup>14</sup> University of California, Santa Barbara American Presidency Project, “Executive Orders”: [www.presidency.ucsb.edu/data/orders.php](http://www.presidency.ucsb.edu/data/orders.php),

<sup>15</sup> UCSB American Presidency Project, “Executive Orders”: [www.presidency.ucsb.edu/data/orders.php](http://www.presidency.ucsb.edu/data/orders.php), “Executive Orders.”

<sup>16</sup> John T. Woolley and Gerhard Peters, Do Presidential ‘Memo Orders’ Substitute for Executive Orders? New Data,” *Presidential Studies Quarterly*, (forthcoming, June 2017)..

<sup>17</sup> Andrew Rudalevige, “The Presidency and Unilateral Power: A Taxonomy,” in Andrew Rudalevige, “The Presidency and Unilateral Power: A Taxonomy,” In Michael Nelson, ed., *The Presidency and the Political System*, 10<sup>th</sup> ed. (Washington, D.C: CQ Press, 2013), p. 484. See also William G. Howell, *Power Without Persuasion* (Princeton University Press, 2003); and Kenneth Mayer, *With the Stroke of a Pen: Executive Orders and Presidential Power* (Princeton University Press, 2001).

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- <sup>18</sup> Andrew Rudalevige, “The Letter of the Law: Administrative Discretion and Obama’s Domestic Unilateralism,” *The Forum* Vol. 12, No. 1 (2014), p. 35.
- <sup>19</sup> Kenneth S. Lowande, “After the Orders: Presidential Memoranda and Unilateral Action,” *Presidential Studies Quarterly* (December 2014), p. 733.
- <sup>20</sup> Randolph D. Moss, “Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order,” Memorandum Opinion for the Counsel to the President, Office of Legal Counsel, Department of Justice (January 29, 2000); John Contrubis, “Executive Orders and Proclamations,” (Washington: Congressional Research Service, 1999), p. 20.
- <sup>21</sup> John T. Woolley and Gerhard Peters, “Presidential Choice of Forum for Issuing Orders: Theoretical Issues and New Data,” manuscript of 14 November 2016, p. 3
- <sup>22</sup> Kenneth S. Lowande, “After the Orders: Presidential Memoranda and Unilateral Action,” *Presidential Studies Quarterly* (December 2014), p. 731.
- <sup>23</sup> For details, see Maeve Carey, et al., “Memorandum: Obama Administration Ruled Potentially Eligible to be Overturned under the Congressional Review Act in the 115<sup>th</sup> Congress,” (Washington: Congressional Research Service, 17 November 2016); Christopher Davis and Richard Beth, “Agency Final Rules Submitted After May 30, 2016,” (Washington: Congressional Research Service, 9 November 2016).
- <sup>24</sup> In 2016 Executive Orders 12866 and 13563 governed this process. See the Office of Management and Budget website: <https://www.whitehouse.gov/omb/oira> (accessed 28 December 2016).
- <sup>25</sup> John Contrubis, “Executive Orders and Proclamations,” (Washington: Congressional Research Service, 1999), p. 15.
- <sup>26</sup> Vanessa K. Burrows, “Executive Orders: Issuance and Revocation,” (Washington: Congressional Research Service, March 25, 2010), p. 5.
- <sup>27</sup> For a full analysis of these reversals, see Phillip J. Cooper, *By Order of the President*, 2<sup>nd</sup> ed. (Lawrence, University Press of Kansas, 2014), pp. 31-33.
- <sup>28</sup> Executive Order 12,866, quoted in John Contrubis, “Executive Orders and Proclamations,” (Washington: Congressional Research Service, 1999), p. 19.
- <sup>29</sup> 343 US 579 (1952), p. 586-589.
- <sup>30</sup> John Contrubis, “Executive Orders and Proclamations,” Congressional Research Service (1999), p. 15.
- <sup>31</sup> *Weekly Compilation of Presidential Documents*, Vol. 29, (1993), p. 88. See Cooper *By Order of the President*, p. 117.
- <sup>32</sup> *Weekly Compilation of Presidential Documents*, Vol. 29, (1993), p. 88. See Cooper *By Order of the President*, p. 117.
- <sup>33</sup> *Weekly Compilation of Presidential Documents* Vol. 37 (2001), p. 216. See Cooper *By Order of the President*, p. 119.
- <sup>34</sup> Cooper *By Order of the President*, p. 119.
- <sup>35</sup> Kenneth S. Lowande, “After the Orders: Presidential Memoranda and Unilateral Action,” *Presidential Studies Quarterly* (December 2014), p. 724.
- <sup>36</sup> See Memorandum to Senator Tom Coburn, “PPACA Provisions and Potential Use of Executive Orders,” (Washington: Congressional Research Service, 14 November 2011), p. 6.
- <sup>37</sup> Todd Garvey, “General Policy Statements: Legal Overview,” (Washington: Congressional Research Service, 14 April 2016), p. ii.

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<sup>38</sup> Other examples of using administrative guidance were Obama's instructions to the Justice Department not to pursue prosecution in states that legalized the use of marijuana and the Department of Education's guidance on the treatment of civil rights for transgender people. CRS Legal Sidebar, "With the Stroke of a Pen: What Executive Branch Actions Can President-elect Trump 'Undo' on Day one?" (Washington: Congressional Research Service, 22 November 2016), p. 1.

<sup>39</sup> Much of this section is based on Harold Relyea, "National Emergency Powers," (Washington: Congressional Research Service, 2007).

<sup>40</sup> The law abolished many of the provisions of the presidential declared emergencies still in effect. Harold Relyea, "National Emergency Powers," (Washington: Congressional Research Service, 2007), 10.

<sup>41</sup> For a list of all of these executive orders, see Harold Relyea, "National Emergency Powers," (Washington: Congressional Research Service, 2007), pp. 13-16.

<sup>42</sup> Such as President Bush's Proclamation 7463 of 14 September 2011 (3 CFR2001) as cited in Relyea, "National Emergency Powers," p. 15.

<sup>43</sup> Cooper, *By Order of the President*, p, 191.

<sup>44</sup> Letter of April 2, 1798 *The Writings of James Madison*. Edited by Gaillard Hunt. 9 vols. New York: G.P. Putnam's Sons, 1900-1910. Found at

<http://press-pubs.uchicago.edu/founders/documents/a1-8-11s8.html>

<sup>45</sup> James Madison, 1793 *The Writings of James Madison*, Vol. 6, p. 174 (Hunt ed. 1900-1910, quoted by Fisher in "Exercising Congress's Constitutional Power to End a War," Statement before Congress (January 30, 2007), Law Library of Congress, p. 4.

<sup>46</sup> Michael John Garcia, "International Law and Agreements: Their Effect upon U.S. Law," (Washington: Congressional Research Service, 2015), pp. 5-6.

<sup>47</sup> See James P. Pfiffner, *Power Play: The Bush Presidency and the Constitution* (Washington: Brookings, 2008).

<sup>48</sup> Shoon K. Murray, "Stretching the 2001 AUMF: A History of Two Presidencies," *Presidential Studies Quarterly*, Vol. 45, No. 1 (March 2015).

<sup>49</sup> Joseph Felter and Jarret Brachman, *An assessment of 516 Combatant Status Review Tribunal (CSRT) Unclassified Summaries*. (NY: West Point, Combating terrorism Center, July 25, 2007).

<sup>50</sup> Church Report, Albert T. Church, Naval Inspector General and Vice Admiral, "Executive Summary" (unclassified summary of longer Report completed February 2005) <http://www.defenselink.mil/news/Mar2005/d20050310exe.pdf>.

<sup>51</sup> For details and documentation, see James P. Pfiffner, *Torture as Public Policy* (Boulder, CO: Paradigm Publishers, 2010), Chapter Three.

<sup>52</sup> Senate Select Committee on Intelligence, Findings and Conclusions, Executive Summary, declassified December 3, 2014.

<sup>53</sup> For details of the legal aspects of US torture, see James P. Pfiffner, *Torture as Public Policy* (Boulder, CO: Paradigm Publishers, 2010), Chapter 5.

<sup>54</sup> Jenna Johnson, "Donald Trump on waterboarding," *Washington Post* (23 November 2015).

<sup>55</sup> CNN/politics, <http://www.cnn.com/2015/12/02/politics/donald-trump-terrorists-families/>

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<sup>56</sup> Missy Ryan and Julie Tate, "With final detainee transfer, Obama's Guantanamo policy takes its last breath," *Washington Post* (28 December 2016).

<sup>57</sup> For details and documentation, see James P. Pfiffner, "Presidents Bush, Obama and the Surveillance of Americans," In *The Quest for Leadership: Essays in Honor of Thomas E. Cronin*, Michael Genovese, ed. (Amherst, NY: Cambria Press, 2015), pp. 131-148.

<sup>58</sup> For details, see James P. Pfiffner, "Presidential Signing Statements and Their Implications for Public Administration," *Public Administration Review* Vol. 69, No. 2 (March/April 2009), pp. 249-255.

<sup>59</sup> A veto negates the whole law unless overturned by a two thirds majority in both houses of Congress. Signing statements usually object to specific provisions in the law, which amounts to an item veto. An item veto allows an executive to veto individual parts of a law and let the rest of the law take effect. A number of states allow an item veto in their constitutions, but the president has no authority for an item veto.

<sup>60</sup> Barack Obama, "Memorandum on Presidential Signing Statements," (March 9, 2009), <https://www.whitehouse.gov/the-press-office/memorandum-presidential-signing-statements>.

<sup>61</sup> Shoon K. Murray, "Stretching the 2001 AUMF: A History of Two Presidencies," *Presidential Studies Quarterly*, Vol. 45, No. 1 (March 2015), p. 287.

<sup>62</sup> John P. Abizaid and Rosa Brooks, *Recommendations and Report of the Task Force on US Drone Policy*, (Washington: Stimson Center, June 2014), pp. 19, 28.

<sup>63</sup> John P. Abizaid and Rosa Brooks, *Recommendations and Report of the Task Force on US Drone Policy*, (Washington: Stimson Center, June 2014), p. 19.

<sup>64</sup> "Department of Justice White Paper, "Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa'ida or An Associated Force" (Draft November 8, 2011).

<sup>65</sup> Arthur Schlesinger, Arthur Jr., *The Imperial Presidency*, (Boston: Houghton Mifflin, 1973), p. 377.