Placing Prerogative Outside the Constittuion

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John Locke's concept of executive prerogative still instructs current legal understandings of the expansion of executive power over the last century. Today—as presidents and their legal teams advance conceptions of far-reaching, constitutionally-permissible executive powers—clearly understanding the scope and function of executive prerogative has become more important than ever. Modern circumstances might seem to demand the location of emergency powers within the executive's constitutional authority. Alexander Hamilton and Thomas Jefferson held two conflicting views on executive prerogative, and the conflict between their two views clarify the importance of understanding the limits of executive power. What results from this conflict is an understanding that executive prerogative must not be seen as located within the president's constitutionally-derived powers. Properly understood, an executive prerogative that exists outside the Constitution best represents the proper location of this power.

I. *The Forefathers of Prerogative*

To understand executive prerogative, one must begin by looking to John Locke. According to Larry Arnhart, Locke defined executive prerogative as "the power of the executive to act for the public good in those cases where action by the legislature would be impossible or ineffective" (1979, 124). Clement Fatovic offers that executive prerogative "gives the executive discretion to act not only where the law is silent, but 'sometimes even against it'" (2004, 430). Fatovic's conclusions support Arnhart, stating Locke's theory requires executive prerogative be exercised for "the public good" (430). At its most essential, executive prerogative acknowledges that unforeseen circumstances sometimes require executive action contrary to the law because the lawmakers—legislatures—are not as equipped for speedy action. Ross J. Corbett makes this clear when he writes, "No innovative ordering of the legislative power can overcome this inadequacy" (2006, 434). Executive prerogative is a necessity for any government employing a constitutional scheme with separated powers.

Yet, where executive prerogative is located within the American constitutional system is a matter hotly contested even among the Founding Fathers. Thomas Jefferson believed executive prerogative to be an extra-constitutional power. As Fatovic explains, "Prerogative must therefore be an extraconstitutional power in as much as the Constitution contains no explicit provision allowing the president to exceed the law" (2004, 434). It was nonetheless a usable power; as Fatovic goes on to write, "Jefferson believed that an extraordinary act of executive power could be both illegal and legitimate" (434). As David J. Siemers notes, "*results* were [Jefferson's] barometer of success" (2009, 67). Thus, Jefferson's utilitarian orientation towards government led him to believe following the written law was not the highest duty of a good citizen; laws, after all, are means to an end. Jefferson's belief was that in times of necessity, the president could act outside the Constitution, acknowledging his deed and appealing to the citizenry

for justification. Since all power ultimately rests in the hands of the citizens, citizens would judge whether the illegal action was justifiable or not. In fact, Jefferson admitted that their judgment might be imperfect, as Fatovic suggests: "Jefferson offered no guarantee that the officer who took such a risk would be vindicated, but his concern was not to protect the executive from prosecution. It was to preserve the foundations of free government" (19). Again, Jefferson emphasizes the overall result, sacrificing the good of the executive if necessary.

In stark contrast, Alexander Hamilton refused to accept this standard of judgment upon the executive, fearing it would discourage a president from exercising executive prerogative even when necessary. Fatovic writes, "The problem with Jefferson's conception of executive power as Hamilton saw it, though, is that it turns the executive into a law-breaker" (2004, 435). Hamilton believed that if extra-constitutional powers were necessary to preserve the nation, then the Constitution was not up to snuff. Therefore, the Constitution must allow for executive prerogative as an intrinsic executive power. Fatovic notes, "Hamilton declared that one of the self-evident and universal truths of politics is the idea that the powers of government to deal with emergencies 'ought to exist without limitation'" (437).

It is important to recognize, however, that Hamilton's statement does not refer exclusively to the executive. Hamilton did not believe the power of executive prerogative ought to be unchecked. Rather, "the burden falls on the people or their representatives to demonstrate that the executive exceeded his or her authority" (Fatovic 2004, 433). Everything the executive did would be subject to scrutiny and checks by the people and legislature—and while the executive's powers might not be able to be checked beforehand—they were subject to condemnation after the fact.

II. *Constitutional and Extra-Constitutional Criteria*

Considering these two views of executive prerogative, trade-offs occur with the selection of either one at the expense of the other. For instance, Jefferson's view of an extra-constitutional executive prerogative risks an executive acting outside the Constitution becoming normal. Secondly, Jefferson's view of the legitimate law-breaking president could mean that the Constitution declines in importance and is no longer respected as the legitimate source of government action. Jefferson's view of extra-constitutional power carries with it the possibility that a president acting in good faith could be punished, likely discouraging presidents from utilizing executive prerogative even when circumstances in fact call for its use. Finally, Jefferson's position risks a president who acts without governmental checks because he or she has invoked a power outside the Constitution with no clear means of reprimand.

However, Hamilton's view of constitutional prerogative risks that an expansive legal authority for executive power could become the norm. Hamilton's view of emergency executive powers implicit in the Constitution could mean the Constitution is seen as meaningless, simply including those things that the government considers desirable. Further, Hamilton's constitutional power chances a president who is too hard to punish if he or she abuses executive prerogative. Finally, Hamilton's position risks a president who acts without proper governmental checks because any actions he or she takes are legal, and even then can only be checked after the fact.

In siding with either Jefferson or Hamilton, one must acknowledge these trade-offs and address the shortcomings of that view on executive prerogative. Otherwise, one has not properly evaluated the effects of placing executive prerogative either outside or inside the Constitution.

III. *The Scholars Speak: A Literature Review*

Jefferson's and Hamilton's views are not the only two camps into which scholars can fall. For instance, Larry Arnhart explicitly rejects both approaches and argues that Locke's executive prerogative has no place in a constitutional democracy, a view that raises important concerns for this debate. Arnhart refutes Jefferson by declaring, "The framers intended that the Constitution be equal to every emergency" (1979, 122). Arnhart then focuses on the *habeas corpus* provision of the Constitution as evidence that the Founders built in explicit emergency powers that they did not intend to be surmounted, distancing himself from Hamilton. Arnhart rejects the idea that scenarios truly exist which might require the executive to act against the law or where it is silent, and asserts that the clearly-defined powers within the Constitution are enough to handle any crisis.

It is important to note that Arnhart is writing in 1979.Admittedly, he does an excellent job highlighting the inherent difficulties in reconciling executive prerogative with a constitutional democracy. However, his claim that "The framers intended that the Constitution be equal to every emergency" fails to answer the question, "But what if it's not?" In the post-9/11 world, Arnhart's refutation of Jefferson by asserting there are no problems the Constitution cannot address seems short-sighted, at best. Still, Arnhart's critique of Hamilton's position continues to have merit. His case that the Founders have already written in specific emergency powers is a strong one, and makes it much harder to simply place emergency powers and executive prerogative within the Constitution's general grant of executive power. The *habeas corpus* example, wherein the Constitution specifically recognizes that crises may arise requiring the writ of *habeas corpus* to be suspended demonstrates the Founders were thinking about emergencies. Their specificity in including this power undercuts the argument that other crisis powers would be included in a general grant of power later. In fact, the Constitutional Convention featured a specific debate concerning those conditions under which *habeas corpus* could be suspended, and how exactly to phrase that provision of the Constitution (Yale Law School 2008).

In contrast, Ralph Ketcham's (2003) collection of papers on the Convention demonstrates it spent very little time debating the extent of executive powers. Rather, the vast majority of debates around the executive focused on how he or she was to be elected, the length of term, and whether the president would be eligible for reelection. Even which body of government would try presidential impeachments appears to have garnered more debate than the extent of presidential powers (114-120, 165-171). When executive powers were discussed, it was done in broad terms, with debate composed near-universally of statements about the need to limit executive power so as to prevent a tyrant or monarch (42-42, 47-49). In fact, in George Mason's speech opposing the Constitution as written, he objected not so much to the strength of the executive as to the executive's weakness and lack of independence, declaring that the president would "generally be directed by minions and favorites; or he would become a tool of the Senate" (174). Perhaps the Framers all simply assumed executive prerogative and the capacity for unlimited power in responding to crises was embedded in the Constitution's general grant of executive power, but Madison's notes on the Constitutional Convention make this unlikely. More likely is that the

Framers explicitly specified in the Constitution those emergency powers they intended to grant to the federal government, such as suspension of *habeas corpus*. In the end, this does not answer the question of what a president is to do if he or she is confronted with a crisis for which the Constitution is not prepared and has not specified crisis powers.

At the far extreme is John C. Yoo, Deputy Assistant Attorney General under President George W. Bush. On September 25, 2001—two weeks after the September 11 al Qaeda terrorist attacks—Yoo authored a memo justifying an expansive use of executive power. Because the president's authority to make a unilateral military move against terrorists and nations supporting them falls within the category of actions where the law is silent or contradictory to the action, the memo is correctly viewed as a justification for executive prerogative. In claiming that this exercise of executive power is Constitutionally permissible, Yoo quotes selectively from Hamilton—over 80% of Yoo's quotes from Founding Fathers or the Constitutional Debates invoke Hamilton's words. Not only does Yoo treat Hamilton almost as if he were the sole Founder, he bends Hamilton's understanding of executive power to its breaking point. Yoo does this by treating Hamilton's references to federal power as references to purely executive power as well as using quotes from Hamilton to distort Hamilton's view of Lockean prerogative.

Yoo's examination of the Constitution ultimately leads him to conclude that decisions regarding military retaliation to the September 11 attacks are " for the President alone to make" (U.S.A. Department of Justice). But as scholar Clement Fatovic (2009) points out, Locke "gives the impression that only a severe crisis that both threatens fundamental values and leaves no time for legislative action would justify resorting to extraordinary powers" (16). Even Hamilton would have held this view. As Fatovic (2009) points out, "Even though the terrorist attacks of September 11 occurred about eight years ago, the situation today is still described as an emergency that justifies the continued use of questionable constitutional and statutory powers in a war with no end in sight" (18). Yoo's definition of executive prerogative is not limited to time and place; pushing Hamilton's view to the extreme, Yoo suggests that if a president ever has a power, then he always has that power, and the Constitution "confides in the President the authority" to make such a determination unilaterally (U.S.A. Department of Justice 2001).

Falling between Arnhart's and Yoo's views is the more moderate view of George Thomas, who believes Hamilton has the correct answer to the executive prerogative riddle. Thomas (2000) points to historical examples to argue "that our judgments of such a use of power are, of necessity, after the fact" (534). In line with Hamilton's thinking, Thomas sees evaluation as coming after action is taken—evaluation by the people and by the other branches of government, who can act against the president if his or her use of power is inappropriate. Thomas identifies the key as the interplay between the branches acting as check, allowing ambition to counteract ambition. A president can misuse executive power without acting illegally; after all, "prerogative is an inherent power derived from the government's power to preserve itself" (Thomas 2000, 536). But checks from the other branches and the people exist when it is misused. In Thomas's view, Hamilton's understanding of executive prerogative is superior to Jefferson's because Jefferson's view makes executive prerogative "necessary but strictly illegal. Necessity suggests that the President can, in fact, set aside the Constitution, and in setting aside the Constitution, the Congress, the courts, and the people are then truly powerless" (544). Only by declaring a power Constitutional and allowing the interplay of the different branches to check its abuse can prerogative be used but properly limited. For Thomas, declaring executive prerogative extra-constitutional is even more dangerous than

a seemingly unlimited executive power because once prerogative moves outside the Constitution, there are no clear means by which to check its misuse.

Thomas makes a mistake here in not recognizing that as an extra-constitutional power, exercises of executive prerogative are strictly illegal, not shielded from outside criticism by some invocation of the power of executive prerogative. At the end of the day, even if executive prerogative is categorized as extra-constitutional, invoking prerogative does *not* give the president carte blanche. Rather, viewed from Jefferson's position, the president has broken the law for the good of the country. He or she is subject to the law and to public opinion. Such a case could result in the impeachment of the president, where during the impeachment trial, the president's defense is, "Though my actions were illegal, the facts clearly show I had no other choice." Thus Congress, the courts, and the people are not so callously tossed aside, as Thomas assumes.

Furthermore, Thomas overlooks the fact that even without appeals to executive prerogative and the common good, a president could still ignore Congress, the courts, and the people, but by viewing executive prerogative as extra-constitutional, the president cannot claim that such action is within his Constitutional rights and hide behind the shadow of executive prerogative. Rather, stating that executive prerogative is extra-constitutional means that in his or her defense, the president must admit guilt, but ask for pardon based on the facts of the case.

Though Thomas attempts to defend the Hamiltonian perspective on executive prerogative, his argument overlooks key facts about the Jeffersonian view that prevent him from easily dismissing the Jeffersonian view. Unfortunately, defenders of Jefferson's view of executive prerogative have thus far done a poor job explaining and defending this Founder's stance.

For instance, Ryan Cooper strongly supports a Jeffersonian view of executive prerogative, declaring, "[A]ny act which violates the dictates of the Constitution is illegal, regardless of circumstance or claims to necessity" (2009, 31). Cooper views the debate as one between those who sacrifice inherent meaning in the Constitution in favor of limitless legal emergency powers and those who see the Constitution as having a fixed meaning with fixed powers while recognizing that some circumstances could require action that exceeds that fixed meaning. He writes:

> Defenders of the internal perspective must be willing to defend that the Constitution has no stable meaning, but rather its meaning is defined in reference to the present political environment... preserving the universality of the Constitution's authority, necessarily means diluting the integrity and coherency of its meaning. (Cooper 2009, 30-31)

Cooper offers a choice between a meaningful Constitution that can be violated and a meaningless Constitution that cannot be.

Cooper's defense of a Jeffersonian view begs the question. Cooper assumes the Constitution does not permit executive prerogative, and then argues that to allow it to do so would make the Constitution meaningless. But if executive prerogative in crises is a legitimate component of the executive power granted to the president, then the Constitution is not meaningless. If executive prerogative is embedded

in the grant of executive power, then a view of the power as Constitutional sacrifices no meaning at all, rendering Cooper's argument inert.

Another defender of extra-constitutional executive prerogative is Ross J. Corbett. Though he still stands clearly within Jefferson's camp, his analysis of Locke has slightly different implications than Cooper's,. Corbett writes, "prerogative is not a form of executive power as Locke defines it" (2006, 445). Thus, it makes no sense for executive prerogative to be a constitutional power. Rather, its extra-constitutionality arises from the fact that "prerogative was possessed before society was constituted, i.e., that it is a *natural* power" (Corbett 2006, 443). Prerogative is therefore a natural right shared by all citizens; the executive simply has more power than most to act where the law is silent or in contradiction of it when the public good requires such action. Corbett argues that laws are tools, not ends in themselves. As evidence, he points to the executive pardon as an occasion where the President can excuse actions by ordinary citizens who violate the law for the common good. Yet the executive cannot pardon himself or herself; rather, when the president violates the law he or she must turn to the people for pardon. This matches the system for which Jefferson advocated.

While Corbett's analysis of Locke is intriguing, his argument for extra-constitutional executive prerogative as a natural power of individuals represents unnecessary overreaching. Such a framing relies upon conceptions of natural rights not universally shared. For a defense of Jeffersonian executive prerogative to have more staying power, it should not rely on an appeal to conceptions such as natural rights. An argument for Jefferson's perspective ought to wrestle with the trade-offs between Hamilton's and Jefferson's views and explain why Jefferson's view comes out on top.

IV. *Where Prerogative Should Lie: Applying Extra-constitutional Criteria*

The first major trade-off between Jefferson's extraconstitutional view and Hamilton's constitutional view is whether one risks normalizing law-breaking through Jefferson's view or risks normalizing expansive and legal executive power through Hamilton's view. Here, one must acknowledge the perverse incentives created by the Hamiltonian view. To attempt to make executive prerogative Constitutional is to force elected officials to claim their actions are always legal. As Fatovic explains, "Contrary to assertions that the Bush administration exhibited utter disregard for the law in its efforts to prevent 'another 9/11,' there is evidence that the Bush administration actually took an 'excessively legalistic' approach in seeking to justify some of the most controversial policies it adopted in the first few years of the attacks" (2009, 14). It is this "excessively legalistic" behavior that truly risks setting a precedent. Yoo's (2001) legal memo serves as a historical example of what happens when the president is placed in a situation where he or she must attempt to justify behavior as legal, setting expansive executive power precedents along the way. Better to simply admit that the executive has broken the law and is subject to legal punishment, should the public through its elected representatives enforce the broken law. Even a Jeffersonian precedent of sometimes-permissible lawbreaking is much less dangerous if all parties acknowledge the president has no guarantee of getting off scot-free.

The second trade-off worth considering is whether one risks a declining respect for the Constitution due to justified executive law-breaking or a declining respect for the Constitution due to its portrayal as a document that justifies any executive action. Cooper's (2009) argument could have some traction here if supplemented by both Arnhart's (1979) reasoning regarding the Founder's intention to explicitly

incorporate emergency powers into the Constitution and a close reading of the Constitutional Convention debates on executive power. Furthermore, it is worth asking why the Constitution must be held in the highest esteem: is it truly more desirable that Americans respect a Constitution with a broad meaning that offers no limitations on executive crisis actions, rather than that Americans must be asked to discern whether a president's actions are just, though not legal? To worry about a declining respect for the Constitution is to assume the Constitution is worth preserving, and if it offers a limitless grant of power to the president under the general label of "executive power," this question must be taken seriously. If this is how the Constitution must be understood in order to preserve respect for the document, then perhaps it is not worthy of that respect, after all.

A third major trade-off is the punishment of a president who legitimately uses Jeffersonian executive prerogative, therefore discouraging presidents from its use, weighed against a president who cannot be easily punished when using Hamilton executive prerogative and therefore risks abuse. That Jefferson and Hamilton had this debate is understandable, but now that the Constitution has been in place for over two hundred years, historians can look at the office of the presidency over that period—and particularly over the last hundred years—to make a judgment over what appears to be the bigger gamble. Almost uniformly, inhabitants of the White House over the past century have been ambitious risk-takers rather than indecisive milquetoasts. The character of past presidents serves as a strong indicator that the true danger is in making executive prerogative too easy to use rather than too risky.

A final major trade-off is between the invocation of an extra-constitutional power with no clear means of punishment and a Constitutional power with no clear means of evaluation. Yet to characterize Jefferson's position as carrying this risk is to make the same error that Thomas made, in thinking the president has a claim of executive prerogative to hide behind. Rather, the true risk is in a president who claims everything he has done is legal and permissible, as Congress and the people then have no clear immediate means of checking his action. If it is legal for the president to break the law, then the nation's lawmakers are no longer a check on his power.

Though a trade-off is made no matter the view taken, it is Jefferson's perspective on executive prerogative that ultimately appears most attractive. Admittedly, it is logical for presidents to subscribe to a Hamiltonian view and attempt to place their actions within those powers that the Constitution permits. After all, "The Constitution permits it" is a much stronger defense than "What I did was unconstitutional, but I had a good reason." The president cannot be the one to advance the extra-constitutionality of executive prerogative argument; rather, scholarship and the American public must unite behind the idea, allowing the public to call out the president when he or she takes an excessively legal stance towards actions. It might be difficult for the public to separate right-and-wrong from legal-and-illegal—yet this is all the more reason for executive prerogative to be an extra-constitutional power. By recognizing that the president does have a possibility of doing something illegal yet going unpunished, defenders of the president will not feel the same need to justify his or her right actions as legal when they are not. This will preserve the Constitution as a meaningful document and help make uses of executive prerogative the exception, not the norm.

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