2011

The Role of Government in a Free Society: The Conception of Lester Frank Ward

Sotirios A. Barber
University of Notre Dame

James E. Fleming
Boston University School of Law

8

CONSTITUTIONAL THEORY, THE UNITARY EXECUTIVE, AND THE RULE OF LAW

SOTIRIOS A. BARBER AND JAMES E. FLEMING

This essay, part of a larger project, considers theories of the unitary executive and what the best of these theories imports for the rule of law and the future of constitutional theory as a whole. As we see it, at least in a sense that predates Bush administration apologist John Yoo,[1] the unitary executive is here to stay. Precisely because the American constitutional executive is a unitary power, President Obama can close Guantánamo unilaterally, without Congress's leave. President Obama, on his own, can also revoke Bush's executive orders regarding secrecy. He can renounce Bush administration memoranda attempting to justify torture, and he can prohibit further acts of torture during his tenure in office. Obama cannot, however, coherently renounce the unitary executive at the same time that he acts unilaterally to undo excesses of the last unitary executive. In any case, to recall Justice Robert Jackson's formulation from *Youngstown Sheet and Tube Co. v. Sawyer*, the "imperatives of events and contemporary imponderables" are going to require strong executive power.[2] The same basic thought appeared some five generations before Justice Jackson's time when Alexander Hamilton, an early proponent of a unitary executive, said in *The Federalist* that because "[t]he circumstances that endanger the safety of nations are infinite . . . no constitutional

shackles can wisely be imposed on the power to which the care of it is committed."[3]

John Yoo claims to derive his theory of the unitary executive from *The Federalist*.[4] We share his assumption that *The Federalist* is a good place to start. Unlike *The Federalist*, however, Yoo fails to embed the unitary executive in proper context: a broad theory of coordinated institutions. When Yoo says that "Federalists defended the centralization of the executive power in the president precisely in order to enable the federal government to respond to the unknowable threats of a dangerous world,"[5] he relies on Hamilton's argument in *The Federalist* No. 70 that good government is impossible without "energy in the executive," that unity in the executive is essential to energy in government, and that unity in the executive is conducive to "[d]ecision, activity, secrecy, and dispatch."[6]

But Yoo does not think like Hamilton. Yoo is an advocate for policies of a particular administration or party during a particular historical period. Because Hamilton thinks holistically, as a Framer, he situates his unitary executive in a broad theory of coordinated institutions in which different sets of power shape and limit one another. Yoo fails to embed his unitary executive in a general theory of coordinated constitutional functions like that articulated in *The Federalist*.

This broader context of executive power has three parts. One is an institutional context that includes the Congress, the courts, and institutional norms like democracy and the rule of law. Another is a substantive context, oriented to constitutional goods or ends to which constitutional institutions are committed. A third is a philosophical context: the view of the human good and the human condition that is believed to justify the constitutional ensemble of substantive goods and institutional means. Insensitive to this broader context, Yoo's partial and distorted understanding of executive power has a striking payoff: the actions of a giant like Lincoln become precedents for the acts of an incompetent like Bush. In this essay we explain why academic constitutional commentary should be prepared to make judgments of this kind.

We begin with the *philosophical* context. Elsewhere, we invoke Lincoln and argue that the executive power is constitutionally obligated to restore or maintain the conditions for constitutional democracy and the rule of law.[7] Our claim is that Lincoln acted

without constitutional authorization to save the Union and the Constitution. Acted extraconstitutionally in order to save the Constitution? There is no paradox, because fidelity to the Constitution always presupposes material conditions that the Constitution cannot guarantee. Lincoln felt that the Civil War might be lost unless he displaced Congress's powers to initiate the raising of armies and navies, to authorize spending, and to suspend the writ of habeas corpus. The conditions of the Civil War brought various constitutional provisions into irresolvable conflict.[8] Abiding by the letter of some provisions meant disobeying others; namely the clause requiring the president to "take Care that the Laws be faithfully executed"[9] and the president's oath to preserve and defend the Constitution.[10] The Constitution is silent as to how to resolve these conflicts—under some conditions, therefore, fully constitutional conduct is impossible. For some situations, all one can hope for are pro-constitutional actions or, as we refer to them, *constitutionalist* actions—actions that restore the conditions for honoring the Constitution—actions that are *constitutionalist* though not *constitutional.* This kind of argument is easier to accept in war than in peace because war exposes the essentially *positive* nature of the Constitution—its overriding commitment to substantive ends like security and the general welfare—and the corresponding *positive duties* of those who take the oath to preserve and defend it.

Bush did not disagree. He acted as a positive constitutionalist when he compromised constitutional restraints to secure the nation against terrorism. But conservative constitutional theorists have yet, officially, to face that fact. Positive constitutionalism has an openly favorable view of government as the agent of collective aspirations. Conservative constitutionalism purports to view government as a necessary evil, with exceptions in the areas of foreign and military affairs, criminal justice, and, for many conservatives, sexual morality. The exceptions are big enough to expose the libertarianism of conservatism as a pretext. Conservatives are as pro-government as anyone else when it comes to ends they seek to promote, like national security, law and order (for individuals if not for corporations), and selective forms of sexual restraint. Yet, among conservatives, the antigovernment mask is effective. Conservatives see themselves as moderate libertarians, not as positive constitutionalists committed to a view of society different from

that of their openly pro-government counterparts on the left. As a consequence, they do not fully explicate and defend the society to which their constitutional doctrines point. They have a positive constitutionalism of their own, but they downplay that fact, and they fail to expose their positive agenda for all to see.

Chief Justice William Rehnquist, the author of the Supreme Court's opinion in *DeShaney v. Winnebago County Department of Social Services*,[11] was the most visible proponent of negative constitutionalism. Yet, in his book, *All the Laws but One: Civil Liberties in Wartime*, Rehnquist practically embraced the idea *inter arma silent leges*—that, during war, constitutional restraints are silent.[12] For Rehnquist, when constitutional forms, rights, and limits are suspended, indeed the laws are silent, and everything is permitted to the executive.[13] Rehnquist thus subscribed to part of Lincoln's view but not all of it. He failed to see, as Lincoln saw, that when the Constitution is suspended, the executive has restorative obligations—affirmative obligations to work actively toward restoring conditions in which the Constitution can function as law once again. These affirmative obligations include the pursuit of domestic conditions (in Lincoln's case, the end of the secessionist threat) that would permit government by constitutional forms, rights, and limits. In sum, unlike Lincoln, Rehnquist failed to see that executive power must be committed to restoring or maintaining the conditions for constitutional democracy and the rule of law.

President Bush may or may not have realized this, but conservative constitutional theory denies affirmative constitutional obligations. In *DeShaney*, Chief Justice Rehnquist denied even a minimal duty of the night-watchman state: the protection of a four-year-old child from the perfectly predictable (because it was repeated and well-reported) violence of a deranged father.[14] And Bush's conception of the war on terror as permanent brought into question the possibility of restoring the conditions for the rule of law.

Next, we will sketch the *institutional* context of the unitary executive. The Constitution does put the president in a strategic setting for exercising the kind of power that Yoo contemplates. We can distinguish between the delegated powers of the presidency and the resulting powers that Yoo contemplates—those powers resulting from the president's strategic position in the constitutional scheme. But a president's exercise of strategic power can be

constitutional only if it can eventually take a form that comports with constitutional criteria. It has to express itself in a way that can be expressed in generally applicable statutory laws that meet constitutional tests and can be applied by courts. Eventually, strategic power must be reconciled to delegated power and the rule of law.

More generally, we need a theory of the unitary executive that situates the executive in the context of an institutional theory of the conflictual Constitution.[15] Bush, together with the theory upon which he acted, was contemptuous of Congress and the courts and would brook no disagreement from, conflict with, or limitation by those institutions. Indeed, the Republican-controlled Congress capitulated to that view. Republican Speaker of the House Dennis Hastert, rather than conceiving of Congress as an institution with responsibilities to check executive power, publicly proclaimed that his job was to enact the president's agenda.[16] Hastert spoke and acted as if the nation had a parliamentary system, rather than a presidential system with institutional checks and balances.[17]

Within institutional theories of the conflictual Constitution of the sort elaborated by Mariah Zeisberg and Jeffrey Tulis, Congress has responsibilities not simply to defer to or serve as an agent of executive power but also to contest exercises of executive power.[18] President Bush, Vice President Cheney, and Karl Rove all made a serious effort to establish a de facto parliamentary system in place of a presidential system of institutional checks and balances. They aspired to install a permanent Republican majority led by a unitary and unilateral executive and supported by a permanently pliant Congress and judiciary—contrary to the separation of powers and the deliberative politics reflected in the American constitutional regime. They sought to govern through secrecy and by leveraging fear—exploiting a permanent war on terrorism, keeping the public in the dark about the formation of major policies, and maintaining a permanently fearful citizenry.[19] To achieve their ends, they promoted the political power of those religious evangelicals who treat disagreement with their beliefs as either sinful or unpatriotic. There were no clearer signs of their hostility to constitutional institutions than their secrecy and their treatment of critics as traitors and heretics. They could not conceive of a loyal opposition; opposition to them meant disloyalty to the country.

These ambitions reflected Bush's sense that his instincts were in tune with God's will and the market's hidden hand, an attitude at odds with the scientifically informed political planning exemplified by the American Founding.[20] Indeed, Bush created a modern analogue to the divine right of kings: certain and infallible executives with direct communications from God do not need deliberative processes for governance; they need only executive processes for carrying out their infallible convictions.

In light of the results of the Bush years at home and abroad, constitutional commentary should be open to an alternative model of presidential power. One such alternative is the Hamiltonian model sketched earlier—the strong but institutionally situated executive. This model includes legislators with a sense of institutional identity and loyalty, along with courts that are committed to contesting and checking executive power. We have no objection to a Hamiltonian presidency—one that remains situated within an institutional scheme and responsible to its norms. Within such a scheme, checks on presidential power are best seen in a positive light, as means for preventing mistakes. This view might have spared the nation the consequences of the Bush era.

To recapitulate: the executive exists in an institutional context that includes Congress and the courts. The president does not float on a detached pedestal. Even when emergencies force the president to act extraconstitutionally, he or she must return to Congress and the courts for post-hoc approval, as Lincoln did. This means that the president's actions must meet the formal and substantive moral standards requisite for constitutional laws. Secrecy might be essential in times of war, but secret institutions (like Bush's foreign prisons) defeat the visibility that is essential to democratic responsibility and the rule of law. By assuming that the "war on terror" would be more or less permanent, Yoo depreciated the institutions and principles of public responsibility represented by Congress and the courts. This transformed Hamilton's unitary-but-attached-and-checked executive into Bush's unitary-but-detached-and-elevated executive.

Finally, we turn to the *substantive* context of the unitary executive, the context of constitutional goods or ends. This context has three aspects: a hierarchy of *goods*—the goods of the large commercial republic;[21] a set of appropriate *attitudes* held by the citizens

or at least the leadership community of the large commercial republic; and certain *virtues* that these goods and attitudes presuppose.

The Federalist situates executive power in an overarching picture of the good life, the social ends to which the Constitution is an instrument. Constitutional goods or ends presuppose certain attitudes, virtues, and character. Most liberals who criticize Yoo's theory (and Bush's execution of it) criticize it in the wrong way.[22] This is because these liberals, like conservatives, have lost touch with the broader concept of constitutional ends and the personal character traits that accompany appreciation of these ends. Thus, current constitutional commentary—both conservative and liberal—largely ignores substantive constitutional ends and personal character.[23]

Yoo invokes not only *The Federalist* but also Lincoln as authorizing Bush's theory and practice of executive power.[24] The big difference between Abraham Lincoln and George Bush lies in Bush's failure to appreciate the broader constitutional context of executive power and to display the attitudes associated with the pursuit of real goods by actors who are aware of their fallibility and their responsibilities to others. Had Yoo appreciated all aspects of this context, he would have been able to articulate in theoretical terms what, we venture, everyone knows: George W. Bush was no Abraham Lincoln! Put another way, the problem with Bush and Cheney, in addition to their view of executive power, is that they lack appreciation of constitutional ends and the attitudes and character presupposed by those ends and requisite for their competent pursuit.

Post-Bush, theorists of executive power will have to rethink the connection between power, the ends of power, and the character of those who wield power. That connection can be established only by reconnecting constitutional institutions to constitutional ends. Constitutional power must be dedicated to public purposes, like those listed in the Preamble. And, because the content of these ends is controversial, constitutional power must be dedicated to a healthy politics—a politics through which the system elaborates the best conceptions of constitutional ends in changing circumstances. After the Bush administration, we must reconnect our un-

derstanding of executive power to an understanding of the constitutional ends that such power is to pursue and the intellectual and moral virtues requisite to that pursuit.

The obstacles to any such project are intellectual and cultural. The intellectual obstacles include relativism, moral skepticism, preference utilitarianism, and dogmatic religiosity. Why? Because each of these forces in its own way obscures the deliberative and self-critical manner in which rational actors should pursue real goods—goods about whose content they can err and about whose means they can err. Academic moral relativism and skepticism in academic law and the social sciences have largely ignored developments in modern philosophy (moral constructivism and moral realism) that justify the assumption of ordinary political life, including the assumption of the American constitutional Framers, that the ends of political life are real goods, not apparent goods or goods determined by subjective preferences.

The cultural obstacles have been fostered by the market economy, which underwrites or reinforces relativism, moral skepticism, and preference utilitarianism. The economic crisis wrought by deregulatory policies that began in the Carter years, together with the larger tragedy to the country wrought by the Bush presidency, should motivate the intellectual community to rethink philosophically dated orthodoxies that divert intellectual energy from questions of value and character, in the abstract and regarding particular historical figures, movements, and developments. Put differently, academics must rethink orthodoxies that rule out propositions like "Bush was no Lincoln," for such orthodoxies blind observers to what we have strong arguments to regard as dimensions of reality. Rethinking academic orthodoxies could be a step toward overcoming the cultural obstacles we've mentioned.

In the wake of the Bush presidency, the time for "normal science" has passed, and constitutional theorists should be prepared to think in unconventional terms. In doing so, constitutional theorists need to develop a deeper understanding of the broader context of constitutional commitments, institutional checks, and constitutional goods, attitudes, and virtues. Theorizing about the unitary executive and maintaining or restoring the rule of law must reckon with that broader context.

NOTES

In this essay, we have drawn extensively from an essay we published in the Randolph W. Thrower Symposium "Executive Power: New Directions for the New Presidency?" held at Emory University School of Law. See Sotirios A. Barber and James E. Fleming, "Constitutional Theory and the Future of the Unitary Executive," *Emory Law Journal* 59 (2009): 459. We gratefully acknowledge Eric Lee and Jameson Rice of Boston University for research assistance.

1. See generally John Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11* (Chicago: University of Chicago Press, 2005). Other prominent recent works defending Bush's vision of the unitary executive include Steven G. Calabresi and Christopher S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* (New Haven: Yale University Press, 2008).

2. 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

3. *The Federalist* No. 23, at 147 (Alexander Hamilton), ed. Jacob E. Cooke (Middletown, CT: Wesleyan University Press, 1961).

4. Yoo, *War and Peace*, 21.

5. Ibid. (further citing twice in the same paragraph Hamilton's *The Federalist* No. 70). Yoo also stated in an essay published by the Heritage Foundation:

> But the text and structure of the Constitution, as well as its application over the last two centuries, confirm that the President can begin military hostilities without the approval of Congress. The Constitution does not establish a strict war-making process because the Framers understood that war would require the speed, decisiveness, and secrecy that only the presidency could bring. "Energy in the Executive," Alexander Hamilton argued in the *Federalist Papers*, "is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks." And, he continued, "the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand."

John Yoo, *Energy in the Executive: Re-examining Presidential Power in the Midst of the War on Terrorism*, First Principles Series No. 4 (Heritage Foundation, Washington, DC), April 24, 2006, at 2 (footnote omitted) (quoting *The Federalist* No. 70, at 423 (Alexander Hamilton)), *available at* http://www.heritage.org/Research/PublicDiplomacy/fp4.cfm.

6. *The Federalist* No. 70, at 472 (Alexander Hamilton).

7. Sotirios A. Barber and James E. Fleming, "War, Crisis, and the Con-

stitution," in *The Constitution in Wartime: Beyond Alarmism and Complacency*, ed. Mark Tushnet (Durham, NC: Duke University Press, 2005), 232, 236–37, 242–43.

8. Ibid.

9. U.S. Const. art. II, § 3, cl. 4.

10. U.S. Const. art. II, § 1, cl. 8.

11. 489 U.S. 189 (1989).

12. William H. Rehnquist, *All the Laws but One: Civil Liberties in Wartime* (New York: Knopf, 1998).

13. Ibid.

14. *DeShaney*, 489 U.S. at 189–90.

15. This sort of theory has been proposed by political scientists Mariah Zeisberg and Jeffrey Tulis. See, e.g., Mariah Zeisberg, "Constitutional War Authority: A Relational Conception" (2009) (unpublished manuscript, on file with Professor Zeisberg, University of Michigan, Dept. of Political Science); Mariah Zeisberg, "The Relational Conception of War Powers," in *The Limits of Constitutional Democracy*, ed. Jeffrey K. Tulis and Stephen Macedo (Princeton: Princeton University Press, 2010), 168; Jeffrey K. Tulis, *Democratic Decay and the Politics of Deference* (Princeton: Princeton University Press, forthcoming); Jeffrey K. Tulis, "On Congress and Constitutional Responsibility," *B.U. L. Rev.* 89 (2009): 515. We interpret Benjamin Kleinerman's view, both in his recent book and in his essay for this volume, similarly as reflecting an institutional theory of the conflictual constitution. See Benjamin A. Kleinerman, *The Discretionary President: The Promise and Peril of Executive Power* (Lawrence: University Press of Kansas, 2009); Benjamin A. Kleinerman, "Separation of Powers and the National Security State," this volume.

16. As Thomas Mann and Norman Ornstein put it: "Speaker Hastert . . . proclaimed that his primary responsibility was not to lead and defend the first branch of government but to pass the president's legislative program." Thomas E. Mann and Norman J. Ornstein, *The Broken Branch: How Congress Is Failing America and How to Get It Back on Track* (New York: Oxford University Press, 2006), 139.

17. Ibid., 7 ("In its highly centralized leadership and fealty to the presidential agenda, the post-2000 House of Representatives looks more like a House of Commons in a parliamentary system than a House of Representatives in a presidential system."); Alan Wolfe, *Does American Democracy Still Work?* (New Haven: Yale University Press, 2006), 60.

18. *See* sources cited in note 15.

19. See, e.g., Andrew Bacevich, *The New American Militarism: How Americans Are Seduced by War* (New York: Oxford University Press, 2005); Benjamin R. Barber, *Fear's Empire: War, Terrorism and Democracy* (New York:

Norton, 2003); Jack Goldsmith, *The Terror Presidency: Law and Judgment inside the Bush Administration* (New York: Norton, 2007); Stephen Holmes, *The Matador's Cape: America's Reckless Response to Terror* (New York: Cambridge University Press, 2007); Robert M. Pallitto and William G. Weaver, *Presidential Secrecy and the Law* (Baltimore: Johns Hopkins University Press, 2007); Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals* (New York: Doubleday, 2008).

20. Sotirios A. Barber and James E. Fleming, *Constitutional Interpretation: The Basic Questions* (New York: Oxford University Press, 2007), 36.

21. Elsewhere we have elaborated these goods. See ibid., 35–55.

22. See, for example, the otherwise excellent book by Peter M. Shane, *Madison's Nightmare: How Executive Power Threatens American Democracy* (Chicago: University of Chicago Press, 2009).

23. For an important exception, see Clement Fatovic, *Outside the Law: Emergency and Executive Power* (Baltimore: Johns Hopkins University Press, 2009). Fatovic's study of *The Federalist* and its philosophic precursors from Machiavelli to Locke discloses a clear expectation that power in the executive would be accompanied by character traits that would serve as a substitute for the rule of law in emergencies whose challenges exceeded the capacity of established constitutional norms.

24. See John Yoo, *War by Other Means: An Insider's Account of the War on Terror* (New York: Atlantic Monthly Press, 2006), 97, 113–14, 121, 122, 148, 238. Jack Goldsmith, a leading conservative lawyer and academic who served in the Department of Justice during the Bush administration, has contrasted Bush with Lincoln. Goldsmith, *Terror Presidency*, 210–15.

PART III

BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS