INTRODUCTION

Invoking Inherent Powers: A Primer

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This special issue was organized to give scholars of different disciplines and persuasions an opportunity to analyze the nature and scope of the president's power to exercise inherent authorities. What is the origin and legitimacy of this type of authority? Is it drawn solely from Article II of the Constitution or also located outside as an extraconstitutional power? What checks from the other branches operate against it? How does the assertion and exercise of this power by President George W. Bush compare to and differ from those of his predecessors? How compatible is presidential inherent power with the U.S. system of republican government and constitutional limits?

Across a broad front, the presidency of George W. Bush claims inherent powers to create military commissions and determine their rules and procedures; designate U.S. citizens as "enemy combatants" and hold them indefinitely without being charged, given counsel, or ever tried; engage in "extraordinary rendition" to take a suspect from the United States to another country for interrogation and possible torture; and authorize the National Security Agency to listen to phone conversations between the United States and a foreign country involving suspected terrorists.

This is not the first time that an American president has invoked inherent powers under Article II and the Commander-in-Chief Clause. Other precedents exist. Some are poorly understood and taken out of context to promote a scope of executive power that was never originally intended. In other cases, there are clear examples of presidents who invoked inherent, extraconstitutional, and exclusive power. Still, at no time in America's history have inherent powers been claimed with as much frequency and breadth as the presidency of George W. Bush.

How much power fits under the umbrella of "inherent"? We are familiar with express and implied powers used by presidents to discharge their constitutional duties. Express powers are clearly stated in the text of the Constitution; implied powers are those

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that can be reasonably drawn from express powers. "Inherent" is sometimes used as synonymous with "implied," but they differ fundamentally. Inherent power has been defined in this manner: "An authority possessed without its being derived from another. . . . Powers over and beyond those explicitly granted in the Constitution or reasonably to be implied from express powers" (Black 1979, 703). That definition remained in the sixth edition of *Black's Law Dictionary* (1990) but dropped out of the current eighth edition (2004), which contains this definition of inherent power: "A power that necessarily derives from an office, position, or status" (Black 2004, 1208).

The purpose of a constitution is to specify and confine governmental powers to protect individual rights and liberties. That objective is undermined by claims of open-ended authorities that are not easily defined or circumscribed. The assertion of "inherent" powers ushers in a range of vague and abstruse sources. What "inheres" in the president? The standard collegiate dictionary explains that "inherent" describes the "essential character of something: belonging by nature or habit" (Merriam 1993, 601). How do we know what is essential or part of nature? The dictionary cross-references to "intrinsic," which can mean within a body or organ (as distinct from extrinsic) but also something "belonging to the essential nature or constitution of a thing," such as the "intrinsic worth of a gem" or the "intrinsic brightness of a star" (ibid., 614). Such words as inherent, essential, nature, and intrinsic are so nebulous that they invite political abuse and endanger individual liberties.

"Inherent" can introduce other properties, including attributes that suggest being superior, exclusive, and enduring. The verb "inhere" is used to describe a fixed element, such as the belief that "all virtue *inhered* in the farmer" or "the excellence *inhering* in the democratic faith" (Merriam 1965, 1163). "Inherence" may imply a power that has "permanent existence as an attribute" (ibid.). "Inherent" is associated with a quality that is settled or established, as "belonging by nature or settled habit" (ibid.).

The difficulty in understanding inherent power poses serious risks to constitutional government. The claim and exercise of inherent powers move a nation from one of limited powers to boundless and ill-defined authority. The assertion of inherent power in the president threatens the doctrine of separated powers and the system of checks and balances. Sovereignty moves from the constitutional principles of self-government, popular control, and republican government to the White House.

Abraham Lincoln

Those who argue for inherent powers for the president frequently cite the extraordinary actions by President Abraham Lincoln at the start of the Civil War. In April 1861, he suspended the writ of habeas corpus, withdrew funds from the Treasury, called forth the state militia, and placed a blockade on the rebellious states without legislative authority. In responding to the greatest crisis the United States has ever faced, he did not invoke exclusive or inherent authority. He claimed the right in time of emergency to act in the absence of law and sometimes against it, for the public good, and to come to

Congress later to explain what he had done (and why) and request from the legislative body the authority he needed. He understood that the superior lawmaking authority was Congress, not the president.

Admitting that he exceeded the constitutional boundaries established for the president, Lincoln knew he needed the sanction of Congress. He told lawmakers that his actions, "whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity, trusting then, as now, that Congress would readily ratify them" (Richardson 1897, 7, 3225). Lincoln never claimed authority to act outside the Constitution. He acted under his Article II powers plus those of Congress, believing that his actions (especially suspending the writ of habeas corpus) were not "beyond the constitutional competency of Congress" (ibid.). In so doing, he combined Article I and Article II powers.

Congress debated his request at length, with members supporting Lincoln with the explicit understanding that his emergency actions lacked legal support.[1] Congress passed legislation approving, legalizing, and making valid all of Lincoln's acts, proclamations, and orders issued after March 4, 1861 regarding U.S. forces "as if they had been issued and done under the previous express authority and direction of the Congress of the United States."[2] Unlike President Harry Truman in 1950 with the Korean War and President Bush from 2001 to 2006, Lincoln took emergency action but then sought statutory authority from Congress. He worked with Congress, not around it.

It is true that Lincoln had a face-off with the federal judiciary on a habeas petition and refused to be limited initially by judicial authority. His suspension of the writ of habeas corpus was opposed by Chief Justice Roger Taney, sitting as circuit judge. Taney ruled that, because the president had no authority under the Constitution to suspend the writ, a prisoner (John Merryman) should be set free. Merryman was suspected of being the captain of a secession troop and of having assisted in destroying railroads and bridges to prevent federal troops from reaching Washington, DC. When Taney attempted to serve a paper to free Merryman, prison officials refused to let Taney's marshal carry out his duty. Sidestepping a direct confrontation with Lincoln he could not win, Taney merely noted that he had exercised all the power that the Constitution and federal law had conferred upon him, "but that power has been resisted by a force too strong for me to overcome." He directed that his opinion be transmitted to Lincoln, after which it would "remain for that high officer, in fulfillment of his constitutional obligation to 'take care that the laws be faithfully executed,' to determine what measures he will take to cause the civil process of the United States to be respected and enforced."[3]

Under Lincoln's interpretation, emergency conditions enabled him to suspend the writ but only temporarily. Afterwards, he needed to work jointly with the legislative and judicial branches. Attorney General Edward Bates understood the limits on Lincoln's power. If the constitutional language in Article I meant "a repeal of all power to issue the writ, then I freely admit that none but Congress can do it." In the circumstances of "a

1. *Congressional Globe*, 37th Cong., 1st sess. (1861), 393 (Senator Timothy Howe).
2. 12 Stat. 326, ch. 63, sec. 3 (1861).
3. *Ex parte Merryman*, 17 Fed. Case no. 9,487 (1861), 153.

great and dangerous rebellion, like the present," the president's power to suspend the privilege for a period of time was "temporary and exceptional, and was intended only to meet a pressing emergency."[4]

Lincoln and Bates accepted the power of Congress to pass legislation to define when and how a president may suspend the writ of habeas corpus during a rebellion. On March 3, 1863, Congress enacted a bill authorizing the president, during a rebellion, to suspend the privilege of the writ of habeas corpus "whenever, in his judgment, the public safety may require it."[5] If suspended, no military or other officer could be compelled to answer any writ and return to the court the person detained under presidential authority. Under these statutory terms, a judicial order would lack force.

The 1863 statute included an important restriction on the president. It directed the secretary of state and the secretary of war, "as soon as may be practicable," to furnish federal judges with a list of the names of all persons, "citizens of states in which the administration of the laws has continued unimpaired in the said Federal courts," who are held as prisoners by order of the president or executive officers.[6] Submitting the list was not discretionary; it was mandatory. Failure to furnish the list could result in the discharge of the prisoner.[7] The legislative history of this statute contains several statements that Lincoln did not possess independent authority to suspend the writ and that Lincoln and other executive officials might have committed illegal acts (Fisher 2005a, 44).

One other point needs to be emphasized about Lincoln's war initiatives. They were directed to domestic, not foreign, conditions. Lincoln and his advisors never argued that he could take unilateral military actions against other nations without prior approval by Congress. In 1863, the Supreme Court upheld Lincoln's authority to place a blockade on the South, but Justice Robert Grier denied that the president as commander in chief had authority to initiate war against another country. Lincoln had acted defensively, not offensively. Grier specifically limited the president's power to take defensive actions, noting that he "has no power to initiate or declare a war either against a foreign nation or a domestic State."[8] The executive branch agreed. During oral argument, Richard Henry Dana, Jr., who represented the president, acknowledged that Lincoln's actions had nothing to do with "the right *to initiate a war, as a voluntary act of sovereignty*. That is vested only in Congress."[9]

The *Curtiss-Wright* Case

Arguments in favor of inherent and extraconstitutional presidential power rely heavily on Justice George Sutherland's decision in *United States v. Curtiss-Wright* (1936).

4. *Opinions of the Attorneys General*, 10: 90 (1861).
5. 12 Stat. 755, sec. 1 (1863).
6. Ibid., sec. 2.
7. Ibid., 756, sec. 3.
8. The *Prize* cases, 67 U.S. 635, 668 (1863).
9. Ibid., 660 (emphasis in original).

He cited this statement by John Marshall during debate in the House of Representatives in 1800: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." From this "sole organ" doctrine, the executive branch lays claim to numerous powers, including the power to conduct warrantless electronic surveillance and take other actions that supposedly override conflicting statutes and treaties. Those arguments depend not only on dicta in Sutherland's decision but dicta that wrench Marshall's statement from context to present a position he never held. Marshall never advocated an independent, inherent presidential power over external affairs, either in his positions as secretary of state, member of Congress, or chief justice of the Supreme Court. The specific frailties of Sutherland's analysis are examined in my article in the Law section of this issue (Fisher 2007).

Harry Truman

In June 1950, President Harry Truman sent U.S. troops to South Korea without ever coming to Congress for authority. His action violated the Constitution, the legislative history of the UN Charter, and the UN Participation Act of 1945, all of which required the president to come to Congress first and obtain legislative authority before venturing into foreign wars (Fisher 2004, 81-104). He even violated his pledge to the Senate while it debated the UN Charter. He stated that when any agreements are negotiated to participate in a UN military action, "it will be my purpose to ask the Congress for appropriate legislation to approve them" (ibid., 91). His initiative marked the first time that an American president initiated a major war without a declaration or authorization from Congress. Part of Truman's defense was the claim that his action in Korea did not constitute a "war" but rather a "police action" (ibid., 99-100).

Full articulation of the inherent-power theory came two years later when the Justice Department defended Truman's seizure of the steel mills to prosecute the war in Korea. Although he based the seizure order on authority under "the Constitution and laws of the United States, and as President of the United States and Commander-in-Chief of the armed forces of the United States" (Executive Order 10340), the Justice Department argued in court that Truman had acted solely on inherent executive power without any statutory support. Assistant Attorney General Holmes Baldridge told District Judge David A. Pine that courts were powerless to control the exercise of presidential power when directed toward emergency conditions. It seemed to Baldridge that "there is enough residual power in the executive to meet an emergency situation of this type when it comes up." Pine's reaction was chilling: "I think that whatever decision I reach, Mr. Baldridge, I shall not adopt the view that there is anyone in this Government whose power is unlimited, as you seem to indicate" (U.S. Congress 1952, 258).

Baldridge told Pine that only two limitations operated on executive power: "One is the ballot box and the other is impeachment." When Pine inquired whether Baldridge was arguing that, when a "sovereign people" granted powers to the federal government, "it limited Congress, it limited the judiciary, but did not limit the executive," Baldridge cheerfully replied: "That's our conception, Your Honor" (Loftus 1952, 1; Paull 1952, 1).

Pine asked whether once the president determines that an emergency exists, "the Courts cannot even review whether it is an emergency." Baldridge responded: "That is correct" (U.S. Congress 1952, 371-72).

At a news conference on April 17, 1952, Truman was asked, if he could seize the steel mills under his inherent powers, could he "also seize the newspapers and/or radio stations." Truman answered: "Under similar circumstances the President of the United States has to act for whatever is for the best of the country" (Public Papers 1952, 273). He insisted that the president "has very great inherent powers to meet great national emergencies" (ibid., 290). On April 29, Judge Pine wrote a blistering opinion denouncing the Justice Department's analysis of inherent presidential power. He flatly rejected the theory of an emergency power for the president that is not subject to judicial review: "To my mind this [theory] spells a form of government alien to our Constitutional government of limited powers." To recognize it "would undermine public confidence in the very edifice of government as it is known under the Constitution."[10] In holding Truman's seizure of the steel mills to be unconstitutional, he acknowledged that a nationwide strike might do extensive damage to the country but believed that a strike "would be less injurious to the public than the injury which would flow from a timorous judicial recognition that there is some basis for this claim to unlimited and unrestrained Executive power, which would be implicit in a failure to grant the injunction."[11]

Gallup polls reflected growing public disapproval of Truman's action. The administration decided to jettison the sweeping arguments for executive power it had presented in district court. Instead of relying on inherent powers, the Justice Department switched gears to argue that the president was simply putting into effect the defense programs authorized by Congress (U.S. Justice Department 1952, 144-72). This shift in legal strategy came too late and could not erase the taste left from district court presentations. The Supreme Court, divided 6 to 3, sustained Judge Pine's decision.[12]

The district court and the Supreme Court were driven by a hostile public reaction to the steel seizure. The great majority of newspapers rejected Truman's sweeping definition of executive power. An editorial in the *New York Times* rebuked him for creating "a new regime of government by executive decree," a system of government that was inconsistent "with our own democratic principle of government by laws and not by men" (Editorial 1952, 28). The *Washington Post* predicted that Truman's action "will probably go down in history as one of the most high-handed acts committed by an American President."[13] Other newspapers weighed in with various forms of denunciation, excoriating Truman for trying to exercise "dictatorial powers."[14]

10. *Youngstown Sheet & Tube Co. v. Sawyer*, 103 F. Supp. 569, 576-77 (D.D.C. 1952).
11. Ibid., 577.
12. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).
13. *Congressional Record*, 98: 4034.
14. Ibid., 4033.

One of the law clerks on the Supreme Court in 1952 was William Rehnquist. He and his associates expected Truman to win. The Court comprised Roosevelt and Truman appointees and "the entire decisional trend for fifteen years [1937-1952] had been in the direction of the aggrandizement of the powers of the president and Congress" (Rehnquist 2001, 171). What would account for the Court deciding against presidential power in the middle of the Korean War? Years later, Rehnquist described the impact of public opinion on the judiciary: "I think that this is one of those celebrated constitutional cases where what might be called the tide of public opinion suddenly began to run against the government, for a number of reasons, and that this tide of public opinion had a considerable influence on the Court" (ibid., 192).

The Influence of Scholars

For the past half-century, political scientists, historians, and law professors have offered intellectual support for the claim of inherent presidential power. They regularly look to the president as the branch of government best equipped to provide expertise, good intentions, and a commitment to the "national interest." By placing their trust in the presidency, they necessarily gave short shrift to legal boundaries and constitutional principles, including checks and balances and separation of powers (Fisher 2005b).

Although some of the scholars identify themselves as "originalists," their framework for government departs markedly from the values that shaped the Constitution. The Framers knew that British precedents assigned all of external affairs, including the war power, to the king. Equally clear is that the Framers did not trust concentrating power in an executive, and that was especially so with the war power. In their effort to create a republican government, they understood from their study of history that executives, in their search for fame and glory, had a dangerous appetite for war. John Jay in *Federalist no. 4* warned that monarchs in other nations "will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans." Those motives prompted executives to engage in wars "not sanctified by justice or the voice and interests of his people" (Wright 1961, 101).

Commager and Schlesinger

When Truman went to war against North Korea in 1950, the academic community had an opportunity to challenge the legality of his actions. Instead, prominent professors and scholars rushed to his defense. The historian Henry Steele Commager rebuked Senator Robert Taft and other critics of Truman's intervention, briskly stating that their objections "have no support in law or in history." He found the historical pattern so clear and obvious and "so hackneyed a theme that even politicians might reasonably be expected to be familiar with it" (Commager 1951a, 11). Commager cited precedents from the time of George Washington, John Adams, Thomas Jefferson, John Quincy

Adams, Abraham Lincoln, and the UN Charter, but none of those presidential actions came close to justifying Truman's action in Korea (Fisher 2005b, 593-95). Commager argued that strong presidents can use executive power boldly without threatening democracy or impairing the constitutional system: "There is, in fact, no basis in our own history for the distrust of the Executive authority" (Commager 1951b, 15).

By the 1960s, with the nation mired in a bitter war in Vietnam, Commager changed his tune and publicly apologized for his earlier unreserved endorsement of presidential war power. Commager told the Senate Foreign Relations Committee in 1967 that there should be a reconsideration of executive-legislative relations in the conduct of foreign relations (U.S. Congress 1967, 21). He returned to the committee in 1971 to testify that "it is very dangerous to allow the president to, in effect, commit us to a war from which we cannot withdraw, because the warmaking power is lodged and was intended to be lodged in the Congress" (U.S. Congress 1971, 62).

Arthur M. Schlesinger, Jr. also stepped forward to defend Truman's military actions in Korea. In a letter to the *New York Times*, he rejected Senator Taft's position that Truman "had no authority whatever to commit American troops to Korea without consulting Congress and without Congressional approval." He similarly dismissed Taft's claim that, by sending troops to Korea, Truman had "simply usurped authority, in violation of the laws and the Constitution." Calling Taft's analysis "demonstrably irresponsible," Schlesinger ended with this admonition: "Until Senator Taft and his friends succeed in rewriting American history according to their own specifications these facts must stand as obstacles to their efforts to foist off their current political prejudices as eternal American verities" (Schlesinger 1951, 28).

Years later, Schlesinger admitted that it was he, not Taft, who tried to rewrite American history and foist off political prejudices. The historical examples Schlesinger identified had no bearing on Truman's claim that he could go to war against another country without first coming to Congress for authority. Edward S. Corwin responded to Commager and Schlesinger by challenging the "course of constitutional development, practical and polemical, which ascribes to the President a truly royal prerogative in the field of foreign relations, and does so without indicating any correlative legal or constitutional control to which he is answerable." Corwin remarked: "Our high-flying prerogative men appear to resent the very idea that the only possible source of such control, Congress to wit, has any effective power in the premises at all" (Corwin 1951, 15).

After witnessing the Vietnam War and Watergate, Schlesinger expressed regret for calling Taft's statement "demonstrably irresponsible." He explained that he had responded with "a flourish of historical documentation and, alas, hyperbole" (Schlesinger 1973, 139). The problem went beyond flourishes and hyperbole. Schlesinger decided to remove his professional and academic hat in the early 1950s and endorse a presidential war for political and partisan objectives. By 1966, he counseled that "something must be done to assure the Congress a more authoritative and continuing voice in fundamental decisions in foreign policy" (Schlesinger and de Grazia, 1967, 27-28). In his 1973 book, *The Imperial Presidency*, Schlesinger wrote about the domestic and international pressures that helped concentrate power in the presidency: "It must be said that historians and

political scientists, this writer among them, contributed to the presidential mystique" (Schlesinger 1973, ix). Reconsideration is always valuable and needs to be encouraged, but independent scholarly checks are needed at the time of constitutional violations, not two decades later.

Richard Neustadt

Probably no presidential study has had the impact of Richard Neustadt's *Presidential Power*, published in 1960 and reissued as a paperback four years later. By concentrating on case studies and practical politics, Neustadt ignored or downgraded institutional, legal, and constitutional values. His emphasis on influence and persuasion overshadowed the fundamental constraints of public law (Moe 1999, 266-67; Moe 2004, 24-25). Starting with the modest theme of presidential power being "the power to persuade" (Neustadt 1964, 23) within a system of "give-and-take" (ibid., 47), a different side emerged as the book progressed. Neustadt now began to urge presidents to take power, not give it or share it. Power was something to be acquired and concentrated in the presidency, and the power was to be used for *personal* use. His model president was Franklin D. Roosevelt, not Dwight D. Eisenhower: "The politics of self-aggrandizement as Roosevelt practiced it affronted Eisenhower's sense of personal propriety" (ibid., 157). Was it just Eisenhower's "personal propriety" or his understanding of what the Constitution allowed, both in terms of separation of powers and federalism? To Neustadt it did not matter. FDR had every right to seek power for his own use and enjoyment: "Roosevelt was a politician seeking personal power; Eisenhower was a hero seeking national unity" (ibid.). Because Eisenhower cared more for national unity than personal power, Neustadt dismissed him as an "amateur" (ibid., 170, 171, 182).

Neustadt's book included a case study of the Korean War. He describes how Truman gave General Douglas MacArthur too much latitude and had to fire him. He also discussed the Supreme Court's decision to strike down the steel seizure. But there is not a word on whether Truman had the constitutional or legal *authority* to go to war against North Korea, nor did Neustadt explore Truman's inflated definitions of executive emergency power that the country and the judiciary found offensive. Certainly Truman never used the power of "persuasion" to convince Congress and the public about the war. Instead of examining the claims of emergency or inherent presidential power, Neustadt was satisfied that Truman had made decisions, taken initiatives, and was the "man-in-charge" (ibid., 166). Neustadt wrote: "The more determinedly a President seeks power, the more he will be likely to bring vigor to his clerkship. As he does so he contributes to the energy of government" (ibid., 174). Neustadt measured presidential success by action, vigor, decisiveness, initiative, energy, and personal power.

Wholly absent from his analysis were constitutional checks, sources of authority, or the ends to which power is put. Alexander Hamilton and other Framers emphasized the need for "energy" in the executive, but it was energy within the law, not outside it. It was energy to see that the laws are faithfully executed. In *Federalist no. 70*, Hamilton argued that energy was necessary to protect "the community against foreign attacks" (defensive,

not offensive, wars) and for "the steady administration of the laws." Energy was needed to carry out the laws, not to make or break them, and certainly not to undermine or threaten republican government.

John Yoo

Over the past decade, John Yoo has emerged as the leading academic voice to press for broad definitions of presidential power in foreign affairs. Unlike the liberal framework of Commager, Schlesinger, and Neustadt, Yoo approaches his work from a distinctly conservative orientation. He has been active with the Federalist Society, which endorses the doctrine of the unitary executive. This theory places all executive power directly under the control of the president, leaving no room for independent commissions, independent counsels, congressional involvement in administrative details, or statutory limitations on the president's power to remove executive officials (Fisher 2006, 1233).

An intellectual tension exists within the Federalist Society. It is generally comfortable in placing foreign policy and the war power with the president. At the same time, it promotes Original Intent, the belief that constitutional analysis needs to adhere to the intent of the Constitution as expressed through the Founding Fathers. Yet the record is overwhelmingly clear that the Framers consciously and deliberately broke with the British model of John Locke and William Blackstone, who placed all of external power and military decisions with the executive (Fisher 2004, 1-16). Yoo, however, wrote a lengthy 1996 article for the *California Law Review*, concluding on the basis of English history that "the Framers created a framework designed to encourage presidential initiative in war. Congress was given a role in war-making decisions not by the Declare War Clause, but by its power over funding and impeachment." Moreover, federal courts "were to have no role at all" (Yoo 1996, 170).

A law review was an ideal place for Yoo's article. Law students, usually without the assistance of peer review by outside scholars, decide which of many submitted manuscripts merit publication. Looking for originality, articles editors are interested in publishing a manuscript that can stimulate debate, draw the attention of other law reviews, and perhaps be mentioned in decisions issued by federal or state courts. Even if articles editors are unprepared to match the intellectual depth and experience of law professors who submit manuscripts, it is surprising that the students at the *California Law Review* could not have asked Yoo: "If the Framers created a framework designed to encourage presidents to initiate war, limited Congress to decisions of funding and impeachment, and prohibited a role for the U.S. courts, why is the Constitution written as it is? Why are so many war and military powers placed in Article I under Congress?"

Moreover, it should have been within the competence of an articles editor to check Yoo's claim that the Constitution provides "no role at all" for the courts in war power disputes. Limiting a review to the first two decades, it would have been easy for law students to locate the Supreme Court decisions of *Bas v. Tingy* (1800), *Talbot v. Seeman* (1801), and *Little v. Barreme* (1804). Not only did the Court take those cases and decide

them, they looked exclusively to Congress for the meaning of the war power.[15] In the last case, the Court decided that, when a collision occurs in time of war between a presidential proclamation and a congressional statute, the statute trumps the proclamation.

The students could have found the *Smith* case in 1806, where a federal circuit court forcefully rejected the argument that the president could ignore and countermand the Neutrality Act of 1794. The court clearly understood the difference between the defensive powers of the president and the offensive powers of Congress. There was "a manifest distinction between our going to war with a nation at peace, and a war being made against us by an actual invasion, or a formal declaration. In the former case, it is the exclusive province of congress to change a state of peace into a state of war."[16]

In *Ex parte Bollman* (1807), Chief Justice Marshall decided the case of two men charged with treason for levying war against the United States. A habeas petition had been filed to bring the men before the Court. Marshall looked to Congress as possessing plenary prerogative over suspending the writ: "If at any time the public safety should require the suspension of the powers vested by this act [Section 14 of the Judiciary Act of 1789] in the courts of the United States, it is for the legislature to say so."[17] The two prisoners were brought before the Court, where it was decided that there was insufficient evidence to justify the commitment of either one on the charge of treason in levying war against the United States.[18]

Of these five cases, Yoo mentions three. He cites *Little* but makes no mention of how the Court decided that a federal statute in time of war is superior to a presidential proclamation (Yoo 1996, 245, n.379). Yoo discusses *Talbot* (ibid., 294), but omits Chief Justice Marshall's statement that the "whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this inquiry."

Yoo claims that the Supreme Court in *Little* "never reached questions concerning the justiciability of inter-branch war powers disputes, or the President's inherent authority to order captures going beyond Congress' commands" (ibid., 295, n.584). Obviously the Court *did* reach questions concerning the justiciability of interbranch war powers disputes. The Court upheld a congressional statute over a conflicting presidential proclamation. Moreover, the Court *did* reach the question of the president's inherent authority to order captures going beyond the statutory authority of Congress. In deciding in favor of the statute, the Court dismissed any possible claim of the president possessing inherent authority in the dispute being adjudicated. As to some other invocation of inherent presidential authority in a different dispute, there was no reason for the Court—or for any court—to decide questions not placed before it. For other commentary on Yoo's analysis, see Fisher (2006, 1234-40) and Fisher (2000, 1658-68).

15. *Little v. Barreme*, 6 U.S. (2 Cr.) 170, 179 (1804); *Talbot v. Seeman*, 5 U.S. (1 Cr.) 1, 28 (1801); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 39-46 (1800).

16. *United States v. Smith*, 27 Fed. Cas. 1192, 1230 (C.C.N.Y. 1806) (no. 16,342).

17. 8 U.S. (4 Cr.) 75, 101 (1807).

18. Ibid., 135.

George W. Bush

Shortly after the terrorist attacks of 9/11, officials in the Bush administration began to advance a broad theory of presidential inherent power to create military commissions, designate U.S. citizens as "enemy combatants," condone torture as an interrogation technique, engage in "extraordinary rendition," and conduct warrantless National Security Agency (NSA) eavesdropping. The administration also cited statutes and court cases to justify these initiatives, but the primary source of authority consisted of Article II and inherent powers that the government argued were not subject to constraints from other branches.

Military Commissions

On November 13, 2001, President Bush issued a military order for the detention, treatment, and trial of noncitizens who belonged to al Qaeda, engaged in international terrorism, or harbored such individuals (Bush 2001). He relied upon "the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force [AUMF] Joint Resolution (Public Law 107-40, 11 Stat. 224) and sections 821 and 836 of title 10, United States Code." The joint resolution authorized war against Afghanistan; the two sections of Title 10 include references to military commissions.

In litigation challenging the president's authority to establish and operate commissions, the Justice Department argued that Bush "had ample authority" to convene them, relying on both the AUMF and Sections 821 and 836 (U.S. Justice Department 2006a, 7). If congressional support for the military order "were not so clear, the President has the inherent authority to convene military commissions to try and punish captured enemy combatants in wartime—even in the absence of any statutory authorization" (ibid., 8). The determination by President Bush that members and affiliates of al Qaeda are not covered by the Geneva Conventions "represents a core exercise of the President's Commander-in-Chief and foreign affairs powers during wartime and is entitled to be given effect by the courts" (ibid., 9). The department referred to "Congress's traditional hands-off approach to military commissions (in contrast to courts-martial)" (ibid., 10). Further, the department claimed that the Supreme Court "has recognized that courts are not competent to second-guess judgments of the political branches regarding the extent of force necessary to prosecute a war" (ibid., 19).

On June 29, 2006, in *Hamdan v. Rumsfeld*, the Supreme Court found those arguments to be meritless. Writing for a 5-3 majority, Justice John Paul Stevens held that President Bush could not use the military commissions he had created. He needed statutory authority from Congress. The commission convened to try Salim Ahmed Hamdan and other suspected terrorists "lacks power to proceed because its structure and procedures violate both the UCMJ [Uniform Code of Military Justice, Sections 821 and

836] and the Geneva Conventions."[19] The administration attempted to discount the importance of this decision by calling it merely a statutory, not a constitutional, question. Testifying on July 11, 2006 before the Senate Judiciary Committee, Acting Assistant Attorney General Steven G. Bradbury said in his prepared statement: "The Court did not address the President's constitutional authority and did not reach any constitutional question" (U.S. Justice Department 2006b, 1).

This position is shallow for two reasons. The administration had argued that the president had independent inherent powers under Article II to create the commissions and determine their procedures. To that proposition the Court gave a flat No. Second, the Court directed Bush to seek legislation from Congress that would comply with Sections 821 and 836 of the Uniform Code of Military Justice. The Court's judgment is anchored in the determination that the constitutional authority over military commissions lies fundamentally in Congress, flowing from Article I authority, and does not derive from any core presidential power.

After the *Hamdan* decision, the military commission bill drafted by the Bush administration continued to argue for inherent power under Article II. As placed in the *Congressional Record* on September 7, 2006, the section on "Findings" asserted: "The President's authority to convene military commissions arises from the Constitution's vesting in the President of the executive power and the power of Commander in Chief of the Armed Forces."[20] If that were true, the administration would have won *Hamdan* and the Court would not have directed Bush to come to Congress to seek statutory authority. The substitute bill (S. 3901), reported by the Senate Armed Services Committee on September 14, drew entirely on the Article I powers of Congress. The compromise bill later agreed to by the administration also deleted the Article II argument but deferred heavily to the president.

Enemy Combatants

The military commissions created by President Bush on November 13, 2001 applied to any individual "not a United States citizen." A number of suspected alien terrorists were prosecuted in civil court or taken before a military tribunal. Others were designated "enemy combatant" and held incommunicado without access to an attorney. Two U.S. citizens, Yaser Esam Hamdi and Jose Padilla, were treated in that fashion by being placed in military confinement without ever being charged or tried.

Regarding Hamdi, the Justice Department argued that, whenever the president designates a U.S. citizen an enemy combatant, federal judges may not interfere with his judgment. According to a government brief in the Fourth Circuit, the Constitution vests the president "with exclusive authority to act as Commander in Chief and as the Nation's sole organ in foreign affairs" (U.S. Justice Department 2002a, 14). As a consequence, courts "may not second-guess the military's determination that an individual is an enemy combatant and should be detained as such. . . . Going beyond that determination would

19. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2759 (2006).
20. *Congressional Record*, 152: S9113 (daily ed., September 7, 2006).

require the courts to enter an area in which they have no competence, much less institutional expertise, intrude upon the constitutional prerogative of the Commander in Chief (and military authorities acting at his control), and possibly create 'a conflict between judicial and military opinion highly comforting to enemies of the United States' " (ibid., 29-30, 31).

American citizens designated as enemy combatants can cite this provision in the U.S. Code: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress" (18 U.S.C. § 4001(a)). The Bush administration argued that it was not limited by this statute because "Article II alone gives the President the power to detain enemies during wartime, regardless of congressional action" (Haynes 2002, 2). Alternatively, the administration concluded that the AUMF, authorizing military action against Afghanistan, represented an act of Congress that satisfied the statutory requirement of Title 18.

Padilla was another U.S. citizen designated as an enemy combatant. He was kept in a Navy brig in Charleston, SC, without access to an attorney, never formally charged, and with no expectation of a trial. Unlike Hamdi, who was captured in Afghanistan, Padilla was arrested in Chicago on a material witness warrant before being designated as an enemy combatant a month later. Although it could not be argued that Padilla engaged as a "combatant" on a battlefield, the government decided that one can be an enemy combatant without ever fighting on a battlefield: "In a time of war, an enemy combatant is subject to capture and detention wherever found, whether on a battlefield or elsewhere abroad or within the United States" (U.S. Justice Department 2002b, 23).

On June 28, 2004, eight justices of the Supreme Court rejected the government's central argument that Hamdi's detention was quintessentially a presidential decision, not to be reevaluated and second-guessed by the judiciary. Writing for the plurality, Justice Sandra Day O'Connor announced: "We necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. . . . We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. . . . Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."[21] On the same day, the Court ducked Padilla's case by deciding that his habeas petition had been filed with the wrong court.[22]

The Torture Memos

After 9/11, a series of Justice Department memos argued for broad and independent presidential authority to determine the methods used to interrogate suspected terrorists. A memo of December 28, 2001, written by John Yoo and Patrick F. Philbin, serving as deputies in the Office of Legal Counsel (OLC), concluded that "the great weight of legal

21. *Hamdi v. Rumsfeld*, 542 U.S. 507, 535-36 (2004).
22. *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

authority indicates that a federal district court could not properly exercise habeas jurisdiction over an alien detained at GBC [Guantánamo Bay, Cuba]" (U.S. Justice Department 2001, 1). That line of analysis, rejected by the Supreme Court in *Rasul v. Bush*,[23] would have allowed executive officials to conduct interrogations and operate military commissions without any interference from federal courts.

Yoo teamed up with another OLC attorney, Robert J. Delahunty, to write a memo dated January 9, 2002. They concluded that such treaties as the Geneva Conventions and various statutes "do not protect members of the al Qaeda organization, which as a non-State actor cannot be a party to the international agreements governing war. We further conclude that these treaties do not apply to the Taliban militia" (U.S. Justice Department 2002c, 1). Treaty provisions, including prohibitions on physical or mental torture, coercive interrogations, acts of violence, inhumane treatment, and any form of cruelty, would not apply. Nor could Congress, by statute, interfere with the president's authority over detainees: "Any congressional effort to restrict presidential authority by subjecting the conduct of the U.S. Armed Forces to a broad construction of the Geneva Convention, one that is not clearly borne by its text, would represent a possible infringement on presidential discretion to direct the military" (ibid., 11).

The legal and constitutional analyses by Yoo and other OLC attorneys led directly to a fifty-page memo by OLC head Jay S. Bybee, prepared for White House Counsel Alberto Gonzales and dated August 1, 2002. Physical pain amounting to torture "must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death" (U.S. Justice Department 2002d, 1). Bybee incorporated Yoo's definition of presidential power in time of war: "[A] statute would be unconstitutional if it impermissibly encroached on the President's constitutional power to conduct a military campaign. As Commander-in-Chief, the President has the constitutional authority to order interrogations of enemy combatants to gain intelligence information concerning the military plans of the enemy" (ibid., 31). Because this power, as read by Bybee and Yoo, comes from the Constitution, no statute, treaty, or court decision could limit it.

The OLC memos greatly influenced the working group that Defense Secretary Donald Rumsfeld established on January 15, 2003. When its report was released, first as a draft on March 6, 2003, and later as a final report on April 4, 2003, they showed the marked impact of OLC analysis on presidential power, treaties, statutes, and court rulings. Both reports state that the torture statute "does not apply to the conduct of U.S. personnel at Guantanamo," and both interpret the torture statute as not applying "to the President's detention and interrogation of enemy combatants pursuant to his Commander-in-Chief authority" (Fisher 2005a, 207-08). From these legal memos it was a short step to the torture of detainees at Guantánamo, Afghanistan, and Iraq, including the notorious prison at Abu Ghraib (ibid., 198-209).

The stunning content of the administration's memos, eventually made available on the Internet, forced the White House into a partial retreat. At a press briefing on June 22, 2004, White House Counsel Gonzales explained that, to the extent that some of the

23. 542 U.S. 466, 485 (2004).

documents "in the context of interrogations, explored broad legal theories, including legal theories about the scope of the President's power as Commander-in-Chief, some of their discussion, quite frankly, is irrelevant and unnecessary to support any action taken by the President" (White House 2004). He announced that the memos were under review and might be replaced.

At the end of 2004, the OLC released a memo that called torture "abhorrent both to American law and values and to international norms" (U.S. Justice Department 2004, 1). This document, superceding the Bybee August 2002 memo, concluded that the discussion in Bybee's memo "concerning the President's Commander-in-Chief power and the potential defenses to liability was—and remains—unnecessary, [and] has been eliminated from the analysis that follows" (ibid., 2). However, "elimination" did not mean disappearance or even repudiation. In the June 22, 2004 meeting with reporters, Gonzales explained that the briefing "does not include CIA activities" (White House 2004, 4). When a reporter asked whether they were "wrong to assume then, that the CIA is not subject to these categories of interrogation technique," Gonzales replied that he was not going "to get into questions related to the CIA" (ibid., 21). The White House clearly intended to maintain two standards: one for interrogations conducted by the Defense Department and a separate procedure for the CIA. That distinction was openly discussed in the military commission bill debated during the fall of 2006 (Baker 2006, A1).

Extraordinary Rendition

Broad interpretations of the president's power as commander in chief in time of war bore fruit in another area: "extraordinary rendition," which allows detainees to be sent to another country for interrogation and possible torture. In previous years, attorneys general had concluded that presidents may not act under some form of implied, inherent, or extraconstitutional authority. They needed authority granted either by treaty or a law passed by Congress.[24] As recently as 1979, the OLC decided that the president "cannot order any person extradited unless a treaty or statute authorizes him to do so."[25]

Use of the adjective "extraordinary" is a clue that the procedure has entered the realm of executive law, where the president acts not only in the absence of statutory or treaty law but even in the face of them. Officials in the Bush administration defended the need to detain and interrogate suspected terrorists outside the country. James L. Pavitt, after retiring from the CIA in August 2004, claimed that the policy of extraordinary rendition had been done in consultation with the National Security Council and disclosed to the appropriate congressional oversight committees (Priest 2004, A21). Of course, the process of consultation and reporting lies wholly outside treaty or statutory law. Critical stories about extraordinary rendition appeared with increasing frequency and intensity (Priest 2005, A1; Kessler 2005, A1; Whitlock 2005, A22; Priest and White 2005, A2).

24. For example, 3 Ops. Att'y Gen. 661 (1841) (the president depends on authority by a law or treaty to surrender someone to a foreign jurisdiction); 2 Ops. Att'y Gen. 559 (1833) (requiring a law or treaty for extradition); 1 Ops. Att'y Gen. 68, 69-70 (1797) ("[H]aving omitted to make a law directing the mode of proceeding, I know not how, according to the present system, a delivery of such offender could be effected. . . . This defect appears to me to require a particular law").

25. 4A Ops. O.L.C. 149 (1979).

In court, the Bush administration argued that individuals subject to extraordinary rendition are barred from litigating their grievances because a lawsuit would risk the disclosure of state secrets and encroach on independent presidential authority: "The state secrets privilege is based on the President's Article II power to conduct foreign affairs and to provide for the national defense, and therefore has constitutional underpinnings" (U.S. Justice Department 2005, 3-4).

In an effort to rebut criticism of extraordinary rendition, Secretary of State Condoleezza Rice issued a detailed statement on December 5, 2005. She maintained that "[f]or decades, the United States and other countries have used 'renditions' to transport terrorist suspects from the country where they were captured to their home country or to other countries where they can be questioned, held, or brought to justice" (Rice 2005). Those renditions were authorized by statute or by treaty, not by independent presidential assertions of authority, and the renditions were subject to traditional judicial procedures. Not so under the Bush administration.

Rice claimed that rendition "is not unique to the United States, or to the current administration," and offered two examples where suspected terrorists were transferred from one country to another. Ramzi Youssef was brought to the United States after being charged with the 1993 bombing of the World Trade Center and plotting to blow up airlines over the Pacific Ocean. "Carlos the Jackal," captured in Sudan, was brought to France (ibid.). Those examples had nothing to do with extraordinary rendition. The two men were not taken to a secret interrogation center, outside the judicial process, and subjected to torture. They were brought to court to face public charges, trial, conviction, and sentence.

On September 6, 2006, President Bush confirmed the existence and operation of CIA prisons abroad for the purpose of interrogating terrorist suspects (Smith and Fletcher 2006, A1; Stolberg 2006, A1). During debate on the military commission bill, which Congress enacted to comply with *Hamdan*, the White House and Republican senators insisted on language that "would provide for continued tough interrogations of terrorism suspects by the CIA at secret detention sites" (Smith and Babbington 2006, A1).

NSA Eavesdropping

On December 16, 2005, the *New York Times* reported that, in the months following the 9/11 attacks, President Bush secretly authorized the NSA to listen to Americans and others inside the United States without a court-approved warrant. The agency had been monitoring the international telephone calls and international e-mail messages "of hundreds, perhaps thousands" of people over the previous three years in an effort to obtain evidence about terrorist activity (Risen and Lichtblau 2005, A1). On December 17, in a weekly radio address, President Bush acknowledged that he had authorized the NSA, "consistent with U.S. law and the Constitution, to intercept the international communications of people with known links to Al Qaeda and related terrorist organizations" (Bush 2005a, 30).

In a news conference on December 19, Bush stated: "As President and Commander in Chief, I have the constitutional responsibility and the constitutional authority to

protect our country. Article II of the Constitution gives me that responsibility and the authority necessary to fulfill it." He noted that Congress after 9/11 had passed the AUMF granting him "additional authority to use military force against Al Qaida" (Bush 2005b, 1885). Also on December 19, Attorney General Gonzales held a press briefing on the NSA program, claiming that "the President has the inherent authority under the Constitution, as Commander-in-Chief, to engage in this kind of activity" (Gonzales 2005, 2). When asked why the administration did not seek a warrant from the Foreign Intelligence Surveillance Act (FISA) Court, which Congress created in 1978 to be the exclusive means of authorizing national security eavesdropping, Gonzales replied that the administration continued to seek warrants from the FISA Court but was not "legally required" to do that in every case if another statute granted the president additional authority (ibid.). It was the administration's position that the AUMF statute provided that additional authority.

Gonzales emphasized the need for "the speed and the agility" that the FISA process lacked: "You have to remember that FISA was passed by the Congress in 1978. There have been tremendous advances in technology" since that time (ibid., 2). Why did the administration not ask Congress to amend FISA to grant the president greater flexibility, as was done several times after 1978 and even after 9/11? Gonzales replied he was advised "that would be difficult, if not impossible" (ibid., 4).

On January 19, 2006, the OLC produced a forty-two-page white paper defending the legality of the NSA program. It concluded that the NSA activities "are supported by the President's well-recognized inherent constitutional authority as Commander in Chief and sole organ for the Nation in foreign affairs to conduct warrantless surveillance of enemy forces for intelligence purposes to detect and disrupt armed attacks on the United States. The President has the chief responsibility under the Constitution to protect America from attack, and the Constitution gives the President the authority necessary to fulfill that solemn responsibility" (U.S. Justice Department 2006c, 1). Later in the paper, the OLC linked "sole organ" to the 1936 Supreme Court decision of *United States v. Curtiss-Wright* (ibid., 6-7).

In addition to these constitutional arguments, the OLC argued that "Congress by statute has confirmed and supplemented the President's recognized authority under Article II of the Constitution to conduct such warrantless surveillance to prevent catastrophic attacks on the homeland." In responding to the 9/11 attacks, Congress enacted the AUMF to authorize the president to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" of September 11 in order to prevent "any future acts of international terrorism against the United States" (ibid., 2). Moreover, although FISA "generally requires judicial approval of electronic surveillance, FISA also contemplates that Congress may authorize such surveillance by a statute other than FISA," and the AUMF, the OLC said, met that requirement (ibid., 2-3). Any congressional statute interpreted to impede the president's ability to use electronic surveillance to detect and prevent future attacks by an enemy "would be called into very serious doubt" as to its constitutionality. If this constitutional question "had to be addressed, FISA would be unconstitutional as applied to this narrow context" (ibid., 3). According to this reading, statutory law could not restrict what the president decided to do under his Article II powers.

When Michael Hayden appeared before the Senate Select Committee on Intelligence on May 18, 2006 to testify on his nomination to be CIA director, he defended the legality of the NSA program on constitutional, not statutory, grounds. He did not attempt to use the AUMF as legal justification. In recalling his service as NSA director after 9/11, he told the committee that, when he talked to NSA lawyers, "they were very comfortable with the Article II arguments and the president's inherent authorities" (Hayden 2006, 35). When they came to him and discussed the lawfulness of the NSA program, "our discussion anchored itself on Article II" (ibid.). The NSA attorneys "came back with a real comfort level that this was within the president's authority [i.e., Article II]" (ibid., 69). This legal advice was not put in writing and Hayden "did not ask for it" (ibid.). Instead, "they talked to me about Article II" (ibid.).

Hayden repeatedly claimed that the NSA program was legal and that the CIA "will obey the laws of the United States and will respond to our treaty obligations" (ibid., 74). What did Hayden mean by "law"? National policy decided by statute or treaty? Or a policy purely executive-made? During the hearing, he treated "law" as the latter, something that can be derived from Article II or inherent powers. "I had two lawful programs in front of me, one authorized by the president, the other one would have been conducted under FISA as currently crafted and implemented" (ibid., 88). He told one senator: "I did not believe—still don't believe—that I was acting unlawfully. I was acting under a lawful authorization" (ibid., 138). He meant a presidential directive issued under Article II.

Hearing him insist that he acted legally in implementing the NSA program, a senator said: "I assume that the basis for that was the Article II powers, the inherent powers of the president to protect the country in time of danger and war." Hayden replied: "Yes, sir, commander in chief powers" (ibid., 144). Hayden implied that he was willing to violate statutory law in order to carry out presidential law. CIA Director George Tenet asked whether as NSA director he could "do more" to combat terrorism with surveillance. Hayden answered: "Not within current law" (ibid., 68). In short, the NSA eavesdropping program he conducted was illegal under FISA.

Conclusions

The purpose of this introduction is to identify claims of presidential power based on inherent authority under (or outside of) Article II. The scholars invited to write for this special issue occupy a range of political positions: liberal, moderate, and conservative. All of them have rich and informed experience with national security. At the outset they were asked these questions: (1) Did the Framers adopt the British war model of Blackstone and Locke? (2) Does the theory of executive prerogative operate without limits imposed by the legislative and executive branches? (3) What role did the Framers anticipate for the courts in matters of war and national security? (4) What role did the Framers anticipate for Congress in matters of war and national security? (5) What is the scope of the president's power as commander in chief? That title provides unity of command and also assures civilian supremacy over the military. What else? What are the limits, if any? The overall goal of

this special issue is to better understand the relationship between inherent powers for the president and the continued vitality of republican government, popular sovereignty, and the traditional checks and balances that channel political power and limit its abuse.

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