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Confronting the Actual Capacity of Judicial Resistance to Executive Action

Without much doubt, the President of the United States has an incredible amount of authority, responsibility, and ability to act unilaterally; creating the conditions to circumvent the Legislative and Judicial Branches. The scope for Executive unilateral action is typically broad and is executed without much challenge from either of the previously mentioned branches. If the president "wants to shift the status quo by taking unilateral action on [his] own authority, whether or not that authority is clearly established in the law, [he] can simply do it—quickly, forcefully," and without notice (Moe and Howell 1999, 855). With concerted deliberation, the Framers of the Constitution created a framework to fend off unilateral action taken by the president, especially those that lead to war. The powers of war and peace rested safely with the Legislature, but other decisions concerning foreign policy were divided between the chief executive and Congress. In the Framers' intent, the separations of authority would be held in place by a system of checks and balances. The three separate branches would be held in check by each other, thus preventing the domination of the American government by a single branch. The intended subversion to presidential war making by unilateral means was held in check until President Truman's decision to deter hostility against the North Korean Army in the summer of 1950. After this action, any effective check on the president's ability to pursue war was removed and essentially made formal declarations of war obsolete. Therefore, the powers of war and peace which originally rested with Congress, are now held solely by the president. Indeed, the president has become the "sole organ" of the American government concerning foreign policy decisions and the other two branches can do little to stop the

president's action.

Although Congress may not be able to directly act against the president when exercise of unilateral war powers occurs, I will contend in this paper that the judiciary has been quick to act against and restrain actions taken by the President. According to Fisher (2005), "Contemporary legal studies often argue that foreign affairs—and particularly issues of war and peace—lie beyond the scope of judicial jurisdiction and competence" (466). Within this analysis, I will explicate through a historical narrative that the courts have decided against the President's unilateral war power and military action during wartime. The narrative will consist of two parts: (1) From 1789 to 2000 and (2) 2001 to the present, with a significant focus on how the Judicial Branch restricted the policies of the George W. Bush Administration during the War on Terrorism. The first portion of the narrative will show how the original intent of the Framers was held in place until President Truman's deployment of troops to South Korea in 1950. After Truman's action, the trend of war and peace power shifted to the President's authority. This trend continued during through the War on Terrorism, but within the past 6 years, the judiciary has acted decisively to thwart President Bush's detention policy for those captured in the War on Terror. Through this narrative I intend to conclude that an era of judicial passivity has mutated into judicial activism. The major question that I will attempt to answer is raised by Genovese and Spitzer (2005), "Will future presidents learn that emergency actions in the gray area of the Constitution are unlikely to be met with Court resistance, at least not during the emergency or during their lifetime?" (18).

Before continuing the analysis, mentioning the findings from *Marbury v. Madison* (1803) is necessary. In *Marbury*, the Supreme Court, led by Chief Justice John Marshall established its ability of judicial review, which allows the Court to interpret and if necessary, nullify actions

taken by either of the two branches. Within the ruling, Chief Justice Marshall declared that "it is emphatically the province and duty of the judicial department to say what the law is" (Whittington 2001, 365). This case is critical to this analysis because the ruling in *Marbury* gave the Judiciary necessary "teeth" or power to dictate over Executive and Legislative action. The actual capacity of the "judicial teeth" will be evaluated within the following narrative.

1789 to 2000: The Plan is Defended, But Crumbles

"For more than a century and a half, from 1789 to 1945, Congress and the President followed the general constitutional principle that the initiation of war against foreign nations lay with the representative branch, Congress" (Fisher 2000, 1671). From 1789 to 1950, presidents used unilateral power numerous times without gaining authority from Congress. However, those instances "consisted largely of fights with pirates, landings of small naval contingents on barbarous or semi-barbarous coasts, the dispatch of small bodies of troops to chase bandits or cattle rustlers across the Mexican border, and the like" (Fisher 2000, 1656). In this narrative, I will attempt to establish a trend that from 1789 the court was not reluctant to act against the president, but after World War I the court became adept to deferring political questions to either of the two branches. During World War II, the courts allowed considerable power for presidential action, but during the Korean War the Supreme Court ruled against presidential action. Finally, during the Vietnam War, the court again deferred to the political branches.

During the undeclared naval war ("Quasi War") with France, Congress suspended commercial activity between the countries and began to plan for war. In an early case, the Supreme Court ruled that the on going conflict resulted in France being declared an enemy regardless of a formal declaration of war. The major case from the Quasi War involved a proclamation by President John Adams to seize ships sailing to and from French ports. The

Supreme Court ruled against Adams by Chief Justice Marshall's decision: "When national policy is defined by statute, presidential instructions cannot change the nature of the transaction, or legalize an act which without those instruction would have been a plain trespass" (Fisher 2005, 470). Also during this period, the Supreme Court determined the president has "defensive power" to resist invasion, but the offensive authority to undertake military action against foreign countries rests entirely with Congress.

In 1814, amid the War of 1812, the Supreme Court ruled that unless Congress directly authorized the seizure of enemy property, it could not be touched. Chief Justice Marshall ruled in favor of Congress because it "had not authorized the confiscation of enemy property located within the United States at the declaration of war" (Fisher 2005, 471). Therefore, if Congress did not specifically authorize capture of enemy goods, then seizure is illegal because it made the final decision.

When President James Polk went before Congress to seek a declaration of war against Mexico, the court was again quick to outline his role concerning war power. Chief Justice Roger Taney determined the president has the authority to issue orders to naval and land forces to invade Mexico and subject it to U.S. control, "His conquests do not enlarge the boundaries of the Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by legislative power" (Fisher 2005, 473). The court determined that the president does have the authority as commander in chief to move military forces, but it must conform to the policies established by Congress.

In 1852, the Supreme Court decided that neither the president nor a military officer may establish a court in a conquered country. Cases concerning this issue would reemerge during

the war on terror in 2004. Essentially, the Supreme Court first struck down unlawful tribunals almost 158 years ago.

During the Civil War in 1864: [Chief Justice] "Taney recognized that the power to see that the laws are faithfully executed belongs to the president, but he said that the president 'certainly does not faithfully execute the laws, if he takes upon himself legislative power, by suspending the writ of habeas corpus, and the judicial power also, by arresting and imprisoning a person without due process of law" (Fisher 2005, 475). This is important because the court upheld due process of law in *Hamdan* and *Hamdi*, and for those "enemy combatants" held at Guantanamo Bay of whom the Bush Administration had attempted to reject rights for habeas corpus. Only Congress has the authority to suspend this right, not the Executive. After the Civil War, the court provided redress to illegal or irresponsible court martial because civil courts did not provide any avenue for grievances.

After World War I, the court decided it was poorly suited to decide war power and foreign affair related emergencies. The judiciary decided that matters of foreign policy, war, and peace are beyond their scope and should be left up to the political branches because a decision might not express respect for the other branches. Also, the Supreme Court acted to avoid addressing issues even if the president was acting in the name of foreign policy or national security. This period marked a shift in the trend of deferring questions to either of the two branches.

During World War II, the Supreme Court upheld the curfew and later internment of 120,000 Japanese Americans living on the West coast. The court's action was important because an order issued by the president, military or executive, and regardless of constitutionality, is not apt to last longer than the military emergency. Essentially, during this episode the court

completely allowed presidential actions to go unchallenged by submission to "total deference to presidential judgement" (Fisher 2005, 482).

"Even in the middle of the Korean War, the Supreme Court was willing to tell President Harry Truman that he lacked authority to seize the steel mills he needed to prosecute the war" (Fisher 2005, 479). President Truman's actions were deemed unconstitutional because he did not have the authority, either inherent or enumerated, to seize private property. The case of *Youngstown Sheet & Tube Company v. Sawyer* (1952) marks the turning point to which the Supreme Court acts directly to restrict unilateral actions taken by the chief executive.

2001 to Present: Reestablishing the Frame

In a series of confidential memos written after 9/11, later released to the public, the Justice Department wrote: "We conclude that the Constitution vests the President with the plenary authority, as Commander in Chief and the sole organ of the Nation in its foreign relations, to use military force abroad—especially in response to grave national emergencies created by sudden unforeseen attacks on the people and territory of the United States" (Fisher 2007, 139). In the aftermath of the September 11 attack the judiciary remained compliant with President Bush's pursuit of war against terrorism in Afghanistan and Iraq. President Bush, on November 13, 2001, issued a military order authorizing the creation of military tribunals to try non-citizens who had given assistance to Al Qaeda" (Fisher 2005, 492). In no less than five cases, the Supreme Court directly refuted President Bush's detainment policy of those who allegedly provided aid to Al Qaeda. The detainees cases are: (1) *Rasul v. Bush* (2004), (2) *Hamdi v. Rumsfeld* (2004), (3) *Rumsfeld v. Padilla* (2004), (4) *Hamdan v. Rumsfeld* (2006), and (5) *Bourmediene v. Bush* (2008). Essentially, the Bush Administration sought to hide those detained at Guantanamo Bay away from federal courts and enacted their own "justice" according to

their standards and timeline. If the Bush detainment plan had continued unchecked, those detained could be held indefinitely and without any of the protections granted in the U.S. Constitution. The Bush detainment policy was an obvious and blatant attempt to circumvent the judiciary's authority to try cases involving the "enemy combatants", to such a degree that the Supreme Court was swift to act and directly rule the detainment unconstitutional.

In *Hamdi*, the Supreme Court determined that U.S. citizens designated as "enemy combatants" by the Executive Branch have the right to challenge the detainment as permissible by the Due Process Clause of the Constitution. After the court's ruling, the Bush Administration decided to release Yaser Hamdi rather than try him before a military tribunal.

In *Rasul*, the Supreme Court ruled that those detained at Guantanamo Bay do have the right to file habeas corpus rights to challenge their detainment even though the naval base is technically governed by Cuban law. After the ruling, Shafiq Rasul was released to England and was not charged with any crime.

In *Padilla*, the court ruled that his petition of habeas corpus had been filed in the wrong jurisdiction. Due to the errors of improper filing, José Padilla's case was dismissed, but he was sentenced to 17 year in prison by a U.S. District Court in Florida.

In *Hamdan* and *Bourmediene*, the Supreme Court acted directly to render unconstitutional the Military Commission used to try suspects and restrictions against habeas corpus rights of foreign terrorism suspects held at Guantanamo Bay, respectively. The Military Commissions used to try terrorism suspects were deemed illegal because of their lack for protection for the Uniform Code of Military Justice and Geneva Conventions. The Commission had no legal authority to try those suspected, and all authority to try these suspects rests with the judiciary, not an executive commission. However, the largest case in this series granted

entitlement of habeas corpus writs to *all* detainees held at Guantanamo Bay, not just American citizens as determined in *Hamdi*. Within these decisions, the Supreme Court rendered null the Bush Administration's policy of detaining terror suspects.

Conclusion: A New Episode of Dynamism?

In this paper, I have attempted to argue that any perceived era of judicial passivity has terminated and a new period of judicial dynamism has emerged. The Constitution is established in such a fashion that encourages presidential imperialism. As Moe and Howell (1999) contend:

> "Presidents are motivated to seek power" and "because the Constitution does not say precisely what the proper boundaries of their power are, and because their hold on the executive functions of government gives them pivotal advantages in the political struggle, they have strong incentives to push for expanded authority by moving into gray areas of law, asserting their rights, and exercising them—whether or not other actors, particularly in Congress, happen to agree" (856).

The Judiciary of the United States is quite active in restraining presidential action during episodes of heightened stress, but acts less stringently if threats from an emergency remain. When the executive oversteps authority, especially in cases which attempt to render null judicial authority, the courts are quite dynamic in checking presidential authority, but usually only after the stress from the perceived emergency has subsided. Therefore, the judiciary assumes the role of a mediator between the political branches and functions to maintain the balance within the American government. Without the court, imbalances and abuses of power would be much prevalent.

The major question I have sought to answer, considers if presidents will learn that emergency actions taken within a gray area of the Constitution are unlikely to be met with Court resistance, especially during the emergency or lifetime of the Chief Executive. Although the Judiciary shifted its role as being active and then passive in ruling over Executive actions, in 2004, the Supreme Court became quite dynamic in directly refuting presidential action. In at

least five Supreme Court cases between 2004 to 2008, rulings were issued to ensure Due Process, Equal Protection, Right to Counsel, and other enumerated civil rights were extended to those detained from capture as a result of the war on terror. Therefore, I am able to answer Genovese and Spitzer's (2005) question and conclude that specifically within the gray areas of the Constitution, the judiciary will act directly to restrain presidential action, even while the war against terrorism still persists. The Judiciary is quick to act, especially when the Chief Executive attempts to deny the authority of the court to settle disputed Constitutional meanings.

The Judiciary can directly restrain presidential action, but the term "quickly" should be considered in relationship with "judicial time"; specifically, because courts are slow to reach decisions.[1] Wheeler (2009) mentions four specific reasons why those expecting the Supreme Court to be a significant check on presidential detention power in the War on Terror are likely to be disappointed: (1) The judiciary makes decisions in what can be referred to as 'judicial time', (2) The courts are usually limited to answer narrow legal questions as opposed to larger, "big picture" policy questions, (3) The judicial implementation process is fraught with uncertainty, and (4) The judiciary has adopted a general posture of deference to the executive in matters of war powers and foreign affairs (681).

The Courts are slow to act and there is no better language to describe this fact. No significant differences between Supreme Court cases involving detainees from the Guantanamo Bay Facility or other tort based cases can be developed. The fact is that the judicial process is time consuming; however that is not to elude that the American Judicial System lacks efficiency. Indeed, as the case load has steadily increased, the judiciary's ability to rule on cases

[1] Note that Wheeler's (2009) idea of "judicial time" is inspired by Skowronek's (1997) *The Politics Presidents Make: Leadership from John Adams to Bill Clinton*, in which he uses "political time" to describe the president's ability to affect policy within a regime.

has remained consistent. Therefore, the president possesses the ability to act much more quickly than the courts.

The Courts are usually limited to answer narrow legal questions as opposed to those concerning "big picture" policies. This can be further supported by the notion that the Supreme Court took over four years and heard at least five cases before it finally granted detainees held at Guantanamo Bay the Constitutional right to challenge their detention in U.S. courts. Most of the plaintiffs in the cases involving detainees were in custody at least two years, Lakhdar Bourmediene was held for six years before his cases was finally decided. Although his cases was arguably the most important, it took the longest to decide.

Implementation of the judicial process is uncertain because the courts must rely on other actors it enact its decisions. The president's broad unilateral power can be used to quickly circumvent any of the courts decisions. In the cases of *Rasul* and *Hamdi*, the Supreme Court ruled that those detained at Guantanamo Bay should have access to a neutral tribunal to determine their status as enemy combatants. "In response to these cases, the Bush Administration created the Combat Status Review Tribunals that were designed to determine whether the detainees should still be considered enemy combatants" (Wheeler 2009, 691). Eventually, the Supreme Court ruled in *Hamdan* that the review tribunals were unconstitutional, but meanwhile the president acted unilaterally to circumvent in progress decisions concerning the detainee cases.

"The final reason one should not look to the courts to check presidential detention power is that the judiciary has, over time, developed a culture of deference to the president in matters of war powers and foreign affairs" (Wheeler 2009, 691). Perhaps this deferment occurs because the courts wants to act in favor of public opinion, Congressional mandate, or only

because it wants to block the president when he tries to specifically limit its judicial review authority.

The fact is that in the new era of the Supreme Court directly attempting to refute presidential action, its power is left wanting. The Framers on the Constitution intended for the powers of war and peace to exist within the scope of Congress, not under the Executive. Congress is better established to restrain presidential action by the retracting of funds from the president, but this action is highly unlikely. Congress in motivated by reelection and revoking money from a policy, especially during a period of war could prove detrimental in an upcoming election. Moreover, the judiciary has the power to directly refute the President's policies, but concerning the detainee cases, its movements are too slow, too narrow in focus, too uncertain, or an opportunity to defer to another branch. "The Court is inherently something of a wild card, therefore, and cannot be counted on to give presidents whatever they want. Presidents can engineer Congress' decisions by manipulating its collective action problems, but cannot interfere with or participate in Court decisions in the same way, and are vulnerable as a result to exercises of judicial autonomy" (Moe and Howell 1999, 866). In sum, the Court is capable of limiting presidential power, especially unilateral action, more so than Congress, but lack the necessary mechanism of speed to have complete effectiveness.

References

Fisher, Louis. 2007. "The Law: Presidential Inherent Power: The "Sole Organ" Doctrine. *Presidential Studies Quarterly* 37 (1). http://www.web.ebscohost.com (Accessed 2 December 2010).

—. 2005. "Judicial Review of the War Power." *Presidential Studies Quarterly* 35 (3). http://www.jstor.org/stable/27552701 (Accessed 17 August 2010).

—. 2000. "Unchecked Presidential Wars." *University of Pennsylvania Law Review* 148 (5). http://www.jstor.org/stable/3312751 (Accessed 11 November 2010).

Genovese, Michael A., and Robert J. Spitzer. 2005. *The Presidency and the Constitution: Cases and Controversies*. New York, NY: Palgrave MacMillian.

Moe, Terry M., and William G. Howell. 1999. "Unilateral Action and Presidential Power: A Theory." *Presidential Studies Quarterly* 29 (4). http://www.jstor.org/stable/27552053 (Accessed 11 November 2011).

Wheeler, Darren A. 2009. "Checking Presidential Detention Power in the War on Terror: What Should We Expect from the Judiciary? *Presidential Studies Quarterly* 39 (4). http://www.web.ebscohost.com (Accessed 2 December 2010).

Whittington, Keith E. "Presidential Challenges to Judicial Supremacy and the Politics of Constitutional Meaning." *Polity* 33 (4). http://www.jstor.org/stable/3235440 (Accessed 11 November 2010).