THE UNCERTAIN LEGAL FATE OF GUANTANAMO BAY AND IT'S DETAINEES:
HOW THE PRINCIPLE OF INHERENT AUTHORITY HAS SHAPED THE FUTURE
OF FOREIGN POLICY

With each inauguration of a new president, the United States of America demonstrates
to the world the peaceful transfer of political power. The Constitution establishes this transfer
with the inherent notion that the succeeding president, while possibly a political opposite,
will equally “preserve, protect and defend the Constitution of the United States.”¹ In 1787,
the delegates to the Constitutional Convention recognized that the principles and
governmental authority of a political society ought to derive from fundamental law and exist
in a constituted form. This is the simple premise known as constitutionalism.² History shows
that each president may possess their own interpretation of the role of the executive,
often times deeply rooted in their political philosophy. What we learned more clearly on or
the days proceeding September 11, 2001 is that presidents will allow their political view of
the Executive's authority in domestic, but especially foreign policy, to override any
overarching understanding the Bush Administration may have of the Constitution and the
granting of authority contained therein.

Since the beginning of the “War on Terror and particularly with the 2004 case of
Hamdi v. Rumsfeld, the executive branch has been at odds with the judiciary over the exact

¹ U.S. Constitution, Article II, Section 1, Clause 8.
² Herman Belz, A Living Constitution or Fundamental Law? American Constitutionalism in Historical
powers the executive may possess or that simply exist by way of Article II of the Constitution.\(^3\) The question ever more present now before the United States, in both legal and political circles, is whether the new president, Barack Obama, will continue the legal arguments of his predecessor. Or, will he bring an entirely new interpretation of his role as executive who's role it is to “take Care” that the “Laws are faithfully executed.” Adler asks: “Is there authority, drawn from some nook or cranny, for the proposition that in times of emergency or crisis a new set of legal norms may be invoked to replace constitutional principles enshrined as the rule of law?”\(^4\) In other words, does the president, and by extension the entirety of the executive branch, possess an inherent, emergency, or revisory power? From Presidents George W. Bush, to Harry S. Truman, even to Thomas Jefferson, each strongly felt that that although the Constitution does not expressly state the president’s powers with regards to emergency scenarios, to keep with the oath of the office, to “preserve, protect, and defend the Constitution,” which means protecting the American people generally, presidents must have the ability to use discretion when exerting the powers from their Office not expressly granted in the Constitution or specifically delegated by Congress.

In this essay, I wish to explore this notion of revisory or emergency power and its relation to the legal arguments presented by the Bush Administration in the Guantanamo Bay cases. What is the historical basis for such a claim by the president? And, how has the existence of a precedent—in some form—allowed presidents to expand their authority in times of crisis or so-called national emergencies? Further, what does it mean for the current administration as they assume all the legal battles, begun under the Bush Administration and

\(^3\) *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) Held that due process exists for U.S. citizens despite their detention as an enemy combatant. Additionally, the Court ruled that the executive's argument of separation of powers was not enough to bar the judiciary from hearing Hamdi's challenge.

presently being waged throughout the federal court system, including the United States Supreme Court? Despite the possibility of a reduced presence in Iraq and Afghanistan, the U.S. may find itself engaged in other military matters in the future; therefore, what will the future legal and military landscape look like regarding the detention and judicial processing of enemy combatants? President Obama ordered the closure of detention facilities at Guantanamo Bay. The many decisions affecting single detainees, groups of detainees, and legal policies, generally and specifically, will most likely continue the battle between the executive and the judiciary.5

SEPARATION OF POWERS

The Framers of the Constitution took great care in establishing the separation of powers principle. First, they understood that a fundamental principle of a well-ordered government would be one where the power was “separate and distinct” and distributed broadly, but not necessarily evenly.6 Article I of the Constitution is substantially longer and more detailed with regards to the powers the government retains in domestic and foreign matters. Second, they recognized through years of practice, that control over foreign policy issues could not solely reside with the executive, but that “joint participation, consultation, and concurrence” with the other branches would again be necessary to maintain an ordered government.7 A long history of abuse in the foreign affairs arena by unilateral executive authority resulted in the collective decision to create a structure of shared foreign affairs power.8 Inherent within the separation of powers doctrine, according to Kaiser, is a “legislative supremacy.” Relying on Federalist No. 51 where Madison says that the

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7 Adler, George Bush and the Abuse of History, 91.
“legislative authority necessarily predominates,” Kaiser asserts, “[a]llied with the checks-
and-balances notion is the constitutional preeminence of Congress, the first branch of
government.” This general principle, which places the executive in a subservient position to
Congress, becomes important as the motives and actions of the executive branch are weighed
against the Guantanamo Bay situation. The Executive asserted its Commander in Chief
authority when addressing Congress about how it wished to “legally” wage war on terrorism.
Despite the clear separation of powers, two Authorizations for Use of Military Force were
passed with relative ease, as were the Detainee Treatment Act and the Military Commissions
Act.

Conversely, the Constitution expresses various powers strictly held by the executive. Unitary executive theorists argue that these powers, combined with the Take Care clause, create a “hierarchical, unified executive department under the direct control of the President.” The theory further contends that the president “possesses all of the executive power” which allows the office holder to “direct, control, and supervise inferior offices or agencies who seek to exercise discretionary executive power.” However, the unitary executive theory is strictly limited to discretionary executive powers over subordinates; it does not necessarily apply to the broad authorization of power legislated by Congress through statute. As will be examined through legal arguments and court opinions in the Guantanamo cases, the Authorization for Use of Military Force (AUMF) became the constitutional authority for the president to “take action” and “prevent acts of international

10 U.S. Constitution, Article II
11 U.S. Constitution, Article II, Section 3. “… he shall from take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.”
terrorism against the United States” through the Commander in Chief and Take Care Clauses of the Constitution.\textsuperscript{14}

However, before we can begin to analyze the arguments made by the Bush Administration and the rulings of the Supreme Court in the detainee cases, we are first confronted with another constitutional problem with respect to the separation of powers between the executive and the judiciary. The powers, as vested by Articles II and III respectively, have nearly identical language:

The executive Power shall be vested in a President of the United States of America.\textsuperscript{15}

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.\textsuperscript{16}

As Calebresi and Rhodes note, the Vesting Clause of Article I differs from that of the clauses detailed above, by stating, “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.”\textsuperscript{17} The powers vested in the Congress are expressly limited and qualified by the phrase “herein granted;” whereas the powers vested in the executive and judiciary are broad, suggesting that these branches have all the executive power and all the judiciary power, respectively.\textsuperscript{18} Thus, in following with this thought, the passage of the Detainee Treatment Act\textsuperscript{19} and the Military Commissions Act,\textsuperscript{20} which established a military

\begin{itemize}
  \item \textsuperscript{15} U.S. Constitution, Article II, Section 1, Clause 1.
  \item \textsuperscript{16} U.S. Constitution, Article III, Section 1, Clause 1.
  \item \textsuperscript{17} U.S. Constitution, Article I, Section 1, Clause 1 (emphasis added).
  \item \textsuperscript{18} Calebresi, “Structural Constitution,” 1175-76.
  \item \textsuperscript{20} 109\textsuperscript{th} Congress of the United States, H.R. 6166, “Military Commissions Act of 2006,” October 17, 2006.
\end{itemize}
tribunal system under authority of the executive branch, would invariably violate the Vesting Clause of the Article III.

EXECUTIVE EMERGENCY POWER

It is the Vesting Clause that past presidents have argued provides for the existence of an inherent authority, or the ability of the executive to act, or react, to matters of war or foreign affairs. During the early years of the Constitution, the Founding Fathers were well aware of the need to separate matters of foreign affairs from the three branches. However, Alexander Hamilton claimed in *Pacificus No. 1* that the Executive was invested with *all* authority stemming from the Vesting Clause, “subject only to the *exceptions* and *qualifications* which are expressed in the instrument.” The exceptions, Hamilton states, are the approval of Executive appointments, the making of Treaties, and the right of the Legislature “to declare war and grant letters of marque and reprisal.”21 In arguing that President Washington was not violating his Office when he made a Proclamation of Neutrality, Hamilton asserts:

> It may be observed that this Inference would be just if the power of declaring war had not been vested in the Legislature, but that this power naturally includes the right of judging whether the Nation is under obligation to make war or not.

> … [I]t will not follow that the Executive is in any case excluded from a similar right of judgment, in the execution of its own functions.

> If the Legislature have a right to make war on the one hand—it is on the other the duty of the Executive to preserve Peace till war is declared; and in fulfilling that duty, it must necessarily possess a right of judging what is the

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nature of the obligations which the treaties of the Country impose on the
Government; … it becomes both its province and its duty to enforce the laws
incident to that state of the Nation.\footnote{22}

Thus, in the case of President Bush following the passage of the AUMF and the clear lack of
the Legislature to “declare war,” his Administration proceeded to use their “judgment” to
maintain a level of security for the nation and fight the “War on Terror.” Further, the
Administration argued Hamilton's assertion of inherent executive power through the
“commander in chief override.” By way of Hamilton, the Legislature, and definitely not the
judiciary, is not the “Organ of Government” to engage in military matters between the United
States and foreign nations.\footnote{23}

Precedent for the Bush Administration's actions can also be found during the Jefferson
presidency as well. Along the same blurred legal lines of inherent authority resides the idea
of retroactive ratification. Relatively unique to the constitutional structure of the United
States government is the fact that the Executive may, in certain cases, as has been noted, act
independently of the Legislative; however if the Executive acts illegally, the doctrine of
retroactive ratification states that the Legislature may, after the fact, enact a statute making
the once illegal act legal. Thus, never is the once illegal act reprimanded. In 1807, President
Thomas Jefferson was faced to confront the attack by a British warship on the Chesapeake.
Jefferson knowingly acted illegally, however, he felt that to protect the American people his
illegal actions were necessary. Explaining to Congress his actions, Jefferson said, “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.”\footnote{24} A number of

\begin{footnotes}
\item[23] Ibid, 803.
\url{http://www.presidency.ucsb.edu/ws/index.php?pid=29449}.
\end{footnotes}
years later, Jefferson fully qualified his belief that if the Legislature disagreed with his actions, the Executive must accept the consequences of the illegal action. In a letter to John Colvin, Jefferson answers the question of whether there are not occasions when officers in authority are permitted to act contra legem, at least in the case of an emergency:

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, property, and all those who are enjoying them with us.  

However,

[T]he good officer is bound to draw it at his own peril, and throw himself on the justice of his country and the rectitude of his motives.

With President Bush, it was not the Legislature who attempted to right any wrongs committed by his Administration. In fact, it was just the opposite. With the cases of Hamdi v. Rumsfeld and Rasul v. Bush, the United States Supreme Court ruled that the executive authority asserted to define certain individuals as “enemy combatants” and to suspend these individual's habeas corpus rights was a violation of the Constitution and the parameters established by the Authorization for Use of Military Force. Following the rulings of these cases, the Bush Administration sought passage of the Detainee Treatment Act of 2005. This act attempted to establish a proper definition of detainees and a proper procedure for hearing habeas appeals. In 2006, the Supreme Court held that neither an act of Congress—portions of

26 Ibid, 1233.
the Detainee Treatment Act—nor the inherent powers of the Executive as laid out in the
Constitution expressly authorized the sort of military commission at issue in this of *Hamdan*.
Absent the express authorization, “the commission had to comply with the ordinary laws of
the United States and the laws of war.” In response to this decision by the Judiciary, the
Legislature passed and the Executive signed into law the Military Commissions Act of 2006.
In *Boumediene v. Bush*, the Supreme Court once again found fault with the Bush
Administration's attempt to fix the Executive’s unconstitutional actions regarding indefinite
detention of “enemy combatants” and further striping of judicial providence from habeas
petitions of detainees at Guantanamo Bay, which had previously been ruled within the
“sovereign” of the United States. Ultimately, as seen in the succession of detainee cases
during the Bush Administration, presidents, along with Congress, have not taken President
Jefferson’s advice regarding retroactive ratification or a variation thereof.

Indeed, the Supreme Court has spoken with a clear voice regarding executive
authority in the most recent cases involving Guantanamo Bay. However, the Court has been
clear on the fact that “the President lacks authority to act *contra legem*, even in an
emergency,” as far back as 1804. Holding in the case of *Little v. Barreme*, the Supreme
Court said that “[t]he President of the United States cannot control the statute, nor dispense
with its execution, and still less can he authorize a person to do what the law forbids.”
President Bush, nonetheless, continued to maintain—as did President's Jefferson, Lincoln,

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33 Monaghan, 27-28. During the Civil War, President Lincoln was faced with the same problem as Jefferson.
   The nation was forced into an emergency and the Executive had to act in order to save preserve the Union.
   In Lincoln's case, the situation was extensively more dire, thus the passage of the Indemnity Act of 1863, the
   suspension of habeas corpus, and even conscription. The Supreme Court ruled for and against Lincoln's war
time assumptions of authority. In *Ex parte Milligan*, 71 U.S. 2 (1866), the Court ruled that the President
could not disregard a legislative statute demanding the release of prisoners held without access to a habeas
court. Conversely, the Court sided with Lincoln and the Indemnity Act in *Mitchell v. Clark*, 110 U.S. 663
and Truman, just to name a few—the existence of inherent authority or a power present in that of a unitary executive. Relying on precedent of presidential action not Court decision, President Bush asserted this authority in his signing statement to the Detainee Treatment Act.

The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President, evidenced in Title X, of protecting the American people from further terrorist attacks.34

Signing statements are entirely separate exercise of executive power; however, these examples of sweeping emergency power by the past presidents all exist within the context of a wartime situation. To be sure, the Constitution appears to present some means of emergency power, not only for the Executive but for the federal government to exercise as a whole. Largely, the call for the federal government to act in times of emergency is limited to violence against the United States in both foreign and domestic situations. This includes “calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions,” suspending habeas corpus only in cases of “Rebellion or Invasion,” and to protect

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(1884). Here the Court held that “ordinary acts of indemnity passed by all governments when the occasion requires it” are within the bounds of executive authority. Lastly, it should be noted, like Jefferson, Lincoln recognized that the law existed to preserve the nation, yet if the law constricted the nation to preserve itself, the law must be overlooked. Lincoln said: “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.” Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), The American Presidency Project, http://www.presidency.ucsb.edu/ws/index.php?pid=69802&st=&st1=.

each of the states “against domestic Violence.”\textsuperscript{35} The Supreme Court has recognized these limitations on emergency power within the Constitution, holding that “the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence.”\textsuperscript{36}

Monaghan notes that history finds two “objections to any residuum of presidential emergency power,” that being federalism and separation of powers. He finds that federalism is unable to locate any “justification” for a “general emergency power.” However, this notion is “eviscerated” under the current functioning of the federal government. As it were the case through much of the nineteenth-century, and now supported by the Courts, “an emergency does create powers, at least as against any argument resting on the supposedly 'limited' nature of congressional power.”\textsuperscript{37} With respect to Guantanamo Bay, Congress clearly delegated powers necessary for addressing the “War on Terror” to the Executive. Instead declaring war as outlined in Article I, Section 8, Clause 11, it authorized broad use of powers through the AUMF. And, when the Supreme Court ruled that the powers asserted by the Executive were not backed up by Congressional decree, the Legislature enacted the DTA and MCA.

**LEGISLATIVE SUPREMACY AND JUDICIAL RELEVANCY**

Along this same path, Monaghan declares that the “President is not Congress,” therefore, “What 'emergency' powers, then, can the President claim?” And, if the “President cannot lawfully disregard positive law in an emergency, what if no relevant positive law exists?” Past presidents such as Jefferson and Lincoln made it known that if no law exists, no authority exists, but if the preservation of the nation is at stake, the Executive is in the Constitutional position to act within reason to protect and preserve the nation. And rightly,

\textsuperscript{35} U.S. Constitution, Article I, Section 8, Clause 15; Section 9, Clause 2; Article IV, Section 4.
\textsuperscript{36} Ex parte Milligan, 71 U.S. 2 (1866).
\textsuperscript{37} Monaghan, 34.
both presidents acknowledged the necessity for Congress to ratify their actions as legal, even after the fact.

But again, the previous examples all detail wartime assertions of executive authority. Besides the President Jefferson's purchase of the Louisiana Territory, which was never brought to question in the courts, we are left with one standout domestic case of a president exercising inherent executive powers to tackle an emergency. The president was Harry S. Truman in 1952; the emergency was the possible nationwide strike of steel mill workers in the United States. At the time, the U.S. was engaged in military efforts in the Korean War. A shutdown of the steel mills would not only have impeded those efforts, but quite possibly would have “jeopardize[d] … other foreign policy and nation security interests in Europe.” There was no statutory authority for President Truman to seize the steel mills on April 8, 1952; instead he asserted an inherent executive authority to act in a time of national emergency.38

The Youngstown Sheet & Tube Co. filed suit against the government. The lower courts sided with Youngstown, holding the seizure to be invalid and that nothing in the Constitution supported an “undefined” inherent emergency power of the presidency.39 The Supreme Court also ruled in favor of Youngstown, however, Justice Black made sure to cover both the interests with separation of powers, but also Truman's claim of inherent executive power. First, Justice Black found no statutory authorization for the president's actions. Next, he could not agree that the executive maintained authority through the Vesting Clause, the Commander in Chief Clause, nor the Take Care Clause.40 Ultimately, Black's opinion dismissed any possible existence of inherent authority in this case.

38 Adler, 106.
40 Adler, 107-108.
In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.\footnote{Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, (1952)}

Justice Black was plain in his assessment that the power to legislate remained with Congress, and in no way, not even in emergency could the Executive enter into this realm, as it would constitute a “rank usurpation” of power based upon the separation of powers doctrine.\footnote{Adler, 108.}

As though the strong opinion by Black and the 6-3 decision wasn't enough for this to be the last word on the matter of separation of powers and inherent authority, concurring opinions from Justice Frankfurter and Justice Jackson, solidified the idea that inherent authority is a “nebulous” concept and is “never expressly granted but said to have accrued to the office from the customs and claims of preceding administrations.”\footnote{Youngstown, (Jackson, J., concurring). Justice Jackson strengthened his opinion that the Constitution lacks an emergency power in the executive by saying, “emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them.”} Unfortunately, while this assertion diminishes inherent authority, is seems to leave open the possibility that “custom” and precedent may have some relevance to Constitutional authority by either of the three branches or by the federal government entirely. This begs the question, is Justice Jackson proffering a form of common law practice, or does that legal principle only reside with the judiciary? And, are common law practices, or “customs” permitted under a constitutional form of government, especially one with clear separations of power? Nevertheless, there is not meant to be a balance amongst the three branches. As the Court
ruled in *Little v. Barreme*, Congress holds the upper hand. Neither the Commander in Chief Clause nor any executive precedent unchecked by the courts could override the statutory power of the Legislature. Congress, if they so chose, could essentially render the Executive motionless and constrained specifically to the enumerated powers of Article II.

It is the judiciary who's mission it is to guide the constitutional ship of the United States. If we subscribe to Kaiser's notion of “legislative supremacy,” we recognize the hierarchical subservience of the judiciary. However, the Founding Fathers understood that “[e]nlightened statesmen will not always be at the helm,” thus, “[n]o man is allowed to be judge of his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men, are unfit to be both judges and parties, at the same time.” Madison further contended that a government “administered by men over men,” must take great care supplying power to those men. He warned that “experience has taught mankind the necessity of auxiliary precautions.” A separation of powers was understood as this necessity, but to what extent could the judicial branch exercise authority over the other two branches?

The Bush Administration relied heavily on the philosophy of Hamilton with respect to the judiciary. In both the Detainee Treatment Act and the Military Commissions Act, judicial authority was stripped from the federal courts in favor of military tribunals, authorized by the Legislature and administered by the Executive. Hamilton maintained that the judiciary “has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever.” It was Hamilton's estimation, much like Kaiser's, that because the executive retained constitutional supremacy

45 Ibid., 162.
over the judiciary, the will of the executive could effectively dictated much of their action except that of their “mere judgment.”  This is not to say that the judiciary did not have role in Hamilton's estimation. The courts do not make law void, but were “designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to the authority. The interpretation of the laws is the proper and peculiar province of the courts.” It could argued that Hamilton's position on a subservient judiciary was precisely the opinion of the Bush Administration and the complicit Congress when enacting the DTA and MCA into law, despite the Court's previous interpretation of the executive's actions.

A consistent argument by the Bush Administration in the Guantanamo Bay cases has been in accordance with the idea that the federal judiciary does not have the authority to act in cases dealing with national security or matters foreign policy. But clearly, Article III, Section 2 of the Constitution extends authority to the judiciary in matters of foreign policy.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies … between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

This argument that the federal courts are not fit, or do not have the authority to hear the detainee cases because of national security or foreign policy concerns has been continued in

48 Ibid., 423.
50 U.S. Constitution, Article III, Section 2.
numerous cases originally briefed by Bush Administration and now argued by the Obama Administration.\textsuperscript{51} Much of what the Bush Administration has relied upon for legal analysis regarding these cases has come from former White House counsel John Yoo. Yoo has written extensively on congressional war powers, however, as Adler states, Justice Marshal in \textit{Marbury v. Madison} “drew no distinction between foreign and domestic powers. [M]oreover, \textit{Chief Justice} Marshall wrote opinions for the Court discoursing on the scope of congressional war powers. John Marshall, not John Yoo, is a better authority on matters of constitutional interpretation and judicial power, all the more so because he was a \textit{Ratifier}.”\textsuperscript{52} Nonetheless, as the detainee cases grew, the argument from the government remains relative the same, but as the Obama Administration is finding out—see the latest decisions in \textit{Maqaleh} and \textit{Jeppesen}—that argument is no longer winning in federal courts.

**CONCLUSION**

The United States Constitution was meant to be a constraint upon the powers of government; however, the men and women who have assumed the positions in the relative branches have continuously sought means to escape those constraints. Specifically, the Executive branch has asserted that the Vesting Clause supplies possession of \textit{all} powers under the executive. It is this inherent authority that is claimed, which lends argument to the supposed authority to exercise executive power in times of emergency. A primary issue however, is who determines what is and is not an emergency. If that determination lies solely with the executive then we must have a usurpation of the separation of powers doctrine.

It is the excursion into foreign affairs that presents considerable concern for constitutionalists, but ultimately for the courts—despite the contention of Hamilton.\textsuperscript{53} Chief


\textsuperscript{52} Adler, 137.

\textsuperscript{53} Alexander Hamilton, “The Federalist No. 78,” 421.
Justice Marshall in *Marbury v. Madison* made numerous distinctions, none more important than that of the Founders clear intention to “subordinate foreign policy to constitutional measures and principles”\(^{54}\) and that the Constitution was established to exert limitations on power, with those limitations not, “at any time, be passed by those intended to be restrained.”\(^{55}\) Justice Patterson in *United States v. Smith*, followed Chief Justice Marshall's lead on the principle of inherent authority and constitutional limitations: “[T]he law is paramount. Who has dominion over it? None but the legislature; and even they are not without their limitations in our republic.”\(^{56}\)

The judiciary has steadfastly exercised its authority in matters of foreign policy, much to the consternation of the Bush Administration. Conversely, the judiciary has expressed concern over the far-reaching executive authority, which has manifested itself in many variations over the years. The Bush Administration's suspension of habeas corpus to “enemy combatants” all around the globe has raised caution flags throughout the federal judicial system—as they have had their jurisdiction stripped from them by the Detainee Treatment Act and the Military Commissions Act. It is argued that the notable difference in language used for the vesting power of the Executive and of the Judiciary allows for a unitary executive.\(^{57}\) Further, the contention is that the Constitution does not “apply to the four corners of the earth.”\(^{58}\) This argument has failed with the Courts due to the considerable presence and unquestionable control over U.S. military installations in foreign lands.

What appears to be taking shape in the courts with respect to the detainee cases is a

\(^{54}\) Adler, 139.


\(^{56}\) *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.N.Y. 1806) (No. 16,342).

\(^{57}\) Calebresi, 1182-1183.

\(^{58}\) Maqaleh et al., v. Gates et al., D.D.C. 06-1669 (2009). “The Suspension Clause only applies where the United States has the degree of control over a site that would permit meaningful review of an individual's detention following a 'reasonable amount of time'.”
return to the questions of inherent and emergency authority and foreign affairs matters once heard and previously decided by the Supreme Court in numerous opinions. It will be extremely difficult for a new administration, even with political differences, to accept a reduction in executive power. No president in this age of uncertainty and constant war wants to be left without the devices of a previous Executive. Can the extended powers of the presidency be rolled back without risking the security of the Nation? From the person in power, it would appear that the answer is no, but the Founding Fathers provided extensive insight through the *Federalist Papers* on the merits of a constrained government and would mostly like reply—as the courts have done so repeatedly—yes, these powers can be returned to their original position, as the original document is virtually unchanged.