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Recommended Citation

Clement Fatovic, *Blurring the Lines: The Continuities Between Executive Power and Prerogative*, 73 Md. L. Rev. 15 (2013)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol73/iss1/3>

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BLURRING THE LINES: THE CONTINUITIES BETWEEN EXECUTIVE POWER AND PREROGATIVE

CLEMENT FATOVIC*

The idea that the President of the United States possesses *prerogative*, or what John Locke defined as the “[p]ower to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it,”¹ is deeply unsettling. According to Locke’s formulation, prerogative is supposed to be used only in extraordinary circumstances and only until the Legislature can remedy whatever defect in the law requires resort to extra-legal measures, but the notion that any individual is ever allowed to exercise such enormous discretionary power is difficult to square with a commitment to limited government and the rule of law. Prerogative entails the use of ad hoc and variable measures that are inconsistent with the predictability and uniformity that the rule of law has always required.² The United States Constitution does contain several provisions that could be interpreted as emergency powers, including the power to suspend the writ of habeas corpus³ and the presidential power to convene both houses of Congress “on extraordinary Occasions,”⁴ but it makes no mention of any power to act extra-legally.⁵ Thus, it is no surprise that legal and political scholars characterize prerogative (when they

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1. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 393 (Peter Laslett ed., Cambridge Univ. Press 2d ed. 1970) (1690).

2. For surveys of ideas associated with the rule of law, see RONALD A. CASS, THE RULE OF LAW IN AMERICA (2001); Richard H. Fallon, Jr., “*The Rule of Law*” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1 (1997).

3. U.S. CONST. art I, § 9, cl. 2.

4. U.S. CONST. art II, § 3.

5. Thus, according to this view, the pardoning power and the veto power are “the only discretionary powers that the President actually possesses.” Morton J. Frisch, *Executive Power and Republican Government—1787*, 17 PRESIDENTIAL STUD. Q. 281, 286 (1987).

acknowledge it at all) as an aberration from the normal operation of executive power.⁶ Whereas prerogative is a highly discretionary power that operates outside the bounds of the law, executive power is a rule-bound power that operates within the bounds of the law.

I argue that the rigid opposition that has dominated scholarship on this topic tends to overstate the differences between executive power and prerogative. Instead of viewing these forms of power as belonging to separate and distinct categories, it might be more accurate to view them as lying along a continuum that stretches from the least rule-bound to the most rule-bound exercises of power. This has important implications for how we understand both prerogative and executive power. Contrary to those who would suggest that prerogative is a wholly lawless power, this means that legal rules structure and regulate exercises of even the most extraordinary forms of prerogative. Prerogative, as Locke defined it, is supposed to be a narrowly tailored response to very specific deficiencies in the law, not an unfettered power that gives executives *carte blanche* to do as they please. At the very least, law provides a normative framework within which prerogative operates. That is, an exercise of prerogative that violates one law or set of laws does not necessarily challenge the entire system of law or rule of law values.⁷ Contrary to those who would argue that executive power is or ought to be wholly defined and structured by law, this means that there is an unavoidable element of discretion irreducible to law in even the most ordinary exercises of executive power.⁸ That is, even routine exercises of executive power either exceed the law or have the potential to do so, if only in small ways. In short, some forms and exercises of executive power are far more rule-bound and others are far less so.⁹ This may help explain why executive pow-

6. See, e.g., ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 7–10 (First Mariner Books 2004) (1973) (“The idea of prerogative was *not* part of presidential power as defined in the Constitution.”).

7. Deviation from particular legal rules is not to be confused with the suspension of the legal order “in its entirety” that Carl Schmitt infamously defended in *Political Theology: Four Chapters on the Concept of Sovereignty*. See generally CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (George Schwab trans., Univ. of Chicago Press 2005) (1992). For a defense of the idea that extra-legal measures can actually uphold rule of law values, see Oren Gross, *Extra-Legality and the Ethic of Political Responsibility*, in *EMERGENCIES AND THE LIMITS OF LEGALITY* 60 (Victor V. Ramraj ed., 2008).

8. It is also worth bearing in mind that law itself confers and invites discretion. Even in its most rule-like forms, law never completely determines action.

9. To acknowledge this feature of executive power is not necessarily to endorse it. Nor is an acknowledgement that there is an element of prerogative in all executive power an argument against the rule of law. In fact, recognizing the extent to which every exercise of executive power contains an element of discretion irreducible to law is the first step

er is such an indistinct concept in so much legal and political thought.¹⁰

None of this is to suggest that there are no meaningful differences between exercises of power that have been prescribed by law and those that have not. In the strictest sense, exercises of prerogative in American history have been rare, limited mainly to extraordinary wartime measures such as President Abraham Lincoln's orders to increase the size of the Army and Navy and payments to private citizens to facilitate recruitment efforts.¹¹ Indeed, there are very good normative reasons to distinguish between exercises of power that are consistent with the law from those that are not, but I suggest that it is also important for analytical reasons to recognize that the distinction between prerogative and executive power is not necessarily as clear-cut as many have suggested. Discretionary exercises of power that walk up to, and sometimes even step over, the limits of the law are not restricted to moments of emergency but occur on a far more regular basis, albeit in far less dramatic ways than prerogative in the strictest sense. The insistence on a rigid separation between these two forms of power, however, makes it easy to overlook the continuities between prerogative and executive power.

toward constraining abuses of that discretion. In recent years, it has not been the critics of expanded executive power but its staunchest defenders who have insisted that prerogative is an improper framework for analyzing the way that presidential power has been exercised since the terrorist attacks of September 11, 2001. The most outspoken proponents of broad executive powers in the Bush Administration's so-called War on Terror, including Vice President Dick Cheney and Deputy Assistant Attorney General John Yoo, consistently maintained that the extraordinary powers wielded by the President were fully authorized by existing laws. See, e.g., JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11*, at 1–11 (2005); JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* (2006) (noting that Congress had authorized the President to use force in response to the September 11 attacks and that Congress had recognized military commissions in the Uniform Code of Military Justice). For critiques of this position, see HAROLD H. BRUFF, *BAD ADVICE: BUSH'S LAWYERS IN THE WAR ON TERROR* (2009) (criticizing the inflated view of executive power during the Bush Administration); JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2009) (discussing the negative effects of the Bush Administration's focus on hard power prerogative in the War on Terror).

10. Edward S. Corwin opened his classic study of the presidency with the observation that, unlike "legislative power" and "judicial power," "executive power" is still indefinite as to *function* and retains, particularly when it is exercised by a single individual, much of its original plasticity as to *method*." EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787–1957*, at 3 (4th rev. ed. 1957).

11. On the extraordinary and even extra-legal character of President Lincoln's actions during the Civil War, see DANIEL FARBER, *LINCOLN'S CONSTITUTION* 115–75 (2003); CLINTON ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* 223–39 (6th prt. 2009) (1948); Benjamin A. Kleinerman, *Lincoln's Example: Executive Power and the Survival of Constitutionalism*, 3 *PERSP. ON POL.* 801, 805–08 (2005).

The sharpness of this distinction reflects the sharpness of the distinction between normalcy and emergency that informs so much political and scholarly discourse. Although there is no agreement either in theory or in practice about the proper way to define a state of emergency,¹² there is wide agreement that an emergency situation is categorically distinct from a normal situation. Even among scholars who are careful to distinguish among different types of emergencies, it is generally assumed that a situation can definitely be classified as an emergency or non-emergency.¹³ A time of emergency is often likened to a time of war, which is treated as a discrete time period that can be easily distinguished from peacetime.¹⁴ It should come as no surprise that the opposition between emergency and normalcy leads to a proliferation of other binaries that reinforce the divisions between these circumstances: normal/abnormal, ordinary/extraordinary, routine/special, regular/extreme, calm/urgent.¹⁵ Perhaps the starkest version of this opposition appears in the work of the German legal and political theorist-turned-Nazi, Carl Schmitt, who characterized the differences between these two states in terms of an unbridgeable ontological divide between the “norm” and the “exception.” According to Schmitt, the norm pertains to a predictable and orderly “everyday frame of life” amenable to legal regulation,¹⁶ whereas the exception refers to “a case of extreme peril” that cannot be “codified in the existing legal order.”¹⁷

The use of such binary oppositions is often unavoidable, but as political theorist Nomi Lazar has argued, they tend to obscure the

12. OREN GROSS & FIONNUALA NÍ AOLÁIN, LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE 5–6 (2006).

13. See, e.g., BRUCE ACKERMAN, BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM 42–44 (2006) (attempting to identify a framework by which to define “state of emergency”); GIORGIO AGAMBEN, STATE OF EXCEPTION 1–2 (Kevin Attell trans., Univ. of Chicago Press 2005) (noting that the “state of exception” exists, although it is difficult to define); DAVID DYZENHAUS, THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY 17 (2006) (noting that states of emergency place legal and executive order under great stress); John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT’L J. CONST. L. 210, 210 (2004) (noting that emergency situations occur when there is an urgent threat to the state or regime).

14. For a critique of this tendency, see generally, MARY DUDZIAK, WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES (2012) (discussing the likening of emergency to wartime).

15. On the tendency of binaries to multiply, see ANNE NORTON, 95 THESES ON POLITICS, CULTURE, AND METHOD 39–40 (2004).

16. SCHMITT, *supra* note 7, at 13.

17. *Id.* at 6.

continuities between normal and emergency circumstances.¹⁸ Lazar contends that the effect of these oppositions is to treat emergencies as if the responses to them require the adoption of logics and values that are alien to those that operate in “normal” circumstances.¹⁹ She argues that “the norm/exception dichotomy is empirically and ethically suspect” because it ignores the extent to which normal institutions and values continue to function in times of emergency and because it often serves as a pretext for the unjustified abandonment of liberal democratic values.²⁰ Instead of viewing the differences between emergency and normalcy as differences in kind, she suggests that they vary in degree (specifically, in terms of the urgency and the scale of the crisis that confronts a government).²¹ As a result, emergencies are notoriously difficult to define with any precision.²²

Although Lazar’s argument is concerned with the elements of normalcy that are always present in emergency, my argument focuses on the element of prerogative that is always present in executive power. As Lazar has argued with respect to emergency and normalcy, I argue that the relevant differences between prerogative and executive power are mainly differences of degree, not of kind. This may help explain why there is so much imprecision in accounts of prerogative and executive power.

Much of the legal and political scholarship has analyzed prerogative within the framework of executive power. As a consequence, the emphasis in these studies has been on the ways that prerogative deviates from the rule of law and ordinary exercises of executive power.²³ But instead of looking to the nature of executive power to explain prerogative, it might be more instructive to view executive power in light of prerogative. Perhaps prerogative is not an aberration from the way that executive power is normally exercised, but rather a radi-

18. NOMI CLAIRE LAZAR, STATES OF EMERGENCY IN LIBERAL DEMOCRACIES 4–5 (2009).

19. *Id.*

20. *Id.* at 4.

21. *Id.*

22. *Id.* at 7.

23. *See, e.g.*, CORWIN, *supra* note 10, at 7–8; CLEMENT FATOVIC, OUTSIDE THE LAW: EMERGENCY AND EXECUTIVE POWER (2009) (examining the openness to exercises of extra-legal prerogative in cases of emergency and the need for virtue in the Executive to inhibit abuse of prerogative); BENJAMIN A. KLEINERMAN, THE DISCRETIONARY PRESIDENT: THE PROMISE AND PERIL OF EXECUTIVE POWER (2009) (discussing the role discretionary executive power should play in the constitutional order); RICHARD M. PIOUS, THE AMERICAN PRESIDENCY 44–88 (1979); Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1796 (2010).

calized or heightened expression of executive power that manifests the informal and discretionary elements that are latent in even the most formal and constrained instances of executive power. Instead of thinking about executive power as a distinct category, it might be better to think of it as being on a spectrum that ranges from the least to the most discretionary, or from the most to the least rule-bound.

Conceptualizing executive power as being continuous with prerogative may help explain why legal and political thinkers have had such difficulty in pinning down the meaning of executive power.²⁴ By viewing prerogative as being different in degree rather than in kind, we might be in a better position to begin understanding why the concept of executive power has been so elusive. As revealed in the following survey of political thought from Locke to the Founding, it was difficult for early theorists to explain the formal features of executive power without reintroducing the informal elements of prerogative that their political and constitutional theories were otherwise designed to eliminate. The indeterminacy of the concept of executive power may help us understand why it has been so easy for executive power to expand in terms of its functions and the means at its disposal. The trend toward ever-greater expansions in executive power may be due, at least in part, to the possibility that there is an element of prerogative in all exercises of executive power.

I. LAW AND THE PARADOX OF EXECUTIVE POWER

Every exercise of executive power is simultaneously rule-bound and discretionary. Sometimes the applicable rules themselves allow or invite some forms of discretion even as they seek to curb or prevent other forms of discretion. Some rules are more flexible than others and might even be better described as standards or as principles.²⁵ But in all cases, the very act of following a rule involves an act of interpretation that is always to some degree discretionary. No matter how formal and specific the rules may be, they are never self-interpreting or self-enforcing. As the philosopher Ludwig Wittgenstein suggested, no rule ever determines a particular course of action

24. For a review and example of the indeterminacy of accounts of executive power, see HARVEY C. MANSFIELD, JR., *TAMING THE PRINCE: THE AMBIVALENCE OF MODERN EXECUTIVE POWER* 1–3 (1993).

25. Cass R. Sunstein argues that “[t]here is a continuum” of law from strict “rules to untrammelled discretion, with factors, standards, and guidelines falling in between.” For a discussion of these distinctions, see CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 21 (1996).

because every rule is susceptible to different interpretations.²⁶ Discretion is not the exception, but the rule, so to speak. The upshot is that the rule of law (to the extent that it is conceptualized as the rule of formal laws)²⁷ is an ideal that is never fully realized in practice.²⁸ Like executive power, it is a matter of degree. To be sure, rules themselves sometimes define the space within which the Executive is authorized to exercise discretion, but there is always a possibility of discretion that exceeds a formal allowance.

This points to the paradox of executive power: Every attempt to augment the law has the potential to augment the power of the Executive, as well. Throughout the history of legal and political thought, it has often been assumed that increases in the law would contribute to decreases in discretion. Increases in either the number or the specificity of laws were expected to constrain, if not eliminate, discretionary action. That has been one of the main justifications for the rule of law dating back to Aristotle, if not earlier.²⁹ The expectation of reformers has been that juridification would promote rule of law values such as predictability, uniformity, and accountability; but that is not always the case. Instead of curtailing the discretion of the Executive, the proliferation of law actually has the potential to increase the discretion of the Executive.

Of course, much of the juridification that has occurred, especially since World War II, has been specifically designed to augment the wartime and emergency powers of the Executive, both in the United States and elsewhere.³⁰ As a result, prerogative in the strictest

26. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 80–82 (G.E.M. Anscombe trans., Blackwell Publishers, Ltd. 1953).

27. *See, e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176–80 (1989) (arguing that law “made” by courts should establish general rules as opposed to leaving ample discretion to lower courts); Robert S. Summers, *A Formal Theory of the Rule of Law*, 6 *RATIO JURIS* 127, 128 (1993) (contending that “the rule of law is best conceptualized as a relatively circumscribed formal theory”).

28. Ernest Weinrib, *The Intelligibility of the Rule of Law*, in *THE RULE OF LAW: IDEAL OR IDEOLOGY* 59 (Allan C. Hutchison & Patrick Monahan eds., 1987); Timothy A. O. Endicott, *The Impossibility of the Rule of Law*, 19 *OXFORD J. LEGAL STUD.* 1, 1 (1999).

29. ARISTOTLE, *THE POLITICS* 124 (Ernest Barker trans., Oxford Univ. Press 1995) (c. 384 B.C.E.). *See also* A. V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 188 (10th ed. 1961).

30. There is also a tendency toward forms of juridification that constrain behavior in those areas where the exercise of power is expected to be most discretionary, namely in the realm of military and foreign affairs. The development of what critics call “lawfare,” which constitutes an attempt to subject military decisions and tactics to legal constraints, actually illustrates how easy it is to move along the continuum between less rule-bound and more rule-bound action. On the development and growth of lawfare in recent U.S. histo-

Lockean sense may now seem obsolete. That is, statutory delegations of authority make it unnecessary for the Executive to act outside the law when the law gives executives almost all the power they would want or need in order to deal with an emergency.³¹ For instance, several major acts passed by Congress since 9-11, including the Authorization for Use of Military Force³² (“AUMF”) and the Emergency Economic Stabilization Act of 2008,³³ provided sweeping grants of authority to the executive branch. These laws confer so much discretion on the Executive that the practical differences (if not the legal status) between Lockean prerogative and action taken in accordance with these laws are difficult to discern. The vast discretionary powers that have been delegated to the Executive make the line between prerogative and rule-based executive action blurrier than ever.

But executive power can also expand in unintended ways, even in those areas where legislators have sought to bring it under greater legal control. The War Powers Resolution of 1973³⁴ (“Resolution”) exemplifies the paradoxical quality of executive power. The purpose of the legislation was to limit the war powers of the President after the misadventures in Vietnam and Cambodia, but it has had the opposite effect. Even though the law was designed to rein in the power of the President to deploy military forces abroad, it has actually done more to expand than to contract those powers. The Resolution stipulates that the President must withdraw the armed forces of the United States from military engagements within ninety days of notifying Congress if Congress has not authorized continued military engagement or “is physically unable to meet as a result of an armed attack upon the United States.”³⁵ Despite the intentions of lawmakers, the actual effect was to expand those very same powers by sanctioning unilateral war-making by the President for up to ninety days.³⁶

ry, see GOLDSMITH, *supra* note 9, at 58–64; JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11, at 223–33 (2012).

31. Some of these trends are documented in ROSSITER, *supra* note 11, at 217–22; GROSS & NÍ AOLÁIN, *supra* note 12, at 35–85. See also Clement Fatovic & Benjamin Kleinerman, *Introduction: Extra-Legal Measures and the Problem of Legitimacy*, in EXTRA-LEGAL POWER AND LEGITIMACY: PERSPECTIVES ON PREROGATIVE (Oxford Univ. Press, forthcoming).

32. Pub. L. No. 107-40, 115 Stat. 224 (2001).

33. Pub. L. No. 110-343, 122 Stat. 3765 (2008).

34. Pub. L. No. 93-148, 87 Stat. 555 (codified at 50 U.S.C. §§ 1541–1548 (1999)).

35. 50 U.S.C. § 1544(b) (2006).

36. LOUIS FISHER, PRESIDENTIAL WAR POWER 145 (2d rev. ed. 2004).

The Freedom of Information Act of 1966³⁷ (“FOIA”) is another example of a law designed to limit executive power that ends up, in fact, augmenting it. The purpose of FOIA was to make government documents and information more readily available to the public.³⁸ However, FOIA also carved out nine areas that would be exempt from its requirements.³⁹ Congress defined the criteria for eight of these exemptions, but it left it up to the President to determine what documents should “be kept secret in the interest of national defense or foreign policy.”⁴⁰ As a result, FOIA—a statute that was intended to expand public access to information—had the effect of giving the President almost total control over certain classes of information.⁴¹ In 1982, President Ronald Reagan took advantage of this provision to issue an executive order that imposed new and expanded classification requirements, undid declassification procedures that had been ordered by President Jimmy Carter, and allowed agencies to classify information that had already been made available to the public.⁴² Although President Bill Clinton issued an executive order in 1995 that undid many of these policies to make the classification system more consistent with the intentions of the legislators who created FOIA,⁴³ his reversal did not change the fact that FOIA allows each president to decide unilaterally how much and what kinds of information the public is able to access.⁴⁴

Even laws that do not directly address the powers of the President have the potential to augment those powers for reasons completely unrelated to increases in the size or budget of the administrative agencies under the control of the executive branch.⁴⁵ The enactment

37. Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552 (2012)).

38. *Id.*

39. 5 U.S.C. § 552(b) (2006).

40. 5 U.S.C. § 552(b)(1)(A) (2006).

41. KENNETH R. MAYER, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER 155–56 (2001).

42. Exec. Order No. 12,356, 47 Fed. Reg. 14,874 (Apr. 6, 1982) (Reagan).

43. Exec. Order No. 12,958, 60 Fed. Reg. 19,825 (Apr. 20, 1995) (Clinton).

44. 5 U.S.C. § 552(b)(1) (2006).

45. Of course, the tremendous growth of the administrative state during the twentieth century has created opportunities for the exercise of discretionary powers by bureaucratic officials that are never fully under the control of the President. Even as the number of officials and responsibilities that fall within the President’s purview has increased dramatically, the President’s ability to exert control over administrative agencies has failed to keep pace. For a classic critique of this problem, see James Q. Wilson, *The Rise of the Bureaucratic State*, 41 NAT’L AFF. 77 (1975).

of new laws creates new opportunities for the exercise of executive power, and the enactment of laws in new areas opens up new areas for the expansion of executive power. The requirement to enforce the law is, of course, an invitation to exercise executive power. But how that power is exercised depends, in the first instance, on how the law is interpreted. Interpretation is a power that should not be underestimated, especially in light of the fact that the Executive gets to act on that interpretation before any court offers its own opinion.⁴⁶ More often than not, courts will defer to the interpretation offered by the Executive.⁴⁷

It is also worth bearing in mind that any decision on *how* to enforce or apply the law always presupposes an antecedent decision *whether* to enforce and apply the law in specific cases. The constitutional requirement that the President “shall take Care that the Laws be faithfully executed”⁴⁸ has not prevented presidents from enforcing particular laws in a highly selective manner—or not at all.⁴⁹ Steven G. Calabresi and Christopher S. Yoo observe that presidents throughout the nation’s history have exercised a form of prosecutorial discretion in their enforcement of particular laws.⁵⁰ They cite numerous examples of George Washington, John Adams, Thomas Jefferson, Andrew Jackson, and other presidents ceasing prosecutions against specific individuals.⁵¹ In at least one of these cases, the order to halt prosecutions was motivated by strong disapproval of the laws on which they were based.⁵² The infamous Sedition Act of 1798⁵³ provided that ongoing prosecutions could continue even after the law expired (the day before the new President took office), but President Jefferson ordered an end to all prosecutions brought under that law, a law he vehemently opposed from its beginnings based on political and constitutional grounds.⁵⁴

46. Geoffrey P. Miller, *The President’s Power of Interpretation: Implications of a Unified Theory of Constitutional Law*, 56 LAW & CONTEMP. PROBS. 35, 35–38 (1993).

47. David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 126–27 (1993).

48. U.S. CONST. art. II, § 3.

49. Miller, *supra* note 46, at 56.

50. STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 49–51, 60–61, 67, 103 (2008).

51. *Id.*

52. *Id.* at 67.

53. Act of July 14, 1798 (Sedition Act), Ch. 74, 1 Stat. 596 (1798).

54. CALABRESI & YOO, *supra* note 50, at 67.

The use of signing statements, which dates back to the administration of James Monroe,⁵⁵ provides another example of how the President's responsibility to execute the law becomes the basis for assertions of power that may be contrary to the law. More specifically, presidents have issued signing statements declaring their refusal to implement the law in the manner prescribed by Congress. Signing statements are often based on—or at least state—constitutional objections to provisions in legislation, especially to congressional assertions of the legislative veto, infringements on executive privilege, and other perceived encroachments on the President's powers and privileges.⁵⁶ Presidents, however, have also used signing statements to pursue objectives that have little to do with protecting the constitutional powers of the office. They have used signing statements to indicate approval of legislation, to provide guidance to officials responsible for implementing the legislation, to express the President's own interpretation of legislation, and to announce limits on the actual enforcement of legislation.⁵⁷ One of the most notable and controversial signing statements in recent history was the one that President George W. Bush issued in response to the 2006 Department of Defense Appropriations bill.⁵⁸ President Bush's signing statement announced that the Executive would "construe" the provision of the bill restricting the use of certain interrogation methods on enemy combatants, better known as the McCain Amendment, "in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief."⁵⁹ Of course, presidents always claim that the law is on their side, even though there is no mention of anything like a power to issue signing statements any-

55. Christopher S. Kelley & Bryan W. Marshall, *The Last Word: Presidential Power and the Role of Signing Statements*, 38 *PRESIDENTIAL STUD. Q.* 248, 253 (2008).

56. Kevin A. Evans, *Looking Before Watergate: Foundations in the Development of the Constitutional Challenges Within Signing Statements, FDR-Nixon*, 42 *PRESIDENTIAL STUD. Q.* 390, 392–94 (2012).

57. PHILLIP J. COOPER, *BY ORDER OF THE PRESIDENT: THE USE & ABUSE OF EXECUTIVE DIRECT ACTION* 199–230 (2002). Recent scholarship has argued that the majority of signing statements are used to establish "a dialogue between the president and Congress regarding the breadth of each institution's powers." Ian Ostrander & Joel Sievert, *What's So Sinister About Presidential Signing Statements?*, 43 *PRESIDENTIAL STUD. Q.* 58, 60 (2013). Other scholars have argued that signing statements are largely rhetorical in function. Christopher S. Kelley et al., *Assessing the Rhetorical Side of Presidential Signing Statements*, 43 *PRESIDENTIAL STUD. Q.* 274, 274–76 (2013).

58. Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 *WEEKLY COMP. PRES. DOC.* 1918 (Dec. 30, 2005).

59. *Id.*

where in the Constitution.⁶⁰ In making these claims, presidents often rely on such expansive and controversial interpretations of their power that the lines between executive power and prerogative seem to disappear entirely. Not only have presidents asserted the right to ignore portions of the law, they have also sought to transform signing statements themselves into a kind of law. In addition to treating past signing statements as precedents to justify presidential actions in the present, there have been successful attempts since the presidency of Ronald Reagan to enter signing statements into the legislative history of particular statutes.⁶¹

Executive orders provide another means for presidents to modify the laws they are supposed to enforce. The President's ability to direct executive agencies through these unilateral edicts is so similar to a legislative power that scholars have described it as a form of "executive lawmaking."⁶² Throughout the history of the United States, presidents have used executive orders to interpret and administer laws in ways that Congress may not have intended.⁶³ A case in point is Executive Order 12,291, which President Reagan issued less than one month after he took office.⁶⁴ Rather than asking Congress to make legislative changes to a regulatory system that the Administration deemed too onerous to business and stifling to the economy, President Reagan invoked "the authority vested in [him] as President by the Constitution and laws of the United States of America" to issue an executive order that would restrict the adoption and implementation of administrative rules and regulations that did not "maximize the net benefits to society."⁶⁵ Executive Order 12,291 required all executive

60. Article I, § 7 of the Constitution stipulates that a presidential veto must be accompanied by a statement of the President's "Objections," but it says nothing about issuing a statement that expresses the President's approval or interpretation of a bill. U.S. CONST. art. I, § 7.

61. COOPER, *supra* note 57, at 210–11.

62. MAYER, *supra* note 41, at 16–22. For a critique of executive lawmaking, see Louis Fisher, *Laws Congress Never Made*, 5 CONSTITUTION 59 (1993). For the counterargument that executive orders are more likely to rely on persuasion rather than command, see Andrew C. Rudalevige, *The Contemporary Presidency: Executive Orders and Presidential Unilateralism*, 42 PRESIDENTIAL STUD. Q. 138 (2012).

63. Of course, efforts to direct agencies to act in ways that conflict with the ostensible intentions of lawmakers do not always succeed—and may even trigger heightened levels of legislative oversight. Scott H. Ainsworth, et al., *Congressional Response to Presidential Signing Statements*, 40 AM. POL. RES. 1067, 1068 (2012). But successful or not, these attempts do indicate something about the way that presidents understand their own powers and what they think they can accomplish.

64. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 19, 1981).

65. *Id.* § 2(c), 46 Fed. Reg. at 13, 193.

agencies to use cost-benefit analyses to justify the promulgation of any new regulations and stipulated that “[r]egulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society.”⁶⁶ The Administration defended its authority to issue this order on the grounds that executive power includes the ability to control all executive agencies; but critics have argued that the order violated the law concerning the rulemaking process laid out in the Administrative Procedures Act of 1946.⁶⁷ Despite complaints that this and other executive orders issued by Republican and Democratic presidents alike have defied the intent of legislators, neither Congress nor the Supreme Court has done much to reverse these decisions.

It is well known that external shocks, including invasions, insurrections, and other emergencies create opportunities for the exercise and expansion of presidential war powers. As James Madison famously warned, “In war, too, the discretionary power of the Executive is extended; its influence in dealing out offices, honors, and emoluments is multiplied; and all the means of seducing the minds, are added to those of subduing the force, of the people.”⁶⁸ The possibility that executive power will start to look more and more like prerogative is most obvious in the President’s direct handling of war and other emergencies. This was evident in the way that the Bush Administration prosecuted the so-called War on Terror. The Bush Administration ordered the National Security Agency to conduct warrantless wiretaps on electronic communications between persons in the United States and those located in other countries, classified hundreds of prisoners as “enemy combatants” in order to detain them in prisons indefinitely, and authorized the use of “harsh” methods of interrogation, including waterboarding, against suspected terrorists. The Obama Administration has continued and even expanded some of these practices, most notably in its use of unmanned aerial drones to target suspected terrorists in Pakistan and other countries.⁶⁹ Although both Administrations justified these controversial policies in terms of the President’s constitutional war powers as commander in chief, critics have charged them with making legally questionable and

66. *Id.* § 2(b), 46 Fed. Reg. at 13, 193.

67. For additional information about the background and consequences of this order, including the debate it generated, see MAYER, *supra* note 41, at 126–31.

68. JAMES MADISON, *Political Observations*, in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 485, 491 (J.B. Lippincott & Co. 1865).

69. Mark Mazzetti & David E. Sanger, *Obama Expands Missile Strikes Inside Pakistan*, N.Y. TIMES, Feb. 21, 2009, at A1.

tendentious assertions of power that might be better characterized as exercises of (unjustified) prerogative.

Other areas of executive power, including ordinary law enforcement, can begin to shade over into prerogative in these circumstances. Ironically, the very same budget constraints brought on by emergencies can provide opportunities for exercises of power that take on the character of prerogative. The need to establish new spending priorities where resources are scarce can provide a convenient excuse for presidents to scale back the enforcement of laws that they never fully supported in the first place. For instance, the need to shift additional law enforcement resources toward the fight against terrorism can be used by a pro-business administration to de-prioritize federal investigations and prosecutions of white-collar crime. In the years leading up to the economic crisis of 2008, the business-friendly Bush Administration repeatedly denied requests by the Federal Bureau of Investigation to devote more resources to the investigation of white-collar crime on the grounds that counterterrorism had to remain a priority. As a result, prosecutions of financial, securities, and insurance fraud plummeted in the years after 9-11.⁷⁰ If executive power strictly conformed to rule of law principles, such variations in law enforcement across different administrations would not exist.

Apparent constraints can be turned to the President's advantage outside the context of emergency, as well. That is, instances of prerogative, however small, emerge even in circumstances that present no immediate danger or urgency at all. One of the most striking examples of executive discretion in recent memory is President Obama's decision, in the summer of 2012, to suspend deportations of undocumented immigrants, no more than thirty years old, who came to the United States before the age of sixteen and had committed no major crimes.⁷¹ One of President Obama's publicly stated justifications for his executive order illustrates how easy it is for executive power to expand as a result of constraints, and not just delegations, of authority. He claimed that budget constraints made it impossible for him to carry out all deportations possible under the law, so he was forced to establish priorities that would leave some individuals free

70. Eric Lichtblau, David Johnston & Ron Nixon, *F.B.I. Struggles to Handle Financial Fraud Cases*, N.Y. TIMES, Oct. 18, 2008, http://www.nytimes.com/2008/10/19/washington/19fbi.html?_r=0&pagewanted=all.

71. Julia Preston & John H. Cushman, Jr., *Obama to Permit Young Migrants to Remain in U.S.*, N.Y. TIMES, June 16, 2012, at A1, <http://www.nytimes.com/2012/06/16/us/us-to-stop-deporting-some-illegal-immigrants.html?pagewanted=all&pagewanted=print>.

from deportation. The fact that this was a convenient pretext that allowed the President to achieve a desired policy outcome he could not secure in an obstructionist Congress does not mean that he was lying when he said that budgetary limitations forced him to set priorities. But it does serve to demonstrate that even ostensible constraints on the Executive can provide opportunities for exercises of power that call to mind prerogative, as critics were quick to point out.⁷²

In the past two hundred plus years, much of the tremendous growth in executive power has been the result of statutory delegations.⁷³ Of course, congressional delegations of authority to the President are formally grounded in law (though whether these delegations are always consistent with the Constitution is another matter). It has been unnecessary for the Executive to act “without the prescription of the Law” because the law itself has been the source of vast new powers. This would seem to suggest that it is unhelpful and even misleading to examine executive power in terms of Lockean prerogative.

In the following section, however, I argue that both delegations of authority and exercises of extra-legal power are made possible by the inherent ambiguity of the concept of executive power. To the extent that the contemporary presidency fits this description of an executive whose powers are never wholly specified in law, it reflects the indeterminacy of the concept of executive power itself. The deceptively simple language of the vesting clause⁷⁴ conceals the deep confusion that surrounded early debates over the meaning of executive power. Not only was it extremely difficult for writers dealing with executive power to avoid addressing prerogative, it was also difficult for them to avoid adding heterogeneous functions and responsibilities that went well beyond mere enforcement of the law. In *Federalist No. 48*, James Madison warned of the dangers of a legislative “vortex” that would suck all powers into itself,⁷⁵ but it turns out that ambiguity in the meaning of executive power has created a vacuum that is just as powerful.

72. For instance, Representative Steve King of Iowa accused President Obama of “planning to usurp the constitutional authority of the United States Congress.” M.J. Lee, *Obama: No Deportation of Some Young Illegal Immigrants*, POLITICO, June 15, 2012, available at <http://www.politico.com/news/stories/0612/77464.html>.

73. THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 7 (2d ed. 1979).

74. U.S. CONST. art. II, § 1, cl. 1.

75. *THE FEDERALIST NO. 48*, at 309 (James Madison) (Isaac Kramnick ed., 1987).

II. DEFINING EXECUTIVE POWER

During the founding of the United States, Americans who looked to influential works of legal and political theory for guidance in understanding the nature and limits of executive power could very well have come away more confused than enlightened. One of the most remarkable features of these accounts is that the writers often provided much more detailed and sustained discussions of prerogative than of executive power *per se*. Though these normative and descriptive accounts of prerogative sometimes differed quite significantly from one another, depending on how closely these writers followed British precedents and usage in referring to the range of powers and privileges associated with royal power, these discussions were strikingly uniform in their reticence on the meaning of executive power. To be sure, they often identified similar sets of foreign and domestic responsibilities, but they never attempted to explain why, for instance, the power to appoint ministers and the power to grant pardons could both be classified as executive powers. The explanation for why the same institutional body should exercise such seemingly different powers was almost always numerical. Aside from their contingent historical association in European monarchies throughout the ages, certain powers over war and peace, diplomacy, the administration of justice, and other areas were lumped together because, it was said, they could be more effectively exercised by “one” than by “many.” Of course, the idea of a unitary executive who could act quickly and decisively because he or she could act unilaterally rested on a fiction that ignored the Executive’s institutional and administrative reliance on a variety of other actors to help formulate and carry out the Executive’s supposedly unified will.⁷⁶ “Executive power” was never presented as a coherent or discrete concept. Instead, it came to stand for a hodgepodge of heterogeneous powers and responsibilities.

The complicated relationship between law and executive power in modern political thought received one of its earliest and best artic-

76. If the idea of a unitary executive was just simplistic at the dawn of the modern era, it is plainly wrong now that government agencies, nominally headed by the chief executive, have become sprawling and labyrinthine structures with multiple power centers that can resist top-down control. For a critique of the idea that the Executive’s singleness still affords great institutional advantages, see WILLIAM E. SCHEUERMAN, *LIBERAL DEMOCRACY AND THE SOCIAL ACCELERATION OF TIME* 26–44 (2004). See also Clement Fatovic, *Filling the Void: Democratic Deliberation and the Legitimization of Extra-Legal Action*, in *EXTRA-LEGAL POWER AND LEGITIMACY: PERSPECTIVES ON PREROGATIVE* (Clement Fatovic & Benjamin Kleinerman eds., forthcoming).

ulations in John Locke's *Second Treatise of Government*.⁷⁷ Along with conformity to natural law and the consent of the governed, Locke pronounced strict adherence to the rule of law as an essential criterion of legitimate government.⁷⁸ The existence of publicly promulgated, settled, standing laws that regulate the actions of governors and governed alike would eliminate the need for the exercise of arbitrary powers inherently inimical to liberty.⁷⁹ As Locke explained of the powers of government in general:

[I]t ought to be exercised by *established and promulgated Laws*: that both the People may know their Duty, and be safe and secure within the limits of the Law, and the Rulers too kept within their due bounds, and not to be tempted, by the Power they have in their hands, to imploy it to such purposes, and by such measures, as they would not have known, and own not willingly.⁸⁰

As a further means of protecting liberty and in order to give institutional effect to this vision of the rule of law, Locke introduced an early version of the separation of powers based on a functional distinction between legislative, executive, and federative responsibilities.⁸¹ Legislative power is relatively straightforward: it consists of an assembly of persons and makes the laws that regulate those inside and outside government.⁸² Because it is unnecessary for the Legislature always to be engaged in lawmaking, it is unnecessary for the legislative assembly always to be in session.⁸³ But neither executive power nor federative power is so straightforward. At first, executive power is defined by the power to enforce the laws enacted by the Legislature.⁸⁴ However, it immediately becomes joined with the federative power, an all-purpose power in foreign affairs that “contains the Power of War and Peace, Leagues and Alliances, and all the Transactions, with all Persons and Communities without the Commonwealth.”⁸⁵ The main reason for combining these very different responsibilities in the same institution is that both require “the force of the Society for their

77. LOCKE, *supra* note 1, at 285–446.

78. *Id.* at 373–79.

79. *Id.* at 376–78.

80. *Id.* at 378.

81. *Id.* at 382–84.

82. *Id.* at 382.

83. *Id.*

84. *Id.* at 382–83.

85. *Id.* at 383.

exercise,” something that is much more effectively deployed by a single set of hands than by a diverse—and potentially divided—set of hands.⁸⁶

Despite Locke’s repeated insistence that the executive and federative powers are analytically “distinct,” it quickly becomes apparent that Locke is unable to maintain the lines between them. While executive power is supposed to revolve around the law, federative power “is much less capable to be directed by antecedent, standing, positive Laws, than the *Executive*, and so must necessarily be left to the Prudence and Wisdom of those whose hands it is in.”⁸⁷ As it turns out, however, executive power also comprehends matters that cannot be fully guided by the law. Though the laws to be enforced may be settled, the means and methods employed to enforce them are not. In this respect, the execution of municipal laws in the commonwealth resembles the execution of natural laws in the state of nature. That is, a great deal is left to discretion. Some means are proscribed by the rules of morality, but individuals exercising executive power (whether they are private individuals in the state of nature or executive officers in the commonwealth) enjoy considerable leeway in how and even whether they enforce the laws. In both instances, the law must be interpreted to be applied, and it must be decided whether the public good is better served by strict or by selective enforcement of the law.

This view of matters was not just theoretical for Locke. Years before he laid out these ideas in the *Two Treatises of Government*, Locke had to decide whether the king could justifiably suspend enforcement of laws against Dissenters who violated the Conventicle Act of 1664, which forbade nonconformists from assembling in groups of five or larger. The First Earl of Shaftesbury, Anthony Ashley Cooper, asked Locke to draft a formal recommendation that he could pass on to Charles II. Even though Locke and Shaftesbury (who would go on to become a founder of the Whig party) opposed expansions of executive power, they ended up endorsing the king’s declaration of an Act of Indulgence.⁸⁸ Locke’s support for the policy of toleration outweighed his opposition to royal prerogative (here understood as the ability to suspend the law). In Locke’s view, the public good—and the

86. *Id.* at 384.

87. *Id.*

88. FATOVIC, *supra* note 23, at 44–45.

right of individual conscience—would be better served by deviation from the strict letter of the law than by rigid adherence to it.⁸⁹

In his discussion of prerogative, in *Two Treatises of Government*, Locke makes his reasoning explicit. Prerogative actually receives far more space and attention in *The Second Treatise* than does executive power, getting its own chapter, not to mention several other substantial discussions.⁹⁰ As Locke explains, it is necessary to place the power of prerogative somewhere because “it is impossible to foresee, and so by laws to provide for, all Accidents and Necessities, that may concern the publick.”⁹¹ It is introduced as if it were a categorically distinct form of power, but it actually turns out to be an extraordinary form of executive power. This is not simply because prerogative “must necessarily be left to the discretion of him, that has the Executive Power in his hands” for the very practical reason that whoever wields the entire force of the community in times of normalcy is best equipped to wield it in times of emergency, as well.⁹² Rather, it is because the power to execute the laws also entails the power *not* to execute the laws. In a sense, the only actor in a position to determine that “the municipal Law has given no direction” in a particular case is the actor most directly responsible for the execution of that same law.⁹³ In the final analysis, Locke’s discussion of prerogative tells us far more about the discretionary and potentially expansive nature of executive power than any of his more direct and rather mechanical accounts of executive power. His theory of prerogative draws attention to the fact that executive power requires uses of discretion that exceed the law.

Locke’s account of prerogative has received the lion’s share of attention in recent (mainly post-9-11) scholarship on the topic. However, many of the liberal constitutional thinkers who explored the same theoretical territory followed closely in his footsteps when it came to executive power.

No thinker was cited more frequently in the years leading up to and immediately after the creation of the Constitution than the French philosopher Montesquieu.⁹⁴ His famous, and famously wrong,

89. RICHARD ASHCRAFT, *REVOLUTIONARY POLITICS AND LOCKE’S “TWO TREATISES OF GOVERNMENT”* 111–12 (1986).

90. LOCKE, *supra* note 1, at 392–98.

91. *Id.* at 393.

92. *Id.*

93. *Id.* at 392.

94. On the frequency of citations to Montesquieu compared to other influential writers, see DONALD S. LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 142–46 (1988).

account of the separation of powers in the English Constitution taught generations of readers the importance of countervailing checks and balances in the preservation of liberty. But for all the attention and acclaim Montesquieu's account has received, it had remarkably little to say about executive power. His major innovation was to separate the power to punish crimes and judge disputes between individuals (or what would become known as the judicial power) from the power to conduct foreign and military affairs.⁹⁵ Montesquieu devoted considerably more space, however, to the composition of the Executive, contributing to the chorus of writers singing the praises of a single executive, than to the actual powers or responsibilities of the Executive. What is perhaps most surprising about his brief remarks on executive power, in light of his reputation as a champion of the separation of powers, is that Montesquieu dismissed the idea of legislative checks on the Executive as unnecessary. The reason, he suggested, is that the Executive's preoccupation with "immediate things" serves as an inherent limit that obviates the need for legislative restraints.⁹⁶ The implication that executive power is exercised on an ad hoc basis, responding to situations as they arise rather than creating them as the Legislature does, suggests that executive power responsibilities and duties cannot be specified in advance. It is telling that in the brief space that Montesquieu devoted to executive power he would emphasize its informality.

Much more instructive and influential on the subject of executive power was the great legal commentator William Blackstone. Perhaps more than any writer other than David Hume (whose writings on executive power were principally historical studies of the English monarchs throughout the centuries rather than theoretical reflections on the concept of executive power *per se*), Blackstone had a fair amount to say about the practice of executive power under the English Constitution. But when it came to the theory of executive power, his reflections focused primarily on the topic of prerogative.⁹⁷ A good deal of this discussion dealt with prerogatives in the plural.⁹⁸ These were very specific and exclusive privileges, powers, and rights that English monarchs enjoyed as a matter of law.⁹⁹ Some of these pertained to the

95. MONTESQUIEU: THE SPIRIT OF THE LAWS 156–57 (Anne M. Cohler, Basia C. Miller & Harold S. Stone eds. & trans., 1989).

96. *Id.* at 162.

97. WILLIAM BLACKSTONE, COMMENTARIES *230–70.

98. *Id.* at *232–70.

99. *Id.* at *232.

unique character and income of the king, but Blackstone did not consider these prerogatives to be an essential part of executive power.¹⁰⁰ In his view, there was an entirely separate branch of prerogatives “in the exertion whereof consists the executive part of government.”¹⁰¹ It is in this part of his lengthy chapter on the king’s prerogative that Blackstone invoked Locke’s extra-legal conception of prerogative to elaborate on the ways that executive power exceeds the law.¹⁰²

Blackstone’s account of executive power is complicated by his general definition of law as a “rule of action, which is prescribed by some superior, and which the inferior is bound to obey.”¹⁰³ One complication peculiar to the English case (as Blackstone presented it) is that the monarch is sovereign and therefore not directly subject to any other earthly power.¹⁰⁴ But another much more significant complication for the theory of executive power in general is that it does not easily lend itself to rules of action. Despite his insistence that the settlement reached by the Glorious Revolution had limited the king’s powers “by bounds so certain and notorious, that it is impossible he should exceed them without the consent of the people,”¹⁰⁵ Blackstone went on to acknowledge that the powers of the king were still quite significant but “not perhaps so open and avowed as they formerly were.”¹⁰⁶ The unprecedented reforms that helped to secure the people in their liberty eliminated arbitrary power of the sort that made the Stuart reigns so odious, but they did not do away with either discretionary power or the need to exercise extra-legal power. Indeed, Blackstone’s account of executive power calls into question his claim that England is a land governed entirely by law. Just before he explicitly introduced Locke into the discussion, Blackstone echoed the philosopher’s claims about the inherent limitations of the law, reminding readers “how impossible it is, in any practical system of laws, to point out beforehand those eccentric remedies, which the sudden emergence of national distress may dictate, and which that alone can justify.”¹⁰⁷

100. *Id.* at *233.

101. *Id.* at *242.

102. *Id.* at *244.

103. *Id.* at *38.

104. *Id.* at *234–35.

105. *Id.* at *137.

106. *Id.* at *324.

107. *Id.* at *244.

Blackstone did not elaborate at much greater length on prerogative in the Lockean sense, but the discussion that immediately followed his remarks on the limitations of the law went on to survey a variety of powers and responsibilities that cannot easily be codified into law.¹⁰⁸ The powers Blackstone addressed in this part of his chapter were not obsolete practices or traditions peculiar to England, as were many of the ones he addressed in the first part of his chapter. In fact, they consisted mainly (though not entirely) of those powers that continue to inform contemporary understandings of executive power (along with a few important exceptions). These powers, which are broadly divided into foreign and domestic matters, include the powers to send and receive ambassadors, form treaties with foreign powers, make war and peace, issue letters of marque and reprisal, grant safe conduct to merchants and those in distress, veto legislation, maintain domestic order and guarantee safe travel, establish courts of justice, grant pardons, bestow honors, regulate commerce, and govern the established church.¹⁰⁹ Both the placement and the content of Blackstone's discussion indicate that the exercise of these powers cannot be fully constrained or guided by law. The latitude associated with many of these powers is determined largely by the objects they concern. Most of these powers concern matters that do not necessarily lend themselves to rule-making, so the Executive is compelled to rely on ad hoc decision-making. Emergencies are a case in point. But even the administration of justice, which is more rule-bound than these other areas, sometimes requires case-by-case judgments. As the list also indicates, executive power becomes a repository for those responsibilities that cannot easily be carried out by other parts of the government. With each additional function and responsibility, the Executive acquires new opportunities for the exercise of the very discretion that England's vaunted rule of law was supposed to curb.

The primacy of law in the English system was a major attraction to foreign admirers. In *The Constitution of England*, Swiss political and constitutional theorist Jean-Louis de Lolme described the king as a magistrate bound to the law as equally as his subjects.¹¹⁰ De Lolme's most significant contribution to debates over executive power in America was his highly influential argument that a single executive is more responsible than a plural executive because it is much easier to

108. *Id.* at *244–70.

109. *Id.*

110. JEAN-LOUIS DE LOLME, *THE CONSTITUTION OF ENGLAND; OR, AN ACCOUNT OF THE ENGLISH GOVERNMENT* 67 (Baldwyn & Co., 1821).

hold a wrongdoer accountable when responsibility cannot be deflected or diffused among a number of actors. De Lolme, however, never bothered to offer a definition or general explanation of executive power. Instead, he identified a heterogeneous assortment of powers and functions belonging to the English king in the administration of justice (including the powers to punish and pardon), as the “fountain of honour” in dispensing titles and awards, as the “superintendent of commerce,” as the head of the Church of England, as “generalissimo” of all military forces, as the representative of the nation in foreign affairs, and as the executor of the laws.¹¹¹ Like Blackstone, de Lolme noted that the king’s prerogatives had been constrained by law. However, unlike the English commentator, the Swiss writer brought an outsider’s objectivity and candor in noting that legal limits on the king’s authority were far less effective (if at all) than parliamentary control over the purse-strings and the power to impeach the king’s ministers.¹¹² In what turned out to be his final word on the subject of executive power in his widely read book, de Lolme criticized the legalistic tendencies of the English for obscuring a truth about executive power in general:

In all monarchies (and it is the same in republics), the executive power in the state is supposed to possess, originally and by itself, all manner of lawful authority: every one of its exertions is deemed to be legal: and they do not cease to be so, till they are stopped by some express and positive regulation.¹¹³

III. THE QUESTION OF EXECUTIVE POWER AT THE CONSTITUTIONAL CONVENTION AND BEYOND

At the time of the American Revolution, Americans were deeply suspicious of and hostile to executive power.¹¹⁴ Not only did they associate executive power with monarchical forms of government, they also questioned how compatible it was with republican ideals and the rule of law. For that reason, the state constitutions drafted immedi-

111. *Id.* at 67–69. In another section of his book, de Lolme remarked that the “true constitutional office” of the king was “the countenancing, and supporting with its strength, the execution of the laws.” *Id.* at 351.

112. *Id.* at 78.

113. *Id.* at 381–82 (emphasis added).

114. *See, e.g.*, CHARLES C. THACH, JR., *THE CREATION OF THE PRESIDENCY, 1775–1789: A STUDY IN CONSTITUTIONAL HISTORY* (2007); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787*, at 148–50 (1969) (noting the “awful fear” that eighteenth-century Americans held toward magisterial authority).

ately after the break with England created very weak executive branches,¹¹⁵ and the Articles of Confederation established no executive department at all. Statements from this period suggest that Americans were not entirely sure what executive power actually meant, but they knew it was dangerous. In many state constitutions, there was “a great indefiniteness in the definitions of executive power.”¹¹⁶ It was not long before Americans began to realize that effective government could not do without more powerful executives than they had initially allowed. Many states began to revise their constitutions to establish governors with stronger powers and national leaders clamored for significant changes to the Articles of Confederation, including the creation of an independent executive branch.

The leading delegates to the Constitutional Convention knew that any changes they recommended to the existing system of government would have to include a provision for an independent executive, but they did not necessarily know what its powers would be, how it would be composed, how it would be selected, or how long its term would be. In fact, many of them had absolutely no idea what executive power even meant. According to the historian Richard Beeman, who has written the authoritative account of the Constitutional Convention, “the nature of presidential power was among the most confounding subjects they faced all summer.”¹¹⁷

The delegates to the Philadelphia Convention generally believed that it would be possible to specify the jurisdiction of both the legislative and the judicial branches. Although some delegates—most notably Gouverneur Morris and Alexander Hamilton—expected provisions such as the “necessary and proper” clause and the “general welfare” clause to provide rather open-ended grants of power to Congress, most delegates expected the Legislature’s powers to be limited mainly to those specific (and sometimes not-so-specific) powers that were enumerated in Article I, Section 8.¹¹⁸ Likewise, delegates ex-

115. WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS* 271–75 (1980).

116. THACH, *supra* note 114, at 17.

117. RICHARD BEEMAN, *PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION* 124–143, 230 (2009) (describing the early debates over the executive branch at the Convention).

118. Of course, there is considerable debate among scholars as to whether the Constitution actually limits Congress to those powers expressly enumerated and whether members of the founding generation themselves understood the Constitution as limiting Congress in this way. On the claim that Article I, Section 8 was intended to limit Congress to those powers expressly enumerated, see RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004). For a more mixed assessment, see

pected the court's jurisdiction to be limited to those areas specified in Article III, Section 2. But it was never entirely clear either to the delegates at the Philadelphia Convention or to the delegates at the various state ratifying conventions what would fall within the President's jurisdiction. To be sure, Article II, Section 2 enumerated a variety of functions and responsibilities, from the power to grant reprieves and pardons to the power to make treaties with the advice and consent of the Senate.¹¹⁹ Although some of these specifically enumerated powers—especially the President's powers as commander in chief—gave the President enormous powers, they did little to explain the most basic functions of the Executive. Neither the text of Article II, Section 2 nor the debates leading up to its adoption tell us exactly what executive power means or what it allows the President to do.

Like every other part of the Constitution, Article II was the result of numerous compromises and bargains struck throughout the summer of 1787. The story of the Convention's struggles over the Executive are well known: any decision reached on one aspect of the Executive (for example, whether to have one person or more hold this power, whether to have an executive council, whether to make the President re-eligible, whether to allow the national legislature to select the Executive, whether to make the term of office relatively short, and so on) would invariably affect a decision on another aspect of the executive. Indeed, the powers of the Executive (and those of the other branches of government) depended on the form of government, and vice versa.¹²⁰ The Framers understood the trade-offs involved in these decisions. But what they did not understand was what executive power actually means. The more they debated the Executive, the more it dawned on many of them that the concept of executive power was inherently indeterminate.

Questions about the meaning of executive power cropped up early at the Convention. From the start, there was a general sense that executive power includes the power to execute or enforce the laws, but there was little agreement beyond that. During the first debate over the Virginia Plan's proposal to establish an independent executive, it quickly became apparent that many delegates conceived of executive power in terms of those prerogatives associated with the

JOSEPH M. LYNCH, *NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT* (1999).

119. U.S. CONST. art. II, § 2.

120. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 300 (Max Farrand ed., 1911) [hereinafter RECORDS 2] (Nathaniel Gorham Remarks, Aug. 15, 1787).

British monarchy. For that reason, many of them expressed grave concerns about placing executive power in one person. In particular, these delegates feared that a single executive would end up having exclusive powers over war and peace. A few delegates—including some of the most outspoken supporters of a strong national executive, such as James Wilson—tried to reassure their colleagues that “[t]he only powers [they] conceived strictly Executive were those of executing the laws, and appointing officers, not (appertaining to and) appointed by the Legislature.”¹²¹ These efforts to clarify the meaning of executive power failed to satisfy Edmund Randolph and other Framers who believed that it was inherently monarchical in nature, so James Madison offered an amendment that was designed to specify the powers of the Executive. His proposal, however, did more to highlight the ambiguous (and therefore worrisome) nature of executive power. He moved to clarify the powers of the Executive under the Virginia Plan by adding the words “with power to carry into execution the national laws,—to appoint to offices in cases not otherwise provided for; and to execute such powers, not legislative or judiciary in their nature, as may from time to time be delegated by the national legislature.”¹²² What is most remarkable about this motion is that the phrase “to execute such powers, not legislative or judiciary in their nature,” would have marked out the powers of the Executive negatively. Madison took it for granted that the meanings of “legislative” and “judiciary” were fairly clear or well understood. It seems that others did, as well. In the end, the delegates accepted the first two clauses of Madison’s amendment, but they rejected the portion that would have granted the Executive powers that were neither legislative nor judicial.¹²³

Ever the theoretician, Madison made several more attempts throughout the summer to nail down the meaning of executive power. When others could not provide answers to his questions, he ventured his own. In a remark on the importance of keeping the different powers separate and independent of each other, Madison noted certain similarities between the Executive and the Judiciary—both execute the laws in certain cases and both interpret and apply the laws in certain cases:

121. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 66 (Max Farrand ed., 1911) [hereinafter RECORDS 1].

122. *Id.* at 63.

123. *Id.* at 63–64.

The difference between them seemed to consist chiefly in two circumstances—1. the collective interest & security were much more in the power belonging to the Executive than to the Judiciary department. 2. in the administration of the former much greater latitude is left to opinion and discretion than in the administration of the latter.¹²⁴

Though Madison favored a strong national executive, he never went as far as Hamilton or Gouverneur Morris. He came to realize that executive power has a natural tendency toward growth and expansion, especially in times of crisis. At one point he declared, “In time of actual war, great discretionary powers are constantly given to the Executive Magistrate.”¹²⁵

Once the Convention agreed on some general principles for a new form of government, it appointed a Committee of Detail to prepare a draft that reflected what they had achieved so far. One of the main principles guiding the work of the Committee of Detail was “[t]o use simple and precise language, and general propositions” because a constitution was not to be construed in the same way as a law.¹²⁶ The acknowledgment that a constitution differs fundamentally from an ordinary law (in terms of its longevity and its flexibility, among other things) can hardly be disputed, but the guidelines adopted were internally inconsistent. There is a contradiction between the demand for “simple and precise language,” on the one hand, and the demand for “general propositions,” on the other hand. A general proposition may require the use of simple language, but it may also militate against the use of precise language. In addition, the demand for “precise” language could come into direct conflict with the demand for “simple” language. The Committee of Detail enumerated ten separate powers that the Executive (not yet designated the “President”) would possess under the principles that had been adopted to that point. These included the powers to execute the national laws, to command the state militias and armed forces of the union, to discipline them, to direct the state governors to call the militias into service, to appoint officers, to veto legislation passed by the national legislature, to receive ambassadors, to commission officers, to

124. RECORDS 2, *supra* note 120, at 34.

125. RECORDS 1, *supra* note 121, at 465.

126. RECORDS 2, *supra* note 120, at 137.

convene the Legislature, and to grant pardons.¹²⁷ The Committee of Detail, however, never made an attempt to define executive power.¹²⁸

The Convention never settled the meaning of executive power. Nor did all the delegates agree that the office they vested with this mysterious power had been adequately checked. Even some of the eventual signers of the Constitution expressed worries that the office they created might someday evolve into a monarchical institution. The only thing that met the agreement (though certainly not the approval) of everyone—from the most outspoken proponent of a strong executive to the most suspicious critic of the presidency—was that the distinguishing characteristic of executive power was “energy.” Indeed, as early as the second day of debate, the ever-vacillating Edmund Randolph had already insisted on “the absolute necessity of a more energetic government.”¹²⁹ After Roger Sherman suggested that the Executive should be “nothing more than an institution for carrying the will of the Legislature into effect,” James Wilson immediately reminded his colleagues of the need for an energetic executive.¹³⁰ Throughout the rest of the summer, Wilson, Morris, Hamilton, and others invoked the concept of energy to explain what distinguished executive power from the rest of the government. It was precisely the association of executive power with energy that led the non-signers Randolph and George Mason to suspect that the presidency would eventually morph into a monarchy.

In many respects, energy was just as vague and elusive a concept as executive power. No one offered anything approaching a clear or precise definition. In fact, Madison offered an elaborate philosophical and linguistic justification for the unavoidable “obscurity” in the Constitution in the installment of the *Federalist* that contains his most

127. *Id.* at 145–46. The draft confusingly includes twelve items under the “powers” of the Executive, including removability by impeachment and compensation for public service. *Id.*

128. Thomas Paine would have no better luck in defining executive power for the French government than the Framers did in the American context. Echoing the uncertainty that had been expressed in Philadelphia, Paine wrote:

[T]he meaning ordinarily assigned to the term, executive power, is indefinite, and, consequently, our conception of it is by no means so exact and plain as when we speak of legislative power. It is associated, some way or other, in our minds with the idea of arbitrary power, and thus a feeling of suspicion rather than of confidence is aroused.

THOMAS PAINE, *Answer to Four Questions on the Legislative and Executive Powers*, in 2 THE COMPLETE WRITINGS OF THOMAS PAINE 521, 523 (Philip S. Foner ed., 1945).

129. RECORDS 1, *supra* note 121, at 24.

130. *Id.* at 65.

extensive use of the term “energy.” Responding to widespread criticisms that the Constitution was riddled with ambiguous and indeterminate phrases and terms inconsistent with the rule of law,¹³¹ Madison reminded readers that language is inherently imprecise and imperfect—so much so, in fact, that “the Almighty himself” would find it difficult to express his “luminous” ideas in a clear and precise fashion.¹³² It is for this reason “that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive, and judiciary.”¹³³ Included in this generalization was the concept of energy. Although Madison never attempted to define energy, he did state with certainty that it is essential to those things that “enter into the very definition of good government.”¹³⁴ The upshot of Madison’s discussion was that some degree of indeterminacy affords government with the flexibility required to act with sufficient energy.

Even though no one provided a definition of energy, everyone understood what it signified. It connoted vigorous, decisive, flexible, and strong government—or, in Jefferson’s words, “high-toned” government. When the Constitution was unveiled to the public in September 1787, one of the most common complaints advanced by critics was that the proposed government would give the President too much energy. Instead of denying the accusation that the Constitution created an energetic President, Federalists like Hamilton went on the offensive and vigorously promoted the need for greater energy in government. In the *Federalist No. 70*, which defended the “unity” of the President against alternatives such as an executive council, Hamilton explained:

Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy.¹³⁵

131. For a survey of these criticisms and Federalist responses to them, see FATOVIC, *supra* note 23, at 168–72.

132. THE FEDERALIST NO. 37, at 245 (James Madison) (Isaac Kramnick ed., 1987).

133. *Id.* at 244.

134. *Id.* at 243.

135. THE FEDERALIST NO. 70, *supra* note 132, at 402 (Alexander Hamilton).

Hamilton was not alone in making the case for energy in the Executive. Madison reinforced the link between energy and the presidency he helped create when he wrote that “energy in government requires not only a certain duration of power, but the execution of it by a single hand.”¹³⁶ Future Supreme Court Justice James Iredell noted at the North Carolina ratifying convention that “[o]ne of the great advantages attending a single Executive power is, the degree of secrecy and dispatch with which, on critical occasions, such a power can act.”¹³⁷ Without actually using the term prerogative, which would have alarmed Americans already suspicious of executive power, those who invoked the idea of energy nevertheless called prerogative to mind in emphasizing the need for flexibility and discretion associated with the concept of energy.

Once the executive branch was established, experience only confirmed what many had suspected: executive power would entail far more day-to-day discretion than the idea of the rule of law would seem to allow. As Secretary of the Treasury, Hamilton summed up the extent to which executive power—including that portion exercised by subordinates of the President—entailed activities that could never be specified in advance, as the rule of law requires:

[T]here is and necessarily must be a great number of undefined particulars incident to the general duty of every officer, for the requiring of which no special warrant is to be found in any law. . . .

. . . .
. . . [T]here is no law providing for a thousandth part of the duties which each [executive] officer performs in the great political machine & which unless performed would arrest its motion.¹³⁸

As discussed below, the Treasury Secretary found it necessary “to act according to discretion, for the publick good, without the prescription of the Law” in situations that fell far short of those life-threatening emergencies that Locke had used to justify prerogative.

136. THE FEDERALIST NO. 37, *supra* note 132, at 244 (James Madison).

137. James Iredell, *Marcus III*, in 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 323 (John P. Kaminski et al. eds., 1986).

138. Letter from Alexander Hamilton to William Heth (June 23[–24], 1791), in 8 THE PAPERS OF ALEXANDER HAMILTON 499–500 (Harold C. Syrett ed., 1979).

IV. DEBATES OVER THE MEANING OF EXECUTIVE POWER IN THE EARLY CONGRESSES

The ratification of the Constitution resulted in the establishment of a single executive but failed to settle the meaning of executive power. In fact, the creation of the presidency created new opportunities to contest the meaning of executive power. To be sure, much of the debate that took place during the first few Congresses did focus on the proper interpretation of various clauses scattered throughout the text of the Constitution, but a significant amount of the debate revolved around the more fundamental question: What does executive power mean?

The first major debate over the meaning of executive power concerned the proper location of the removal power.¹³⁹ Or, to put it more accurately, the debate over the proper location of the removal power raised a question about whether it was an executive power at all. The dispute arose because Article II, Section 2 of the Constitution stipulated that the President would “have Power, by and with the Advice and Consent of the Senate” to appoint certain “inferior officers,”¹⁴⁰ but the Constitution did not specify any means for removing officers except by the cumbersome process of impeachment.¹⁴¹ Members of Congress generally agreed that the power to remove officers short of impeachment existed somewhere in the government, but they could not agree whether this power rested with the President alone, the Senate alone, or with the President and the Senate working in conjunction.

Though much of the debate hinged on the meaning and implications of the language and structure of the Constitution, it sometimes turned to more theoretical considerations of the meaning of executive power. Supporters of an exclusive presidential removal power often moved beyond the explicit text of the Constitution to make the case that a presidential power to remove inferior officers was an implied constitutional power and perhaps even an inherent executive power. In general, they argued that because removal is an executive power, it belongs to the President, who, by virtue of Article II, Section 1, is vested with the executive power of the United States.¹⁴²

139. For a summary of the major constitutional arguments advanced during the debate over the removal power, see DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801*, at 37–41 (1997).

140. U.S. CONST. art. II, § 2, cl. 2.

141. U.S. CONST. art. II, § 4.

142. U.S. CONST. art. II, § 1.

The arch-Federalist Fisher Ames made the most forceful case for an exclusive presidential power:

The constitution places all executive power in the hands of the President, and could he personally execute all the laws, there would be no occasion for establishing auxiliaries. . . . But in order that he may be responsible to his country, he must have a choice in selecting his assistants, a control over them, with power to remove them when he finds the qualifications which induced their appointment cease to exist.¹⁴³

Critics, like James Jackson of Georgia, countered that executive power is not vested exclusively in the President.¹⁴⁴ Instead, they argued, certain powers are divided between the branches in order to prevent tyranny. In response to those who suggested that locating the removal power in the President would promote “energy,” John Page of Virginia declared, “The doctrine of energy in Government, as I said before, is the true doctrine of tyrants.”¹⁴⁵

Some of these disputes can be explained by differences in ideology or by honest disagreements over the best way to interpret the Constitution. But genuine confusion also helps account for the range and intensity of opinions expressed in this debate. Participants in the debate used the term “executive power” without a common understanding of its meaning. At one point, Michael Jenifer Stone asserted that these constant references to executive power did absolutely nothing to clarify matters: “[T]elling me that this is an executive power [] raises no complete idea in my mind.”¹⁴⁶ William L. Smith of South Carolina put his finger on one of the main sources of confusion: “What powers are executive, or incidental to the executive department, will depend upon the nature of the Government; because some powers are vested in the Executive of a monarchy that are not in an aristocracy.”¹⁴⁷ In other words, executive power had no unvarying meaning or essence, but instead changed from one context to another.

Uncertainty about the meaning of executive power—coupled with intense disagreements over the proper division of power in the national government—continued to shape a variety of debates that developed in the coming months and years. Virtually every matter

143. 1 ANNALS OF CONG. 492 (1789) (Joseph Gales ed., 1834).

144. *Id.* at 506.

145. *Id.* at 572.

146. *Id.* at 589.

147. *Id.* at 566.

that involved the executive branch in one way or another touched off a debate over the proper divisions between executive and legislative power. More often than not, the blurriness of these lines and the protean qualities of executive power made it easy for members of the first few Congresses to support expansions in the powers and responsibilities of the executive branch, even when that would entail considerable discretion. Critics of the Constitution had worried that the indeterminate nature of executive power would make it easy for the President to exercise powers and responsibilities that had not been authorized by the law. What many of them did not realize was that this same indeterminacy would make it easy for Congress to delegate by law additional powers and responsibilities to this amorphous office.

Not all of the debates that took place over the meaning of executive power were triggered by discussions about the powers and responsibilities of the President. In the debate over establishment of the Treasury Department during the First Congress, some representatives wondered whether the Secretary's duty "to prepare and report estimates of the public revenue and public expenditures" would be an unconstitutional abridgement of the prerogatives of the House.¹⁴⁸ John Page spoke for many when he argued that the Secretary's reporting duty would interfere "in business of legislation."¹⁴⁹ Page reiterated his objections to allowing the Secretary of the Treasury even to recommend possible sources of revenue during the Second Congress when he stated that Anti-Federalist warnings about the inevitable growth of undefined executive power were already coming to pass.¹⁵⁰ Representative William Findley, from the backcountry of Pennsylvania, echoed Page's assertion that congressional reliance on the executive branch for information constituted "a transfer of Legislative authority."¹⁵¹

In the following years, members of Congress debated the constitutionality and the wisdom of delegating power to the President to establish post roads. Opponents argued that giving the President this power would amount to an unconstitutional delegation of legislative authority to the executive branch. Supporters of the post office bill argued that it was constitutional because all it did was give the Executive discretion within limits set by Congress.¹⁵² Perhaps the most vocal

148. *Id.* at 616.

149. *Id.* at 617.

150. 2 ANNALS OF CONG. 441 (1792).

151. *Id.* at 447.

152. 1 ANNALS OF CONG. 1734–35 (1790) (Joseph Gales ed., 1834).

proponent of the bill was the Massachusetts Federalist Theodore Sedgwick, who said he favored delegating this power to the President because members of Congress would be apt to favor their own constituents rather than locate post roads in areas that served the best interest of the country as a whole.¹⁵³ Although Sedgwick also advanced the constitutional claim that there was nothing wrong with Congress delegating execution of the principles and goals that they set to another branch, there was an even more basic reason why the Executive would continue to gain power: It was simply “impossible precisely to define a boundary line between the business of Legislative and Executive.”¹⁵⁴ In the end, Congress declined to delegate this power to the President. Instead, it delegated this and many other powers to the Postmaster General. Indeed, the final bill gave the Postmaster General enormous discretion to establish post offices, determine the manner in which the mail would be delivered, and prescribe regulations to subordinates, among other things.¹⁵⁵

One of the most blatantly partisan episodes from the Second Congress illustrates just how much discretion of the sort associated with prerogative figures into the exercise of what is supposed to be routine executive power. Toward the very end of the Second Congress, William Branch Giles, who quickly earned a reputation as one of the Washington Administration’s fiercest critics, introduced a set of resolutions in the House of Representatives accusing Alexander Hamilton of misusing funds. Giles and his allies alleged that the Treasury Secretary violated the law when he used monies in a way that had not been specifically authorized by Congress, when he borrowed more money from Holland than he was authorized, and when he failed to provide Congress adequate information in his report on these activities. The most serious charge, and the one that most directly raised a constitutional question, was the allegation that Hamilton had used funds appropriated to pay off one debt with funds that had been appropriated to pay another debt. Hamilton defended these actions by pointing out that he had simply refinanced a loan of the United States at a lower interest rate by shifting around some funds. Although Hamilton had saved the government a substantial amount of

153. 2 ANNALS OF CONG. 229–30 (1791).

154. *Id.* at 239–40.

155. For a more extensive discussion of the constitutional debate over post roads, see CURRIE, *supra* note 139, at 146–49.

money, his critics argued that he should be removed from office because he had acted without the prescription of the law.¹⁵⁶

The debate that ensued revealed that critics and defenders of Hamilton alike believed that an element of prerogative is always involved in any exercise of executive power, even when there is no life-threatening emergency. Hamilton's supporters in the House pointed out that necessity (or in this case, a really good opportunity to save money) justifies departures from the strict letter of law. William Smith argued that Hamilton's actions should not be judged by how closely he hewed to the law, but by how well he served the public interest—even if that involved a direct violation of the law, stating:

[I]t must be admitted, that there may be cases of a sufficient urgency to justify a departure from it, and to make it the duty of the Legislature to indemnify an officer; as if an adherence would in particular cases, and under particular circumstances, prove ruinous to the public credit, or prevent the taking measures essential to the public safety, against invasion or insurrection. In cases of that nature, and which cannot be foreseen by the Legislature nor guarded against, a discretionary authority must be deemed to reside in the P[resident], or some other Executive officer, to be exercised for the public good; such exercise instead of being construed into a crime, would always meet the approbation of the National Legislature. If there be any weight in these remarks, it does not then follow as a general rule, that it is essential to the due administration of the Government, that laws making specific appropriations should in all cases whatsoever, and under every public circumstance, be strictly observed.¹⁵⁷

A few days later Smith elaborated on his conception of executive power, saying that “in all Governments a discretionary latitude was implied in Executive officers, where that discretion resulted from the nature of the office, or was in pursuance of general authority delegated by law.”¹⁵⁸

For critics of Hamilton, the fact that he violated the law was the decisive point, regardless of any good that came from it. However, even many of his opponents accepted William Smith's contention that it is sometimes permissible for an executive officer to step outside the

156. For more complete background, see RON CHERNOW, *ALEXANDER HAMILTON* 425–28 (2004); STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 295–302 (1993).

157. 2 ANNALS OF CONG. 901–02 (1793).

158. *Id.* at 911.

law in the performance of his responsibilities. Madison, who had urged his fellow Framers to define executive power, now acknowledged that prerogative is an unavoidable feature of executive power, stating:

Much has been said on the necessity of sometimes departing from the strictness of legal appropriations, as a plea for any freedoms that may have been taken with them by the Secretary. He would not deny that there might be emergencies, in the course of human affairs, of so extraordinary and pressing a nature, as to absolve the Executive from an inflexible conformity to the injunctions of the law. It was, nevertheless, as essential to remember, as it was obvious to remark, that in all such cases, the necessity should be palpable; that the Executive sanction should flow from the supreme source; and that the first opportunity should be seized for communicating to the Legislature the measures pursued, with the reasons explaining the necessity of them. This early communication was equally enforced by prudence and by duty. It was the best evidence of the motives for assuming the extraordinary power; it was a respect manifestly due to the Legislative authority; and it was more particularly indispensable, as that alone would enable the Legislature, by a provident amendment of the law, to accommodate it to like emergencies in the future.¹⁵⁹

Madison denied that this situation presented a case of necessity, but he had conceded the basic point that supporters of a strong and energetic executive had been making: Legal rules cannot account for all that passes under the label of executive power. In the end, Hamilton was exonerated of any wrongdoing with only four members voting in support of Giles's resolutions.¹⁶⁰

Proponents of a strong executive would take advantage of the apparent elasticity of executive power to argue for expansions in the powers of the President during many important controversies that arose during the first years under the Constitution. In his pseudonymous debate with James Madison over President Washington's authority to issue a Proclamation of Neutrality in the conflict between France and England, Hamilton exploited the undefined nature of executive power to argue that the vesting clause of Article II gives the President broad powers to conduct the foreign affairs of the United

159. *Id.* at 941.

160. For a more extensive discussion of the legal and constitutional issues involved in this episode, see CURRIE, *supra* note 139, at 164–68.

States. Hamilton argued that the President's power to interpret the law—including treaties—included the power to “first judge for himself their meaning.”¹⁶¹ Based on this power to interpret and enforce treaties, Hamilton maintained, Washington could effectively annul the part of America's Treaty of Alliance with France that would have drawn the country into a war against England.

Of course, Madison, Jefferson, and others would vigorously contest these and other attempts to expand the powers of the President. Such expansive interpretations of executive power were never universally accepted. In fact, they would continue to generate some of the most heated controversies in the history of the early republic. However, even those who were most insistent about the importance of following the strict letter of the law in a republican form of government conceded that the Executive possesses great latitude in interpreting and applying the law. Jefferson drew a sharp contrast between the way that judges and executives ought to approach the law. Although the judge is required to take “the intention of the lawgiver as his true guide” and give “effect” to all parts of the law,

in laws merely executive, where no private right stands in the way, and the public object is the interest of all, a much freer scope of construction, in favor of the intention of the law, ought to be taken, and ingenuity ever should be exercised in devising constructions, which may save to the public the benefit of the law.¹⁶²

But even more remarkable than these statements is that Jefferson, that outspoken critic of “high-toned” government, would become perhaps the most articulate defender of Lockean prerogative in the nation's history. In his famous letter to John B. Colvin, Jefferson confirmed that there are circumstances “which make it a duty in officers

161. Alexander Hamilton, Pacificus Number 1, in *THE PACIFICUS-HELVIDIUS DEBATES OF 1793–1794: TOWARD THE COMPLETION OF THE AMERICAN FOUNDING* 16 (Morton J. Frisch ed., 2007). For background on this controversy, see Morton J. Frisch, *Introduction*, in *THE PACIFICUS-HELVIDIUS DEBATES OF 1793–1794: TOWARD THE COMPLETION OF THE AMERICAN FOUNDING*, at vii–xiv (Morton J. Frisch ed., 2007); ELKINS & MCKITRICK, *supra* note 156, at 330–65.

162. Letter from Thomas Jefferson to William H. Cabell (Aug. 11, 1807), in *11 THE WRITINGS OF THOMAS JEFFERSON* 318–19 (Albert Ellery Bergh ed., 1907). Jefferson justified this difference on the grounds that “[i]t often happens that, the Legislature prescribing details of execution, some circumstance arises, unforeseen or unattended to by them, which would totally frustrate their intention, were their details scrupulously adhered to, and deemed exclusive of all others.” *Id.* For more detailed analysis of this letter and how it fits into Jefferson's overall conception of executive power and constitutional government, see JEREMY D. BAILEY, *THOMAS JEFFERSON AND EXECUTIVE POWER* 247–50 (2007).

of high trust, to assume authorities beyond the law.”¹⁶³ It was “embarrassing” to admit this, but “[a] strict observance of the written laws is doubtless *one* of the high duties of a good citizen, but it is not *the highest*.”¹⁶⁴ There are extraordinary circumstances in which the Executive must act outside the law because strict adherence to the law would lead to disaster.¹⁶⁵ The fact that a thinker who was otherwise so adamant about the importance of drawing clear lines around different powers found it so difficult to maintain the lines between executive power and prerogative may help explain why executive power has been so capacious.

V. CONCLUSION

All three powers—legislative, judicial, and executive—have grown substantially since the Constitution was ratified. But it is arguable that the growth of legislative and judicial power has always revolved around law. Increasing areas of social and economic life have come under legislative jurisdiction, but Congress’s activities are still fundamentally tied to or grow out of lawmaking (even if some of those laws actually end up delegating lawmaking powers to others). The Judiciary inserts itself into more domains of life, as well; but its activities are still connected to the interpretation of law—even if the way it interprets the law is sometimes tendentious. Most of the growth in executive power has also been the result of law that has been delegated by Congress or interpreted to the President’s own advantage. However, some of the growth in executive power has been unconnected to law in any direct way. Presidents have taken extraordinary actions without express legal authorization since the Constitution was established. Of course, as Jack Goldsmith has argued in much of his work, lawyers for presidential administrations will always insist that there is some law somewhere that somehow authorizes whatever actions the President thinks is necessary. But the legal basis for the President’s ability to deploy forces abroad without congressional authorization, eavesdrop on communications with individuals in other countries, use drones to assassinate suspected terrorists and their associates, and do a host of other things that have become shockingly routine since 9-11 is questionable at best.

163. Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), in THOMAS JEFFERSON: WRITINGS 1231 (Merrill D. Peterson ed., 1984).

164. *Id.*

165. *Id.*

We have to consider how much the growth of executive power in these and other areas owes to a tendency toward the extra-legal that we are often reluctant to acknowledge. There may be few outright or acknowledged instances of prerogative today, but there may be an element of prerogative in all executive power. The inability of early modern constitutional thinkers and their followers in the early republic to maintain a sharp distinction between supposedly routine and rule-bound exercises of executive power, on the one hand, and extraordinary and extra-legal exercises of prerogative, on the other, suggests that these powers actually fall along a continuum. If the development of the presidency in the twentieth century, and especially since 9-11, has tended to blur the lines between executive power and prerogative, that may be because they were never distinct categories in the first place. Recognizing just how easy it is to move along the continuum between actions prescribed by law and those without the prescription of the law does not require acceptance of any particular exercise of power. But recognizing the potential for extra-legal action in all executive power may be required to keep it in check.