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The framers and executive prerogative: a constitutional and historical rebuke

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Continued assertions within scholarly precincts and the corridors of power of the need to concentrate in the executive authority to meet foreign affairs and national security challenges, particularly in the decade since the 9/11 outrage, have renewed debate on the issue ofwhether the Constitution vests in the American presidency what has been characterized as a prerogative power to meet emergencies. The contention that the executive possesses the authority to act in the absence of law or even in violation of it--exalted in the literary tradition of the Lockean Prerogative--is an issue of great moment for a nation committed to constitutional government and the rule of law. The concept of executive prerogative is hardly a new issue; indeed, it plumbs the depths of Anglo-American legal history, and it has absorbed the energy and wits of scholars and statesmen across the decades, fromthe American Revolution and the Constitutional Convention to the Civil War and the Cold War (Adler 1988; Corwin 1984; Fatovic 2004; Judson 1949; Langston and Lind 1991; Mansfield 1989; Robinson 1995; Rossiter 1948; Scigliano 1989; Wormuth 1939). Yet, it has assumed a new urgency in the context of an ill-defined and indeterminate War on Terror, in which presidents assert expansive, unilateral powers that are coterminous with the emergencies that they perceive (Adler 2010; Fisher2007b; Healy 2008; Pfiffner 2008; Pious 2007, 2011; Rakove 2007; Schwarz and Huq 2007).

Advocates of sweeping executive powers have sought rationales in assertions of national security, necessity, and emergency. On various occasions, defenders have invoked the framers of the Constitution whom, they maintain, clothed the president with a Lockean Prerogative tomeet national security crises. That premise, destined to become a staple of teaching and writing on the American presidency, was first asserted by Edward Corwin who, in his influential The President: Officeand Powers (1940), drew a connection between Locke and the framers of the Constitution (Corwin 1984; Scigliano 1989, 236). Corwin first quoted Locke's famous statement, set forth in the chapter, "Of Prerogative," in The Second Treatise of Government, that prerogative was the"Power to act according to discretion, for the publick good, withoutthe prescription of the Law and sometimes even against it" (Corwin 1984, 8; quoting Locke 1986, 92). He proceeded to claim that "what theFramers had in mind" was "a broad range of autonomous executive power or 'prerogative'" (Corwin 1984, 14). Corwin's contention that the framers had embraced the literary concept of the

Lockean Prerogative, which included the authority to set aside laws, assumed the status ofconvention among political scientists, historians and lawyers. (Fatovic 2004, 430; Mansfield 1989, 247-78).

The Lockean Prerogative, somehow embedded in the Constitution, wasdrawn straight from the pages of the Stuart Kings' doctrine of High Prerogative. Did the framers embrace the Stuart Kingship? The assertion that the framers of the Constitution endowed the president with the Lockean Prerogative, requires reexamination of their conception of executive power. Does the Constitution confer upon the president authority to violate the law? If so, is it derived from the Vesting Clause or the Take Care Clause? Is there, indeed, room in the Constitutionfor the president to defy the instrument from which he derives his authority? Is it permissible for a president to swear an oath to uphold the Constitution and at the same time to ignore its provisions? That, precisely, is the threshold question raised by the claim of executive prerogative.

Clarifying the Theory of Prerogative

For the sake of analytical clarity, it should be recalled that theconcept of executive prerogative is not synonymous with such notionsas inherent presidential power, extra-constitutional presidential power, and presidential emergency power. While writers sometimes treat these claims as synonyms, there are, I believe, substantial differences. The failure to draw appropriate distinctions clouds academic discussion and frustrates efforts to analyze and critique presidential claims of power. Let us consider some fundamental distinctions. The claim of inherent executive power, however specious it may be, represents an effort to locate within the executive constitutional authority that exceeds the textual grant of enumerated powers, as well as implied authority that flows from that grant, but that, nonetheless, is derived from article II of the Constitution (Adler 2002, 155-213; Fisher2007a, 1-22; Youngstown Sheet & Tube Co. v. Sawyer 1952). The assertion of extra-constitutional power, which is equally specious in a constitutional system in which government derives its authority from theConstitution, rests on the bizarre argument that executive power is drawn from sources beyond the Constitution (Adler 1988, 32-34; Fisher2007b, 139-152; United States v. Curtiss-Wright Export Corp. 1936). The vague concept of a presidential emergency power, moreover, may beviewed as either inherent or extra-constitutional, such is the ambiguity of the claim, but what is clear is that Congress may, by statute, vest emergency powers in the president. That sort of legislative enactment, constitutionally permissible from a procedural standpoint, would create yet another category--a fourth kind--of presidential power, which further blurs analysis of the source and scope of authority wielded by the president unless, of course, commentators exercise care in explaining the difference between statutorily conferred emergency authority and the claim of a constitutionally based, executive emergency power. The great need for clarification of terms in the discussion of executive power recalls the wisdom of Voltaire's admonition: Define your terms. For the sake of academic discussion, I submit, scholars should reserve use of the term, presidential prerogative, as a claim of authority to act in the absence or violation of law to meet an emergency. Its use as a synonym for executive power muddies the waters and deprives the scholarly fraternity of the assurance that it isengaged in the same discussion when referring to claims executive power.

The Lockean Prerogative, it is familiar, is merely a literary theory, not a juridical concept. As we shall see, there is nothing in thetext of the Constitution, the debates or train of discussion in either the Constitutional Convention or the state ratifying

conventions, or in contemporaneous writings for that matter, to support the claim that the president possesses a prerogative power to violate the laws of the nation. The Supreme Court, it bears reminder, has never employed such logic. Indeed, assertions of an executive authority to trample constitutional restraints invites Chief Justice John Marshall's rejoinder in Marbury v. Madison: "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained"(1803, 176). From the beginning, it was recognized that the platformof American Constitutionalism, as Justice Hugo Black observed in Reid v. Covert (1957, 5-6), stands for the proposition that "The United States is entirely a creature of the Constitution. Its powers and authority have no other source. It can act only in accordance with all the limitations imposed by the Constitution." Manifestly, that platform would be reduced to rubble if the president enjoyed power to rampage across the metes and bounds of American law. The passage of time has dimmed neither the force nor the vitality of that principle. If it were otherwise, it would be necessary to acknowledge that we have abandoned governance based on preestablished rules and embraced governance predicated on the whims of those who wield power, including executive fiat. "That might result in a benevolent despotism," Justice Benjamin Cardozo rightly observed, "if the judges," or presidents for that matter, "were benevolent men." In any case, he added, it "would putan end to the reign of law" (Cardozo 1921, 136).

The assertion of presidential prerogative to violate the laws represents, in its raw form, a claim of power, triggered by the claim of necessity, to act illegally or unconstitutionally. The theory of prerogative conflicts with every tenet of American constitutionalism. If,in fact, necessity is the measure of power, why should any consideration be given to legal restraints or constitutional limitations? And,we are entitled to ask, by what measuring stick may the legality of an extra-constitutional act be evaluated? Since the theory of prerogative is nowhere enshrined in the Constitution, its assertion represents what the language philosophers call an "illicit presupposition" (Austin 1962). Neither the desire for power nor the assertion of an ipse dixit can create constitutional authority. There is no doubt that in a constitutional system, in which governmental officials derive their authority from the Constitution, that the executive, like the Court, bears an obligation to ground its acts in constitutional norms (Ely 1973, 949).

Manifestly, the Constitution does not confer upon the president authority to flaunt the laws. Indeed, no governmental actor--president,judge, or legislator has been granted an exemption or dispensation from adherence to the Constitution, to which he has sworn an oath to defend. The omission in the Constitution of an articulated or implied grant of authority to the president to violate laws in the face of anemergency reflected the framers' most-deeply felt fears about executive power. In his celebrated concurring opinion in the Steel Seizure Case (1952), Justice Robert H. Jackson rightly observed that the framers did not vest emergency powers in the president. The framers recognized, Jackson explained, "that emergency powers would tend to kindleemergencies" (650). Yet the founders well understood that laws mightnot provide a remedy for every conceivable situation or crisis that America might encounter. As a consequence, they did not ignore the sundry challenges posed by emergencies. On the contrary, the framers' response to the problem of emergency lay in the doctrine of retroactive ratification. This solution, laid bare, requires a governmental actor who has acted illegally for the purpose of meeting an emergency, to assume the burden of explaining to the lawmaking body why his action was necessary and reasonable. The request for ratification, or legislative

indemnification, represents an acknowledgment that the act was illegal. If the legislative body accepts the officials' explanation, it will grant retroactive authorization, making the illegal act legal, after the fact. If, on the other hand, the legislature finds the official's action unreasonable and unnecessary, it will impose sanctions that, in the case of the president, may include censure and impeachment.

Vesting Clause

Proponents of an executive prerogative power have sought, primarily, to ground presidential prerogative in the Vesting Clause in article II, which states that "the executive power shall be vested in a President of the United States of America." The question of whether thisprovision will bear the weight assigned it may be illuminated by what delegates to the Constitutional Convention actually said. It is instructive as well to recall the understanding of the term, "executive power" on the eve of the Convention. The renowned legal historian, Julius Goebel, observed that "executive" as a "noun ... was not then a word of art in English law--above all it was not so in reference to the crown. It had become a word of art in American law through its employment in various state constitutions adopted from 1776 onward.... It reflected ... the revolutionary response to the situation precipitated by the repudiation of the royal prerogative (Goebel 1954, 474).

The use of the word "prerogative," as Robert Scigliano has demonstrated was, among the founders, a term of derision, a political shaft intended to taint an opponent with the stench of monarchism (Scigliano 1989, 248). The rejection of the use of the word "prerogative" in favor of the new and more republic-friendly noun, "executive," necessitated discussion and explanation of its scope and content. The provisions of state constitutions conveniently frame and illustrate the meager scope of authority granted to state executives. In his 1783 work,"Draft of a Fundamental Constitution for Virginia," Thomas Jeffersonstated, "By Executive powers, we mean no reference to those powers exercised under our former government by the Crown as of its prerogative.... We give them these powers only, which are necessary to executethe laws (and administer the government)" (Warren 1947, 177).

This understanding of "executive power" and its implementation were reflected in the Virginia Plan, which Edmund Randolph introduced tothe Constitutional Convention, and which provided for a "national executive ... 'with power to carry into execution the national laws'; [and] to appoint to offices in cases not otherwise provided for" (Farrand 1937, 1: 62-63). For the framers, the phrase "executive power" was limited, as James Wilson declared, to "executing the laws, and appointing officers" (Farrand 1937, 1: 66). Roger Sherman "considered theExecutive magistracy as nothing more than an institution for carrying the will of the Legislature into effect" (Farrand 1937, 1: 65). Madison agreed with Wilson's definition of executive power. He thought it necessary "to fix the extent of the Executive authority ... as certain powers were in their nature Executive, and must be given to that departmt" and added that "a definition of their extent would assist the judgment in determining how far they might be safely entrusted to a single officer." (Farrand 1937, 1: 66-67). The definition of the executive's authority should be precise, thought Madison; the executivepowers "shd. be confined and defined" (Farrand 1937, 1: 70).

And so it was. In a draft reported by Wilson, the phrase, "The Executive Power of the United States shall be vested in a single Person," first appeared. (Farrand 1937, 2: 171). His draft included an enumeration of the president's power to grant reprieves and pardons and toserve as commander in chief; it included as well the charge that

"[i]t shall be his duty to provide for the due & faithful exec--[sic] ofthe laws" (Farrand 1937, 2: 171). The report of the Committee of Detail altered the "faithful execution" phrase to "he shall take care that the laws of the United States be duly and faithfully executed" (Farrand 1937, 2: 185). This version was referred to the Committee on Style, which drafted the form that appears in the Constitution: "The executive power shall be vested in a president of the United States of America.... [H]e shall take care that the laws be faithfully executed" (Farrand 1937, 2: 597, 600).

To the extent that there was a debate on "executive power," it centered almost entirely on the question of whether there should be a single or a plural presidency. There was no challenge to the definitionof executive power held by Wilson, Sherman, and Madison; nor was an alternative understanding advanced. Moreover, there was no argument about the scope of executive power; indeed, any latent fears were quickly allayed by Wilson, second in importance to Madison as an architect of the Constitution, who assured his colleagues that "the Prerogatives" of the Crown were not "a proper guide in defining the Executive powers." (Farrand 1937, 1: 65). Professor Corwin's observation that Wilson was the leader of the "strong executive" wing of the Conventionmay be affirmed simply by noting that no member of those proceedingspromoted a conception of executive power that exceeded his stated parameters--to execute the laws and make appointments to office (Corwin1984, 111). That conception of executive power, which echoed Jefferson's and was shared by delegates to the various state ratifying conventions, provides the historical context within which to view the founders' conception of executive power.

It was in this context, then, that the Constitutional Convention designed the office of the presidency. Far from establishing an executive resembling a monarch, the framers, in fact, severed all roots to the royal prerogative. As Wilson noted, the "prerogatives" of the Crown were ill suited to the republican enterprise on which the framers had embarked. Benjamin Franklin, as familiar with the prerogatives ofthe Crown as anyone, observed on more than one occasion Americans' denunciation of governmental arrangements and institutions that smacked of "too much Prerogative" (Franklin 1949, 135, emphasis in original). The framers' rejection of the English Model, grounded in their fear of executive power and reflected in their derision of monarchical claims and prerogatives, was repeatedly stressed by defenders of the Constitution. Alexander Hamilton, who was at the center of Federalist writings, attempted to allay concerns about the creation of an embryonic monarch. In Federalist No. 69 (Earle 1937), it will be recalled, he conducted a detailed analysis of the enumerated powers granted to the president as commander in chief and provided a narrative that trumpeted the framers' refusal to vest in the president unilateral authority over matters of war and peace, a decision that represented a radical departure from the High Prerogative wielded by the king of England.

Hamilton's Federalist essays fairly reflect the constitutional "sketch" that he laid before the Convention. His ruminations in Philadelphia, aired in a lengthy speech on June 18, 1787, have inspired in the scholarly realm some misconceptions that require attention at this juncture. On the floor of the Convention, Hamilton noted his admiration for the British system. He admitted that in his "private opinion he had no scruple in declaring . . . that the British Gov't. was the best in the world" (Farrand 1937, 1: 288). The "Hereditary interest ofthe King was so interwoven with that of the Nation," Hamilton stated, that he was beyond "the danger of being corrupted from abroad." Accordingly, as it has often been observed, he preferred an "Executive ... for life." But it is often overlooked that he also preferred that "one

branch of the Legislature hold their places for life or at leastduring good behavior" (Farrand 1937, 1: 289).

After giving flight to his personal preferences, entirely hypothetical given the context of his speech, Hamilton acknowledged that theyhad no application to America and the creation of a republic, an enterprise in which he and his fellow delegates were engaged.

In his own "plan" for a Constitution, which amounted to ideas thathe would contribute to Edmund Randolph's proposals, which were submitted as the Virginia Plan, Hamilton proposed an executive that reflected Wilson's views. The executive, he stated, would have responsibility for "the execution of all laws passed." The president, moreover, would be required to obtain the Senate's approval for making treaties and appointing ambassadors. Hamilton preferred a presidential pardon power weaker than the design that ultimately prevailed, for he would prohibit the president from issuing pardons in cases of treason without the approbation of the Senate. In another rebuke to the monarchical model, Hamilton would vest in the Senate "the sole power of declaring war" (Farrand 1937, 1: 292). In the end, Hamilton's conception of executive power mirrored the views of presidential power advanced by Wilson, Madison, and Sherman.

The confined nature of the presidency, a conception rooted, for example, in Wilson's observation that the president is expected to execute the laws and make appointments to office, or in Sherman's remark that "he considered the Executive magistracy as nothing more than an institution for carrying the will of the Legislature into effect," represented a characterization that was never challenged throughout theConvention (Farrand 1937, 1: 65). No delegate to the Constitutional Convention, it is to be emphasized, advanced a theory of presidentialprerogative. Madison justly remarked, "The natural province of the executive magistrate is to execute laws, as that of the legislature isto make laws. All his acts, therefore, properly executive, must presuppose the existence of the laws to be executed" (Madison 1900-10, 145).

At the time of the American Revolution it was widely understood that the principle of the rule of law implied executive subordination to the law. In fact, it was clear that republican government differed from the monarchies of Europe in precisely this respect. The framers,it may be said, did not even squint in the direction of presidentialprerogative. Certainly there is no evidence to suggest that the founders who, in 1776 had introduced the term executive power to avoid the stench of prerogative, had by 1787 found the odor any less repugnant.

There remains the need to address the claim, long asserted in scholarly quarters, that the framers had in the back of their minds the availability of the Lockean Prerogative as a presidential power to meet emergencies. What influence, it must be asked, did Locke's writingswield in America? Professor Donald Robinson has rightly noted that, "what seems beyond doubt is that his notions of constitutional engineering had less influence than his teaching about the foundations of civil government and the right to revolution" (Robinson 1995, 115). Infact, there is not a scintilla of evidence whatever that the framersintended to incorporate the Lockean Prerogative in the Constitution.And lacking a textual statement or grant of power to that effect, such an intent is indispensable to the claim of constitutional power. In fact, as we have seen, the evidence runs in the other direction. Fears of executive power led the framers to enumerate the president's power; they undertook to "define and confine" the scope of his authority. And clearly, an undefined reservoir of

discretionary power in theform of Locke's prerogative would have unraveled the carefully crafted design of Article II and repudiated the framers' stated aim of corralling executive power. More importantly, the absence of such authority means that by definition any presidential assertion of a prerogative power to violate the law is an extra-constitutional claim; an action based on such an assertion is, by definition, unconstitutional.

Take Care Clause

The theory of an executive prerogative power cannot be reconciled with the Take Care Clause. The proposition that the duty to execute the laws carries with it the power to defy, violate, or create them would have surprised the framers. Rather, the delegates imposed on the president a solemn duty to "take Care that the Laws be faithfully executed" and, as a necessary consequence, stripped him of all pretense to the Stuart Kings' dispensing and suspending prerogatives, which were utterly discordant with the president's duties under the Take CareClause. In fact, according to Lord Mansfield, by 1766 the king's prerogative no longer entailed a suspending or dispensing power:

I have a very simple notion of it, and it is this, that prerogative is that share of the government which, by the constitution, is vested in the king alone.... I can never conceive the prerogative to include a power of any sort to suspend or dispense with laws, for a reason so plain that it cannot be overlooked, unless because it is plain; and that is, that the great branch of the prerogative is the executive power of government, the duty of which is to see the execution of the laws, which can never be done by dispensing or suspending them. (Wilmerding 1952, 335)

If, therefore, the framers had decided to vest in the president legal authority to suspend or dispense with the enforcement of laws, itwould have involved the resurrection of an old prerogative that the English themselves had discarded, a prerogative that swam against thetides of history, which were surging toward republicanism. Given theodious reputation of the dispensing power and the framers' derisive references to monarchical prerogatives, it is beyond belief that the framers would have incorporated an executive prerogative within theirconstitutional scheme. The framers, it is pellucidly clear, granted to the president less, not more, power than that enjoyed by the king of England. What the framers did do, of course, was to erect a barrier against the assumption of the suspending and dispensing powers through the creation of the Take Care Clause. The unusually emphatic phrasing of the clause--the president shall take care that the law be faithfully executed--is uncharacteristically awkward when compared to the crisp, spare prose employed in every other provision of the Constitution, but its dramatic nature and double emphasis on the solemn responsibility imposed on the president, missing, perhaps, only an exclamation point, is explicable when viewed against the backdrop of the monarchical authority to suspend laws, which caused Parliament to fear for its lawmaking power. But if, for some inexplicable reason, the framers had rehabilitated the despised tool of the High Prerogative, itwould be reasonable to assume that someone, somewhere, in one of thestate ratifying conventions in 1787 and 1788 would have said something about it. Of course, nobody did. It is revealing, moreover, that in the years and decades that passed, no early legal treatise or commentary, from the distinguished pens of Wilson, Kent, Story, or Rawle spoke of a prerogative power to violate laws in the context of an emergency.

Finally, let us consider the impact of an executive prerogative power to suspend laws

and to dispense with their enforcement on the congressional power of impeachment. The framers, it will be recalled, determined that a president would be rendered vulnerable to impeachmentfor failure to perform his duty under the Take Care Clause, a criterion invoked against Andrew Johnson and one that resonates across a vista of two centuries of American history (Berger 1973, 263-96). Manifestly, the violation of the Take Care Clause could not constitute an impeachable offense if the executive possessed a dispensing or suspending power, or a general legal authority to violate the law in an emergency. Uncurbed executive power would reduce the rule of law to a mere fiction. The concept of executive prerogative--authority to act indefiance of law to meet an emergency--renders meaningless the concepts of usurpation and abuse. It bears reminder that disregard of the rule of law, which requires executive observance of the limitations imposed by the Constitution, strikes at the very roots of the republic.Justice Hugo Black justly stated that the essential purpose of a written constitution was "to make certain that men in power would be governed by law, not the arbitrary fiat of the man or men in power" (In re Winship 1970, 384, Black, J. dissenting, emphasis added).

The Convention's rejection of a presidential prerogative power to act in the absence of law or in violation of laws to meet an emergency raised a critical question: How did the framers intend to handle emergencies? That was no mean question for a generation that, more thanonce, had faced devastation on the battlefield at the hands of an invading empire. Indeed, the prospect of an invasion informed their decision to permit the suspension of habeas corpus. As Justice Jackson observed in the Steel Seizure Case, with the exception of the "suspension of the privilege of habeas corpus in time of rebellion or invasion, when the public safety may require it, they made no express provision for exercise of extraordinary authority because of a crisis" (1952, 650, emphasis added). Indeed, the framers' response to the problemof emergency lay in the doctrine of retroactive ratification.

Retroactive Ratification

The doctrine of retroactive ratification--retroactive legislative authorization rendering an illegal act legal after the fact--a practice firmly rooted in English law and one with which the framers were familiar, provided a solution to the problem of emergency. Lord Dicey explained the rationale that lay behind the approach: "[t]here are times of tumult or invasion when for the sake of legality itself the rules of law must be broken. The course which the government must then take is clear. The Ministry must break the law and trust for protection to an Act of Indemnity" (Dicey 1885, 339). The mechanism had clearapplication in the United States. If the president perceived an emergency, he might act illegally and seek ratification of his actions from Congress. Ratification would hinge on the question of whether Congress shared the president's perception of emergency. The principal virtue of this method lay in the fact that it left to Congress, the nation's chief lawmaking body, the ultimate authority to determine the existence of an emergency. Of course, it also denied to the president the opportunity to be the judge of his own cause, a principle of fundamental importance in Anglo-American legal history

(Dr. Bonham's Case 1610). Lucius Wilmerding, Jr., drew the measureof the importance of the doctrine to the enterprise of constitutionalism: "[f]or if the President is the judge of the necessity, his power is unlimited; he may apply his discretion to any instance whatever"(Wilmerding 1952, 330). Such power, Justice Jackson observed in the Steel Seizure Case, "either has no beginning and no end," and is impervious to legal restraints. (1952, 653). As we have seen, the

framersbrooked no such assertion of High Prerogative. The Take Care Clause alone was thought sufficient to protect the nation from executive resort to monarchical dispensing and suspending powers. If usurpation oflegislative power--the essence of executive prerogative--continued, an errant president could be brought to heel through the exercise of the impeachment power.

The doctrine of retroactive ratification was likely to temper presidential claims of emergency. Since exoneration by Congress was contingent upon a shared understanding about the existence of an emergency, executives would be slow to risk their fate and fortune without considerable confidence that the legislature would view the president's extralegal act as an indispensable necessity. The principle of retroactive ratification, moreover, incorporates elements of the doctrines of separation of powers and checks and balances. As a consequence, itmaintains a semblance of constitutional government. The doctrine enjoyed broad support among the founders. Indeed, it has been observed that "this doctrine was accepted by every single one of our early statesmen" (Wilmerding 1952, 324).

Whether true or not, there is no evidence of an expression of an alternative approach that asserted executive authority to violate the law (Scigliano 1989, 248). Wilmerding's meticulous research revealed an impressive list of incidents and controversies at the dawn of the republic that reflects the founders' commitment to the practice of legislative immunity. An early assertion of the doctrine of retroactiveratification, as described to the First Congress by Representative Alexander White, a leader in the Virginia Ratifying Convention, occurred in Virginia during the Revolutionary War. Governor Nelson believedit was necessary to exceed his authority for the purpose of issuing warrants and impressing supplies. White noted that Nelson's acts werewidely regarded as illegal, yet necessary. In short, the legislatureagreed that "his country was benefited by this resolute measure," and he was indemnified by the legislature (Annals of Congress 1789, 1: 525). Representative White declared, "This corresponds with the practice under every limited government" (Annals of Congress 1789, 1: 525-26).

The rich historical practice of retroactive ratification was illustrated in two early episodes, one involving Hamilton, and the other, Jefferson. Both took actions that required legislative indemnification. A third episode--the ratification of Abraham Lincoln's extra-constitutional actions in the Civil War--provides additional illumination of the doctrine and its rationale.

In 1793, Hamilton, then serving as secretary of the Treasury, was the subject of a House resolution that charged him with violation of appropriations statutes. Hamilton denied any wrongdoing and he was exonerated by the House. Conspicuous in the debate, however, was agreement by both sides on the importance of legislative indemnification. Representative William Smith of South Carolina, who served as Hamilton's counsel addressed the rationale of retroactive ratification: "Yet it must be admitted that there may be cases of a sufficient urgency to justify a departure from it, and to make it the duty of the legislature to indemnify an officer; as if an adherence would in particular cases, and under particular circumstances, prove ruinous to the public credit, or prevent the taking [of] measures essential to the publicsafety, against invasion or insurrection." But a vote on such a "proposition," according to Smith, would require prior examination of allthe surrounding "circumstances which would warrant any departure" from the law. He concluded: "Let every deviation from law be tested on its own merits or demerits." Supporters of the resolution conceded the need for legislative ratification (Wilmerding 1952, 117-

18).

In 1807, a British warship attacked the American frigate Chesapeake. With Congress in recess, President Jefferson spent unappropriated funds to build gunboats. "To have awaited previous and special sanction by law," he explained to Congress in seeking retroactive approval,"would have lost occasions which might not be retrieved.... I trust that the Legislature, feeling the same anxiety for the safety of our country ... will approve, when done, what they would have seen so important to be done if then assembled" (Richardson 1903, 428). In the debate that preceded congressional sanction of Jefferson's unauthorized expenditures, members duly emphasized the illegal character of his acts, of course, but they focused on the pivotal question underlying every request for ratification, as expressed on the House floor by the prominent Federalist, Representive Samuel W. Dana of Connecticut: "Would you ... had you assembled at this time, with a knowledge of allthe existing circumstances--would you have authorized these expensesto be incurred" (Annals of Congress 1807, 17: 827). But if Congress did not share the president's perception of emergency, or the acts that he performed to meet it--if, indeed, "the Legislature condemns theprocedure," Dana added, then "the officers must bear the loss" (Annals of Congress 1807, 17: 827)

The importance ascribed by the founders to the practice of retroactive ratification, and its rationale, were underscored in Jefferson'scorrespondence. In 1807, when confronted with the Burr conspiracy, Jefferson wrote, "[o]n great occasions every good officer must be ready to risk himself in going beyond the strict line of the law, when the public preservation requires it; his motives will be a justification" (Jefferson to W. C. C. Claiborne, February 3, 1807, in Jefferson 1904, 151). Whether or not Congress would grant immunity would hinge on its perception of the officer's "motives" or the "existing circumstances" that defined the emergency. In 1810, Jefferson provided a moredetailed analysis of the virtue and value of the doctrine, in terms that anticipated and, perhaps, influenced Lincoln's own views on emergency, when he was asked, "Are there not periods when, in free governments, it is necessary for officers in responsible stations to exercise an authority beyond the law?" (Letter from J. B. Colvin to Jefferson, September 14, 1810, quoted in Wilmerding 1952, 120). Jefferson wrote,

A strict observance of the written laws is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger,are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, and property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means. (Letter from Jefferson to J.B. Colvin, September 20, 1810, in Jefferson 1904, 418)

But Jefferson fully understood, as seen in the Chesapeake episode,that the "law of necessity" did not confer upon the executive any authority to violate the Constitution or the laws of the land. Thus, hewas at pains to emphasize that an official who assumes the power to act illegally must seek exoneration from Congress:

The officer who is called to act on this superior ground, does indeed risk himself on the justice of the controlling powers of the Constitution, and his station makes it his duty to incur that risk. But those controlling powers, and his fellow citizens generally, are boundto judge [him] according to the circumstances under which he acted....

The line of discrimination between cases may be difficult; but thegood officer is bound to draw it at his own peril, and throw himselfon the justice of his country and the rectitude of his motives ((Letter from Jefferson to J. B. Colvin, September 20, 1810, in Jefferson 1904, 418).

By virtue of its status as the nation's lawmaking authority, Congress represents, in Jefferson's words, the "controlling power," which possesses the capacity to make legal an action that was illegal at the time it was undertaken. A presidential claim to such authority would eviscerate the concept of legal restraint, for the president would be governed solely by his own compass; in that event, every question of emergency would be a matter of the executive's political interest,discretion and will.

It is perhaps testimony to Lincoln's commitment to constitutional government that while caught in the clutches of America's gravest crisis, he nevertheless refrained from laying claim to a theory of High Prerogative but, in fact, adhered to the practice and tradition of legislative ratification. In the context of defending the Union after the Confederacy attacked Fort Sumter on April 12, 1861, and initiated the Civil War, President Lincoln, it is familiar, assumed powers not granted to the executive by the Constitution. While Congress was in recess, Lincoln issued proclamations calling forth state militias, suspending the writ of habeas corpus, and instituting a blockade on the rebellious states. He also spent public funds without congressional authorization. Arthur Schlesinger, Jr., fairly observed, "No Presidenthad ever undertaken such sweeping action in the absence of congressional authorization. No President had ever challenged Congress with such a massive collection of faits accompli" (Schlesinger 1973, 59). When Congress convened, Lincoln explained that his actions," whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity, trusting then, as now, that Congress would readily ratify them" (Richardson 1903, 3225). After Congress reviewed the circumstances and concluded that Lincoln had acted out of necessity, it passed an act approving, legalizing, and making valid all "the acts, proclamations, and orders of the President ... asif they had been issued and done under the previous express authority and direction of the Congress of the United States" (12 Stat. 326 (1861)).

The courts have upheld the authority of Congress to grant immunityto executive officials who have violated the law in the name of emergency. In 1824, in The Appollon, the Supreme Court for the first timeaddressed the practice of legislative ratification. The Court levieddamages against an executive official for the seizure of a ship and its cargo, despite the fact that he acted on the basis of what he perceived to be an emergency. In an opinion for a unanimous Court, Justice Joseph Story wrote, "It may be fit and proper for the government, in the exercise of the high discretion confided to the executive, forgreat public purposes, to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures which are not found in the text of the laws. Such measures are properly matters of state, and if the responsibility is taken, under justifiable circumstances, the Legislature will doubtless apply a proper indemnity" (366-67).

In 1863, in The Prize Cases, the Supreme Court upheld the blockadeof the southern states that had been ordered by President Lincoln in1861. The Court, in an opinion written by Justice Robert Grier, heldthat the "sudden attack" on Fort Sumter constituted a state of war which provided constitutional justification for the blockade, but if "it were necessary to the technical existence of a war, that it shouldhave a legislative sanction, we find it in almost every act passed at the extraordinary session of the Legislature of 1861.... And finally, in 1861, we find Congress ... in

anticipation of such astute objections, passing an act "approving, legalizing, and making valid all the acts, proclamations, and orders of the President ... as if they hadbeen issued and done under the previous express authority and directions of the Congress of the United States." (670-71).

Conclusion

The founders provided a solution to the problem of emergency. If the president perceives an acute emergency for which there is no legislative provision, he might, by virtue of his high station act illegally and then turn to Congress for ratification of his measures. But there is nothing in either the text or the architecture of the Constitution that suggests or even intimates that the executive possesses a prerogative power to violate the law on behalf of the welfare of the nation. The framers, hardened by invasion and their experience under arbitrary executive fiat, delivered a robust historical and constitutional rebuke to the concept of executive prerogative and its declaration that necessity knows no law. Across the centuries, alternative approaches to the problem of emergency have been suggested and pursued but, invariably, they have exhibited no regard for the rule of law, and they have placed the laws and fate of the nation in the judgment ofa single person. History has long since demonstrated the deficiencies of such systems.

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