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THE SCOPE OF EXECUTIVE POWER IN THE TWENTY-FIRST CENTURY: AN INTRODUCTION

ROBERT D. SLOANE*

The scope of the executive power, the topic of the present panel, embraces a number of conceptually distinct questions. In the first place, we must distinguish issues of source (from where does the President derive a particular power?) from those of scope (in what does that power, properly construed, consist, and how far does it extend?). What, for example, does the Vesting Clause,¹ assuming it constitutes an independent source of presidential power, vest? Also, does the scope of the executive power expand and contract, as Justice Jackson famously suggested,² based on its arguable overlap with powers vested in Congress or on the latter's express or implied will? Many argue – and experience and precedent attest – that the scope of the executive power expands during times of perceived crisis.³ But if so, who may decide what constitutes a crisis, as well as when it begins and ends? In particular, is this a political question, or do standards of law play some role? To cite a timely example, is it a question of law whether the “Global War on Terror” is a “war” in the constitutional sense,⁴ which activates certain executive powers of the President under the Commander in Chief Clause?⁵

Finally, we should distinguish descriptive questions (what is the scope of the executive power?) from normative ones (what should it be?) – although some would argue that the possibility of a non-normative theory of constitutional interpretation is a fiction.⁶ On the normative side, further questions inevitably

* Associate Professor of Law, Boston University School of Law. This is a revised version of introductory remarks to a panel entitled “The Scope of Executive Power” held on October 12, 2007, at Boston University School of Law’s symposium *The Role of the President in the 21st Century*.

¹ U.S. CONST. art. II, § 1, cl. 1.

² See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

³ See Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 695-702 (2004).

⁴ See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 98-99 (Oxford University Press 2d ed. 1996); see also *Campbell v. Clinton*, 203 F.3d 19, 37-39 (D.C. Cir. 2000) (Tatel, J., concurring) (discussing the competency and constitutionality of courts determining the existence of a war).

⁵ U.S. CONST. art. II, § 2, cl. 1.

⁶ See, e.g., SOTIRIOS A. BARBER & JAMES E. FLEMING, *CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS*, at xiii (2007); RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL*

arise: if, for example, the scope of the executive power is, in the President's view, inadequate to address a particular crisis, should he exceed it – as President Lincoln avowedly, though transparently and temporarily, did during the Civil War?⁷ And if a state of genuine necessity seems to require the President to exceed the scope of his constitutional powers, an idea captured (again by Justice Jackson) in the oft-cited maxim that the Constitution is not a “suicide pact,”⁸ should that be done secretly, or publicly in the sort of political order our Constitution enacts?⁹

None of these questions is academic in the pejorative sense. Indeed, a panel on the scope of the executive power could hardly be more timely. Countless articles, both in the popular press and law reviews,¹⁰ and several recent books,¹¹ suggest that a unifying theme of Bush administration policy and ideology has been its effort to aggrandize – or restore,¹² depending on one's view – the scope of the President's constitutional executive powers relative to the other branches of the federal government. Charlie Savage, among others, argues that the administration, animated in large part by an ideological conviction formed by Vice President Richard B. Cheney decades before the

READING OF THE AMERICAN CONSTITUTION 7-12 (1996). Compare Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823 (1997) (arguing that constitutional scholars must distinguish theories of interpretation – questions about the Constitution's meaning – from political theories about its legitimacy or normative force), with Michael C. Dorf, *Recipe for Trouble: Some Thoughts on Meaning, Translation and Normative Theory*, 85 GEO. L.J. 1857, 1858 (1997) (“Whether we equate meaning with original public meaning, or with speaker's meaning, or with a dynamic conception of meaning, or with something else, depends on why we care about the meaning of whatever it is we are interpreting.”).

⁷ See Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 148 (2004). In a speech made to Congress after his extra-constitutional conduct, Lincoln famously asked: “[A]re all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?” Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 421, 430 (Roy P. Basler ed., 1953).

⁸ *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

⁹ See JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 81 (2007) (expressing the view that executive disregard of the law, while necessary at times and hardly without precedent, should be done publicly so that “Congress and the people [may] decide whether the emergency was severe enough to warrant extralegal action”).

¹⁰ See, e.g., Rosa Ehrenreich Brooks, *We the People's Executive*, 115 YALE L.J. POCKET PART 88, 88 (2006) (“Over the past few years, President George W. Bush and his chief advisors have claimed a range of powers that would have turned Britain's King George III green with envy.”).

¹¹ See, e.g., GOLDSMITH, *supra* note 9; CHARLIE SAVAGE, *TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY* (2007); FREDERICK A.O. SCHWARZ, JR. & AZIZ Z. HUQ, *UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR* (2007).

¹² See GOLDSMITH, *supra* note 9, at 89.

tragic events of September 11, 2001,¹³ has consistently sought to increase the powers of the executive to a level equal to, if not exceeding, those famously described in 1973 – at the apex of the Nixon administration – as “imperial.”¹⁴ What, in particular, lends credence to this allegation? The answer is both abstract and concrete, for “[i]t is only a very vulgar historical materialism that denies the power of ideas.”¹⁵

At an abstract or theoretical level, according to Savage and others, the Unitary Executive theory of the presidency,¹⁶ which constitutional scholars and historians debated fiercely in the 1990s (and continue to debate),¹⁷ has been adapted and merged by the Bush administration with a new “Unitary Executive” theory, which differs profoundly from its namesake.¹⁸ This new theory, unlike the original one, does not refer principally to a particular (stringent) conception of the separation of powers established by the Constitution and to powers derived from the original meaning of the executive power vested in the President. Rather, it refers to a broad (many would say exorbitant) scope of purportedly inherent executive power, the pedigree of

¹³ See *id.* at 85-90; SAVAGE, *supra* note 11, at 8-9, 69 (asserting that Cheney’s view “had been cultivating for nearly thirty years, and would be a guiding principle from the first day he and Bush took office”); SCHWARZ & HUQ, *supra* note 11, at 154-55.

¹⁴ ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973); see also GOLDSMITH, *supra* note 9, at 183 (“The presidency in the age of terrorism – the Terror Presidency – suffers from many of the vices of Schlesinger’s Imperial Presidency.”).

¹⁵ ISAIAH BERLIN, *Two Concepts of Liberty*, in *LIBERTY* 166, 167 (Henry Hardy ed., 2002).

¹⁶ The Unitary Executive theory draws its name from a passage in *The Federalist No. 70*, in which Alexander Hamilton defended the need for a vigorous, energetic, and therefore unified executive. *THE FEDERALIST NO. 70*, at 471, 471-72 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). The theory’s first sustained defense, according to Savage, is to be found in an executive memorandum entitled “Separation of Powers: Legislative-Executive Relations,” dated April 30, 1986, which former Attorney General Edwin Meese commissioned during the Reagan administration. SAVAGE, *supra* note 11, at 47-48.

¹⁷ The *locus classicus* of this debate is the argument of Lawrence Lessig & Cass R. Sunstein in *The President and the Administration*, 94 *COLUM. L. REV.* 1 (1994), and the response of Steven G. Calabresi & Saikrishna B. Prakash in *The President’s Power to Execute the Laws*, 104 *YALE L.J.* 541 (1994). Recent contributions include Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 *MICH. L. REV.* 545, 554 (2004) and Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 *COLUM. L. REV.* 1002, 1006 (2007).

¹⁸ See SAVAGE, *supra* note 11, at 122-24 (describing how the Bush administration merged its theory that the President has vast “inherent” powers that do not appear in the Constitution or federal law with its expanded view of the original Unitary Executive theory to conclude that the “president could do virtually anything, without any check by Congress”); see also GOLDSMITH, *supra* note 9, at 85 (stressing the “newer and more aggressive incarnation” of the Unitary Executive theory invoked by the Bush administration); SCHWARZ & HUQ, *supra* note 11, at 157.

which is frequently unclear. Therefore, despite their nominal overlap, the implications and consequences of these two theories differ significantly.¹⁹ Their combination has culminated in a view of the scope of the executive power that is unprecedented in its breadth.²⁰

The Unitary Executive theory, as initially formulated and understood, posits that the Constitution textually vests the executive power, which must be understood as a substantive grant of power, in a single individual: the President.²¹ He or she performs and enjoys exclusive and plenary power over all subordinate agencies and officials, provided they are properly understood as part of the executive branch. The executive power of the President therefore includes the authority to modify decisions issued by administrative agencies and to exercise total control over subordinate executive officials, unconstrained by statutes purporting to limit or condition presidential powers vested by the Constitution in a single, unitary executive. The Constitution therefore forbids, for example, independent administrative agencies,²² or those provisions of the Ethics in Government Act of 1978, as amended,²³ which had authorized independent counsels – independent in the sense that the President lacked exclusive and plenary control over them – to investigate allegations of executive branch malfeasance.²⁴ Equally, to cite a more timely example, if the power to conduct foreign intelligence surveillance falls within the purview of the executive power, properly construed, then the Foreign Intelligence

¹⁹ *But see* SCHWARZ & HUQ, *supra* note 11, at 157 (arguing that the two views share historical, methodological, and intellectual commonalities).

²⁰ *See, e.g.*, SAVAGE, *supra* note 11, at 124.

²¹ For a concise statement of the position, see Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165-68 (1992) (“[Unitary Executive theorists] conclude that the President alone possesses *all* of the executive power and that he therefore can direct, control, and supervise inferior officers or agencies who seek to exercise discretionary executive power.” (footnote omitted)) and Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1, 22-43 (defending against a variety of critiques the view that the Vesting Clause is a substantive grant of executive power).

²² *Contra* *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 628-29 (1935) (stating that Congress has the authority to create administrative bodies, the officials of which are free from the President’s power of removal).

²³ *See* Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended in scattered sections of 2 U.S.C., 5 U.S.C., and 28 U.S.C.).

²⁴ *See* *Morrison v. Olson*, 487 U.S. 654, 697-734 (1988) (Scalia, J., dissenting). The independent counsel statute, which had been reenacted, in amended form, in 1982, 1987, and 1994, expired on June 30, 1999. *See* 28 U.S.C. § 599 (2000).

Surveillance Act (“FISA”)²⁵ unconstitutionally (and ineffectively) purports to regulate an authority vested exclusively in the President.²⁶

The more recent manifestation of what has also been described – although almost certainly misleadingly – as the Unitary Executive theory is quite different. Indeed, many proponents of the original Unitary Executive theory explicitly disavow the suggestion that it implies a broad scope of residual, unenumerated, or inherent executive powers beyond those either specified in the Constitution’s text or historically derived from the original meaning of the executive power.²⁷ Schwarz and Huq refer to this new theory as that of a “monarchical executive.”²⁸ Associated with John C. Yoo’s scholarship,²⁹ the new theory also emerges, implicitly and sometimes explicitly, in the controversial Office of Legal Counsel (“OLC”) memoranda produced by John Yoo, David Addington, Alberto R. Gonzales, and other key attorneys involved in the formulation of Bush administration policies, particularly those germane to the “Global War on Terror.”³⁰ On this view, Savage writes:

[T]he president, as head of the executive branch and the commander in chief of the armed forces, has vast “inherent” powers that are not spelled out in the Constitution or federal law. Especially in matters of national security, these unlisted powers provide for an enormous potential scope

²⁵ Foreign Intelligence Surveillance Act, Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified as amended at 50 U.S.C. §§ 1801-1871 (2000 & Supp. IV 2004)).

²⁶ See Gary Lawson, *What Lurks Beneath: NSA Surveillance and Executive Power*, 88 B.U. L. REV. 375, 390 n.94, 391-93 (2008).

²⁷ See, e.g., Saikrishna B. Prakash & Michael D. Ramsey, *Foreign Affairs and the Jeffersonian Executive: A Defense*, 89 MINN. L. REV. 1591, 1601-06 (2005); see also Christopher S. Yoo, Steven G. Calabresi, & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945-2004*, 90 IOWA L. REV. 601, 729-30 (2005).

²⁸ SCHWARZ & HUQ, *supra* note 11, at 157.

²⁹ E.g., JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11*, at 18-19 (2005); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 174 (1996) (“A war may be constitutional, even if no declaration of war has issued or if the President acted unilaterally, so long as one branch has not usurped the textually enumerated power of another.”); see GOLDSMITH, *supra* note 9, at 97 (“[Yoo] believed that when the Constitution vested ‘the executive power’ in the President, it gave him all of the military powers possessed by the King of England save those expressly given to Congress.”); SCHWARZ & HUQ, *supra* note 11, at 163.

³⁰ E.g., Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002), *reprinted in* THE TORTURE PAPERS 172 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter Bybee Memorandum].

of action. The government can do virtually anything the president believes is necessary to defend the country.³¹

Similarly, Jack Goldsmith, who served as head of the OLC for a nine-month period between 2003 and 2004, describes Addington's belief "that presidential power [i]s coextensive with presidential responsibility."³²

The extent to which this idea has filtered into mainstream legal culture in the post-9/11 world may be evident in, for example, Judge Michael B. Mukasey's response during his Attorney General confirmation hearings in October 2007 when asked by Senator Patrick Leahy whether the President must obey federal statutes: "That would have to depend," he said, "on whether what goes outside the statute nonetheless lies within the authority of the president to defend the country."³³ Again, the idea of an inherent executive authority to take whatever action the President deems necessary to defend the country, even if that action violates a valid federal statute, is quite distinct from the original Unitary Executive theory, which holds, more modestly, that some statutes purporting to constrain the scope of executive authority should not be deemed valid in the first place because they infringe on plenary, exclusive powers vested in the President by the executive power, properly construed. The new Unitary (or monarchical) Executive theory is redolent of President Nixon's infamous remark that "when the President does it, that means that it is not illegal."³⁴ Goldsmith recounts that Addington, for example, expressed exasperation at the idea "that the Constitution doesn't empower the President to do what he thinks is necessary to prevent an attack" even if the contemplated conduct would violate valid congressional restrictions.³⁵

In short, Savage and others argue that the Bush administration forged a breathtakingly robust view of the scope of executive power by combining the original Unitary Executive thesis, which insists on the *exclusivity* of certain plenary presidential powers (that is, on powers beyond the constitutional authority of Congress to regulate) with a vastly expanded "monarchical" vision of the inherent *scope* of those powers (that is, on powers that inhere in the President's role under the Constitution despite the absence of an express textual basis).³⁶

³¹ SAVAGE, *supra* note 11, at 123; *see also* GOLDSMITH, *supra* note 9, at 82 (recounting that Addington frequently argued that "the Constitution empowers the President to exercise prerogative powers to do what is necessary in an emergency to save the country").

³² GOLDSMITH, *supra* note 9, at 79.

³³ Jed Rubenfeld, *Lawbreaker in Chief*, N.Y. TIMES, Oct. 23, 2007, at A29.

³⁴ Jinks & Sloss, *supra* note 7, at 149 (quoting Interview by David Frost with President Richard Nixon (May 19, 1977)); *id.* (elaborating that "Nixon claimed that if the President determines that a specified action is necessary to protect national security, then the action is lawful, even if it is prohibited by a federal statute").

³⁵ GOLDSMITH, *supra* note 9, at 78-79 (quoting David Addington).

³⁶ SAVAGE, *supra* note 11, at 124; SCHWARZ & HUQ, *supra* note 11, at 161.

At a more concrete level, controversy over the scope of the executive power has been perhaps the paramount theme unifying headline political controversies of the past seven years. To cite a few well-known examples: (1) the frequent use of robust executive privilege claims to shield from scrutiny controversial executive conduct, such as the practice of extraordinary rendition,³⁷ or the activities of the national energy task force chaired by Vice President Cheney;³⁸ (2) the contention that the President may disregard, redefine, or marginalize treaty obligations such as those defining U.S. obligations under the Geneva Conventions and prohibiting torture and cruel, inhumane, or degrading treatment;³⁹ (3) the assertion of authority to detain individuals, including U.S. citizens and lawful, permanent-resident aliens, without charge or access to an attorney, based on the President's unilateral and unreviewable classification of them as unlawful enemy combatants;⁴⁰ (4) the creation and design by executive order of military commissions for the trial of foreign detainees in the "Global War on Terror";⁴¹ and (5) the warrantless wiretapping of U.S. citizens in apparent violation of FISA.⁴²

Now, in citing these examples from the Bush administration, it should be stressed that, historically, the struggle over the proper scope and limits of the executive power is neither a new issue nor a partisan one. For most of our constitutional history, Presidents of all political parties have almost invariably sought to increase the scope of the executive power while they held office.⁴³

³⁷ See *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 539 (E.D. Va. 2006), *aff'd*, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 373 (2007); *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 254-55 (E.D.N.Y. 2006). See generally Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333 (2007).

³⁸ See, e.g., *In re Cheney*, 334 F.3d 1096, 1107 (D.C. Cir. 2003), *vacated and remanded*, *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 392 (2004), *on remand* 406 F.3d 723 (D.C. Cir. 2005).

³⁹ See, e.g., Memorandum from Alberto R. Gonzales, Counsel to the President, to George W. Bush, President of the United States, Decision Re Application of the Geneva Conventions on Prisoners of War to the Conflict with Al-Qaeda and the Taliban (Jan. 25, 2002), *reprinted in* THE TORTURE PAPERS, *supra* note 30, at 118; see also Bybee Memorandum, *supra* note 30, at 172.

⁴⁰ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 539-40 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment); *Rumsfeld v. Padilla*, 542 U.S. 426, 430-32 (2004); *Al-Marri v. Wright*, 487 F.3d 160, 163-64 (4th Cir. 2007).

⁴¹ See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2760 (2006).

⁴² See *ACLU v. Nat'l Sec. Agency*, 438 F. Supp. 2d 754 (E.D. Mich. 2006), *rev'd and remanded*, 493 F.3d 644, 648-49 (6th Cir. 2007). *But see* Lawson, *supra* note 26, at 391-93 (arguing that the President may enjoy the constitutional authority under the Vesting Clause to monitor communications during wartime and that this authority, if it exists, cannot be regulated by Congress).

⁴³ Presidents of both contemporary political parties, including, for example, Abraham Lincoln, Theodore Roosevelt, Franklin Delano Roosevelt, Harry S. Truman, Richard M.

In fact, in a sense this debate precedes the Constitution – and, of course, also profoundly shaped it. The debate did not begin with the administration of George W. Bush, the forty-third President of the United States, but with the colonial administration of George William Frederick (King George III) of Great Britain. The Declaration of Independence is substantially comprised of a litany of grievances against what its drafters and many Americans at the time saw as the exercise by King George III of an unduly broad, indeed tyrannical, scope of executive power.⁴⁴ The Articles of Confederation, in part for that reason, deliberately did not create a national executive at all. While this proved, as we know, unworkable, the fear of a tyrannical executive persisted in the minds of the Framers.⁴⁵ Since the Constitution's ratification in 1789, questions about the proper scope of the executive power have proved a persistent and recurrent theme of our constitutional narrative.

One of the first constitutional controversies, for example, which broke out almost immediately after the Constitution's enactment, involved issues about the scope of the executive power and congressional power to restrict it by treaty or statute. Before independence, the United States had entered into treaties of alliance with France.⁴⁶ Shortly after independence, France, emerging from its own revolution, declared war on, among others, Great Britain and Holland.⁴⁷ The United States, anxious to avoid war and fearful that France would invoke U.S. treaty obligations, sought to preserve its neutrality. So on April 22, 1793, President George Washington issued a proclamation of neutrality, which – though studiously avoiding the actual word neutrality – purported to require the United States to “adopt and pursue a conduct friendly and impartial toward the belligerent Powers.”⁴⁸ This led to a famous debate over the executive power between Alexander Hamilton, writing under the pseudonym *Pacificus*, and James Madison, writing under the pseudonym *Helvidius*. The former contended that the power to declare neutrality rested in the President's discretion.⁴⁹ The latter inferred from the congressional power to declare war, as well as other enumerated powers and structural features of the Constitution, a cognate power to declare neutrality, and he insisted on the

Nixon, Ronald Reagan, and William Jefferson Clinton have sought to aggrandize the scope of executive power while in office. See SAVAGE, *supra* note 11, at 63.

⁴⁴ See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

⁴⁵ See HENKIN, *supra* note 4, at 27-28.

⁴⁶ William R. Casto, *Pacificus and Helvidius Reconsidered*, 28 N. KY. L. REV. 612, 614 (2001).

⁴⁷ See Morton J. Frisch, *Introduction* to THE PACIFICUS-HELVIDIUS DEBATES OF 1793-1794, at vii (Morton J. Frisch ed., 2007).

⁴⁸ President George Washington, *Washington's Neutrality Proclamation, Apr. 22, 1793*, in THE PACIFICUS-HELVIDIUS DEBATES OF 1793-1794, *supra* note 47, at 1, 1.

⁴⁹ See, e.g., Alexander Hamilton, *Pacificus Number 1*, in THE PACIFICUS-HELVIDIUS DEBATES OF 1793-1794, *supra* note 47, at 8, 8-9.

authority of treaties as “the supreme law of the land.”⁵⁰ In language often cited by those who caution against claims of exorbitant executive power in the contemporary context of the “Global War on Terror,” Madison stressed that “[t]hose who are to *conduct a war* cannot in the nature of things, be proper or safe judges, whether *a war ought* to be *commenced, continued, or concluded*.”⁵¹

There is a great deal more constitutional history that arguably bears on the scope of the executive power in the twenty-first century. But it is vital to appreciate that the scope of the executive power, particularly in the twenty-first century, is not only a constitutional or historical issue. As an international lawyer rather than a constitutionalist, I want to stress briefly that these debates and their concrete manifestations in U.S. law and policy potentially exert a profound effect on the shape of international law. Justice Sutherland’s sweeping dicta in *United States v. Curtiss-Wright Export Corp.*, that the President enjoys a “very delicate, plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations – a power which does not require as a basis for its exercise an act of Congress,”⁵² has been (correctly, in my view) criticized on a host of grounds.⁵³ But in practice, in part for institutional and structural reasons,⁵⁴ it accurately reflects the general preeminence of the President in the realm of U.S. foreign affairs.

Because of the nature of the international legal and political system, what U.S. Presidents do and say often establish precedents that strongly influence what other states do and say – with potentially dramatic consequences for the shape of customary international law. The paradigmatic example is the establishment of customary international law on the continental shelf following the Truman Proclamation of September 28, 1945,⁵⁵ which produced an echo of similar claims and counterclaims, culminating in a whole new corpus of the international law of the sea for what had previously been understood only as a geological term of art.⁵⁶

Many states took note, for example, when in the 2002 National Security Strategy of the United States (“NSS”), President Bush asserted that the United States had the right under international law to engage in preventive wars of

⁵⁰ See, e.g., James Madison, *Helvidius Number 1*, in THE PACIFICUS-HELVIDIUS DEBATES OF 1793-1794, *supra* note 47, at 55, 61 (citing U.S. CONST. art. VI, cl. 2).

⁵¹ *Id.* at 62.

⁵² *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936).

⁵³ See generally HENKIN, *supra* note 4, at 19-20.

⁵⁴ See Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1258 (1988).

⁵⁵ Proclamation No. 2667, 10 Fed. Reg. 12,303 (Oct. 2, 1945).

⁵⁶ See Bernard H. Oxman, *The Territorial Temptation: A Siren Song at Sea*, 100 AM. J. INT’L L. 830, 832 (2006); Edward T. Swaine, *Rational Custom*, 52 DUKE L.J. 559, 608-12 (2002) (explicating the emergence of custom on the continental shelf in game theoretic terms).

self-defense.⁵⁷ While, contrary to popular belief, the United States never in fact formally relied on that doctrine in practice, many would argue that President Bush de facto exercised this purported right when he initiated an armed conflict with Iraq based on claims, which have since proved unfounded, about its incipient programs to develop catastrophic weapons. The 2006 NSS notably retreats from the 2002 NSS's robust claims of a right to engage in preventive wars of self-defense.⁵⁸ Yet even within this brief, four-year period, an astonishing number of other states have asserted a comparable right to engage in preventive self-defense. These include not only states that the United States has described as "rogue states," such as North Korea and Iran, but Australia, Japan, the United Kingdom, China, India, Iran, Israel, Russia, and (though technically not a state) Taiwan.⁵⁹ I doubt we will welcome the consequences of this pattern for the evolving *jus ad bellum* of the twenty-first century.

Equally, after President Bush's decision to declare a global war on terror or terrorism – rather than, for example, the Taliban, al-Qaeda, and their immediate allies – virtually every insurgency or disaffected minority around the world, including peoples suffering under repressive regimes and seeking to assert legitimate rights to liberty and self-determination, has been recharacterized by opportunistic state elites as part of the enemy in this global war.⁶⁰ The techniques employed and justified by the United States, including the resurrection of rationalized torture as an "enhanced interrogation technique,"⁶¹ likewise have emerged – and will continue to emerge – in the

⁵⁷ THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES 6 (2002), available at <http://www.whitehouse.gov/nsc/nss.pdf> (stating that the United States "will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country").

⁵⁸ See W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AM. J. INT'L L. 525, 531-32 (2006).

⁵⁹ See *id.* at 538-46.

⁶⁰ See LAWYERS COMM. FOR HUMAN RIGHTS, *ASSESSING THE NEW NORMAL: LIBERTY AND SECURITY FOR THE POST-SEPTEMBER 11 UNITED STATES* 73-80 (2003) (detailing how human rights have been affected by countries that have imitated and expanded upon the United States's post-9/11 actions, for example, with respect to detainment of individuals and treatment of political dissidents).

⁶¹ Torture itself remains widely practiced despite its prohibition by customary and conventional international law. But few, if any, states claimed the *right* to torture before the attacks of September 11, 2001. See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 & n.15 (2d Cir. 1980). I do not think it is either helpful or accurate to use euphemisms like "enhanced interrogation techniques." Those who quibble about the level of severe pain and suffering that must be deliberately inflicted on a person for a particular act to qualify as torture rather than "merely" cruel, inhumane, or degrading treatment, as do the authors of the Bybee Memorandum, inhibit rather than promote candid debate and obfuscate the moral and legal issues that torture raises. See Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1695-1709 (2005).

practice of other states. Because of customary international law's acute sensitivity to authoritative assertions of power, the widespread repetition of claims and practices initiated by the U.S. executive may well shape international law in ways the United States ultimately finds disagreeable in the future.

So as we debate the scope of the executive power in the twenty-first century, the stakes, as several panelists point out, could not be higher. They include more than national issues such as the potential for executive branch officials to be prosecuted or impeached for exceeding the legal scope of their authority or violating valid statutes.⁶² They also include international issues like the potential use of catastrophic weapons by a rogue regime asserting a right to engage in preventive war; the deterioration of international human rights norms against practices like torture, norms which took years to establish; and the atrophy of genuine U.S. power in the international arena, which, as diplomats, statesmen, and international relations theorists of all political persuasions appreciate, demands far more than the largest and most technologically advanced military arsenal.

In short, what Presidents do, internationally as well as domestically – the precedents they establish – may affect not only the technical scope of the executive power, as a matter of constitutional law, but the practical ability of future Presidents to exercise that power both at home and abroad. We should candidly debate whether terrorism or other perceived crises require an expanded scope of executive power in the twenty-first century. But it is dangerous to cloak the true stakes of that debate with the expedient of a new – and, in the view of most, indefensible – “monarchical executive” theory, which claims to be coextensive with the defensible, if controversial, original Unitary Executive theory.⁶³ We should also weigh the costs and benefits of an expanded scope of executive power. But it is vital to appreciate that there *are* costs. They include not only short-term, acute consequences but long-term, systemic consequences that may not become fully apparent for years. In fact, the exorbitant exercise of broad, supposedly inherent, executive powers may well – as in the aftermath of the Nixon administration – culminate in precisely the sort of reactive statutory constraints and de facto diplomatic obstacles that proponents of a robust executive regard as misguided and a threat to U.S. national security in the twenty-first century.

⁶² See GOLDSMITH, *supra* note 9, at 67-68; Lawson, *supra* note 26, at 378.

⁶³ See GOLDSMITH, *supra* note 9, at 97; SCHWARZ & HUQ, *supra* note 11, at 157 (“The Reagan-era vision of a unitary executive is distinct and different from the much more sweeping claims of unchecked presidential power after 9/11. Unlike the monarchical vision put forward after September 2001, the ‘unitary executive’ thesis rested on at least defensible readings of the Constitution.”).