

ABSTRACT

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CONSTITUTIONAL BASIS OF THE
EXECUTIVE WAR POWER

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Traditional approaches to questions of executive war power emphasize presidential-congressional relations, and focus on the meaning and implications of specific constitutional clauses. This dissertation offers an alternative approach by examining executive war power through the higher, more normative purposes to which the Constitution aims. It views executive war power from the perspective of Constitution's basic but essential goal of self-preservation, and argues that the Presidency has a special duty to preserve, protect, and defend the Constitution. Presidential power, therefore, should be viewed in light of its duties to preserving the constitutional order. Presidential power, however, should not be viewed as "anything goes" for, true to republican principles, the people ultimately are sovereign and have multiple constitutional means by which to hold their leaders accountable. The dissertation focuses its analysis on the Constitution's text, examining Publius and other writings of the Founding era, to help uncover the explicit purpose and implicit

principles for understanding the Constitution. Understanding “to what end” the Constitution provides the lens through which we should view the actions of its institutions and officers. The dissertation then offers an interpretative analysis of President Washington’s words and deeds during the Whiskey Rebellion, demonstrating that his construction of the executive war power offers an important contribution to U.S. constitutionalism. It also focuses on Lincoln’s construction of the executive war power during the Civil War, arguing that although Lincoln exercised extraordinary power in meeting the necessity of the situation, he did so while remaining true to both the spirit and the letter of the Constitution. This counters conventional opinions that Lincoln’s conduct was un- or extraconstitutional, or that he had to act outside of the Constitution in order to save it. The dissertation suggests that the constitutionalism and statesmanship of Washington and Lincoln offer much perspective for understanding issues surrounding the executive war power today.

IN TREPIDIS REBUS: THE CONSTITUTIONAL BASIS OF
THE EXECUTIVE WAR POWER

By

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Preface

“What chiefly attracts and chiefly benefits students of history is just this—the study of causes and the consequent power of choosing what is best in each case. Now the chief cause of success or the reverse in all matters is the form of the state’s constitution; for springing from this, as from a fountain-head, all designs and plans of action not only originate, but reach their consummation.”

Polybius, *The Histories*, Book VI, I.2.8-10

Dedication

In memory of my grandfather, Ralph Francis Winebrenner, 1916-2002.

And to my boys, Alex and Aiden.

Acknowledgements

When one works on something for so long, one naturally incurs a number of debts. To everyone who, over the years, offered advice and encouragement—and you are too many to name—please know that you in some way contributed to the writing of this dissertation. Specifically, I thank Professors Irwin Morris, Steve Elkin, George Quester, and Bill Galston for serving on my dissertation committee, and for offering me helpful suggestions and advice. I especially thank Herman Belz for his mentorship and friendship over the years. He is an outstanding scholar of the American Constitution and his work inspired me throughout the writing of this dissertation. He has given me wise advice and counsel, and I look forward to our continued friendship. I also give special thanks to my teacher and advisor, Charles Butterworth. His encouragement, and occasional reminders to me to finish my dissertation, proved indispensable. His careful reading of each chapter along the way was beyond generous, and in the end, made this dissertation a much better product than I could have written on my own. I honestly can say I may not have finished were it not for his efforts. I also must thank Mr. Butterworth for his years of friendship and mentorship; he has led me to realize what a liberal education truly entails, and has helped put me on a path to a lifetime of careful study and liberal learning. Whether I follow through is up to me but I could not ask for a better guide in that pursuit than Mr. Butterworth.

I also thank my dear friend Rene Paddags, who graciously gave his time to read each chapter for me. He is a true friend and colleague in every sense of the word, and I look forward to continuing our discussions. I also thank my old buddy

Steve Dinauer, who reminded me often of the need to finish; his words of encouragement proved critical at times when I questioned whether I would really do it. I also must thank Steve's better half, Leslie, who also took the time to provide me with advice and read over some portions of the dissertation. Although he had nothing to do with the writing of this dissertation, except occasionally shaming me to finish, I thank Mike Vickers for his years of friendship and mentorship. His service to our nation has inspired me in many ways, and I look forward to continuing to work with him.

I also thank my parents, who for the past several years have asked me every week about the status of my dissertation. More importantly, you taught me (mostly by example) from a young age the virtues of working hard and doing things to the best of my ability. I thank you for that, and I can now say to you: "I'm done." As with all matters in life, this dissertation's dedication also has a twist of irony. To my boys, Alex and Aiden, who kept me away from writing my dissertation on many occasions, I dedicate it to you. Although I do not expect you to read this dissertation, I do hope you will take from it that if you put your mind to something, you can carry it through completion as well. Never give up, however tempting it may be. I love you both dearly and regret that I could not have been with you more over the past few years. Finally, to my wife Treva, who has been with me every step of the way, I could not have completed this dissertation (or anything else for that matter), were it not for your unconditional love and support. I would have dedicated the dissertation to you, however, it does not even begin to pay the debt I owe you.

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Chapter I: Introduction

After explaining to a friend the Constitution's Office of the Presidency, Alexander Hamilton predicted: "You nor I, my friend, may not live to see the day, but most assuredly it will come, when every vital interest of the state will be merged in the all-absorbing question of *who shall be the next President?*"¹ Hamilton's prophetic observation underscores the significant constitutional role that the Presidency would play in the success of the American experiment in self-government. The Presidency represents an innovation in government, reflecting the Framers' explicit intention to reconcile the need for a strong and energetic executive to meet the manifold challenges to the nation's security with a republican form of government. Hamilton saw the Presidency as the centerpiece of the new Constitution, reinforcing the national government with the requisite energy for self-defense in a potentially dangerous, war-prone world but also containing the appropriate safeguards to maintain its republican character.

Although the question of who will be elected President has become all-absorbing, it is not for the constitutional reasons Hamilton envisioned. The Presidency today is viewed as a powerful and important institution to be sure, particularly in matters of war and foreign affairs, but not because of any constitutionally assigned role. Neither supporters nor critics of presidential power base their opinions in a firm understanding of the Constitution. The Presidency has

¹ According to Governor Lewis, as reported in John C. Hamilton, *History of the Republic of the United States: As Traced in the Writings of Alexander Hamilton and of his Contemporaries* (New York: D. Appleton & Co., 1859), Vol: III, 346-347. *Author's Emphasis.*

become commonly characterized as a *modern* institution that sometime during the 20th century threw off its constitutional chains to more ably meet the increasingly complex challenges of American society.² Others, less sanguine about the perceived increase in presidential power, particularly vis-à-vis Congress over matters pertaining to war and military hostilities, consider it an *imperial* institution that usurps power and undermines American democracy.³ To scholars in the imperial presidency tradition, the Presidency is more of a threat to the United States than its adversaries. Regardless of which approach one accepts, the Presidency has become detached from its constitutional roots, and we are left today without a fixed standard of judgment for

² The modern presidency thesis emerges most clearly from the work of Fred Greenstein who argues that the Presidency underwent a “metamorphosis” with the election of Franklin Roosevelt. Accordingly, the Presidency was transformed from a “traditional” office, weak and constitutionally restrained to performing mere clerkship-like functions, into a powerful institution, unfettered from its constitutional shackles, at the pinnacle of American political society. See Fred Greenstein (ed.), *Leadership in the Modern Presidency* (Cambridge, MA: Harvard University Press, 1988), and Fred I. Greenstein, Larry Berman, and Alvin Felzenberg, *Evolution of the Modern Presidency: A Bibliographical Survey* (Washington, D.C.: American Enterprise Institute, 1977). Also see James P. Pfiffner, *The Modern Presidency*, 2nd edition (New York: St. Martin’s Press, 1998). This thesis also has been heavily influenced by the work of Richard Neustadt who introduced the behaviorist approach to the study of the Presidency. Neustadt argued that the Presidency could not be understood by any formal powers conferred upon the office by the Constitution; rather it was best understood by the specific behavior of the individuals who occupied it. The informal powers of the individuals, their bargaining capacity, their leverage, and their persuasion abilities meant more to the Presidency than any “literary theory of the Constitution.” Richard E. Neustadt, *Presidential Power: The Politics of Leadership* (New York: John Wiley and Sons, Inc., 1960). Reflecting Neustadt’s support for the modern presidency thesis, the most recent edition of his book has been renamed is *Presidential Power and the Modern Presidents: The Politics of Leadership From Roosevelt to Reagan* (New York: The Free Press, 1990). For the enduring influence of Neustadt’s work see Michael Nelson, “Neustadt’s ‘Presidential Power’ at 50,” *The Chronicle Review*, March 28, 2010.

³ Arthur Schlesinger Jr. is the founder of the imperial presidency thesis. His work *The Imperial Presidency* was first published in 1973 in the milieu of Vietnam and Watergate. He updated it in 2004 with a new introduction critical of the Bush Administration’s response to the September 11, 2001 attacks and the war in Iraq. See Arthur Schlesinger, Jr., *The Imperial Presidency with a new introduction* (New York: Houghton Mifflin Company, 2004).

understanding and holding accountable the President's exercise of power in times of war and emergency.

Purpose and Research Question(s)

This dissertation seeks to reunite the Presidency with the Constitution, and come to terms with the underlying constitutional logic of Hamilton's prophesy and what he saw in that framing document to make such a bold prediction. The question of who is President should be all absorbing because that office has the principal constitutional responsibility for handling the most vital interest of the state: the preservation, protection, and defense of the constitutional order. The central research question of this dissertation is: What role does the Constitution assign the Presidency in times of war and danger? Answering that question requires returning to first principles to ask: what are the ends of the Constitution and to what higher, more normative purpose(s) does it aim? After addressing these fundamental questions, the dissertation then asks: What role does the Presidency serve in achieving the Constitution's overarching purpose? And what constitutional means does the Presidency possess to achieve the Constitution's ends?

This dissertation stems from a desire to use the Constitution as a guide to understand the extent and scope of the President's power in times of war and emergency. It also reflects a deeper interest in the ambivalent attitudes toward executive power, particularly within republican regimes.⁴ Since the power necessary

⁴ Harvey C. Mansfield, Jr. famously highlighted the ambivalence of modern executive power. His *Taming the Prince* provides a most thorough and penetrating analysis of executive power in the history of political philosophy. See Harvey C. Mansfield, Jr., *Taming the Prince: The*

to defend the nation in times of war can also be abused, executive power is viewed, at once, as the promising savior and the potential destroyer of republican government. Put differently, it can be the means for preserving a free government as well as the cause for its demise. Wartime, not surprisingly, tends to heighten the tension within the debate over the exercise of executive power, and the early part of the 21st century has proven no differently. Since the September 11, 2001 attacks on the United States, the Presidency has been at the forefront of America's response to those attacks and efforts to prevent others. The Presidency, not surprisingly, also has emerged at the forefront of scholarly debates over the Constitution in wartime. Over the past decade, views of an imperial Presidency run amok have become increasingly popular among scholars, and the President's power is viewed to be just as, if not more, threatening to America as those enemies that seek to attack it.⁵

It is no exaggeration to suggest that the prism through which Presidential power in wartime is viewed today remains the imperial presidency thesis emanating from the Vietnam War and Watergate scandals.⁶ The exercise of presidential power is viewed with suspicion, and imperial presidency scholars discuss the Presidency

Ambivalence of Modern Executive Power (Baltimore, MD: The Johns Hopkins University Press, 1993).

⁵ See, for example, Arthur Schlesinger, Jr.'s new introduction to his *The Imperial Presidency*. Also see his *War and the American Presidency with a new chapter* (New York: W.W. Norton and Company, 2005) in which he speaks of the "Imperial Presidency Redux" in the post-9/11 world. Other works to emerge after 2001 in the imperial presidency genre that view the Presidency as a potential threat to the United States include: Peter Irons, *War Powers: How the Imperial Presidency Hijacked the Constitution* (New York: Metropolitan Books, Henry Holt & Co., 2005). Also see Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (New York: W.W. Norton & Co., 2007).

⁶ In addition to Arthur Schlesinger Jr.'s work, cited above, former Nixon White House Counsel John Dean epitomizes the use of the Vietnam/Watergate prism by writing *Worse than Watergate: The Secret Presidency of George W. Bush* (New York: Little, Brown and Co., 2004).

primarily through its relationship with Congress, and not the Constitution.⁷ They have too narrowly construed issues of “war power” as conflicts over the power to “declare war” neglecting the broader powers and duties the Constitution assigns the Presidency to “preserve, protect, and defend” the constitutional order. This dissertation challenges such narrow opinions, arguing that we need a constitutional perspective of the Presidency; the dissertation offers it by returning to questions of first principles to understand the constitutional basis of the executive war power. In doing so, it presents an alternative perspective of the Presidency and its wartime role, one rooted in the Constitution that proves as relevant in the 21st century as it did when the Constitution was established and ordained by popular consent in 1789.

Summary of Findings and Overview of the Study

In exploring the central research questions, this dissertation finds a radical and potentially dangerous interpretative principle: the Constitution must be read through the lens of self-preservation; it contains all necessary powers for its survival; and it entrusts in the Presidency the primary (but not exclusive) responsibility to ensure its safety. That the extent and scope of the threats to the constitutional order cannot be predicted with any precision, the power necessary to meet them must be understood

⁷ It should be noted that the critique of presidential power is not simply a product of those of a liberal persuasion as conservatives have long held suspicions of a powerful president. For example, William Rusher, the former publisher of the conservative magazine the *National Review*, wrote after Watergate that “a presidency whose steadily growing power has for forty years been the most serious danger facing the American society.” He would also criticize that liberals “have not been overly generous about admitting that conservatives recognized and resisted that menace for decades before they did.” Quoted in Jack Goldsmith, “The Accountable Presidency,” *The New Republic*, February 1, 2010 published on <http://www.tnr.com>. Goldsmith provides a short but excellent overview of how political views of presidential power have evolved and shifted over the last several decades.

to exist potentially *without limit*. This understanding challenges conventional notions that the Constitution seeks to limit government power, instead suggesting that it provides the principal ends and purposes toward which that power should be exercised. That such power may be dangerous does not mean that it does not exist.⁸ This dissertation, moreover, refutes arguments that the Constitution leaves executive power “ambiguous” and “underdefined”⁹ positing that the Constitution explicitly vests the executive power in the Presidency and defines the higher, more normative purposes toward which the President must employ that power. Similarly, it also rejects scholarly opinion that the Constitution is an unfinished product with significant lacunae, or that it is a “cryptic text” requiring us to decipher it with other constitutional concepts and principles such as international legal norms.¹⁰ As such, it disagrees with the oft-cited opinion of Supreme Court Justice Robert Jackson in *Youngstown Sheet and Tube Co. v. Sawyer*, in which he commented that:

A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result, but only supplies more or less apt quotations from respected sources on each side of any

⁸ Michael Stokes Paulsen “The Constitution of Necessity,” *Notre Dame Law Review*, Vol 79 (2004), 1257.

⁹ See, for example, Richard Pious, “Inherent War and Executive Powers and Prerogative Politics,” *Presidential Studies Quarterly*, Volume 37, Number 1 (March 2007).

¹⁰ See, for example, Harold Hongju Koh, *The National Security Constitution: Sharing Power After the Iran-Contra Affair* (New Haven, CT: Yale University Press, 1990) and Louis Henkin, *Foreign Affairs and the US Constitution*, 2nd ed., (New York: Oxford University Press, 1996).

question. They largely cancel each other. And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.¹¹

This dissertation affirms that the Constitution itself provides the best means for understanding, *inter alia*, the President's powers and responsibilities in times of war and danger. The dissertation then offers two case studies of Presidents, who in the most profound crises, were forced to come to grips with the constitutional basis of the powers of the office to which they were elected. Therefore, this dissertation looks beyond the partisan debate and scholarly speculation to the Founding itself and to periods of crises, and to the statesman who led during those times, to answer the fundamental questions of the executive war power.

Though the Constitution contains all requisite powers for its self-preservation and the President is duty-bound to “preserve, protect, and defend” it, the President's power should not be understood as “anything goes.” The corollary interpretative principle, this dissertation puts forth, is that the Framers attempted to mitigate the potential dangers of the executive by explicitly *republicanizing* it to ensure the Presidency maintains a “due dependence” on the sovereign people, who have multiple constitutional means to hold it accountable.¹² The people must remain the ultimate judge of the President's exercise of power. Every ingredient of the Presidency—from its eligibility requirements, unitary form, mode of election, term of office, and its grounds and procedures for removal—received the Framers most careful attention to

¹¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

¹² Mansfield eloquently captures the relationship between the exercise executive power and accountability in republican government when he writes, “The executive is limited only by the end for which it is entrusted by the people, which is the public good as they interpret it.” Mansfield, *Taming the Prince*, 258.

ensure that the Constitution combines in the Presidency the energy and strength necessary for the effective and energetic execution of its solemn duties with adequate republican safety measures.

Grounding the study of presidential war power in the Constitution, and exploring how it was understood and employed by two Presidents at critical junctures, this dissertation makes several significant contributions to the scholarly study of the Presidency. First, it rejects predominant notions that the “pre-modern” or “traditional” Presidency was an office with limited powers, hamstrung by the Constitution and needing to be unchained from it in order to meet the challenges of the 20th century.¹³ Instead, this dissertation argues that the Presidency, from its inception and as understood by Washington and Lincoln, occupies a special constitutional position with significant powers and responsibilities to achieve the principal ends of the U.S. political order. Second, this dissertation counters prevalent scholarly views that the Presidency, in extreme circumstances such as war, must resort to powers outside the realm of the Constitution or even against it to ensure the nation’s survival.¹⁴ This dissertation argues that the Constitution incorporates

¹³ See Fred I. Greenstein, “Change and Continuity in the Modern Presidency,” in *The New American Political System*, ed. Anthony King (Washington, D.C.: American Enterprise Institute Press, 1978), 45-48 and Pfiffner, *The Modern Presidency*, 1-3. However, the most deliberate effort to detach the Presidency from the Constitution came much earlier in the writings of Woodrow Wilson and other progressives who found the Constitution as institutionally weakening and hamstringing the Presidency. Of the President's constitutional duties and powers, Wilson wrote, “It is through no fault or neglect of his that the duties apparently assigned to him by the Constitution have come to be his less conspicuous, less important duties, and that duties apparently not assigned to him at all chiefly occupy his time and energy.” See Woodrow Wilson, *Constitutional Government in the United States* (New York: Columbia University Press, 1908), 67.

¹⁴ The principal basis for discussions of the executive conducting necessary extra- or un-constitutional measures originates with John Locke’s discussion of prerogative, which he characterizes in one chapter as “This power to act according to discretion, for the public

necessity into its framework, and that all powers exercised in defense of the nation are to be understood as constitutionally justified. Third, by focusing on the President's duty to the Constitution and his accountability to the people, this dissertation argues that the Presidency ought to be understood according to its constitutionally assigned duties and responsibilities, not exclusively from its relationship with Congress. The debate over "war powers" today has been narrowly construed, centering primarily on the President-Congress disputes over initiation of military hostilities¹⁵—obscuring the more appropriate lens of viewing the President's duty to the preservation of the constitutional order.

Furthermore, by examining the Constitution as an overarching and enduring framework of government that provides the purposes and ends to which power should be exercised, this dissertation offers a broader, more fundamental basis for understanding the President's wartime duties and powers. As such, it can be distinguished from those studies that examine the President's power in light of one

good, without the prescription of the law, and sometimes even against it..." See John Locke, *Two Treatises of Government*, (ed.) Peter Laslett (New York: Cambridge University Press, 1988), 375. Chapter II discusses the concept of prerogative as it compares to the understanding of constitutional self-preservation. Chapter IV of this dissertation focuses specifically on the applicability of Locke's prerogative to understanding Lincoln's construction of the executive power during the Civil War, which has broader implications for understanding that power more generally. For more on the concept on prerogative in the United States specifically, see Daniel P. Franklin, *Extraordinary Measures: The Exercise of Extraordinary Powers in the United States* (Pittsburgh, PA: University of Pittsburgh Press, 1991).

¹⁵ Edward Corwin's famous suggestion that the Constitution is an "invitation to struggle" to President and Congress over the "privilege of directing" foreign affairs has significantly influenced scholarly debate over the meaning of the "war power," which tend to be viewed as a subset of foreign policy. Edward S. Corwin, *The President, Office and Powers: History and Analysis of Practice and Opinion* (New York: New York University Press, 1940). See Louis Fisher, *Presidential War Power*, 2nd ed. (Lawrence, KS: University of Kansas Press, 2004), who critiques a perceived growth in Presidential powers over war, but focuses the meaning on the deployment of military forces abroad.

particular clause or “enumerated power” within the Constitution, which offer too narrow a conception of the President’s power and fail to recognize that the Constitution duty-binds whomever occupies the Office of the Presidency to ensure its preservation, protection, and defense. Article II’s Commander-in-Chief Clause perhaps best exemplifies the narrow focus on one specific clause as the basis for understanding the executive war power, for scholars often reference it as the primary source of the executive war power.¹⁶

David Luban, for example, offers an excellent overview of the history and basis of that clause, specifically its role in ensuring civilian control of the military. Luban, moreover, argues that the Commander-in-Chief clause only tells us that the President has that authority but “tells us nothing about what the commander-in-chief power encompasses.”¹⁷ Yet, as this dissertation shows, Luban’s argument, for all its insights, addresses the issue too narrowly when it comes to understanding the basis for the executive war power, which can be more appropriately found in the broader presidential responsibilities to ensure the safety and survival of the constitutional order. The Commander-in-Chief clause authorizes the President as the supreme commander of the armed forces but it represents only a slice of the power—albeit an important one—that the President can exercise to meet his (or her) constitutional duties. Luban, thus, misses that the President’s exercise of wartime power is rooted

¹⁶ See, for example, David J. Barron and Martin S. Lederman “The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding” *Harvard Law Review* 121:3 (January 2008); David J. Barron and Martin S. Lederman “The Commander in Chief at the Lowest Ebb—A Constitutional History,” *Harvard Law Review* 121:4 (February 2008); and David Luban, “On the Commander-in-Chief Power” *Georgetown Law Faculty Working Papers* Paper 40. http://scholarship.law.georgetown.edu/fwps_papers/40

¹⁷ Luban, 7.

more in its obligations to the Constitution, and the higher, more normative purposes to which it aims, rather than a particular clause describing a specific function of the office. Luban focuses on the President's accountability to the Congress and Judiciary, relationship that merit observation, but in doing so does not acknowledge, as this dissertation emphasizes, the Presidency's more fundamental accountability to the sovereign people.

To answer the research questions and elaborate upon the interpretive principles outlined above, Chapter II of this dissertation offers an in-depth analysis of the overarching purpose and meaning of the Constitution, relying primarily on the text itself as well as *The Federalist* of Publius. Written during the period of ratification in 1787-1788, *The Federalist* helped explain the meaning of the Constitution to the people who ordained and established it, and proves just as useful in helping to uncover the meaning of the Constitution today as it did then. It tries to understand the Constitution as those who framed it did. Chapter II explores the constitutional text, focusing on its Preamble as a way to unlock the Constitution's fundamental purpose to furnish an overarching frame of government that provides for the safety of its citizens so that they may enjoy their natural liberties, as articulated in the Declaration of Independence. Grounded in natural law reasoning of modern political philosophers, namely Thomas Hobbes and John Locke, this essential understanding of the Constitution shows that it must be read through a lens of self-preservation and that the long-term survival of the political order serves as the principal objective to which all measures must first aim and be understood. This understanding does not, as many commentators do, juxtapose security with liberty,

suggesting that they are competing interests to be balanced.¹⁸ Instead, it supports the underlying premise that a secure political order, fully equipped to defend itself against internal and external threats, provides the best means for individuals to attain their natural liberties. That the Constitution was explicitly designed to be an enduring framework of government to serve future generations, any and all measures taken in defense of the political order thereby should be considered legitimate and sanctioned by the Constitution itself.

Chapter II also focuses on the meaning and implications of Article II of the Constitution, which vests the President with the executive power, or all of the necessary means to execute the purpose of the laws and the Constitution. Measures that the President takes to achieve these ends ought to be understood as legitimate and Constitutional. The Constitution requires the President to take a special oath to “preserve, protect, and defend” the Constitution before the execution of the Office. This Oath is unique to the President, and provides the aims toward which the President’s executive powers are to be exercised. Chapter II employs Publius’s explanation of the Constitution to show that the key ingredients of the executive power are energy, responsibility, and safety, and explores the importance of each of these concepts that, when blended, form the basis for understanding the President’s power in times of war.

¹⁸ Richard A. Posner *Not a Suicide Pact: The Constitution in Time of National Emergency* (Oxford University Press: New York, 2006). Michael Howard succinctly captures this historical problem writing, “The dialectic between freedom and security lies at the basis of all political society.” See his introduction to Michael Howard (ed.), *Soldiers and Governments: Nine Studies in Civil-Military Relations* (Bloomington, IN: Indiana University Press, 1959), 24.

Using Chapter II's analysis of the Constitution as the backdrop, the dissertation then examines the constitutional thought of Presidents Washington and Lincoln, specifically how they constructed the executive war power. These chapters explore the writings of Washington and Lincoln as buttresses of the interpretive principle of constitutional self-preservation and demonstrate that the necessity of the circumstances determines the extent to which power can be employed. Similarly, these chapters examine how each President viewed the responsibilities articulated in Article II of the Constitution, and how each saw the Presidency as republican institution fully accountable to the people. Chapter III focuses specifically on Washington's words and deeds during the Whiskey Rebellion, a crisis that threatened the existence of the new political order just a half decade after its founding. Focusing on Washington during the Whiskey Rebellion enables us to discern how the first president—who played a, if not *the*, primary role in each stage of the nation's founding—understood the Constitution and translated it into practice in a time of threat to the political order. Washington, in many ways, helped “complete” the Constitution¹⁹ by putting the framework of government into effect and showing the people to whom it belongs that it could adequately provide for their safety. However, by concluding that Washington made substantive contributions to U.S.

¹⁹ In his introductory essay to the Pacificus-Helvidius Debates of 1793-1794, Morton Frisch argues that Hamilton and Madison's writings helped “complete” the Constitution. I take his suggestion a step further to contend that Washington, himself, through his words and deeds helped complete the Constitution by translating into practice the intent of the Constitution. See Morton Frisch, “The Significance of the Pacificus-Helvidius Debates: Toward the Completion of the American Founding” in *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).

constitutionalism, and that we have much to learn from his construction of the executive war power, cuts against the scholarly grain that holds Washington as more of a mythical symbol of national unity than a forceful constitutional theorist. Chapter III, therefore, serves to correct the reputation of Washington's constitutionalism, or lack thereof, by analyzing his contribution to our understanding of the President's duty and power in times of war.

Chapter IV focuses on Lincoln's words and deeds during the Civil War. This chapter demonstrates that Lincoln read from the same constitutional script as Washington and Publius as he relied upon the text and logic of the Constitution to construct the executive power during the most calamitous event in U.S. history. Consistent with the findings of Chapters II and III, Lincoln held self-preservation as the fundamental principle by which to understand the Constitution. He similarly viewed the President as constitutionally duty-bound to take all necessary measures to preserve, protect, and defend the constitutional order; measures in pursuit of those overarching aims, Lincoln showed, were sanctioned by the Constitution itself. Whereas Washington's understanding of the constitutional basis of executive war power has been relatively neglected, Lincoln's remains central to the current scholarly debate over presidential war powers. Yet, as Chapter IV shows, scholarly views of Lincoln are diverse, with some extreme critical views holding him as tyrant who destroyed the Founders' Constitution while others more sanguinely view his exercise of executive power as *un-* or *extra-*constitutional but nonetheless necessary. In either case, scholars caution against learning any lessons from Lincoln either because he was a tyrant who put the U.S. on a path to ruin or as a savior too unique to

offer anything useful for understanding the Presidency. This dissertation counters such notions, illuminating Lincoln's profound understanding of the constitutional basis of the executive war power, and suggesting that he, above all others, can offer us much perspective in our own time.

Taken together, these three chapters offer insight into constitutional basis of the executive war power and how two Presidents constructed and employed it during crucial times. It offers much perspective and provides constitutional lessons for our own time. Yet this dissertation also hopes to shed light on the broader subject of statesmanship— particularly whether it can exist constitutionally within the United States.²⁰ Thomas Pangle captures the difficulties that American Presidents have becoming statesman, writing, “We are forever demanding, on the one hand, that the president be a leader, with the sort of stature and dynamism of Pericles of Athens; and then, on the other hand, demanding that the president and his men remain strictly within the bounds of the rule of law established by the legislative branch in its ultimate supremacy.”²¹ Pangle illuminates the fundamental tension between excellent leadership in extraordinary times and the rule of law of the legislature but it unfortunately obscures the President's independent duty to the Constitution, which this dissertation argues affords the executive the opportunity to excel and act with the

²⁰ Herbert Storing challenges the increasingly popular notion that “Statesmanship is almost un-American” in his “American Statesmanship: Old and New” in *Toward a More Perfect Union: Writings of Herbert Storing*, (ed.) Joseph M. Bessette (Washington, D.C.: American Enterprise Institute Press, 1995), 403. For a broader discussion of the challenges to and criticism of democratic statesmanship, see Richard S. Ruderman, “Democracy and the Problem of Statesmanship,” *The Review of Politics*, Vol. 59, No. 4 (Autumn, 1997), pp. 759-787

²¹ Thomas L. Pangle, “Executive Energy and Popular Spirit in Lockean Constitutionalism,” *Presidential Studies Quarterly*, (Spring 1987), Vol. 17, No. 2, 256.

stature and dynamism of Pericles while remaining wholly within the boundaries of constitutional rule of law. It is in the realm of necessity in the defense of the nation where American statesmanship can flourish, when Presidents are duty-bound to meet the demands of the situation. The Constitution cannot guarantee statesmanship from its Presidents; but it does provide them the opportunity and means to do so. Whether they have met the task will be determined by the people, who have multiple constitutional means to judge and hold their leaders accountable.

Finally, although this dissertation focuses on the American Constitution and proposes a corrective remedy to the current scholarly debates over presidential war powers, it also seeks to contribute to understanding those perennial political questions, namely: to what ends do we order political society? War and the prospect of it unfortunately pose a constant threat to political regimes, and founders must address how they will order their laws to meet such challenges. More specifically, republican regimes must address how they will structure the executive to ensure that it has the requisite energy to meet those challenges without transforming the republic into a tyranny. The Romans, for example, famously took refuge in the celebrated wartime executive institution of the dictator. The Roman historian Livy tells us that, *in trepidis rebus* (fearful times) when normal measures would not suffice, the Romans would proclaim a dictatorship, entrusting in one individual for a fixed period of time the absolute power to resolve the crisis at hand.²² This institution served the Roman Republic well for some time; however, it eventually lost its liberty at the hand

²² See, for example, Livy *Ab Urbe Condita*, Book 4, XVII in Livy with an English Translation by B.O. Foster, (New York: G.P. Putnam and Sons,, 1927) Volumes III and IV, 313-314. I use the translation offered by David J. Bederman, *The Classical Foundations of the American Constitution*, (New York: Cambridge University Press, 2008), 146.

of a dictator, a lesson certainly not unnoticed by the Framers. At its core, therefore, this dissertation attempts to come to grips with how the Framers prepared for “fearful times” while mitigating the risk of losing their liberties; the answer lies in studying the constitutional basis of the executive war power. Paraphrasing Machiavelli, this dissertation puts forth that the Office of the Presidency may be the cause of greatness of so great a *republic*.

Chapter II: The Constitution and the Special Role of the Presidency

Current scholarly opinion generally accepts that the Presidency is out of step with the Constitution, particularly on matters pertaining to war and national defense. The Presidency is commonly described as a modern, imperial institution that has, at a minimum, taken on roles and responsibilities for which it was not intended, or worse, outright usurped the powers of Congress and Judiciary. The Presidency, accordingly, has “hijacked” and “subverted” the Constitution, leaving Americans today with an unconstitutional and imperial executive institution at the forefront of its foreign and military policy that threatens to undermine the political order it is intended to serve.²³

Before accepting such opinions unchallenged, it is worth reflecting upon Alexis de Tocqueville’s assessment of the Presidency. Tocqueville concludes that the U.S. Constitution supplies a strong executive but that it appeared weak due to the lack of a security threat at the time. Comparing the Office of the Presidency to the King of

²³ Peter Irons, *War Powers: How the Imperial Presidency Hijacked the Constitution* (New York: Metropolitan Books, 2005). Also see Arthur M. Schlesinger Jr.’s *War and the American Presidency* (with a new chapter) (New York: W.W. Norton & Co., 2005).

France, Tocqueville implies that it is the law—or more precisely the Constitution—that grants such vast power to the Presidency, whereas in France it is the constant threat of invasion by hostile neighbors that caused that nation to rely more heavily on its executive in times of danger. He writes:

The President of the United States possesses almost royal prerogatives, which he has no occasion to make use of, and the rights which, up to now, he can use are very circumscribed: the laws permit him to be strong, circumstances keep him weak.²⁴

Two issues central to Tocqueville’s analysis are: law and circumstance. Framed around these two themes, the present discussion explores the U.S. Constitution as fundamental law during such circumstances as war and national emergency when the survival of the nation is at stake. What does the Constitution say about war and emergency, and specifically what role does it assign the Presidency in matters of national defense? More importantly, how did the American Founders look at the rule of law and the circumstances of national danger when designing, developing, and implementing the U.S. Constitution? This dissertation argues that war and national security were prominent themes underlying the design of the Constitution. After all, why did the Constitutional Convention of the summer of 1787 convene? The delegates to the convention met with the explicit purpose of addressing the “defects” of the Articles of Confederation, and to “render the federal constitution adequate to the exigencies of Government & the preservation of the

²⁴ Alexis de Tocqueville, *Democracy in America*, trans. Harvey C. Mansfield and Delba Winthrop (Chicago: University of Chicago Press, 2000), 119.

Union.”²⁵ They sought to establish the Constitution, as the fundamental *law*, adequately equipped with all of the necessary powers to endure through the challenging *circumstances* all governments face.

War, internal and external, is but one circumstance that governments face, but it perhaps is the most dangerous since it can pose an existential threat to the political order. A constitution designed to endure ought to contain the requisite means to meet such dangers; those unprepared or ill equipped for such challenges are perhaps not long for this world. This chapter argues that the Framers explicitly addressed the challenges of war and puts forth straightforward but radical principle for Constitutional interpretation: The principal purpose of the U.S. Constitution is to provide for the safety and defense of the nation and that all powers exercised to that end are, by necessity, legitimate and Constitutional. This principle serves as the primary lens through which we should view the exercise of power and interpret its Constitutionality.²⁶

²⁵ *Resolution of Congress*, 21 February 1787, in Max Farrand (ed.) *The Records of the Federal Convention of 1787* (New Haven: Yale University Press, 1911), Vol 3, 13-14. Hereafter cited as *Farrand's Records* with volume and page number.

²⁶ Herbert Storing argues forcefully that the “Constitution must be read—was meant to be read—in light of necessity. The Constitution is law that opens up to the realm of necessity—and returns to the realm of law. The Constitution is meant to be commodious and elastic enough to met the demands of necessity and yet retain its character as law.” This passage helps form the foundation of the issues explored in this dissertation. See Herbert J. Storing, *Toward a More Perfect Union: Writings of Herbert J. Storing*, edited by Joseph Bessette (Washington, DC: The American Enterprise Institute Press, 1995). The most extensive and persuasive argument for reading the Constitution in this way is Michael Stokes Paulsen, “Symposium: The Changing Laws of War: Do We Need a New Legal Regime After September 11?: The Constitution of Necessity,” *Notre Dame Law Review* Vol 79 (July 2004), 1257-1298. I acknowledge my significant debt to Mr. Paulsen’s insightful work, which has inspired many of the ideas in this dissertation. I also am grateful for his willingness to answer my questions over the past couple years through email correspondence. I also acknowledge the excellent critique of Mr. Paulsen work offered by Saikrishna Prakash in the same symposium. See Prakash, “Symposium: The Changing Laws of War: Do We Need a

Unlike the predominant scholarly discussions of “war power” that focus narrowly on disputes between Presidency and Congress over the initiation of military hostilities,²⁷ this dissertation offers a broader, more fundamental definition of the war power as all necessary measures taken in pursuit of the Constitution’s ultimate goal of self-preservation and national security. This constitutional basis of the war power provides perspective for understanding the Presidency’s roles and responsibilities with respect to war and national defense. To this end, this dissertation argues a second subordinate principle, which is no less radical or dangerous, but equally significant: the Constitution assigns to the Office of the Presidency the primary responsibility for preserving and protecting the Constitution, and the ultimate safety of the political order. Measures the President takes towards this end, therefore, ought to be understood as legitimate and constitutional.

Such interpretative principles could prove dangerous since it provides the national government almost unlimited power in pursuit of security and holds the executive as the institution primarily (but not exclusively) responsible for determining the extent of exercising that power. It proves radical because it challenges the basic tenets of constitutionalism, which argue that constitutions serve primarily to

New Legal Regime After September 11?: The Constitution as Suicide Pact,” *Notre Dame Law Review* Vol 79 (July 2004), 1299.

²⁷ Edward Corwin’s famous suggestion that the Constitution invites the Presidency and Congress to struggle over foreign affairs has influenced much of the analysis of powers in times of war. See Corwin, *The President: Office and Powers: History and Analysis of Practice and Opinion* (New York: New York University Press, 1940), 200. This is especially true of the Imperial Presidency scholars who fear that the Presidency is winning that struggle to the point of presenting a threat to the Constitution. Yet even proponents of Presidential power tend to frame issues in this way. See, for example, John Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11* (Chicago: The University of Chicago Press, 2005), 11-12 and 17.

circumscribe and delineate government power. However, it is imperative that these principles not be understood as “anything goes,” and that they are to be understood along with a third corollary principle: Although the Presidency has the primary responsibility to preserve, protect, and defend the Constitution, and can wield all necessary power to meet that objective, it has a due dependence on the people, who have multiple constitutional means to judge the constitutionality of his (or her) behavior and to hold him (or her) accountable. The President, therefore, must abide by the constitutional institutions explicitly established to hold it accountable (e.g., periodic elections). In short, although the President may wield enormous power in defense of the nation, it cannot be unlimited, for basic republican institutions of accountability, namely national elections, must be maintained.

To articulate these fundamental interpretive principles, this chapter focuses primarily on the Constitution’s text and relies heavily upon *The Federalist*, the series of essays written by Publius—the collective pseudonym of Alexander Hamilton, John Jay, and James Madison—that offers the most cogent explanation of the Constitution and the underlying principles for comprehending it. The initial section discusses why the Constitution should be used as a guide, specifically examining why a written constitution occupies a special place in the American political order. This section also briefly explains why this chapter uses Publius as a single voice as opposed to an edited volume by three authors with very different ideas. Treating *The Federalist* as a coherent explanation of the Constitution and its underlying principles presents a rather unusual approach, since many scholars tend to read into *The Federalist* the later disputes between Hamilton and Madison, among others. As such, this chapter

does not necessarily endorse a “pro-Hamiltonian” or “pro-Madisonian” view of the Constitution, instead it tries to understand the Constitution as it was originally explained by Publius to the people who took part in ordaining and establishing it.

After addressing the sources and methods questions, this section aims to explain briefly “to what end” the Constitution was ordained and established, focusing specifically on the primary concerns of safety and security. A tranquil and secure political order provides the best means for its citizens to enjoy the “blessings of liberty.” This chapter, as such, rejects the frequent juxtaposition of security and liberty, explaining instead how the Framers viewed the former as a means to the latter. This is an important distinction, for when we understand the Framers’ more nuanced view that security and liberty are intertwined and not necessarily competing goals, we recognize that government power to achieve security actually helps maintain a free political order over the long run. This section further suggests that it is imperative to understand the Constitution in light of Publius’s maxim, which he emphasizes throughout *The Federalist*, that “[a] government ought to contain in itself every power requisite to the full accomplishment of the object committed to its care” (*Federalist 31*).²⁸ Since the nation’s defense is the object for which the national

²⁸ All citations of *The Federalist* are from *The Federalist Papers* edited by Clinton Rossiter with Introduction and Notes by Charles R. Kesler, (New York: Signet Classics, 2003). What is commonly known as *The Federalist Papers* was originally published as *The Federalist*, a collection of essays appearing in the New York press beginning in October 1787. Alexander Hamilton, one of the co-authors, published them in two volumes in March and May 1788. Addressed to the Citizens of New York, the essays intended to influence the New York state convention on the ratification of the proposed U.S. Constitution. Secondly, the essays are co-authored by three individuals, Alexander Hamilton, James Madison, and John Jay under the pseudonym Publius, for Publius Valerius Publicola who was a founder of the Roman Republic, who retired from public service but later returned to save it in the midst of a crisis. For reasons elaborated below, all citations refer to Publius, and not the individual authors.

government is responsible, the Constitution contains every power necessary to ensure its security.

The subsequent section explores the powers and special duty that the Constitution assigns to the Office of the Presidency to “preserve, protect, and defend” the constitutional order. Organized around energy and responsibility, the key “ingredients” of executive power, this chapter shows the constitutional basis of the executive war power. Though the President is expected to wield extraordinary power in defense of the nation, the Constitution structures the office in such a way to remain safely republican with a due dependence on the people to whom the Constitution ultimately belongs. To help clarify and put these findings in their scholarly context, the chapter concludes with a brief comparison of its findings with alternative perspectives on the basis of the executive war power.

That to Which All Parts Aim: The Overriding Purpose of the Constitution

At the risk of stating the obvious, any inquiry into the constitutional basis of a particular issue should begin with an examination of the Constitution itself with assistance from the writings of those who developed and explained it publicly (e.g., Publius’s *The Federalist*). Yet relying upon the Constitution’s text is not common practice among those who expound upon American political and legal issues as is evident in the judicial case study method that dominates contemporary law school curricula and the subfield of public law within political science departments. Students and scholars in these fields usually try to discern the meaning of the Constitution by “interpreting the interpreters” and probably rely too much on one set

of interpreters: the courts.²⁹ Others more flagrantly ignore the Constitution or consider it a living document that changes with new developments in society and interpretive methodologies.³⁰ If one accepts the Constitution as a living document that evolves with the “progress” of political thought, one must conclude that it offers no fixed standard of judgment and therefore, is not an instrument or symbol that expresses the principles and purpose of the United States but one that can be bent to reflect fashionable political discourse.

Such views are problematic since the genius of the American experiment in self-government, in part, rests upon a written document intended to be read and interpreted in service of those who adopted it as well as future generations.³¹ As such, the Constitution serves two primary purposes. First, it is concerned with organizational and procedural issues such as the size and composition of the legislature, modes of election, basic requirements for candidacy for office, and the process of impeachment. In this way, the Constitution is positive law, describing how the basic functions of government are established and how it should operate. Second,

²⁹ See the remarks made by Akhil Amar, *America's Constitution: A Biography*. (New York: Random House, 2006), xi. Commenting on the lack of attention given to the Constitution's text, Professor Amar shares the anecdote that it has become a common joke among law faculty not to assign the Constitution for it may only serve to confuse the students. For another excellent, not to mention witty, critique of the study of law today see Michael Stokes Paulsen's "How to Interpret the Constitution (and How Not To)" *Yale Law Journal*, Vol: 115 (2006), 2037.

³⁰ See, for example, Woodrow Wilson, *Congressional Government: A Study in American Politics* (New York: Meridian Books, 1956), which is examined in a bit more detail in the conclusion of this dissertation.

³¹ See Herman Belz's discussion of "written constitutionalism as the American Project" in Herman Belz, *A Living Constitution or Fundamental Law?: American Constitutionalism in Historical Perspective* (Lanham, MD: Rowman & Littlefield Publishers, Inc., 1998), chapter 1. Also see Frederick A. von Hayek's discussion of the written constitution as the "American contribution" to constitutionalism in *The Constitution of Liberty* (Chicago: The University of Chicago Press, 1960).

Constitution provides the United States with political purpose, defining to what ends the political order has been ordained and established. Hence it has a higher, more normative purpose.³²

Though many discussions center around the former, to understand the Constitution and use it to guide for understanding the President's exercise of power in times of war, *inter alia*, we must explore the latter as well. Even the organizational and procedural issues, important as they are, only can be properly understood in the context of the broader, more fundamental purpose of the Constitution. In this light, for instance, the common approach to the war powers debate—which focuses narrowly on Presidential-Congressional disputes over the initiation of military hostilities—misses the proverbial “forest for the trees,” focusing on organizational and procedural issues and not the overarching purpose toward which those particular powers are exercised. Thus, this approach fails to recognize that the President's actions in times of war ought to be judged against whether they are conducted in pursuit of the ends of the Constitution—namely the preservation and protection of the political order—not simply in relation to Congress.³³ It is imperative, therefore, that the ends of the Constitution be understood so that we can appropriately understand,

³² Herman Belz, *A Living Constitution or Fundamental Law?*, 3-4. Martin Diamond provides a similar take on this issue, “The principles and arrangements are so designed as to be capable of guiding conduct in varying circumstances.” He goes on to discuss how each decade brings about new problems that requiring adaptation (“new practices and new judicial interpretations”) of the Constitution to deal with them. He then says, “But the Constitution remains the source of fundamentals from which these practices and interpretations are derived. Thus it is adaptable but firm in its essential character.” Martin Diamond, *The Founding of the Democratic Republic* (Itasca, IL: F.E. Peacock Publishers, Inc., 1981), 103.

³³ Harvey Mansfield emphasizes this point, “The executive is limited only by the end for which it is entrusted by the people, which is the public good as they interpret it.” *Taming the Prince*, 258.

adjudicate, and prioritize the means for serving those ends. As Publius informs us, the methods of Constitutional construction should be “dictated by plain reason as well as founded on legal axioms,” that the parts ought to be understood as serving some end, and when it conflicts with another part in achieving the ends of government, “the lesser should give way to the more important part” (*Federalist 40*). After a few remarks on this dissertation’s use of *The Federalist*, the remainder of this section explores in greater detail the explicit purposes of the Constitution and the implicit principles for comprehending the means to pursue them.

A Note on Publius’s Constitution

Treating *The Federalist* as a coherent set of essays written by a single voice explicitly intending to expound upon the Constitution and its underlying republican principles does not reflect the common approach to this text. Rather, it usually is viewed as the conglomeration of disparate and competing ideas of three different authors. As a result, many readers tend to view the essays and ideas as either “Hamilton’s” or “Madison’s” (to say nothing of Jay’s contributions) and not those of pseudonymous Publius, who represents the common constitutional frame of mind of all three authors.

When Douglas Adair authoritatively established the authorship of the 85 essays that compose *The Federalist*, he also instigated a debate over Publius’s “split personality,” highlighting the tensions and competing ideas. He contended that: the essays were either a “pure Hamilton” or “pure Madison” persuasion; collaboration even in the form of discussing ideas did not occur; and both Hamilton and Madison

would regret their contributions to *The Federalist*.³⁴ To Adair, moreover, *The Federalist* does not offer an explanation of the Constitution but a piece of propaganda to force its ratification. Expanding upon “split personality” theme, Alpheus Mason highlights Hamilton and Madison’s “diverging political creeds” and “sharp theoretical split,” contrasting the former’s “bold nationalist stance” with the latter’s “balanced purpose” and goes so far as to accuse the Hamilton of essentially not understanding Madison.³⁵ To Adair, Mason, and other proponents of Publius’s split personality thesis, *The Federalist* does not offer a coherent, unified authority on the principles of the Constitution.

George Carey, however, persuasively countered the “split personality” thesis put forth by Adair and Mason, effectively displaying that the differences between Hamilton and Madison, specifically, are “miniscule” and that even on the most controversial items, such as Hamilton’s suggestion of nearly unlimited financial and military power for the national government, Madison concurred in several areas.³⁶ David Epstein, in his marvelous interpretation of *The Federalist*, also demonstrates the significant similarities of the ideas underpinning the essays, and cautions that “reports of inconsistency have been greatly exaggerated.”³⁷ Epstein and Carey’s worthy attempt to counter the split personality thesis, however, has not proven the

³⁴ Douglas Adair, “The Authorship of the Dispute Federalist Papers,” in *Fame and the Founding Fathers: Essays by Douglas Adair*, edited by Trevor Colburn with a personal memoir by Caroline Robbins and a Bibliographical Essay by Robert E. Shalhope, (Indianapolis, IN: Liberty Fund, 1998), 37-105.

³⁵ Alpheus Thomas Moore, “The Federalist—A Split Personality,” *The American Historical Review* Vol. 57, No. 3 (April 1952), 625-643; see specifically 627-628 and 642.

³⁶ George W. Carey, “Publius: A Split Personality?,” *The Review of Politics* Vol 46, No.1 (Jan 1984), 5-22.

³⁷ David F. Epstein, *The Political Theory of the Federalist* (Chicago: The University of Chicago Press, 1984), 2.

final word as many scholars continue refer to the individual essay by either Hamilton, Madison, or Jay rather than Publius. That Hamilton and Madison would later vehemently disagree and publicly argue over prominent issues (e.g., the establishment of the National Bank, Washington's Neutrality Proclamation of 1793) helps explain, in part, the endurance of the "split personality" of Publius thesis. The positions of Hamilton and Madison (often joined by Jefferson) in these later debates did reflect the deepening divisions within the American polity over the proper role of the new national government and its institutions and how it would work in practice. However, hindsight is 20/20, and we ought to be cautious not to read later disagreements between Hamilton and Madison into the text of *The Federalist* for that would reflect a sense of conflict and competition among the collaborators that was neither present nor intended. Instead, we ought to try to understand *The Federalist* as it was intended to be understood: the work of a single anonymous voice, advocating for the ratification of the Constitution by appealing to reason and experience to explain its purpose, meaning, and underlying principles in extensive detail. They wrote anonymously to focus readers on the arguments advanced and not on the reputation and political persuasion of individual authors.

Publius, by no means, represents the only or even the final word on the Constitution; however, it does reflect arguably the most forceful of our foundational documents aside from the Constitution and the Declaration of Independence themselves. None other than Jefferson, who would later develop a deep suspicion and animosity toward Alexander Hamilton, commented that *The Federalist* represent the "best commentary on the principles of government which was ever written."

More importantly, *The Federalist* ought to be understood, again as it was intended, as a public commentary to explain the merits on the proposed Constitution. It serves as a useful reference for the Founding generation's posterity to gain greater insight into the Constitution's purpose and meaning. Treating *The Federalist* as a single voice, however, does have implications for understanding and interpreting the Constitution. Notably, it does not easily lend to categorization as a purely "Hamiltonian" or "Madisonian" interpretation of the Constitution. Such debates reflect an important part of our constitutional discourse but focus on them deviates from this chapter's attempt to start with a *tabula rasa* of sorts to present the constitutional basis of the executive war power as it was understood when it was initially established and ordained.

The Explicit Purpose of the Constitution

Commenting on the proposed Constitution, James Monroe insightfully identified the Preamble as the principal basis for interpreting the purpose and intentions of the Constitution. He explains, "The introduction, like a preamble to a law, is the Key of the Constitution. Whenever federal power is exercised, contrary to the spirit breathed by this introduction, it will be unconstitutionally exercised, and ought to be resisted by the people."³⁸ Opponents of the Constitution, too, looked to the Preamble as a means to comprehend its overarching purpose. Arguably the most serious and persuasive Anti-Federalist writer, Brutus, suggests: "To discover the

³⁸ James Monroe writing as A Native of Virginia, *Observations Upon the Proposed Plan of Federal Government*, 1788.

spirit of the constitution, it is of the first importance to attend to the principal ends and designs it has in view. These are expressed in the preamble.”³⁹

In accepting the merits of these observers, examining the Preamble does offer a means to unlock the stated meaning and purpose of the Constitution and use it as an overriding principle for interpreting the Constitutional basis of the executive power in times of war.⁴⁰ However, neither the Preamble, nor the Constitution more broadly, can be properly understood when divorced from the other primary Founding document, the Declaration of Independence. The Preamble opens with the famous “We the People” reflecting that the new government will derive its “just powers” from the “consent of the governed.” It also demonstrates the explicit republican principle that a free and equal people are sovereign and do ordain and establish the Constitution as a compact that binds them together to more ably preserve and protect their natural rights as outlined in the Declaration of Independence.⁴¹ The Constitution intends to carry into effect the Declaration of Independence’s bold statement that “it is the right of the people...to institute new Government, laying its foundations on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.” Safety and happiness are equally important goals that the Constitution aims to secure. They are not competing goals

³⁹ Brutus *XII* in Herbert J. Storing (ed), *The Complete Anti-Federalist*. (The University of Chicago Press: Chicago, 1981) 2.9.150.

⁴⁰ Paulsen, “The Constitution of Necessity,” 1259.

⁴¹ For an articulation of the significance between a Constitution ordained and established by the people for their “original” natural rights, see speech by James Wilson during the Pennsylvania ratification debate, in Jonathan Elliot (ed.), *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787* (Philadelphia: J.B. Lippincott and Co, 1901), Vol. II, 434-435, 478-479. Hereafter cited as *Elliot’s Debates* followed by volume and page number.

but intertwined: a free people cannot have the opportunity to achieve their happiness if they are not safe. A free people, moreover, will not remain free if they are safe but unable to pursue their happiness.

Embodying the Declaration's language of safety and happiness, the Constitution expressly aims at attaining six principal objectives that are interdependent and ordered logically. The bookend objectives demonstrate an explicit break with the past for the purpose of creating and maintaining a political order for the future. The Constitution aims to be "more perfect" than its predecessor Articles of Confederation which, after just a mere decade, could not be maintained. The fact that the Articles' Framers, within a decade, had to revisit the basic principles of government and completely restructure its framework suggests that the Articles, needless to say, were wanting and not enduring. Therefore, the Constitution, in forming a "more perfect Union" must be understood to be designed from the outset, as an enduring framework of government. The Constitution will be considered a failure, like the government under the Articles, if it faces a situation for which it is ill equipped to handle or survive intact.

A "more perfect union" can more easily attain the other goals, which are necessary to perpetuate a free political order for future generations.⁴² The Constitution does not, as recent scholars tend to do, juxtapose common defense and

⁴² Elbridge Gerry, a Massachusetts delegate to the Constitutional Convention, articulated the problems of the rather short-lived Articles: "The causes which produced the Constitution were an imperfect union, want of public and private justice, internal commotions, defenceless community, neglect of the public welfare, and danger to liberties." Gerry's statement corresponds with each of the objectives outlined in the Constitution's Preamble.

domestic tranquility with establishing justice and securing liberty.⁴³ That is, there is no choice between “security” on the one hand and “justice,” “general welfare,” and “liberty” on the other. The Preamble shows that these objectives are intertwined and the Framers understood that achieving the former principles are a means to attaining the latter. A government incapable of defending itself or unable to maintain a civil and tranquil polity ceases at some point to be a government. Furthermore, such a government could not permit the establishment of justice or promote welfare generally, let alone secure liberty for future generations. Therefore, the two objectives most explicitly related to the principles of self-preservation—to “insure domestic Tranquility” and “provide for the common defence”—are listed centrally as third and fourth, respectively, forming a core around which the other goals can be achieved. Publius helps us understand their centrality in interpreting the purpose of the Constitution when he writes, “Among the many objects to which a wise and free people find it necessary to direct their attention, that of providing for their safety seems to be the *first*.” (*Federalist 3*) The key for the Framers of the U.S. Constitution was to provide for this safety in a way that permitted the people to live in a free political order. Only after adequately providing for the defense of all and maintaining domestic tranquility could the Constitution be said to be a “more perfect Union” that could endure and secure liberty for “posterity.”

⁴³ It is quite popular for scholars to discuss the zero-sum nature of the “security-liberty balance” in that measures taken to secure more of one will automatically resort to a decrease in the other. See Richard A. Posner, *Not a Suicide Pact*. The Framers, though recognizing that some security measures could have some impact on the peoples’ liberties, did not view the issue as such a stark choice.

The Constitution has roots in the natural law reasoning of modern political philosophers such as Thomas Hobbes and John Locke, who argued that the principal purpose of men instituting government was self-preservation. Locke went beyond Hobbes's rather bleak defense of absolutism for the mere sake of survival by suggesting the ends of government should be the preservation of life, liberty, and property. Locke called for a more comfortable self-preservation (but self-preservation nonetheless) and it was upon a similar foundation that the American Framers developed a political order that would provide for the basic security of its members and enable them to more safely experience the private blessings of liberty. Put differently, the Framers embraced the "new science of politics" developed in the centuries leading up to the American Founding, and created a government more capable of allowing individuals to live a safe and happy existence. The government they designed did not intend, as ancient regimes did, to prescribe the political way of life for its citizens collectively to achieve higher, more noble goals; rather, they sought a stable government capable of providing for the safety of the citizens so that they could privately as individuals achieve their own happiness.⁴⁴ A threat to the safety of the Union—whether stemming from external or internal sources—would no less threaten the government's ability to establish justice, promote the general welfare, or secure the blessings of liberty.

The intent of the Constitution, in sum, is to provide for safety in a manner that enables citizens to effectively enjoy their natural rights as a free people. Security is a

⁴⁴ For my understanding of the contrast between the purpose of ancient political orders and the American Constitution, I am indebted to Martin Diamond's essay "The Separation of Powers and the Mixed Regime," in William Schambra (ed.) *As Far as Republican Principles Will Admit: Essays by Martin Diamond* (Washington, DC: The AEI Press, 1992), 58-67.

means to achieving liberty; they are not incompatible or competing goals. The latter cannot be secured without the former. One notable author captured this fundamental sentiment: “There is no quarrel between government and liberty; the former is the shield and protector of the latter. The war is between government and licentiousness, faction, turbulence, and other violations of the rules of society, to preserve liberty.”⁴⁵ The Constitution must be understood as designed explicitly and principally to provide for the security of its citizens; it also must be understood as intending to endure, no matter the circumstances it faces. The Constitution, hence, ought to be understood as containing all the requisite powers necessary to ensure its survival and that it can provide for future generations what it did for those who founded it. When compared to the Articles, the new Constitution created “a national government more wisely framed” to provide “ample security” a people “enamored with liberty” and dedicated to remaining free and united.

Implicit Principles

Why is this Union *more perfect* and more likely to *secure the blessings of Liberty for ourselves and our posterity*? Why is it more capable of protecting and defending against external and internal threats and permitting citizens to pursue their happiness securely? After all, Publius even suggests at one point that the aims of the Constitution do not appear to be all that different from those of the Articles. The key difference, as Publius (and other proponents of the Constitution) repeatedly emphasized, rests upon the underlying principle upon which the Constitution was

⁴⁵ Quoted in Storing, *What the Anti-Federalists Were For: The Political Thought of the Opponents of the Constitution*, Vol.1, 71.

explicitly created: It must be understood as a self-containing framework in that the government it establishes contains all of the necessary powers to achieve its expressed purpose. Comparing it to the maxims in geometry, Publius's articulates this universal principle of the science of "ethics and politics" that:

[T]here cannot be effect without a cause; that the means ought to be proportioned to the end; that every power ought to be commensurate with its object; that there ought to be no limitation of a power destined to effect a purpose which is itself incapable of limitation (*Federalist 31*).

The three "ought" clauses appear to follow, or are subordinate to, the initial clause on causation to which Publius deductively concludes that if the government is charged with some purpose (e.g., provide for the common defence and insure domestic tranquility) it must have the power to achieve it; if that purpose cannot be defined or understood in advance, the power to achieve it cannot be circumscribed and must exist *ad infinitum*. In appealing to geometry, and the physical laws of cause and effect, Publius offers a natural foundation for interpreting the Constitution. Governments not adequately empowered and structured to achieve the ends for which they were formed (e.g., the Articles of Confederation) are, in many ways, defying nature and cannot endure. Government must be understood to reflect nature, and since survival is a primitive natural object, the political order ought to be understood to contain all means necessary for its survival.

Though the Preamble states the purposes for which the Constitution was ordained and established, the imperative interpretive principle is based upon recognizing that the Constitution explicitly contains all powers necessary to achieve

its purposes. The Constitution, as Publius emphasizes again, “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” (*Federalist 23*). This universal principle, though self-evident and simple, can be obscured and is worth uncovering since it can help us recognize the legitimate exercise of power in pursuit of the objectives discussed above.

The government under the Articles of Confederation was not wisely constructed and did not envision the manifold challenges that governments face. As Publius says, they were formed in haste at a time when the peoples’ “habitation were in flames” and “citizens were bleeding” and the necessity of the situation forced them to create a government, even if it would not endure much past the crisis at hand (*Federalist 2*). They were, in the words of *Federalist 1*, a product of “accident and force” not of “reflection and choice.” Had they been the latter, they would have been established not as a league or alliance to the immediate challenges of the War for Independence but would have, like the Constitution, established a unified political order with a stronger national government comprising all necessary means to endure in perpetuity. With the War for Independence over, the “mild season of peace” provided the Framers a special opportunity to address whether good government could be established from “reflection and choice” or whether societies of men “are forever destined to depend for their political constitutions on accident and force”

(*Federalist 1*).⁴⁶ Good government, properly organized and structured, and containing all the necessary powers to meet the ends for which it was ordained and established was what they sought to create without jeopardizing the political order.

What role would war, or accident and force more broadly, play in the future of the United States? Was the U.S. Constitution created with an eye towards war and national security? Publius appears to have thought so, or at least we can conclude that from the prominent place that war occupies in his essays. Although much is made of Publius's later essays (e.g., *Federalist 10 and 51*) for articulating the fundamental principles of the American regime—and republican government more broadly—Publius's initial essays represent the most cogent and forceful arguments regarding the necessity of adopting the proposed Constitution and securing the Union. Despite his suggestion that the Constitution represents a product of “reflection and choice,” Publius does not neglect the obvious and potentially perilous role that “accident and force” will play in shaping the future of the nation. He focuses several of his first essays on a broad overview of threats to the preservation of the nation's security, specifically the “dangers from foreign arms and influence, as from dangers of the like kind arising from domestic causes” (*Federalist 3*). By placing the

⁴⁶ *The Federalist* is arranged around two overarching themes, which we know, above all, from how they were collected and published in two volumes shortly after they ran in the New York press and also because Publius provides an overview of what he wishes to tackle in the first essay. *Federalist 2-36* emphasize on the importance of government broadly, but specifically united government addressing the following “particulars”: The Utility of Union to your political prosperity (1-14); the insufficiency of the present Confederation to preserve that Union (15-22); The necessity of a government at least equally energetic with the one proposed, to the attainment of this object (23-36). *Federalist 37-85* focus on the Merits of the proposed Constitution addressing the “particulars”: The conformity of the proposed Constitution to the true principles of republican government; Its analogy to your own state constitution; and lastly, The additional security which its adoption will afford to the preservation of that specific of government, to liberty, and to property.

discussion of war in the opening essays, Publius indicates that they contain some of the most direct and serious issues, and present the most obvious and forceful reasons for adopting the Constitution. After all, he was trying to persuade the people of New York—particularly the “fence-sitters”—in the vote over the Constitution, and he had a closing window of opportunity to convey his message to them. If his arguments did not resonate and were found to be unpersuasive, his attractiveness would have waned. He, thus, had to put his make his strongest case first and, in doing so, he describes a rather bleak and pessimistic view of international politics as well of the dangerous possibility of insurrection and internecine warfare should the Constitution not be adopted to solidify the Union of states under a strong national government.

After the introductory essay, *Federalist 2-8* specifically focus on the various causes of war, the susceptibility of the disunited states to foreign influence, and the prospects of war among blocs of disunited states. Appealing to instinctual fears of anarchy and danger as well as the dreaded experience under the weak Articles, Publius outlines the many potential characteristics and possibility for war should the people refuse the new Constitution. Publius acknowledges the difficulties of trying to define the potential contingencies the nation will face when he writes that safety “doubtless has relation to a great variety of circumstances and considerations,” affording “great latitude” to those trying to “define it precisely and comprehensively” (*Federalist 3*). War, Publius quickly identifies, does not simply result from a despotic monarch but is rooted in the Hobbesian character of man as “vindictive,

ambitious, and rapacious” (*Federalist 6*).⁴⁷ The likelihood of another country invading or directing violence toward the United States, moreover, does not result from the character of the government. After all, Publius suggests that republican governments, particularly commercial republics like the various states, are no less war prone than monarchs: “Sparta, Athens, Rome and Carthage are all republics; two of them, Athens and Carthage, of the commercial kind. Yet were they as often engaged in wars, offensive and defensive, as the neighboring monarchies of the same time” (*Federalist 6*). Yet it is not just external invasion that threatens the new nation. He focuses on the problems stemming from faction—which he roots in the nature of man and is more prone to occur with a weakened central government—that could cause internal friction and a general outbreak of violence.

Publius’s discussion of the various underlying causes of war and the manifold forms of violence facing the new nation are not unique, nor does it necessarily help us understand the constitutional allocation of powers for war and national defense. Therefore, it is his articulation of the constitutional implications of these challenges that matter most. Throughout his first volume, which focuses on the necessity of the Union, he repeatedly emphasizes that since the possibility of war and violence, resulting either from internal convulsions or foreign invaders, cannot be foretold, the

⁴⁷ See also John Marshall’s discussion of the problem of war and the Constitutional powers necessary to prepare for it. Appealing to experience and history, and speaking specifically of the power of taxation, Marshall says, “It is, then, necessary to give the government that power, in time of peace, which the necessity of war will render indispensable, or else we shall be attacked unprepared. The experience of the world, a knowledge of human nature, and our own particular experience, will confirm this truth.” Interestingly, Marshall goes on to argue that the Constitution must account for the possibility of war when securing powers otherwise it will be forced to take refuge in dangerous devices such as the dictatorship, which is a similar argument that Publius makes in *Federalist 70*. Marshall’s argument found in *Elliot’s Debates*, Vol. III, 227.

government, if it is to endure, cannot be fettered by any “Constitutional shackles” that would impede its ability to thwart these attacks and adequately defend the community.

This underlying principle for understanding the relationship between ends and means is central for Constitutional interpretation and understanding the constitutional basis of power wielded in pursuit of the nation’s safety. In *Federalist 23*, Publius willingly entertains whether citizens should desire that the new government be responsible for their common defense. (However, this is a bit tongue-in-cheek, since the very purpose of the Constitutional Convention was to create a national government more capable of ensuring the safety of the nation.) He suggests that people may reject the Constitution if they do not wish for the new government to serve that purpose, as foolish as that may be. However, what Publius clearly wants the people to understand is that once the new Constitution is accepted, it must be understood to contain all the powers necessary to achieve those ends. He writes: “the moment it is decided in the affirmative, it will follow that the government ought to be clothed with all the powers requisite to complete execution of its trust.” This may seem like a radical proposition, but as Publius suggests: “it must be admitted to be necessary consequence that there can be no limitation of that authority which is to provide for the defense and protection of the community in any matter to its efficacy—that is, in any matter essential to the *formation, direction, or support* of the NATIONAL FORCES.”⁴⁸ Publius’s word choice interestingly highlights that this

⁴⁸ Publius mentions two caveats: “And unless it can be shown that the circumstances which may affect the public safety are reducible within certain determinable limits; unless the contrary of this position can be fairly and rationally disputed.”

principle for understanding the Constitution may be politically difficult to swallow given the potential implications and the traditional notion that constitutions seek to limit power. For Publius suggests power can be exercised without limit in pursuit of an overriding constitutional purpose.

Despite his extensive use of historical examples, Publius warns not to use history exclusively as our guide, since the challenges to the nation's security are unpredictable and without limit. History (the "tried" course of human affairs) along with man's nature does illustrate, however, that war is a prominent feature of politics and the human condition. Founders who fail to recognize this are creating a government built upon fallacies, and are ultimately doomed to failure. Since the Constitution is explicitly designed to endure, Publius argues that we must look into the future and not tie the powers and organization of the government to immediate security demands. The Constitution cannot prudently prescribe ways to handle future threats. The powers to defend the nation, therefore, must be considered to exist without limit under the Constitution.⁴⁹ This is a radical and dangerous proposition—not to mention paradoxical—for it suggests that the Constitution is not an instrument to limit power but one that permits power to exist without limit. The Constitution

⁴⁹ Though Publius offers the most coherent and persuasive explanation of these principles, he was by no means alone. See, for example, the statement by James Iredell at the North Carolina Constitutional Convention, when he states, "The powers of government ought to be competent to the public safety. This, indeed, is the primary object of all governments. It is the duty of gentlemen who form a constitution to take care that no power should be wanting which the safety of the community requires. The exigencies of the country must be provided for, not only in respect to common and usual cases, but for occasions which do not frequently occur. If such a provision is not made, critical occasions may arise, when there must be either a usurpation of power, or the public safety eminently endangered..." *Elliot's Debates*, Volume IV, 95.

articulates the purpose for which the government exists and is to be understood as containing all powers requisite to achieve those ends.

When one recognizes that founders cannot predict all the contingencies that their political orders could face, one must accept that power cannot be circumscribed. Publius elaborates that the threats to the nation cannot be foretold, so the government's capacity to meet them cannot be outlined in advance. According to *Federalist 34*,

Constitutions of civil government are not to be framed upon a calculation of existing exigencies, but upon a combination of these with the probable exigencies of ages, according to the natural and tried course of human affairs. Nothing, therefore, can be more fallacious than to infer the extent of any power proper to be lodged in the national government from an estimate of its immediate necessities. There ought to be a CAPACITY to provide for future contingencies as they may happen; and as these are illimitable in their nature, so it impossible safely to limit that capacity.

The extensive powers of the national government emerged as a focal point of criticism and warning for the Constitution's opponents. As demonstrated above, Publius, however, did not shrink from Anti-Federalist challenges that too much power to the national government risked abuse and despotism.⁵⁰ Publius argues that it is against reason for a people to place their security in the hands of the government but not trust it with the power necessary to meet that object. Publius's discussion of the necessity of the government to contain all the powers necessary to preserve the safety

⁵⁰ See, for example, the following Anti-Federalist essays (Vol. and No. refer to Storing (ed.), *The Complete Anti-Federalist*): Luther Martin (2.4), Cato V (2.6), Centinel (2.7), Montezuma (3.4), Tamony (5.11), and The Impartial Examiner (5.14).

of the people Publius explains: “For the absurdity must continually stare us in the face of confiding to a government the direction of the most essential national interests, without daring to trust it to the authorities which are indispensable to their proper and efficient management” (Federalist 23). Publius’s argument, in effect, forced opponents of the Constitution into the defenseless position that the best way to prevent power from being abused is to not provide the power in the first place—even if that power was to do good. The implicit question to the Anti-Federalists emerges: Why then have a government if you are not going to enable it to do anything on your behalf?⁵¹ Anti-Federalists simply could not meet Publius’s simple but powerful logic and found themselves unsure of how to break from the problems of the Articles.

Anti-Federalists had cautioned that power should be cautiously given to the government, as it was easier to grant power later than to take it away.⁵² However, Publius suggested that it would take too long for such powers to be granted and warned that nation would have to suffer an invasion before it could even begin to deliberate how to thwart such an attack. Furthermore, Publius takes the argument a step further, suggesting that the government without adequate powers would not only be unable to provide for the nation’s security immediately but also could, over time, undermine the Constitution. A weak constitution results only in “dissolution for want of proper powers” or worse, in the “usurpation of powers requisite for the public safety” (Federalist 20). He continues that tyrants usually emerge in weak and defective constitutions that are not properly equipped to meet “critical emergencies” and “pressing exigencies” since once usurpation begins, it never seems to find a

⁵¹ Ibid. Vol I, 28-29.

⁵² Ibid, Vol. I, 30-31.

“salutary point” and continue to the dangerous extreme of tyranny. Publius further warns in *Federalist 25*,

[N]ations pay little regard to rules and maxims calculated in their very nature to run counter to the necessities of society. Wise politicians will be cautious about fettering the government with restrictions that cannot be observed because they know that every breach of the fundamental laws, though dictated by necessity, impairs that sacred reverence which ought to be maintained in the breast of rulers towards the constitution of a country, and forms a precedent for other breaches where the same plea of necessity does not exist at all, or is less urgent and palpable.

Publius again articulates that the new Constitution is designed to endure and that it will continue because it reflects nature, specifically the natural impulse to self-preservation. Any attempts to circumscribe the Constitution or to limit its power to defend itself would not only be unwise, but could result in the gradual destruction of the political order. This statement also cuts against arguments that suggest the Constitution seeks to limit and restrict power for fear of its abuse. It is the want of power, not a fear of it, that most concerns Publius (e.g., *Federalist 20*).

The Special Role of the Presidency

Recognizing that the Constitution contains all the necessary powers to achieve its explicit purpose of providing for the safety of the people to whom it belongs, we now turn to the second question: What role does the Constitution assign the Presidency in securing the political order? All of the government’s branches certainly have a significant role to play; however, it is the President, as the nation’s first

officer, that has the special duty and solemn duty to preserve, protect, and defend the Constitution. The Presidency, imbued with executive energy, serves a necessary function in ensuring that the purposes of the Constitution are met. To suggest that the Constitution enables one person to wield extraordinary powers in its defense is paradoxical, however. After all, the original founding document, the Declaration of Independence, inveighs against the British King's history of abuse of power, which is a "history of repeated injuries and usurpations"—the Declaration lists 27 "facts" that specify the King's abuse of power—with the direct object to establish an absolute tyranny. Yet, in the course of deliberating and reflecting upon the principles of government (and the experience under the weakened executive of the Articles), the Framers understood that a strong, independent, and energetic executive is central to ensuring the stability and long-term survival of the political order. They recognized that it was more dangerous to have a weakened executive, particularly at the expense of an omnipotent legislature. They therefore sought to unleash executive power but did so in a way to ensure it remained legitimate and responsible in a republican manner. The Presidency as the Constitution's executive, Publius helps us understand, represents an innovation in government, by reconciling the energy necessary for matters of national security with safety mechanisms necessary to remain entirely republican.

Again, we should turn first to the Constitution to begin understanding the role it assigns to the Presidency in times of war. Two aspects of the Constitution's Article II are rather striking: the opening vesting clause and the Oath of Office. Unlike Article I's opening phrase that vests the Congress with all legislative power "herein

granted,” Article II does not contain the restrictive provision suggesting that the President has powers beyond those listed in Article; thus the powers listed are to be considered more exemplary than enumerated. The Presidential Oath, moreover, is rather unique to include specific and personal language by which the President must swear. The Oath by itself does not grant the President powers, but does bind him to exercise the reservoir of undefined executive powers vested in him to “preserve, protect, and defend” the Constitution. The Oath affirms that the Presidency is dependent not on the legislature but on the people to preserve the political order that they established and ordained.

Though Article II does not precisely define executive power, an examination of its language, combined with Publius’s discussion that emphasizes that the executive was explicitly designed to be “energetic,” we gain insight into the “real character” and role of the Presidency within the Constitutional order. It is clear that the Presidency has a unique role in preserving the security of the nation, which has enormous implications for our understanding of the war power. When understood in this light, the discussion no longer focuses on the balance of relative authorities between the Congress and the President over matters pertaining to war, but rather on the President being the principal agent upon which the Constitution relies to preserve, protect, and defend it. The Presidency has a vast reservoir of loosely defined powers and authorities by which it can act to ensure the nation’s security. This is a dangerous and unpopular proposition, but it was the aim of the Framers to build a framework of government that would, as best as possible, enable this energetic executive to wield the sword of the nation but do so in a manner safe to the republican principles of the

constitutional order. In short, the Presidency ought to be understood by the following characteristics: 1) vested with competent powers; 2) duty-bound to defend the political order; and 3) dependent upon the people to remain wholly republican. The following section explores these three traits, organizing them around the key executive ingredients of: *Energy, Responsibility, and Safety*.⁵³

Energy in the Executive

Publius dedicates many of the initial Federalist essays to explaining why the Constitution, if it is to be a “more perfect Union” capable of enduring, must be understood to contain all of the powers requisite for self-preservation. He waits until later to explain the unique role of the Presidency in ensuring the preservation of that constitutional order. In the latter part of the Federalist, Publius addresses each of the three branches in turn, dedicating Federalist 52-66 to the Congress (62-66 specifically address the Senate); Federalist 67-77 address the Executive Department; and Federalist 78-83 discuss the Judiciary, “the weakest of the three departments of power.” The 11 essays dedicated to the Executive are distinguished, most notably, by

⁵³George Washington lamented the lack of “energy” in the Confederation and singled it out as a cause for the struggles of the War for Independence. He writes, “I could demonstrate to every mind open to conviction, that in less time and with much less expence than has been incurred, the War might have been brought to the same happy conclusion, if the resources of the Continent could have been properly drawn forth, that the distresses and disappointments which have very often occurred, have in too many instances, resulted more from *a want of energy, in the Continental Government*, than a deficiency of means in the particular States.” See George Washington, Circular to the States, 14 June 1783 in Colleen A. Sheehan and Gary L. McDowell (eds.) *Friends of the Constitution: Writings of the “Other” Federalists 1787-1788* (Indianapolis: Liberty Fund Press, 1998), 12-22 (Emphasis Mine.) For Washington’s take on the need for “more responsibility” particularly in the executive see, George Washington to James Duane: “There are two things indispensably necessary to the well being and good Government of our public Affairs...greater powers to Congress, and *more responsibility and permanency in the executive bodies*.” (December 26, 1780).

the forceful and bold language Publius uses to explain and defend the Presidency's "real character."

In discussing the character of the Executive Department, Publius does not shy away from its great power and responsibility, not to mention the unique role, that it will play in the nation's affairs. Publius has to overcome the biases against an energetic executive and ensure that people recognize that it is not only consistent with republican government, but necessary its survival. One way or the other, the Union would have an energetic executive if it were to survive. Why not constitutionalize it and try to control it as best as possible? As Harvey Flaumenhaft captures the challenges:

In rejecting the hereditary principle in government, a British inheritance from less enlightened times, Americans had not cast off their unenlightened parochial prejudice against executive energy. But the necessity of executive energy was rooted in the nature of things: in some way or other it would return; and if refused stately republican admission, it would break violently through the front door—or enter by stealth through the back.⁵⁴

Publius's objective, therefore, is to explain how an energetic executive, vested with extensive powers and given great responsibility for the preservation of the political order, has been safely reconciled within the proposed republican form of government. He has to offer a forceful defense of the Presidency, for it is a novel approach to having a strong executive within republican government, and it is easily misunderstood, misrepresented, and misconstrued. The Framers, according to

⁵⁴ Harvey Flaumenhaft, *The Effective Republic: Administration and Constitution in the Thought of Alexander Hamilton* (Durham, NC: Duke University Press, 1992), 192-193.

Publius, deliberated more on the proper role of the executive within the Constitution; unfortunately, the Presidency is also the most poorly understood component.⁵⁵ Therefore, he must counter the “idea, which is not without its advocates, that a vigorous executive is inconsistent with the genius of republican government.” Publius recognizes that executive energy presupposes that the President would be able to wield powers dangerous to the community. After all, an executive must have dangerous powers for the community depends upon him to endanger its enemies, when necessary.⁵⁶ Executive power is feared because of the harm it can do those who threaten the nation. Therefore, Publius must explain how the Constitution can *safely* enable an energetic executive with such dangerous powers without threatening the political order.

The genius of the American experiment in government is that it turned on its head the proposition that executive power is dangerous to republican government and instead set out to demonstrate that executive power, in fact, is critical to its safety and survival.⁵⁷ At the center of the American experiment is the hypothesis that, “Energy in the executive is the leading character in the definition of good government”

⁵⁵ “There is hardly any part of the system which could have been attended with greater difficulty in the arrangement of it than this; and there is, perhaps, none which has been inveighed against with less candor or criticized with less judgment” (*Federalist 67*).

⁵⁶ David F. Epstein, *The Political Theory of the Federalist*, 45. Also see Edward Rutledge of South Carolina who argued that “The very idea of power included a possibility of doing harm; and if the gentlemen would show the power could do no harm, he would at once discover it to be a power that could do no good.” *Elliot’s Debates*, Vol. IV, 276.

⁵⁷ As Harvey C. Mansfield writes, “The Federalist, then, constitutionalizes the republican tradition. By finding a place for the necessities of government within the framework of government itself, the Constitution corrects the foolish optimism of republicanism which thinks, in essence, that men can live by the laws they choose and never have to bow to the necessities they do not choose, or learn from their experience of them.” Mansfield, *Taming the Prince*, 257.

(*Federalist 70*). The reason why executive energy is important is that it is the central component for protecting and ensuring the safety of the republic. As Publius writes,

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. (*Federalist 70*).

In examining this statement further, we recognize that executive energy, according to Publius, is “essential” to many of the themes of the Constitution’s Preamble, specifically, common defense, domestic tranquility through the steady administration of the laws, ensuring justice, and securing liberty. The energetic executive, thereby, is central to ensuring that the means are aimed toward achieving the ends of government. The President has responsibility for directing the common strength of the community in times of danger, and Publius clearly argues that this is well within the executive purview.⁵⁸ Energy in the executive, Publius succinctly suggests, is the “bulwark of the national security” (*Federalist 70*).

Publius suggests that the “ingredients which constitute executive energy are unity, duration, and adequate provision for its support; and competent powers.” These ingredients correspond to the description of the Presidency as outlined in Article II of the U.S. Constitution. The executive power is vested in one person in the

⁵⁸ “Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength forms a usual and essential part in the definition of the executive authority” (*Federalist 74*).

Presidency who is to be elected for a four-year period without limitation. Section 3 of Article II discusses the relationship the Presidency has with other branches, specifically when he may “convene” the Congress in “extraordinary Occasions” and “recommend to their Considerations such Measures as he shall judge necessary and expedient.” The Congress, therefore, is to provide support to the President when asked, and in many ways serve as an advisory council, particularly on extraordinary occasions such as war and emergency. The previous section of Article II discusses competent powers explicitly belonging to the Presidency, specifically the Commander-in-Chief, Treaty powers, and those of the appointment of officers. Although the commander-in-chief powers are the most heavily contested by those discussing constitutional war powers, Publius hardly addresses it, suggesting “the propriety of this provision is so evident in itself.” The President, thus, has all of the powers necessary and support from the other branches to execute his duties for a four-year period, at which point he will be subject to the people to determine whether he should continue to serve.

Responsibility and the Presidential Oath

Though the vesting clause suggest that the Presidency has some broad grant of executive power, and Publius helps us recognize that the executive is to be understood as a strong and independent office, replete with the requisite ingredients for energy, it is the unique language of the Presidential Oath of Office that helps us understand the link between the President’s powers and his responsibilities. The

President has the principal responsibility of executing the laws, which include laws passed by the Congress but also executing the Constitution, as the supreme Law of the United States.⁵⁹ The Constitution establishes the expressed purpose of the political order and the President has the responsibility to act towards attaining these ends. Much attention has focused on the extent of the powers granted to the President in the vesting clause. However, it is the Presidential Oath that provides the overarching interpretive principle for understanding the extent of Presidential power. The Oath is not an explicit grant of power; rather it informs and provides the overarching justification for exercise of the President's powers. The Oath reflects Publius's underlying axiom: means to the ends. It provides the connective tissue between the ends of the Constitution and the means by which it will ultimately be "preserved, protected, and defended."

Presidents Washington and Lincoln, as will be discussed in subsequent chapters, made much of the "solemn Oath" in justifying their exercise of wartime powers. Article II's Oath can be loosely traced, at least, to the English Coronation Act of 1688, which prescribed the religious ceremony and oath that the monarch must

⁵⁹ Article II, Section 3 states that the President has the responsibility "to take care that the laws are faithfully executed." This is an important statement, particularly since it comes in the section discussing the President's relations with the other branches of government. Similar to the Oath, this clause shows that the President is duty-bound to ensure the faithful executive of the laws, as duty not qualified by the condition of war or peace. Hence the President has the duty to faithfully execute the laws in extraordinary times as he does in ordinary times. However, this clause, too, is subordinate to the broader principle for Constitutional interpretation found in the President's Oath to "preserve, protect, and defend the Constitution," which permits Presidential discretion to achieve the purposes for which the government is constituted.

take before being crowned.⁶⁰ Oaths for various government officials and citizens, moreover, were relatively common in all of the State Constitutions at the times.⁶¹ Many of these were loyalty oaths. The Presidential Oath, as written in the Constitution, stands out for its bold and personal language as well as the significant duties that it imposes upon the principal executive officer. Somewhat surprisingly, the Presidential Oath has not received as much scholarly attention as its direct, unique, and personal language might suggest. After all, why would the Framers, in all their discussions and machination at the Constitutional Convention explicitly express an oath that suggests such far-reaching responsibilities and duties? Edward Corwin, for instance, raises the issue of the Oath, and asks appropriate questions regarding the Oath's relationship with Presidential powers; however, he stops short of analyzing its full implications.⁶² He acknowledges that the Oath received little discussion, at least according to Madison's notes, at the Convention and that it

⁶⁰ Amar, 177-179. In addition to discussing the personal nature of the Presidential Oath and its significance for our understanding of the special duty of the President, he also emphasizes that the Constitution's Oath, by departing from the religious symbolism of the British Coronation Oath, represents a significant symbol of America's religious freedom and tolerance.

⁶¹ The Constitution of the State of Georgia, February 5, 1777 contains language in an Oath for the governor that is similar to that used in the U.S. Constitution. Most of the other state constitutions at the time had more general language in their oaths, oaths of loyalty, and the same oaths for multiple officers (not a unique one for the executive).

⁶² Corwin, *The President: Office and Powers*, 148-150. Matthew A. Pauley focuses on the issues that Corwin raises with respect to the Presidential Oath. Yet he too leaves several questions unanswered. Moreover, he makes other rather odd claims such as the constitutional oath made President Lincoln, for example, do things that are blatantly unconstitutional. Matthew A. Pauley, *I Do Solemnly Swear: The President's Constitutional Oath* (New York: University Press of America, 1999). See Chapter IV of this dissertation for the centrality of the Presidential Oath in understanding Lincoln's constitutionalism. Pauley does, however, provide a solid background on the history of oaths.

garnered little attention during the ratification debates.⁶³ Yet, he does not explore the questions begging to be addressed: Why does Constitution contain the Oath and why is it worded as it is? George Anastaplo suggests that in specifying the language of the Presidential Oath, the Constitution seeks to “strictly define” the President’s role and circumscribe his powers when compared with other officers. Yet, in his otherwise erudite examination of the U.S. Constitution, Anastaplo also leaves an essential question about the Presidential Oath unanswered:

Notice that he is not personally pledged to serve the people or the Country or even the good or the just, but rather the Constitution, which would seem to discourage the invocation by any President, *except perhaps in the most catastrophic circumstances*, of supposed prerogatives rooted in the people or in the Country at large or in any extra-constitutional standards.⁶⁴

What are these “catastrophic circumstances” that “perhaps” would allow the President to call upon “supposed prerogatives” rooted in the people or in the Country? Anastaplo appears to leave a crack in the door for the legitimate and constitutional exercise of extraordinary powers by the President in times of war and danger. In an excellent article on the 1973 War Powers Resolution, Robert Scigliano almost

⁶³ In his voluminous commentary of the U.S. Constitution, Justice Joseph Story wrote briefly on the Presidential Oath, “There is little need of commentary upon this clause. No man can well doubt the propriety of placing a president of the United States under the most solemn obligations to preserve, protect, and defend the constitution. It is a suitable pledge of his fidelity and responsibility to his country; and creates upon his conscience a deep sense of duty, by an appeal at once in the presence of God and man to the most sacred and solemn sanctions, which can operate upon the human mind.” Joseph Story, *Commentaries on the Constitution of the United States* (Boston: Hilliard, Gray & Co., 1833), Section 1482.

⁶⁴ George Anastaplo, *The Constitution of 1787: A Commentary* (Baltimore: The Johns Hopkins University Press, 1989), 117-118 (Emphasis Mine).

offhandedly ends his discussion of the constitutional sources of presidential war powers with a paragraph worth quoting at length:

When the president suspends or dispenses with the prescription of law in special situations, we may say that he exercises emergency power so long as we understand that the source of this power is not, strictly speaking, the Constitution or statutory law but the “law of necessity.” We qualify this statement because the need for the president to act in emergencies seems also to be acknowledged by the Constitution in the *oath which it requires him, and him alone, to take, to “preserve, protect, and defend the Constitution of the United States.”... Easily overlooked in ordinary times, this provision suggests the crucial part which the energetic executive play in the American form of republican government.*⁶⁵

Scigliano references how the “crucial part” the Oath plays connecting executive energy and the President’s special duty. However, he also stops short of exploring the full meaning of the Oath and the significant implications it has for how we understand the President’s wartime powers.

The question remains: why is a separate Presidential Oath included in Article II, and what significance ought we to place upon it? Oaths of office or position were commonplace in many governments before the United States. The British Monarch even took a prescribed oath at the Coronation, which was a religious ceremony that also made him the head of the Anglican Church as well. Early state constitutions also included some form of oath for their governors and these likely served as a model during the Constitutional Convention. But why does the President not simply take the

⁶⁵ Robert Scigliano, “The War Powers Resolution and the War Powers” in *The Presidency in the Constitutional Order*, edited by Joseph Bessette and Jeffrey Tulis. (Baton Rouge: Louisiana State Univ. Press, 1981) 115-53.142-143. (Emphasis mine).

oath in Article VI to “support” the Constitution just as Senators, Congressman, members of the judiciary, and virtually all other government officers? If this were the requirement, the President could be viewed as normal loyal political officer, carrying out the same duties of government that others have. The oath outlined in Article VI, however, represents more of a political loyalty test to the government, to ensure that those in its service support the Constitution as the supreme law of the land (as opposed to subordinate to individual state laws). The Presidency, however, has its own special Oath, very personal to the President-to-be, to which he must swear before entering the office:

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: - “I do solemnly swear (or affirm) that I will faithfully execute the Office of the President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.

The wording of the President’s Oath and its position within Article II provide some insight into the special responsibilities the Constitution assigns to the Presidency. Whereas the oath of Article VI require political officers to “support” the Constitution, Article II’s Presidential Oath goes beyond support to include a solemn duty to “preserve, protect and defend” the Constitution. The Framers explicitly placed a higher calling and greater responsibility upon the shoulders of the Presidency in the wording of the Presidential Oath. The President must do more than just support the Constitution and swear political allegiance; he (or she) must swear to exercise all of those powers vested by the Constitution to ensure its survival (“to the best of my ability”). Appearing at the end of Article II, Section 1, which outlines the size, term,

mode of electing, requirements (citizenship, age, and residency), procedures for replacing, and compensation of the Presidency, the Presidential Oath Clause serves as a transition to Section 2's outline of President's general powers. The Oath must be taken after all of the procedures and requirements (e.g., age, citizenship, mode of election) of Section 1 are met, and only then can the President begin to execute the Office by exercising its powers. The Oath is very personal, with the phrases "I do solemnly swear," "I will faithfully execute," and "best of my ability" and corresponds with the Preamble's personal language "We the People" that established and ordained the Constitution.⁶⁶ These are the only two places in the Constitution where personal pronouns are used. Whereas the People are the only ones able to establish the constitutional order, they ask the President to swear to do everything he can to ensure that it survives.

The Presidential Oath, thus, indicates that the Presidency has a special responsibility within the Constitutional order.⁶⁷ Although others have responsibility to support the Constitution, preserving, protecting and defending the Constitutional order against threats ultimately falls to the Presidency. Put differently, the Constitution's survival ultimately rests with the President. As Michael Stokes

⁶⁶ Amar, 177-178. "In the center of an impersonal legal text setting forth general rules and principles lay a strikingly personal passage."

⁶⁷ Responsibility is an appropriate characterization—Publius suggests a "due responsibility" is the key ingredient of ensuring the safe use of executive energy. Interestingly enough, the root of the word "responsibility" is the Latin *spondeo* which means to take a solemn or religious oath. For an excellent discussion of "responsibility" and its meaning to the Framers, see Charles R. Kesler, "Responsibility in The Federalist," in *Educating the Prince*, 219-232.

Paulsen rightfully argues that the Presidential Oath makes the President a “kind of special guardian—almost a ‘Lord Protector’—of the Constitution.”⁶⁸

Understanding the Presidency as such has significant implications for the interpretation of war powers. Though Congress may have the Constitutional power to “declare war,” the President has a higher purpose, assigned explicitly by the Constitution, to use whatever means at his disposal to ensure that the constitutional order remains intact. Returning to our previous discussion of Publius’s notion of the “absurdity” of establishing *ends* without providing the adequate *means* to achieve it, it would be similarly absurd to conclude the Constitution assigns a special duty to the President without providing it the requisite powers to carry out that duty. The President, therefore, is bound by “solemn Oath” to use whatever powers to ensure that the Constitution ultimately survives. To understand the President’s power as limited and restricted would be mistaken and inconsistent with the Constitution’s own language. The Constitution is an enduring document, contains all the necessary powers for its continuance, and ultimately expects the Presidency to ensure that its survival. The interpretative principle of Presidential Oath suggests that the President may legitimately interpret and utilize any power granted by the Constitution to ensure its survival. It is worth repeating that this is a potentially dangerous principle for Constitutional interpretation, but that danger does not imply that it incorrect.

⁶⁸ Paulsen, “The Constitution of Necessity,” 1261. Paulsen’s insightful interpretation is worth quoting at length, “The duty is awesome and personal. On its face, the clause appears to assign to the President a special, unique responsibility to the Constitution, certainly not one that is subordinate to the judgment of other actors in the constitutional system. The Presidential Oath Clauses seems to suggest that the President (not the courts) is a kind of special guardian—almost a “Lord Protector”—of the Constitution. Put less grandly, the President is charged with a personal duty of constitutional stewardship.”

Safety in the Republican Sense

How does the Constitution ensure that energy exerted by the President will not be abused? The Presidential Oath is indeed solemn but it does not guarantee that the President will not exercise power towards personal, illegitimate, or unconstitutional ends. As mentioned previously, recent scholarly debate over war powers focuses the debates between Congress and the Executive, specifically, the split authority over the “sword and purse.” The Framers certainly intended for the branches of government to check and balance each other. However, the additional, and perhaps more fundamental, relationship that must be appreciated regards the people who established and ordained the Constitution and the role that the Constitution assigns the Presidency. As such, the President has extensive powers, and the special responsibility, to ensure the survival of the political order. The “safety in the republic sense” from an abuse or overexertion of executive energy that Publius articulates, in short, revolves principally around relationship between the President and the sovereign people.

As Publius explains, the “structure and powers” of the executive department combine the ingredients for energy but also “combine the requisites to safety, in the republican sense”—and he specifically defines the latter as a due dependence upon the people, a due responsibility. The Oath emphasizes the President’s special responsibility to the Constitution. The due dependence upon the people stems primarily from the mode of the election of the President, the length of the term of office, its unitary nature, and, overall, the fact that the Constitution empowers the

Office of the President, not the person, or peoples who have served in it. As Publius writes,

[T]he election of the President once in four years by persons immediately chosen by the people for that purpose, and his being at all time liable to impeachment, trial, dismissal from office, incapacity to serve in any other and to the forfeiture of life and estate by subsequent prosecution in the common course of the law. (*Federalist 77*)

A unitary executive, who alone, is accountable for his actions, elected through a special mode every four years, and subject to impeachment and dismissal from office at all times by the people's representatives ensures a "due dependence" upon the people. Publius goes to great lengths to show why a unitary executive is necessary for safety of the republic, cautioning that having more than one executive would reduce accountability as they could hide behind others. A unitary executive essentially has "nowhere to hide" and stands alone front and center to be held accountable to the people. Though we tend to take Presidential elections and the process of impeachment for granted, they are central to understanding how the Framers reconciled a strong, independent Presidency with great responsibility and powers, with a republican form of government. Publius begins his discussion of the Executive Department with a description of the mode of election: "if the manner of it be not perfect, it is at least excellent" (*Federalist 68*). The mode of election, in which the people of the several states elect fellow citizens for the "special purpose" of choosing the President, is fundamentally a republican act and reflects the "partly federal, partly national" character of the Constitution and the way in which it was established and ordained by the people of the individual states. Thus, the mode of

election—similar to the personal language used in the Preamble and the Presidential Oath—shows the connection the Office of the Presidency has with the Constitution. Moreover, Publius shows us how the connection between the President’s great responsibility and an electoral process to hold him accountable when he writes, “It was desirable that the sense of the people should operate in the choice of the person to whom so important a trust was to be confided” (*Federalist 68*).

Furthermore, a four-year term combines the advantages of energy and safety, the right balance of time for the President to have enough time to plan and execute duties, but return to the people to judge what he has done and hold him accountable. That the Founders did not include in the original a 22nd-Amendment-like limitation on Presidential terms suggests that they were less fearful of continuous executive rule; after all, continuing to serve during “good behavior” represents a significant “improvement in modern government” (*Federalist 78*). This is especially important during times of war, with all its variables, in which a President must develop a plan, resource it, and execute it against a potentially strong and dynamic foe. Thus, four years enables the President to exert energy for several years but remain periodically accountable to the people, assuming he maintains good behavior, to ensure that he is carrying out the public good.

Publius further suggests that a four-year term provides a “firmness” to the Presidency, enabling him to stand against the “prevailing current” and “be in a situation to dare to act upon his own opinion with vigor and decision” (*Federalist 71*). The President, who has a special duty to execute efforts towards the public good, could occasionally be forced to carry out unpopular measures and go against the

prevailing opinion—the “sudden breeze of passion” and “transient impulse”—of the community or legislature to achieve the “public good” (*Federalist 71*). A period of four years often permits sufficient time for events to unfold, popular passions to cool, reason to prevail, and ultimately enable the people to make reasonable judgment regarding the President’s decisions during that period. This is particularly true in times of war and crises, in which anger, passion, and fear are prevalent. The President may, on occasion, have to undertake unpopular measures to try to prosecute a war that has caused suffering and frustration and appears unwinnable, for instance. However, knowing that his policies will be subjected to national scrutiny every four years, and that the people will hold him accountable, forces the President not to consider those choices lightly. The structure of the elections forces Presidents to strive for the public good, and to weigh and consider their measures. Imprudent or foolish choices will not be rewarded; those that prove to be in the public interest will be.

The constitutionally prescribed structure of regular, periodic national elections, which serves as a principal forcing function to help ensure Presidents behave properly, even in times of crisis; however, it is not the only means. The people, through their representatives, have recourse to removing the President from office for “high crimes and misdemeanors.” Therefore, when Presidents usurp Constitutional powers, the Legislature has a tool also for ensuring the preservation and protection of the Constitution. After all, what higher crime could there be than violating the “sacred law of the land”? Therefore, before scholars accuse Presidents of usurping powers or of undermining the Constitution, they should examine more

fundamental questions about the measures that the Constitution contains to ensure “safety in the republican sense.” The Presidents exercise of wartime power is ultimately held accountable by the people who either accept that the acts were legitimately conducted in defense of the political order, or choose to remove the President from office.

The nature of the executive department—its structure, tenure, and mode of election—is central to ensuring that executive energy can be expended safely. However, we must return to a theme discussed previously, principally that the purpose of the Constitution was to unleash executive energy to ensure that the Constitution would endure. Put differently, as Publius explains, the danger to republican government lay more in the potential for legislative usurpation, and the lack of energy in a legislative-dominant government not in the threat posed by a single executive.⁶⁹ The former was of much greater concern; even more, the latter was seen as a check against the former. It was imperative to have a strong, independent executive, with great responsibility and beholden to the people to ensure that power would be exercised to meet the ends of the government. Hence, Publius dedicates devotes much more discussion to why more energy in the executive is necessary, and seems satisfied that its structure and organization will ensure that the executive department remain safely republican while exerting energy. His intent, put differently, was to unfetter the executive not bound it and contain it. Publius and other Founders had much more to fear from a weakened executive, shackled and confined institutionally, than a strong, independent executive capable of decisive

⁶⁹ Judith A. Best, “Legislative Tyranny and the Liberation of the Executive: A View From the Founding” *Presidential Studies Quarterly* (Fall 1987), 697-709.

action and fending off the encroachments of the legislature. This has enormous implications for the debate over the war power, which again focuses primarily on the relations between Congress and the Presidency and the Constitution's "invitation to struggle" to the branches of government. The intent of the Framers, rather, is to provide the President—as a truly republican officer—with significant powers and equal responsibility, and to have him held accountable to the people to whom he must answer.

That the Constitution seeks to liberate the executive from legislative dominance and views a vigilant and free people as the more effective and appropriate mechanism for ensuring that the Presidency exercises powers and duties safely for the public good does not imply that we should simply ignore relations between the Presidency and Congress or the Presidency and the Judiciary. Each represent an equal and independent institution with its own constitutional powers and responsibilities. Congress, for example, can use its legislative powers in contradiction to the Presidency. And the Judiciary can certainly rule against the President. The President, in its execution of the law, however, also has the interpretative responsibilities in how and with what force it will execute legislative statutes or judicial rulings.⁷⁰ This has and will continue to bring the Presidency in conflict with the legislative and judicial branches and vice versa; in such cases, however, all three branches have the ability to articulate and explain the constitutional basis of their actions, and leave it to the sovereign people to decide. This is the essence of republican government. As two well-regarded legal scholars note: "Each

⁷⁰ See the discussion below for more on the executive branch's interpretation of the Constitution and the implications it has for the separation of powers.

department (correctly) understands that its ultimate success may depend in large part on its ability to plausibly assert—and persuade the public of—its ‘core,’ preclusive.”⁷¹ This is part of that institutional deliberation that forms a core part of the separation-of-powers principle that underpins the Constitution. Furthermore, such institutional deliberation, combined with periodic elections permits the republican accountability to remain in the hands of the sovereign people. The President, first and foremost, is duty-bound to the Constitution and must continuously explain how his wartime exercise of power will help meet the preservation, protection, and defense of the Constitution. It is by this standard that the President should articulate its wartime activities and also by which the people should judge his or her conduct. As suggested above, the pursuit of this duty may require the President, in extreme times, to ignore or even violate a legislative statute or judicial ruling; however, this does not imply that the President has acted unconstitutionally. For it is not subordinate to either of those branches; the constitutionality of its actions, as those of Congress and the Supreme Court, remain ultimately in the hands of the sovereign people.

Alternatives to Self-Preservation

This chapter has put forth that the Constitution’s explicit purpose and implicit meaning center around the basic but essential concept of self-preservation and security of the political order. Using the Constitution’s text as well as supporting writings such as *The Federalist*, this chapter also argues that the Constitution assigns the Presidency the special (but not exclusive) duty to ensure the safety of the political

⁷¹ Barron and Lederman, “The Commander in Chief At the Lowest Ebb – Framing the Problem, Doctrine, and Original Understanding,” 725.

order, and that it equips it with the requisite tools and necessary energy to carry out its solemn responsibilities. The subsequent chapters will show how two of the greatest U.S. Presidents similar understood their duties and authority. This chapter also, and perhaps most importantly, shows that the President does not operate without limit but that the Constitution structures the Office in such a way to ensure it remains accountable. Such an explanation helps us understand Harvey Mansfield's argument that the Framers' "constitutionalized" the executive power,⁷² meaning that they explicitly designed it to be able to wield enormous and necessary power in defense of the political order but structured with the requisite mechanisms of accountability so that it would remain representative of the sovereign people.

Viewing the Constitution through the lens of self-preservation, and using it to determine the constitutionality of the President's wartime actions, however, is not a generally accepted view of executive war power. As admitted above, it is not simply an unconventional approach but even potentially a dangerous and radical proposition for constitutional interpretation. To help clarify and distinguish the ideas put forth in this chapter, it concludes by briefly addressing the following related issues: prerogative power; constitutional self-preservation and the "spectre" of Carl Schmitt; and the separation of powers.

⁷² Mansfield, 252-255. George Thomas also eloquently captures this point, "The modern executive is truly an attempt to reconcile necessity with Republican and ultimately constitutional government." See Thomas "As Far as Republican Principles Will Admit: Presidential Prerogative and Constitutional Government," *Presidential Studies Quarterly* Vol 30, No. 3 (September 2000), 534-552.

Of Prerogative

The term prerogative has been widely used to describe executive power, particularly the conduct of activities that have not been explicitly legislated. The term itself stems from the political philosopher John Locke's basic definition of prerogative as "the power to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it, is that which is called Prerogative."⁷³ Locke brilliantly captures the fundamental problem of reconciling written law and discretionary executive power necessary in times of emergency. Yet, Locke offers a more nuanced understanding of prerogative as he defines it at least five different times, grounding it in nature—beginning with his discussion of parental power—but also describes it as arbitrary and that it "never be questioned" under his discussion of tyranny.⁷⁴

In recent years, the term prerogative has gained significant currency in discussions regarding executive power, particularly the exercise of extraordinary power in times of crises, to the point where executive prerogative and executive

⁷³ John Locke, *Two Treatises of Government*, edited with an introduction and notes by Peter Laslett, (New York: Cambridge University Press, 2000).

⁷⁴ Locke describes prerogative at some length in Chapter XIV of the *Second Treatise*, but he also discusses it in at least four other chapters: VI: Of Paternal Power; VIII: Of the Beginning of Political Societies; XIII: Of the Subordination of the Powers of the Commonwealth; and XVIII: Of Tyranny. Though Locke discusses prerogative as executive discretionary power to do "good, not harm" when the legislature is not in session or when there is no written law to prescribe what measure to take, his discussion of prerogative has a bit more nuance. Locke is not merely describing executive discretionary power in lieu of written law but the exercise of power in the execution of the law of nature: self-preservation. This thought is developed in more detail in the examination of Lincoln in Chapter IV. For more on this deeper and more nuanced understanding of Locke's influence on the American Founders, see David Weaver, "Leadership, Locke, and The Federalist," *American Journal of Political Science* Vol 41, No 2 (April 1997), 420-446. For an overview of Locke's different uses of prerogative see, Thomas S. Langston and Michael E. Lind, "John Locke and the Limits of Presidential Prerogative," *Polity* Vol 24, No. 1 (Autumn 1991), 49-68.

power have become indistinguishable. Scholars who use the term prerogative, particularly with respect to emergency or war powers, to describe executive power confront one key challenge: the Framers never used the Lockean prerogative to describe presidential power.⁷⁵ As Martin Diamond reminds us about the Presidency, “although a very powerful office, the executive still lacks one supremely dangerous ingredient—the prerogative.”⁷⁶ As Robert Scigliano informs us, the use of the Lockean prerogative as a way to describe extraordinary presidential power did not emerge until Edward Corwin in his landmark *The President: Office and Powers* first published in 1940. Since then, “it has been customary for scholars on the presidency to make that connection [between Locke’s discussion of prerogative and the presidency.]” Corwin accordingly “set an example” that continues influence the presidency literature today by “regarding prerogative (most of the time, at least) as identical to executive power.”⁷⁷ Richard Pious represents this line of reasoning most clearly, arguing that prerogative power results from President’s claiming constitutional authority to make important decisions. Pious expresses concern that President’s claims constitutional authority to exert their decision-making role rather than more “routine methods of influence and persuasion.”⁷⁸ What appears to concern Pious most is that the President looks to the Constitution as the basis for

⁷⁵ See, for example, Jack Rakove, “Taking the Prerogative out of the Presidency: An Originalist Perspective,” *Presidential Studies Quarterly* Vol: 37, No. 1 (2007) 85-100.

⁷⁶ Martin Diamond, *The Founding of the Democratic Republic*, 88. Diamond goes on to describe that the prerogative was the “British king’s area of personal and independent authority...[and] always a threat in the background to constitutional government.” He concludes that the President’s powers derive from the Constitution and not any other source.

⁷⁷ Robert Scigliano, “The President’s ‘Prerogative Power,’” in *Inventing the American Presidency*, edited by Thomas Cronin (Lawrence, KS: University Press of Kansas, 1989), 236-237.

⁷⁸ Pious, *The American Presidency*, 47-50.

understanding its duties and authorities rather than the more informal, “Neustadtian” bargaining and influence, which, in theory at least, has no boundaries.⁷⁹

To recognize prerogative as an alternative, or even similar to, the argument put forth in this chapter depends upon how one defines the term. If prerogative is, as Pious and many other presidential scholars use the term, simply synonymous with executive power, then the term lacks any analytical precision to be useful. Put differently, if prerogative simply means executive power, then, of course, the executive has prerogative power by definition. If by prerogative, however, we understand it as Locke presented it, at least in one place in his *Second Treatise*, as the power to without or even against the law for the public good, it becomes more useful. The challenge of understanding the Presidency’s connection with the Lockean prerogative emerges most prominently when scholars conflate it to mean both “extralegal” and “extraconstitutional” powers. These terms ought to be distinguished for they have enormous implications for our understanding of the fundamental principle underlying the Constitution and the basis of the executive war power. As this chapter has shown, the President is duty-bound to preserve, protect, and defend the Constitution, and actions taken towards those ends are fully consistent with the Constitution. They should not be understood as “extraconstitutional” or as going above, beyond, or in addition to the President’s constitutional power. However, the President may at times take actions that conflict with or go beyond legislative statutes if those actions are necessary to the fulfillment of its duties. In such cases, the

⁷⁹ In many ways, Pious has completely inverted the understanding of prerogative by associating it with President’s who claim to act within the Constitution.

Presidency may be said to exercise “extralegal”—but not “extraconstitutional”—powers.

The other key distinction between Locke’s use of the prerogative and the arguments of constitutional self-preservation and presidential duty put forth is in this chapter centers upon this issue of accountability. Locke suggests that the prerogative should “never be questioned” and that the people’s only recourse is an “appeal to heaven.” As this chapter has argued, however, the President has the duty to wield extraordinary power in times of danger but the Framers went to great lengths to make the exercise of presidential power “safe in the republican sense.” The President, after all, ultimately stands before the judgment of the people.⁸⁰ The President, in other words, must constantly “appeal to the people,” who have multiple constitutional means of accountability, including voting the President out of office. Therefore, unlike Locke’s prerogative, the people may *question* the President’s exercise of power; it is the people, not “heaven” who question, and ultimately determine, whether the Presidency acted for the “publick good” in the exercise of its power.

Constitutional Self-Preservation and the Spectre of Carl Schmitt⁸¹

That the President may wield enormous powers *constitutionally* to meet the needs of an emergency situation could be subject to the criticism that it poses to great

⁸⁰ Martin Diamond simply, and brilliantly, points out the obvious that is often overlooked: “The President is basically a democratic elective office; the people can vote a dangerous President out of office...Presidential power, like all political power under the Constitution, results primarily from winning majorities in free, popular elections.” Diamond, *The Founding of the Democratic Republic*, 88.

⁸¹ See Mark Tushnet, “Comment: Meditations on Carl Schmitt,” *Georgia Law Review* Vol 40 (Spring 2006), 877.

a risk of transforming the constitutional order into a tyranny. It raises the prospect that John Milton captures in *Paradise Lost*: “So spake the Fiend, and with necessity, The tyrant’s plea, excused his devilish deeds.” Accordingly, the question could be posed: Are President’s appeal to the Constitution to wield the power, however extraordinary it may be, to meet the necessity of the situation merely to veil tyrannical acts and excuse wrongs inflicted? Concern with necessity as the tyrant’s plea provides the backdrop of several key criticisms of the arguments put forward in this dissertation and others sympathetic to it.

In a lecture before the University of Georgia Law School, the renowned legal scholar Sanford Levinson raised several key questions regarding presidential emergency powers, and the potential threat it poses to the constitutional order.⁸² Levinson, who admits that his comments were motivated, in part, by his partisanship and dislike of the George W. Bush Administration and the path to a more “authoritarian mode of governance” that he feels he was blazing. His admitted partisanship aside, Levinson outlines the fundamental problem of constitutionalism as limited government with defined powers and the prospect of needing seemingly unlimited powers to meet the demands of an emergency when he writes:

A basic question is precisely the extent to which a well-designed constitution should, on the one hand, be “rigid,” pretending to an impermeability to change and “adaptation” even in time of perceived emergency; or,

⁸² Sanford Levinson delivered the 2005 Sibley Lecture to the University of Georgia Law School, which became the basis for a Georgia Law Review Symposium on “Emergency Powers and the Constitution.” Levinson’s speech provided the basis for his article in that symposium, “Norms in a State of Permanent Emergency,” *Georgia Law Review* Vol. 40 (Spring 2006), 699. Levinson also responded to commentary on this article in his “Response: The Deepening Crisis of American Constitutionalism,” *Georgia Law Review* Vol. 40 (Spring 2006), 887.

on the contrary, be flexible enough even to ‘suspend’ the normal operations of the constitutional order when such emergencies present themselves.⁸³

Levinson then contends that the United States Constitution represents the former. Conclusions such as Levinson can only be made by taking a clause-specific approach to constitutional interpretation, focusing on the forms and procedures while ignoring the higher, more normative purposes towards which the Constitution aims. The President, after all, is charged with faithfully executive the law, and what is the Constitution but the highest law of the land? Referencing Tocqueville’s quote used to open this chapter, should we not use “law” and “circumstance” to better understand the President’s exercise of power? Implicitly then, the President’s constitutional duties to preserve, protect, and defend it require the different application of power depending on the circumstance. The President, ultimately, has discretion to determine how best to meet its duties, but must be able to explain it in constitutional terms to the sovereign people, who ultimately hold him accountable. Levinson and others downplay that self-preservation and the President’s duty to it serves “meta rule of constitutional interpretation”⁸⁴ and does not acknowledge that we ought to interpret the rules and procedures of the Constitution in light of the explicit purposes for which is designed.

Levinson, furthermore, argues that the Bush Administration employed a “a near-dictatorial conception of president power,” and that it can best be understood as an extension of the political thought of Carl Schmitt, the Weimar-era political theorist

⁸³ Levinson, “Norms in a State of Permanent Emergency,” 716.

⁸⁴ Paulsen, “The Constitution of Necessity,” 1271.

and jurist who supported the Nazi regime in Germany. His fears of the Bush Administration expressed in his lecture opened up for other the possibility of Schmitt informing contemporary constitutional understanding.⁸⁵ Schmitt, in criticizing modern liberalism as well as German parliamentary system for its ability to act decisively in a crisis, wrote extensively about the concept of the dictator and the “state of the exception,” when the rule of law no longer operates.⁸⁶ Schmitt’s perhaps most famous dictum, that the “sovereign is he who decides on the exception.”⁸⁷ A Schmittian interpretation of the Presidency, therefore, implies that the President can suspend the Constitution and decide when to do so. In commenting on Levinson’s speech, William Scheuerman helps clarify this notion: “In the spirit of Carl Schmitt, executive emergency power is conceived as a fundamentally normless realm in which the President exercises pure discretion to war off life-threatening existential threats to the political community.”⁸⁸

In employing Schmitt as the basis for understanding the exercise of executive wartime power in the United States, Levinson and others face a serious challenge in that the people are sovereign and possess multiple constitutional means by which to hold the President, and other elected officials, accountable. This obvious response

⁸⁵ Mark Tushnet commends Levinson for having done “yeoman work in brining Schmitt’s perspective to the attention of constitutional theorists.” See Tushnet, “Comment: Meditations on Carl Schmitt,” 877.

⁸⁶ Ibid. 877-878.

⁸⁷ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, George Schwab (trans.), (Chicago: University of Chicago Press), 2005. Clinton Rossiter’s *Constitutional Dictatorship* remains the most insightful, engaging, and disturbing discussion of the concept of dictatorship in modern democratic government. See Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies*, with a new introduction by William J. Quirk, (New Jersey: Transaction Publishers, 2004).

⁸⁸ William Scheuerman, “Comment: Time to Look Abroad? The Legal Regulation of Emergency Powers,” *Georgia Law Review* Vol 40 (Spring 2006), 863-864.

appears to have escaped Professor Levinson and others who expound upon the dangers of presidential power in times of crises. This is not to say that elections, and other republican institutions of accountability, can ensure that the President does not commit an unconstitutional act; it does, however, provide the mechanism to mitigate it or at least hold it accountable. The President, moreover, does not act in a “normless” environment in an emergency situation, and the Constitution is not set aside. Quite the opposite for the President must constantly appeal to the Constitution to justify his (or her) actions in an emergency to remain accountable to the people and their representatives.

The President’s power, at times, can be accurately described as extraordinary and discretionary but sovereignty ultimately remains with the people, who, as discussed in this chapter, from time to time, judge the behavior of their leaders. For all of Levinson’s fears of the Bush Administration and the “war on terror,” elections were held in 2004 and 2008 with the latter resulting in a complete change in the party leadership, and at no point did any serious discussion of canceling or postponing the election occur. Similarly, elections have taken place in the midst of many crises, including 1800, 1864, or 1944 to name but a few. As Chapter IV will discuss in more detail, Lincoln’s constitutionalism stems as much from what he did not do, specifically postpone elections, than from the actions he took.

Executive War Power and the Separation of Powers

Levinson’s broader concern over the constitutionality of presidential power in times of emergency, however, faces an admitted “cognitive dissonance” in the

prospect that presidents such as Lincoln or Franklin Roosevelt may have acted “quite cavalier at time with regard to legal norms that might have constrained their doing what they viewed as best for the country.” Avoiding this cognitive dissonance could cause us to “redefine the laws rather redefine the presidents.”⁸⁹ Inherent in Levinson’s remark, however, is the predominant scholarly notion that judicial opinions (and by extension those who study them) maintain the authority to judge the constitutionality of particular acts, and to “say what the law is.”

Judicial supremacy, or holding the judiciary superior in all matters of constitutional challenges, poses two key shortfalls: it ignores the merits of presidential contributions of constitutional interpretation and it implicitly (if not explicitly) violates the basic principles of separation of powers and republican government. The Office of Presidency stands as one of three branches of the national government as outlined in the Constitution, and as such is vested with powers and conferred duties to which it must swear an oath to uphold. In executing its powers and carrying out its duties, the Presidency, as an independent branch of government must have some interpretative responsibilities to determine to what extent, with what emphasis, and in what way the Constitution obliges it to execute its office. This does

⁸⁹ Levinson, “Constitutional Norms in a State of Permanent Emergency,” 703-704. Kevin Jon Heller argues that we must be able to distinguish between the use of necessity and self-preservation by “great” presidents and not-so-great presidents. He cautions that Levinson does not make such distinctions. He also, paralleling the Milton quote above, critiques Michael Stokes Paulsen for providing “nothing more than a trope that Presidents can use to justify their partisan political agendas.” See Keller, “The Rhetoric of Necessity (Or, Sanford Levinson’s Pinteresque Conversation),” *Georgia Law Review* Vol 40 (Spring 2006), 783-785. As will be discussed below, however, President’s must articulate and explain the constitutionality of their actions to the citizens who are ultimately in a position to judge. Keller is correct that President’s can try to wrap their actions in the justification of necessity of the situation but the people will ultimately determine if such actions were warranted. Furthermore, Keller correctly cautions that such power could be abused; however, simply because it can be abused, does not suggest that the power does not exist.

not mean that the Presidency ignores other branches or considers itself superior; rather, it represents but one of three branches, all of which have different duties and thus likely to have different constitutional perspectives on a particular matter.⁹⁰

Accordingly, as Jeffrey Tulis articulates so well,

The President, Congress, and the Supreme Court are constituted not just by assigned power but rather by congeries of structures and powers.” Plurality or unity of office-holders, extent of the terms of office, modes of selection for office, as well as specified powers and duties combine to create a set of institution that behave and “think” quite differently from each other. A crucial invention of the new American science of politics was to design institutions to represent differing desiderata of democratic governance rather than represent social orders or alternative regimes.⁹¹

The President, therefore, interprets the Constitution from its vantage point, influenced by factors including its assigned duties and powers to the very nature of the Office itself. In times of war, in particular, the President must articulate and explain the constitutionality of its actions, and leave it to the people to weigh and consider the circumstances and ultimately determine the constitutionality of the President’s activity. As one scholar notes, “emergencies, then, are a function of circumstance rather than edict” and the circumstances shape the public’s perception of the President’s actions.⁹²

⁹⁰ Abraham Lincoln argued that the Court and the Presidency could look at the same constitutional issue but view it differently; he also warned of the risks of accepting the Supreme Court decisions without question. See, for example, *Speech on the Dred Scott Decision*, June 26, 1857 in Roy P. Basler, ed., *Collected Works of Abraham Lincoln*, (New Brunswick, NJ: Rutgers University Press, 1953), Vol: 2, 398-410.

⁹¹ Jeffrey K. Tulis, “Deliberation Between Institutions,” in *Debating Deliberative Democracy*, edited by James S. Fisher and Peter Laslett (Malden, MA: Blackwell Publishing, 2003), 208-209

⁹² Daniel Franklin, *Extraordinary Measures*, 67. See also Thomas, 542.

The Courts and Congress may have a very different understanding of the constitutionality of the President's actions, but that does not necessarily give them the last word. This is not an attempt to downplay the importance of the Supreme Court; rather it is an argument for why the Presidency should have an equal voice in constitutional matters. How President's construct their wartime powers should occupy an equal place with Supreme Court opinions and Congressional statutes in shaping the debate on and understanding of the Constitution in times of war. After all, the very nature of the office, a single person, nationally elected, with unique responsibility to "preserve, protect, and defend the Constitution" forces those elected to occupy the Office of the Presidency to carefully consider how they understand and articulate its powers and duties. The next two chapters will focus on how two of America's greatest presidents constructed the executive war power. Their constitutionalism, it can be said, was forged in the cauldron of war and crises, and perhaps offers us rare insight into how the Constitution enables a free society to maintain its fundamental constitutional character even in the most trying times.

Chapter III: Completing the Founding: Washington, the Whiskey Rebellion, and the Constitutional Presidency

Though President George Washington's Administration played perhaps the most crucial role in the development of a strong and independent presidency, his particular views on presidential power, specifically its scope and extent in times of war, have been overlooked. That is, despite the popular, near-mythical status that Washington occupies as *the* Founding Father of the United States and as the person most commonly associated with the creation and development of the Presidency, there is a corresponding dearth of scholarly attention paid to his political thought. It is surprising that someone so central to the Founding of the United States and its successful experiment in republican government has had such little direct attention paid to his interpretation of the principles underlying the American political order. More specifically, as the first person to occupy the Office of the Presidency, it is ironic that his construction of the executive power also has been given short shrift. Since no major war occurred during his Presidency, scholars have simply neglected to examine Washington's words and deeds with an eye for what could be learned about the role of the presidency in times of danger. Only a few scholars have directly addressed Washington's political thought, and, as a result, the literature on Washington's constitutionalism pales in comparison to that dedicated to some of those who followed him.⁹³ Studies of his presidency, in fact, tend to focus more on

⁹³ Glenn Phelps probably has done more than anyone else to show that Washington had a coherent political thought that guided his understanding of the Constitution and the Presidency. He does not, however, focus on Washington's construction of the executive

the political debates among his subordinates than on Washington's articulation of any coherent constitutional thought about the Presidency. As a result, Alexander Hamilton and Thomas Jefferson emerge as more influential to our understanding of executive power than the man who first occupied the office.⁹⁴

This dissertation seeks to build upon the relatively small but hopefully growing literature that argues that Washington not only possessed a firm grasp of the core principles underpinning the Constitution, but that he employed those principles to provide a clear and coherent understanding of the constitutional role of the Presidency. Furthermore, although major war did not erupt during Washington's term, it nearly did on several occasions, and his response to the threats against the new nation, and his constitutional justification for Presidential leadership and action

power in times of war and rebellion. The following chapter seeks to build upon and supplement Phelps's work. Glenn A. Phelps, *George Washington & American Constitutionalism* (Lawrence, KS: University Press of Kansas, 1993). Richard Loss also offers an excellent overview of Washington's understanding of the Presidency, but he, like Phelps, does not focus on the President's power in extraordinary times. See Richard Loss, *The Modern Theory of Presidential Power: Alexander Hamilton and the Corwin Thesis* (New York: Greenwood Press, 1990). Jeffrey Morrison offer a broader discussion of Washington's underlying political philosophy, drawing attention to its roots in classical and modern republicanism as well as Christian thought. See Jeffrey H. Morrison, *The Political Philosophy of George Washington* (Baltimore, MD: The Johns Hopkins University Press, 2009). Paul O. Carrese also offers an excellent general overview of Washington's political thought in his "Liberty, Moderation, and Constitutionalism: The Political Thought of George Washington," in Bryan-Paul Frost and Jefferey Sikkenga (eds.), *History of American Political Thought* (Lanham, MD: Lexington Books, 2003).

⁹⁴ See, for example, Raymond Tatalovich and Thomas S. Engeman, *The Presidency and Political Science: Two Hundred Years of Constitutional Debate* (Baltimore, MD: The Johns Hopkins University Press, 2003), 25-26. Tatalovich and Engeman suggest that the debate between Hamilton and Jefferson over executive power essentially was a carry over from that of Federalist and Anti-Federalists. Similarly, Edward Corwin cites Hamilton and Madison's debate over the President's power to issue a declaration of neutrality as signaling the "early differentiation of what might be termed the quasi-monarchical and the ultra-Whig conceptions of the Presidency." See Edward S. Corwin, *The President Office and Powers: History and Analysis of Practice and Opinion* (New York: New York University Press, 1940), 18.

offer much perspective on how to view the constitutionality of wartime deeds of those who have followed and will follow him in the Presidency. This chapter specifically focuses on Washington's response to the Whiskey Rebellion, which posed one of the most severe threats to the nation during this formidable period in the young nation's history. My goal is to explore how he understood and articulated his powers and responsibilities of the President. Washington, in short, put the Constitution into effect, and cogently and consistently articulated that it assigned the President the uniquely special role of providing for the preservation of the nation, and that as such, the President legitimately could employ any and all measures as necessary to defend the constitutional order. Washington understood the executive to be strong, independent organ of government but ultimately accountable to the sovereign people who could inflict "Constitutional punishments" on him should he violate his sacred duty to their defense.

The next section of this chapter reviews the predominant scholarly views on Washington as President, which for the most part, either blatantly overlook his contributions or consider his thoughts inferior to those of his subordinates. It is followed by a section that examines the Whiskey Rebellion in some detail and attempts to understand the threat it posed to the constitutional order as Washington himself understood it. Recognizing that Washington viewed the Whiskey Rebellion as a clear and present danger to the political order underpins this section's discussion of Washington's construction of the President's powers and duties to respond to and use force against threats to the nation. This chapter concludes with a brief discussion of Washington's understanding of the constitutional role of the executive as an

extension of the Framers' understanding as described in Chapter II and a precursor to Lincoln's construction of the executive war power seven decades later in the Civil War is discussed in Chapter IV.

President Washington: The Man Behind the Myth

In a speech before the New York Historical Society on the semicentennial of Washington's Inauguration as first President of the United States, John Quincy Adams eloquently borrows from the poet Virgil to compare Washington to Aeneas, the legendary and divinely protected Trojan warrior who became the founder of ancient Rome. Asking his audience to indulge their imaginations and to see Washington much like the poet Virgil viewed Aeneas, Adams opens his speech:

Would it be an unlicensed trespass of the imagination to conceive, that on the night preceding the day of which you now commemorate the fiftieth anniversary - on the night preceding that thirtieth of April, one thousand seven hundred and eighty-nine, when from the balcony of your city-hall, the chancellor of the state of New York, administered to George Washington the solemn oath, faithfully to execute the office of President of the United States, and to the best of his ability, to preserve, protect and defend the Constitution of the United States - that in the visions of the night, the guardian angel of the Father of our country had appeared before him, in the venerated form of his mother, and, to cheer and encourage him in the performance of the momentous and solemn duties that he was about to assume, had delivered to him a suit of celestial armor.⁹⁵

Adams's vivid and powerful language portrays Washington as America's Aeneas, the hero of the national epic, whose legacy will be venerated by future generations of the

⁹⁵ John Quincy Adams, *The Jubilee of the Constitution: A Discourse* (New York: Berford and Co., 1848), 5-7.

great republic. Though Adams's opening portrayal continues by focusing on Washington's virtuous character, he equally, if not more importantly, draws attention to Washington's special relationship with the Constitution. Washington's celestial armor, which he received upon becoming President, Adams's states, consisted of "the Constitution of the United States, a SHIELD embossed by heavenly hands, with the future history of his country." As such, Adams colorfully but correctly depicts the central importance of understanding President Washington's special bond to the Constitution—a divinely protected warrior with his heavenly embossed shield—as the foundation for the future of free government in America.

Adams's poetic license aside, his characterization of the inextricable connection among Washington, the Presidency, and the Constitution, serves as the basis for this chapter's discussion of Washington: as *the* Founding Father whose understanding and use of the Constitution in trying times helped construct the President's powers and responsibilities to the people. Washington, to be sure, is widely and popularly viewed as the mythical hero of the American Revolution and Father of his Country, often portrayed as the Cincinnatus who led his country to victory but selflessly relinquished power when it was in his grasp to return to his farm.⁹⁶ For the most part however, scholars have tended to overlook Washington's intellectual contributions to the constitutional development of the Presidency and have neglected to view him as central to understanding the Presidency in our own time. As one scholar notes, "For all the research and exposition and synthesis that

⁹⁶ Historian Marcus Cunliffe describes what Washington the legendary hero meant to his country while also trying to portray an accurate biography of the man behind those myths. See Cunliffe, *George Washington: Man and Monument* (Boston, MD: Little, Brown, and Company, 1958).

scholars have lavished on the eight formative years that George Washington occupied the chair of state, the figure of the first president is remarkably vague.”⁹⁷ Put differently, for all the works praising and mythmaking about the special place Washington occupies in the American Founding, his constitutionalism and construction of the executive power are a relatively neglected area of study. Worse, some scholars actually diminish his substantive role, citing his political thought as inferior to many of his contemporaries. As a result, the scholarly literature on Washington might best be characterized as having a dualism or “split personality” portraying him at once as the heroic non-partisan unifier of the nation⁹⁸ but also as a weak intellectual who did not contribute substantively to the development of the constitutional presidency.

To demonstrate the central point that Washington’s political thought, or more specifically his construction of the executive power, has been underappreciated, we need look no further than the two most prominent books written by the 20th century’s doyens of presidential studies: Edward Corwin’s *The President: Office and Powers* and Richard Neustadt’s *Presidential Power and the Modern Presidents*. Clearly a rare scholar who took the Constitution and its Framers seriously, Corwin does an excellent job highlighting how the broader powers of the Presidency were shaped, in part, by a general recognition that Washington would be the first to occupy it. That

⁹⁷ J.A. Carroll, “George Washington,” in *America’s Eleven Greatest Presidents*, Morton Borden (editor) (Chicago: Rand McNally, 1971), 4.

⁹⁸ Historian Ralph Ketcham captures the historical portrayal of Washington as a non-partisan unifier suggesting he was “patriot leader, above faction, working for national unity, and seeking to reign as well as to rule.” See Ralph Ketcham, *Presidents Above Party: The First American Presidency, 1789-1829* (Chapel Hill, NC: The University of North Carolina Press, 1984) 89.

is, he claims that the Framers left key issues regarding the scope and extent of the President's powers un- or underdefined in the Constitution since the man they all trusted so much would be its first holder.⁹⁹ He also points out, without much analysis however, that Washington exploited some of the Constitution's vagueness to carve out a "monopoly" for the President in foreign relations.¹⁰⁰ As accurate as his conclusion might be, he makes it *de facto*, without offering an underlying examination of how Washington interpreted the Constitution to grant the presidency this leading role in foreign affairs. For that, Corwin turns primarily to Hamilton, among others. Most of Corwin references to Washington are to events that occurred during his Administration that present an opportunity to air the arguments of Hamilton on the one hand and Jefferson and Madison *et alii* on the other; Corwin found Hamilton to be the real champion of the presidency.¹⁰¹ Though Corwin's

⁹⁹ Edward S. Corwin, *The President Office and Powers*, 18. This notion stems undoubtedly from Pierce Butler's suggestion shortly after the Constitutional Convention of 1787 that the constitutional powers of the Presidency were "greater than I was disposed to make them. Nor, Entre Nous, do I believe they would have been so great had not many of the members cast their eyes towards General Washington as President; and shaped their Ideas of the Powers to be given to a President, by their opinions of his Virtue." See Farrand, *Records*, Vol 3: 302.

¹⁰⁰ Corwin, *The President: Office and Powers*, 214.

¹⁰¹ Richard Loss, in his excellent book on Presidential power, cites Corwin's thesis that presidential power is "the contribution primarily of Alexander Hamilton." Loss continues by citing Corwin's identification of the goal for modern Presidents to be "the kind of President George Washington was..." implying that Washington, too, was significant to the development Presidential power. Loss then goes on to provide a brief but excellent analysis of Washington's interpretation of that power. Corwin's passage that Loss cites as his point of departure, however, does not deal explicitly with Washington construction of executive power. Yet Corwin's quote is from his discussion on presidential term limits and what effect they have on the President's party leadership contra his role as leader of the nation. Term limits, Corwin avers, relieve the President's concern for his political future and that of his party's, thereby allowing him to be the "kind of a President" Washington was, which we should read as non-partisan or above party factionalism, not as a President who played a critical role in the construction of executive power. Though this quote inspired an excellent essay by Richard Loss on Washington's construction of executive power, the underlying

landmark work offers us much, it does not provide any systematic analysis of how the nation's first president constructed the office and powers of the presidency or how Washington's own thoughts may prove helpful to understanding subsequent presidents. Corwin's relative neglect of focus on Washington, and his more weighty discussions on the contributions of Hamilton, Jackson, Jefferson, Wilson, and FDR, leave one with the impression that Washington is a less significant contributor to the presidency, even if Corwin does not explicitly say so.

Unlike Corwin, Neustadt pays little attention to the Constitution as a source of presidential power, and he paid even less attention to any insight Washington (or any other Founders) may contribute to the presidency. Neustadt's influential work offers but one passing reference to Washington, in which he discusses President Eisenhower's desire to emulate the first President as a "good man above politics." Discussing Eisenhower's attempt to live up to Washington, Neustadt remarks: "And he genuinely thought the Presidency was, or ought to be the source of unifying, moderating influence above the struggle, on the model of George Washington—the Washington, that is to say, of legend, not of life."¹⁰² Neustadt's brief reference to Washington as more legend than real life demonstrates his general disregard of Washington's thinking but also hints at why generations of scholars who have followed him ignore Washington as well. Washington, according to Neustadt, offers

premise of the Corwin quote shows that Corwin himself viewed Washington's primary contribution as non-partisanship and the management of subordinates who were the primary contributors to our understanding of the Presidency. See Corwin, *Presidential Power and the Constitution: Essays by Edward Corwin*, edited with an introduction by Richard Loss, (Ithaca, NY: Cornell University Press, 1976), 174-175. See Loss, *The Modern Theory of Presidential Power*, xiii-xiv and 43-82.

¹⁰² Neustadt, *Presidential Power and the Modern Presidents*, 139-140.

the image of a unifying and “above party” President who others have personally attempted to emulate; whether he was in real life or not (Neustadt seems to doubt it) really is immaterial. Washington’s words and deeds essentially play no role in Neustadt’s discussion of the presidency other than a historical figure whose legend could inspire later presidents.

Appreciation of Washington’s constitutionalism and the significance of his contributions to our understanding of the powers and responsibilities of the presidency unfortunately have not progressed among presidential scholars since Corwin’s mid-20th century *locus classicus*. This perhaps can be attributed, in part, to Neustadt’s scholarly legacy of ignoring the Constitution and the political thought of those who framed it. The lack of progress also can be attributed to the persistent notion that Washington’s principal contribution was unifying the nation by serving as President and managing the partisan disputes of his subordinates, not in constructing the constitutional powers and responsibilities of the office. Again, that Washington was a national unifier and President dedicated to the nation more than any political party are not insignificant statements or problematic in and of themselves; rather that they remain the exclusive focus of what little scholarly attention Washington receives, and that they are highlighted at the expense of his greater substantive contributions to the development of the presidency present are objectionable.

Two recent works demonstrate the lack of improvement since Corwin. Sidney Milkis and Michael Nelson write in their standard textbook *The American Presidency*, “Washington’s awe-inspiring personality and popularity made him an

indispensable source of unity and legitimacy for the newly formed government.”¹⁰³ After proceeding through a series of events and issues during that occurred on Washington’s watch, they continue that, “his extraordinary stature and popularity, combined with his commitment to a strong and independent legislature, restrained partisan strife for as long as he was President. Moreover, Washington’s renunciation of party leadership left his successors a legacy of presidential impartiality that has never been eclipsed.”¹⁰⁴ Milkis and Nelson capture the aforementioned themes about Washington, namely that he was essentially the only person who at the time of the Founding possessed the necessary trust and popularity to lead the new government and that he maintained a position above the party fray, who masterfully balanced the competing ideas of the emerging political parties within his own cabinet. They mention the opinions of and conflicts between Jefferson, Madison, Hamilton, and Adams—and Washington’s management of these disputes—as important to the development of the Presidency. Yet, at no point do they wrestle with Washington’s constitutionalism or his understanding of the constitutional duties and powers of the Presidency. Though they obliquely acknowledge that Washington’s Presidency established precedents for the Office and that he himself was devoted to the principle of separation of powers, they do not provide readers a sense what the Constitution meant to Washington, how he understood it, or what role he thought it assigns to the Presidency. In other words, aside from being the right person at the right time to

¹⁰³ Sidney M. Milkis and Michael Nelson, *The American Presidency: Origins and Development, 1776-2005* (5th edition) (Washington, DC: Congressional Quarterly, Inc., 2007), 71-72.

¹⁰⁴ Ibid.

occupy it, students are left pondering what Washington substantively contributed to the origins and development of the presidency.

Consistent with the above-described characterizations of Washington, presidential scholars Matthew Crenson and Benjamin Ginsberg contend that he “was the towering figure in the pantheon of revolutionary heroes, the most prominent in a reservoir of presidential eligibles.”¹⁰⁵ They continue, “Because he was chosen by acclamation rather than nomination Washington was a president above faction. He was the living embodiment of the new nation, the Father of His Country, whose very presence would reassure his people that they were one. It was from this elevated status that Washington weathered the conflicts within his own cabinet, all the while denouncing the spirit of faction.”¹⁰⁶ As a result, Crenson and Ginsberg label Washington’s the “visual Presidency,” suggesting thereby that it was the image of him as leader that brought the nation together at a critical time. In doing so, however, Crenson and Ginsberg offer only faint praise, or worse, a thin cover to their criticism that Washington was essentially vacuous with no substantive contributions to the development of the Presidency or the Constitution. They suggest Washington, “was not a man of many talents, and he was surrounded by fellow founders—Jefferson, Hamilton, [Benjamin] Franklin, and others—whose range of brilliance far exceeded his own. Yet even before *they* invented the presidency these luminaries had chosen Washington to preside over them twice.”¹⁰⁷ Surely this is evidence that Washington’s presence must have meant something to his peers, even though Crenson and Ginsberg

¹⁰⁵ Matthew Crenson and Benjamin Ginsberg, *Presidential Power: Unchecked and Unbalanced* (New York: W.W. Norton & Co., 2007), 57.

¹⁰⁶ Crenson and Ginsberg, 67.

¹⁰⁷ *Ibid.*, 58, *emphasis mine*.

cannot find it in their analysis of him. Note that it is “they”—Jefferson, Hamilton, and Franklin, among others—who invented the presidency, not Washington. For Crenson and Ginsberg, Washington’s central place in the Founding and in the development of the presidency was neither his overarching political thought nor how he interpreted his constitutional powers and duties as President but what his popular image meant to the people writ large. While Milkis and Nelson simply ignore or downplay any of Washington’s substantive contributions, Crenson and Ginsberg blatantly exemplify the dualism of Washington scholarship portraying him at once as both an indispensable symbol for the nation’s Founding but substantively insignificant contributor in its political thought. By Crenson and Ginsberg’s logic, Washington’s heroic image provided a façade under which the real intellectual constitutionalists could “invent” the presidency. Washington, in short, was the tool with which superior intellects could create the Office of the Presidency.

Diminishing Washington’s intellectual contributions to the constitutional presidency is not just the vice of political scientists, however. The eminent historian Forrest McDonald remains the scholar who perhaps best articulates the dualistic approach to studying Washington, offering praise of him as the instrument of national unity but simultaneously diminishing his contributions to constitutional development. McDonald opens his book-length treatment of Washington’s Presidency by positing:

The significance of George Washington to the presidency of the United States is somewhat different from what is commonly supposed. He was indispensable to the American experiment in self-government, and the success of his administration made possible the success of the government. And yet, as his

actions and the quality of his leadership as president are appraised in the following pages, the reader may wonder just what made Washington himself so special.

Washington, according to McDonald, was essential to the Founding of the United States, not because he did anything significant or special but because he served as a much-needed symbol at the right time. McDonald concludes his book emphasizing this point by exposing the long-held secret of Washington's insignificance to the Presidency:

We end, then, where we began. George Washington was indispensable, but only for what he was, not for what he did. He was the symbol of the presidency, the epitome of propriety in government, the means by which Americans accommodated the change from monarchy to republicanism, and the instrument by which an inconsequential people took its first step toward becoming a great nation.

No one who followed Washington in the presidency could escape the legends that surrounded his tenure in the office, but the more perceptive among them shared a secret: Washington had done little in his own right, had often opposed the best measures of his subordinates, and had taken credit for achievements that he had no share in bringing about.

They kept the secret to themselves.¹⁰⁸

McDonald expresses the general attitude towards Washington, specifically that he was special but superficial, indispensable to the nation as the first President but insignificant to the development of the presidency. Such assessments of Washington have enormous implications for the study of the Constitution and the American Presidency, principally that if one accepts these views, there is no real

¹⁰⁸ Forrest McDonald, *The Presidency of George Washington* (Lawrence: University Press of Kansas, 1974), ix and 186.

reason to examine Washington to help shed light on this field. In fact, McDonald takes one more step to suggest that the nation's first President may have, in fact, stifled the development of the presidency and the American constitutional order by "opposing the best measures" of his subordinates. Worse yet, since Washington "had taken credit for achievements that he had no share in bringing about," our study of him may dupe us into learning the wrong constitutional lessons. In other words, we have to see through Washington to acquire a sharper understanding of those who actually developed the Presidency.

This dissertation seeks to counter this view of Washington and recognize him as serious interpreter of the Constitution, who is critical to the development of the presidency, particularly to defining its proper constitutional role in times of danger. As the first and most influential president, Washington permanently shaped the idea and practice of executive power in the United States, and he did so knowingly. Shortly after taking office as the first President of the United States, George Washington wrote that his political conduct must be "exceedingly circumspect." Then referring to the Argus Panoptes ("all-seeing") of Greek mythology, he explained that "the eyes of Argus are upon me."¹⁰⁹ Washington clearly recognized that the eyes of Argus were not only those of his contemporaries who would surely judge his conduct. Those eyes also would include future Presidents who would seek to emulate him as well as future American citizens who would use his conduct as the standard of judgment for their own political leaders. Finally, those eyes would include those

¹⁰⁹ "To Bushrod Washington," July 27, 1789 in *The Writings of George Washington from the Original Manuscript Sources, 1745-1799* edited by John C. Fitzpatrick (Government Printing Office: Washington, DC, 1931-1944), Vol: 30. Hereafter cited as *Writings of George Washington* followed by the volume and page number(s).

trying to determine whether and why the American experiment in self-government actually worked. His conduct in office thus would serve the broader purpose of demonstrating how the U.S. Constitution successfully reconciles the need for executive power with the principles of republican government. This chapter represents but one “eye” attempting to see Washington and his constitutionalism as he viewed it himself.

Whiskey and the Constitution

Paying the debts incurred during the struggle for independence posed one of the most essential tasks undertaken by the Washington Administration. If unable to service its debts and develop a solid financial footing, the new nation would be unable to secure future funds, and would be viewed as a weak government incapable of harnessing the necessary resources to govern effectively. President Washington charged his Secretary of Treasury, Alexander Hamilton, to develop a plan for ensuring the payment of the debt and for establishing the long-term fiscal stability of the new nation. As part of Hamilton’s plans, the U.S. Congress passed an excise tax on alcohol in 1791, which was the first domestic tax issued. The tax was denounced and opposed almost immediately by many, most notably by western farmers who profited from distilling their excess grain into alcohol for sale. As a result, a group of farmers and local sympathizers in four western counties of Pennsylvania openly and violently resisted the new excise law, and posed the first violent attempt to undermine the sovereignty of the new constitutional order.

Though the Whiskey Rebellion represented the most significant armed resistance to the United States between the signing of the Constitution and the outbreak of the Civil War, it has not received due attention. Scholars tend to dismiss anachronistically the accounts of those who in 1794 and shortly thereafter considered the Whiskey Rebellion a grave threat to the survival of the new nation.¹¹⁰ After all, the insurrection fizzled and did not erupt into a civil war, due in no small part to the masterful handling of the situation by President Washington. Violence fortunately was avoided; however, since it was not an especially bloody event in the end, scholars unfortunately have avoided studying it to gain greater understanding of the Constitution in times of dangers. In many ways, the Whiskey Rebellion—the threat it posed and the implications of it—has been eclipsed by the brutal and bloody American Civil War seventy years later. As historian Thomas Slaughter remarks, “[t]he Civil War put a real damper on interest in the Whiskey Rebellion.”¹¹¹ Since then, the earlier attempted insurgency in western Pennsylvania has been cited as a minor episode in the early republic and a quaint event, the study of which belongs to specialist historians. In short, it has been relegated secondary status in the study of the

¹¹⁰ See James Kirby Martin’s “Introduction” to Steven R. Boyd (ed.), *The Whiskey Rebellion: Past and Present Perspectives* (Westport, CT: Greenwood Press, 1985), 3.

¹¹¹ Slaughter elaborates that the Whiskey Rebellion “paled in comparison to the violent threat to the national union posed by the war between the states. The lessons of the Civil War—from either side—were even clearer, even more horrible, and even more conclusive than those of the earlier episode. As a consequence, Whiskey Rebellion historiography entered in a long postwar hiatus that was in large part a reflection of an anachronistic conviction that the union was secure...[and the Rebellion] was not threatening to the nation’s survival.” See Slaughter, “The Friends of Liberty, the Friends of Order, and the Whiskey Rebellion: A Historiographical Essay,” in Boyd (ed.), *The Whiskey Rebellion*, 18-19.

Constitution and the Presidency, and its many possible lessons for interpreting the Constitution in times of danger go largely ignored.¹¹²

Edward Corwin, for instance, reflects the predominant tendency of scholars to downplay the threat and significance of the Whiskey Rebellion, citing it as a case of “presidential power in the face of situations of violence less than ‘war.’”¹¹³ Corwin, writing nearly one-hundred fifty years after the event and thus knowing the outcome and undoubtedly influenced by intervening events, projects his own historical understanding onto the crisis and fails to understand the event as those who participated in it. This has particular implications for trying to come to grips with President Washington’s words and deeds during the crisis, for he clearly viewed the insurrection as an existential threat to the new nation and its fragile constitutional order. Even if the insurrection did not boil over into open warfare, Washington and his advisors feared that possibility and took corresponding actions to prevent it from doing so. When we view the event through Washington’s mind, therefore, we can gain appreciation of how the first President interpreted the Constitution and the duties of the executive in times of grave national danger. This insight provides us perspective for our own time, as we continue to wrestle with issues the constitutional

¹¹² Thomas P. Slaughter offers the best historiography of the Whiskey Rebellion. See Slaughter, “The Friends of Liberty, the Friends of Order, and the Whiskey Rebellion: A Historiographical Essay,” in Boyd (ed.), *The Whiskey Rebellion*, 9-30. See also his book-length treatment of the Whiskey Rebellion. Thomas P. Slaughter, *The Whiskey Rebellion: Frontier Epilogue to the American Revolution* (New York: Oxford University Press, 1986). Slaughter, however, argues that the insurrectionists and their supporters’ confrontation with Washington and proponents of a strong national government was part of a broader a dispute between the “friends of liberty” and the “friends of order.” Though this may be a way of neatly categorizing the literature on this event, it also risks obscuring the central tenet of Washington’s political thinking on the purpose and principles of the Constitution (and the premise of this chapter): that providing for the order and safety of society are the primary purpose of government so that individuals can attain their natural liberties.

¹¹³ Corwin, *The President: Office and Powers*, 167-168.

basis for executive war power.

While scholars like Corwin have downplayed the significance of the Whiskey Rebellion, others tend to characterize the insurrection as another episode in the rise of political parties and factionalism in the United States. The event, in sum, has been subsumed by the larger debates between the Federalist and Democratic-Republican political parties, and the respective disputes between Alexander Hamilton and Thomas Jefferson, James Madison, and others. Specifically, scholars highlight the undue influence of Alexander Hamilton in the Washington Administration, and suggest he exploited the Whiskey Rebellion to advance the Federalist agenda by denigrating political opponents who were sympathetic to the rebels. This view stems primarily from the contemporary views of William Findley, a local Democrat-Republican politician from western Pennsylvania at the time of the insurrection, who devised an account of the insurrection in 1796 to counter Hamilton's 1794 report of the situation to Washington.¹¹⁴ Findley used his history as a platform from which to attack Hamilton and the Federalists and Findley's argument has been favored by historians an anti-Hamiltonian predisposition in the literature.¹¹⁵ Jacob Cooke

¹¹⁴ The three most-cited and influential contemporary accounts of the Whiskey Rebellion are Alexander Hamilton to George Washington, *Report on the Western Country*, (August 5, 1794); William Findley, *History of the Insurrection* (1796); and Hugh Henry Brackenridge, *Incidents of the Insurrection* (1795). Excerpts of the latter two and Hamilton's report in its entirety are provided in Boyd (ed.), *The Whiskey Rebellion*.

¹¹⁵ For Findley's reasons for writing his treatise, one of which was to lay culpability on Hamilton, see Boyd's brief introduction to excerpts from Findley's account, in Boyd (ed.), *The Whiskey Rebellion*, 77. Jacob Cooke, similar to Thomas Slaughter's categorization, argues that the historiography on the United States generally has been bifurcated between the *Jeffersonian* and the *Hamiltonian* persuasions, which for the Whiskey Rebellion implies a split among those who are sympathetic to the insurrection and those supporters of the Washington Administration's response. Cooke suggests that the Jeffersonian perspective lasted for much of antebellum history, with Hamiltonian ascending in the post-Civil War period. Writing in 1963, he argues, "But for the past half-century and longer, the

accurately captures Findley's partisan argument and the narrow focus of the scholarly literature, "Alexander Hamilton, eager to discredit his political opponents and anxious to show by a test of force that the federal government was truly supreme, maneuvered the West into armed opposition. How did he accomplish this Machiavellian feat?"¹¹⁶ Forrest McDonald, perhaps not surprisingly, is the most prominent subscriber to this view, writing "it seems entirely probable that the provocation came from Alexander Hamilton, and that his motive was to discredit and crush his political enemies by identifying them with treason."¹¹⁷ Historian Richard Kohn, on the other hand, has tried to correct this notion, arguing that study of the Whiskey Rebellion shows that President Washington "was far less a tool of Hamilton, and far more perceptive politically, than historians have thought."¹¹⁸ Kohn notably captures the internal deliberation and decision-making process of the Washington Administration in their effort to suppress the rebellion. Yet, Kohn's discussion focuses more on the debates over the "tactics" of how to suppress the rebellion and does not address the more strategic issues of how Washington viewed his constitutional powers and duties to take action against the rebellion. His analysis, quite deliberately, overlooks the proverbial forest by focusing on the trees.

As this section demonstrates, the Whiskey Rebellion represents a significant constitutional event, replete with the central questions of constitutional necessity and

interpretation that our historians have given to the American past has been predicated on a Jeffersonian bias, and the Whiskey Insurrection is no exception." See Jacob E. Cooke, "The Whiskey Insurrection: A Re-Evaluation," *Pennsylvania History*, Vol: 30, No. 3 (July 1963), 316.

¹¹⁶ Cooke, "The Whiskey Insurrection," 317.

¹¹⁷ McDonald, *The Presidency of George Washington*, 147.

¹¹⁸ Richard H. Kohn, "The Washington Administration's Decision to Crush the Whiskey Rebellion," *The Journal of American History*, Vol. 59, No. 3 (December 1972), 568.

self-preservation and executive power, duty, and responsibility. When viewed as such, the Whiskey Rebellion, and Washington's response to it, offers many insights into the scope, extent, and basis of the President's power in times of war. Even though Washington's handling of the situation prevented a full-blown war from occurring, his words and deeds demonstrate the constitutional powers, duties, and responsibility of the President in times of danger. After providing a brief summary of the events that led up to and composed the Whiskey Rebellion, this section focuses on Washington's articulation of the threat the insurrection posed to the Constitution, and hence the principles upon which he would develop a response. The next subsection focuses on Washington's understanding of the President's constitutional duties in times of crisis like the Whiskey Rebellion.

What was the Whiskey Rebellion?

The Whiskey Rebellion includes a series of events beginning with the passage of a federal excise tax on distilled spirits in 1791 until roughly the end of 1794, when the resistance, in effect, no longer existed.¹¹⁹ Though the so-called rebellion ended in a fizzle, at certain points it appeared as if the United States would descend into civil war, which would have meant a failure of the American experiment in self-

¹¹⁹ The Army began its march home on November 19, 1794 leaving a remnant force of about 1500 soldiers in place for several months. The aftermath and legal prosecution of the perpetrators was a bit of a fiasco, which unfortunately has influenced some historical perspectives on the event. In short, the Army failed to capture any of the leaders of the insurrection, and the arrests made were plagued by cases of mistaken identity and lack of witnesses. In the end, all but two individuals were acquitted of treasonous acts. These two gentlemen, deemed mentally incompetent and "simple" souls, were later pardoned by President Washington, bringing a rather droll ending to an otherwise serious event. For more on the arrests, trials, and pardons, see Slaughter, *The Whiskey Rebellion*, 219-220.

government within five years of its establishment. The seeds of the revolt sprouted from the excise tax on distilled spirits that Congress had passed in 1791.¹²⁰ Whiskey was a principal commodity of the local economy in western Pennsylvania among other rural areas. Excise taxes, or indirect duties levied against the production of specific goods, moreover, were long associated with tyranny and oppression, and for many Americans conjured up memories of the British taxes that justified the War for Independence. So despised were excise taxes in the Anglican tradition that the notable author Samuel Johnson defined them in his *Dictionary* as: *A hateful tax levied upon commodities, and adjudged not by the common judges of property, but wretches hired by those to whom excise is paid.*¹²¹

That there were protests against the passage of the excise tax, hence, should not be too surprising. Initial resistance to the tax organized by townhall meetings in Brownsville, Washington, and Pittsburgh, and, in September 1791 a local mob tarred and feathered the tax collector for Washington and Allegheny counties in Pennsylvania. In August of 1792, the revenue office in Washington County was forced open, the excise tax posting torn down, and a portrait of President Washington filled with bullet holes. On August 21, 1792 a second protest meeting was held in Pittsburgh, out of which result a report strongly condemning the tax and threatening ostracism to anyone who held the office of tax collection. Congress attempted a

¹²⁰ For more on the whiskey excise tax as a visible and audible reflection of deeper complaints, see Stanley Elkins and Eric McKittrick, *The Age of Federalism*, (New York: Oxford University Press, 1993), 473.

¹²¹ Samuel Johnson, *Johnson's Dictionary: A Modern Selection*, edited by E.L. McAdam Jr. and George Milne, (Mineola, NY: Dover Publications, Inc., 2005), 170.

series of amendments easing the conditions of the tax in attempt placate the protesters, and violence subsided through much of 1793.

Violence, however, erupted in 1794, with western Pennsylvanians again particularly agitated by the provision in the excise tax law requiring violators to appear before a federal court in Philadelphia, not before a local court. They considered the cross-state travel too burdensome and, as a result, assembled again to protest the law. This organized resistance boiled over into violence, and represents the period and events most commonly known as the Whiskey Rebellion. The most violent event occurred on July 16, 1794 when roughly fifty armed men marched to the house of General John Neville, the supervisor for the federal excise tax in western Pennsylvania, to demand that he resign and turn over all records associated with the tax. When Neville refused, shooting began. The result was that five attackers were wounded with one later dying. Neville and his slaves successfully defended his house and suffered no casualties. The next day 400-800 western Pennsylvanians returned to the house defended by Neville, his slaves, and 11 soldiers reinforcing him from nearby Fort Pitt. Another gunfight occurred, and accounts suggest that one or two aggressors were killed and perhaps one soldier killed with several others wounded. Neville escaped, the slaves and soldiers surrendered, and the mob torched the house and associated buildings.¹²²

The mob would march along, accumulating additional support. By early August 1794, an estimated seven thousand western Pennsylvanians marched to the

¹²² Slaughter, *The Whiskey Rebellion*, 3-6. For a short but excellent overview of the insurrection see Bennett M. Rich, "Washington and the Whiskey Insurrection," *The Pennsylvania Magazine of History and Biography*, Vol. 65, No. 3 (July 1941), 334-352.

outskirts of Pittsburgh, threatening the town's residents and feigning attacks against Fort Pitt. They banished seven people from the area who were known to support the tax and destroyed the property of several others. Sympathizers in other communities emerged, with violence spreading to western Maryland where a crowd in Hagerstown began to march against the federal arsenal at Frederick; sympathetic resistance organized in Carlisle, PA and in the hills of western Virginia and Kentucky. The insurgents also intercepted the federal mail service outside of Pittsburgh to determine who may be assisting the government in undermining their cause. The Federal government across the state in the capital of Philadelphia received reports that western Pennsylvania was in open revolt and that some leaders of this mob were in discussions with representatives of Great Britain and Spain for aid to the burgeoning insurrection. Therefore, the atmosphere in August 1794 was one of fear, anarchy, and violent civil war. It was in this context that Washington formulated a response that eventually mustered an army of 12,950 soldiers to march into western Pennsylvania and crush the rebellion. This was no trivial force, and the purpose for which it was to be used—crushing an armed insurrection comprised of fellow citizens—should not be considered lightly. Had the insurrection not fizzled, there was every potential for a bloody civil war.

“The Constitution and the laws must strictly govern:” Washington and Constitutional Self-Preservation

To Washington, the government's response to the insurrection in western Pennsylvania was not simply an operation short of war; rather he viewed it as the use of all measures necessary to thwart an existential threat to the new nation. Allowing a

minority to refuse to obey laws legitimately passed by constitutional means amounted to anarchy or no government at all; in short, the United States could not survive for long if a small minority of armed citizens could use violence to stop the normal administration of constitutional government. Facing the growing threat, Washington carefully articulated the danger it posed to the Constitution and, as such, his grounded his approach to the crisis and basis of his response in the principle of constitutional self-preservation. Two important events served as the backdrop to Washington's views of the Whiskey Rebellion and the potential threat it posed to the constitutional order: 1) Shays Rebellion of 1786 and 2) the French Revolution and the spread of radicalism. Briefly discussing these in the context of the Whiskey Rebellion will help us gain better understanding constitutional mindset with which Washington confronted the crisis.

The Ghost of Shays. Washington's reaction to the Whiskey Rebellion has roots in an earlier crisis that the Founding generation faced in August 1786 when Revolutionary War veteran and farmer Daniel Shays led a group of armed protestors against increasing debt and taxes that resulted from the War. Shays Rebellion, though short-lived, had convinced many of the Founding generation that the political order needed revamped and was one of the events that motivated them to revise the Articles of Confederation and convene the Convention of 1787.¹²³ Washington certainly saw the threat posed by armed resistance to legitimately enacted laws, and from his

¹²³ For a brief discussion of Shays Rebellion underpinning Washington's push for a stronger central government, see Elkins and McKittrick, *The Age of Federalism*, 43-44.

retirement at Mount Vernon, he expressed his concerns and advice on handling the situation to Virginia delegate to the Continental Congress, Henry Lee:

You talk, my good Sir, of employing influence to appease the present tumults in Massachusetts. I know not where that influence is to be found; and if attainable, that it would be a proper remedy for the disorders. *Influence is no Government. Let us have one by which our lives, liberties and properties will be secured; or let us know the worst at once.* Under these impressions, my humble opinion is, that there is a call for decision. Know precisely what the insurgents aim at. If they have real grievances, redress them if possible; or acknowledge the justice of them, and your inability to do it in the present moment. If they have not, employ the force of government against them at once. If this is inadequate, all will be convinced that the superstructure is bad, or wants support. To be more exposed in the eyes of the world, and more contemptible than we already are, is hardly possible. To delay one or the other of these, is to exasperate on the one hand, or to give confidence on the other, and will add to their numbers; *for, like snow-balls, such bodies increase by every movement, unless there is something in the way to obstruct and crumble them before the weight is too great and irresistible.*

These are my sentiments. Precedents are dangerous things; let the reins of government then be braced and held with a steady hand, and every violation of the Constitution be reprehended: if defective, let it be amended, but not suffered to be trampled upon whilst it has an existence.¹²⁴

Washington's letter to Lee has several implications for our understanding of his constitutionalism and his later response to the Whiskey Rebellion during his presidency. First, Washington recognizes that at times, the underlying reasons for rebellion may be, in fact, justified. If they are, he believes that the government

¹²⁴ "To Henry Lee," October 31, 1786, *Writings of George Washington*, Vol 29: 33-35 *emphasis mine*.

should attempt to address them or at least acknowledge the grievances and work towards a transparent and peaceable solution. If it cannot, it still should openly explain why it would be difficult to achieve this outcome. This certainly was much preferred to resorting to force. However, if there are not just reasons underpinning the resistance, the “full force of the government” must be brought against them “at once.” Any measures short of a strong and immediate reaction to crush the resistance only will serve to further embarrass and weaken the government. Inaction or weakness on the part of the government would embolden the insurrection and, like a “snowball,” it would gain momentum and grow beyond the government’s ability to control it.

Washington, with this advice to Lee, also offers us a glimpse of his understanding of human nature and politics, specifically that the human passions, unless checked immediately by a superior force, will naturally feed off themselves until they grow uncontrollably and threaten the very existence of society. Grounded in modern natural law, Washington holds that government serves the primary purpose of helping individuals within society secure their life, liberty, and property. As such, Washington does not juxtapose security and liberty, suggesting that they are in a zero-sum tension and must be balanced appropriately; rather, he implies that people must first be secure in their lives before they can enjoy their natural liberties and property. Part of this task requires government to contain and control the dangerous proclivities of excessively passionate groups and individuals within society so that it can preserve itself. Passions have a tendency to grow as they go, and thus every rebellious or unlawful incident to which the government does not immediately and forcefully respond sets precedent for further erosion of the edifice of government and causes

eventual dilapidation into anarchy. It was with the above philosophical understanding of the purpose of government that Washington advocated for and supported a new constitutional order; and it was with this mindset that he would make decisions to defend that new order as its first executive officer. That the ghosts of Shays Rebellion in 1786 were with Washington when he confronted the Whiskey Rebellion of 1794 should not surprise us.

The Radicalism of the French Revolution. Washington's Presidency coincided with the French Revolution. The Whiskey Rebellion, more specifically, occurred around the same time as the infamous Reign of Terror of 1793-1794, which spread genuine fears about the spread of radicalism and violence against existing political orders, including the recently constituted United States. In the United States, organized societies sympathetic to the principles of the French Revolution, known as "Democratic-Republican societies," emerged.¹²⁵ Though there is some historical dispute over the origins and inspiration of these societies, Elkins and McKittrick persuasively argue that they were deeply connected to spreading the ideals of the French Revolution. They write, "[m]ost of the societies' immediate inspiration actually came from France, and in deference to the fraternal sentiments believed to subsist between the two peoples a general effort was understandably made to impart

¹²⁵ Philip S. Foner (ed.), *The Democratic-Republican Societies, 1790-1800: A Documentary Sourcebook of Constitutions, Declarations, Addresses, Resolutions, and Toasts* (1976). Historians have generally labeled these societies "Democratic-Republican," however, few actually took such names, and Washington and most of his contemporaries usually referred to them as "Democratic," perhaps so as to detach them from any association with republicanism. Hereafter, I will refer to them as Washington did, "Democratic Societies."

to their doings a certain French accent.”¹²⁶ The underlying connections between the Democratic Societies and the French Jacobins only increased Washington and many of his advisors’ fears as news of the bloody Reign of Terror made its way across the Atlantic to Philadelphia.

How much these societies actually instigated and fueled the excise tax resistance in western Pennsylvania is actually immaterial; what really matters is Washington’s understanding of that threat as he developed a response and articulated the constitutional basis of his actions. Washington, without a doubt, felt that the Democratic Societies were behind the insurrection, pointing specifically to the Mingo Creek society in western Pennsylvania as the main perpetrator.¹²⁷ As the crisis came to a head in mid-1794, Washington underscored on several occasions the revolutionary French connection of these societies and the Whiskey Rebellion. “I consider this insurrection as the first *formidable* fruit of the Democratic Societies,” Washington wrote to Virginia Governor Henry Lee.¹²⁸ He continues, “[t]hat these societies were instituted by the *artful* and *designing* members (many of their body I have no doubt mean well, but know little of the real plan,) primarily to sow the seeds of jealousy and distrust among the people, of the government, by destroying all confidence in the Administration of it; and that these doctrines have been budding and blowing ever since.”¹²⁹ To Washington, this was not simply popular unrest against an unpopular tax but a burgeoning plot of foreign radicals threatening to

¹²⁶ Elkins and McKittrick, *The Age of Federalism*, 456.

¹²⁷ *Ibid.*, 484-485.

¹²⁸ “To Governor Henry Lee,” August 26, 1794, Washington, *Writings of George Washington*, Vol: 33, 474-476, *Washington’s emphasis*.

¹²⁹ “To Governor Henry Lee,” August 26, 1794, *Writings of George Washington*, Vol: 33, 474-476, *Washington’s emphasis*.

undermine and destroy the United States. He acknowledges that some of those involved may not even recognize that they are part of “real plan” of the radical French government, but their purpose still remains the ultimate destruction of the political order.

The Existential Threat to the Constitution. Washington confronted the Whiskey Rebellion with the deeply held conviction that the insurrection, if not dispersed, could represent the beginning of a civil war that would tear apart the new nation. Such fears only were exacerbated by his belief that the radicalism of the French Revolution had spread to the United States in the form of Democratic-Republican Societies that actively sought to undermine the United States. In articulating the threat posed, Washington also outlines his philosophical understanding of republican government and the purpose of the U.S. Constitution, both of which were threatened by the mere existence of a minority faction violently rejecting the rule of law. Washington expressed the gravity of the situation privately and publicly, and through analysis of his writings we can understand how he himself understood the situation: an existential threat to the United States that, if ignored, would amount to nothing less than the overthrow of the constitutional order and degeneration into anarchy and eventual tyranny. The American experiment in self-government thus would come to an untimely end.

Washington, from its incubation in 1791, anticipated and carefully explained that the Whiskey Rebellion represented more than a group of disenfranchised citizens. Two years prior to the outbreak of violence in 1794, Washington issued a

proclamation that described the resistance to the excise tax law as “subversive of good order, contrary to the duty that every citizen owes to his country and to the laws, and of a nature dangerous to the very being of a government.”¹³⁰ From the onset, thus, he wanted the public to understand the existential threat—the “very being of a government”—that the insurrection posed. In August 1794 shortly after violence erupted in western Pennsylvania, Washington would issue a proclamation in which he, with “deepest regret,” again publicly stressed the looming existential threat:

[A]nd I have accordingly determined so to do, feeling the deepest regret for the occasion, but withal the most solemn conviction that the essential interests of the Union demand it, *that the very existence of Government and the fundamental principles of social order are materially involved in the issue*, and that the patriotism and firmness of all good citizens are seriously called upon, as occasions may require, to aid in the effectual suppression of so fatal a spirit.¹³¹

Washington’s somber tone and word choice reflect the gravity of the situation. At stake was not simply the issue of a tax on distilled spirits but the fundamental principles of social order and government’s *raison d’etre*. The dangerous circumstances “demand” that the insurrection be crushed, or to put it more directly, the Constitution’s preservation necessitated the use of whatever means available for the “effectual suppression” of the rebellion. With American experiment in self-government jeopardized, Washington clearly, carefully, and consistently demonstrated that there was no choice in the matter: constitutional self-preservation

¹³⁰ “Proclamation” September 15, 1792, *Writings of George Washington*, Vol: 32, 150-151.

¹³¹ “Proclamation,” August 7, 1794, *Writings of George Washington*, Vol 33, 460-461.

required the “fatal spirit” of insurrection to be suppressed, anything short would be in violation of the Constitution’s fundamental principles.

Washington privately provided additional details of his understanding of the nature of the threat to the Constitution. Shortly after writing the previously cited letter to Henry Lee, Washington would reiterate his fear of the danger of a foreign-born conspiracy against the United States in a letter to his friend and fellow Virginian Burgess Ball. In this letter, Washington also illuminates his essential understanding of the underlying principles of the Constitution and republican government. This letter, worth quoting at length, was sent to Ball the same day Washington made a public proclamation (September 25, 1794) to call out the militia of several states to crush the rebellion in western Pennsylvania:

I hear with the greatest pleasure of the spirit which so generally pervades the Militia of every State that has been called upon, on the present occasion; and of the decided discountenance the Incendiaries of public peace and order have met with in their attempt to spread their nefarious doctrines, with a view to poison and discontent the minds of the people against the government; particularly by endeavouring to have it believed that their liberties were assailed, and that all the wicked and abominable measures that could [could] be devised (under specious guises) are practiced to sap the Constitution, and lay the foundation of future Slavery.

The Insurrection in the Western counties of this State is a striking evidence of this; and may be considered as the first ripe fruit of the Democratic Societies. I did not, I must confess; expect their labours would come to maturity so soon; though I never had a doubt, that such conduct would produce some such issue; if it did not meet the frown of those who were well disposed to order and good government, in time; for can any thing

be more absurd, more arrogant, or more pernicious to the peace of Society, than for self created bodies, forming themselves into permanent Censors, and under the shade of Night in a conclave, resolving that acts of Congress which have undergone the most deliberate, and solemn discussion by the Representatives of the people, chosen for the express purpose, and bringing with them from the different parts of the Union the sense of their Constituents, endeavouring as far as the nature of the thing will admit, to form that will into Laws for the government of the whole.¹³²

This letter, too, offers key insights into Washington's constitutionalism and helps us understand the basis for the actions he took as President. This crisis, in short, was the ripened fruit of the seeds planted by, or at least watered by, the radical agents of revolutionary France.¹³³ Washington, surprised that the threat had matured so rapidly, nonetheless forcefully outlines his recognition that the Whiskey Rebellion represented a significant blow to the Constitution that, if not nipped immediately, would grow into a full-blown assault on the U.S. political order. This statement also reflects Washington's underlying political philosophy and his belief that the U.S. constitutional order offered the American people the best protection and means by

¹³² "Letter to Burgess Ball," September 25, 1794, *Writings of George Washington*, Vol: 33, 505-507.

¹³³ Washington even suggested that revolutionary France's envoy to the United States, Citizen Genet, whom he already viewed with great suspicion for his activities in trying to lure the United States into a war with England and Spain in 1793, was responsible for the creation and ideas of the Democratic Societies. Washington tells Henry Lee that the views of the societies "had been instituted by their father, Genet, for purposes well know to the Government; that they would shake the government to its foundation." See "To Governor Henry Lee," August 26, 1794, *Writings of George Washington*, Vol: 33, 476. In his letter to Major General Daniel Morgan, Washington would emphatically connect revolutionary France and Citizen Genet to the insurrection, "but how can things be otherwise than they are when clubs and Societies have been instituted for the express purpose though clothed in another garb by their diabolical leader Gt [Genet] whose object was to sow sedition, to poison the minds of the people of this Country, and to make them discond. with the Government of it, and who have labored indefatigably to effect these purposes." See "To Major General Daniel Morgan," October 8, 1794, *Writings of George Washington*, Vol: 33, 524.

which they could enjoy their natural liberty. Should it be undermined, as the insurrection threatened to do, the Constitution would be sapped of its energy, and deprive the individuals living under its protection of their natural liberties and property thereby putting them on a path to lawlessness and eventual tyranny. Washington's logical understanding of the pathway to tyranny is worth reflection. For him, the government serves the primary purpose of providing for the safety of society so that its members could freely seek and enjoy their natural liberties. Laws provided a means by which to secure society; when the laws go unexecuted, however, the security of society—the reason for which everyone agrees to live under government—is undermined and people, unsafe, will not be able to seek and attain their natural liberties. The result is lawlessness and insecurity, resulting in the eventual sacrifice of natural liberties for protection under an illegitimate rule or tyranny. Safety, in short provides the means to attaining life, liberty, and property.¹³⁴

Furthermore, with this letter Washington describes how the insurrection undermines the basic principles and processes by which republican government functions, specifically the law-making process of the U.S. Congress. Consistent with definition of republican government offered in *Federalist 10*, Washington implies the people are sovereign in republican government, represented by freely chosen individuals who would serve a specified time in the various institutions of

¹³⁴ For Washington's most succinct expression of his understanding of the primary principle of government under the Constitution and the reason for laws, see "To Major General Daniel Morgan," October 8, 1794, *Writings of George Washington*, Vol: 33, 522-524. He would also emphasize that a "union of good men is the basis on which the security of our internal peace and the stability of our government may safely rest" by which he meant a union of law-abiding citizens committed to ensuring the faithful execution of the laws and "defeat the acts of the factious." See "To the Inhabitants of the Borough of Carlisle," October 6, 1794, *Writings of George Washington*, Vol: 33, 519.

government. Washington emphasizes that these representatives are “chosen for the express purpose” of carrying out the will of the people from the various parts of the United States. They make laws, in other words, but do so at the behest of the people, and republican law-making *ipso facto* amounts to the act of transforming the will of the people into means to govern their political order.¹³⁵ Washington recognizes that there are limitations on perfectly transforming a disparate peoples’ will into action, but the republican scheme of representation does offer the best, most practical means for doing so, or as he says, permits it “as far as the nature of the thing admits.” Representative law-making is a most essential republican process, the details of which are outlined by the Constitution, requiring extensive deliberation and “solemn discussion” before a law is actually made.¹³⁶

Washington’s understanding of the fundamental principles of republican government, particularly as they are defined in the U.S. Constitution, help further explain why he found the Whiskey Rebellion as such a grave threat. A small minority, operating from a conclave of the republic, fomented by “self-created bodies” (i.e. Democratic-Republican Societies), violently resisting a constitutionally enacted law was by its very nature the most pernicious threat to constitutional

¹³⁵ Washington would reiterate his understanding of this basic republican principle to Major General Daniel Morgan of the Virginia Militia operating in western Pennsylvania. Washington explained the importance of Morgan and his troops’ mission to ensure that the “business we are drawn out upon, should be effectually executed” referring to subduing the factious spirit of insurrection. He would go on to say that if they did not, “we may bid adieu to all government in this Country” for “the minority, a small one too, are suffered to dictate to the majority, after measures have undergone the most solemn discussions by the Representatives of the people, and the Will though this medium is enacted into a law.”

¹³⁶ In his September 25, 1794 Proclamation calling out the militia, he would “call to mind, that as the people of the United States have been permitted, under the Divine favor, in perfect freedom, after solemn deliberation, in an enlightened age, to elect their own Government...”, *Writings of George Washington*, Vol: 33, 507-511.

government. After all, if a minority group simply could, with impunity, pick and choose which laws it wished to obey and disregard all others, what purpose would the Constitution, or the laws more generally serve? Nothing could be more unconstitutional than rule of a minority over the will of the majority—constitutional reasoning that Abraham Lincoln would echo nearly seven decades later. Washington argues that this minority, through its threats of violence, essentially become “Censors,” who filter out laws to which they object. In short, they become an illegitimate regulator of the majority’s will, and undermine the fundamental principle of a constitutional republic. Washington would emphasize this basic principle of republican government in his public proclamation that he was calling out the military force of the government to suppress the rebellion on September 25, 1794:

[W]hen the opportunity of examining the serious consequences of a treasonable opposition has been employed in propagating principles of anarchy, endeavoring through emissaries to alienate the friends of order from its support, and inviting its enemies to perpetrate similar acts of insurrection; when it is manifest that violence would continue to be exercised upon every attempt to enforce the laws; when, therefore, Government is set at defiance, *the contest being whether a small portion of the United States shall dictate to the whole Union*, and, at the expense of those who desire peace, indulge a desperate ambition.¹³⁷

After outlining the violent seditious acts of insurrection and labeling the perpetrators treasonous, Washington again emphasizes the fundamental constitutional question: would a small part rule the whole, and thus result in an end to republican government? In a letter to Charles Mynn Thruston of Kentucky, Washington

¹³⁷ “Proclamation,” September 25, 1794, *Writings of George Washington*, Vol: 33, 507-511, *emphasis mine*.

succinctly reiterates this point, “But if the Laws are to be so trampled upon, with impunity, and a minority (a small one too) is to dictate to the majority there is an end put, at one stroke, to republican government.”¹³⁸ Once again, he would return to this issue in his November 1794 Annual Address to Congress, which focused on recounting the Whiskey Rebellion:

[T]he judiciary was pronounced to be stripped of its capacity to enforce the laws; crimes, which reached the very existence of social order, were perpetrated without controul, the friends of government were insulted, abused, and overawed into silence, or an apparent acquiescence; and *the yield to the treasonable fury of so small a portion of the United States, would be to violate the fundamental principle of our constitution, which enjoins that the will of the majority shall prevail.*¹³⁹

Paralleling his previous public and private statements, Washington again clearly articulates the principal constitutional issues that the Whiskey Rebellion posed. The survival of the Constitution was at risk, and the choices he would make to suppress the insurrection flowed from the principle of constitutional self-preservation.

“Obedience to that High and Irresistible Duty”: Washington’s Construction of Executive Power

That Washington found the insurrection a direct threat to the Constitution has been demonstrated. What did he understand the President’s role to be in meeting that threat? Did he find the Constitution assigns any particular role to the President, or

¹³⁸ “To Charles Mynn Thruston,” August 10, 1794, *Writings of George Washington*, Vol: 33, 464-465.

¹³⁹ “Sixth Annual Address of Congress, November 19, 1794, *Writings of George Washington*, Vol: 34, 28-37.

was the President to look to Congress or elsewhere to determine a response? As this section will show, Washington held that the Presidential Oath consigns to the Office of the Presidency unique duties to preserve the political order, and he understood the Constitution as providing all the means necessary to meet any possible contingency the Whiskey Rebellion, or other such event, might present. As such, Washington translated the underlying principles of the Constitution into practice, cementing the duties, responsibilities, and powers of the Presidency within the Founders' Constitution. Washington's construction of the executive power is essential not only to understanding his response to the Whiskey Rebellion but also to providing perspective on constitutionality of the wartime actions taken by those who have and will follow him.

Though the Whiskey Rebellion presents an invaluable opportunity to explore Washington's understanding of the constitutional basis of the President's powers and responsibilities, it generally has been neglected for its insights. What little attention it has garnered, unfortunately has obscured the lessons to be learned. For instance, in the two paragraphs that he dedicates to the Whiskey Rebellion in his book *Presidential War Power*, Louis Fisher suggests "Washington acted expressly on authority delegated to him by Congress."¹⁴⁰ Fisher concludes this based on Washington's August 7, 1794 Proclamation in which he explicitly cites the Militia Act of 1792, a series of statutes that outlined under what conditions state militias could be called into Federal service. By Fisher's reasoning, Congress had the legitimate responsibility to respond to the insurrection, and a subordinate President

¹⁴⁰ Fisher, *Presidential War Power*, 22-23.

Washington merely carried out the duties as delegated to him. As will be discussed in detail below, this is a narrow reading of one of Washington's Proclamations during the crisis and infers too much from the fact that Washington did follow the Act's guidelines. The Act, simply put, provided Washington all the procedural means needed to execute his duty, or perhaps more importantly, it did not infringe upon the President's particular powers and responsibilities to do so. It gave him and others an agreed-upon process by which he could call out the militia in service to the national government but it was not the source of why or whether he could take such actions.

However, one could reach a similar conclusion as Fisher if one reads only Washington's August 7, 1794 Proclamation that explicitly references the 1792 Militia Act. Washington cites that law, and shows how he is complying with it systematically. Yet this proclamation must be understood as one piece of Washington's broader attempt to develop a response to the situation, and should not be the sole source for interpreting how Washington understood the President's role. That Congress has the responsibility for organizing, arming, and disciplining the militia and to provide for calling it forth to execute the Laws of the Union, suppress Insurrections and repel Invasions are granted by the Constitution. The Militia Act of 1792 did just that, "provided" the procedures for how the militia was to be called forth to meet threats to the nation.

Washington notably followed those procedures, and did so undoubtedly because they enabled him to generate the forces necessary to meet the crisis with the full weight of the national government behind him. As President, after all, he did sign the law into effect. Yet, we must be careful not to suggest that Washington himself

viewed the Militia Act, or any other Congressional act, as the source of his powers and responsibilities. When understood against the backdrop of Washington's construction of the role of the Presidency, as well as his public and private messages issued before and after the August 7, 1794 Proclamation, one sees that Washington clearly perceived the procedural and cooperative benefits of the 1792 Militia Act but did not believe that it was the basis for executive action in times of danger. As will be discussed in detail below, Washington clearly found his basis for response in the Constitution itself, and the duties and powers it assigns to the Presidency. Hence, Fisher neglects Washington's repeated reference to the President's unique constitutional duty to ensure the faithful execution of the laws and preserve the constitutional order, and overall fails to understand Washington as he understood himself.

As a backdrop to his construction of the executive power during the Whiskey Rebellion, we should pause and examine Washington's Second Inaugural Address, which he delivered after the tumultuous summer of 1792 but before the open violence of mid-1794. Though the bookend addresses of Washington's presidency—the First Inaugural and his Farewell Address—are perhaps the most cited of his public presidential statements, his very brief Second Inaugural eloquently captures his basic understanding of the Presidency, latent with the pertinent constitutional themes of energy and responsibility. Upon taking the presidential oath of office a second time, Washington briefly stated:

I am again called upon by the voice of my Country to execute the functions of its Chief Magistrate. When the

occasion proper for it shall arrive, I shall endeavour to express the high sense I entertain of this distinguished honor, and of the confidence which has been reposed in me by the people of United America.

Previous to the execution of any official act of the President, the Constitution requires an Oath of Office. This Oath I am now about to take, and in your presence, that if it shall be found during my administration of the Government I have in any instance violated willingly, or knowingly, the injunction thereof, I may (besides incurring Constitutional punishment [sic]) be subject to the upbraidings of all who are now witnesses of the present solemn Ceremony.¹⁴¹

The words chosen, however few, and the tone used display the solemn and serious mindset with which Washington understood the Office of the Presidency. Washington, most notably, demonstrates the critical link between the Office of the Presidency and the sovereign people on behalf of whom he acts and to whom he is ultimately accountable. The President is not an officer whose sole purpose is to execute laws passed by Congress; rather it is a strong, independent office unto itself with solemn responsibilities to the people to whom the Constitution belongs. More specifically, Washington focuses on the central connection between the Oath of Office and the execution of his duties, and implores that if he should violate the “injunction” of the Oath he is to be subject not only “Constitutional punishment” of impeachment but also the criticism of his peers, which would tarnish his reputation and honor.

Most importantly, however, Washington firmly roots the Presidency in the straightforward but unique and special duty to “preserve, protect, and defend” the Constitution, the violation of which he suggests should incur the harshest penalties

¹⁴¹ “Second Inaugural Address,” March 4, 1793, *Writings of George Washington*, Vol:

possible. Moreover, his interesting use of the term injunction, which implies a legally bound obligation or a command from someone in a position of authority, shows that he holds the President legally and morally duty-bound to a free and sovereign people who ultimately will determine whether he had upheld these most solemn responsibilities. This would include those extraordinary times – “the occasion proper for it shall arrive” – when the Constitution must be defended and to which all eyes will turn to the duty-bound President. Washington promises that even on these trying occasions, he will strive to show “high sense” or solemn understanding of the President’s special constitutional duty with which he will execute the functions of the office.

The Whiskey Rebellion would present but one such occasion for Washington to put in practice his understanding of the President’s responsibilities in times of danger, and study of Washington writings and proclamations during this fearful time help explain his construction of the Constitution’s executive war power. Throughout the crisis, as Washington described the existential threat to the government, he also carefully articulated that any and all responses he might take were clearly rooted in the President’s Constitution duty to preserve the political order and ensure the faithful execution of the laws. In his September 15, 1792 Proclamation, Washington makes this clear:

Whereas it is the particular duty of the Executive ‘to take care that the laws be faithfully executed,’ and not only that duty but the permanent interests and happiness of the people require that every legal and necessary step should be pursued as well to prevent such violent and

unwarrantable proceedings as to bring to justice the infractors of the laws and secure obedience thereto.¹⁴²

Washington underscores the unique nature of the President's constitutional role when he cites the "take care" clause of Article II and that this duty is "particular" to the President. Disruptions to the normal and orderly proceedings of government, whether from internal or external causes, are the sole duty of the executive to subdue. Though their cooperation is expected and urged, neither the Congress nor the judiciary are assigned such a special responsibility. It is the President's alone.

Washington, moreover, goes beyond the "take care" clause to root the President's response in the broader obligation to preserve the political order or the "permanent interests and happiness of the people." In doing so, Washington returns to natural law reasoning and the principles underlying the Constitution, the fundamental purpose of which is to provide for the safety of individuals so that they may attain their natural happiness. As discussed in Chapter II of this dissertation, the Constitution provides the framework of government under which equal citizens can securely enjoy the natural liberties as articulated in the Declaration of Independence. Washington follows the same foundational reasoning and roots the President's protective duties in the broader societal needs and happiness of the people.

In addition, by referencing pursuit of "every legal and necessary step" to counter the disruption to the political order, he also scopes the basis and extent of the measures the President may employ in protecting society. For Washington, the President simply does not execute "legal" measures as prescribed by congressionally enacted laws; he also may take steps to protect society that are grounded in the

¹⁴² "Proclamation," September 15, 1792, *Writings of George Washington*, Vol: 32, 150-151.

necessity of the situation. That is, the President is constitutionally bound to execute all “necessary” steps, even if they are beyond the measures set down by Congress, to counter violence against the political order. Executive measures, accordingly, would be driven by the necessity of the situation but also clearly constitutional so long as they strive to achieve the permanent interests of society and the happiness of the people.

Washington expanded upon this point in his Address to Congress in November 1792, which also sheds some light on his understanding that the President was an independent and equal organ of government, and that he had expectations of them as they did of him:

Congress may be assured, that nothing within Constitutional and legal limits, which may depend on me, shall be wanting to assert and maintain the just authority of the laws. In fulfilling this trust, I shall count intirely [*sic*] upon the full cooperation of the other departments of Government, and upon the zealous support of all good Citizens.¹⁴³

This address, notably, does not have the tone of subordinate to superior, or of one to whom higher authority has been delegated. Washington, for instance, does not state that he will act in accord with powers delegated to him by Congress, nor does he imply that he defers to Congress to establish the scope and extent of his possible response to the crisis. Rather, Washington emphasizes that he would not hold back and that he is fully prepared to use any and all measures to ensure that he can carry out his duty to ensure the laws are obeyed, and that parameters of those measures

¹⁴³ “Fourth Annual Address to Congress,” November 6, 1792, *Writings of George Washington*, Vol: 32, 205-212.

were not set by Congress alone but by the Constitution. Washington, to be sure, certainly recognized that Congress had a significant role to play and that their cooperation was necessary to ensure success in whatever endeavor he might have to pursue. However, he also establishes that he, as the President, expects them to cooperate fully with him as he fulfills his constitutional duties as President. The framework popular among many recent scholars of presidential power, Fisher included, pits questions of war power as a tug-of-war between Congress and the President. Yet, as even this brief passage shows, Washington articulates it as a matter of constitutional duty, with each branch playing their respective role but with the executive explicitly responsible for ensuring the faithful execution of the laws for which he would call upon Congress to support.

When violent opposition to the excise tax law reemerged in mid-1794, Washington again cited Article II of the Constitution and held that it granted him, as President, the special responsibility to respond to the insurrection and ensure a tranquil domestic order:

Now, therefore, I, George Washington, President of the United States, *in obedience to that high and irresistible duty, consigned to me by the Constitution,* "to take care that the laws be faithfully executed;" deploring that the American name should be sullied by the outrages of citizens on their: own Government.¹⁴⁴

Washington's use of the words "high" and "irresistible" clearly show his recognition of the special and extraordinary nature of the President's duty to the Constitution and the faithful execution of the laws legitimately enacted under its auspices. The duty,

¹⁴⁴ "Proclamation," September 25, 1794, *Writings of George Washington*, Vol: 33, 507-511, *emphasis mine*.

furthermore, was especially given, or *consigned*, to the President from the Constitution; it was not delegated from Congress, nor does Washington make any such inference. For Washington, this duty was something elevated above all else and no matter his personal feelings or desire, he could not refuse to carry out. The oath to Washington is solemn and sacred—or as Lincoln would describe it seven decades later as an oath “registered in heaven”—a breach of which would be tantamount to violating the Constitution, and acting unfaithfully to that government that he was bound to protect. Failing to take any and all measures necessary to carry out his duty, in other words, would make Washington no better, nay even worse, than the insurrectionists in western Pennsylvania. In the sentiment of his Second Inaugural, if Washington did not carry out measures to effectively subdue the insurrection, he ought to be subjected to constitutional punishments and the upbraids of his peers.

Finally, Washington’s Annual Address to Congress in November 1794 offers an exceptionally reflective statement on his understanding of the situation of the Whiskey Rebellion and his powers and duties in response to it. Written in a very personal tone, Washington expresses that “On this call, momentous in the extreme, I sought and weighted what might best subdue the crisis,” and he proceed to outline each step that he took along the way. He makes clear, that in such extraordinary situations that he, as President and Commander-in-Chief, has the constitutional discretion to determine the course to be pursued in meeting a crisis. Washington again reinforces the central place that the Oath of Office has in his understanding not just of his response to the Whiskey Rebellion but, more broadly, to his construction of the executive war power:

Having thus fulfilled the engagement which I took when I entered into office, ‘to the best of my ability to preserve, protect, and defend the Constitution of the United States’, on you, gentlemen, and the people by whom you are deputed, I rely for support.¹⁴⁵

With the insurrection subdued, Washington confidently asserts that he has fulfilled his constitutional duty to which he swore an oath upon entering office. Therefore, all actions he took during the insurrection he holds stem from the unique constitutional powers and responsibilities assigned to the Presidency. He then continues that for the President to carry out his constitutional obligations, the office depends on support from both the Congress and the people. He then states:

In the arrangements, to which the possibility of a similar contingency will naturally draw your attention, it ought not to be forgotten, that the militia laws have exhibited such striking defects, as could not have been supplied but by the zeal of our citizens. Besides the extraordinary expense and waste, which are not the least of the defects, every appeal to those laws is attended with a doubt of its success.¹⁴⁶

For the Constitution to be successfully preserved, protected, and defended require the active and zealous support of the patriotic citizens but also proper laws passed by the Congress. Washington affirms that in the recent crisis the former was present but that the latter unfortunately were absent. In fact, the people’s zealous patriotism and commitment to their Constitution overcame the seriously defective laws of Congress, and Washington expresses his gratitude to the people for that.

¹⁴⁵ “Sixth Annual Address to Congress,” November 19, 1794, *Writings of George Washington*, Vol: 34, 28-37.

¹⁴⁶ *Ibid.*

However, with this statement, Washington clearly admonishes Congress for not having provided proper support to the President to carry out his constitutional duties in service of the people. Washington goes on in his Address to request Congress to revise the Militia Act, to eliminate its inefficiencies and waste, and to examine what measures it can take to provide better support to the President in the fulfillment of his constitutional duties. Returning to Louis Fisher's contention that Congress delegated authority to a subordinate President Washington, this public rebuke is not that of a subordinate to a superior. He does not express appreciation to Congress for powers delegated nor that he did what he could with the powers granted to him by Congress. Washington instead openly calls the Militia Act deficient, and suggests that the successful defense of the Constitution, which he is duty-bound to lead on behalf of the people, occurred in spite of Congress insufficient efforts. It reflects, in other words, a strong and independent President, the ultimate protector of the political order and responsible solely to the people to whom that Constitution rightfully belong, calling on the people's representatives to do their duty to support the Office of the Presidency in its unique obligations to the Constitution.

Conclusion: Washington's Lessons in Statesmanship

Posing an existential threat to the new political order, the Whiskey Rebellion presented President Washington the opportunity to clearly and cogently articulate the powers and duties of the Presidency in times of danger. Though war fortunately was avoided, the event still provides observers numerous insights into how the first President, and in many ways, *the* Founder of the United States, constructed the

constitutional basis of the executive war power. Washington, himself, recognized significant results from his Administration's suppression of the Rebellion, exclaiming that it proved the superiority of the U.S. constitutional order to the monarchists of Europe that, "republicanism is not the phantom of a deluded imagination: on the contrary, that under no form of government, will laws be better supported, liberty and property better secured, or happiness be more effectually dispensed to mankind."¹⁴⁷ Despite the significance assigned to this event by Washington and his contemporaries, scholars tend to be dismissive, or even critical, of the long-term lessons that may be learned from it. Leading presidential scholars Sidney Milkis and Michael Nelson, for instance, conclude, that despite Washington's success in avoiding civil war, "the Whiskey Rebellion and Washington's response exacerbated rather than ended the political conflicts that divided Americans in the 1790s."¹⁴⁸ This conclusion unfairly views Washington's response to the Whiskey Rebellion through Milkis and Nelson's own lenses jaundiced by their present-day concerns with the rise of partisan politics. Instead of trying to project their own biases onto Washington, scholars should first attempt to understand Washington as he understood himself. Doing so provides the marvelous opportunity to glean insights from the nation's first President, who found himself in a national crisis and needed to reason through and return to his first principles of constitutionalism to understand the President's proper role in resolving it.

¹⁴⁷ "To Edmund Pendleton" January 22, 1795, *Writings of George Washington*, Vol: 34, 98-101.

¹⁴⁸ Milkis and Nelson, *The American Presidency*, 83.

As this chapter has shown, Washington's response during the Whiskey Rebellion offers several key insights for interpreting the Constitution. First, Washington understood that the Constitution was premised upon the principle of self-preservation,¹⁴⁹ and that its original design and intent was to provide a secure political order for people to enjoy their natural liberties and happiness. Perhaps Washington's most concise statement reflecting his understanding that the primary purpose of the Constitution was to provide the security of individuals so that they might enjoy their natural liberties in a letter he sent to Major General Daniel Morgan of the Virginia Militia who was called out to suppress the insurrection. Emphasizing the importance of Morgan's mission to suppress the insurrection, Washington claims that if the laws are not faithfully executed: "there can be no security for life, liberty, or property."¹⁵⁰ Again, Washington consistently suggests that security and liberty are not in tension but that the former is the principal means to the latter.

Furthermore, Washington teaches us that measures taken in defense of the Constitution would have to be dictated by the necessity of the situation; put differently, he recognizes that when threatened, the Constitution permits all measures necessary to thwart the danger and ensure the preservation of the political order.

¹⁴⁹ Perhaps Washington's most succinct statement on the Constitution principle of self-preservation, and the necessary *and preventive* measures the Executive could justifiably take, came after he had retired from the Presidency. Reflecting on the events in France and Europe and what lessons might be learned about how to handle subversive "passionate and party" elements in the United States, Washington wrote to his long-time friend John Marshall, "If there were good grounds to suspect that the proscribed and banished characters were engaged in a conspiracy against the Constitution of the people's choice, to seize them even in an irregular manner, might be justified upon the group of expediency, or self preservation." See "Letter to John Marshall," December 4, 1797, *Writings of George Washington*, Vol: 36, 92-95.

¹⁵⁰ To Major General Daniel Morgan, October 8, 1794, *Writings of George Washington*, Vol: 33, 522-524.

Washington also understood that the President has the special responsibilities to carry out the defense of the Constitution—a duty particularly consigned to the President alone. This duty is higher than all other duties and cannot be resisted lest the President be in violation of the Constitution. Finally, Washington makes clear that he is accountable to the people, to whom the Constitution rightfully belongs, and who have the necessary constitutional means to punish him should he violate his trust with them.

Contrary to the dominant scholarly views of Washington as only an indispensable symbol of national unity who did not have much to contribute to constitutional interpretation, this chapter finds that Washington possessed a firm grasp of the underlying republican principles of the Constitution. Washington did not write a treatise on government like many of his contemporaries. However that should not diminish the contributions he made to American constitutional development. Through his public addresses and proclamation, as well as private letters to other individuals of influence, Washington helped Americans better appreciate and interpret the meaning of their Constitution. Moreover, he expounded upon its meaning when it was under assault, when the stakes were high and the future uncertain, and used it to guide his actions in defense of the people and their political order. As such, Washington performed the highest act of statesmanship: articulating and applying the unbending principles of the political regime in the most trying of time to meet the necessities of the situation and to enable a people to realize their Constitution as a form of government capable of preserving itself. He and his interpretation of the Constitution offer us much perspective—not to mention

exceedingly high expectations—for understanding the Constitution and the Presidency in the current trying times the United States faces

In sum, Washington’s constitutionalism and construction of the executive power in times of danger are consistent with the analysis of the Constitution and *The Federalist* offered in Chapter II. This should not be surprising since, after all, Washington was arguably the most influential of the Founding generation, and he probably made a much more significant imprint upon it even if the surviving records do not show him overtly doing so.¹⁵¹ Moreover, Washington’s constitutional reasoning under the threat of rebellion—in particular his recognition of the special responsibilities of the Presidency to preserve, protect, and defend the Constitution—foreshadow President Lincoln’s understanding of the Constitution during the Civil War nearly seventy years later. This, too, should not come as surprise, for as we will discuss in greater detail in Chapter IV, Lincoln revered the Constitution and its Founders, and he would go to great lengths to articulate how the measures he was taking in response to southern secession were consistent with and rooted in the Constitution.

¹⁵¹ I am referring here to Washington’s relative silence during the Constitutional Convention at least as it was captured by Madison in his Notes. On the last day of the Convention, Madison speaks of the rare occurrence for Washington, President of the Convention to speak. On the question of the number and proportion of Representatives, Madison noted: “When the PRESIDENT rose, for the purpose of putting the question, he said that *although his situation had hitherto restrained him from offering his sentiments* on questions depending in the House, and it might be thought, ought now to impose silence on him, yet he could not forbear expressing his wish that the alteration proposed might take place. It was much to be desired that the objections to the plan recommended might be made as few as possible.” *Emphasis mine*. Furthermore, though a strong advocate of the newly signed Constitution, Washington also was neither a delegate to, nor did he openly weigh in, the ratification debates including that of his home state of Virginia. For more on Washington during the ratification of the Constitution, see Paul O. Carrese, “Liberty, Moderation, and Constitutionalism: The Political Thought of George Washington,” 104.

Chapter IV: The Constitution and Lincoln: The War Power, the Oath Registered in Heaven, and His Rightful Master

The imperial presidency thesis has shaped the conception of presidential war powers for nearly four decades, and President Lincoln and his actions during of the Civil War have not been spared being viewed in this light. Arthur Schlesinger Jr. contends that Lincoln was responsible for two “innovations” in our understanding of wartime emergency powers: “emergency power” as a weapon wholly *within* the Constitution and the connection of emergency powers with the duty and responsibility of the President.¹⁵² Thus, Lincoln’s decision to “call out the war power

¹⁵² Arthur Schlesinger, Jr. *The Imperial Presidency*, 60-68. Schlesinger, in this work, further contends that Lincoln’s constitutional claims “marked the beginning of a fateful evolution” in the expansion of Presidential powers, representing a departure from the Founders’ vision of the Constitution. In a later essay published in 2005 (originally published as the new Introduction to his *The Imperial Presidency*), Schlesinger would sound more sympathetic to Lincoln but still claim that he [Lincoln] consciously took acts that he understood to be “beyond the Constitution” but that he never claimed them to be inherent in the Presidency, a trait of Presidents in the latter half of the 20th century. Schlesinger, at least later, does not mind Lincoln’s departure from the Constitution since it set no precedent for future Presidents—a claim contrary to his earlier statement regarding Lincoln’s “innovations” in the constitutional justification for Presidential war powers. Even more troubling, however, is a statement made by Schlesinger in 1988, when he defended Lincoln (and Franklin Roosevelt) suggesting that Lincoln had “remained faithful to the spirit, if not the letter, of the Constitution: acting on the spirit to save the letter.” This statement, too, reflects a different conclusion by Schlesinger than his other works. After, all how can Schlesinger claim that Lincoln acted “within” but also “beyond” the Constitution? Schlesinger’s inconsistencies are indicative of the ambivalent nature of executive power, particularly in wartime, as well as the difficulty of reconciling executive power with constitutional government. However, it also displays Schlesinger’s overall lack of appreciation the fundamental purpose and intent of the Constitution as well as Lincoln’s own construction of the President’s constitutional duty. See *supra* Schlesinger, *The Imperial Presidency*, xiii-xiv; this essay also has been republished in Schlesinger, *War and the American Presidency* (with a new chapter) (New York: W.W. Norton & Co. Ltd, 2005), 50-51. For Schlesinger’s claim that Lincoln remained within the spirit of the Constitution see Schlesinger, *War and the Constitution: Abraham Lincoln and*

of the government” represents the ultimate act of an imperial president, violating the Constitution and establishing precedents that have proven instrumental in “rise of Presidential Wars” that continue to plague the United States.

The novelty of Lincoln’s construction of “the war power” remains a thread that scholars have woven into histories of the Civil War and of Lincoln. The eminent Civil War historian James McPherson, for instance, casually remarks “the Constitution makes no mention of war power; Lincoln seems to have invented both the phrase and its application.”¹⁵³ Others seem not to be concerned about the constitutionality of Lincoln’s actions. Clinton Rossiter, in discussing Lincoln’s wartime tenure, suggests that whether Lincoln’s actions were truly within the bounds of the Constitution or not is a “minor issue.”¹⁵⁴ Similarly, former Supreme Court Justice Sandra Day O’Connor in reviewing Lincoln’s wartime actions, namely his proclamations to suspend the writ of habeas corpus, admits that she does not wish to “wade into the muddy waters” of the debate over whether the Constitution authorized Lincoln to undertake such actions.¹⁵⁵

This chapter, however, decidedly enters “the muddy waters” to discern the constitutional basis of Lincoln’s wartime words and deeds and holds that the constitutionality of Lincoln’s acts are central to understanding the Constitution in times of war and ultimately provide us a guide for determining the constitutional

Franklin D. Roosevelt, 27th Annual Robert Fortenbaugh Memorial Lecture, Gettysburg College, 1988, 27.

¹⁵³ James M. McPherson, *Tried By War: Abraham Lincoln as Commander in Chief*, (New York: The Penguin Press, 2008), 24.

¹⁵⁴ Rossiter, *Constitutional Dictatorship*, 224

¹⁵⁵ Sandra Day O’Connor, “Suspension of Habeas Corpus” in *Lincoln Lessons: Reflections on America’s Greatest Leader*, eds. Frank J. Williams and William D. Pederson, (Carbondale: Southern Illinois University Press, 2009), 105.

boundaries of other wartime activities. The chapter counters claims that Lincoln departed from the Constitution or the intention of the Framers by “inventing” the war power. Lincoln, perhaps more than any other president, revered the Founding generation and the Constitution they produced; and he consciously acted, even in the most calamitous event the United States has ever or since faced, within the spirit and letter of the Constitution.¹⁵⁶ In constructing the war power of the government and the scope of executive power to exercise that power, Lincoln’s constitutionalism consistently flowed from the thought of the Framers. Lincoln, if we must, would best be characterized as a Constitutional “conservative”,¹⁵⁷ who sought to *preserve* and *restore* the Framers’ understanding of the Constitution, and who ultimately found the Constitution as the source of power necessary to preserve the United States during its most profound crisis.

The Civil War fundamentally was a Constitutional event,¹⁵⁸ pregnant with those perennial political questions among which include: sovereignty and the nature of the political order; the principles of natural right; the tension between liberty and

¹⁵⁶ Herman Belz best captures the underlying purpose of Lincoln’s words and deeds when he writes, “Lincoln adhered to the written Constitution of the framers—its forms, procedures, principles, and spirit—and was guided by it in political action aimed at achieving the ideals asserted in the Declaration of Independence. Prudent and practical in his statesmanship, Lincoln possessed in himself and inculcated in the people constitutionalist conviction that regarded preservation of republican self-government as the nation’s defining and paramount purpose.” See Herman Belz, *Abraham Lincoln, Constitutionalism, and Equal Right in the Civil War Era* (New York: Fordham University Press, 1998), 74.

¹⁵⁷ See Lincoln’s exposition on the meaning of “conservatism” in his *Address to the Cooper Institute*, February 27, 1860. Roy P. Basler (ed.), *The Collected Works of Abraham Lincoln* (New Brunswick, NJ: Rutgers University Press, 1953), III: 522-550. All citations in this dissertation refer to Basler’s *Collected Works*.

¹⁵⁸ For a much richer discussion of the Civil War as a constitutional event see Michael Stokes Paulsen, “The Civil War as Constitutional Interpretation,” *University of Chicago Law Review*, 71 (2004), 691, which is a review of Dan Farber’s *Lincoln’s Constitution*. Also see Arthur Bestor, “The Civil War as a Constitutional Crisis,” *The American Historical Review*, Vol. 69, No. 2 (Jan. 1964), 327-352.

order; and the ambivalence of executive power. Lincoln, unlike any President since and possibly any previous, offers more wisdom and guidance to understand the underlying principles of the American constitutional order and the construction of executive power in times of war. Therefore, if we accept that the Civil War stands as a significant constitutional event, President Abraham Lincoln ought to be recognized as a primary source of constitutional interpretation. Hence, far from a “minor issue,” Lincoln’s constitutional construction of the war power and the executive’s duty to employ it in defense of the nation represents an important issue of inquiry, one that can help us better understand the nature of our Constitution in times of grave danger.

As the brief analysis of the literature illustrates, however, Lincoln’s constitutional legacy has been (and continues to be) heatedly debated and the dominant view remains that he acted outside of or against the Constitution in his prosecution of the war. Critics and admirers alike view his actions as un- or extraconstitutional and, as a result, he is characterized either as a tyrant who ruined the Constitution or a savior who rescued the Constitution from itself. The more critical view holds Lincoln at fault for destroying the nation’s founding principles; admirers imply fundamental flaws in the Constitution and Lincoln a savior who overcame them in a time of need. Both views, this dissertation argues, are incorrect for Lincoln, above all else, understood the Founders’ Constitution and, as its executive, employed all of the constitutional tools at his disposal to ensure the safety and survival of the political order.

It would not be an overstatement to suggest that Lincoln’s presidency represents the single-most debated issue in U.S. history regarding executive

emergency powers. He undertook a number of extraordinary actions in response to southern secession to include: calling forth the militia; blockading ports; raising and expanding the size of the Army and Navy (without initial Congressional authorization); suspending the writ of habeas corpus; emancipating slaves; and conducting military detentions and instituting martial law. As one notable historian remarked, the Civil War represents “the high-water mark of the exercise of executive power in the United States...No one can ever know just what Lincoln conceived to be limits of his powers.”¹⁵⁹ This surge in Presidential power leads many observers to conclude that the Constitution, at least for a time, ceased to function as a governing framework as the President wielding arbitrary and virtually unlimited power. For example, the astute commentator on America, Henry Adams wrote that the Civil War “obliterated” the Constitution.¹⁶⁰ Lincoln, himself, however, would deny such charges, and in fact would argue that the Constitution proved to be the source and purpose of the executive functions he performed throughout the Civil War. As this chapter shows, he recognized his constitutional duties as well as the limits on his exercise of executive power.

To argue that Lincoln did not violate the Constitution, this chapter builds upon Chapter II’s analysis of the Founders’ Constitution, in which we discerned three principles for Constitutional interpretation: 1) The necessity of self-preservation serves as the primary lens through which we should view the constitutionality of particular actions; 2) that the Presidency has a special duty to preserve, protect, and defend the Constitution; and 3) that the people, through various institutions, remain

¹⁵⁹ Wilfred E. Binkley, *President and Congress* (New York: Alfred A. Knopf, 1947), 126.

¹⁶⁰ Henry Adams, *Historical Essays*, (New York: Charles Scribner’s Sons, 1891), 369.

the sovereign and ultimately determine whether the President adhered to the Constitution. Organized around these three principles, this chapter first explores Lincoln's understanding of the enduring nature of the Union and Constitution, and that the latter could not survive without the former. He recognized that the Constitution, as a frame of government, must be understood to contain all the powers necessary for its own defense and preservation. Lincoln's calling out "the war power of the government" was neither an invention nor an innovation but a reflection of the Founders' explicit design to create a frame of government capable of defending itself and enduring in the face of great challenges.

The chapter then discusses Lincoln's construction of the executive war power, and his understanding of his duty as President. It specifically focuses on his interpretation of the Presidential oath – the "oath registered in heaven." Unlike his predecessor, President James Buchanan, who refused to acknowledge that the President had the authority to prevent the break up of the Union, Lincoln quickly and forcefully asserted his special duty as the President to employ all necessary measures to ensure the survival of the constitutional order.¹⁶¹ In doing so, he acted within the spirit and letter of the Constitution, and did not resort to un- or extraconstitutional means. Despite wielding tremendous executive power, Lincoln did not view his powers as "without limit" or with an "anything goes" mentality. Instead, Lincoln clearly recognized the limitations of his power, deferring to Congress when appropriate, and most importantly, permitting elections to be conducted in the midst of a bloody civil war. Lincoln always sought to be held accountable to his "rightful

¹⁶¹ See Herman Belz, "Lincoln's Construction of the Executive Power in the Secession Crisis," *Journal of the Abraham Lincoln Association*, Winter 2006.

master,” the American people. Therefore, it is equally important to recognize that actions Lincoln did not take (e.g., postponing or canceling elections, preventing Congress from assembling) are as significant to understanding his constitutionalism as those actions that he did take.

This chapter concludes with a brief discussion of why Lincoln’s writing and speeches should serve as an integral part of Constitutional interpretation, a point not without controversy and significance in our current milieu of case law and judicial supremacy. To help realize why it remains important to think anew Lincoln’s constitutionalism, we shall begin with a brief literature review to highlight the persistent but erroneous notion that he violated the Constitution.

Lincoln’s Mixed Reviews

Early in his career in 1838, Abraham Lincoln delivered a speech to the Young Men’s Lyceum of Springfield, IL on “The Perpetuation of our Political Institutions” in which he argued that a reverence for the Constitution and laws ought to become the “political religion” of the nation.¹⁶² He warned that history is filled with the dangers of “men of ambition” who spring up among the people to “naturally seek the gratification of their ruling passion.” These men – Alexanders, Caesars, and Napoleons – will not wish to maintain and perpetuate the political institutions inherited from our forefathers; rather, disdaining the beaten path, they will seek some new course and bow to no chief or principle other than their own ambition. This,

¹⁶² Abraham Lincoln, *The Perpetuations of Our Political Institutions*, Address Before the Young Men’s Lyceum in Springfield, Illinois, January 27, 1838, Basler (ed.), I:108-115.

Lincoln warned, would undermine and destroy the Constitution, and the principles of free government to which it aims.

Lincoln as Tyrant, Despot, and Dictator

Ironically, Lincoln is often portrayed as that ambitious man who undermined and altered the Framers Constitution for his own personal gain. A contemporary of Lincoln's, Senator Willard Saulsbury Sr. captured the critical view of Lincoln most vividly when he passionately cried out on the Senator floor: "If I wanted to paint a despot, a man perfectly regardless of every constitutional right of the people, I would paint the hideous form of Abraham Lincoln..."¹⁶³ The Lincoln-as-despot viewpoint, interestingly, is officially sanctioned by the state of Maryland in its state song which sings in one verse (to the tune of O Tannenbaum):

The despot's heel is on thy shore,

Maryland!

His torch is at thy temple door,

Maryland!

Avenge the patriotic gore

That flecked the streets of Baltimore,

And be the battle queen of yore,

Maryland! My Maryland!¹⁶⁴

¹⁶³ Quoted in David Herbert Donald, *Lincoln Reconsidered: Essays on the Civil War Era*, third edition, revised and updated, (New York: Vintage Books: 2001), 3.

¹⁶⁴ The lyrics of this song, written by James Ryder Randall, can be found on the official Maryland State Government website: State Facts at a Glance: <http://www.msa.md.gov/msa/mdmanual/01glance/html/symbols/lyricsco.html>

The despot whose heel is on the Maryland shore and whose torch is threatening the temple door is Abraham Lincoln. The call to avenge the patriotic gore flecking the streets of Baltimore refers to the clashes between pro-secession mobs in Baltimore and Federal troops, called by President Lincoln to defend the Union, traversing the city on their way to Washington, DC. It is worth recalling that Maryland though a slave state remained loyal to the Union; imagine the sentiment of those states that seceded. Therefore, portraying Lincoln as a despot, tyrant, or dictator¹⁶⁵ who behaved illegally and actively undermined the Constitution remains an enduring legacy of the Civil War.

This view has been carried forth by self-described group of conservatives and libertarians, many of whom can best be characterized as neo-Confederates or southern sympathizers, highly (if not hyperbolically) critical of Lincoln. The most prominent proponent of this view in recent years is economist Thomas DiLorenzo, who has made a career of “unmasking” Lincoln as a tyrant.¹⁶⁶ DiLorenzo argues that

¹⁶⁵ Tyranny and despotism are commonly understood to be associated with illegitimate and unjust rule. The term dictatorship, however, has been used too loosely and is often grouped with these other terms, giving it negative connotations. However, dictatorship has a long republican legacy as a legitimate emergency executive institution dating to the Roman Republic. This distinction is significant since the view of Lincoln is split among critics who label him a tyrant or despot and admirers who call him a dictator but who praise him as a savior of the republic. As we shall see, none of these terms accurately describe Lincoln. For an overview of the dictatorship, its Roman roots, and its role in democratic emergency government see, Clinton Rossiter, *The Constitutional Dictatorship*. For Rossiter’s specific views on Lincoln see 223-239. The best refutation of the Lincoln-as-dictator thesis remains, by far, Herman Belz’s essay “Lincoln and the Constitution: The *Dictatorship Question* Reconsidered” in Herman Belz, *Abraham Lincoln, Constitutionalism, and Equal Right in the Civil War Era* (New York: Fordham University Press, 1998), 17-43.

¹⁶⁶ Thomas J. DiLorenzo, *The Real Lincoln: A New Look at Abraham Lincoln, His Agenda, and an Unnecessary War* (New York: Random House, 2003). DiLorenzo dedicates another book, *Lincoln Unmasked: What You’re Not Supposed to Know About Dishonest Abe* (New York: Crown Forum: 2006), to Mel Bradford, a prominent southern conservative scholar of literary criticism who was forceful proponent of the “anti-Lincoln tradition.” See M. E.

Lincoln's Presidency carried forth the Whig Party's unconstitutional platform of strengthening the power of the national government at the expense of the states. He further asserts that Lincoln rhetorically misled U.S. citizens, equating the Union and the Constitution as inseparable and thereby prosecuting an unconstitutional war against states that had the legitimate right to secede from the Union. According to DiLorenzo, Lincoln's handling of wartime liberties, namely the suspension of the writ of habeas corpus, and his use of a massive military machine to wage an "unnecessary war" against legitimate southern secessionists were part of Lincoln's agenda to neutralize any opposition to his self-conceived mandate to destroy the Constitution and erect a new, highly centralized state. He sums up his views that "in reality, Lincoln was a glutton for tyranny, as his actions proved time and again during his entire administration."¹⁶⁷ He further concludes, "that the Old Republic established by the U.S. Constitution has been effectively overthrown, with Lincoln leading the way."¹⁶⁸ In a similar vein – equally critical as well as hyperbolic – former Reagan Administration official and former editor of the *Wall Street Journal*, Paul Craig Roberts suggests:

Lincoln was an American Pol Pot, except worse. Pol Pot's barbarism was justified by the Marxian doctrine of class genocide to which he adhered. Lincoln's barbarism was prohibited by the morality of his time and the U.S. Constitution, yet neither deterred him.¹⁶⁹

Bradford, "The Lincoln Legacy: A Long View," *Modern Age*, (1979–80): 355–63. For a description and summary of the anti-Lincoln tradition, see Don E. Fehrenbacher, "The Anti-Lincoln Tradition," *Journal of the Abraham Lincoln Association*, 1982.

¹⁶⁷ Thomas J. DiLorenzo, *The Real Lincoln*, 162.

¹⁶⁸ *Ibid.*, 170

¹⁶⁹ Paul Craig Roberts, "Lincoln and the War on Terror: A Conservative Reappraisal," syndicated column, March 19, 2002, vdare.com/Roberts/police_state.htm. One cannot help

DiLorenzo and Roberts are but two proponents of the school of thought characterizing Lincoln as a despot and tyrant who destroyed the Constitutional order of limited government and put America on a path to all the problems associated with the overly taxed and highly centralized welfare and warfare state. Despite their attempts to juxtapose Lincoln and the Founding generation, this school of thought has difficulty with the explanation of the Constitution by none other than Publius. After all, to form a “more perfect union” is a principal purpose of the Constitution, and Publius dedicates his initial 14 essays to explaining at the great length the importance of Union and why the national government must be empowered to ensure its preservation. Furthermore, many of Publius’s most explicit statements on the need for national government power “without limit” reside in his chapters describing the importance of military and taxation.

Southern sympathizers aside, the view that Lincoln acted beyond or even in violation of the Constitution remains a serious point of scholarly focus. This line of reasoning stems, on the one hand, from the long-held view that the Constitution explicitly seeks to constrain executive power but, on the other hand, also from the broader challenge of discerning the ambivalent and ambiguous nature of executive power. Undoubtedly, there is significant difficulty (discussed in Chapter I)

but notice the grossly exaggerated comparisons used by critics of Presidential power. Whereas Roberts compares Lincoln to Pol Pot, Arthur Schlesinger Jr. argues that Presidents since World War II have wielded power on parallel with Chairman Mao, see *The Imperial Presidency*, xxvii. Such views highlight the shallow opinions of the American elite—left and right—on the genocidal horrors of modern tyranny. To compare Lincoln’s prosecution of the Civil War or Nixon’s actions during Vietnam, for example, to the horrors inflicted by Pol Pot or Mao is demeaning to those millions of victims of Cambodia’s “killing fields” or who were brutally persecuted China’s “cultural revolution.”

reconciling executive power with constitutional government. Therefore, that Lincoln violated the Constitution even if he did so for noble purpose of saving it remains the prevalent view, and unfortunately it limits what we might learn from Lincoln about the Constitution and executive power.¹⁷⁰

Admirers of Lincoln label his actions unconstitutional, illegal, or extraconstitutional,¹⁷¹ but praise him for prudently stepping outside of the Constitution in order to preserve it. Some scholars go so far as to label Lincoln a dictator, albeit a “constitutional,” “democratic,” or “benevolent” one, suggesting that even if he violated the Constitution it was the right course of action for the public good. Clinton Rossiter, for instance, suggests Lincoln’s actions during the secession crisis represent the “paragon of all democratic, constitutional dictatorships...For if Lincoln was a great dictator, he was a greater democrat.”¹⁷² The historian James Randall in his monumental *Constitutional Problems Under Lincoln* argues, “If Lincoln was a dictator, it must be admitted that he was a benevolent dictator.”¹⁷³ The political scientist Richard Pious, moreover, writes Lincoln “in effect created a form of constitutional dictatorship: constitutional because the ultimate checks of election and

¹⁷⁰ Larry Arnhart, for example, writes Lincoln sets an “example of violation of the Constitution that could only have a pernicious effect upon his successors.” See Arnhart, “The God-Like Prince: John Locke, Executive Prerogative, and the American Presidency,” *Presidential Studies Quarterly* 9 (Spring 1979), 121-130.

¹⁷¹ Forrest MacDonald, for example, bluntly states: “Lincoln took a number of unconstitutional and extralegal actions.” MacDonald, *The American Presidency*, 398.

¹⁷² Rossiter, *Constitutional Dictatorship*, 224.

¹⁷³ For the description of Lincoln as a “benevolent dictator” see, J.G. Randall, *Constitutional Problems Under Lincoln*, revised edition, (Urbana, IL: The University of Illinois Press, 1951), 47. George Fletcher, an admirer of Lincoln, offers a more extreme interpretation of Lincoln and the Constitution, suggesting that he completely transformed the American political order by “rejecting the people and their Constitution in throes of war” and ushering in a “secret constitution” built upon new principles radically different than those of the Founders. See George P. Fletcher, *Our Secret Constitution: How Lincoln Redefined American Democracy* (New York: Oxford University Press, 2001).

impeachment remained, but a ‘dictatorship’ because he disregarded the proximate check and balances in the emergency.”¹⁷⁴ As noted above, the dictatorship, in its original form, is a formal constitutional mechanism in which the legislature empowers an executive officer to handle an emergency—the absolute power of a single man—for a specified period of time. The U.S. Constitution does not include a provision for a dictator or any such institution, and Publius even uses the Roman dictatorship in contrast to his description of the Presidency (*Federalist 70*). Therefore, to label Lincoln a dictator implies either the introduction of a foreign institution into the Constitution or to suggest that he acted beyond or outside the Constitution.

Lincoln, the Lockean Prerogative, and Extraconstitutionalism

Other scholars place Lincoln’s wartime actions in the context of the political philosopher John Locke’s notion of prerogative power.¹⁷⁵ There is no evidence that Lincoln ever read *Locke’s Two Treatises on Government*¹⁷⁶ and though Lincoln was well versed on the writings of the Founders, Locke’s discussion of prerogative power

¹⁷⁴ Pious, *The American Presidency*, 56-57

¹⁷⁵ Michael Genovese, for example, writes, “He [Lincoln] assumed the ‘prerogative’ power (as Locke described it), and took unto himself powers otherwise reserved for the other branches of government.” See Genovese, *The Power of the American Presidency 1789-2000* (New York: Oxford University Press, 2001), 87-88. In the preceding sentence, Genovese labels Lincoln a “Constitutional Dictator,” which as we’ve noted differs from the Lockean prerogative. This provides another example of the confusion among scholars on how to treat Lincoln’s constitutional exercise of executive power. For other discussions of Lincoln and Locke’s prerogative see Arnhart, “The God-Like Prince: John Locke, Executive Prerogative, and the American Presidency”; Sean Mattie, “Prerogative and the Rule of Law in John Locke and the Lincoln Presidency,” *Review of Politics*, 67 (2005), 77-111; and Benjamin Kleinerman, “Lincoln’s Example: Executive Power and the Survival of Constitutionalism,” *Perspectives on Politics*, December 2005.

¹⁷⁶ Harry Jaffa, *A New Birth of Freedom: Abraham Lincoln and the Coming of the Civil War* (Lanham, MD: Rowman & Littlefield Publishers, Inc., 2004), 243.

was not used to describe executive power during the framing of the Constitution. Scholars examining Lincoln in this tradition usually begin with Locke’s basic definition of prerogative as “the power to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it, is that which is called Prerogative.”¹⁷⁷ They seize hold of executive discretionary power acting whenever the law is silent or even against the law if the ends are in the public interest. Locke brilliantly captures the fundamental problem of reconciling written law and discretionary executive power necessary in times of emergency. Yet Locke offers a more nuanced understanding of prerogative as he defines it at least five different times, grounding it in nature—beginning with his discussion of parental power—but also describes it as arbitrary and that it “never be questioned” under his discussion of tyranny.¹⁷⁸

We must bear in mind several key points when considering Lincoln and the Lockean prerogative. Lincoln never claimed to act against the Constitution nor wield arbitrary power that would “never be questioned.” In fact, he went to great lengths to prove the Constitutionality of his actions to his “rightful master,” the American people. As eminent Lincoln scholar Harry Jaffa remarks, “Throughout the war, Lincoln will take the greatest pains to prove in every instance that the authority he

¹⁷⁷ John Locke, *Two Treatises of Government*, edited with an introduction and notes by Peter Laslett, (New York: Cambridge University Press, 2000).

¹⁷⁸ Locke’s describes prerogative at some length in Chapter XIV of the *Second Treatise*, but he also discusses it in at least four other chapters: VI: Of Paternal Power; VIII: Of the Beginning of Political Societies; XIII: Of the Subordination of the Powers of the Commonwealth; and XVIII: Of Tyranny. Though Locke discusses prerogative as executive discretionary power to do “good, not harm” when the legislature is not in session or when there is no written law to prescribe what measure to take, his discussion of prerogative has a bit more nuance. Locke is not merely describing executive discretionary power in lieu of written law but the exercise of power in the execution of the law of nature: self-preservation.

exercises, however extraordinary it may appear, is genuinely derived from the people by means of the Constitution and that he has exercised no authority originating in any will or purpose of his own.”¹⁷⁹ The people, Lincoln understood and indeed demanded, would question and ultimately judge his actions through multiple constitutional institutions, namely free elections. Lincoln did employ discretionary action—that is actions that he alone made determinations upon without the prescription of written law—but that is to be expected as that is what leaders are expected to do. Lincoln, moreover, in applying his judgment to particular challenges remained fully cognizant that he would have to explain his actions to the people who would either accept or reject them as in line with their understanding of the Constitution. Lincoln went to great lengths not to construe the Constitution by any “hypercritical rules” but in ways that would be understood and recognizable to his fellow citizens.¹⁸⁰

Rather than focus on particular instances or passages where Lincoln might sound like Locke, it would be more prudent to examine both Locke and Lincoln through the prism of natural law and the principles of natural right that each saw as the foundation of political society. We also should reexamine Locke’s discussion of prerogative and read him as a natural lawyer more than a liberal constitutionalist. For the latter view, as many have adopted, focuses on the use of discretionary executive power in the absence of written prescriptive law. However, when read as a natural

¹⁷⁹ Jaffa, 349.

¹⁸⁰ Lincoln’s use of a rather unusual word like “hypercritical” in his First Inaugural Address suggests that he had no intentions of sophistry, interpretive legerdemain, or obscure and complex legal arguments but to offer constitutional reasoning clearly and broadly understood by the people to whom the Constitution rightfully belongs.

lawyer, Locke provides us with a more fundamental understanding of the primacy of self-preservation as the foundation of political society and that actions taken towards that end should be viewed as consistent with the natural foundations of political society. Again, though Lincoln did not reference, or perhaps even read Locke, his actions to defend the Constitution were reflections of the expressed purpose of that document: self-preservation. Only by creating a frame of government capable of attaining this latter primary objective could the Constitution secure the “blessings of liberty” for the current and future generations. Locke’s natural law approach offers us much perspective not only on Lincoln, but also on constitutionalism and executive power more broadly.

However, scholarly and popular opinion continue to promulgate the myth that Lincoln rescued the Constitution in spite of itself, primarily by breaking free of the shackles it places on executive power. Sotirios Barber and James Fleming succinctly capture this reasoning when they write, “Lincoln violated the Constitution to save the Union and the Constitution.”¹⁸¹ Michael Nelson adds, “Lincoln departed from the Constitution in order to save it.”¹⁸² As a result of such thinking, Lincoln’s constitutional thought does, by default, become a “minor issue”¹⁸³ since it is not to be repeated and offers no lessons to evaluate the actions of future Presidents. Lincoln, hence, emerges to admirers as a unique leader, and, fortunately for the American political order, power during this great crisis fell in the hands of a man who in acting outside of the Constitution did not permanently transform the regime. Former New

¹⁸¹ Tushnet (ed.) *The Constitution in Wartime*, 236

¹⁸² Michael Nelson, *Guide to the Presidency*.

¹⁸³ Rossiter, *The Constitutional Dictatorship*, 224

York Governor, and author of the popular book *Why Lincoln Matters*, Mario Cuomo captures this view when he writes regretfully, “I still wish the great Lincoln had stood by the Constitution despite the strong temptation not to.” Cuomo presumptuously goes on to offer a speech that he believes Lincoln would have delivered to Congress in 2004 should he have been alive, expressing that “my [Lincoln’s] disputed actions in the past are a precedent that may be safely ignored today. Either they will be considered wrong and should be ignored for that reason, or they will be considered right but for reasons that do not pertain in the current emergency [i.e., the post-9/11 terrorist threat].”¹⁸⁴ Cuomo’s Lincoln, therefore, offers us no lessons; or more accurately, the main lesson is: even if Lincoln was a great president, do not repeat after him for he did not act constitutionally. This sentiment unfortunately not only fails to capture Lincoln’s own understanding of the Constitution but also neglects to gain perspective on the Constitution from one of its greatest interpreters and defenders.

The Constitution and Lincoln

Those who argue that Lincoln violated the Constitution, even if he did so nobly to save it, ignore Lincoln’s lifelong reverence for the Constitution as well as his articulation, as President, that the actions he took were not only consistent with, but also actually required by, the Constitution. Beginning with the aforementioned speech that he gave as a young lawyer at the Springfield Lyceum in 1838, Lincoln

¹⁸⁴ Mario M. Cuomo, *Why Lincoln Matters: Today More Than Ever* (New York: Harcourt Press, 2004), 85, 176.

consistently showed reverence for the Constitution as well as the “iron men” who framed it.¹⁸⁵ At Cooper Union in 1860, in a speech that secured him the Republican Party’s nomination for the Presidency, Lincoln outlined his understanding of the government framed by our “fathers” under which we should live. In doing so, he showed his deep-rooted attachment to the Constitution by advocating “adherence to the old and tried, against the new and untried” and displayed his disinterest in and distrust of new modes and orders. Therefore, when Lincoln took office on March 4, 1861, he brought with him an entire political life dedicated to adherence to and reverence for the Constitution. Even in the midst of the greatest calamity to face the United States, he would not buckle in his reverence for the Constitution, and in fact he found it as the reason for and source of legitimacy of all his actions. The Constitution, at the highest level, empowered Lincoln to take the actions he did. It would be more accurate to characterize Lincoln as saving the Constitution, the Union, and the natural right principles of the American political order, not by stepping outside or departing from the Constitution, but by adhering to its spirit and letter to prove that it provides all the means necessary to ensure its existence.¹⁸⁶

¹⁸⁵ For Lincoln’s Address to the Young Men’s Lyceum in Springfield see *supra* Basler (ed.), I:108-115. Speaking in celebration of July 4th in 1858, Lincoln asked the crowd to look back 82 years to 1776: “We find a race of men living in that day whom we claim as our fathers and grandfathers; they were *iron men*, they fought for the principle that they were contending for; and we understood that by what they then did it has followed that the degree of prosperity that we now enjoy has come to us.” See Basler (ed.), II: 484-502 (Speech at Chicago, Illinois, July 10, 1858, primarily as recorded by the *Chicago Daily Democrat*).

¹⁸⁶ As Herman Belz argues, “Lincoln employed a two-track constitutional justification in explaining the legitimacy of controversial measures adopted under executive authority. The first and more familiar track involved legalistic arguments from the text of the Constitution. The second involved more broadly political arguments concerning the relationship between the Union, the Constitution, and the nature of republican government.” Herman Belz, *Abraham Lincoln, Constitutionalism, and Equal Right in the Civil War Era*, 35.

Our primary question remains: did Lincoln violate the Constitution? To address that question, we must recognize that Lincoln's construction of the executive war power hinges upon three core principles: 1) the symbiotic relationship between of the Union and Constitution and their role in protecting the natural right principles of the Declaration of Independence; 2) both the Union and the Constitution were designed explicitly to endure; and 3) the executive was duty-bound to ensure that they continued unimpaired. By its very nature, secession represented the gravest threat to the Union and the Constitution. Finally, and most importantly, the constitutional legitimacy of Lincoln's actions depended upon the maintenance of the most basic republican institutions specifically elections and mechanisms of Congressional accountability. Not unexpectedly, the concepts found in this section—constitutional self-preservation and necessity; duty, energy and responsibility in the executive; and accountability to the people—parallel the discussion of the Founders' Constitution in Chapter II.

The Union and the Constitution in Perpetuity

Lincoln's understanding of the Constitution and Union was underscored by two key tenets: the Constitution created the frame of government for a Union of sovereign people politically organized as states dedicated to the principles of natural right as outlined in the Declaration of Independence; and that the Constitution and Union were expressly designed by the Founders to endure and serve as the most effective means of protecting and promulgating the natural right principles of the Declaration. From the outset of his Presidency, Lincoln consistently held that

secession expressly violated the “universal law” of the social compact upon which the United States was founded, challenged the underlying principle that a proper government does not contain a provision for its own termination, and contradicted the “history of the Union itself.”¹⁸⁷ For Lincoln, secession was the paramount unconstitutional act, and served as the primary basis of his construction of the executive power necessary to preserve the Union. For if the Constitution legally permitted secession, Lincoln’s understanding of the deep-rooted connection between the Union and the Constitution would be null and any use of force to resist secession *de facto* would be unconstitutional.¹⁸⁸ Therefore, Lincoln is careful to articulate why secession is unconstitutional and he never recognizes Southern secession as anything but a treasonous act of insurrection and rebellion. He also very carefully articulates the social compact foundations of the Union and the nature of the Constitution, stressing that it cannot be altered or undermined by one party electing to withdrawal. This underscores his grasp of the enduring nature of the Constitution as well as the powers it enables to ensure its survival.

One of Lincoln’s most profound and philosophical writings on the foundations and causes of the Constitution comes in a fragment he penned in the winter of 1860-

¹⁸⁷ Abraham Lincoln, *First Inaugural Address—Final Text*, March 4, 1861, Basler (ed.), IV: 262-271.

¹⁸⁸ In examining Lincoln’s constitutionalism, Tom Krannawitter addresses the issue of secession in determining the constitutionality of Lincoln’s actions: “First and foremost is the question of secession. If Southern states possessed the legal and constitutional right to secede peaceably, the indeed virtually all of Lincoln’s action in defense of the Union were constitutionally illegitimate. But...secession cannot be squared with either the conditions necessary for constitution government...or the textual provisions of the Constitution. What some Southerners called secession was, in light of the Constitution and the social contract principles of the American Founding, rebellion.” Thomas Krannawitter, *Vindicating Lincoln: Defending the Politics of Our Greatest President*, (New York: Rowman & Littlefield, 2008), 319.

61. Faced with the distinct possibility of secession and the destruction of the United States, Lincoln again worked out an understanding of the foundations of the American regime that would serve as the basis for his arguments on the unconstitutionality of secession. Recognizing the relationship between the Declaration, the Union, and the Constitution – which is consistent with the Founding generation’s – Lincoln writes that the natural right principle of Declaration “was the word, ‘fitly spoken’ which has proved an ‘apple of gold’ to us. The Union, and the Constitution, are the picture of silver, subsequently framed around it. The picture was made, not to conceal, or destroy the apple; but to adorn, and preserve it. The picture was made for the apple not the apple for the picture.”¹⁸⁹

Lincoln’s use of this Biblical metaphor (*Proverbs* 25:11) to describe the nature of the Union would become fundamental to his construction of the “war power of the government” and his duty to take all measures to ensure the survival of the Constitution. He concludes, “So let us act, that neither *picture*, or *apple* shall ever be blurred, or bruised or broken.” For Lincoln, any threat to break or bruise the Constitution posed a fundamental danger to the apple of natural liberty and thus, all actions taken to defend it were legitimate and necessary. The Union was indissoluble and the Constitution inviolable for they were the silver frames protecting the golden apple of liberty. He sought not to alter the frame or the apple, nor did he seek to bruise or violate the silver picture to preserve it. He, in fact, wished to prevent any blurring, bruising, or breaking of the frame; he did not wish to see it violated even if such an act was carried out with the purpose of protecting it. This fragment provides

¹⁸⁹ Abraham Lincoln, *Fragment on the Constitution and the Union*, Basler (ed.), IV: 168-169.

insight into his constitutional reasoning, showing that he did not believe that the Constitution or Union should be violated or broken, even if to preserve or protect the natural right foundations of the United States. Taking his metaphor one step further, Lincoln refrains from juxtaposing security and because he views them as intertwined (i.e., “made for each other”), and that the former is necessary to preserving and promoting the liberty. Free government and a free people depended upon the Union remaining intact and the Constitution unbreached.

Building upon this philosophical foundation, Lincoln’s First Inaugural Address on March 4, 1861 makes the case for why secession is not constitutional, and why if permitted, it violates the expressed constitutional purpose of forming a “more perfect union.” Though Lincoln’s constitutional reasoning in the First Inaugural provides the foundation for understanding his wartime words and deeds, it is imperative to recognize Lincoln was not foreshadowing the exercise of extraordinary executive power for it was an attempt to demonstrate his commitment to the Constitution and a desire to prevent the eruption of violence. In other words, if we wish to understand Lincoln as he understood himself, we cannot read the First Inaugural through the bloodied lens of the Civil War that would occur after it; we must recognize what Lincoln was trying to say at that time. However, the First Inaugural does provide insight into Lincoln’s constitutional and political thinking, thereby offering us a glimpse of the philosophical foundations of his words and deeds through the war. The First Inaugural, most pertinently, shows Lincoln’s grounding his understanding of the Union in Constitution in natural law when he states:

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. It is safe to assert that no government proper, ever had a provision in its organic law for its own termination.¹⁹⁰

Lincoln echoes the principles upon which the Framers had created the constitutional order. For they, as we discussed in Chapter II, abandoned the government under the Articles of Confederation since it lacked the requisite powers and structure to ensure a perpetual union. The Constitution, furthermore, was ordained and established by “the people” and represented an explicit break with the league or alliance structure of the Articles to form a binding national union. In contemplating universal law, Lincoln reflects the Framers’ thought, particularly that of Publius who argued from the universal principles and maxims of politics to show the importance of Union and why the Constitution must be understood to be self-perpetuating. Paralleling the reasoning of the Founders, Lincoln asks:

Again, if the United States be not a government proper, but an association of States in the nature of contract merely, can it, as a contract, be peaceably unmade, by less than all the parties who made it? One party to a contract may violate it—break it, so to speak; but does it not require all to lawfully rescind it?¹⁹¹

After briefly emphasizing the historical and natural roots of the Union, he answers his question:

But if destruction of the Union, by one, or by a part only, of the States, be lawfully possible, the Union is

¹⁹⁰ See supra note, *First Inaugural Address—Final Text*, Basler (ed.), IV: 264-265.

¹⁹¹ *Ibid.*, IV: 264-265

less perfect than before the Constitution, having lost the vital element of perpetuity.¹⁹²

To Lincoln, consistent with the Founders, the Union provides the best means of achieving the political liberty for which the American Revolution was fought. The explicit purpose of the Constitution is to provide a frame of government that forms a more perfect union to secure that liberty in perpetuity. Without the Constitution, the Union would be less perfect, and the Constitution would be hollow without the Union. Secession, thus, threatened the very foundations of both. Lincoln unequivocally states that secession is the “essence of anarchy,” actions to that effect are “legally void” and either “insurrectionary or revolutionary, depending on the circumstances.” Though Lincoln recognizes the natural right of revolution (as embodied in the Declaration), he decidedly makes the case that southern secession represents an insurrectionary movement, one that threatens the very fabric of the Union and the Constitution thereby obliging him to take actions that would protect the nation from dissolution. Thus, proving it as insurrection serves as the basis upon which he constructs the war power and executive’s special duty to exercise that power.

Although Lincoln’s belief in the Union and Constitution has been criticized and characterized by some as mystical or, even worse, as lyrical mysticism cloaking sophistry,¹⁹³ his uncompromising position on the natural connection between the

¹⁹² Ibid., IV: 265

¹⁹³ Alexander Stephens, Vice President of the Confederacy, was an early critic of Lincoln’s views on the Union. He suggested, “The Union, with him, in sentiment rose to the sublimity of a religious mysticism, while his ideas of its structure and formation, in logic, rested upon nothing but the subtleties of a sophism!” See Alexander H. Stephens, *Recollections of*

Union and Constitution, and that the act of secession represented the gravest of threats to them, are critical to the legitimacy of his construction of war and executive power. For if we accept that his underlying philosophy of the naturalness of the Union and Constitution was mere sophistry, his Presidency would amount to nothing more than tyranny shrouded in misleading interpretations. However, Lincoln's emphasis on the Union and its natural relation to the Constitution rests on the solid ground of the Framers, directly adapted from the Constitution's opening language of the expressed purpose of forming a "more perfect Union." Furthermore, for all the criticism of Lincoln's Unionism being "religious mysticism," it was no more so than that discussed by Publius in his opening Federalist essays, specifically that of Federalist 2 which refers to the natural union as a "design of Providence" that "should never be split into a number of unsocial, jealous, and alien sovereignties." The people, Publius and Lincoln both argued, are uniquely and strongly tied by union and sought a federal government wisely constructed to ensure their liberty in perpetuity. Thus Lincoln, building upon Publius and other Framers, recognized that the United States was the embodiment of modern natural right, in which government was formed among an inseparable union of people to provide their basic security and enjoy their natural liberties. Lincoln's sole focus, in sum, was to preserve the Union and its Constitution that protected the natural right principles of the Declaration, and do so while adhering to and remaining within the boundaries of the Constitution.

Alexander H. Stephens: His Diary Kept When a Prisoner at Fort Warren, Boston Harbour, 1865, ed. Myrta Lockett Avary (New York: Doubleday, Page, 1910), 62.

The War Power of the Government and the President's Responsibility to Execute It

In his address to a special session of Congress on July 4, 1861, Lincoln's used of the phrase "war power of the government" to explain the measures the Executive had taken in response to the Southern use of force at Fort Sumter. His use of the term "war power of the government" reflects an interesting word choice since that term does not explicitly appear anywhere within the four corners of the Constitution. To recognize what Lincoln meant by the war power of the government, we must clear away all current definitions and discussions of this term. The use of the term war power(s) over the past several decades unfortunately have become synonymous with the initiation of military hostilities, or the "war-making power" or "war declaring" power, and the debates between Congress and the Presidency over this issue. This is a legacy of modern scholarship, particularly the imperial presidency thesis. In fact, the War Powers Resolution of 1973 focuses only on the deployment of military forces abroad and constraints on the President's entry into military hostilities. It reflects nothing of Lincoln's understanding of measures taken in defense of the nation, nor the constitutional basis of this term. Despite James McPherson's contention that Lincoln "invented the phrase" or Geoffrey Perret's suggestion that the war power was "Lincoln's creation," the specific phrase had been used in the *ante bellum* most notably in a speech delivered by John Quincy Adams (which was reproduced and distributed by some radical republicans after Fort Sumter.)¹⁹⁴

¹⁹⁴ See *supra* note McPherson, *Tried By War*, 24 and Geoffrey Perret, *Lincoln's War: The Untold Story of American Greatest President as Commander in Chief* (New York: Random House, 2001), xv. For more on Adams's speech and its influence early in the Civil War see Guelzo, 195-200. Adams juxtaposed the extent of the war power with the peace power, the

Lincoln, however, discerned its greatest meaning, expounding upon the thought of the Framers, who created a constitutional order containing all requisite powers for its own survival. The time between Lincoln's April 15 Proclamation calling forth the militia and his July 4 speech, in which he outlined the constitutional justification of those measures, represent the book-ends of an eleven week period during which Lincoln as Clinton Rossiter posits "was the Government."¹⁹⁵ More importantly, this reflects the critical time period in which he defined, acted upon, and articulated the constitutional meaning of the war power. Examining Lincoln's words and deeds during this period serve as the primary point of inquiry into his construction of the war power and the executive's duty to implement it.

Lincoln applied the term war power to the collection of measures necessary to "resist" destructive internal forces and ensure the restoration and long-term preservation of the political order.¹⁹⁶ The war power, at its core, is organic to the Constitution and Lincoln's articulation of the war power specifically reflects the "authority" referenced in *Federalist 23*, in which Publius states: "it must be admitted to be necessary consequence that there can be no limitation of that authority which is

latter are derived from "internal municipal sources" while the latter from "the laws and usages of nations." Notably, Adams discussion of the war power emphasizes two key themes that the power is indeed extraordinary (and potentially dangerous) but that it is "vested by the Constitution of the United States." He states, "The power is tremendous; it is strictly constitutional, but it breaks down every barrier so anxiously erected for the protection of liberty, of property, and of life." See Speech by The Hon. John Q. Adams, The First Session, 24th Congress, *The Congressional Globe: Sketches of the Debates and Proceedings*, edited by Blair and Rivers, (City of Washington: Printed at the Globe Office For the Editors, 1836), Volume II-III, 447-451. Adams speech on the war power, delivered before Congress in 1836, was widely referenced and distributed in the opening days of the Civil War particularly among abolitionist who saw it as a means for Lincoln to emancipate slaves at the initiation of hostilities.

¹⁹⁵ Rossiter, *The Constitutional Dictatorship*, 224.

¹⁹⁶ Abraham Lincoln, *Message to Congress in Special Session*, July 4, 1861, Basler (ed.), IV: 421-441.

to provide for the defense and protection of the community in any matter to its efficacy--that is, in any matter essential to the *formation, direction, or support* of the NATIONAL FORCES.” These were not just military measures, but broader political, economic, and diplomatic efforts that the nation could legitimately undertake in its own defense. For Lincoln, as with Publius, measures taken in defense of the Constitution and the Union could not, by definition, be understood as un- or extraconstitutional, since the overriding purpose of the Constitution is self-preservation. Therefore, the Constitution must be understood to contain all of the means necessary to ensure that end.

Prior to the Southern attack on Fort Sumter on 12 April 1861, Lincoln’s speeches are marked by a hope, fleeting perhaps, that the secession crisis could be handled without resort to violence. He was firm that secession was unconstitutional and an act of treason, and that as President, he was duty-bound to “run the machine as it is” with the Union intact.¹⁹⁷ However, he did seek to assuage Southerners by stating unequivocally that he would not order an act of aggression or coercion against them. His duty obliged him to ensure the laws were faithfully executed but nothing permitted him to do more. Lincoln consistently placed the onus on the Southern states not to make peace, stating that he did not represent a threat, and that he only sought to uphold the Constitution and the laws, as his constitutional duty conferred upon him.

¹⁹⁷ A week prior to South Carolina’s formal declaration of secession from the Union, Lincoln directly addressed his opinion on secession in a letter to Thurlow Weed, “I believe you can pretend to find but little, if anything, in my speeches, about secession; but my opinion is that no state can, in any way lawfully, get out of the Union, without the consent of the others; and that it is the duty of the President, and other government functionaries to run the machine as it is.” Abraham Lincoln, *To Thurlow Weed*, December 17, 1861, Basler (ed.), IV: 154.

Once the Southern insurrectionists fired the first shot, Lincoln saw that a violent insurrection and rebellion that threatened the nature of the Union was underway, and he looked to the Constitution to guide his actions. Fewer than 72 hours after the first shots were fired, Lincoln issued a proclamation calling the militia into service and convening Congress. The proclamation stands as his very first act as a wartime president and the act by which he “called out the war power of the government.” The militia requests were made in reaction to a threat emanating from seven secessionist states “by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the Marshals by law.”¹⁹⁸ The size, scope, and overall threat, in other words, made it impossible to arrest individuals for treasonous or threatening acts and prosecute them in the normal proceedings of the courts. It required a national response on a much greater scale and Lincoln, as President of the United States, made this determination “in virtue of the power in me vested by the Constitution, and the laws.” The President, after all, is obliged to ensure that the laws are “faithfully executed.” Lincoln’s April 15 Proclamation provides the overarching purpose for his actions,

I appeal to all loyal citizens to favor, facilitate and aid *this effort to maintain the honor, integrity, and the existence of our National Union, and the perpetuity of popular government*; and to redress wrongs already long enough endured.¹⁹⁹

From the outset, Lincoln framed the war as a people’s contest, and effort in national self-preservation and constitutional perpetuation. Secession, and threats of it, had

¹⁹⁸ Abraham Lincoln, *Proclamation Calling Militia and Convening Congress*, April 15 1861, Basford (ed.), IV: 331-332.

¹⁹⁹ *Ibid.*, IV: 331-332 (Emphasis mine).

gone on long enough, too long in fact, and all powers of government would be needed to crush it.

In that same proclamation, Lincoln would convene Congress, a constitutional power of the President, asking them to meet in special session on July 4, 1861, nearly 11 weeks after Fort Sumter. That speech provides the most cogent and philosophical justification of the constitutionality of the war power that he “called out” in the days following Sumter. The date for convening has obvious symbolic meaning, but practically it also took into account ongoing Congressional elections and travel time required to meet in Washington.²⁰⁰ By choosing July 4, Lincoln symbolically enforced his point that the Declaration of Independence (signed 85 years earlier) was an act of Union that preceded the Constitution of 1787 and the principles of which form the cornerstone of the natural rights foundation of the United States. Invoking the Declaration in a speech about his extraordinary executive actions and in which he spoke of being forced to call out “the war power of the government” underscored the point that principles of natural right could not be preserved and protected without a government capable of defending itself. Free government, in other words, could not continue unless the government was sufficiently powerful to ensure domestic tranquility and protect its citizens.

Equally important to understanding the war power is not what Lincoln says in the July 4th speech but how he says it. Lincoln uses the third-person singular throughout this speech, which to my knowledge, is the only speech Lincoln delivered in this way. In his Inaugural speech several months prior, Lincoln was very personal

²⁰⁰ Allen Guelzo, *Abraham Lincoln: As a Man of Ideas* (Carbondale, IL: Southern Illinois University Press, 2009), 203.

as he took the oath of office, and provided his views on the Union, the Constitution, and slavery. The July 4th speech, however, takes a very impersonal tone with Lincoln referring to himself as “the Executive” as he explains the actions undertaken since the firing on Fort Sumter. The entire speech gives the sense that powers exercised and activities undertaken in defense of the Constitution are not choices but an obligation, the natural reaction of self-defense and that no one, unless acting against the natural course of matters could have behaved differently. Similar to man in the state of nature, the nation was forced to take actions to prevent itself from being devoured and destroyed. Harry Jaffa captures the natural law reasoning underpinning Lincoln’s thought: “And just as there is no assignable limit to what is permitted to individuals by the law of self-preservation in the state of nature, there can be no assignable limit to what a government may do on behalf of those to whose care that preservation has been entrusted.”²⁰¹ The use of the third-person singular, moreover, conveys the sense of the officer “with the imperative duty” to execute his office, like any other person in his position would or at least should do. It is not Abraham Lincoln acting on his own accord or by personal prerogatives but the person who has been elected by a free people and in whom they confided with such a sacred trust of executing the office of the Presidency to provide for their safety and preserve their natural liberty.

Lincoln uses this occasion to frame and then answer the fundamental question presented to the “whole family of man” whether “a constitutional republic or democracy—a Government of the people, by the same people—can or cannot

²⁰¹ Jaffa, 363.

maintain its territorial integrity against its own domestic foes.” He would simply pose the question as: "Is there, in all republics, this inherent and fatal weakness? Must a government, of necessity, be too strong for the liberties of its own people, or too weak to maintain its own existence?" The answer centers around his declaration “no choice was left but to call out the war power of the Government; and so to resist force, employed for its destruction, by force, for its preservation.” This phrase contains several key characteristics that merit elaboration. Like the obligatory tone of his use of the third-person voice, he states there was “no choice” explicitly referencing the obligation that he, as an officer of the Constitution, has to prevent its demise. No law-abiding, constitutional officer, from the President to a postal clerk, could lawfully ignore the Constitution’s explicit right to self-preservation. Acting otherwise, in fact, would have violated the Constitution.

The purpose of the power employed is “to resist” destructive force with sufficient force to ensure “its preservation.” This phrase shows what Lincoln clearly understood, but overlooked by others, that the war power had limits and that it was bound by the Constitution for which it is designed to protect. It could not be employed to achieve ends not expressed by or even prevented by the Constitution. Only when those specific provisions harmed or undermined the nation’s ability to defend itself could the overarching principle of self-preservation override specific laws or constitutional provisions. The most explicit example of this is the issue of slavery and emancipation. Senator Charles Sumner and other radical Republicans, building upon John Quincy Adams speech, had argued that “the war power” had no

bounds and could therefore be used, *inter alia*, to squash slavery permanently.²⁰² Lincoln, however, rejected such arguments based upon the limitations that the Constitution placed upon the exercise of power in its own defense. Lincoln, in fact, rescinded the emancipation declaration of his subordinates early in the war since he felt slavery, at least initially, did not need to be destroyed as an institution for the Union and Constitution to be preserved.²⁰³ He did this despite his deep personal hatred of the institution of slavery;²⁰⁴ however, he recognized that the Constitution had protected it as an institution—restricted and put on a path to eventual extermination—but nonetheless unfortunately protected it. Furthermore, Lincoln initially viewed emancipation as “purely political” and “not within the range of

²⁰² See *supra* note, Guelzo, 195-200.

²⁰³ In August 1861, General Fremont issued a proclamation, without Lincoln’s knowledge, emancipating slaves in Missouri. On September 11, 1861 Lincoln instructed Fremont to modify his order to conform with recently passed Congressional legislation dealing with emancipation. See Lincoln, *To John C. Fremont*, September 11, 1861, Basler (ed.), IV: 517-518. Also see *Proclamation Revoking General Hunter’s Order of Military Emancipation of May 9, 1862*, issues May 19, 1862, Basler (ed.), V: 22-23, in which he stated that emancipation would be order only when it had “become a necessity indispensable to the maintenance of the Government to exercise such supposed power.” Furthermore, historian Michael les Benedict captures Lincoln’s reasoning on slavery and military necessity as well as his recognition of Congress’ role when he writes, “After a delay of more than a year, Lincoln concluded that slavery constituted so powerful a strategic resource for the South that he was justified as commander in chief in proclaiming the emancipation of all slaves behind rebel lines. But this was hardly a denial of congressional authority. In fact, Lincoln drew specific attention to prior congressional legislation in his preliminary emancipation proclamation...*What Lincoln did deny, both to himself and to Congress, was the power to decree abolition of slavery as an institution, as distinguished from the emancipation of the slaves of rebels.*” See Michael les Benedict, “The Lincoln Presidency and the Republican Era,” in *The Constitution and the American Presidency*, edited by Martin L. Fausold and Alan Shank (Albany, New York: State University of New York Press, 1991), 57 *emphasis mine*.

²⁰⁴ Lincoln was careful not to permit his personal feelings to influence the exercise of his constitutionally conferred powers. He later wrote of his personal views in a public letter to Senator Albert Hodges of Kentucky, “I am naturally anti-slavery. If slavery is not wrong, nothing is wrong. I can not remember when I did not so think, and feel. And yet I have never understood that the Presidency conferred upon me an unrestricted right to act officially upon this judgment and feeling.” See Abraham Lincoln, *Letter to Albert Hodges*, Basler (ed.), VII: 282-284.

military law, or necessity”²⁰⁵ and issuing a proclamation when it was *not* a military necessity would represent a permanent law-making function on the issue of property in states loyal to the Union. This would amount to, as Lincoln describes, a “dictatorship” or the President, or generals, performing the “permanent legislative functions of the government.” Only when emancipation became a military necessity that could help undermine the stubborn war effort of those secessionist states did Lincoln, as Commander in Chief, issue the Emancipation Proclamation in 1863. The war power is responsive to the demands of constitutional self-preservation, as dictated by the necessity of the threat to the Union, and not the personal views of the executive or his subordinates.

Lincoln acknowledges that his actions in response to Fort Sumter are extraordinary and therefore would require explanation.²⁰⁶ Speaking specifically to his executive orders suspending the writ of habeas corpus, Lincoln articulates the Constitution’s higher purpose and provides the overriding principle of constitutional interpretation. Primarily, Lincoln argues that the necessity of preserving the Constitution—the whole of laws—could in times require ignoring or even violating a

²⁰⁵ Abraham Lincoln, *To Orville H. Browning*, September 22, 1861, Basler (ed.), IV: 531-533. Lincoln would himself raise the dictatorship issue by refuting the war power permits Generals in the field to do “anything he pleases” including the freeing of slaves. This to Lincoln amounted to a “reckless position” in which the executive or the military was making “permanent rules of property” by proclamation, thereby circumventing the law-making branch. Lincoln continues: “What I object to, is, that I as President, shall expressly or impliedly seize and exercise the permanent legislative functions of the government.” To Lincoln, this represented absolute rule of a dictator and the undermining of the Constitution. The President, he implies, can take on legislative functions temporarily (not permanently) when necessity demands.

²⁰⁶ Lincoln states, “Nevertheless the legality and propriety of what has been done under it are questioned and the attention of the country has been called to the proposition that one who is sworn to ‘take care that the laws be faithfully executed’ should not himself violate them.” Basler (ed.), IV: 429-430.

specific law or require executive initiative to begin acting on laws not yet made by the legislature. Lincoln's plain reasoning echoes the legal axiom discussed in Federalist 40 that "the lesser should give way to the more important part." In times when adherence to specific law would actually violate the Constitution, the higher law triumphs. Lincoln continues to peel the proverbial onion:

To state the question more directly, are all the laws but one to go unexecuted and the Government itself go to pieces lest that one be violated? Even in such a case would not the official oath be broken if the Government should be overthrown, when it was believed that disregarding the single law would tend to preserve it?²⁰⁷

Posing the question as such points to the absurdity of idly standing by and watching the Union crumble and the Constitution cease to function as a frame of government so long as one law, "made in such extreme tenderness of the citizen's liberty" not be violated "even to a limited extent." Upon reflection and choice, no reasonable individual could conclude that a specific law should be prioritized over the "whole of laws." This is a fundamental axiom of constitutional interpretation, one emphasized by the Founders and demonstrated by Lincoln. He, however, proceeds to show that, in fact, there was no violation of the law since the constitutional provision on the writ of habeas contains language as to when it can be suspended. The Constitution's framers, therefore, recognized that in certain times, the writ may need to be suspended as required by "public safety." The Constitution does not say that the sacred writ *shall never be suspended* but quite the contrary. Lincoln drives home the point:

²⁰⁷ Ibid., 430.

It was not believed that any law was violated. The provision of the Constitution that ‘the privilege of the writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it,’ is equivalent to a provision -- is a provision -- that such privilege may be suspended when in cases of rebellion or invasion the public safety does require it. It was decided that we have a case of rebellion, and that the public safety does require the qualified suspension of the privilege of the writ which was authorized to be made.²⁰⁸

Was not secession the ultimate act of rebellion? Acknowledging the possibility of such contingencies, the Constitution’s Framers wisely provided a constitutional exception to the provision preventing the suspension of the writ of habeas corpus thereby not fettering future leaders from employing tools that though potentially dangerous could prove necessary to the nation’s survival. Barring the suspension of the writ, in other words, was not an absolute constitutional guarantee but an acknowledgement that it is a dangerous measure that might necessarily be employed by future national governments to suppress rebellion or thwart invasion.²⁰⁹ Therefore, Lincoln decided to suspend the writ of habeas corpus, an act well within the Constitution’s parameters, to combat the violent insurrection. It is worth repeating a point made previously: Simply because a measure (e.g., suspending the writ of habeas corpus) may pose a danger, it does not mean it is unconstitutional. The

²⁰⁸ Ibid.

²⁰⁹ Lincoln would later emphasize that the Constitution prescribes different approaches depending upon the circumstances in his letter to Erastus Corning in June 12, 1863: “If I be wrong on this question of constitutional power, my error lies in believing that certain proceedings are constitutional when, in cases of rebellion or Invasion, the public Safety requires them, which would not be constitutional when, in absence of rebellion or invasion, the public Safety does not require them; in other words, that the constitution is not in it’s application in all respects the same, in cases of Rebellion or invasion, involving the public Safety, as it is in times of profound peace and public security. The constitution itself makes the distinction...” Basler (ed.), VI:261-269.

genius of the American Constitution is that it was made to endure, and therefore, does not shackle future leaders from actions that may be necessary in dangerous times. However, as we will discuss below, it also erects multiple institutions to ensure that the nation's officers remain accountable to the people, by and for whom the Constitution is established and ordained.

Despite making the case that no such law was violated, Lincoln poignantly articulates the overriding principle of constitutional interpretation: specific laws, provisions, or actions must be viewed first and foremost through a lens of self-preservation. Lincoln outlines the relationship between the Union and Constitution and constitutional self-preservation as an overriding interpretative principle when he asks in a letter to Albert Hodges in 1864:

Was it possible to lose the nation, and yet preserve the constitution? By general law life and limb must be protected; yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb. I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation. Right or wrong, I assumed this ground, and now avow it. I could not feel that, to the best of my ability, I had even tried to preserve the constitution, if, to save slavery, or any minor matter, I should permit the wreck of government, country, and Constitution all together.²¹⁰

Though this passage has been cited as evidence to suggest Lincoln acted beyond or outside of the Constitution in order to save the nation—i.e. trading or violating the constitutional limb to save the nation's life and to conduct measures beyond or outside of the Constitution—it actually provides a succinct outline of Lincoln's

²¹⁰ See *supra*, Lincoln, *Letter to Albert Hodges*, Basler (ed.), VII: 282-284.

principles of constitutional interpretation. Lincoln's metaphor demonstrates the inextricable link between the Constitution and the nation. Without the latter, the former would be meaningless. However, the Constitution also provides the nation with its sense of purpose, and therefore, the nation would be incomplete or fundamentally altered should the Constitution be violated. Notice also that Lincoln uses the word "constitution" twice, once capitalized, the other lower case. From this, we can infer that Lincoln did have different conceptualizations of the "constitution", one (the lower case) representing but a general code of laws common to all political organizations, the other (capital "C") being those "principles, ideals, institutions, laws, and procedures tending toward the maintenance of republican liberty by which the American people agreed to order their political existence."²¹¹ Put differently, the former (lower case constitution) represents positive law, whereas the Constitution is the manifestation of those higher, more normative purposes upon which the American people founded their nation.

Amputating as massive a limb as the Constitution would result in a severely weakened and handicapped nation, one with neither a frame of government nor a political purpose. In the latter part of the passage, Lincoln explains why times of emergency permit the exercise of particular measures that would be considered unconstitutional in peaceful times. The most apt example is the suspension of the writ of habeas corpus, which the Constitution permits but only in times of rebellion or invasion. That is, the needs of national security determine whether the writ of habeas corpus can be justifiably suspended. If the government suspended the writ when

²¹¹ Belz, *Abraham Lincoln, Constitutionalism, and Equal Rights in the Civil War Era*, 39.

there no legitimate and generally recognizable threat to the nation's security existed, it would be an unconstitutional act. However, when a legitimate threat is recognized, a measure such as the suspension of the writ can be taken, if it will help defeat the threat and ensure the preservation of the nation. The latter would be fully consistent with the Constitution.

Lincoln, furthermore, shows the primacy of national self-preservation as a principle for determining the constitutionality of particular measures. When constitutional provisions conflict, priority is given to that one which best meets, or does the least damage to, the expressed purpose of the Constitution. This is particularly applicable in times of national danger, as specific provision must give way the broader purpose of securing the nation. Again, as *Federalist 40* indicates, a part is always given to the whole but the whole never given in favor of a part. Michael Stokes Paulsen summarizes,

Lincoln did not believe that circumstances might justify violating the Constitution; he believed that the Constitution itself supplied a meta-interpretive principle of necessity, justifying – constitutionally justifying – subordination, temporarily, of specific provisions.²¹²

In addition to discussing the necessity of the war power to defend the nation, Lincoln also articulated why the President had the Constitutional duty to “call out” that power to ensure the faithful execution of the laws and to preserve, protect, and defend the Constitution. This is the second principle of constitutional interpretation and for understanding the war power: The President has a special duty to preserve, protect, and defend the Constitution, and therefore, all measure taken towards those

²¹² Paulsen, “The Civil War as Constitutional Interpretation,” 725.

ends are to be considered constitutional. Before discussing specific cases of Lincoln's exercise of power in support of his presidential duty, it is worth reflecting upon the source upon which he based his understanding: Article II's Presidential Oath and its specific provision that the President "take care that the Laws are faithfully executed." Lincoln understood that the Presidential Oath placed upon him a special duty; it was deeply personal and arguably the most solemn obligations—an "Oath registered in heaven." He believed that he would be judged not only by the people but also by God as to whether he did all he could to meet the obligations of that oath. Writing on the seriousness of the oath to Lincoln, Allen Guelzo remarks "And anyone who imagined that Lincoln took the oath of office as a mere rhetorical formality would soon discover how painfully dear the idea of honor—of fidelity to promises above all things—was to him."²¹³ The oath, however, did not grant the President power nor did Lincoln think it did; rather, it stated the overarching purpose to which the President's exercise of power should aim.

For Lincoln, the central issue, despite the enormous consequences, was rather simple: the President either exercised his powers to achieve his constitutional obligations or he did not thereby conducting as unconstitutional and treasonous act as secessionists and insurrectionists. Lincoln ties the necessity of defending the nation as the President's principal duty throughout the July 4th speech to a Special Session of Congress, but he drives home the point:

It was with the deepest regret that the Executive found
the duty of employing the war power, in defense of the

²¹³ Guelzo, 202.

Government, forced upon him. He could but perform this duty or surrender the existence of the Government.

This was his second reference to the “war power”, the first referring generally to the nation’s power to resist its destruction with force. The second use of the term, however, links that power with the duty of the executive. Lincoln regretted this move since he preferred for the southern secessionists to settle their disputes peaceably. However, his hands were tied and the Constitution obliged him to defend the nation lest it collapse. It was the executive’s duty to employ the war power to achieve the explicit purpose of defending the government from collapse. Again, Lincoln presents the situation in a very matter-of-fact manner, showing that as President he could either perform his constitutionally assigned duty to “preserve, protect, and defend the Constitution” or simply watch the United States cease to exist. The latter was not an option for he had “no moral right to shrink” from this crisis, and had he done so, it would be as unconstitutional as the act of secession itself. As Lincoln cogently states, not resisting secession and break of the Union would represent a “betrayal of so vast and so sacred a trust as these free people had confided to him.”²¹⁴ The President was sworn to carry out his duty to the best of his ability, and that meant using all means at his disposal to ensure the political order survived. In short, the President was responsible for energetically applying all means at his disposal to ensure the safety and security of the nation.

Returning briefly to Lincoln’s decision to suspend the writ of habeas corpus provides additional insight into how Lincoln constructed the executive responsibilities and power. Though he would ultimately conclude that his orders to

²¹⁴ See *supra* note, Basler (ed.), IV:440.

suspend the writ of habeas corpus (as discussed above) were lawful, Lincoln's discussion of that issue in his July 4th speech emphasizes the duty of the President to the Constitution. In response to criticism that he should not have suspended the writ of habeas corpus, Lincoln again emphasizes that as President he would be acting unconstitutionally—by violating his constitutionally prescribed oath to “preserve, protect, and defend the Constitution”—had he not employed measures he thought necessary to put down the rebellion. He rhetorically asks, “Even in such a case would not the official oath be broken if the Government should be overthrown, when it was believed that disregarding the single law would tend to preserve it?” Furthermore, in explaining that the executive does have the constitutional authority to suspend the writ, Lincoln states that the Constitution is “silent” as to which branch can suspend it only saying that it cannot be suspended unless in a case of rebellion or the public safety requires. The Constitution does not say the President can suspend the writ of habeas corpus but also does not forbid the executive from doing so either. The President, constitutionally vested with the powers of the Commander in Chief and with the overarching duty to preserve, protect, and defend the Constitution, has the authority and duty to determine those constitutional measures necessary to the war effort.

In this regard, Lincoln shows that the President, as an independent and equal branch of government, has both the authority and the duty to interpret the Constitution and adjudicate conflict or ambiguous provisions depending upon the circumstances at hand, particularly in matters of national security. In essence, Lincoln is articulating basic statesmanship in which the leadership is expected to

understand the fundamental principles of the political order, act upon them given the circumstances confronted, and explain them to those who have entrusted in him the authority to rule. This concept is rooted in Aristotle's notion of *phronesis*, that is prudence or practical judgment, determining what actions will achieve a desired end by applying broader knowledge of universals to particular circumstances.²¹⁵ Statesmanship requires such practical judgment, or the ability to understand broader, fundamental principles and how they apply (or not) in particular circumstances to achieve the ends of the political regime.

Lincoln, more specifically, stresses that the Presidency has an independent and equal (but not necessarily superior) voice on the meaning of the Constitution and "to say what the law is." This counters the notion of judicial supremacy, the school of thought that argues that the Supreme Court is the final arbiter of constitutional interpretation. Lincoln shows, however, that the democratically elected executive, whose conduct is held accountable through formal constitutional mechanism such as periodic elections and the possibility of impeachment, also has the interpretive powers particularly on matters pertaining to the preservation and protection of the political order. After all, the President's interpretation of his authorities and exercise of his powers must be sound otherwise he faces the possibility of impeachment or the people may not reelect him. Thus through executive interpretation, the people ultimately have a voice in constitutional questions of such magnitude such as self-

²¹⁵ See specifically Book VI of Aristotle's *Nicomachean Ethics*. Joe Sachs offers an excellent summary of the meaning of *phronesis* in his translation of the *Nicomachean Ethics*. See Aristotle, *Nicomachean Ethics*, translation, glossary, and introductory essay by Joe Sachs, (Newburyport, MA: Focus Publishing, 2002), 209-210.

preservation and national defense, a voice that does not resonate as much with an “eminent tribunal” of unelected judges appointed for life.²¹⁶

Less than three weeks after his first war power measure of calling up the Militia, Lincoln found the security situation even more dire and determined it necessary to further expand the size of the armed forces in his May 3 Proclamation.

He explains the immediate gravity of the situation:

Whereas *existing exigencies demand immediate and adequate measures* for the *protection of the National Constitution and the preservation of the National Union* by the suppression of the insurrectionary combinations now existing in several States for opposing the laws of the Union and obstructing the execution thereof, to which end a military force in addition to that called forth by my proclamation of the fifteenth day of April in the present year, appears to be indispensably necessary.²¹⁷

Whereas the April 15 Proclamation was undoubtedly within the President’s purview due to the 1795 Militia Act, his decision to call forth additional volunteers for military service appeared, at least on the surface, to cross into Congress’s constitutional authority to “raise and support” an army and a navy. Lincoln clearly recognized the potential controversy, and showed its constitutional basis in his July 4th speech:

²¹⁶ In his First Inaugural, Lincoln conveys, “At the same time, the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal. Nor is there in this view any assault upon the court or the judges. It is a duty from which they may not shrink to decide cases properly brought before them, and it is no fault of theirs if others seek to turn their decisions to political purposes.” See *supra* note.

²¹⁷ Abraham Lincoln, *Proclamation Calling for 42,034 Volunteers*, May 3, 1861, Basler (ed.), IV: 353-354 (emphasis mine).

Other calls were made for volunteers to serve for three years, unless sooner discharged, and also for large additions to the Regular Army and Navy. 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.

Scholars have focused on Lincoln's phrase "whether strictly legal or not" as proof that Lincoln exceeded his constitutional boundaries. Louis Fisher, for instance, concludes, "In ordering those actions, Lincoln never claimed to be acting legally or constitutionally and never argued that Article II somehow allowed him to do what he did."²¹⁸ However, Fisher's claims are much too broad and he misses the Lincoln's fundamental point that the President's constitutional duty required him to take such measures. Returning briefly to Lincoln's understanding of his duty: either he obeyed the Constitution by taking measures to take adequate measures to resist the dissolution of the nation or he violated his constitutional duty and allowed it to collapse. Moreover, Lincoln may have questioned the strict legality of his action but never suggests that it was unconstitutional. In fact, expanding the size of the armed forces was well within constitutional "competency" of Congress, however they were not in session to take such measures and had not yet provided any laws on the books to enable it. Lincoln was not splitting constitutional hairs, rather he was initiating a measure to expand the size of the armed forces in response to "popular demand and public necessity" to defend the nation a constitutional obligation of the President's.

²¹⁸ Statement by Louis Fisher presented to the Senate Committee on the Judiciary for hearings on "Restoring the Rule of Law," September 16, 2008.

He never claimed that expanding the size of the armed forces was a routine executive function; rather his justification was grounded in the overriding principle that the President has a special (but not exclusive) responsibility to defend the Constitution from disintegration.

The executive, accordingly, is to act with energy in executing its duties and responsibilities, and that could include initiating measures of expediency in times of need. Nonetheless, Lincoln also recognized that he could not “go it alone” and that Congress too has constitutional responsibilities. In the Proclamation itself as well as in his July 4 speech, Lincoln recognized Congress’s role in this matter, and asked them approve his measure.²¹⁹ They had a choice at that juncture either decided against Lincoln’s call for additional volunteers, or if they disagreed with his justification of his actions, to deny funding to the expanded armed forces. Even more drastic, Congress could have deemed his actions to be illegal or unconstitutional and begun impeachment proceedings against the President for a high crime of abuse of power. Instead, they approved the measure, at least tacitly acknowledging Lincoln’s constitutional principle that defending the nation would at times require the executive to initiate measures when existing laws did not explicitly prescribe what was to be done.

Had the July 4th speech been Lincoln’s last word on this matter, the arguments of Louis Fisher and others might be on more solid ground. However, Lincoln would

²¹⁹ After stating how he viewed his responsibilities and duty, Lincoln requested, “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.” Basler (ed.), IV: 440-441.

reference the weeks after Fort Sumter on several future occasions, explaining his constitutional reasoning and his construction of the executive war power. Nearly a year later, Lincoln reiterated the reasoning behind his actions just after Fort Sumter:

There was no adequate and effective organization for the public defense. Congress had indefinitely adjourned. There was no time to convene them. It became necessary for me to choose whether, using only the existing means, agencies, and processes which Congress had provided, I should let the government fall at once into ruin or whether, *availing myself of the broader powers conferred by the Constitution in cases of insurrection*, I would make an effort to save it, with all its blessings, for the present age and for posterity.²²⁰

Lincoln is relying upon very straightforward reasoning to explain the constitutionalism of his actions. Again, he presents the stark choice of either inadequately addressing the insurrection and letting the nation break apart or he could employ broader constitutional powers for its own defense. Following the former course of action would have violated his constitutional duty; the latter was legitimate, consistent within the constitutional framework. Lincoln's Secretary of War would similarly issued an executive order that offered additional insight into the President's responsibility:

In this emergency the President felt it his duty to employ with energy the extraordinary powers which the Constitution confides to him in cases of insurrection. He called into the field such military and naval forces, unauthorized by the existing laws, as seemed necessary.²²¹

²²⁰ Abraham Lincoln, *To the Senate and House of Representatives*, May 26, 1862, Basler (ed.), V: 240-242, (emphasis mine).

²²¹ *Executive Order No. 1*, Relating to Political Prisoners, February 14, 1862.

The use of the words energy and duty related to extraordinary executive powers reflects Publius's explanation of the U.S. Constitution, in which he put forth the proposition that "Energy in the Executive is a leading character in the definition of good government" (*Federalist 70*). The Civil War would test that hypothesis, and Lincoln would validate it by explaining how the Constitution conferred upon the President the special responsibility to "preserve, protect, and defend the Constitution." Lincoln effectively demonstrated that the Executive had no choice in times of emergency but to exercise the full scope of the Constitution's power vigorously and energetically to ensure the nation's survival. All measures taken to that end were not only consistent with the Constitution but also required by it and acting otherwise would have been an unconstitutional act.

Accountable to his Rightful Master

Arguably one most significant yet overlooked aspects of Lincoln's construction of the war power and executive duty to exercise it was his constant effort to inform the Congress and the public of the reasoning behind his actions. Lincoln did not view his power as "without limit" or as "anything goes" and he certainly did not see it as never to be questioned like the Lockean prerogative. Lincoln's views, in fact, were quite the opposite. Though Lincoln understood the Founders' Constitution permitted the exercise of extraordinary power to ensure the survival of the political order and that it placed upon the President a special duty to exercise that power, he consistently acknowledged that he ultimately would be held accountable to the people to whom the Constitution rightfully belonged.

Though it is common to examine the constitutionality of particular actions that Lincoln undertook, ironically it is what Lincoln *did not do* that emerges as equally important element of his constitutionalism. Lincoln never tried to prevent scrutiny or accountability of his actions or to stop legitimate institutions from holding him accountable. For example, he never prevented Congress from assembling; on the contrary, he called it into session to review his actions and asked for its support. He was not looking for a legislative fig leaf to cover his unconstitutional actions nor was he bowing to Congressional superiority; he acknowledged Congress as an equal and independent branch of the United States government. After explaining his exercise of the war power in the immediate aftermath of Fort Sumter, Lincoln stated that he had performed what he saw as his duty but also recognized Congress, as the people's representatives, also had a duty. He states, "In full view of his great responsibility he has, so far, done what he has deemed his duty. You will now, according to your own judgment, perform yours."

Lincoln, furthermore, did not stifle Congressional inquiries into the conduct of the war, even if he considered it to be a distraction and a nuisance. On December 10, 1861 Congress established a Joint Select Committee on the Conduct of the War (CCW) to investigate matters related to the war. The CCW was formed principally response to the unhappiness of Congress with early military failures and a perceived initial weakness and incompetence on the part of the Lincoln Administration.²²² Throughout the war, the CCW would exercise broad authorities and conduct wide-ranging investigations in Lincoln's conduct of the war. As historian Bruce Tap

²²² See Bruce Tap, *Over Lincoln's Shoulder: The Committee on the Conduct of the War*, (Lawrence, KS: University Press of Kansas, 1998), 20-24.

suggests, “the committee investigated military disasters and subjected defeated generals to rigorous examinations, prompting some observers to draw a comparison with the famous Committee on Public Safety of the French Revolution.” Overall, the CCW was deeply involved in the war, constantly scrutinizing the decisions of Lincoln and of his civilian and military subordinates. Carl Sandburg captures the mixed reviews of the CCW, when he suggests it “helped Lincoln, and more often interfered with him, for a long time.”²²³ Yet Lincoln never stopped the CCW from assembling, and even cooperated with them, providing them information and allowing them to hold hearings with members of his cabinet and military officers. This provides but one more example of how those who declare Lincoln a tyrant, despot, and dictator simply fail to account for Lincoln’s words and deeds. What tyrant or despot would permit a legislature to scrutinize and even harangue his actions? Moreover, what dictator—constitutional or otherwise—would permit such legislative activity? The very purpose of the dictatorship, at least in its original republican form in the Roman Republic, was to avoid legislative interference in the executive’s conduct of the war. Lincoln, however, never threatened to halt Congress’s legitimate wartime responsibilities.

A key tenet of Lincoln’s constitutional thought and his construction of executive power, moreover, revolves around the Constitution as a reflection of the will of the people and that he, as the executive officer, was ultimately accountable to them. He acknowledged his subordination to the people in his First Inaugural:

²²³ Ibid., 2-3.

Doing this I deem to be only a simple duty on my part, and I shall perform it so far as practicable, unless my rightful master, the American people, shall withhold the requisite means, or, in some authoritative manner, direct the contrary.

He consistently held throughout the Civil War that he was executing a duty confided in him by the Constitution, and that the people were to judge whether he had appropriately carried out that duty. The American people had multiple means of holding Lincoln accountable, including through their Congressional representatives. Not surprisingly, democratic elections represent the most important institution of constitutional accountability, and Lincoln emphasized the necessity of their conduct. Though in the run up to the 1864 election he warned that "it was not best to swap horses when crossing streams,"²²⁴ he insisted that the elections were a necessity and would occur even if he were sure to lose. On the eve of the 1864 election, when facing the distinct possibility that the people would not reelect him and thereby freely choose to allow the southern states to secede and the Union collapse, Lincoln eloquently captured the popular foundations of American constitutionalism when he declared:

Their will, constitutionally expressed, is the ultimate law for all. If they should deliberately resolve to have immediate peace even at the loss of their country, and their liberty, I know not the power or the right to resist them. It is their own business, and they must do as they please with their own. I believe, however, they are still resolved to preserve their country and their liberty; and in this, in office or out of it, I am resolved to stand by them.²²⁵

²²⁴ Abraham Lincoln, *Reply to Delegation from the National Union League*, June 9, 1864, Basler (ed.), VII: 383-384.

²²⁵ Abraham Lincoln, *Response to Serenade*, October 19, 1864, Basler (ed.), VIII: 52-53.

A tyrant or despot would not willingly let the people take his power from his hands, and certainly would not insist upon holding an election that could have resulted in undermining his rule. Speaking on the extraordinary nature of the elections during the Civil War, Clinton Rossiter posits, “the congressional elections of 1862 and 1864 and the presidential election of 1864 were probably the first general elections ever held in a nation at war since manhood suffrage was adopted.”²²⁶ Furthermore, Herman Belz notes, “in facing the Democratic challenge in 1864, Lincoln accepted the risk and permitted his power to be threatened in a way that no dictator, constitutional or otherwise, would have tolerated.”²²⁷ That the election occurred testifies to Lincoln’s constitutional roots, and the legitimacy of his executive actions.

Elections must be understood as an integral component the war power, for they are the primary mechanism by which the exercise of executive power is held accountable and judged. Shortly after being reelected, Lincoln revisited the question he originally posed in his July 4, 1861 speech: “It has long been a grave question whether any government, not *too* strong for the liberties of its people, can be strong *enough* to maintain its own existence, in great emergencies.”²²⁸ A free and fair Presidential election, even in the “severe test” of a great civil war, definitively answered that government could adequately maintain the liberties of its people while having the strength to ensure its survival. The conduct of elections, Lincoln declared, was a “necessity” and any hindrance or delay in the constitutional institution by

²²⁶ Rossiter, 238.

²²⁷ Belz, 33.

²²⁸ Abraham Lincoln, *Response to a Serenade*, November 10, 1864. Basler (ed.), VIII: 100-102.

which the sovereign people expressed their will and judged their elected leaders would have fundamentally undermined the constitutional republic. That Lincoln chose to use “necessity”—the same word that he used to justify the Executive calling out the war power—to the holding of elections, demonstrates his understanding that constitutional republics could generate extraordinary power to defend themselves while still remaining republican. Necessity for Lincoln meant that there were no alternatives to holding a democratic election—it was a constitutional obligation. Lincoln poignantly draws out the implications of not having an election when he states: “We can not have free government without elections; and if the rebellion could force us to forego, or postpone a national election, it might fairly claim to have already conquered and ruined us.”

The conduct of scheduled elections in the midst of a grave emergency – “occurring in regular course during the rebellion”—underpinned the constitutionalism of Lincoln’s construction of the executive war power. The Constitution, after all, reflects the higher purpose of a people coming together under a common frame of government to strengthen their security and maintain their liberties. Through the election of the President, the people confided in an individual the great responsibility to “preserve, protect, and defend” their Constitution through the execution of that office. Whether the President fulfilled that solemn duty, and did so constitutionally, was left to the people to decide. Lincoln’s extraordinary actions remained within the bounds of the Constitution so long as he maintained the basic institutions of constitutional expression. Like all Presidents, he continuously had to account for his actions, and explain his constitutional reasoning. It is worth recalling Lincoln’s early

promise not to construe the Constitution by any “hypercritical rules” for he recognized that events surrounding secession and insurrection would create controversy, and that his constitutional reasoning must resonate with the people writ large. After all, the Constitution is for the people, and by the people.

People freely choosing their representative is the very definition of republican government. Though it is common today to take elections for granted to the point of almost dismissing them, the significance of holding an election in the midst of such a violent and bloody civil war with the country teetering on collapse, the President wielding extraordinary power, and a large armed force deployed throughout the country, cannot be understated. The 1864 Presidential election proves a remarkable event and arguably represents the “high water mark” of republican war power, demonstrating that that free government can generate the power necessary for its defense and survival without transforming into autocratic rule. Those who characterize Lincoln as a tyrant, despot, or dictator fail to grasp the importance of a wartime election. His rule was not absolute and his conduct not spared scrutiny. Rather, the election permitted the people to assess the legitimacy of their leaders’ action, and, determine whether the President upheld his duty and the Constitution he was sworn to “preserve, protect, and defend.”

Conclusion: Lincoln as a Constitutional Guide

Though Lincoln understandably occupies an important place in American history, his contribution to political and constitutional thought has not been given its proper due. This can be attributed, at least in part, to the persistent myth that he acted

outside of the Constitution's boundaries. As this chapter has shown, Lincoln's construction of the "war power" provides significant constitutional lessons regarding the nature and purpose of the Constitution, interpretive principles for exercise of power, and the proper role and responsibilities of the executive. However, constitutional scholars tend not to look to Lincoln as a way to interpret and understand constitutional matters today. Rather they seem to prefer the case study method, using judicial opinions as the basis for determining the constitutional and legal framework of Presidential decisions. However, this is done at the expense of using executive writings as constitutional commentary; Lincoln, thus, has been neglected as a result of this bias to judicial opinion. Michael Stokes Paulsen captures this problem when he writes:

Given the centrality of Lincoln and the Civil War to the constitutional order we have today, it is little short of incredible how little attention modern scholarship pays to the Civil War as an event of constitutional interpretation or to Lincoln as a Constitutional interpreter. In part, the neglect is a byproduct of the Langdellian "case" method of teaching and study, with its reliance on written judicial opinion producing the occupational habit (and hazard) of thinking of the law solely in terms of such opinions. But this cannot be a sufficient explanation. The constitutional issues framed by the Civil War provide excellent case studies appropriate to the case method, and Lincoln produced great legal texts worth of study alongside the most classic of judicial opinions.²²⁹

As this chapter has stressed, Lincoln's explanation of the connection between the Union and Constitution, and his emphasis on the overriding interpretative principle of

²²⁹ Paulsen, "The Civil War as Constitutional Interpretation," 693.

constitutional self-preservation should serve as an important component of the basis for understand the Constitution in times of war. After all, Lincoln lived in a time of war, when the nation's survival was at stake affording him the experience of such circumstances to apply his broader knowledge of the principles of the American constitutional order. Put differently, Lincoln's constitutionalism was forged in the cauldron of a great Civil War, and he proved that the Founder did create a "more perfect union" capable of securing the "blessings of liberty" for posterity. Though prudence or phronesis cannot, by definition, be scripted, Lincoln offers us a basis for what can be achieved and what we should expect from America's leadership in times of crisis. Too often, we rely on commentary and analysis produced in times of safety and peace when the experience of war is but a distant past.

Writing in the midst of the Civil War, Sidney George Fisher eloquently captured this thought:

Books, laws, facts, even words and phrases, sometimes assume a new aspect, when seen through the medium of feelings produced by important events and a novel situation. Like many others, I had been content to sit at the feet of the learned doctors of our law, and accept their interpretation as correct. But the war has shed new light on the principles and meaning of our Constitution, and revealed in it imperfections, perhaps also powers, scarcely perceived by its makers, and hidden from the superficial and unsuspecting glances of the people, during our long period of prosperity and peace.²³⁰

Projecting times of peace and tranquility onto the constitutional construction formed in times of great danger, when the circumstances may require a different application

²³⁰ Sidney George Fisher, *The Trial of the Constitution*, vi

of the Constitution. Yet the Founders' genius was not to prescribe specific written laws or rules of conduct for future leaders for every possible situation but to provide a framework of government that would enable a statesman at the helm to adapt to the circumstances at hand. Lincoln was such a leader, and his ability to apply and articulate the broader meaning and purpose of the Founders Constitution to the particulars of America's most trying and calamitous event make him a statesman whose writings and speeches should be given priority by any serious student of government and politics.

Chapter V: The Once and Future Presidency

Upon completion of the final deliberations of the Constitutional Convention of 1787, a Mrs. Powel of Philadelphia approached delegate Dr. Benjamin Franklin to ask, “Well, Doctor, what have we got—a Republic or a Monarchy?” Franklin famously responded, “A Republic, if you can keep it.”²³¹ Mrs. Powel and Franklin’s simple exchange underscores the perennial question that political founders must address: who rules? The exchange also smacks of irony for, as this dissertation has argued, what the Americans “got” and how they have “kept” it centers around the Framers contrivance of “a kind of constitution that has all the internal advantages of a republican, together with the external force of a monarchical government” (*Federalist* 9).²³² That is, the Office of the President represents an innovation in government, with which the Framers ably reconciled a strong and energetic executive—necessary to ensure the nation’s defense—with the principles of republican government, primarily a free people retaining sovereignty.

With this dissertation, I have tried to reconnect the Presidency with the Constitution by exploring the constitutional basis and republican nature of the exercise of executive power in times of war and crisis. In doing so, I offer an alternative perspective to the dominant trends in scholarship, which view it as a modern invention of the 20th century unrecognizable to those who created it. It is often characterized as imperial, usurping the rightful powers of Congress, particularly those related to war and national defense. In addition, presidency scholars, following

²³¹ “James McHenry: Anecdote,” *Farrand’s Records*, Vol. 3, Appendix A, 85.

²³² Publius directly quotes from Montesquieu, *Spirit of Laws*, Vol. I., Book IX., Chap. I.

in the footsteps of Richard Neustadt, are often more concerned with the particular actions or behavior of the individuals who occupy the office rather than with the constitutional foundations of the office itself. As a result, the study of the Presidency has become detached from the Constitution, and we are often left trying to discern a standard of judgment for understanding it and its exercise of power, particularly in trying times such as war when the nation relies most upon it.

Furthermore, a strong undertone from Edward Corwin's famous claim that the Constitution invites a "struggle" between the President and Congress over their respective roles in foreign relations reverberates in the scholarly literature on presidential power.²³³ Scholars treat the President's powers over war and the nation's defense as just another dispute with Congress over interaction with foreign countries, and they have focused most of their attention to the debate over the initiation of military hostilities. This narrow focus on the Presidency-Congress debate over the meaning of the "declaration of war" clause has unfortunately come at the expense of a broader, more profound understanding of the Constitution and the role it particularly assigns the President for preservation, protection, and defense of the constitutional order against enemies internal and external. Among scholars, the term "war power" has become narrowly construed and synonymous with the initiation of military hostilities, as opposed to a recognition of those measures broadly defined that the government can constitutionally employ in its own defense. The scholarly debate, in many ways, has missed the proverbial forest for the trees, focused on settling specific debates between the branches of the government without exploring constitutional first

²³³ Corwin, *The President: Office and Powers*, 200.

principles. As such, it has obscured a more profound understanding of the nature of executive power within the constitutional order.

A Matter of Interpretation

In attempting to recover the constitutional foundations of the Presidency, I sought to address the specific question: What is the constitutional role of the Presidency in times of war and danger? However simple that question may appear to be, it requires returning to first principles and asking: what are the ends of the Constitution and to what higher, normative purpose(s) does it aim? After addressing this fundamental question, we then must ask: What role does the Presidency serve in achieving the Constitution's overarching purpose? Moreover, what constitutional means does the Presidency possess to achieve the Constitution's ends? Addressing these basic questions permits a view of the Presidency from the Founding, a view that remains constant no matter who occupies the Office or the challenges the nation faces.

To answer these essential questions, I first examined the text of the Constitution, and relied upon *The Federalist* to help interpret and explain its meaning—the primary purpose for which those essays were written during the Constitution's ratification. I then examined the constitutional thought of Presidents Washington and Lincoln as each made decisions, took actions, and exercised the executive power in defense of the political order. In each case, the dissertation found a consistent interpretation of the Constitution, its purpose and meaning, and more specifically the special role it assigns the Presidency. I find that the fundamental

purpose of the Constitution is to furnish an overarching frame of government to provide for the safety of its citizens so that they may enjoy their natural liberties, as articulated in the Declaration of Independence. Lincoln best captures the relationship between the Constitution and the Declaration in his Fragment on the Constitution, writing that the Declaration is like an “apple of gold” within by a “picture of silver,” meaning that the latter serves to protect the principles of the former. That the need for security and safety formed the bedrock around which the rest of Constitution is framed is evident when Publius writes, “Among the many objects to which a wise and free people find it necessary to direct their attention, that of providing for their safety seems to be the *first*” (*Federalist 3*). Other objectives may be more noble or more desirable, but they will be impossible to attain if the political order is unable to provide for basic security. A free and wise people, in constructing a political order, must first turn their attention to how best to effectively satisfy their essential security needs while they aim to set higher, more noble goals.

Grounded in modern natural law reasoning, this essential understanding of the Constitution shows that it must be read through a lens of self-preservation, implying that the long-term safety of the political order serves as the principal objective to which all measures must first aim and be understood. The Constitution, designed explicitly to endure and serve future generations, contains all the necessary means for its survival. Any and all measures taken in defense of the political order thereby should be considered legitimate and sanctioned by the Constitution itself. This understanding does not, as many commentators do, juxtapose security with liberty, suggesting that they are competing interests to be balanced. Rather, a secure political

order, fully equipped to defend itself against internal and external threats, provides the best means for individuals to attain their natural liberties. That the threats to the political order are unforeseen and their scale cannot be measured in advanced, the Constitution's power to defend itself must exist *ad infinitum*. Publius also informs us that the Constitution rests upon those "simple" but "universal" axioms that the "means ought to be proportionate to the ends" and that any agency assigned a specific role or responsibility ought to be understood to have all the requisite powers necessary to carry it out effectively.

What role does the Constitution assign the Office of the Presidency in this primary objective of providing for the safety of the political order? And how ought we to understand its exercise of power in service to that role? After arguing that the Constitution must be viewed through a perspective of self-preservation, this dissertation then suggested a second interpretative principle: That the Constitution assigns to the Office of the President the primary responsibility for preserving and protecting the Constitution, and thus the safety of the nation. It also vests the President with the executive power, or the means necessary to execute the purpose of the laws and the Constitution. Measures that the President takes to achieve these ends ought to be understood as legitimate and Constitutional. The Constitution requires the President to take a special oath to "preserve, protect, and defend" the Constitution before the execution of the office. This oath is unique to the President, and provides the end toward which the President's executive powers are to be exercised.

When taken together, these interpretive principles are dangerous and radical since it suggests the national government contains almost unlimited power to provide

for the safety of the nation, and that the President is the institution primarily (but not exclusively) responsible for determining the extent and scope of the exercise of this power. With this dissertation, I challenge the notion that the purpose of the Constitution is to delineate and limit government power; instead I argue that those powers exist without limit and that the Constitution expresses the purpose and ends for which that power should be exercised. It has become fashionable among presidential scholars to view the President's power in times of crisis as stemming from some extraconstitutional executive prerogative or to be the result of constitutional vagueness. As Richard Pious remarks, "The President claims the silences of the Constitution."²³⁴ I counter such opinions, explaining in detail that the Constitution properly understood, is not silent on such matters and serves as the basis for President's wartime powers.

It is imperative to recognize, however, that though the President is obliged to "preserve, protect, and defend" the Constitution and can wield all necessary power to do so, the Office of the Presidency is structured in such a way to ensure a "due dependence" on the people, who have multiple constitutional means to judge his behavior and hold him accountable. As Publius explains, every ingredient of the Presidency—from its eligibility requirements, unitary form, mode of election, and term of office—received the most careful attention to ensure it combines the energy necessary for the effective execution of its solemn duties while remaining safe "in the republican sense."

²³⁴ Richard Pious, *The American Presidency*, 333.

Though the Constitution and Publius's explanation of it provide the basis for this dissertation argument, echoes of constitutional self-preservation and the President's special duty to ensure the safety of the political order were clearly found in the analysis of Washington during the Whiskey Rebellion and Lincoln during the Civil War. That is, both Washington and Lincoln understood the Constitution in the same way as those who created it, and Publius who explained it. Washington and Lincoln read from the same constitutional script as Publius and the other Framers, and the meaning of the Constitution clearly and consistently presented itself to them as they publicly and privately articulated its meaning. Perhaps Washington's consistency with the Constitution should not come as a surprise; after all, he was among those who framed the Constitution. Yet Washington has not been considered among the intellectual heavyweights behind the Constitution, and his political thought has been dismissed as insignificant to its formation. However, as I have discussed in some detail, Washington as President cogently articulated the underlying principles of the Constitution and rooted his actions in his understanding of the President's duties and powers in times of danger. Washington understood the Constitution to include all requisite means for its preservation. He also recognized that the Constitution assigns the President a special duty to ensure the faithful execution of the laws, including that higher law of the Constitution, and that he, as President, was duty-bound to preserve, protect, and defend the Constitution. He recognized his "high and irresistible oath" to the Constitution, and that this, above all else, enabled the President to take all measures necessary to ensure the common defense and a tranquil political order. This would include mustering an army of nearly 13,000 soldiers to march against rebels in

western Pennsylvania. Washington's statesmanship during the Whiskey Rebellion proved critical to the young nation at a formidable time, and following constitutional principles he constructed the executive power to respond to threats to the political order. His words and deeds, moreover, helped translate the Constitution into practice as he applied energy to the Office of the Presidency, articulating and putting into effect the constitutional duties and powers of that office in defense of the nation. He, in other words, put into practice the proposition put forward by Publius that energy in the executive is the leading character of good government, and in doing so served as *the* Founder of the Constitution.

Seventy years later, in a situation that proved to be even more dire, President Lincoln would be forced to call out the "war power" of the government, using all means to ensure the preservation and long-term safety of the constitutional order. Echoing Washington, and reflecting Publius's explanation of the Constitution, Lincoln confronted Southern secession as an existential threat to the United States and interpreted the Constitution as providing all requisite means to its own defense. Lincoln similarly saw the President as bound by a high and irresistible oath—one that he considered to be "registered in Heaven"—to take any and all measures to prosecute the war and ensure the nation's safety. He exercised the executive power energetically, relying upon all its advantages—decision, activity, secrecy, and dispatch (Federalist 70)—to carry out his unique and special duty to preserve, protect, and defend the Constitution in a time of grave danger. Equally, if not more importantly, Lincoln's construction of the executive war power depended as much on the actions he did *not* take during the war as those he did. Proving Publius's notion

that the executive power remains safe “in the republican sense,” President Lincoln displayed his due dependence upon the people, permitting and ensuring the conduct of the regular election process and cooperating with the peoples’ representatives in Congress. He ensured that these basic republican institutions persisted throughout the most perilous times, and more importantly agreed to abide by their judgment even if they were not favorable to him. In doing so, Lincoln proved that the Constitution combined in the executive the energy necessary for national defense with the requisite safety measures to remain true to its republican principles even in the most extraordinary times.

In short, the most remarkable takeaway from this dissertation is the striking similarity and consistency among Publius, Washington, and Lincoln in their construction of the Constitution and the Presidency in times of danger. In this dissertation, I do not introduce any unique notions of executive power that could be categorized as “Washingtonian” or “Lincolnian,” for that would counter both the spirit and the letter of each of these Presidents. Instead I demonstrate what each of them sought to do: articulate the constitutional powers and duties of the office they each temporarily held. This dissertation, in essence, can best be described as a discussion of the establishment, completion, and restoration of the Constitution. In other words, the Constitution along with Publius’s explanation of it permits us understand how, why, to what ends it was ordained and established; Washington helped complete the Constitution by translating its meaning and purpose from words into deeds, and demonstrating what it actually looks like in practice; finally, Lincoln showed that there was no need to forge new meanings to the Constitution to resolve

the Civil War but, more importantly, it was necessary to recognize and restore the original understanding of the Constitution.

The Future of War and the Constitutional Presidency

After addressing these basic questions about the constitutional basis of the executive war power, and offering an alternative perspective to the conventional scholarship on the Presidency, one immediate practical question remains to be addressed directly: so what? Or to put it slightly more elegantly, how does my discussion of the Constitution and executive war power help us better understand the United States and the national security challenges that we face today or that lie ahead? After all, one could argue, my dissertation focuses on a mindset of those who framed the Constitution in 1787 and that of Presidents who faced crises in 1794 and 1861. What could we possibly infer from the Constitution and these cases about the exercise of Presidential power today and in the future, when the United States with the world's most sophisticated military engages in daily operations globally? Simply put, one might critique, the world is such a different place as is the United States, and I merely offer a quaint discussion of an antiquated issue. My terse response to such inquiry would: we have a great deal to learn.

The optimistic projections of a more peaceful world that emerged with the end of the Cold War at the end of the 20th century did not carry over too far into the 21st. The September 11, 2001 attacks ended the perceived invulnerability of the United States, and displayed the significant destruction that a relatively small group of individuals operating from dispersed and remote locations could inflict. Global

communications and financial networks, the proliferation of increasingly sophisticated weapons and tactics, and the spread of radical ideologies internationally will only increase the scale and scope of the threats likely to be faced. The overall threat increases when one considers the likely possibility that states will seek to exploit technologies to disrupt and undermine U.S. military advantages. Therefore, the future appears to present even greater challenges than the past, and these threats likely will require increasing investments in technologies and capabilities to protect the United States. However, such investments are only a partial solution.

The greatest challenge to the United States will not be whether it can keep apace materially and technologically with the emerging threats; rather it will be whether the United States can maintain its constitutional republic when facing new threats of attack. Can it, in the wise words of the notable scholars Carl Friedrich, preserve its “inner-most self” while defending its “outer-most boundary?”²³⁵ Undoubtedly, as new threats emerge, questions will arise on the adequacy and relevance of the Constitution for a brave new world, and discussions will emerge on the need for new legal regimes and alternative constitutional forms.²³⁶ However, as I have argued, the United States will be best served if it adheres to its tried and true constitutional principles and focuses on trying to uncover and truly understand them. In other words, in the most trying times, we should focus on recovering the Constitution instead of jettisoning it at the first sight of danger. After all, the Framers did not even attempt to anticipate with precision and legislate for the manifold threats

²³⁵ Carl J. Friedrich, *Constitutional Reason of State: The Survival of the Constitutional Order* (Providence, RI: Brown University Press, 1957), 13.

²³⁶ See for example, Bruce Ackerman, “The Emergency Constitution,” *Yale Law Journal* (2004), 1029-1091.

likely to emerge; rather they sought to develop a political framework capable of handling those threats, no matter how extraordinary. Their primary solution lie in an energetic executive, armed with the full strength of the government and duty-bound to protect it. The executive power, the Framers clearly recognized, could prove dangerous but it would be necessary, and thus they explicitly designed a political order capable of mitigating some of that danger, making the executive safe in the republican sense.

The principal safety mechanism is the President's relationship with the people, for the latter hold the necessary constitutional means to hold that office accountable and inflict constitution punishments upon it, if necessary. The Framers specifically designed the President to be a republican executive, having a due dependence on the people to whom the Constitution belongs. Unlike the prerogative exercised by Locke's god-like princes, against which the people have no appeal "but to heaven,"²³⁷ the American people have multiple constitutional appeals to their President's exercise of executive power. This requires, however, a people attached to their Constitution, actively seeking to understand it and its underlying principles, and applying them regularly in their political affairs. In this way, they remain grounded in the foundation of their political regime, and have a basis from which they remain vigilant in setting expectations for and holding accountable their leaders. Therein lies perhaps the greatest challenge to the United States constitution order: Whether the people will continue to rely upon their Constitution as the basis for their security and liberty? Should the people become further removed from it or abandon it altogether,

²³⁷ John Locke, *Second Treatise on Government*, Chapter XIV.

the Constitution's republican principles could fail to mitigate and hold accountable the energy necessary for its defense for future turbulent times. This imbalance likely will result in weakened republican safety mechanisms and potentially could cause the gradual erosion of the American constitutional order.

Adherence to the Constitution has been under fire for some time. None other than Woodrow Wilson railed against "an indiscriminating and almost blind worship" of the Constitution, and questioned "whether the Constitution is still adapted to serve the purposes for which it was intended." Seeking to extinguish attachments to a "literary theory of the Constitution," Wilson and his colleagues put into motion the theory of a "living constitution," which is "Darwinian in structure and practice." To Wilson and other progressives, the Constitution must be understood as a natural organism, the content of which changes with the external social and political environment. Similarly, Wilson and others approached the U.S. Constitution a la Hegel, rooting its meaning and purpose in the historical development of American society. Wilson went on to argue that the political order was "eminently adapted to express the changing temper and purposes of the American people from age to age." It was not, in other words, grounded in sound principles of natural right or the reflection and choice of a wise and free people. Instead, Wilson and progressives argued, it should be understood as part of the Hegelian historical development, based upon the evolving spirit of society and not anything permanent like the Founding principles.²³⁸

²³⁸ Woodrow Wilson, *Congressional Government: A Study in American Politics* (New York: Meridian Books, 1956).

Such ideas continue to pervade popular and scholarly understanding of the Constitution, resulting in a growing disconnect from the principles of the Founders. With of a people increasingly unhinged from their Constitution and uninformed about their sovereign responsibilities, wars and crises in the future could lead to an unaccountable and irresponsible use of executive power. But to paraphrase Lincoln, how do we “fortify” against this growing detachment from the Constitution? Lincoln, expressing similar fears early in his career, offers an answer that is just as applicable today as it was in 1838:

The answer is simple. Let every American, every lover of liberty, every well wisher to his posterity, swear by the blood of the Revolution, never to violate in the least particular, the laws of the country; and never to tolerate their violation by others. As the patriots of seventy-six did to the support of the Declaration of Independence, so to the support of the Constitution and Laws, let every American pledge his life, his property, and his sacred honor; let every man remember that to violate the law, is to trample on the blood of his father, and to tear the character of his own, and his children's liberty. Let reverence for the laws, be breathed by every American mother, to the lisping babe, that prattles on her lap—let it be taught in schools, in seminaries, and in colleges; let it be written in Primers, spelling books, and in Almanacs; let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice. And, in short, let it become the political religion of the nation; and let the old and the young, the rich and the poor, the grave and the gay, of all sexes and tongues, and colors and conditions, sacrifice unceasingly upon its altars.²³⁹

The most important “check” against a runaway wartime executive is neither blindly to criticize its exercise of power as imperial nor simply to focus on “rebalancing” its

²³⁹ Abraham Lincoln, “Address Before the Young Men's Lyceum of Springfield, Illinois,” January 27, 1838. Basler, *Collected Works of Abraham Lincoln*, Vol I: 112-113.

relationship with Congress. Nor does the answer lie in studying the significance of the Presidency solely in the behavior of the individuals who occupies it at the expense of understanding the constitutional powers and duties of the office. Rather it requires a more constitutionally minded approach to the Presidency by the people whom it serves. For the American experiment to continue to succeed, the people must recognize the republican nature of the Presidency and that it offers the best prospect for ensuring executive energy is applied safely to current and emerging threats to the political order. The Framers originally understood it as such, and Washington and Lincoln recognized it as such during the crises they faced; therefore, this understanding should apply equally today and in the future. Improving our understanding of the Constitution and strengthening the peoples' attachment to it ultimately provides the best, most practical means for a safe and secure political order in which the people have the greatest opportunity to attain their natural liberties as articulated in the Declaration of Independence.

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