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## CONSTITUTIONAL THEORY AND THE FUTURE OF THE UNITARY EXECUTIVE

*Sotirios A. Barber\**

*James E. Fleming\*\**

In *The Constitution in Wartime: Beyond Alarmism and Complacency*, Mark Tushnet distinguishes two voices: “alarmists who see in every action taken by the Bush [A]dministration a portent of gross restrictions on the civil liberties of all Americans, and administration shills who see in those actions entirely reasonable, perhaps even too moderate, accommodations of civil liberties to the new realities of national security.”<sup>1</sup> Tushnet’s volume contains essays, including one by us,<sup>2</sup> which he judges to lie “beyond alarmism and complacency” (or perhaps *between* alarmism and complacency). But critics of the Bush Administration’s theory of the unitary executive may be alarmed by what we say here, and defenders of that theory may view us as complacent shills for the Obama Administration!

In this Essay, we consider constitutional theory and the future of the unitary executive. As we see it, at least in a sense that predates Bush Administration apologist John Yoo,<sup>3</sup> the unitary executive is here to stay. Precisely because the American constitutional executive is a unitary power, President Obama can close Guantanamo unilaterally, without Congress’s leave. President Obama, on his own, can also revoke Bush’s executive orders regarding secrecy. He can renounce Bush Administration memoranda attempting to justify torture, and he can prohibit further acts of torture during his tenure in office. Obama

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<sup>1</sup> Mark Tushnet, *Introduction* to *THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY I* (Mark Tushnet, ed., 2005).

<sup>2</sup> Sotirios A. Barber & James E. Fleming, *War, Crisis, and the Constitution*, in *THE CONSTITUTION IN WARTIME*, *supra* note 1, at 232.

<sup>3</sup> See generally JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005) [hereinafter *YOO, WAR AND PEACE*]. Other prominent recent works defending Bush’s vision of the unitary executive include STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008).

cannot, however, coherently renounce the unitary executive at the same time that he acts unilaterally to undo excesses of the last unitary executive. In any case, to recall Justice Robert Jackson's formulation from *Youngstown Sheet & Tube Co. v. Sawyer*, the "imperatives of events and contemporary imponderables" are going to require strong executive power.<sup>4</sup> The same basic thought appeared some five generations before Justice Jackson's time when Alexander Hamilton, the first proponent of a unitary executive, said in *The Federalist* that because "[t]he circumstances that endanger the safety of nations are infinite . . . no constitutional shackles can wisely be imposed on the power to which the care of it is committed."<sup>5</sup>

This Essay outlines part of a larger project on executive power. Like that larger work, these remarks are as much about the future of constitutional theory—the form it should take and the questions it should address—as they are about the future of the unitary executive.

John Yoo claims to derive his theory of the unitary executive from *The Federalist*.<sup>6</sup> We share his assumption that *The Federalist* is a good place to start. Unlike *The Federalist*, however, Yoo fails to embed the unitary executive in proper context: a broad theory of coordinated institutions. When Yoo says that "Federalists defended the centralization of the executive power in the president precisely in order to enable the federal government to respond to the unknowable threats of a dangerous world,"<sup>7</sup> he relies on Hamilton's argument in *The Federalist* No. 70 that good government is impossible without "energy in the executive," that unity in the Executive is essential to energy in

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<sup>4</sup> 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

<sup>5</sup> THE FEDERALIST NO. 23, at 147 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

<sup>6</sup> YOO, WAR AND PEACE, *supra* note 3, at 21.

<sup>7</sup> *Id.* (further citing twice in the same paragraph Hamilton's *The Federalist* No. 70). Yoo also stated in an essay published by the Heritage Foundation:

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

John Yoo, *Energy in the Executive: Re-examining Presidential Power in the Midst of the War on Terrorism*, FIRST PRINCIPLES SERIES NO. 4 (Heritage Found., Wash. D.C.) Apr. 24, 2006, at 2 (footnote omitted) (quoting THE FEDERALIST No. 70, at 423 (Alexander Hamilton) (Jacob E. Cooke ed., 1980)), available at <http://www.heritage.org/Research/PublicDiplomacy/fp4.cfm>.

government, and that unity in the Executive is conducive to “[d]ecision, activity, secrecy, and dispatch.”<sup>8</sup>

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

This broader context of executive power has three parts. One is an institutional context that includes the Congress, the courts, and institutional norms like democracy and the rule of law. Another is a substantive context: constitutional goods or ends to which constitutional institutions are committed. A third is a philosophical context: the view of the human good and the human condition that is believed to justify the constitutional ensemble of substantive goods and institutional means.

Ignoring much of this broader context, Yoo has a partial and distorted understanding of executive power. Yoo’s conceptualization has a striking payoff: a cipher like Bush can support incompetent and unconstitutional acts by invoking a giant like Lincoln. This issue is discussed further below.

We begin with the *philosophical* context. In our contribution to the Tushnet book, we invoke Lincoln and argue that the executive power is constitutionally obligated to restore or maintain the conditions for constitutional democracy and the rule of law.<sup>9</sup> Our claim is that Lincoln violated the Constitution to save the Union and the Constitution.<sup>10</sup> Violate the Constitution to save it? There is no paradox because as a practical matter (and as a theoretical matter too), fidelity to the Constitution always presupposes material conditions that the Constitution cannot guarantee.<sup>11</sup> Lincoln felt that the Civil War might be lost unless he displaced Congress’s powers to initiate the raising of armies and navies, to authorize spending, and to suspend the writ of habeas corpus.<sup>12</sup> The conditions of the Civil War brought various

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<sup>8</sup> THE FEDERALIST NO. 70, at 472 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

<sup>9</sup> Barber & Fleming, *supra* note 2, at 236–37, 242–43.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

constitutional provisions into irresolvable conflict.<sup>13</sup> Abiding by the letter of some provisions meant disobeying others: namely, the clause requiring the President to “take Care that the Laws be faithfully executed”<sup>14</sup> and the President’s oath to preserve and defend the Constitution.<sup>15</sup> The Constitution is silent as to how to resolve these conflicts—fully constitutional conduct is impossible. All one can hope for are pro-constitutional actions or, as we refer to them, *constitutionalist* actions—actions that restore the conditions for honoring the Constitution—actions that are *constitutionalist* though not *constitutional*. This kind of argument is easier to accept in war than in peace because war exposes the essentially *positive* nature of the Constitution—its overriding commitment to substantive ends like security and the general welfare—and the corresponding *positive duties* of those who take the oath to preserve and defend it.

Bush did not disagree. He acted as a positive constitutionalist when he compromised constitutional safeguards to secure the nation against terrorism. But conservative constitutional theorists have yet, officially, to face that fact. Positive constitutionalism has an openly favorable view of government as the agent of collective aspirations. Conservative constitutionalism purports to view government as a necessary evil, with certain exceptions of course. The exceptions arise in the following areas: foreign and military affairs, criminal justice, and, for many conservatives, sexual morality. The exceptions are big enough to expose the libertarianism of conservatism as a pretext. Conservatives are as pro-government as anyone when it comes to ends they seek to promote, like national security, law and order (for individuals if not for corporations), and selective forms of sexual restraint. Yet even among conservatives, the anti-government mask is effective. Conservatives see themselves as moderate libertarians; they do not see themselves as positive constitutionalists committed to a view of society different from that of their openly pro-government counterparts on the left. As a consequence, they do not fully explicate and defend the society to which their constitutional doctrines point. They have a positive constitutionalism of their own, but they seem unaware of that fact; and they do not develop and expose their positive agenda for all to see.

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<sup>13</sup> *Id.*

<sup>14</sup> U.S. CONST. art. II, § 3, cl. 4.

<sup>15</sup> U.S. CONST. art. II, § 1, cl. 8.

Chief Justice William Rehnquist, the author of the Supreme Court's opinion in *DeShaney v. Winnebago County Department of Social Services*,<sup>16</sup> was negative constitutionalism's most visible proponent. Yet in his book, *All the Laws but One: Civil Liberties in Wartime*, Rehnquist practically embraced the idea *inter arma silent leges*—that during war constitutional restraints are silent.<sup>17</sup> For Rehnquist, when constitutional forms, rights, and limits are suspended, indeed the laws are silent, and everything is permitted to the Executive.<sup>18</sup> Rehnquist thus subscribed to part of Lincoln's view but not all of it. He failed to see, as Lincoln saw, that when the Constitution is suspended, the Executive has restorative obligations—affirmative obligations to work actively toward restoring conditions in which the Constitution can function as law once again. These affirmative obligations include the pursuit of domestic conditions (in Lincoln's case, the end of the secessionist threat) that would permit government by constitutional forms, rights, and limits. In sum, unlike Lincoln, Rehnquist failed to see that executive power must be committed to restoring or maintaining the conditions for constitutional democracy and the rule of law.

President Bush may or may not have realized this, but conservative constitutional theory denies affirmative constitutional obligations. In *DeShaney*, Chief Justice Rehnquist denied even a minimal duty of the night-watchman state: the protection of a four-year-old child from the perfectly predictable (because it was repeated and well-reported) violence of a deranged father.<sup>19</sup> And Bush's conception of the war on terror as permanent brought into question the possibility of restoring the conditions for the rule of law.

Next, we will sketch the *institutional* context. The Constitution does put the President in a strategic setting for exercising the kind of power that Yoo contemplates. We can distinguish between the delegated powers of the Presidency and the resulting powers Yoo contemplates—those resulting from the President's strategic position in the constitutional scheme. But a President's exercise of strategic power can be constitutional only if it can eventually take a form that comports with constitutional criteria. It has to express itself in a way that can be regularized or regulated in laws and applied by courts. Eventually, strategic power must be reconciled to delegated power.

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<sup>16</sup> 489 U.S. 189 (1989).

<sup>17</sup> WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* (1998).

<sup>18</sup> *Id.*

<sup>19</sup> *DeShaney*, 489 U.S. at 189–90.

More generally, we need a theory of the unitary executive that situates the Executive in the context of an institutional theory of the conflictual Constitution.<sup>20</sup> Bush, together with the theory upon which he acted, was contemptuous of Congress and the courts and would brook no disagreement from, conflict with, or limitation by those institutions. Indeed, the Republican-controlled Congress capitulated to that view. Then-Republican Speaker of the House Dennis Hastert, rather than conceiving of Congress as an institution with responsibilities to check executive power, publicly proclaimed that his job was to enact the President's agenda.<sup>21</sup> Hastert spoke and acted as if we have a parliamentary system rather than a presidential system with institutional checks and balances.<sup>22</sup>

Within institutional theories of the conflictual Constitution of the sort elaborated by Mariah Zeisberg and Jeffrey Tulis, Congress has responsibilities not simply to defer to or serve as an agent of executive power but also to contest and check it.<sup>23</sup> President Bush, Vice President Cheney, John Yoo, and Karl Rove all made a serious effort to establish a de facto parliamentary system in place of a presidential system of institutional checks and balances. They aspired to install a permanent Republican majority led by a unitary and unilateral executive and supported by a permanently pliant Congress and judiciary—contrary to the separation of powers and the deliberative politics reflected in the American constitutional regime. They sought to govern through secrecy and by leveraging fear—waging a permanent war on terrorism, keeping the public permanently in the dark about what was going on in government, and maintaining a permanently fearful citizenry.<sup>24</sup> To achieve

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<sup>20</sup> This sort of theory has been proposed by political scientists Mariah Zeisberg and Jeffrey Tulis. *See, e.g.*, Mariah Zeisberg, *Constitutional War Authority: A Relational Conception* (2009) (unpublished manuscript, on file with Professor Zeisberg, University of Michigan, Dept. of Political Science); Mariah Zeisberg, *The Relational Conception of War Powers*, in *THE LIMITS OF CONSTITUTIONAL DEMOCRACY* (Jeffrey K. Tulis & Stephen Macedo eds., forthcoming 2010); JEFFREY K. TULIS, *DEMOCRATIC DECAY AND THE POLITICS OF DEFERENCE* (forthcoming 2011); Jeffrey K. Tulis, *On Congress and Constitutional Responsibility*, 89 B.U. L. REV. 515 (2009).

<sup>21</sup> As Thomas Mann and Norman Ornstein put it: "Speaker Hastert . . . proclaimed that his primary responsibility was not to lead and defend the first branch of government but to pass the president's legislative program." THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* 139 (2006).

<sup>22</sup> *Id.* at 7 ("In its highly centralized leadership and fealty to the presidential agenda, the post-2000 House of Representatives looks more like a House of Commons in a parliamentary system than a House of Representatives in a presidential system."); ALAN WOLFE, *DOES AMERICAN DEMOCRACY STILL WORK?* 60 (2006).

<sup>23</sup> *See supra* note 20.

<sup>24</sup> *See, e.g.*, ANDREW BACEVICH, *THE NEW AMERICAN MILITARISM: HOW AMERICANS ARE SEDUCED BY WAR* (2005); BENJAMIN R. BARBER, *FEAR'S EMPIRE: WAR, TERRORISM AND DEMOCRACY* (2003); JACK

their ends, they promoted the political power of those religious evangelicals who treat disagreement with their beliefs as either sinful or unpatriotic. There were no clearer signs of their hostility to constitutional institutions than their secrecy and their treatment of critics as traitors and heretics. They could not conceive of a loyal opposition; opposition to them meant disloyalty to the country.

These ambitions reflected Bush's sense that his instincts were in tune with God's will and the market's hidden hand, an attitude at odds with the scientifically-informed political planning exemplified by the American Founding.<sup>25</sup> Indeed, Bush created a modern analogue to the divine right of kings: certain and infallible executives with direct communications from God do not need deliberative processes for governance; they need only executive processes for carrying out their infallible convictions.

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

To recapitulate: the Executive exists in an institutional context that includes Congress and the courts. The President is not up there in some detached posture. Even when emergencies force the President to act extra-constitutionally, he or she must return to Congress and the courts for post-hoc approval, as Lincoln did. This means that the President's actions must meet the formal and substantive moral standards requisite for constitutional laws. Secrecy might be essential in times of war, but secret institutions (like Bush's foreign prisons) defeat the visibility that is essential to democratic responsibility and the rule of law. By assuming that the "war on terror" would

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GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007); STEPHEN HOLMES, *THE MATADOR'S CAPE: AMERICA'S RECKLESS RESPONSE TO TERROR* (2007); ROBERT M. PALLITTO & WILLIAM G. WEAVER, *PRESIDENTIAL SECRECY AND THE LAW* (2007); JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* (2008).

<sup>25</sup> SOTIRIOS A. BARBER & JAMES E. FLEMING, *CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS* 36 (2007).

be more or less permanent, Yoo depreciated the institutions and principles of public responsibility represented by Congress and the courts. This transformed Hamilton's unitary-but-attached-and-checked executive into Bush's unitary-but-detached-and-elevated executive.

Finally, we turn to the *substantive* context of constitutional goods or ends. This context has three aspects: a hierarchy of *goods*—the goods of the large commercial republic;<sup>26</sup> a set of appropriate *attitudes* held by the citizens or at least the leadership community of the large commercial republic; and certain *virtues* that these goods and attitudes presuppose.

*The Federalist* situates executive power in an overarching picture of the good life, the ends to which the Constitution is an instrument. Constitutional goods or ends presuppose certain attitudes, virtues, and character. Most liberals who criticize Yoo's theory (and Bush's execution of it) criticize it in the wrong way.<sup>27</sup> This is because these liberals, like conservatives, have lost touch with the broader concept of constitutional ends and personal character traits that accompany appreciation of these ends. Thus, current constitutional discourse—both conservative and liberal—ignores substantive constitutional ends and personal character.

Yoo invokes not only *The Federalist* but also Lincoln as authorizing Bush's theory and practice of executive power.<sup>28</sup> The big difference between Abraham Lincoln and George Bush lies in Bush's failure to appreciate the broader constitutional context of executive power and to display the attitudes associated with the pursuit of real goods by actors who are aware of their fallibility and their responsibilities to others. Had Yoo appreciated all aspects of this context, he would have been able to articulate in theoretical terms what, we venture, everyone feels in their gut: George Bush was no Abraham Lincoln! Put another way, the problem with Bush and Cheney, in addition to their view of executive power, is that they are Bush and Cheney—they lack appreciation of constitutional ends and even more so the attitudes and character presupposed by those ends and requisite for their competent pursuit.

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<sup>26</sup> Elsewhere we have elaborated these goods. See *id.* at 35–55.

<sup>27</sup> See, for example, the otherwise excellent book, PETER M. SHANE, *MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY* (2009).

<sup>28</sup> See JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* 97, 113–14, 121, 122, 148, 238 (2006). Jack Goldsmith, a leading conservative lawyer and academic who served in the Department of Justice during the Bush Administration, has contrasted Bush with Lincoln. GOLDSMITH, *supra* note 24, at 210–15.

Post-Bush, theorists of executive power will have to rethink the connection between power, the ends of power, and the character of those who wield power. That connection can be established only by reconnecting constitutional institutions to constitutional ends. Constitutional power must be dedicated to certain ends and, because these ends are controversial, must be dedicated to a healthy politics—a politics through which the system elaborates the best conceptions of constitutional ends in changing circumstances. Put another way, after the Bush Administration, we must reconnect our understanding of executive power to an understanding of constitutional ends that such power is to pursue.

The obstacles to doing so are intellectual and cultural. The intellectual obstacles include relativism, moral skepticism, preference utilitarianism, and the like. Why? Because fallibility presupposes real public goods; and because relativism and the rest, each in its own way, deny real public goods. The resurgence of objective conceptions of moral reasoning, including moral constructivism and moral realism, has lifted these obstacles.<sup>29</sup> But by and large, law schools and political science departments have not received word, or in any case have obstinately resisted, these developments. The cultural obstacles have been fostered by the market economy, which underwrites or reinforces relativism, moral skepticism, and preference utilitarianism. The economic crisis, together with the larger tragedy to the country wrought by the Bush presidency, should motivate the intellectual community to rethink its orthodoxies. And this could be a step toward overcoming these cultural obstacles. In the wake of the Bush presidency, the time for “normal science” has passed, and constitutional theorists should be prepared to think in unconventional terms. In doing so, constitutional theorists need to develop a deeper understanding of the broader context of constitutional commitments, institutional checks, and constitutional goods, attitudes, and virtues.

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<sup>29</sup> See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* (forthcoming 2010); MICHAEL MOORE, *EDUCATING ONESELF IN PUBLIC: CRITICAL ESSAYS IN JURISPRUDENCE* (2000); JOHN RAWLS, *A THEORY OF JUSTICE* (1971); JOHN RAWLS, *POLITICAL LIBERALISM* (1993).