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Executive Prerogative: The Constitutionality and Future Implications of President Barack Obama's 2014 Executive Order regarding Immigration Law in the United States of America

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CLAREMONT McKENNA COLLEGE

**Executive Prerogative: The Constitutionality and Future Implications of
President Barack Obama's 2014 Executive Order regarding Immigration
Law in the United States of America**

SUBMITTED TO

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ABSTRACT

United States President Barack Obama issued an Executive order on November 20, 2014 to implement new law regarding the American immigration system and deportations. The system has long been skewed, and a polarizing issue among both the general public and of those involved in the United States government. Obama, by issuing this decree, created a law on his own due to congressional deadlock in creating and passing immigration reform legislation. However, the constitutionality of his decision to do so has now become highly debated, with many officials and academics across the country asserting their beliefs in his legal ability to issue the order. The ability to create laws is explicitly prescribed to the Legislative branch in the Constitution, but there have been past examples of Executive authority being necessary so as to preserve the Union and allow the government to continue. This thesis will examine the constitutionality of Obama's Executive decree and the potential precedent that it will set for future Presidents by analyzing it within the context of John Locke, the original proprietor for the rule of law, James Madison, the father of the United States Constitution and separation of powers system, Alexander Hamilton, the forthcoming advocate for an energetic Executive of the Founding Fathers, the Abraham Lincoln presidency, which involved the crisis known as the Civil War, and the George W. Bush presidency, widely known as one of the most polarizing constitutional presidencies in American history. When looking at these past examples it becomes clear that Barack Obama overstepped his place in the government with no existential crisis threatening the nation, therefore setting a dangerous precedent for future Executive's as well as damaging the force of the separation of powers system.

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CHAPTER 1: INTRODUCTION

The growth of partisanship in the United States of America's political environment has been well documented over the last seventy-five years, and at this point, the divide has arrived at its peak. Political deadlocks between different branches of government and inability to pass legal policy have created frustrations on all sides of the spectrum, as the separation of powers principles that the country's constitutional framework is based upon has created a significant number of ways to stop the passing of legislation and Executive activity. A now Republican-controlled Congress and a democratic presidential administration that has been one of the more polarizing administrations in United States history have resulted in a lack of production in a time when production seems to be absolutely necessary to solving the nation's issues. Currently at the forefront of this deadlock is immigration law, as there have been numerous issues regarding the temporary protection from deportation for illegal immigrants, and particularly the children born in America, those with jobs, clean records, and strong community ties. These children were brought to America by their undocumented parents, and therefore were not given the choice of arriving illegally, while the others have integrated themselves as productive and valuable members of society. The official number of people in this category is unknown, but some news outlets, such as the *New York Times*, have estimated that there are between four and five million¹, which is over a third of the total undocumented resident population (11

¹ *New York Times Editorial Board*, "Mr. Obama, Your Move", *The New York Times*, http://www.nytimes.com/2014/08/10/opinion/sunday/mr-obama-your-move.html?_r=0, , August 9, 2014

million²) in the United States today. While this may not be a huge portion of the total population, most of these people are centered around a few major metropolitan hubs, are prominent and contributing members of their communities, and have faced a large amount of hardships to get to where they are with the disadvantages that are inherently given to undocumented immigrants.

Not only do these immigrants play roles in the country, but citizens of the United States have also taken up a vested interest in immigration law, primarily because of the value undocumented immigrants provide in the workforce, civil rights activity, and in exposing inefficient law enforcement. There is a large amount of wastefulness occurring in the enforcement of deportations, as they chase millions of people who pose no threat and help keep the economy afloat by working jobs that the general citizenry avoid at almost all costs while not complaining about wages and unfair working conditions³.

There are massive civil rights abuses that expose the prevalence of racism in the United States today, and the increased publicity for occurrences of racial profiling towards those that should be deemed innocent has made this more obvious to the general population⁴.

In addition, because a lot of the undocumented immigrants, whether they are valuable or not, fear law enforcement even if they've done nothing illegal, ripe conditions for crime and exploitation flourish wherever they remain hidden⁵. With all of these issues

achieving national prominence because of President Obama's 2012 program that deferred

² Nakamura, David, "Obama Readies Executive Action on Immigration", *Washington Post*, http://www.washingtonpost.com/politics/obama-readies-executive-action-to-legalize-millions-of-undocumented-immigrants/2014/08/01/222ae2e8-18f8-11e4-85b6-c1451e622637_story.html, August 1, 2014

³ *New York Times Editorial Board*, "Mr. Obama, Your Move"

⁴ *New York Times Editorial Board*, "Mr. Obama, Your Move"

⁵ *New York Times Editorial Board*, "Mr. Obama, Your Move"

deportations of many immigrants who had been brought to the country illegally as children⁶, Congress reallocating resources for Obama to deport 350,000 to 400,000 undocumented immigrants per year⁷, and the social stands that undocumented children under the age of 18 (most of whom are not criminals, drug dealers, violent or non-violent offenders, and are simply trying to escape the dangers and threats of their home countries) have been taking by turning themselves over to immigration authorities⁸, a massive pressure from multiple directions is continuously rising on the federal government to act upon reforming immigration law. However, the previous divide in Congress (now controlled by the GOP) and differences between Congress and the presidential administration, as mentioned before, are blocking legislation from being passed.

The ridiculous sums of money spent on border patrolling have also contributed to the idea of reforming the system, as the government allocated \$11.7 billion to border security in 2012, which is an extremely high number during the recovery from a financial crisis⁹. Furthermore, Mexico, adjacent to the United States, in terms of domestic immigration law governing their potential immigrants, is treated under the same rules and regulations as Switzerland in the center of Europe¹⁰. The current immigration quotas limit each country to no more than 7% of the total of 700,000 legal immigrant visas each year, although it seems obvious that countries in closer proximity, and with more reason

⁶ Nakamura, "Obama Readies Executive Action on Immigration"

⁷ Nakamura, "Obama Readies Executive Action on Immigration"

⁸ Gonzales, Alberto, "Alberto Gonzalez: Obama's Time for Immigration Action", *USA Today*, <http://www.usatoday.com/story/opinion/2014/08/12/border-children-action-obama-executive-authority-action-column/13921133/>, August 12, 2014

⁹ Klein, Ezra, "Why the President becomes more Powerful when Congress Fails"

¹⁰ Nakamura, "Obama Readies Executive Action on Immigration"

for citizens to leave, would get a higher percentage of the total visas given¹¹. There are so few avenues for low and moderately skilled workers to migrate lawfully from foreign countries to the United States that these migrant workers are forced to break the law to enter the United States and work¹². In the original theory of the United States government, a situation like this is supposed to immediately inspire Congress to act on either reforming or overhauling the immigration law, as there are clearly large implications economically, politically and socially. Unfortunately, the stubbornness of all parties involved, and the Democrats losing control of the Senate, is going to result in extreme difficulties in the passing of legislation on immigration, along with many other issues.

President Obama and his administration have now decided to drastically act upon the immigration issue by using his Executive discretionary authority to step over Congress' constitutional right of lawmaking and reform immigration law unilaterally¹³. The President, on November 20, 2014, made history at Del Sol High School in Las Vegas, Nevada, by using an Executive order to temporarily modify immigration law until legislation can be passed¹⁴. He set the conditions of the "Priority Enforcement Program", the name he deemed the program, as follows: "If you've been in America for more than five years; if you have children who are American citizens or legal residents; if you

¹¹ *U.S. Citizenship and Immigration Services*, "Per Country Limit", <http://www.uscis.gov/tools/glossary/country-limit>

¹² Johnson, Kevin and Trujillo, Bernard, "Immigration Law and the US-Mexico Border", *University of Arizona Press*, 2011, pg 1

¹³ *The Washington Post Editorial Board*, "Frustration over Stalled Immigration Action doesn't mean Obama can act Unilaterally", *The Washington Post*, http://www.washingtonpost.com/opinions/frustration-over-stalled-immigration-action-doesnt-mean-obama-can-act-unilaterally/2014/08/05/9c7bc1c6-1c1c-11e4-ae54-0cfe1f974f8a_story.html?wpmk=MK0000200, August 5, 2014

¹⁴ Davis, Julie, "Obama's Immigration Action has Precedents, but May Set a New One", *The New York Times*, http://www.nytimes.com/2014/11/21/us/politics/obamas-immigration-decision-has-precedents-but-may-set-a-new-one.html?_r=1, November 20, 2014

register, pass a criminal background check, and you're willing to pay your fair share of taxes—you'll be able to apply to stay in this country temporarily, without fear of deportation"¹⁵. The program is only meant to be a temporary one until concrete legislation can be passed, but this seems unlikely anytime soon¹⁶. Moreover, the initiative can be easily reversed by a future President once in office, so reform may never follow from the action¹⁷. Obama's commitment to this action may be established with the right ideas in mind, but the constitutionality of his action is highly debatable in the context of the separation of powers, and may not even be a solution to the current problems.

Obama's frustration due to congressional paralysis over what some people are considering a humanitarian crisis has become more obvious, and the Republican controlled House of Representatives has only passed measures that have no chance of becoming law regarding immigration¹⁸. Obama, because of the congressional inactivity on productive and beneficial immigration reform legislation, has come to believe that it is only natural that the Executive moves in to accomplish what the Legislature cannot¹⁹. In his announcement of the Priority Enforcement Program, Obama said, "Had the House of Representatives allowed that kind of bill a simple yes-or-no vote, it would have passed with support from both parties, and today it would be the law. But for a year and a half now, Republican leaders in the House have refused to allow that simple vote"²⁰. He continues by contextualizing his prerogative power usage in the usages of past presidents,

¹⁵ Davis, "Obama's Immigration Action has Precedents, but May Set a New One"

¹⁶ Davis, "Obama's Immigration Action has Precedents, but May Set a New One"

¹⁷ Davis, "Obama's Immigration Action has Precedents, but May Set a New One"

¹⁸ *The Washington Post Editorial Board*, "Frustration over Stalled Immigration Action doesn't mean Obama can act Unilaterally"

¹⁹ Klein, "Why the President becomes more Powerful when Congress Fails"

²⁰ Davis, "Obama's Immigration Action has Precedents, but May Set a New One"

which further exemplifies the dangerous precedent usage of Executive action can set. He said, “The actions I’m taking are not only lawful, they’re the kinds of actions taken by every single Republican President and every single Democratic President for the past half century. And to those members of Congress who question my authority to make our immigration system work better, or question the wisdom of me acting where Congress has failed, I have one answer: Pass a bill”²¹.

There have been a significant number of attempts at justification of Obama’s power to act on immigration reform, such as the maintaining of laws that are out of sync with social reality, the number of immigrants in the United States today being significantly more than the resources that authorities possess to arrest and deport them can handle, and the lack of realism in the policies that are becoming a threat to the rule of law because they force more people to break laws on a consistent basis²². Supporters are attempting to justify the plan itself that Obama would institute by saying that he would only focus on high priority targets so no damage to the economy would be done, a deterrent would be created for undocumented immigrants to commit less crime so they are not one of the high priority targets, and the precedent that the Executive branch would set by suspending the enforcement of the law is more likely to favor the right-wing over the left in the long run²³. Now, Obama has achieved the legal basis for his Executive prerogative usage, as the White House unusually released a formal, 33-page Justice

²¹ Davis, “Obama’s Immigration Action has Precedents, but May Set a New One”

²² Klein, Ezra, “Why the President becomes more Powerful when Congress Fails”

²³ Chait, Jonathan, “Obama’s Immigration Plan should Scare Liberals, too”, *NY Mag*, <http://nymag.com/daily/intelligencer/2014/08/obamas-immigration-plan-should-scare-liberals.html>, August 11, 2014

Department memo detailing the action's legal justifications²⁴. In this memo, White House officials and broad array of legal experts, including 10 of the nation's top legal and constitutional scholars, call the new policy "lawful" and "within the powers of the Executive branch"²⁵. The text of this memo specifically says, "We are law professors and lawyers who teach, study, and practice constitutional law and related subjects... While we differ among ourselves on many issues relating to Presidential power and immigration policy, we are all of the view that these actions are lawful. They are exercises of prosecutorial discretion that are consistent with governing law and with the policies that Congress has expressed in the statutes that it has enacted"²⁶. Obama's legal counsel has provided a precedent that could become dangerous in the future without utilizing the past precedent of necessity, and now Presidents will be able to cite his actions in utilizing their own, potentially more expansive actions.

The President has previously expressed his belief in the rule of law, however: "If, in fact, I could solve all these problems without passing laws in Congress, then I would do so. But we're also a nation of laws"²⁷. Clearly, this view has changed, as his exercising of Executive authority, which is traditionally considered constitutional only in extraordinary circumstances, has now become one of the most important assertions of power in presidential history. Obama had previously expressed his desire to work together with Congress to create a solution plan, but after being rejected on multiple occasions, it is clear that he has given up on that approach. However, because of the lack

²⁴ Davis, "Obama's Immigration Action has Precedents, but May Set a New One"

²⁵ Davis, Julie, "Obama's Immigration Action has Precedents, but May Set a New One"

²⁶ "Scholars Letter on Immigration", *Scribd*, <http://www.scribd.com/doc/247489145/Scholars-Letter-on-Immigration>, November 20, 2014

²⁷ *The Washington Post Editorial Board*, "Frustration over Stalled Immigration Action doesn't mean Obama can act Unilaterally"

of common ground that his administration and Congress have reached, many proponents of immigration reform in Congress were expecting the President to take action²⁸. Illinois' Democratic Representative Luis Gutierrez of the House of Representatives has been quoted saying, "I think the President's going to take action on all...levels. He is going to take broad, expansive action that the law allows him to take"²⁹. Gutierrez's hopes have now come to fruition with Obama's announcement of the reform of immigration law as an Executive order.

Obama's justification regarding his approach to reforming immigration law has caused a lot of people in government and throughout the country to debate the constitutionality of this action, and whether or not it destroys the separation of powers principles. Article I of the United States Constitution explicitly gives Congress the right to make laws: "All legislative Powers herein shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives"³⁰. The wording of this seems to be a clear cut statement of duty, however, the argument stems over how Article II deems the Executive power and its scope: "the executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows"³¹. The dilemma continues later on in Article II, when it says, "He shall from time to time give to the Congress Information of the State of the Union, and

²⁸ Sullivan, Peter, "As Obama Returns, Advocates look for Executive Action", *The Hill*, <http://thehill.com/homenews/administration/215808-as-obama-returns-advocates-look-for-executive-action>, August 25, 2014

²⁹ Sullivan, Peter, "As Obama Returns, Advocates look for Executive Action"

³⁰ Article I, Section I, *United States Constitution*, http://www.archives.gov/exhibits/charters/constitution_transcript.html

³¹ Article II, Section I, *United States Constitution*

recommend their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper”³². It is clear that in the Constitution, when read from a textualist and traditional perspective, Congress is given the power to make laws, and the Executive is there to enforce these laws. On the other hand, some arguments stem from the fact that the Constitution was written long ago, so there is no way that the nation’s Founding Fathers could have known the growth path that society would take into this day and age.

The legal basis from past precedence also creates an opportunity for Obama to find a loophole through which he is able to at least make a case for the constitutionality of his actions. The oath that the President takes when entering into office also convolutes the true answer to the question of the constitutionality of Obama using his Executive authority as well: it reads, “I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect, and defend the Constitution of the United States”³³. When the nation is in a time of crisis, faithfully executing the Office of President involves coming up with sound solutions to the issues- on the other hand, preserving, protecting, and defending the Constitution means abiding by its rules, which President Obama would not be doing by exercising his prerogative power. In the grand scheme of the federal government, the roles that the three branches play are relatively simple; the Executive preserves national

³² Article II, Section III, *United States Constitution*

³³ Article II, Section I, *United States Constitution*

security when necessary, while enforcing the laws; the Legislative represents the people while drafting and passing laws that protect the good of the whole nation; and the Judiciary protects individual rights. This oversimplified way of looking at a very complicated scenario creates an obvious answer to Obama's situation, and the Constitution explicitly denies the Executive the ability to create laws unless absolutely necessary for the preservation of the nation, no matter how beneficial or necessary the laws might be on a non-existential level.

In addition to Obama's recent expressions of alleged respect for the rule of law in American governance, he condemned the Bush administration's usage of Executive authority in foreign matters, and Article II of the Constitution to justify usage, to base part of his initial 2008 campaign for office. In an interview with *The Boston Globe*, Obama denied the presidencies constitutional right to utilize unilateral action in foreign policy, as well as domestically after being asked about President Bush's example. When responding to a question about the constitutionality of conducting surveillance for national security purposes without judicial warrants, Obama says, "The Supreme Court has never held that the President has such powers...I will only authorize surveillance for national security purposes consistent with FISA and other federal statutes"³⁴. The article then moves into the direction of international relations, and the Executive's ability to act alone in this realm. Obama is asked whether the position of the presidency has the constitutional authority to bomb Iran without seeking a use-of-force authorization from Congress, and he responds as so: "The President does not have power under the

³⁴ Savage, Charlie, "Barack Obama's Q&A", *The Boston Globe*, <http://www.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA/>, December 20, 2007

Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation...It is always preferable to have the informed consent of Congress prior to any military action”³⁵. Obama continues along the lines of criticizing the Bush Administration’s actions, both domestically and internationally, as a part of the platform for his campaign. His goal was to run as a complete opposite to the Bush Administration, and he expresses his misgivings about utilizing the Article II justification that previous presidents have given in their attempts to legalize the Executive prerogative power. However, a major contradiction results when examining this article in coagulation with Obama’s recent statements about reforming immigration law- If the President cannot act without Congress’ approval on the international front, where it is well known that he or she is prescribed more independence and power in action, how can he now attempt to justify the constitutionality and necessity of his potential actions domestically? Obama has begun to entirely contradict himself during his presidency from his words in this interview, first in Libya, and now in immigration law.

President Obama’s pre-election convictions are based on the fact that the Constitution does not explicitly state the existence of the separation of powers, but both on an obvious and implicit level, it exists throughout the document. Most of the law of separation of powers has developed outside of the specific texts³⁶, but the Constitution employs two main separation of powers techniques³⁷. First, it guarantees each branch

³⁵ Savage, “Barack Obama’s Q&A”

³⁶ Bruff, Harold, “Balance of Forces: Separation of Powers Law in the Administrative State”, *Carolina Academic*, 2006. Print, Durham, NC, 3

³⁷ Bruff, 27

particular attributes of autonomy that experience had suggested, such as Congress receiving control over its elections, membership, and meetings³⁸. Second, the checks and balances that exist for each branch to make sure the others don't utilize more power than they should, such as the existence of vetoes, and Congress' control of the purse over the Executive, inherently imply the separation of powers among the major branches³⁹. While the system applies to the three branches of government, in this specific case, the focus will primarily be on the distinctions between the Executive branch and Legislative branch, as that is where the dilemma lies currently. The structure of the Constitution appears to have been designed for three overall purposes; the Framers meant to diffuse and offset power in hopes of achieving a relatively even balance, or at least avoid the concentration of too much power in one place so as to secure the rule of law; they had hoped that it would protect individual liberties, although the quick establishment of the Bill of Rights shortly after ratification shows that this was unsuccessful; and, that the new government would promote the broad public interest, and not narrow faction, through multiple bases of political representation⁴⁰. When the Constitution is read in a way that analyzes what the Framers meant when writing, then the appearance of separation of powers becomes obvious with the constitutional structure, even if it is not out rightly mentioned at any point.

John Locke, who will be discussed in depth in the first chapter, is one of the original men to discuss the existence of prerogative power in a democratic government, and is often turned to when looking at issues regarding the separation of powers in the

³⁸ Bruff, 27

³⁹ Bruff, 27

⁴⁰ Bruff, 28-29

context of the Executive branch. His *Second Treatise on Government* argues strongly for the rule of law to be considered necessary for a solid political environment and process, but also includes the power of the Executive to act outside of the law when the nation is in crisis. According to Locke, the beginning of political society lies in its constitution by persons originally or naturally free, and it is the original and rightful rule of law that affirms individual's natural freedom and rationality by regarding them uniformly⁴¹. The separation of powers follows from this uniformity and purpose of law (safety) so the Executive power is subordinate to the supreme Legislative power and to the supremacy of the rule of law⁴². But, under certain circumstances where the public good is at stake, the rule of law is not adept at providing the correct solutions so violations may be required⁴³. Thus, the idea of the Executive prerogative power was born, and now provides United States Presidents, general academics, and anyone who has a stake in the issue a precedent to contextualize an argument when looking at potential usage of the power and its constitutionality. While Locke believes that the people will and should be the final judges of the actual necessity of the Executive acting, this does not apply as strongly nowadays, especially on such a polarizing issue during a partisan deadlock⁴⁴. John Locke has insightful views upon the prerogative power that are very applicable to the current situation, and analyzing these views will help further in the analysis of Obama's Executive discretionary authority regarding immigration reform.

⁴¹ Mattie, Sean, "Prerogative and the Rule of Law in John Locke and the Lincoln Presidency", *Review of Politics*, <http://search.proquest.com/docview/60154656?accountid=10141>, 2005, 82

⁴² Mattie, 85

⁴³ Mattie, 85

⁴⁴ Kleinerman, Benjamin, "the Discretionary President: The Promise and Peril of Executive Power", *University Press of Kansas*, 2009, print. 49

The second chapter will discuss the views of James Madison and Alexander Hamilton, which are highlighted in the *Federalist Papers* and *The Pacificus-Helvidius Debates of 1793-1794*. Each of their individual viewpoints causes the other issues with how the Executive, and the separation of powers, should operate, and both of their arguments grow in terms of breadth and depth due to the opposing arguments supplied by each. James Madison, on one hand, understands the Constitution as a stricter doctrine of limited powers, creating an energetic but not over-powering national government that operates within limits under the idea of separation of powers⁴⁵. He is of the belief that it is necessary for the preservation of liberty that the three departments of the federal government remain separate and distinct, and they are only blended when it is the goal of effectually guarding against an entire consolidation⁴⁶. When speaking about the presidency, Madison has a vision of the Executive as easily limitable, but not overly so because the position is still in need of the means to achieve governmental ends⁴⁷. Madison also believed that strength in the Legislature needed to be limited by increasing power in the Executive initially, especially in times of crisis and in the foreign realm⁴⁸. His ultimate goal, which later came to fruition during his time as United States President, was to restrain each institution of the federal government to avoid a tyrannical, monarchical, or overreaching branch which defuses the reason that they chose to create the United States of America, while promoting the separation of powers and co-equal but

⁴⁵ Kleinerman, "The Discretionary President", 119

⁴⁶ Kleinerman, "The Discretionary President", 121

⁴⁷ Kleinerman, "The Discretionary President", 123

⁴⁸ DePlato, Justin, "The Cavalier Presidency: Executive Power and Prerogative in Times of Crisis", *Lexington Books*, 2014, Maryland, print. 80

independent branches⁴⁹. Madison's views, and role as one of the original founders of the country, should give President Obama a better understanding of his role as the head of the Executive branch and what should constitute extralegal activity by the President.

Alexander Hamilton is also supportive in regards to the Executive's power in the government and the separation of powers principles. He openly advocated for an "energetic and active" Executive and federal government throughout the *Federalist Papers*, as his experiences from the Articles of Confederation caused him to realize the necessity of a strong national government with adequate powers to achieve a national purpose⁵⁰. Hamilton wrote in *The Federalist Papers*, "We forget how much ill may be produced by the power of hindering the doing that which is necessary to do and of keeping affairs in the same unfavorable posture in which they may happen to stand at particular periods"⁵¹. That being said, Hamilton does make the distinction that the ends have to justify the means of discretionary authority, and, consequently, that the ends limit the means, as governmental power is only unlimited insofar as it seeks the national ends by the Constitution in his opinion⁵². Hamilton is basically saying that the government was created to achieve its ends, so it needs the power to do this while still operating on a system of checks and balances. He focuses on Article II of the Constitution, and specifically the Executive's command of the treaty-making power, to justify why he should have the right to act for the good of the nation while still being judged by the

⁴⁹ Shane, Peter, "Madison's Nightmare: How Executive Power Threatens American Democracy", *University of Chicago Press*, 2009, London, England, print. 2-3

⁵⁰ Pratt, Ronald, "Alexander Hamilton: The Separation of Powers", *University of Illinois Press Public Affairs Quarterly*, 1991, <http://www.jstor.org/stable/40435772>, 101

⁵¹ Hamilton, Alexander, "Federalist #22", *The Federalist Papers*, <http://www.foundingfathers.info/federalistpapers/>, 137

⁵² Kleinerman, "The Discretionary President", 95

people and the other branches of government. Hamilton and Madison have slightly differing views on the Executive's role in the federal government and the separation of powers idea, and have an interesting dynamic precedent that can contextualize Obama's usage of prerogative power.

Chapter 3 will discuss the Lincoln Presidency, which occurred during one of, if not the most trying times in history of the United States of America. Lincoln took drastic measures of Executive prerogative during an existential crisis for the Union, utilizing powers that most would never have known existed before the Civil War. As President during a time of immense crisis, he decided to utilize unestablished supplementary powers when suspending Habeas Corpus, raising an army, invading, establishing a military government in a captured territory, and employing tough internal security measures so as to preserve the nation⁵³. The South was seceding not for issues with the style of governance the nation undertook and advanced, but because of specific ideals that they thought were necessary, which does not give them reason to leave the contract they agreed upon when creating the government. Lincoln, while taking these actions, expressed the understanding that Executive action can only be used during extraordinary circumstances and is extralegal; therefore, it should not be institutionalized or legalized as a common occurrence and should only be a supplement to the rule of law⁵⁴. However, Lincoln's actions themselves set a dangerous precedent, as many United States Presidents following him have looked at his presidency and decided that they could potentially

⁵³ DePlato, 99-100

⁵⁴ Kleinerman, "The Discretionary President", 165-166

exercise their own Executive authority, but in situations that do not warrant it⁵⁵. Because of the ambivalence of the people towards the presidency, there is a fear that they can be easily swayed by a convincing president who is able to justify his or her actions by citing Lincoln's example, but not highlighting his words about the cases when prerogative power should be used⁵⁶. Lincoln's unique approach to the prerogative power, which included him not wanting to utilize it early on in his presidency because of the dangers that he saw with it, plays a large role in the creation of the modern president, and has led to unwarranted uses of Executive power as Obama's immigration reform is today.

One of the presidencies that clearly looked at Lincoln's precedent, along with the writings of Alexander Hamilton regarding prerogative, is that of George W. Bush. The Bush administration's actions post-September 11, 2001, involved heavy uses of Executive power, as his Office of Legal Counsel (OLC) justified his actions by citing words of past Presidents and those involved with structuring the Constitution. In total, his "dirty war" treatment and tactics involved violations of the 1949 Geneva Conventions, the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, the American Declaration of the Rights and Duties of Man, the United Nations Charter, customary law prohibiting forced disappearance of human beings, and various customary international legal rights and proscriptions in relevant treaties⁵⁷. The "War" on Terror" that Bush declared, which is a subjective and inherently ambiguous way to refer to battling all of terrorism around the world, was used under the umbrella of

⁵⁵ Kleinerman, "The Discretionary President", 168

⁵⁶ Belz, Herman, "Lincoln's Construction of the Executive Power in the Secession Crisis", *University of Illinois Press*, 2006, <http://www.jstor.org/stable/20149090>, 13

⁵⁷ Paust, Jordan, "The Bush Administration's Unlawful Responses in the 'War' on Terror", *Cambridge University Press*, 2007, New York, print. 45

a true Lincolnian “war”, so as to create the idea that the Union was in danger. John Yoo, the head of the OLC during the Bush administration, said that “our political leaders should consider new ways of addressing the threats posed by the new kind of enemy we now face”, but the administration still uses older paradigms to justify the expansion of presidential power⁵⁸. They incorporated the thought that Congress cannot legislate for every contingency under the Lockean belief, as well as insisting that the expanded presidential power capable of overriding the laws of Congress is constitutionally guaranteed at all times⁵⁹. By misconstruing the words of the American Founders and other prominent individuals on the issue of prerogative, the Bush administration justified clearly extralegal actions during an ordinary time because there was no necessity to preserve the Union from a danger, while also setting a precedent that Obama promised to initially avoid but is now walking a fine line of utilizing for his own political benefit.

The impotency of the presidency in a domestic issue, such as acting on immigration reform, has forced Presidents in the past to become significantly more active on the international front. Obama has been forthcoming in this regard, but in his opinion, immigration law has finally reached a tipping point, and had to be restructured. Although the office of the President possesses a huge amount of power, the checks and balances in place limit him from acting on what he wants to do, what he is pledged to do, what he is expected to do, and what he knows he must do⁶⁰. All modern Presidents have been frustrated by their inability to do anything about fundamental problems, and Obama’s

⁵⁸ Kleinerman, “The Discretionary President”, 2-3

⁵⁹ Kleinerman, “The Discretionary President”, 4-5

⁶⁰ Hodgson, Godfrey, “All Things to All Men: The False Promise of the Modern American Presidency”, *Simon and Schuster*, 1980, New York, Print. 13-14

case is no different⁶¹. Unfortunately for him and for those who support immigration reform, the President acting through Congress, or taking action with the consent of Congress, is a complicated process that requires a massive amount of support, of which Obama lacks⁶². As President of the United States, the frustrations will build, and attempted actions do not always work out as planned, which will be the case if the current President exercises his prerogative power because of the precedent that it will set and the difficulty that will exist in creating a solid policy that truly helps the situation and is enforceable.

Defining what constitutes a crisis that requires extralegal power is a fundamental part of the argument regarding the usage of Executive prerogative, and it becomes obvious that a crisis of this magnitude does not fit the traditional Lincolnian definition of a crisis. The definition of a crisis large enough to allow for Executive actions through Article II of the Constitution, in my opinion, coincides with that of Abraham Lincoln's time as President; When the state of the Union is at stake, and could potentially be destroyed even though democratic governance is still occurring, then supplemental constitutional uses of power by the Executive would be permitted, but only until the crisis is solved. Immigration law in the United States is not endangering the Union, and there is no actual threat to the nation's future. Therefore, it does not warrant President Obama stepping over Congress' constitutional rights of creating laws. The Article II argument that has been used in multiple presidential administrations, such as Lincoln's and Franklin Delano Roosevelt's, is not going over the separation of powers, primarily

⁶¹ Hodgson, 30

⁶² Hodgson, 119-120

because the argument is incorporating the prerogative power within the separation of powers and the Constitution. In those cases, Congress has, in the past, authorized the Executive to act in their place regarding these dangers, making it an easier approach, although they do loosen the definition of a crisis as more reference to this argument occurs. In spite of previous examples, President Obama has demonstrated his lack of comfortability in utilizing Executive authority in foreign relations, which is at an inherently contradictory tension with reforming immigration law because the Executive is supposed to have more absolute discretion and control in international relations than domestically.

Obama, instead, clearly believes in his presidential policy independence on the home front, which perverts the functions of the separation of powers, basically stepping over the structure that the United States Constitution is framed around. Obama's duty in this situation should be to get the Houses of Congress to convene if possible, and continue enforcing the laws that are in place, all-in-all following his constitutionally prescribed powers. While there are clearly positives that would occur in the short-term economically, politically, and socially, the long term implications of Obama reforming immigration law create a much larger issue. The separation of powers principles would be effectively weakened, and potentially neutralized, in the long-run because future Presidents will be able to cite this action as one that allows them to do even less deserving actions through prerogative, while also weakening congressional power. The blurring of the line of separation of powers, and the President's ability to utilize prerogative for domestic policy advocacy and shaping public opinion, is unacceptable and completely independent from past examples. Further, Obama's legalization of his

actions through the Department of Justice memo sets an explicit precedent for future Executive leaders to cite when trying to expand their branch's power. Executive authority, at the maximum, is reserved for very compelling scenarios that endanger the safety of the government, and immigration reform does not fit this billing, as it is clearly a domestic policy issue constitutionally prescribed to be solved by Congress. The long-term effects of Obama's Executive order remains to be seen, but it is likely that this usage of prerogative will set a precedent that creates far too much ability in the Executive to expand its power beyond anything that the Founding Fathers were expecting when creating the Constitution under the separation of powers' principles.

CHAPTER 2: JOHN LOCKE AND THE PREROGATIVE POWER

John Locke is one of the front-runners in defining the needs, goals, and methodologies of running an effective and balanced democratic government through his writings in *Two Treatises on Government*. Locke, the original proponent of the rule of law in government, included an important discussion of prerogative power to illustrate his awareness of the necessity of a response to the limitations of the rule of law⁶³. This discussion stems from Thomas Hobbes' writing on the unencumbered unitary sovereign, as Hobbes prescribes the sovereign of the state an unlimited power, which Locke believes will become a much greater threat to peace than the threats prerogative power is meant to prevent⁶⁴. In essence, Locke suggests that in a time of war, crisis, or danger to the nation, the normal laws set down by the Legislature might be inadequate for, or even a fatal obstacle to, the promptness of action to avert an existential danger to the nation⁶⁵. He wants to be certain that the Executive emergency powers in their simplest form are those power the Executive gains, or uses, during a time of crisis to end the event and preserve the state swiftly with the appropriate amount of energy as well as be held fully accountable due to the singularity of the decision to respond to the crisis⁶⁶. While Locke may be more supportive of Obama's decision to exercise his prerogative power in restructuring immigration law than the other men being discussed, his commitment to the rule of law, his description of Legislative supremacy domestically, and the fact that he

⁶³ Kleinerman, "The Discretionary President", 49

⁶⁴ Kleinerman, "The Discretionary President", 48

⁶⁵ DePlato, 21

⁶⁶ DePlato, 13-14

makes a distinction between utilizing the power out of necessity versus frustration, clearly shows that he would not be in support of Obama's use and the precedent it could set for the usurpation of Legislative powers.

Locke's discussion of Executive discretionary authority begins when he examines the aptitude of Legislative power, and its necessity for the successful governance of all democratic commonwealths. Locke says, "THE great end of man's entering into society, being the enjoyment of their properties in peace and safety, and the great instrument and means of that being the laws established in that society; the *first and fundamental positive law* of all commonwealth's is the establishing of the legislative power; as the *first and fundamental natural law*, which is to govern even the legislative itself, is the preservation of the society, and (as far as will consist with the public good) of every person in it"(John Locke, *Two Treatises of Government*, Section 134)⁶⁷. The necessity of Legislative power in democratic government is a result of Locke's idea that the rule of law must reign supreme, as strict law-following is the only way to eliminate subjectivity in government and treatment of a government's citizens. Locke goes on to say; "...which has not its *sanction from that legislative* which the public has chosen and appointed: for without this the law could not have that, which is absolutely necessary to its being a law, *the consent of the society*, over whom no body can have a power to make, but by their own consent, and by authority received from them"(Locke, Section 134). Because the initial idea of a social contract, and democratic governance, is that the people agree to relinquish some of their freedoms for their safety, and instead will choose representatives that will make

⁶⁷ Locke, John, "Two Treatises of Government", *Hollis ed.*, 1689, <http://oll.libertyfund.org/titles/222>, Section 134

decisions for the “common good”, Locke finds that the Legislature is the ultimate necessary entity so as to have the rule of law above all else in ordinary circumstances.

Locke’s commentary of the Legislative power continues by explaining the lack of ability of the institution to violate the natural rights and agreements of the people. He says, “It is *not*, nor can possibly be absolutely *arbitrary* over the lives and fortunes of the people: for it being but the joint power of every member of the society given up to that person, or assembly, which is legislator; it can be no more than those persons had in a state of nature before they entered into society... Their power, in the utmost bounds of it, is *limited to the public good* of the society... The *rules* that they make for other men’s actions, must, as well as their own and other men’s actions, be conformable to the law of nature” (Locke, Section 135). In this case, the “law of nature” is that of the right of man to life, liberty, and property, all of which the Legislative power must abide by so as to be considered legitimate in its rule. The law of nature, therefore, prescribes that this would be a violation of a constitution by which the people determined the Legislature to be the regular authority⁶⁸. Furthermore, Locke prescribes the Legislative institution’s “commitment to dispensing justice, deciding the rights of the subject by promoting standing laws, and authorizing judges to enforce these laws” (Locke, Section 135). Absolute arbitrary power and governing with settled standing laws are inherently in tension, as they are unable to work together with the purpose of society and government⁶⁹.

⁶⁸ Mattie, Sean, 84

⁶⁹ Locke, Section 137

A major risk of Legislative domain for Locke is the possibility of the transfer of the power from the Legislative to any other individuals or entities in the system of government. Accountability to the people, as they are the ones alone who can appoint and constitute the Legislative, is the emphasis and purpose because it is derived from the people by a voluntary grant and institution, and only the Legislative has the power to make laws⁷⁰. He establishes that Executive power, when placed anywhere but in a person that also has a share in the Legislative, is visibly subordinate and accountable to it and exists for the supreme execution of the laws, not to create laws⁷¹. This is an important point because it applies to the case of President Obama and immigration reform; Obama has become the supreme legislator in issuing his Executive decree even though in no case does the original prerogative power thinker express any one man's ability to create laws other than the Legislative branch. Because the laws need enforcing, Locke establishes the idea of the Executive, and its distinction from the Legislative, which eventually leads to his discussion of prerogative power and its place in a Legislative-dominant style of governance.

The movement to the discussion of the prerogative power in democratic government then follows, manifesting from the idea that several things should be left to the Executive's discretion since the common good of the society and its continuation is of upmost importance. Locke begins by saying, "...for the legislators not being able to foresee, and provide by laws, for all that may be useful to the community, the executor of the laws, having the power in his hands, has by the common law of nature a right to make

⁷⁰ Locke, Section 141

⁷¹ Locke, Section 153

use of it for the good of society, in many cases, where the municipal law has given no direction... Many things there are, which the law can by no means provide for and those must necessarily be left to the discretion of him that has the executive power in his hands, to be ordered by him as the public good and advantage shall require” (Locke, Section 159). It follows that given the impossibility of the ordinary rule of law to anticipate all powers that might become necessary in any given exigency, a power must exist that is not within the bounds of this necessary rule of law⁷². Locke deems prerogative as the power to act according to discretion, for the public good, without the prescription of the law and sometimes even against it; because some governments do not always have the lawmaking power and can be too slow-acting and convoluted, the Executive may need flexibility to do things that the laws do not prescribe him the power to do⁷³.

While the existence of the prerogative power is necessary in Locke’s prescribed form of government, it is still most accountable to the people that are being governed. An issue arises, as Locke expresses doubts that the people will not scrutinize and harshly judge the usage of Executive discretion; the people are seldom examining its usage, so long as it is meant for the relative good of the people and not obviously doing them any damage⁷⁴. In the early days of government Locke acknowledges that it is conceivable that it was primarily executed through paternal prerogative, as there likely was not enough development in the rule of law in these societies for the laws to be able to sufficiently govern the people; now, however, the people have found that they must declare limitations on prerogative for their own good as they gain more experience being

⁷² Kleinerman, “The Discretionary President”, 49

⁷³ Locke, Section 160

⁷⁴ Locke, Section 161

governed⁷⁵. These restrictions lead to one of, if not, the most well-known quotes from *Two Treatises of Government*, with Locke saying, “Upon this is founded that saying, That the reigns of good princes have been always most dangerous to the liberties of their people: for when their successors, managing the government with different thoughts, would draw the actions of those good rulers into precedent, and make them the standard of their *prerogative*, as if what had been done only for the good of the people was a right in them to do...” (Locke, Section 166). The idea of prerogative precedent that can be potentially set applies directly the overhaul of immigration law, as Obama is utilizing legal justifications along with precedents set by President Lincoln during the existential crisis that was the Civil War, among other examples. The Bush Administration also looked at Lincoln’s precedent, as well as that set in *The Federalist Papers* by Alexander Hamilton, to commit and justify allegedly constitutional activities. The danger of precedent has long been exacerbated throughout modern history, and Obama’s usage of Executive discretionary authority will further the likelihood of future Executive’s going beyond the scope of the rule of law in ordinary situations.

Locke prescribes the necessity of the people to be committed to their own preservation and survival as no Executive action that results in the injury or damage of the people is justifiable. Locke says, “And this judgment cannot part with, it being out of a man’s power so as to submit himself to another, as to give him a liberty to destroy him; God and nature never allowing a man so as to abandon himself, as to neglect his own preservation: and since he cannot take away his own life, neither can he give another power to take it... But this the executive power, or wise princes, never need come in

⁷⁵ Locke, Section 162

danger of: and it is the thing, of all others, they have most need to avoid, as of all others the most perilous” (Locke, Section 168). Natural law prescribes individual men the right to fight for their survival, as well as their ability to avoid injury, so once an Executive violates these natural rights through the usage of prerogative, or a different power, the rule of law must take over, along with accountability to the people. An Executive exercising prerogative, in Locke’s opinion, must take every action that he or she can to avoid injury to the people, as they are then able to appeal to heaven and the rule of law for the removal of said Executive. However, the deception of a strong Executive in his uses of discretionary authority is an issue that arises with the people’s judgment. The majority of people will not be moved by Executive usurpation of what are prescribed Legislative powers and will not be moved by the unnecessary abuse of the rights of a minority, even if it is a significant one, within a society⁷⁶. Further, the people’s limited sense of government and their own well-being allows a ruler who knows how to make it appear to his people that he is consistently acting for the greater common good to explain soundly and convincingly the appearance of oppression or usurpation⁷⁷. In Locke’s opinion, this deception would be impossible if the people felt oppressed directly, but when they cannot see the immediate effects upon themselves it is far easier for a ruler to slip by without being held accountable to what ultimately can be considered unjust actions⁷⁸. In essence, the necessary power of the Executive combined with the people’s natural tendency to allow those with confidence, knowledge, and wit to reign supreme creates a serious threat to the security of many individuals within a society. The

⁷⁶ Kleinerman, “The Discretionary President”, 66

⁷⁷ Kleinerman, “The Discretionary President”, 66

⁷⁸ Kleinerman, “The Discretionary President”, 66

promulgation of requirement of a sound constitution, and consequently the rule of law arises, so as to protect the individual rights of as many as possible against the problematic existence of Executive discretion⁷⁹. The Executive's accountability to the people and the rule of law stops usurpation of powers from other necessary functions of the government, and therefore is necessary, even when exercising prerogative for the common good of society, as prerogative is institutionalized in political society by the rule of law⁸⁰.

Locke, as a whole, expresses a deep willingness to give significantly more leeway to the Executive in matters of foreign affairs, depending on them being truly foreign. Domestically, the Executive power can and must be susceptible to direction by standing laws, as the Lockean paradigm is meant to limit the immense power and continued growth of the Executive because of the dangers that can emanate⁸¹. His first articulation of the distinction between foreign and domestic powers occurs when describing the "Federative" power (the power to direct foreign affairs): "This therefore contains the power of war and peace, leagues and alliances, and all the transactions, with all persons and communities without the common-wealth, and may be called *federative*, if anyone pleases" (Locke, Section 146). He continues, "And though this *federative* power in the well or ill management of it be of great moment to the common-wealth, yet it is much less capable to be directed by antecedent, standing, positive laws, than the executive; and so must necessarily be left to the prudence and wisdom of those, whose hands it is in, to be managed for the public good..." (Locke, Section 147). This distinction between the Federative and the Executive power occurs because in the Executive's case, the laws

⁷⁹ Mattie, 77

⁸⁰ Mattie, 84

⁸¹ Kleinerman, "The Discretionary President", 3

concern how the people relate and interact with one another within society; the Federative power, in an opposing fashion, exists to respond to the actions of foreigners, which can vary greatly and are difficult to anticipate by standing laws, so trust must be given to this power to do whatever is best for the society, government, and people.

Distinguishing these powers establishes different uses of the rule of law to govern the Executive.

The separation of powers that Locke advocates for (specifically the distinction between the Legislative power and Executive power) exists to force the Executive to provide reasons for his actions to the other independent branches so as to improve all of their functions, while also creating limits on the other branches so neither has the final authoritative distinction⁸². Locke, in his lifetime, saw the results of when a Legislative body is not constrained by an Executive during the “Long Parliament” and the reign of Cromwell, and what can happen when the King is not constrained by Parliament, when Charles II continuously cancelled Parliamentary meetings through much of the 1680’s⁸³. These examples have caused him to understand the importance of a system of separation of powers and checks and balances between branches⁸⁴. In addition, the people being governed must also be given justification for the Executive’s actions in Locke’s system, so as to prove to them that these actions were taken for the benefit of the common good, as opposed to hurting those being governed. That being said, because Executive prerogative allows the government to act in certain exigencies outside the authority provided by the existing laws, it is a crucial supplement to the constitutional order created

⁸² Kleinerman, “The Discretionary President”, 6

⁸³ Kleinerman, “The Discretionary President”, 58

⁸⁴ Kleinerman, “The Discretionary President”, 58

by these standing laws⁸⁵. Part of the promise of Executive power is that it allows the Legislature to leave certain kinds of actions either outside the scope of ordinary governmental legal authority, and for the Constitution to remain, but the entity as a whole to be able to handle unforeseen circumstances. Locke's major assumption of an essential relationship between liberalism—the government's aims to secure the people's lives, liberties, and properties—and constitutionalism—the government acts according to established, standing laws that apply to everybody equally—is a necessity to continue the viability of the regime⁸⁶.

The Two Treatises of Government establishes goals for the overall good governance of a regime in order to provide a compelling reason for each branch and entity to be able to limit each other and effectively rule over its constituents. First, Locke wants to use the principles of natural law to override the controversy between the Legislative branch and the Executive branch by showing that it is unacceptable for either to act contrary to the proper ends of government and acceptable for either to act to achieve those ends with the rest of the government's approval of the actions taken and the powers exercised⁸⁷. The long lasting protection of liberty is a priority, and the superiority of the rule of law is a more dependable method to achieve this; together, they give us a predictable landscape of government, as opposed to allowing for an unpredictable ruler to take control in all instances⁸⁸. Executive power is a constitutional authority distinct from and superior to normal legislation, but also confines prerogative within fundamental

⁸⁵ Corbett, Ross, "The Extraconstitutionality of Lockean Prerogative", *Cambridge University Press*, 2006, <http://www.jstor.org/stable/20452801>, 428

⁸⁶ Kleinerman, "The Discretionary President", 54

⁸⁷ Kleinerman, "The Discretionary President", 62

⁸⁸ Kleinerman, "The Discretionary President", 64

“legal” limits, such as the rule of law, accountability, the people, so as to be able to identify usurpations and tyranny⁸⁹. When the Executive claims his prudence to administer his power within the laws, and in terms of his space for discretion, as he sees fit, it does not prove that he is superior or independent to the Legislature; if the Executive successfully argues that he cannot be legitimately curtailed or questioned, the regime has become imbalanced, as the rule of law becomes a meaningless defense against arbitrariness⁹⁰. Prerogative, as it appears to Locke, must be understood to be a natural power and beyond constitutional control—as it stands outside of the government’s constitution because its logic denies that a good constitution is sufficient for liberal constitutional governance⁹¹.

Constitutionalism is intrinsically tied to the Legislature rather than to the Executive, so if an original constitution can make it clear to the people that laws are only properly made by the Legislative branch, and it is understood as separate from the Executive branch, then legislators have the ability to demonstrate to the people that their constitutional powers are being breached when Executives seek to do too many things outside of their prescribed powers⁹². Overall, the necessity of democratic governance to rely on a set of written laws in the form of a constitution allows for both Executive and Legislative accountability in their actions, but Locke still contests that the prerogative power can be necessary outside of the rule of law, as long as the people approve of the actions and they are for the common good of the society.

⁸⁹ Ward, Lee, “Locke on Executive Power and Liberal Constitutionalism”, <http://www.jstor.org/stable/25165850>, *Canadian Journal of Political Science*, September 2005, 719

⁹⁰ Kleinerman, “The Discretionary President”, 70

⁹¹ Corbett, 428

⁹² Kleinerman, “The Discretionary President”, 71-72

The United States government, and the Constitution, is modeled consistently with Locke's prescription of ideal democratic governmental form for persistence of the society, as well as existence of prerogative but not in its constitutionality. First, in regards to foreign affairs, the Executive has a significantly larger amount of unchecked power than domestically as there is no societal governing document that he must abide by. However, currently, Barack Obama has expressed opposing beliefs to this, which is very rare for an American president. He believes that the Executive is more accountable to Congress on foreign affairs, citing the Bush Administration, and that he has the ability to be independent of Congress domestically and reform immigration law. This belief inherently goes against Locke's writings, primarily due to the premise that he is violating the rule of law, and the constitutionally prescribed powers that the Legislature has, to resolve a non-existential issue that only some consider a crisis of magnitude. Inability to fulfill duties, as Locke has said, is not a reason for the Executive to be able to exercise prerogative discretion, as the lawmaking power is entirely given to the Legislature by the United States' fundamental Constitution. Locke realizes that the extraordinary is an ordinary part of politics⁹³, with the definition of extraordinary being an incident placing the nation at risk that the Constitution, and the laws that have been made subsequently, are unable to prescribe a solution to, which is why prerogative exists. However, the Obama Immigration Order is not one that meets the standard of the definition of extraordinary circumstances. The legislators in Congress are openly pointing to the Constitution, and Obama's violation of it, as Locke exactly said should be able to happen because of the supreme rule of law and supreme document. Immigration law is explicitly

⁹³ Kleinerman, "The Discretionary President", 49

under Congress' jurisdiction, and therefore, the Executive has no right, in Locke's view, to step over the Legislature's explicit powers and create a solution unilaterally to a domestic legal issue.

CHAPTER 3: ALEXANDER HAMILTON'S ENERGETIC EXECUTIVE AND JAMES MADISON'S SEPARATION OF POWERS

The Federalist Papers were written primarily by Alexander Hamilton and James Madison, two of the most prominent Founding Fathers in terms of their contributions to the United States' constitutional structure. The papers were published during 1787 and 1788 in multiple New York State newspapers to persuade voters in New York to ratify the proposed constitution, which they ultimately succeeded in doing⁹⁴. These documents outlined the functions of the United States government that would come to exist with the Constitution, established the system of separation of powers and checks and balances within the structure, and created an infamous dialogue between Hamilton and Madison regarding their fear of power in the Legislative and the treaty-making power later on in the *The Pacificus-Helvidius* debates. All of the essays in *The Federalist Papers* are signed "Publius", but it is widely thought that Hamilton wrote fifty-two of the essays, Madison wrote twenty-eight, and John Jay, whom will not be discussed, wrote the remaining five⁹⁵. When Madison formulated the idea of writing *The Federalist Papers*, Alexander Hamilton was his fourth choice as a collaborator; a New York luminary rejected him, another proved inadequate to the task, and his third, John Jay, fell ill after only completing a short few; Hamilton ended up being his prime choice⁹⁶.

⁹⁴ *FoundingFathersinfo*, "The Federalist Papers", <http://www.foundingfathers.info/federalistpapers/>

⁹⁵ *FoundingFathersinfo*, "The Federalist Papers"

⁹⁶ Shane, 1

Madison's idea behind creating and distributing these documents, besides advocating for ratification of the proposed constitution, was to promulgate the reasons for why a constitution, specifically one with the proposed constitution's structure, is necessary for good governance. In *Federalist 20*, Madison says, "Tyranny has perhaps oftener grown out of the assumptions of power, called for, on pressing exigencies, by a defective constitution, than out of the full exercise of the largest constitutional authorities"(Madison, *Federalist #20*⁹⁷). Both of their commitments to a constitutional structure of this capacity is clearly visible throughout their writings, as they advocate for specific powers and abilities of the Legislative, Executive, and Judicial branches of government to achieve the ends of constitutional government without encroaching on the other branches. Their writings have resulted in a precedent of fundamental separation of powers and a checks and balances system that clearly explains the thought-process behind the creation of the Constitution. Since the document was published, it has been examined and cited by many, including United States Presidents, when discussing a multitude of different issues and the solutions being undertaken to eliminate them.

When looking at President Obama's Executive order regarding immigration reform, both Hamilton and Madison's commitment to the rule of law, and the separation of powers system, would cause them to disapprove of his power-usurping actions without proving necessity. While they both promote the idea of an energetic Executive, this is primarily because of their desire to limit the Legislative power and prevent Legislative tyranny, not to give free reign to the Executive over the other branches whenever he so

⁹⁷ Madison, James, "Federalist #20", <http://www.foundingfathers.info/federalistpapers/fed20.htm>, *The Federalist Papers*, December 1787

chooses. The separation of powers were designed with the idea of limiting each branch of government to execute its own constitutionally prescribed powers without major interference or overstepping by any of the other branches. Clearly, Obama's Executive decree is a direct usurpation of explicit congressional powers and the Legislature's role in the national government. Hamilton, although he advocates heavily for an energetic Executive throughout *The Federalist Papers* and *The Pacificus-Helvidius* debates, and even supports Washington's Proclamation of Neutrality in France, would still be hesitant in giving his approval for such an explicit disregard for the separation of powers principles and direct over-stepping of the Legislative branch. In *The Pacificus-Helvidius* debate regarding the treaty-making power, Madison's true regard for the inability of the President to act without congressional cooperation on the foreign front clearly demonstrates that his response to domestic constitutional usurpation of explicit powers would not be one of support, although he mildly contradicts his original line of thought articulated in *The Federalist Papers*. Further, the clear polarization of thought in the American public regarding the immigration law issue would cause both to be even more questioning of Obama's announcement and decision, as the violation of separation of powers creates a dangerous precedent for future Presidents, and is currently an outright ignorance of constitutional laws.

Alexander Hamilton- the Energetic Executive

Alexander Hamilton, James Madison's partner in writing *The Federalist Papers*, and one of the men commonly considered to have played a major role in constructing the format of the Constitution, is very supportive of an energetic Executive within a system

of energetic governance, so as to fulfill the goals and agenda of government as a whole. Under the same mindset as John Locke, Hamilton advocates for the Constitution to be understood as empowering government to take all necessary actions without limitations, as unforeseen scenarios and occurrences will arise at some point in the country's future that the rule of law is not capable of preparing a solution for immediately. He says, "THE necessity of a Constitution, at least equally energetic with the one proposed, to the preservation of the Union, is the point at the examination of which we are now arrived. This inquiry will naturally divide into three branches the objects to be provided by the federal government, the quantity of power necessary to the accomplishment of these objects, the persons upon whom that power ought to operate" (Hamilton, Federalist #23). Hamilton continues to highlight the importance of the safety of the people, as well as multiple other goals of government that need to be achieved for good governance to be declared. He says, "The principal purposes to be answered by union are these the common defense of the members; the preservation of the public peace as well against internal convulsions as external attacks; the regulation of commerce with other nations between the States; the superintendence of our intercourse, political and commercial, with foreign countries" (Hamilton, Federalist #23). Hamilton's experiences with the Congress created by the Articles of Confederation affirmed his belief that the United States needed to establish a national government and ensure its possession of adequate powers to achieve a national purpose, as the inherent weakness of Congress to carry out legislation requires a need for a strong national institution and Executive⁹⁸. Hamilton's commitment to the idea of strength in government eventually leads to him opposing

⁹⁸ Pratt, 101

Madison on the treaty-making power discussed in the *Pacificus-Helvidius* debates, even though they seem to be in agreement regarding the separation of powers and the Executive in *The Federalist Papers*.

Hamilton's belief in the necessity of an energetic national government begins with his support for an energetic Executive, as he sees this position as the head of the government with the best ability to act for the good of its people. His argument is as follows; the Executive must have the energy capabilities required to respond to a crisis; he must be able to use the army as he sees fit to respond to the crisis; there will be cases where the Executive will need to act swiftly and even secretly without initial congressional approval; his role is to preserve the state; and to ensure accountability for the actions taken while responding to a crisis⁹⁹. In *Federalist #70*, Hamilton says, "Energy in the Executive is a leading character in the good definition of government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy" (Hamilton, *Federalist #70*). In other words, an Executive with a strong right to act is what will stop the issues that Madison foresees occurring with the separation of powers from coming to fruition. Hamilton then lays out the four necessary ingredients for energy in the Executive—unity, duration, provision for support, and

⁹⁹ DePlato, 40-41

competent powers¹⁰⁰. These ingredients all give the government a strong means to achieve its functional ends efficiently and effectively.

Hamilton goes on to speak about the authorities essential to the common defense, and why they must be given to the national government. Hamilton says, “The authorities essential to the common defense are these: To raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support. These powers ought to exist without limitation, because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed” (Hamilton, Federalist #23). In his vision of the United States, these powers all should be under the Executive because of its inherent ability to act unhindered without deliberation and with swiftness in situations that require efficient responses to be successfully combated. The presidency’s powers are derived from the advantage of its unique institutional position and its distinct structural functions, but for him, the ends of the powers used must be able to justify the means, which also means that the ends limit the means¹⁰¹. Hamilton says, “It rests upon axioms as simple as they are universal; the MEANS ought to be proportioned to the END; the persons, from whose agency the attainment of any END is expected, ought to possess the MEANS by which it is to be attained” (Hamilton, Federalist #23). This argument is Hamilton’s version of limiting the

¹⁰⁰ Hamilton, “Federalist #70”

¹⁰¹ Kleinerman, “The Discretionary President”, 94

Executive power of prerogative, as he advocates for a required justification of actions, but if given and accepted, then the actions are constitutionally permissible to undertake. Because the Executive can be easily monitored in its actions, prescribing it the means to energetically act is much less dangerous than to potentially risk allowing Legislative uncheckable power with no accountability.

Hamilton's ultimate fear is a government inadequately equipped with powers to deal with circumstances outside of the rule of law, and he believes that a weak Executive will limit the ability of a government to make decisions swiftly and decisively. Strength in the Executive is important, as he says, "A feeble Executive implies a feeble execution of government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government" (Hamilton, Federalist #70). In his mind, because the government may not be able to foresee circumstances in which certain powers may be necessary, the fear of encroachment upon the freedom of power is unfounded, and the Executive should be given whatever he needs to preserve the Union and execute his duties faithfully¹⁰². By refraining from detailing the Executive's powers, Hamilton claims the other Framers provided the presidency with the ability to respond to the protean nature of attacks and their frequency, thus enabling the Executive to respond without encroaching upon power but still completing his duties to the nation¹⁰³. In regards to the checks on the President, and in particular impeachment, Hamilton shows that the robust power of impeachment might actually promote a strong Executive because it gives a feeling of comfortability to

¹⁰² Pratt, 102

¹⁰³ DePlato, 44

the people being governed over simply because of the fact that they know there is a check on Executive prerogative¹⁰⁴. The fear of weak governance, in Hamilton's mind, is more profound than the fear of an Executive usurping power because of the fact that foresight into what instances the nation may face in the future is not possible.

While an Executive unbound by rules when necessary should exist in Hamilton's mind, accountability still plays a role in his vision of the prerogative power. He outlines two fundamental necessities constituting safety, saying: "The ingredients which constitute safety in the republican sense are, first, a due dependence on the people, secondly, a due responsibility" (Hamilton, Federalist #70). Hamilton assumes that the branches will easily exchange information amongst each other so as to be totally transparent and accountable, which may be idealistic, as an important part of the struggle between Congress and the Executive in recent history is the congressional efforts to obtain information from the Executive, which are often resisted to protect Executive autonomy¹⁰⁵. He continues by outlining the kinds of responsibility that the people being governed have when analyzing Executive actions. He says, "Responsibility is of two kinds to censure and to punishment. The first is the more important of the two, especially in an elective office. Man, in public trust, will much oftener act in such a manner as to render him unworthy of being any longer trusted, than in such a manner as to make him obnoxious to legal punishment" (Hamilton, Federalist #70). Removing someone from office, or just not re-electing them, displays a disapproval for their actions while in office,

¹⁰⁴ Kleinerman, "The Discretionary President", 112

¹⁰⁵ Bruff, 356

and the fact that they do not successfully fulfill their roles in the duty as well as they could.

The danger of usurpation of power exists through the people in addition to the government, because as Locke and Madison have previously outlined, the people are very rarely as politically active and viable to hold every political official, and especially the Executive, to the standards of accountability initially outlined and desired of the general population. Usurpation cannot be controlled through constitutional shackles in Hamilton's opinion; instead, it must be controlled through a constitutional structure that holds those accountable who do usurp power, and the people are not responsive to this encroachment¹⁰⁶. Hamilton says, "If the representatives of the people betray their constituents, there is then no resource left but in that original right of self-defense which is paramount to positive forms of government" (Hamilton, Federalist #28). He means that the people should be at least partially responsible in holding the Executive at fault for whatever actions taken if it is not for the true common good of the society, and Hamilton finds it to be one of the primary constraints on Executive prerogative. Accountability results from the people's ability to allow or condemn an Executive's usage of discretion, the inherent desires of man's nature to keep equal power in the other branches of government, and following from that, the Executive's absolute responsibility to the people and to the society as a whole to act within good faith and for the common benefit of those being governed. President Obama's direct usurpation of Congress' constitutionally prescribed powers is exactly what both Madison and Hamilton are attempting to discourage when creating *The Federalist Papers* and the Constitution.

¹⁰⁶ Kleinerman, "The Discretionary President", 96

The Pacificus-Helvidius Debates of 1793-1794 truly encompass how Hamilton and Madison believe the Executive powers are to be applied, as Hamilton sticks to his ideals of a strong and energetic Executive while Madison regresses in his argument and advocates for a more limited Executive in the domain of the treaty-making and war-making powers. These debates were ignited by George Washington's Proclamation of Neutrality of 1793 regarding the United States' agreement with the French and whether President Washington had the authority to declare America neutral despite an early alliance treaty¹⁰⁷. Hamilton begins his argument for the Executive treaty-making power by outlining the objections against Washington's Proclamation: that the Proclamation was without authority, was contrary to the United States' treaties with France, was contrary to the gratitude, which is due from this to that country because France assisted the United States in seceding from England, and that it was out of time and unnecessary¹⁰⁸. However, it is the initial complaint that is most important regarding this debate, as it is where he focuses on the Executive's constitutional role in the treaty-making power. Hamilton says, "The Legislative Department is not the organ of intercourse between the United States and foreign nations. It is charged neither with making nor interpreting Treaties. It is therefore not naturally that organ of the government which is to pronounce the existing condition of the Nation, with regards to foreign powers, or to admonish the Citizens of their obligations and duties as founded upon that condition of things. Still less it is charged with enforcing the execution and observance of these obligations and those duties" (Hamilton, Pacificus #1, 11). Because

¹⁰⁷Hamilton, Alexander and Madison, James, "The Pacificus-Helvidius Debates of 1793-1794": *Toward the Completion of the American Founding*, edited with and Introduction by Morton J. Frisch (Indianapolis: Liberty Fund, 2007). http://lf-oll.s3.amazonaws.com/titles/1910/3953_LFeBk.pdf, 9

¹⁰⁸ Hamilton, "The Pacificus-Helvidius Debates of 1793-1794", 9

the Executive is given a significant amount of leeway in terms of his foreign actions, Hamilton subsequently articulates that the Executive has control of the treaty-making power. He also focuses on why it is not an inherently Judicial power, writing, “It is equally obvious that the act in question is foreign to the Judiciary Department of the Government. The province of that Department is to decide litigations in particular cases. It is indeed charged with the interpretation of treaties; but it exercises this function only in the litigated cases; that is where contending parties bring before it a special controversy” (Hamilton, *Pacificus*, 11). According to Hamilton, the Judiciary could preside over the issue in question, but definitely does not have the treaty-making power within its constitutionally granted powers.

Hamilton continues by establishing connections between the treaty-making power and the Executive powers already expressed and established. He says, “It appears to be connected with that department (Executive) in various capacities, as the *organ* of intercourse between the Nation and foreign Nations—as the interpreter of the National Treaties in those cases in which the Judiciary is not competent, that is in the cases between government and government—as that power, which is charged with the Execution of the Laws, of which treaties form a part—as that Power is charged with the command and application of Public Force” (Hamilton, *Pacificus* #1, 11). He then supports his point by citing the Constitution’s text: “In the article which grants the legislative powers of the government the expressions are—‘All Legislative powers herein granted shall be vested in a Congress of the United States’; in that which grants the Executive power the expressions are, as already quoted ‘The Executive Power shall be vested in a President of the United States of America’” (Hamilton, *Pacificus* #1, 12). The

Executive power of the nation is vested in the President, with only a few exceptions of absolute power, such as the participation of the Senate in the making of treaties, but not giving Congress the entire power¹⁰⁹. Following from this, Hamilton says that the issuing of a Proclamation of Neutrality is merely an Executive act in nature¹¹⁰.

Although the Senate plays a role in the making of treaties, Hamilton explicitly states that their role in the foreign realm should be limited strictly to that, and not involve more domain than is explicitly prescribed. He writes, “It deserves to be remarked, that as the participation of the Senate in the making of Treaties and the power of the Legislature to declare war are exceptions out of the general ‘Executive Power’ vested in the President, they are to be construed strictly—and ought to be extended no further than is essential to their execution” (Hamilton, *Pacificus* #1, 16). During times of peace, the Executive is in charge of the nation—the Legislature has the power to remove the nation from a time of peace by declaring war, but doesn’t operate in the foreign realm other than in that capacity¹¹¹. He concludes by saying, “The President is the constitutional Executor of the laws, Our Treaties and the laws of nations form a part of the law of the land. He who is to execute the laws must first judge for himself of their meaning” (Hamilton, *Pacificus* #1, 16). Overall, this debate regarding the power exercised by Washington continues along Hamilton’s ideas of a strong national government with a powerful Executive.

¹⁰⁹ Hamilton, *Pacificus* #1, 13

¹¹⁰ Hamilton, *Pacificus* #1, 13

¹¹¹ Hamilton, *Pacificus* #1, 16

In conclusion, Hamilton remains of the beliefs that he articulated in *The Federalist Papers* throughout his argument regarding the Proclamation of Neutrality unlike James Madison regarding the energetic role of the Executive for the sake of good governance.

James Madison- the Separation of Powers and Rule of Law

James Madison is often viewed as the lead designer of the United States Constitution, and his structure and goals from the document are very forthcoming through *The Federalist Papers* so as to appeal to the people and states even though the separation of powers are not explicitly stated in the text of the Constitution. He focuses on advocating for three independent branches with checks and balances on each other so as to stop one from gaining an unnecessary power over the other, which is intended primarily to prevent Legislative tyranny. Madison, in *Federalist #51*, says, “The great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department in the necessary constitutional means and personal motives to resist encroachment of others” (Madison, Federalist 51). Madison is of the belief that the Executive should initially have his powers inflated artificially, but once the system is placed in motion, the separation of powers comes to fruition among the three branches. He claims that it is necessary for the preservation of liberty that the three departments remain separate and distinct, saying, “In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own;

and consequently should be constituted that the members of each should have as little agency as possible in the appointment of the members of others” (Madison, Federalist 51). Madison later continues, so as to establish balance between acceptable constitutional functions and those considered unacceptable, that even though power can be possessed inherently through the Constitution, it does not mean that it translates into the inherent goodness of the ends pursued with these means¹¹². However, he creates a contradiction in his original support for an energetic Executive in *The Pacificus-Helvidius* debates as he attempts to advocate for the limiting of the President’s powers in the international domain.

Accountability of the federal government is of the utmost importance to preventing illegal usurpations of a branches powers, so in Madison’s mind, through the multiplicity of the institutions, each with different constituencies, organizational structures, modes of selection, and internal decision making processes, the United States would not begin a program of public policy or action without the examination of that policy from various different perspectives and those with different agendas¹¹³. He says, “It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part... If a majority be united by common interest, the rights of the minority will be insecure, There are but two methods of providing against this evil: the one by creating a will in the community independent of the majority that is, of the society itself...” (Madison, Federalist #51). The ability of his belief to become a reality, and persist as one,

¹¹² Kleinerman, “The Discretionary President”, 121, 123

¹¹³ Shane, 7

depends on the capacity of the government to demonstrate informal practices of cooperation and mutual respect among the branches of government¹¹⁴. At the same time, he continues to maintain that the United States Constitution's major achievement is that it properly separates the respective branches, while forcing each branch to abide by its traditional role so as to keep a balance of power and eliminate the threat of usurpation; the Executive executes the laws, the Legislative makes the laws, and the Judiciary maintains and interprets the laws¹¹⁵. The articulation of the separation of powers, and their implicit existence in the Constitution, were Madison's security blanket, in the end, to an overly strong Legislative. Because he is the original believer in the Legislature explicitly making the laws in the federal government, President Obama's Executive order would clearly be understood as an unconstitutional usurpation of a clear Legislative power.

Madison's constitutional system of separation of powers depends on the absence of the ability to exercise unlimited prerogative by any branch so that actors are unable to claim unquestionable inherent powers. His view of the government being accountable to the people follows because the Constitution is a foundational document by which the people establish their sovereignty over the government, and therefore, cause the different branches to be accountable to their document. He says, "The several departments being perfectly co-ordinate by the terms of their common commission, none of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers; and how are the encroachments of the stronger to be prevented,

¹¹⁴ Shane, 175

¹¹⁵ Kleinerman, "The Discretionary President", 123

or the wrongs of the weaker to be redressed, without an appeal to the people themselves, who, as the grantors of the commissions, can alone declare its true meaning and enforce its observance” (Madison, Federalist #49). As Locke stated previously, and as many of the original thinkers on democratic governance believe, the people are those that the government is accountable to in the end; however, Madison finds that the people only play a portion of the role of judging accountability, as he later goes on to discuss inherent issues that may occur. He writes, “In the first place, the provision does not reach the case of a combination of two of the departments against the third. If the legislative authority, which possesses so many means of operating on the motives of other departments, should be able to gain to its interest either of the others, or even one third of its members, the remaining department could derive no advantage from its remedial provision” (Madison, Federalist #49). Although this fault exists, Madison is of the belief that the people need to conceptualize every unjustified public usurpation of power as an encroachment on the private right of every single person being governed over, and that the public should respect and entrench the Constitution enough so as to circumscribe the political actions by the force of public opinion¹¹⁶. Because the people would be unable to hold two branches accountable in this situation, and because the third branch’s checks on the other two branches would be effectively eliminated, the separation of powers must persist in a strong enough methodology so as to eliminate the potential for this danger.

Madison spends a portion of *The Federalist Papers* focused on why the Legislative should not be given a lot of discretion to exercise power in particular, and

¹¹⁶ Madison, James, “Federalist #49, #50”, *The Federalist Papers*, <http://www.foundingfathers.info/federalistpapers/fed49.htm>,

how the individual should be checked by the other branches. He does so to avoid an over-concentration of power in the place where it can most easily be abused, as has occurred within the states' governments, and where accountability is at its lowest because there are many members of the Legislative body. Madison, to create a solution to the danger of having the parchment barriers system that some of the states implemented through their constitutions that favor and basically require governance to occur through the Legislative branch, initially desired for an Executive that could act with energy and swiftness so as to mitigate that risk¹¹⁷. When speaking about the ease with which the Executive and Judiciary can be restrained compared to the Legislative, Madison writes, "On the other side, the Executive power being restrained within a narrower compass, and being more simple in its nature, and the judiciary being described by landmarks still less uncertain, projects of usurpation by either of these departments would immediately betray and defeat themselves" (Madison, Federalist #48). The accountability that the Executive encompasses allows for it to be more powerful initially than the Legislative, and the Judiciary branch only makes judgments on the laws, which limits its power inherently.

Madison's encouragement and support of the Executive branch having supremacy over the other two branches also initially emanates from the fact that the Legislature has strong checks on the President. First, the presence of the impeachment power is emphasized by Madison, as he consistently suggests that it must play a prominent role in limiting the Executive. He says, citing the New Hampshire State Constitution, "The Senate, which is a branch of the legislative department, is also a judicial tribunal for the

¹¹⁷ Madison, James, "Federalist #49, #50", *The Federalist Papers*, <http://www.foundingfathers.info/federalistpapers/fed49.htm>, <http://www.foundingfathers.info/federalistpapers/fedindex.htm>

trial of impeachments” (Madison, Federalist #47). His idea of what constitutes grounds for impeachment is different than some of the other Founding Fathers’ opinions, as he objected to including maladministration as an impeachable offense during the Constitutional Convention because of the fear that it would give Congress too much power over the Executive, saying, “So vague a term will be equivalent to a tenure during pleasure of the Senate”¹¹⁸. That being said, impeachment is one of Congress’ ultimate weapons against Executive personnel in Madison’s opinion, as it is an exception to the Constitution’s guarantees of autonomy for each of the three branches¹¹⁹. Another check upon the Executive, the congressional check of the purse, where Congress has the ability to control the appropriations given to the President to carry out the laws, provides a limitation on the Executive regarding how much production he can have in office¹²⁰. The President is only capable of executing the laws faithfully and creating change in society during his time in office with money, thus the monetary check creates an extremely viable and demanding position for Congress, forcing the President to have more allegiance to their will.

In addition, Congress also possesses the ability to override vetoes that the President exercises upon legislation by a 2/3 vote in both houses—not an unreachable margin by any means, but definitely still difficult enough to limit the power of Congress to completely remove the Executive from the process¹²¹. The veto power, which initially places the Executive in a position of control regarding the Legislative law-making

¹¹⁸ *University of Missouri-Kansas City School of Law*, “The Constitution and Impeachment”, <http://law2.umkc.edu/faculty/projects/ftrials/impeach/constitution.html>, 11/29/14

¹¹⁹ Bruff, 311

¹²⁰ Shane, 29

¹²¹ Bruff, 27

process, exists to reconcile the separation of powers as a limited check that can only, if the margin is achieved, override the President and empower the Legislative branch. What Madison fears is that the veto power does not have an even balance on both sides, as the Legislative is easily able to overcome the check, but it does give enough power to the Executive in the case that Congress is divided on a certain piece of legislation to take some sort of action, or it is just an irresponsible law. Last, the Senate has the ability to deny both Supreme Court appointments and ratification of treaties with other countries¹²². These powers allow for the Legislature to have control of the ability of the President to determine the composition of the highest Court by choosing only those who will side with him in interpretation of constitutional laws, and stop him from completely utilizing his Federative power to run the country internationally as he pleases¹²³. These checks mitigate the strength of the Executive on multiple levels, and inherently increase accountability of the government. Overall, the Executive is accountable in his actions through the checks that the Legislative branch has, as he can be limited in multiple discreet methods within the context of Madison's strong separation of powers and checks and balances system.

On the other hand, the Executive possesses fewer checks on Congress so as to mitigate Legislative strength. First, as was already highlighted, is the veto power that the President has regarding laws that Congress decides to pass¹²⁴. The veto power gives the Executive a dimension in the Legislative law-making power, but the Legislature can respond by limiting funds or increasing the usage of other checks in the system. Second,

¹²² Shane, 28-29

¹²³ Shane, 28-29

¹²⁴ Shane, 29

the Vice President, a member of the Executive cabinet, is the real President of the Senate, presiding over meetings and issue discussion throughout¹²⁵. This gives the President direct involvement in hearing what is going on with the Senate, but doesn't give him any say or tangible involvement in legislation in discussion, as the Vice President doesn't play a large role in Congress even in this position. The Executive can also make recess appointments in the Supreme Court, as well as call into session one or both houses of Congress in emergencies¹²⁶. However, neither of these powers is substantive, as recess appointments can be reversed as soon as Congress is back in session, and the ability to call Congress into session doesn't give the Executive any more power than he already has regarding the substance of what is occurring during the sessions. The Executive checks on the Legislative are much less powerful than those that the Legislative possesses, which is a primary reason why Madison is an advocate for a strong Executive and prevalent separation of powers among the branches.

While Madison is clearly in support of a weakened Legislative power via an energetic Executive to avoid usurpation, he later goes on to contradict himself by de-energizing the Executive in his discussion regarding the treaty-making and treaty-ending powers in *The Pacificus-Helvidius* debate, where he vehemently argues against Hamilton initial words in saying that it is inherently a Legislative power because it is law. To give an idea of the distaste Madison has for Hamilton's words in the *Pacificus* writings, he says, "Several pieces with the signature of Pacificus were lately published, which have been read with singular pleasure and applause, by the foreigners and degenerate citizens

¹²⁵ US Constitution, http://www.usconstitution.net/consttop_cnb.html

¹²⁶ US Constitution, http://www.usconstitution.net/consttop_cnb.html

among us, who hate our republican government, and the French Revolution; whilst the publication seems to have been too little regarded, or too much despised by the steady friends to both” (Madison, *Helvidius* #1, 55¹²⁷). His frustrations become prevalent throughout *Helvidius*, as he often quotes Hamilton in his argument for the Executive treaty-making/ending power, while attacking the core basis of the argument made.

Madison’s argument rests upon the fact that the power to make treaties is a law-making power, not a power that involves the execution of the laws which the Constitution clearly cites is the primary, and basically sole, purpose of the Executive. First, when highlighting the Constitution, he writes, “This conclusion becomes irresistible, when it is recollected, that the constitution cannot be supposed to have placed either any power legislative in its nature, entirely among executive powers, or any power executive in its nature, entirely among legislative powers, without charging the constitution, with that kind of intermixture and consolidation of different powers, which would violate a fundamental principle in the organization of free governments” (Madison, *Helvidius* #1, 60-61). Because the Constitution gives the war-declaring power expressly to Congress, then it follows that the treaty-making power, which is the ability to end wars or start them, is inherently Legislative. When speaking about the Legislative functions, he says, “If we consult for a moment, the nature and operation of the two powers to declare war and make treaties, it will be impossible not to see that they can never fall within a proper definition of executive powers. The Natural province of the executive magistrate is to execute laws, as that of the legislatures to make laws. All his acts therefore, properly executive, must presuppose the existence of the laws to be executed. A treaty is not an

¹²⁷ Hamilton, Alexander and Madison, James, “The Pacificus-Helvidius Debates of 1793-1794”

execution of laws: it does not pre-suppose the existence of laws. It is, on the contrary, to have itself the force of a law, and to be carried into execution like all other laws, by the executive magistrate. To say then that the power of making treaties which are confessedly laws, belongs naturally to the department which is to execute laws, is to say, that the executive department naturally includes a legislative power. In theory, this is an absurdity—in practice a tyranny” (Madison, Helvidius #1, 59). This argument is compelling because of the fact that treaties, when instituted, are considered law until repealed—however, because the Legislative is not in full control of the treaty-making power, in that the Executive can draft the treaties, the argument falters slightly using Madison’s argument, as treaty-making and repealing should be fully under Legislative domain if his claims of congressional powers in this case are to be considered true.

Madison continues along the idea that the treaty-making power is inherently a law-making initiative through ironic inclinations and a strong dislike for the argument that Hamilton makes. He writes, “Treaties when formed according to the constitutional mode, are confessedly to have the force and operation of laws, and are to be a rule for the courts in controversies between man and man, as much as any other laws” (Madison, Helvidius #2, 61). He continues sarcastically, “Were it once established that powers of war and treaty are in their nature executive; that so far they’re not by strict construction transferred to the legislature, they actually belong to the executive; that of course all powers not less executive in their nature than those powers, if not granted to the legislature may be claimed by the executive. If granted, are to be taken strictly, with a residuary right in the executive; or, as will hereafter appear, perhaps claimed as a concurrent right by the executive; and no citizen could any longer guess at the character

of the government under which he lives; the most penetrating jurist would be unable to scan the extent of constructive prerogative” (Madison, Helvidius #2, 65). Madison’s fear of the Constitution being interpreted any way that the interpreter sees fit comes to fruition here, as he clearly begins to fear the potential for the Executive to construe the original text to give him more power.

Madison concludes his remarks regarding the Executive’s ability to control the treaty-making and treaty-ending powers by highlighting the importance of the separation of powers principles that the Constitution is based around. He says, “an independent exercise of an executive act, by the legislature alone, or of a legislative act by the executive alone, one or other of which must happen in every case where the same act is exerciseable by each, and the latter of which would happen in the case urged by the writer, is contrary to one of the first and best maxims of a well-organized government, and ought never to be founded in a forced construction, must less in opposition to a fair one” (Madison, Helvidius #2, 68). Separation of powers keeps the government organized and effective, so the alleged encroachment, and potential usurpation, of a congressional power by George Washington in this case creates alarm in Madison as it oversteps the system he worked to get into place.

Overall, Madison’s commitment to the separation of powers, and a limited Legislature, becomes obvious throughout *The Federalist Papers*, but in retrospect, he begins to contradict his idea of an empowered Executive when discussing the treaty-making power in *The Pacificus-Helvidius* debates.

Conclusion

While Alexander Hamilton and James Madison have concurrent thought-processes throughout *The Federalist Papers*, their ideas begin to separate when examining the treaty-making power in the *Pacificus-Helvidius Debates*. They both fear an over-energetic Legislative, which is prominent in the individual states' governments, and therefore require an energetic Executive to mitigate this danger as well as execute government in a swift and unhindered fashion. Madison's focus on and commitment to separation of powers is clear, as he prescribes to the rule of law being above all in normal circumstances. He states that creating treaties is the same as creating a law, just in the international realm, which is why it should be considered an inherent Legislative power, and therefore, a Legislative power in the United States government. Hamilton supports the separation of powers system and accountability from all branches, but differs in that he finds the Executive to be basically unhindered on the international front, and does not believe the treaty-making power is inherently a Legislative power. Hamilton wants to integrate the ambitious into the government, and allow for sufficiently flexible constitutionalism to allow the government to achieve the public good¹²⁸. He says, "The best security for the fidelity of mankind is to make their interest coincide with their duty" (Hamilton, Federalist #72). Both of their beliefs are characterized by an energetic Executive; however, the extent to which they want to give the Executive the freedom to enact swift governance and judgments is where the difference between the two occurs.

¹²⁸ Kleinerman, "The Discretionary President", 115

When looking at President Obama reforming immigration law through Executive decree, it becomes understandable that they both would not be in support of his alleged legal usage of his prerogative power. In the case of Alexander Hamilton, there would be a slight unpredictability in his response to Obama's Executive order. This is primarily because of the fact that although immigration is not an existential threat, Obama was elected by the people to govern the United States, and a significant number of citizens and constituents desire for the reform of immigration law as soon as possible through usage of prerogative power. Moreover, if the Executive believes that it will be in the best interest of the nation, Hamilton seems to support the idea that action should be taken. That being said, I still do not believe that Hamilton would approve of Obama's actions, primarily because it is such an obvious and explicit overstepping of the separation of powers, and the precedent that could potentially be set by doing this. The United States' Constitution explicitly prescribes the power to make the laws to the Legislative branch of the federal government, and there is no ambiguity on which an argument can be formulated within the constitutional framework allowing for President Obama to usurp this power to achieve his own political ends, or for any other reason not involving a true existential crisis. There are also a significant number of citizens and constituents that openly do not want Obama to overstep his constitutional grounds to complete this reform, which would likely play a role in Hamilton's decision to support or condemn Obama. Hamilton is still a strong supporter of the separation of powers ideals, and Obama's outright ignorance of the ideals that the United States Constitution is based upon would violate what he even would find acceptable of the Executive.

As for James Madison, it is clearly articulated in *The Federalist Papers* that he is a full supporter of the separation of powers being entrenched in the Constitution, also in support of giving the Executive power when either an instance of Legislative encroachment or an existential crisis occurs. In this case, the separation of powers would reign supreme, as Obama is directly going around the separation of powers system, and the unambiguous and direct words of the Constitution, as creating laws is explicitly stated as a Legislative power. There is clearly no existential crisis occurring, as immigration does not provide any major danger to the Union as a whole. His belief becomes more concrete after looking at *The Pacificus-Helvidius* debates as he clearly states that the law-making power is always a Legislative power, and the Executive has no correct time when he can overstep the system to create laws of his own. He also would fear the precedent that this direct encroachment of power would set, as future President's now have the ability to look at what Obama has done, and cite it for even larger separation of powers violations. Obama's usurpation of power is the exact instance that Madison created and instituted the separation of powers to combat, and it obviously follows that he would not support the decision.

In the end, I do not think that either of these Founding Fathers, whether it be with Madison's obvious commitment to the separation of powers, or Hamilton's idea of a strong Executive that has the authority to act domestically, would support President Obama in his usage of Executive prerogative to reform immigration law. Obama's violation of the separation of powers would not be acceptable to either of these two men, as the founding document of the United States explicitly states the congressional law-making power.

CHAPTER 4: THE ABRAHAM LINCOLN PRESIDENCY DURING THE CIVIL WAR AND THE GEORGE W. BUSH PRESIDENCY DURING THE “WAR ON TERROR”

Throughout the history of the United States of America, the usage of unilateral Executive action has occurred on several different occasions, and the results have been diverse both in the success in combating the initial issue and in the general view of the action’s constitutionality. Some successful examples include Washington’s Proclamation on Neutrality and the resolution of the volatile Cuban Missile Crisis¹²⁹; however, some unsuccessful examples exist as well, such as Harry Truman’s attempt at seizing private property in the *Youngstown Sheet & Tube Co. v. Sawyer* case, and the Iran-Contra Scandal¹³⁰. In this thesis, a successful example of Executive discretionary authority being used is one that is justifiable to the people and undertaken within the confines of a constitutionally justifiable crisis, and utilized out of necessity because the Executive needs to direct the nation with efficiency. It is almost a nationwide consensus that the most successful usage of the prerogative power is President Lincoln’s actions during the Civil War, as the Union was in the midst of an existential crisis. His usages of prerogative set the standard for what has since been deemed a successful instance of exercising Executive authority. During this period, Lincoln provided strong justifications for his unilateral presidential actions by emphasizing the necessity of what he was doing

¹²⁹ Shane, 5

¹³⁰ Shane, 18

primarily to the other branches of the federal government, but also to the people. The President took action under three principles; authority outside of and especially against the Constitution is only constitutional when the Union itself is at risk; the Constitution should be understood as different during extraordinary times compared to ordinary times; and a line must separate the Executive's personal feelings and official duty¹³¹. While it was necessary for the perseverance of the United States at the time, Lincoln's presidency provided a dangerous precedent for subsequent leaders of the Executive branch in usurping the other branches' powers, as John Locke expressed his fear that something of this magnitude when he said, "That the reigns of good princes have been always most dangerous to the liberties of their people: for when their successors, managing the government with different thoughts, would draw the actions of those good rulers into precedent, and make them the standard of their *prerogative*, as if what had been done only for the good of the people was a right in them to do..." (Locke, Section 166). James Madison also expressed his fear through his constant articulation of the importance of separation of powers, and the condemnation of at the very least ambiguous uses of Executive authority.

A recent example is the usage of Executive prerogative by George W. Bush and his administration between 2000 and 2008, as it was one of the most aggressive presidential assertions of power in United States history. Bush's administration, instead of acknowledging the necessity of his prerogative along the lines of President Lincoln, attempted to legalize his actions post-September 11 tragedy by declaring a "War" on

¹³¹ Kleinerman, "The Discretionary President", 184

Terror”¹³². The administration cited the words of Alexander Hamilton and other original constitutional thinkers in a misconstruing fashion, and emphasized the necessity of preserving the Union during an alleged time of war¹³³. Bush used these justifications on both the domestic and international fronts, therefore resulting in backlash from internal and external pundits, as many believed that he overstepped the constitutional limits prescribed to the President through manipulation and deceit¹³⁴. Following the Bush administration’s abuses of prerogative power, Barack Obama instituted a platform that involved him condemning these abuses, saying that on the international front, the President is responsive to Congress and the Constitution. Since then, Obama’s true views may have come to fruition, or he could simply have realized that he cannot make change in the country during his time in office under this approach. Obama has examined Bush’s administration and it has paved the way for him to believe in the legality of using unilateral Executive actions to reform immigration law while overstepping the separation of powers, albeit utilizing different methods of justification. The Lincoln Administration’s justified uses of prerogative led to examples that have not been nearly as successful or accepted, and now President Obama has now begun to legalize his usage of Executive authority while attempting to show that it coincide with congressional priorities in governance using an alternative approach

¹³² Shane, 69

¹³³ Shane, 69

¹³⁴ Kleinerman, “The Discretionary President”, 1-2

President Lincoln- Justified Usage of Executive Prerogative

The Civil War stands as the event that most jeopardized the continuation of the United States constitutional order, and luckily, Abraham Lincoln was at the helm of the country with the willingness to do whatever it took to preserve the Union while successfully justifying his actions. Before his presidency commenced, Lincoln was a member of the Whig party—one of the central planks of the party was that Presidents should remain deferential to Congress in matters of both domestic and foreign policy, of which Lincoln showed his support for during the Mexican-American War¹³⁵. Contrary to his actions during his time as President, Lincoln repeatedly stated that there should not be presidential involvement in Legislative activities and that the Mexican-American War was unnecessarily and unconstitutionally initiated by President James Polk¹³⁶. The Constitution is explicit that a President, at least in regard to war with foreign nations, must be controlled by more than the individuals impression as to what public good constitutes¹³⁷. Lincoln, in the case of his disapproval, distinguishes between a foreign and domestic conflict and the congressional need to approve any action on the foreign front, which eliminates the potential for highlighting his hypocrisy when examining his true beliefs in future actions. However, Lincoln implies that the general public is not a dependable judge of constitutionality when left to its own devices, primarily in the case of President Polk because he violated the Constitution when attacking Mexico without consulting Congress, yet because he was successful, the public ignored the violation¹³⁸.

¹³⁵ Kleinerman, “The Discretionary President”, 175

¹³⁶ Kleinerman, “The Discretionary President”, 175

¹³⁷ Kleinerman, “The Discretionary President”, 176

¹³⁸ Kleinerman, “The Discretionary President”, 177

Polk then refused to defend himself, which angered Lincoln more than any other aspect because by doing this, Polk implied that he was the sole judge of the necessity of his action, and did not provide any sort of constitutional defense¹³⁹. Once Lincoln was elected President, and was faced with a much more significant threat to the existence of the United States, he in turn would go on to violate the constitutional powers explicitly given to him as the Executive domestically, but because his ultimate goal was to preserve the Union, he was successfully able to justify the actions, unlike President Polk was to him during the Mexican-American War.

The Southern Secession crisis began when Lincoln was elected President, as a partisan divide on his election arose; Southerners viewed his election as constitutionally illegitimate, and a preemptive act of war calculated to instigate slave rebellion through unlimited exercises of Executive power¹⁴⁰; on the other hand, Republican's viewed his election as an affirmation of constitutional orthodoxy which, through responsible exercise of Executive duties, could restore national politics while defusing threats of disunionism from the South¹⁴¹. Before Lincoln was able to step into office, James Buchanan was the constitutionally sworn President, and he differed greatly from Lincoln in his view of Executive and presidential powers in extraordinary circumstances¹⁴². During this time, the withdrawal of Alabama, Florida, Georgia, Louisiana, Mississippi, South Carolina, and Texas, all cotton states other than South Carolina, occurred and brought the government to a standstill¹⁴³. Buchanan approached the situation in a completely different fashion

¹³⁹ Kleinerman, "The Discretionary President", 177

¹⁴⁰ Belz, 14

¹⁴¹ Belz, 14

¹⁴² Belz, 14

¹⁴³ Belz, 14

than Lincoln would once inaugurated, as he stated in his annual message to Congress that the responsibility and true position of the Executive was to take care that the laws be faithfully executed, and that no human power could absolve the President of this obligation¹⁴⁴. He denied Executive responsibility for resolving the constitutional crisis in this message, saying “The Executive has no authority to decide what shall be the relations between the federal government and South Carolina... He possesses no power to change the relations heretofore existing between them, much less acknowledge the independence of that State”¹⁴⁵. Buchanan’s beliefs about the Executive coincide strongly with a limited presidency within the separation of powers with no consideration of extenuating. The declaration of war displays that this may not be in the country’s best interest at all times, because although Lincoln initially denied the existence of a constitutional crisis, once he acknowledged it and took action, the Union was eventually saved and the crisis averted.

President Lincoln, once he took office, adopted a strategy of Executive minimalism that reduced his ability to bring the discombobulated parts of the country under the control of the federal government¹⁴⁶. In his first inaugural address, he reiterated the theme of formal Executive restraint, saying, “I hold, that in contemplation of universal law, and of the Constitution, the Union of these States is perpetual. Perpetuity is implied, if not expressed, in the fundamental law of all national governments... I therefore consider that, in view of the Constitution and the laws, the Union is unbroken...I will continue to execute all the express provisions of our national

¹⁴⁴ Belz, 16

¹⁴⁵ Buchanan, James, “Fourth Annual Message to Congress on the State of the Union”, <http://www.presidency.ucsb.edu/ws/?pid=29501>, December 3, 1860

¹⁴⁶ Belz, 16-17

Constitution, and the Union will endure forever—it being possible to destroy it, except by some action not provided for in the instrument itself...The Chief Magistrate derives all his authority from the people, and they have conferred none upon him to fix the terms for the separation of the States”¹⁴⁷. While Lincoln may have believed that the people did not confer in him the power necessary to act unilaterally, there were many in the North whom wanted to abandon the Constitution because they thought it systematically prevented the strong response necessary to keeping the southern slaveholders in line¹⁴⁸. Others didn’t want to necessarily abandon the founding document entirely, but instead reinterpret its structures so that it could become a constitutional dictatorship with the capabilities to combat crises such as the Civil War¹⁴⁹. Lincoln at the outset was attempting to establish a rapport for not abusing Executive power by going outside of the explicit legal obligations that the Constitution created and operating within the implicit obligations, but because of a singular focus on necessity, and determining the true constitutional meaning regarding the continuation of the Union via his commitment to statesmanship, he abandoned the congressional deference with which he entered his presidency¹⁵⁰.

Statesmanship is defined as political action for the good of the community based on the virtues of practicality and political reason, and under the American Constitution,

¹⁴⁷ Lincoln, Abraham, “First Inaugural Address”, <http://www.bartleby.com/124/pres31.html>, March 4, 1861

¹⁴⁸ Kleinerman, “The Discretionary Presidency”, 188

¹⁴⁹ Kleinerman, “The Discretionary Presidency”, 188

¹⁵⁰ Kleinerman, Benjamin, “Lincoln’s Example: Executive Power and the Survival of Constitutionalism”, *Perspectives on Politics*, American Political Science Association, 2005, http://ry6af4uu9w.search.serialssolutions.com/?ctx_ver=Z39.88-2004&ctx_enc=info:ofi/enc:UTF-8&rft_id=info:sid/ProQ%3Awpsashell&rft_val_fmt=info:ofi/fmt:kev:mtx:journal&rft.genre=article&rft.jtitle=Perspectives+on+Politics&rft.atitle=Lincoln%27s+Example%3A+Executive+Power+and+the+Survival+of+Constitutionalism&rft.au=Kleinerman%2C+Benjamin+A&rft.aulast=Kleinerman&rft.aufirst=Benjamin&rft.date=2005-12-01&rft.volume=3&rft.issue=4&rft.spage=801&rft.isbn=&rft.btitle=&rft.title=Perspectives+on+Politics&rft.issn=15375927&rft_id=info:doi/, 806

the statesman is concerned to maintain the principles, goods, customs, traditions, and acts of foundation that compose the priorities of republican governance¹⁵¹. Under the altering circumstances of American nationality during the Civil War crisis, President Lincoln's role as a statesman led to the nation having to decide the fundamental answer to the Secession movement, as the Constitution neither confers nor prohibits the right of a state to secede from the Union, nor does it authorize or deny the right of the federal government to stop a state or group of states from seceding¹⁵².

As soon as Lincoln realized that the Civil War was a true existential crisis for the United States, and the necessity for him to undertake Executive action outside of the legal presets of the Constitution became apparent, he was finally convinced that only this necessity could justify his actions, not public approval or congressional legislation¹⁵³. In his mind, through the existence of the Habeas Corpus Clause, the Constitution points to the goal of preservation, as well as makes a distinction between ordinary and extraordinary times¹⁵⁴. Following from this, Lincoln realized that "No organic law can ever be framed with a provision specifically applicable to every question, which may occur in practical administration. No foresight can anticipate, nor any document of reasonable length contain, express provisions for all possible questions"¹⁵⁵. Because of the rule of law's inability to adequately prescribe solutions to all issues, Lincoln constantly referred to the fact that the people of the United States, through deciding to elect him as President, chose to condemn the secession of the Southern states, and it was

¹⁵¹ Belz, 20-21

¹⁵² Belz, 21-22

¹⁵³ Kleinerman, "Executive Prerogative and the Survival of Constitutionalism", 806

¹⁵⁴ Kleinerman, "The Discretionary President", 179

¹⁵⁵ Lincoln, Abraham, "A Compilation of the Messages and Papers of the Presidents Volume VI Part 1", <http://www.gutenberg.org/files/12462/12462.txt>

his duty to carry out popular will while perpetuating the Union through Executive actions¹⁵⁶. The justification for his actions rests heavily on the distinction between “ordinary” and “extraordinary” circumstances, and President Lincoln believed that maintaining this critical distinction substantially removed the dangers of his actions and allows them to become constitutionally acceptable¹⁵⁷. Lincoln’s commitment to the rule of law in all ordinary circumstances allowed for him to cite the extraordinary in the case of the Civil War, which therefore gave him the ability to take over at the helm of the government within the parameters of the Constitution.

To begin the Civil War, President Lincoln sent a commercial ship with provisions to Fort Sumter with orders not to return fire if attacked, as he understood the strategic and moral necessity of inducing the South to fire the first shots of the war that had basically already begun¹⁵⁸. Southern high command ordered an attack on the ship sent by the North, therefore proving peaceable secession to be impossible, and displaying the political and legal situation the country was now facing in full¹⁵⁹. The offensive attack on a supply ship cleared the way for Lincoln to step into the situation with the power of retaliation rather than being the aggressor, and granted him the ability to utilize the Executive prerogative power to sustain the United States. His construction of the Executive power conformed to the design and intent of the Constitution: Article IX, Section IV, says, “The United States shall guarantee to every State in the Union a Republic Form of Government”¹⁶⁰. This section established the republican principal as a

¹⁵⁶ Belz, 27

¹⁵⁷ Kleinerman, “The Discretionary President”, 180

¹⁵⁸ Belz, 31-32

¹⁵⁹ Belz, 32

¹⁶⁰ Article IX, Section IV, *United States Constitution*

national political standard that implicated the meaning of liberty, equality, and consent as principles of self-government—Lincoln understood that the republican government needed to be preserved and that the integrity of the Union depended on and required an understanding of these principles¹⁶¹.

On April 15, 1861, Lincoln published the Proclamation Calling Militia and Convening Congress under the Militia Act of 1795, which announced the purpose of executing the laws of the United States, and stated that combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers given to the Executive by the Constitution, obstructed enforcement of the laws in the seven “seceded” states¹⁶². Later on, he stated that slavery not only violated the simple human liberty rights of blacks, but also circumscribed republican equality and consent by giving, through the existence of the three-fifths system of representation under the Constitution, a privileged position to owners of slave property and citizens of slave states¹⁶³. After this, Lincoln waited to call a joint session of Congress because he thought the war would be over by July 4, 1861 (the date he chose for the session)¹⁶⁴. He made the date this late so that he could avoid potential delays, a weakened war effort, and extreme deliberation that would inevitably arise with the inclusion of the Legislature¹⁶⁵. On April 19, Lincoln created a blockade on the ports of the seceded states to protect the lives, property, and public peace in the United States; on April 20, he ordered a total of nineteen vessels to be added to the Navy immediately along with directing the Secretary of the Treasury to advance \$2

¹⁶¹ Belz, 34

¹⁶² Belz, 34-36

¹⁶³ Belz, 36

¹⁶⁴ DePlato, 103

¹⁶⁵ DePlato, 103

million of unappropriated funds to three private citizens of New York whom had the sole responsibility to use the money to finance government military operations without congressional approval; on April 22, the blockade mentioned previously was extended to the ports of Virginia and North Carolina; on April 27, he suspended Habeas Corpus to maintain public order and suppress open treason in the Union after classifying secessionists as violators of the law; on May 3, he used the powers typically reserved to Congress in raising an army and providing a navy, followed by regulating the distribution of mail¹⁶⁶.

Lincoln decided to issue these Executive decrees and begin to use Executive prerogative while Congress was not in session, although he and his allies in the Senate and House of Representatives were able to arrive at the argument that the presidential war power maintained constitutionalism better than the congressional war power¹⁶⁷. They contended that the President is uniquely capable of limiting actions to those necessary and because the individual in the position can be held solely accountable for the actions that the Executive decides to undertake¹⁶⁸. That being said, he truly believed the conflict would be under control by July 4, when Congress was scheduled to reconvene, but it ended up persisting for longer than expected. However, when Congress did finally meet, President Lincoln defended his actions to them as constitutional under the war powers of the government, and clarified that his decisions were based on necessity due to the non-peaceful form of resolution the Southerners desired¹⁶⁹. He urged them to give him legal

¹⁶⁶ DePlato, 104-106

¹⁶⁷ Kleinerman, "The Discretionary President", 189

¹⁶⁸ Kleinerman, "The Discretionary President", 189

¹⁶⁹ DePlato, 106

sanction for the Executive authority utilized for the sake of preserving the Union, while also demonstrating restraint and regret in acting this way¹⁷⁰: “It was with the deepest regret that the Executive found the duty of employing the war-power, in defense of the government, forced upon him. He could but perform this duty, or surrender the existence of government”¹⁷¹. He then strategically placed the onus to perform the congressional duty of legitimizing Lincoln’s actions by saying, “You will now, according to your own judgment, perform yours. He sincerely hopes that your views, and your action, may so accord with his, as to assure all faithful citizens, who have been disturbed in their rights, of a certain, and speedy restoration to them, under the Constitution and the laws”¹⁷². In response to this letter from Lincoln, Congress, on August 6, 1861, registered approval of all the acts, proclamations, and order of the President respecting the Army and Navy of the United States and calling out or relating to the militia or volunteers of the United States, giving Lincoln exactly what he requested¹⁷³. Clearly, from these words and his actions, Lincoln adhered closely to Hamilton’s vision of emergency power and Executive energy during time of peril and he was able to constitutionally defend the powers exercised¹⁷⁴. Nevertheless, Lincoln’s strategic, true, and consistent expressions of regret and restraint clearly appealed to the Legislative, as they validated his usage of Executive prerogative to complete the tasks necessary to preserve the Union that they themselves were unable to complete. In the end, their decision resulted in the seceding states

¹⁷⁰ DePlato, 107

¹⁷¹ Lincoln, Abraham, “Special Message to Congress on July 4, 1861”, <http://teachingamericanhistory.org/library/document/message-to-congress-in-special-session/>

¹⁷² Lincoln, Abraham, “Special Message to Congress on July 4, 1861”

¹⁷³ DePlato, 109

¹⁷⁴ DePlato, 109

returning and the continued existence of the democratic republic that was known as the Union.

Congress had previously tried to derail the separation of powers by implementing laws such as the Second Confiscation Act of Spring 1862, where the institution attempted to take property from the southerners attempting secession¹⁷⁵. This was considered an attempted congressional dictatorship, and the bill was condemned by many as it is explicitly prohibited in the Constitution for this kind of action to be undertaken¹⁷⁶. For Congress to pass certain laws during emergencies, such as the case of seizing the property (including slaves) of all rebels, overruns strict constitutional limitations—In this case, Lincoln’s seizure of property, when it became necessary to do so for the prosecution of the war, does not suffer from the same sort of constitutional dilemma¹⁷⁷. Because of the Legislative’s inherent inability to act with swiftness and energy towards the preservation of the Union, and to be held fully accountable, Lincoln found it necessary for him to be in control of mitigating the existential crisis that the Civil War became. Through trusting his own capacities to only allow himself to obtain the power during the crisis, he was able to successfully coerce, using force and strategy, the secession states back into the original Union. Lincoln, as a President with the previously unestablished and unutilized prerogative powers, decided to suspend Habeas Corpus, raise an army and invade, establish a military government in a captured territory, and employed tough internal security measures without the consultation of Congress, partially because they were not in session, and partially because he understood the necessity of him acting

¹⁷⁵ Kleinerman, “The Discretionary President”, 194

¹⁷⁶ Kleinerman, “The Discretionary President”, 194

¹⁷⁷ Kleinerman, “The Discretionary President”, 189-190

instantly before the war process moved too far forwards¹⁷⁸. He was able to justify these actions because the South was not seceding due to discontent with the style of governance (a democratic government still persisted), but rather because of specific ideals and beliefs that Lincoln was elected President unfairly and was set on eliminating slavery.

President Lincoln famously asked the question, after the Civil War was over, “Must a government, of necessity, be too strong for the liberties of its own people or too weak to maintain its own existence?”¹⁷⁹. This question has further diversified the arguments over the legality of his usage of Executive discretionary authority, and whether subsequent usages of Executive discretionary authority are acceptable. When utilizing the prerogative power to combat the Southern Secession crisis, Lincoln repeatedly articulated the need for his Executive orders to be understood as a constitutionally acceptable supplement to the rule of law that only applied in circumstances where the rule of law had no previously prescribed judgment as the powers were exercised out of necessity¹⁸⁰. He says, “These measures, 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. It is believed that nothing has been done beyond the constitutional competency of Congress”¹⁸¹. Further, when writing about his justification for the Emancipation Proclamation, he claimed the necessity of this action only possible to be exercised during war. This was

¹⁷⁸ Kleinerman, “The Discretionary President”, 94

¹⁷⁹ Lincoln, Abraham, “First Message to Congress, at the Special Session”, <http://www.historytools.org/sources/lincoln-messages.html>, July 4, 1861

¹⁸⁰ Kleinerman, “The Discretionary Presidency: The Promise and Peril of Executive Power”, 166

¹⁸¹ Lincoln, Abraham, “Special Message to Congress on July 4, 1861”

not an obvious usurpation of power, as it is unclear whether Congress had the power during peacetime, but because of the crisis facing the nation, Lincoln undertook the power to weaken the Southern states. He said, "I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the Constitution, through the preservation of the nation"¹⁸². Lincoln was attempting to create a certain constitutional standard by which future claims of prerogative could be examined¹⁸³. While he technically did so, the ability of later presidents to skew his words and actions has absolutely given them a style of precedent that can justify unilateral action to those that aren't entrenched with knowledge of what actually was said and done during his presidency.

Lincoln feared, as those who created the constitutional structure did, the usage of a precedent of positive prerogative power as justification for later abuses of the power, as he compared the attraction to Executive power to the human attraction to drugs in that is great but addictive¹⁸⁴. Ultimately, an overuse of drugs will make a human sick, and the Executive power does the same, especially because the growth of the discretionary prerogative power has a positive correlation with the likelihood that a power hungry Executive will utilize it in an arbitrary manner that does not seek the public good¹⁸⁵. Unfortunately for Lincoln, effective conduct in the Executive office transcended the previously existing dichotomy between formal restraint and informal initiative for

¹⁸² Lincoln, Abraham, "Letters to Albert G. Hodges", <http://www.abrahamlincolnonline.org/lincoln/speeches/hodges.htm>, April 4, 1864

¹⁸³ Kleinerman, "The Discretionary President", 168

¹⁸⁴ Kleinerman, "The Discretionary President", 179

¹⁸⁵ Kleinerman, "The Discretionary President", 181

preserving the government in the constitutionally prescribed Executive structure¹⁸⁶. On the other hand, the departure from the Constitution, and the separation of powers, renewed the people's attachment to the notion of limits on governmental power at the time, but it did not persist. The constant discussion about prerogative legality, as well as the return to constitutionalism that Lincoln embodied, allowed for the rule of law to return with more fervor than before the incident¹⁸⁷. Successful constitutions require popular attachment, especially to avert the ambitions of those few who would destroy the constitutional order to fulfill their own ambition or even to promote what they think is the public good¹⁸⁸. However, as the Bush Administration, and now the Obama Administration, have displayed, Lincoln's massive expansion of previously unutilized Executive prerogative power set the precedent that the original constitutionalists feared; as the power expands over time and usage, there will be more and more violations of the original justification for the power, and eventually, the Constitution could lose its meaning within society and Executive power could become the ultimate governmental power in the United States.

President Bush- Unjustified Usage of Executive Prerogative

While the Lincoln Administration was a successful, and constitutionally acceptable, example of the extreme use of Executive prerogative during an existential crisis, there have been multiple attempts at using the power to strictly political ends, which is the exact precedent that Lincoln was trying to avoid. An example of the

¹⁸⁶ Belz, 20

¹⁸⁷ Kleinerman, "The Discretionary President", 183

¹⁸⁸ Kleinerman, "The Discretionary President", 186

questionable usage of Executive authority, and what is known to some as one of the most aggressive presidential assertions of power in history¹⁸⁹, is that which occurred during the administration of George W. Bush, the 43rd President of the United States. The Bush administration, in a similar fashion to Lincoln, attempted to justify usage of Executive prerogative by claiming that the nation was at “war” and that he was exercising the war-powers constitutionally prescribed to the President in times of crisis out of necessity. The administration’s actions since the acts of terror that occurred on September 11, 2001, caused many scholars and commentators to reexamine the questions concerning the proper sphere of Executive power within the system of separation of powers¹⁹⁰. As the presidency preceding the election of Barack Obama, Bush attempted to legalize all of his uses of Executive discretion, and made many different assertions to justify his emergency power by relying on Alexander Hamilton’s interpretation of Executive emergency power in *The Federalist Papers* with John Locke’s *Two Treatises of Government* in a skewed fashion¹⁹¹. By referencing Hamilton as a Founding Father, and John Locke as an original constitutionalist thinker, the administration claimed the legality of their decision to define the enemy, act against the enemy in a superficial state of war, imprison the enemy indefinitely without legal processes and under any conditions, and prevent review of any of these discretionary actions by the Courts¹⁹². The Bush Administration utilized the Unitary Executive theory, which claims that the Executive has the lawful right to completely control and administer the duties of his office without congressional oversight

¹⁸⁹ Kleinerman, “The Discretionary President”, 1

¹⁹⁰ Kleinerman, “Lincoln’s Example: Executive Prerogative and the Survival of Constitutionalism”, 801

¹⁹¹ DePlato, 125-126

¹⁹² Kleinerman, “The Discretionary President”, 1

or consultation¹⁹³; however, this theory only applies to existential times of a true crisis, such as the Civil War, and the “‘War’ on Terror” and does not constitute an existential crisis for the United States of America.

President Bush’s Office of Legal Counsel (OLC) provides constitutional legal advice to all of the departments within the Executive Branch of the federal government, as well as both written and oral advice to the Counsel of the President¹⁹⁴. Since leaving office, Bush has often stated that the lawyers, and primarily John Yoo, advised him on his constitutional authority regarding his emergency power¹⁹⁵. But, even though the OLC has the primary responsibility of protecting the President from congressional encroachments of power, they are not the ultimate authority in these cases¹⁹⁶. The administration, in the attempts to legalize Executive discretionary actions, blurred the lines of what is understood as domestic and foreign in nature to justify the actions undertaken—In one of Bush’s radio addresses, he says, “In this first war of the 21st century, one of the most critical battlefields is on the home front”¹⁹⁷. By using this claim of a “war” from the September 11 attacks, the OLC at the time began to construct the argument that the usage of Executive authority would be unlimited, not only on the foreign front, but domestically because the distinction between foreign and domestic now allegedly doesn’t apply in the same fashion¹⁹⁸.

¹⁹³ DePlato, 128

¹⁹⁴ DePlato, 131

¹⁹⁵ DePlato, 131

¹⁹⁶ DePlato, 131-132

¹⁹⁷ Kleinerman, “The Discretionary President”, 1

¹⁹⁸ Kleinerman, “The Discretionary President”, 2

To begin their argument, John Yoo, head of the OLC under President Bush, drafted an advisory memorandum regarding the President's authority to use emergency powers on October 23, 2001, following the attacks of September, 11, 2001, called "Authority for Use of Military Force to Combat Terrorist Activities within the United States of America"¹⁹⁹. Preceding this was the "The Constitutionality of Amending Foreign Surveillance Act to Change the Purpose Standard Searches" memorandum, issued on September 25, 2001²⁰⁰. The OLC continued establishing memorandums like this, such as on November 15 of the same year, when they published the "Authority of the President to Suspend Certain Provisions of the Anti-Ballistic Missiles treaty", followed by "Determination of Enemy Belligerence and Military Detention" on June 8, 2002, "the President's Power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations" on March 13, 2002, and "The Swift Justice Act" on April 8, 2002²⁰¹. Throughout the memorandums, the OLC selectively referred to *The Federalist Papers* contextualized through unrelated other papers and documents to construct an interpretation of Hamilton's and Locke's words to favor the argument that the Executive is all powerful during these scenarios, even though it was not successfully justified as a true existential crisis²⁰². In regards to Locke, Yoo claimed that he first observed that a constitution ought to give the foreign affairs power to the Executive because foreign threats are much less capable to be directed by standing laws, with the argument being predicated on the distinction between an internal Executive power and an external Federative power, a distinction which the Bush Administration completely

¹⁹⁹ DePlato, 132-133

²⁰⁰ DePlato, 134

²⁰¹ DePlato, 134

²⁰² DePlato, 138

ignored²⁰³. Locke's willingness to give more leeway to the Executive, as was mentioned previously, is dependent upon this distinction, which shows the ambiguity that Yoo approached the attempts at justification. Bush would then initiate what would later become known as the Bush Doctrine, which resulted in the subsequent United States invasion of Afghanistan to topple the Taliban regime (Operation Enduring Freedom)²⁰⁴.

Directly after the September 11 attacks, the administration pursued legislation from Congress to empower the federal government in responding to potential threats domestically and internationally, which resulted in the Patriot Act²⁰⁵. The 2001 Patriot Act was 324 pages of legislation written by the White House and pushed through Congress without any formal drafts from congressional leadership²⁰⁶. It gave the Executive Branch extensive and secret power to act without warrants in the pursuit of terrorist counterintelligence which included NSA wiretaps, granting the Executive the power to allow federal agencies to intercept wire, oral, and electronic communications relating to terrorism, computer fraud, and abuse, and allowed for the outsourcing of high-value detainees to third party states that use torture or aggressive interrogation²⁰⁷. In regards to outsourcing of prisoners, detainees were sent to Egypt, Syria, Thailand, Morocco, Saudi Arabia, South Africa, Jordan, and Pakistan—all nations that use torture as one of their mechanisms to gather intelligence information²⁰⁸. Through this act and the frequent memorandums, the Executive branch spent most of its energy insisting on the inherent legality of such actions through precedent and the Founding Fathers.

²⁰³ Kleinerman, "The Discretionary President", 2

²⁰⁴ DePlato, 144

²⁰⁵ DePlato, 145

²⁰⁶ DePlato, 145

²⁰⁷ DePlato, 145-146

²⁰⁸ DePlato, 146

Nevertheless, they attempted to provide reasoning to the Legislature on why these were necessary actions as the original separation of powers structure intended²⁰⁹. The “Dirty War” treatment and tactics involved violations of multiple human rights laws and various customary international legal rights and proscriptions reflected in other relevant treaties²¹⁰. These acts violated international agreements that the United States explicitly consented to being applied to their actions long before. Although Bush was acting in the foreign domain, the Bush administration overstepped the constitutional bounds of Executive capabilities in foreign affairs, while also creating a negative perception and reputation of the United States around the world.

Domestically, the NSA wiretapping provided a major constitutional issue because it legalized the American people having their privacy rights violated without constitutional justification²¹¹. Congress passed the Foreign Intelligence Surveillance Act (FISA) in 1978, and allowed for repeated amendments to be made since September 11, 2001, which have given administrations extreme leeway in their surveillance of United States citizens and non-citizens in America²¹². The Act was amended in 2001 via the Patriot Act, so as to include terrorist groups that are not specifically backed by a foreign government—in other words, the amendment gave the NSA the ability to wiretap basically any citizen by citing vague “suspicion” of terrorist collaboration²¹³. Congress, when approving the passage of this act and following amendments, thought that they were restraining presidential discretion, but instead created secret courts and easy access

²⁰⁹ Kleinerman, “The Discretionary President”, 6

²¹⁰ Paust, 45

²¹¹ Kleinerman, “The Discretionary President”, 12

²¹² *The Foreign Intelligence Surveillance Act of 1978*, 50 U.S.C., <https://it.ojp.gov/default.aspx?area=privacy&page=1286>

²¹³ *The Foreign Intelligence Surveillance Act of 1978*, 50 U.S.C.,

to warrant wiretapping with almost no justification, which are inherently constitutionally unacceptable and a violation of citizen's rights²¹⁴. If wiretapping was purely limited to the foreign realm, then it would be considered espionage, which is widely accepted and has never been seriously questioned constitutionally²¹⁵. By changing the language of FISA from "the primary purpose" of information gathering to be national security to a "significant purpose", the Patriot Act made the governmental burden in obtaining FISA warrants extremely low²¹⁶. The transfer of espionage to domestic monitoring of normal United States citizens play a major role in the argument of the illegality of the Bush administration's actions, and have potentially paved the way for further constitutional violations to become acceptable, so long as the Legislature approves at the time.

Congress, through the enactment of these statutes and acts, also transferred its responsibility of judging the Executive over to the Judicial Branch. The Judicial Branch has very different political logic from the Legislative, and the Supreme Court became the primary institution in attempting to check the Executive, a difficult task for the Judiciary to undertake²¹⁷. The Court gaining this control discouraged the political accountability of both Congress and the President that comes through political contestation, a crucial part of the separation of powers that James Madison originally outlined in *The Federalist Papers* and is implied through the constitutional structure²¹⁸. Executive discretion must be judged politically, and the Courts are inherently unable to make political judgments

²¹⁴ Kleinerman, "The Discretionary President", 223

²¹⁵ Kleinerman, "The Discretionary President", 225

²¹⁶ Kleinerman, "The Discretionary President", 226

²¹⁷ Kleinerman, "The Discretionary President", 228

²¹⁸ Kleinerman, "The Discretionary President", 229

and still remain Courts²¹⁹. In addition, John Locke specifically condemned the Legislature transferring its powers to other branches in a liberal constitutional government²²⁰. If an unconstitutional or illegal action comes in front of the Courts, it would likely be better for them to judge it via the Constitution, as opposed to the political necessity, which in the case of George W. Bush would have condemned most, if not all, of his “wartime” unilaterally enacted actions.

The Bush administration’s idea that Executive discretion is inherently legal, and the fact that they justified his usage of prerogative by referring to a vague “war” which didn’t present a direct threat to the United States, sets a precedent that future presidents of the United States may be able to utilize in their increasing expansions of Executive prerogative, which creates the ultimate danger for the country in that the Executive can eventually reach an illimitable power. The OLC was correct in claiming that discretionary power lies within the presidency in extraordinary circumstances, but they were wrong to imply that this power cannot be judged no matter the circumstances, and to claim the situation they were in as an existential crisis²²¹. President Lincoln feared that his precedent would allow for a president like this to arise, as he openly stated that Executive authority is supposed to be justified to Congress, as well as judged by the people, so as to ensure the legitimacy of the actions. However, in this case, none of that was done, as an insistence on the President’s inherent ability to be unlimited in his usage of this power clearly became a commonality, and even though the majority of it took place on the foreign front, there was no truly existential crisis.

²¹⁹ Paust, 84

²²⁰ Mattie, 84

²²¹ Kleinerman, “The Discretionary President”, 8

Since the Bush presidency has ended, there have been many pundits attempting to assert literature that signifies the direct constitutional violations that were committed, and many have made in depth arguments for impeachment and prosecution for George W. Bush. In this fashion, Congressman Dennis Kucinich published a book titled “35 Articles of Impeachment and the Case for Prosecuting George W. Bush”, where he cited violations such as Article II of the Constitution in multiple sections, Article I of the Constitution in multiple sections, and numerous federal statues, international treaties, and congressionally established Acts²²². The amount of laws that the Bush Administration violated, nonetheless during a time that did not qualify under the criteria of a true crisis, is astronomically high. These violations have created a heated debate over what the true limits on the Executive prerogative power are when an argument can be crafted to circumscribe them in now what seems to be any situation. President Bush and his Executive branch did exactly what John Locke, James Madison, Alexander Hamilton, and Abraham Lincoln feared would be possible with the existence of the Executive power, and now has set a precedent for President Obama to condemn foreign usage of the power, but instead, authorize domestic usage and continue the weakening of the separation of powers.

Conclusion

Abraham Lincoln set a precedent that was absolutely necessary for the preservation of the Union during the Civil War, as the nation was threatening to become divided without the consent of all citizens. However, as Hugh Gallagher has written,

²²² Kucinich, Dennis, “The 35 Articles of Impeachment and the Case for Prosecuting George W. Bush”, *Public Domain as Part of the Congressional Record*, June, 2008

“The danger of allowing a president like Lincoln to act without regard to constitutional restraints in a great crisis is that lesser men may take Lincoln as a precedent in lesser causes”²²³. While there have been smaller violations that involved Executive discretionary authority being utilized, in the case of the Bush administration, there had never been such an outright usage of prerogative and ambiguous justification of a “crisis”. The Lincoln administration unfortunately paved the way for this type of violation. Lincoln clearly would be against Obama’s usage of the Executive power to reform immigration law, as there is absolutely no sign of an existential crisis, and Obama completely overstepped the explicitly congressional power of law-making in taking his actions, although he did provide legal “justification” through a unique and unprecedented reading of congressional priorities in immigration law. Obama is working to achieve a policy goal, which goes against the separation of powers along with the entire idea of the Constitution. Because of the Bush administration’s obvious violations of Executive authority on the international front, Obama was able to run his platform off of his condemnation of these actions, but now, he is using the precedent set by Bush on the domestic front, with a differing method of legally justifying his actions.

Obama is stepping over the separation of powers principles that are entrenched in the Constitution without the existence of a crisis, and usurping congressional power. The definition of a crisis, and of successful usage of prerogative, is of utmost importance, and examining Lincoln’s crisis of the continuation of the Union to Bush’s “War on Terror” and Obama’s immigration law situation, it is clear that the latter two pale in comparison. In Bush’s case, there is no threat of the destruction of the Union, and while the “War on

²²³ Kleinerman, “Lincoln’s Example: executive Power and the Survival of Constitutionalism”, 803

Terror” will be positive for the United States on the international front and gives a very small amount of validation in claiming that the nation is at “war”, it doesn’t validate domestic violations of civil rights that are expressly given in the Constitution, nor does it allow for the violations of international treaties that have been agreed to by previous leaders. In Obama’s case, there is absolutely no danger to the Constitution, the Union, or any significant number of people—there is no threat to the people even in this case, other than a sheer uncomfortableness. He has taken a different approach than both Lincoln and Bush as he is claiming the priorities of immigration law, rather than inciting the immigration issue as a crisis or some sort of danger to the nation. As for successful prerogative, Lincoln’s time in office set the standards of success; actions taken out of necessity for the preservation of the Union, actions justifiable to the people, and utilization of powers given to the Executive during a crisis endangering the nation. However, it is Congress’ constitutionally prescribed power to make the laws, and since there is no extraordinary circumstance, Obama should not have the ability to overstep the separation of powers and reform immigration law.

CHAPTER 5: CONCLUSION

The President of the United States of America is called “the most powerful man in the world” for good reason, as he leads the most powerful country in all international interactions, and is viewed to be the driver behind domestic politics. However, within the separation of powers system established by the Constitution, the position of the presidency is one of deadlock when it comes to creating change inside the boundaries of the nation. As Woodrow Wilson writes in his *President of the United States*, “The makers of the Constitution constructed the federal government upon a theory of checks and balances which was meant to limit the operation of each part and allow no single part or organ of it a dominating force...The President is balanced off against Congress, Congress against the President, and each against the Courts” (Wilson, 54, 56²²⁴). The constitutional separation of powers system is based around preventing Legislative and/or Executive tyranny, so that the democratic republic form of governance can remain and the nation can be operated with some semblance of fairness. That being said, there are still times where the nation needs a strong individual to be able to make quick efficient decisions to enact effective governance. This role falls upon the President, as he is unhindered by others playing the same role as him within the branch, and accountable as the individual whom is seen as the lone decision-maker when taking action. There have been cases of successful Executive actions, such as Abraham Lincoln’s presidency during the Civil War, but each usage of Executive discretionary authority results in furthering the precedent of when it can be utilized. President Obama recently decided that because

²²⁴ Wilson, Woodrow, “Constitutional Government in the United States”, *Columbia University Press*, 1908, http://books.google.com/books?id=CsWh4c7X-Y0C&pg=PA54&source=gbs_toc_r&cad=3#v=onepage&q&f=false, 54, 56

Congress has been unable to pass legislation regarding a skewed and inefficient immigration system, he would issue an Executive order over the constitutional separation of powers that basically usurps an explicitly congressional power of law-making from Congress. While the immigration system is widely thought of in this manner of negativity, and generally thought to be in need of reform, the implications of Obama's decisions are far more important.

For those that support the presidency's usage of Executive prerogative, both currently and in the past, there is a general belief that the President of the United States should be given freedom to act energetically when the nation is in need of action. Being elected by the people gives the position the power to act, and be held accountable, by its constituents and other institutions of government in this mindset supports this train of thought. Wilson continues, when writing about the American presidency, by saying, "The President is at liberty, both in law and conscience, to be as big a man as he can. His capacity will set the limit; and if Congress be overborne by him, it will be no fault of the makers of the Constitution—it will be from no lack of constitutional powers on its part, but only because the President has the nation behind him, and Congress does not" (Wilson, 70). There are others that prescribe to the belief that no matter the time, there will be scenarios in which the rule of law will not be apt to solve all problems that the issue will face, both domestically and internationally. Their view is that the Executive must have the ability to act without the approval of the laws because if every action of the President must be preauthorized by the laws, then the constitutional order becomes a

legalistic order that is no longer constitutional²²⁵. Woodrow Wilson clearly is under this school of thought, as he says, “But the Constitution of the United States is not a mere lawyers’ document: it is a vehicle of life, and its spirit is always the spirit of the age. Its prescriptions are clear and we know what they are; a written document makes lawyers of us all, and our duty as citizens should make us conscientious lawyers, reading the text of the Constitution without subtlety or sophistication but life is always your last and most authoritative critic” (Wilson, 69-70). This presidentialist view rests upon the ambiguities of the Constitution, as when read through a textualist lens, there clearly is not an illimitable freedom in the Executive office. But, when viewing the document arbitrarily, many further uses of power can be ascertained utilizing Wilson’s, and many others’, view of the Constitution.

The modern presidency of strong Executive leadership was created by Franklin Delano Roosevelt, and now many American’s see this as the norm in the position²²⁶. In the context of President Obama’s Executive actions, the people within this frame of thought would approve because of the power of the position that has manifested since FDR. His goal of furthering a policy initiative, versus dealing with an existential crisis, over the Legislative branch has been accepted, and preceded by, many previous leaders of the United States. A President cannot seriously expect to persuade Congress to pass more than a fragment of his/her Legislative program and the platform with which he/she ran on, causing the Executive to be forced to consider alternative ways of getting

²²⁵ Kleinerman, “The Discretionary President”, 248

²²⁶ Hodgson, 50-51

legislation passed²²⁷. Wilson, an Executive leader known for advocating for expansive Executive authority, writes, “There are illegitimate means by which the President may influence the action of Congress. He may also overbear Congress by arbitrary acts which ignore the laws or virtually override them. He may even substitute his own orders for acts of Congress which he wants but cannot get” (Wilson, 71). When looking at this quotation, a major question arises: what is the President of the United States unable to do to those of this mindset? According to Wilson in his writings, the President basically does not abide by any separation of powers principles whenever he feels the desire, as the energetic Executive is one that can overcome any limits upon his power no matter the situation. The fact that the question regarding the presidency’s potential unlimited power exists is precisely why the Founding Fathers decided to utilize a constitutional government that operates under the rules of written law.

Madison, and all of the other great men at the Constitutional Convention, articulated the system of checks and balances precisely so that one branch couldn’t usurp the power of another, as President Obama is currently doing by taking over the law-making process with his Executive decree. Constitutional government was created in the United States to limit the dangers of tyranny, but as of late, Presidents have been overstepping their prescribed powers on a more consistent basis. President George Washington and President Abraham Lincoln, the drivers behind the Proclamation of Neutrality Executive order and the Civil War Secession Crisis Executive orders, respectively, are the original examples of leaders of the United States overstepping their constitutional grounds to issue a decree utilizing their Executive authority; however, both

²²⁷ Hodgson, 15

of these examples had much more justification through both the inherent roles of the Executive and the situation that the presidents were faced with. Washington, because the treaty-making power is on the foreign front, and may require swift Executive action, was able to justify his usage of Executive discretion to declare neutrality in France during the war that was occurring at the time in Europe. Lincoln, on the other hand, was faced with a domestic existential crisis, and therefore was justified in using his prerogative by acting on the necessity of the preservation of the Union. While these examples may have been necessary at the time, they were the first successful examples of prerogative, and they set the scene for future, less justified exercises and expansions of Executive discretionary authority.

In recent history, the Executive orders issued, especially those by President George W. Bush, struggle to meet the necessity or existential standards that Washington and Lincoln were able to meet when deciding to utilize their power to overstep the separation of powers. Bush, in the foreign realm, utilized his Office of Legal Counsel to ignore multiple treaties and agreements made regarding the treatment of prisoners and their ability to be extradited to countries that have a history of using torture to obtain information. In truth, Bush's violation would not have been entirely unjustified if his actions had just remained on the foreign realm, because we had been attacked on September 11, 2001, and he had the opportunities to operate as the extreme Executive because of that. However, after Bush declared a "'War' on Terror", he utilized the fact that the United States was in an undefined, unquantified, and ambiguous enemy that could basically be construed to mean that the country was at war with millions of people from many different countries. Following from this, the administration then outlined legal

claims that he could utilize his Executive prerogative to institute the NSA wiretapping of American citizens. He was successfully able to change the language of the Foreign Intelligence Surveillance Act from “primary purpose” to “significant purpose” of information gather to be national security, which lowered the standards of the Act substantially, allowing for near-unlimited wiretapping of United States citizens²²⁸. Bush, throughout this process, sought out the approval of Congress by attempting to legally justify his actions through the Founding Fathers’ words and the argument that it was within the extraordinary constitutional presidential war powers, primarily Alexander Hamilton, and was able to achieve some validation for his actions.

President Obama, in his Executive order regarding immigration reform, did not look for any validation from Congress, as he understood that there would be absolutely no realistic chance for him to do so and he made no attempt in claiming the nation is in crisis. He previously has made multiple attempts even from his time in the Legislative branch to reform immigration law by passing bills; unfortunately, the congressional process is complicated due to the number of committees, subcommittees, and varieties of individual interests and egos that have to be accommodated for in one way or another create a near impossible likelihood that a full bill will be passed without amendments being made²²⁹. In the document published by the Department of Justice articulating the legal backing that Obama has, it says, “Prosecutorial discretion—the power of the Executive to determine when to enforce the law—is one of the most well-established traditions in American law. Prosecutorial discretion is in, in particular, central to the

²²⁸ Kleinerman, “The Discretionary President”, 226

²²⁹ Hodgson, 119-120

enforcement of immigration law against removable noncitizens. As the Supreme Court has said, ‘The broad discretion exercised by immigration officials’ is ‘[a] principal feature of the removal system’ *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012)”²³⁰. The letter continues, “There are, of course, limits on the prosecutorial discretion that may be exercised by the Executive Branch. We would not endorse an Executive action that constituted an abdication of the President’s responsibility to enforce the law or that was inconsistent with the purposes underlying a statutory scheme. But these limits on the lawful exercise of prosecutorial discretion are not breached here...Both the setting of removal priorities and the use of deferred action are well-established ways in which the Executive has exercised discretion in using its removal authority. These means of exercising discretion in the immigration context have been used many times by the Executive branch under President of both parties, and Congress has explicitly and implicitly endorsed their use”²³¹. Further justification exists from scholars, as they say that because Congress does not appropriate nearly enough money to deport all of the 11 million undocumented immigrants estimated to be living in the United States, the President has the ability to choose whom he deports, so he cannot reasonably accused of usurping lawmakers’ authority by issuing the Executive order²³². While this is not the detailed edition of the legal justifications, the pure validity that it is given because of who has signed off on the letter (10 prominent legal scholars at top law schools and undergraduate universities such as University of Chicago, Duke University,

²³⁰ “Scholars Letter on Immigration”, *Scribd*

²³¹ “Scholars Letter on Immigration”, *Scribd*

²³² Davis, “Obama’s Immigration Action has Precedents, but May Set a New One”

and Yale University²³³) will give Obama's argument staying power to the people and to others analyzing his usage of prerogative. These justifications will appeal strongly to the masses, as the name recognition of the prestigious universities and positions that these scholars undertake will overcome the official argument, which, when analyzed, does not circumscribe the fact that Obama clearly overstepped the separation of powers. However, as defined in the Lincoln/Bush chapter, a successful usage of prerogative power is one that is undertaken out of necessity, during a time of crisis, and justifiable to the people—Obama's usage of his Executive authority does not pass this test.

Previous Presidents who utilized their Executive authority to shield, or at the very least assist, undocumented immigrants have not been faced with the criticisms that President Obama faces currently because their actions were not as substantial in terms of the pure number of people affected and the polarization of the issue at the time. For instance, in 1986, President Reagan signed the Amnesty Bill passed by Congress that granted legal status to three million undocumented immigrants, and then acted on his own, without congressional approval, to expand it even more within the next year²³⁴. However, because Reagan initially signed a bill passed by the Legislative branch before using his Executive authority on his own, he was much less maligned. In addition to Reagan, President George H.W. Bush, in 1990, moved to allow 1.5 million undocumented spouses and children of immigrants whom were in the process of becoming permanent residents to stay in the country to obtain work permits—This number was about 40% of the undocumented population, while Obama's actions in 2014

²³³ "Scholars Letter on Immigration", *Scribd*

²³⁴ Davis, "Obama's Immigration Action has Precedents, but May Set a New One"

affects about 45% of the undocumented population²³⁵. Due to the lack of polarization on the issue at the time, and the other issues that were capturing the United States' attention, there was no backlash against either of the presidents at the time, and the constitutionality of the decision faded to the background. Further, these exercises of Executive prerogative should not be deemed acceptable, just as Obama's is not constitutional.

Those that are not in support of Obama's usage of prerogative have taken to vocalizing their disapproval, and some of these people have worked closely with the current President in the past. The primary issue, and the one that is absolutely the most compelling as to why President Obama is wrong in issuing this Executive order, is the purposeful existence of the separation of powers, and his usurpation of Legislative explicit authority. The power to legislate, and pass laws, is entirely and explicitly prescribed to Congress in Article I of the Constitution, which, in my opinion, allows the Legislature, and only the Legislature, to create legislation. Clearly, past Presidents, and now Obama, have been attempting to circumscribe their constitutionally given powers, but I do not agree that any of them have succeeded in justifying their attempts without an existential crisis or true war. The United States' government is entirely based around the system of checks and balances, and the idea that ambition must counteract ambition, yet in recent history, individual ambition in the Executive has been overcoming collective ambition within the Legislative branch. This has been done through the ambiguous citations of constitutional text, and past precedents, so as to continue the expansion of Executive authority prior to Obama, although Obama makes no attempt at justification out of necessity. George W. Bush's administration was unsuccessful in passing an

²³⁵ Davis, "Obama's Immigration Action has Precedents, but May Set a New One"

immigration system overhaul through the Senate, and was then told that the President couldn't reshape the system through Executive prerogative by his own legal team²³⁶. In other words, Bush, a President who didn't hesitate to create the "'War' on Terror" and utilize it to expand Executive power domestically and internationally, forfeited the idea of immigration reform and moved on for his last 18 months in office²³⁷. The President preceding Obama, who is known as one of the most expansive Executive regimes in the history of the United States, could not find the legal justification for overhauling the immigration reform, even after discovering a method to institute the NSA wiretapping upon the United States' citizens. The United States has survived, and flourished, on the words and meanings of the Constitution for its entire history, but Obama is in the process of venturing down the path of straying from the Constitution's explicitly prescribed powers for the co-equal branches in his actions regarding immigration.

Not only does the initial violation of the constitutional system create a major issue, the precedent that President Obama has now set in regards to expansive Executive prerogative powers is even more dangerous. Precedence is entirely what the Founding Fathers' feared, as the more expansive precedents already set become, the easier it becomes for the current President to expand even more on the Executive's authority to act unilaterally. David Martin, a University of Virginia law professor who was a counsel at the Department of Homeland Security in 2009 and 2010, has said that beyond the question of whether Obama was staying within the bounds of his constitutionally

²³⁶ Collinson, Stephen, "On immigration, a tale of two presidents", *CNN*, http://www.cnn.com/2014/11/20/politics/obama-immigration-bush/index.html?hpt=po_c1, November 21, 2014

²³⁷ Collinson, Stephen, "On immigration, a tale of two presidents"

prescribed power (which he isn't), the issue for the future is the precedent set because even if his directive is legally defensible, it is paving the way for future presidents to act to contravene laws²³⁸. The past has shown how one initial precedent, meaning the one set by Abraham Lincoln, may be acceptable at the time, but has now slowly allowed for the Executive power to continue to grow as uses of it become more common and frequent. Lincoln's usage of Executive prerogative, unlike Obama's, was actually to combat an extraordinary and existential crisis, the Civil War. The War crisis posed a direct threat to the persistence of the Union and endangered the people, which in turn gave validation to the uses of Executive authority. In our current system, there is no absolute existential threat to the persistence of the United States, and no direct threat to the population, that results from the faulty immigration system.

Using this logic, President Bush, when acting in the "'War' on Terror", was more justified in using his prerogative because there was at least some sort of threat to the population and the nation, whereas Obama, if anything, has placed the people more in danger by potentially allowing criminals to remain in the United States. American citizens have also realized this fear, as Sheriff Joe Arpaio, who frequently butted heads with the federal government over the treatment of undocumented immigrants in Arizona, claimed immediately after Obama's Executive order that he would be suing the President²³⁹. Arpaio was quoted saying by a group called "Freedom Watch", which released news of the suit, "among the many negative effects of this Executive order, will

²³⁸ Davis, "Obama's Immigration Action has Precedents, but May Set a New One"

²³⁹ Mandaro, Laura, "Arizona's Arpaio sues Obama on immigration", *USA Today*, <http://www.usatoday.com/story/news/nation-now/2014/11/21/arpaio-sues-obama-immigration-reform/70045742/>, November 21, 2014

be increased release of criminal aliens back onto streets of Maricopa County, Arizona, and the rest of the nation”²⁴⁰. Throughout his usage of prerogative, Lincoln never once attempted to legalize it on a consistent basis—rather, he looked for congressional validation of his actions, but only for the duration of the crisis, and did not wish for them to be ingrained in the Constitution at all times because he understood the dangers that this would pose for the federal government in the future. Furthermore, the true dangers that the crisis Lincoln was facing posed were mitigated as he utilized his Executive authority responsibly and effectively. However, it is totally feasible to fear that a President of the United States could be elected into office, at some point in the future, and overhaul entire legislative and/or judicial programs that have been in place for hundreds of years, with Obama’s action and unique approach in attempting to justify it being another stone in the path of moving towards this capability.

Another contradiction that has come to fruition through Obama’s Executive order temporarily reforming immigration law is the purely political sense that the President views the issue. In 2007, there was a strong bipartisan congressional effort to push a comprehensive immigration package through to President Bush, of which Obama signed on to be a part²⁴¹. On several occasions, Obama, who had by then begun his presidential campaign, kept straying from the group’s agreements, as he offered or supported amendments that if they passed, may have defeated final passage of the immigration bill²⁴². Because of this, many senators that experienced Obama’s flip-flopping find his

²⁴⁰ Mandaro, Laura, “Arizona’s Arpaio sues Obama on immigration”

²⁴¹ Tapper, Jake, “Obama, pushing immigration action today, said to have hurt effort in the past”, *CNN*, http://www.cnn.com/2014/11/21/politics/obama-immigration-flashback/index.html?hpt=po_c1, November 21, 2014

²⁴² Tapper, Jake, “Obama, pushing immigration action today, said to have hurt effort in the past”

frustration over Legislative inactivity seems inauthentic, as he was part of that issue back in 2007²⁴³. It becomes clear that Obama is in support of certain beliefs on issues when it benefits him politically, as immigration does right now in terms of his support within the United States—But, when it was politically problematic for him to fully support the bipartisan effort, he did what benefitted his political career the most²⁴⁴. Viewing issues politically creates far too much subjectivity for a president to be operating with, especially when the implications of him utilizing his Executive authority, in this case, could potentially change the course of the United States and the power of the President forever.

Even Woodrow Wilson, a strong advocate for an independent and powerful Executive to accomplish the ends of modern government, articulates in his *President of the United States*, when speaking of the presidential powers, that the overstepping into congressional authority, and explicit usurpation of congressional powers, is condemnable. He says, “He may even substitute his own orders for acts of Congress which he wants but cannot get. Such things are not only deeply immoral, they are destructive of the fundamental understandings of constitutional government, and, therefore, of constitutional government itself. They are sure, moreover, in a country of free public opinion, to bring their own punishment, to destroy both the fame and the power of the man who dares to practice them” (Wilson, 71). The separation of powers principles were engraved in the United States’ Constitution to prevent the encroachment, and usurpation, of any of the branches upon any others’ powers, and President Obama has done exactly

²⁴³ Tapper, Jake, “Obama, pushing immigration action today, said to have hurt effort in the past”

²⁴⁴ Tapper, Jake, “Obama, pushing immigration action today, said to have hurt effort in the past”

that; usurped the power of the Legislative branch granted in the Constitution through issuing this Executive decree, and it would not be approved by any of the original creators of the Executive discretionary authority or the separation of powers.

Constitutionalism, the original idea articulated by John Locke, requires an adherence to the rule of law in all circumstances deemed ordinary, such as Legislative deadlock, and only allows for the Executive discretion outside of the laws when extraordinary circumstances arise. President Lincoln experienced these extraordinary circumstances of danger to the Union, but few Presidents since have experienced the magnitude of danger that he did when deciding whether or not to utilize his prerogative powers. James Madison, the originator of the separation of powers system that our government now relies on, created the structure so as to limit Legislative tyranny, but also to stop the other branches from acting or encroaching on powers not directly constitutionally prescribed to them when not involved in a crisis. Alexander Hamilton, while advocating for an energetic Executive, still believed in the constitutional separation of powers principals, and in limiting each of the branches so as to stop the usurpation of powers unless absolutely necessary for the continuation of the government. These men whom all assisted in the creation of the Constitution, and the form of government that the United States is under, adhered strongly to the rule of law, but still understood that there are circumstances where the rule of law will not have prescribed answers. However, in their understandings, these circumstances were of much more intensity and danger than simple Legislative deadlock regarding a non-existential domestic issue, such as immigration. Obama, utilizing past examples of Presidents acting outside of their constitutional powers whom were able to justify their actions at the time, has ignored the

rule of law and the powers given to him by the Constitution in a situation that does not constitute the President utilizing other branches' powers out of necessity, and therefore his prerogative is not acceptable under the constitutional system of government in the United States. Condemning Obama's usage of this power, and the precedent that will now be set for future presidents to expand more of their own Executive power, is an absolute necessity if the United States is to stay within the confines of a system of separation of powers, and constitutional government, throughout the nation's future.

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