

Constitutional Theories of Executive Power: Effects on Current and Future Decision Making in the Executive Branch and on the US Supreme Court

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James Madison, in Federalist 51, stated that “in republican government, the legislature necessarily predominates.” This philosophy is born out through a quick examination of the US Constitution. Article I on Congress is longer and much more developed. Article II on the Executive is much shorter and less detailed. However, Madison’s vision is not born out by history. The power of the presidency has grown despite the Constitution granting few enumerated powers to the President. Times of war and domestic crisis such as the Great Depression have caused the powers of the presidency to grow. Sometimes Congress has assisted this growth with delegations of power to the executive branch. However, presidential power has often grown because Presidents have acted on their own and simply assumed power. Expansions of presidential power are currently taking place during the war on terrorism from the administration’s policies toward prisoners at Guantanamo, aggressive interrogation techniques, wire taps and signing statements. What this paper will do is to examine the US Supreme Court’s reaction to exercises of presidential power and consider how current cases are changing prior US Supreme Court positions on the use of this power. This paper also questions the Court’s very role in settling issues of presidential powers.

The US Supreme Court has previously reviewed two theories of Presidential power. The two theories differed in how they interpret the language found in Article II Section I of the US Constitution. Article II Section I states that “executive power shall be vested in a President of the United States.” Executive power is not defined. Sections 2 and 3 continue by listing specific enumerated powers granted to the president. The question becomes whether Section I is a separate grant of executive power along with the powers found in Sections 2 and 3, or whether Section I is merely an introductory statement with Sections 2 and 3 solely containing the actual executive powers. James Madison argued for a more restrained role for the President. He envisioned the President executing the laws that Congress passed. To do anything more would require a specific grant of power from Section 2 or 3. This theory has been called the Constitutional Theory of Presidential Power. Under this theory, Section I would not grant any additional powers to the President. Alexander Hamilton envisioned a more activist role for the President. He realized the need for the President to be able to act quickly in times of crisis and be able to respond quickly to the needs of the country as long as such actions did not conflict with the spirit of the Constitution. This theory has been called the Stewardship Theory of Presidential Power. Section I is a separate grant of inherent presidential powers. Section 2 and 3 are only examples of presidential powers. Presidents cannot be limited to what is listed in Section 2 and 3 because everything the President may need to do to respond to a crisis cannot be envisioned in advance and listed in the Constitution. To limit the President in this fashion would potentially make it impossible for the country to quickly respond to future crisis situations. James Madison replied to this theory by stating that “no citizen could any longer guess at the character of the government under which he lives.” (Stephens & Scheb, 2008).

The US Supreme Court in 1890 adopted the Stewardship theory of presidential power in the case of In re Neagle. David Neagle was a federal marshal who was charged with first degree murder in California for having killed a man while attempting to protect the life of US Supreme Court Justice Stephen J. Field.

While in California to hear a case, Justice Field was threatened by a disgruntled litigant. Neagle was assigned to protect the justice on his next trip to California. While in California the second time, David Terry found Justice Field in a restaurant and struck him. Neagle shot Terry. It was later determined that no weapon was on Terry so Neagle was arrested. Neagle would have been protected if he were acting under federal law from California prosecution. However, no statute authorized Neagle to protect the justice. The US Attorney General, on his own, decided to assign Neagle the job of protecting Justice Field. According to the US Supreme Court, that act was tantamount to operating under federal law. The Court used the Stewardship Theory of presidential power to conclude that the President was not limited to enforcing the acts of Congress. The US Constitution gives the executive the obligation to protect the peace of the US. Thus the President can do whatever is necessary and proper to fulfill that obligation. Neagle was authorized by the executive and thus immune from prosecution by the state of California.

The US Supreme Court recognized limits on the Stewardship Theory in 1952 in the case of Youngstown Sheet and Tube Company v. Sawyer. In December 1951 President Harry S. Truman was informed that negotiations between labor and management in the steel industry had broken down. Concerned about the possible consequences of a work stoppage to the Korean War and the domestic economy, Truman delayed the strike by referring both sides to the Wage Stabilization Board for additional negotiation. By April 1952 it was clear that these efforts were useless and a strike was imminent. Truman ordered Charles Sawyer, the Secretary of Commerce, to seize the steel mills and keep them operating. Splitting 6 - 3, the Supreme Court refused to allow the government to seize and operate the steel mills. Justice Hugo Black wrote for the majority and followed closely the language of the Constitution. The Court rejected inherent executive power as a justification for this action. Justice Robert Jackson recognized inherent executive power but did not allow Truman's actions in this case. Congress had already considered and rejected legislation that would have authorized the seizure of the steel mills. Truman's actions were incompatible with the will of Congress and thus beyond what even the Stewardship Theory would allow. Future US Supreme Court decisions followed Justice Jackson's limitation while following the Stewardship Theory.

A Unitary Theory of executive power developed during President Ronald Reagan's tenure in the 1980's (Savage, 2007). It was considered as a possible means to gain control over independent executive agencies. The theory was reexamined after 911 when President Bush's legal team revived the theory. They combined it with inherent powers and began to apply it to national security matters. In 1936 the Supreme Court decided in the case of United States v. Curtiss-Wright Export Corporation, that the President was the primary player in the area of foreign affairs. The legal team developed the idea that statutes and treaties that restricted what the military and other security forces could do were unconstitutional. Only the Commander-in-Chief could decide how the executive branch should defend America. The President can do things even if Congress specifically says no because Congress cannot limit the President's use of inherent power in the area of foreign affairs. This theory spread to give the President power over all permanent parts of the executive branch. It was the job of the President to tell the executive branch how to carry out the laws of the United States.

Supporters of the Unitary Theory are David Addington and John Yoo (2005). They point to Hamilton in Federalist 70. The Founders put a single President in charge of the executive branch in order to give it unity so it could act decisively and quickly in times of need. Hamilton suggested this was especially important in a time of war for the country to respond and protect itself. Four criticisms of this theory have been raised (Goldsmith, 2007). First, Hamilton in Federalist 70 is talking about a committee versus a single president. Thus Hamilton is saying nothing about Congress versus the President. He is suggesting a committee could not make decisions as decisively or swiftly as a single President. He is not saying that Congress cannot check the executive branch through legislation. Federalist 70 furthers this argument by saying that Congress is the best branch for devising the general rules under which government should act. The Founders considered the legislative branch the best adapted to deliberate and exercise wisdom. They are also best at gaining the confidence of the people and secure their privileges and interests. Second, the theory fails to take into account ideas expressed in Federalist 69. The founders explained that although the American President would oversee the nation's military, the American

Commander-in-Chief's powers would be subject to much stronger checks and balances than a king. The President must submit to the laws of Congress. The Commander-in-Chief means first general so the military is under civilian control. These powers are much inferior to the powers of a king over a military. Third, Congress is given the power to make laws that are necessary and proper to organize the executive branch and regulate the general conduct of executive officials. This means that the Constitution envisions Congressional oversight over the executive branch. And fourth, the Supreme Court has upheld the power of Congress to pass laws limiting the president's absolute control over lower-ranking officials. In 1935 the Supreme Court allowed Congress to set up independent agencies inside the executive branch. In 1988 the Supreme Court decided a case on independent counsel which is incompatible with a unitary executive theory where the president alone would control everyone in the executive branch (Savage.2007).

There are many examples where the Unitary Theory of presidential power could apply. One specific power, that of Commander-in-Chief, will be examined. The President has great power over the military. Force is often threatened and sometimes even used to protect US and allied interests. The ability to act quickly in the area of foreign affairs has been recognized by the courts as necessary. However, the Constitution does not give the President unlimited powers. While the President is the Commander-in-Chief, Congress is the branch that declares war. Checks and balances were certainly anticipated even in this area.

The Supreme Court didn't review the President's war powers until 1863 in The Prize Cases. During the Civil War President Lincoln ordered a blockade of the South. Any vessels that tried to run the blockade were to be seized. Under existing laws of war, captured vessels could only become the property of the Union navy if the conflict was a declared war. Congress didn't declare war in the Civil War. When the Supreme Court reviewed the case, the Court found the seizures to be legal. "The President is not only authorized but bound to resist force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority." The Court acknowledged the necessity of deferring to the President's decision in times of crisis.

In the 1936 case of United States v. Curtiss-Wright Export Corporation, the Supreme Court declared the President to be the primary player in the area of foreign affairs. In 1934, Congress authorized the President to prohibit US companies from selling munitions to Paraguay and Bolivia. Congress provided for criminal penalties for violating presidential prohibitions. President Roosevelt then issued an executive order imposing an arms embargo on the two warring countries. Curtiss-Wright Export Corporation was indicted for conspiring to sell arms in violation of the embargo. The company argued Congress made an unconstitutional delegation of lawmaking power to the President. In upholding the delegation of power, the Court distinguished between domestic and foreign power. Congress could delegate more power in the area of foreign than domestic power. The Court also suggested that the President would have inherent power to impose the embargo even without a delegation of lawmaking power from the Congress.

President Johnson claimed inherent presidential power included the power to deploy American forces abroad when the President decides the action is necessary. Congress passed the Gulf of Tonkin Resolution in 1964 allowing the President to defend the government of South Vietnam and American interests in the area. President Johnson expanded this grant of power past what many in Congress thought was authorized. President Nixon used the resolution to wage war in Cambodia which was even a broader interpretation of the resolution. During the Vietnam War, the Supreme Court had many opportunities to rule on the Constitutionality of the war and presidential powers. However, the Court exercised judicial restraint and refused to do so on the grounds that it was a political question. Political questions are essentially fights between two branches of government. Restraint courts prefer that these fights be resolved in the political arena instead. Courts exercising judicial restraint will take this approach especially in the areas of international relations, military affairs and foreign policy.

The Court's unwillingness to act prompted Congress in 1973 to pass the War Powers Resolution over the veto of President Nixon. The act was designed to limit the President's unilateral ability to send troops into foreign countries for combat purposes. It requires the President to make a full report to Congress if troops are sent and allows for Congress to force the recall of the troops. The Supreme Court has not had an opportunity yet to rule on the validity of the Resolution. As the President is the primary player in the

area of foreign affairs, the Resolution may be an unconstitutional attempt to limit the President's power in this area. Those subscribing to the Unitary Theory of presidential power would certainly come to this conclusion. However, the Court may never review the Resolution. The Court could call it a political question and leave the resolution of the dispute to the public.

The question of presidential power keeps coming up. The events of September 11, 2001, which left 3,000 people dead on American soil, caused George W. Bush to declare a war on terror. On September 14 Congress passed a resolution authorizing the use of military forces against nations, organizations or persons who planned, authorized, committed or aided the terrorist attacks on September 11. By October American forces were in combat against the Taliban and hunting for Osama in Afghanistan.

On November 13, 2001 President Bush issued an executive order authorizing the use of military tribunals to try foreign nationals apprehended in the war on terrorism. While most people thought he had the power to do this, many thought he should have been more specific as to when and how the tribunals would be used. Others thought the use of military tribunals would send the message to the world that the U.S. was abandoning normal due process. It was argued that the terrorists win if we give up our ideals. By 2002 the military began to incarcerate enemy combatants at the Naval Base at Guantanamo Bay. Detainees were held without any determination as to whether the detainees were terrorists or even enemies of the U.S.

In Rasul v. Bush in 2004, the Supreme Court declared that they had Jurisdiction over the petitions brought on behalf of the prisoners at Guantanamo. The Court did not rule on Bush's executive order. Following the ruling, the military created special three member military panels to review whether the detainees were being lawfully held. In January 2006, the government resumed military trials of the detainees. This resulted in the 2006 case of Hamdan v. Rumsfield. A Yemeni national brought suit challenging the legality of the military tribunals. The majority of the Court held that the Bush Administration's plan to try the detainees was unauthorized by statute and violated international law. The Court decided the case despite the 2005 Detainee Treatment Act passed by Congress. This act barred federal jurisdiction to review cases from Guantanamo. The majority decided that they could still rule on the case because, in looking at the congressional record, they decided that the act applied to future cases. It did not apply to pending cases already in the system. The dissenting justices considered President Bush's signing statement. They concluded that all appellate review in this area was barred. Congress and the President resurrected the tribunal in another form under the 2006 Military Commissions Act. In the 2008 case of Boumediene v. Bush, the Court ruled that foreign terrorism suspects held at Guantanamo have a constitutional right to challenge their detentions in U.S. civilian courts. The Court also decided that the administration's system for classifying detainees as enemy combatants does not meet legal standards despite the President this time having Congress on his side through the 2006 Military Commissions Act. The Court said the 2006 law unconstitutionally suspended habeas corpus. They have a right to these protections even though they were declared enemy combatants and even though they are located at Guantanamo.

The Bush/Cheney legal team would not go to Congress for its approval of the administration's plan for prisoners. They subscribed to the Unitary Theory of presidential power. Thus they believed Congress' approval was not needed. In fact, they concluded that going to Congress could pose additional problems. If Congress disagreed with their plans, Congress would have weighed in against the administration's positions. This could muddy the waters on which branch of government was in control and it could undermine the Unitary Theory. However, by not going to Congress, the administration lost the chance to negotiate a position that both Congress and the executive branch could support right from the start. This would have made it more likely the Court would honor their joint agreement. By having the executive act alone and only later having Congress enter the discussion, the door was opened for the Court to enter the discussion. The Military Commissions Act was considered an unconstitutional suspension of habeas corpus. Prisoners at Guantanamo have the right to challenge their detentions even if not on American soil or Congress and the President decided not to give them this right. Despite the Detainee Treatment Act passed by Congress, which barred federal courts from reviewing cases from

Guantanamo, the majority of the court still decided the federal courts could continue to hear cases that were currently in the system.

What is the role of the Supreme Court in our democracy? The two theories that govern this question are judicial activism and judicial restraint. Judicial activism considers the role of the Supreme Court to be an equal branch of government with that of Congress and the Presidency. This theory would see the courts as having a seat at the table of in the making of public policy. Those who subscribe to the theory of judicial restraint envision a more narrow role for the judiciary. There would be no place for the Courts to make public policy, only to interpret the policy. It is the job of Congress and state legislatures to be the primary custodian of the general welfare. These officials are elected and directly answerable to the people. Federal judges are appointed. As they hold their jobs for life, they are not directly answerable to the people. As judges are not “philosopher kings”, they should limit judicial inquiry into the Constitutional matters and give the discretion, when possible, to the other branches of government (Wittes, 2008).

What theory of presidential power should be adopted? Only the President faces a national election. Thus only the president really speaks for the nation as a whole. Certainly the President needs to be able to respond quickly to the threats to the American people, their interests and the interests of our allies. The Constitutional Theory of presidential power does not enable the country to respond quickly to emergencies. However, the Unitary Theory of presidential power does not need to be adopted. The lack of checks and balances is contrary to the spirit of the Constitution and too high a price to pay for quick presidential action. The Stewardship Theory of presidential power should continue to be the accepted theory. It allows the president to act quickly in a time of crisis, yet it allows the Congress to check the broad inherent presidential power. Had Congress specified in greater detail how this war was to progress, Congress could have created details that would have unified the congressional and presidential branches of government as they went forward. When Congress decided not to extend appeals to the American Courts, the Supreme Court second guessed what Congress desired. It grabbed jurisdiction and in doing so a seat at the table in devising the details of the in how prisoners were to be treated.

The Court did not have to grab jurisdiction. There was precedent to declare that they had no jurisdiction and thus could have declined to hear the case. A good precedent is Ex parte McCordle decided in 1869. After the Civil War, Congress passed the Reconstruction Acts. These acts imposed military rule on the states formerly comprising the Confederacy. Military tribunals were authorized to try civilians who interfered with the reconstruction. McCordle was an editor of a newspaper who wrote a series of editorials highly critical of the reconstruction. He was arrested by the military and held for trial by a military tribunal. He sought release through a habeas corpus petition to federal court. After his case was argued in the Supreme Court, Congress enacted legislation withdrawing the Supreme Court’s appellate jurisdiction in the habeas corpus cases. The Court took a restrained position and recognized Congress’ ability to take away appellate jurisdiction both in future cases and those currently in the system. There was no attempt to split hairs and conclude only part of the appellate jurisdiction was removed. The current Supreme Court could have done the same thing in it’s current cases. This would have put the burden on Congress to continue to act in regard to these prisoners. This is appropriate as Congress should be making the laws especially once the immediacy of the conflict is lessened. At this point the President and Congress need to be working together and across party lines to iron out thorny problems in the War on Terror. Under the Stewardship Theory, Congress should be encouraged to check the President and assume an active role. The Court took a very activist approach when it decided to extend the Constitution past the borders of the country, extend the Constitution to foreigners and invoke international law. Under judicial restraint, the courts would not have heard these cases based on a lack of jurisdiction. Another approach the Court could have taken was to call the case a political question and leave the case to the other branches of government to resolve in the arena of public opinion. The result would have been to force the Congress and the President to come to a consensus. Since they did decide to hear the case, they could have at least upheld what Congress and the President jointly agreed to. This would have encouraged more joint efforts. Taking an activist position strengthened the Court’s power. However, this was at the expense of the other two branches of government which are more empowered

and most able to make and exercise foreign and military power. The Court does not have to be the final authority on military matters and foreign affairs. To do so on a regular basis results in other branches not making hard concessions and working out disagreements. This approach on the part of the Court needs to be used very sparingly. Otherwise there will be no incentive to make the difficult political compromises. The approach will also undermine the Stewardship Theory by forcing all military and foreign affairs questions into the courts.

The dissenting justices in Hamdan used a Presidential signing statement when deciding that the Detainee and Treatment Act removed federal jurisdiction to review cases from Guantanamo. Part of the reason for doing so may be Justice Scalia's (2008) frustration with the majority of the Court turning to the congressional record to decide what the act meant. Justice Scalia has always noted that it is impossible to know why a particular member of Congress votes or does not vote for a particular act. Sometimes a congressman votes for the bills of colleagues in order to get their votes on a different bill of greater personal interest. At least with a signing statement there is only one President and the President's intent is clearer. However, the use of the signing statement can lead to the adoption down the road of the Unitary Theory of presidential power. Congress needs to be able to check the president through the acts it passes. If signing statements continue to be recognized, Presidents could completely rewrite statutes passed by Congress. A good example of this was the administration's attempt to rewrite what should be allowed in interrogation procedures. The signing statement would have rewritten Congress' statute completely contrary to the intent of Congress, and thus undermined Congress' attempt to check the President.

People may not be concerned about these theories as there is a tendency to assume all will be well again now that we had an election and now have a new president. However, people need to remember that the Unitary Theory of presidential power is not limited to Republicans. Clinton also used this theory although in more modest ways. After 1994, Clinton used executive orders to advance his agenda without going to congress in areas of environmental protection and in implementing international human rights theories. Some conservatives charged that he was acting like a dictator. In 1996 when congress banned the placing of U.S. troops under United Nations' command, Clinton decided that he could bypass the ban under his power as Commander-in-Chief. The point is that both democrats and republicans will drift towards the Unitary Theory because it is easier than compromises. Governing with another branch of government is hard and time consuming. The only differences between the parties are really just in focus and goals. Neither party will easily give up the presidential power contained in the Unitary Theory. People also need to be concerned as justices leave the Supreme Court. If we continue to place justices on the Court who envision a very expansive role for the courts they will continue to make the courts an equal player in the making of public policy. As noted, this judicial activism creates it's own host of problems.

While James Madison's belief that Congress would dominate the federal system did not occur. There is no reason we need to drift towards an imperial presidency or activist judiciary. Subscribing to the Stewardship Theory can allow the country to act quickly when needed while still allowing Congress later to check the President. The Court should have a lesser seat at the table when drafting public policy and should be encouraging the Congress and President to come to a consensus and actually govern. Judicial restraint would encourage needed compromises. However, for this ideal situation to occur, the people need to assume their role. The people hold the power in a democracy. They delegated some of their power to the branches of government. If that power is not being used well, the people have to be vigilant and notice. They then need to force change through their elections. If not, the people will get all the bad government they deserve. There were signs in the 2008 elections that some American voters were looking for candidates who wanted to be leaders in developing policy. Many candidates asserted that they were candidates of change and action. Let's hope the change that might be occurring leads back to a respect for our government's checks and balances system and political parties governing together, rather than continuing to take extreme partisan positions that encourage branches of government to win their proposed positions at all costs.

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