

Fall 12-2013

Like a Boss: Presidential Prerogative as a Means for National Security

Joshua E. Darichuk
University of Southern Mississippi

Follow this and additional works at: https://aquila.usm.edu/honors_theses



Part of the [American Politics Commons](#)

Recommended Citation

Darichuk, Joshua E., "Like a Boss: Presidential Prerogative as a Means for National Security" (2013).
Honors Theses. 199.
https://aquila.usm.edu/honors_theses/199

This Honors College Thesis is brought to you for free and open access by the Honors College at The Aquila Digital Community. It has been accepted for inclusion in Honors Theses by an authorized administrator of The Aquila Digital Community. For more information, please contact Joshua.Cromwell@usm.edu.

The University of Southern Mississippi

Like a Boss: Presidential Prerogative as a Means for National Security

by

Joshua Darichuk

A Thesis
Submitted to the Honors College of
The University of Southern Mississippi
in Partial Fulfillment
of the Requirements for the Degree of
Bachelor of Arts
in the Department of Political Science, International Development,
and International Affairs

December 2013

Approved By

Marek Steedman, Ph.D.
Associate Professor of Political Science

Allan McBride, Chair
Department of Political Science,
International Development and International Affairs

David R. Davies, Dean
Honors College

Abstract

Executive power in America is outlined by the U.S. Constitution, but presidents have made decisions which questionably violate the rights American citizens are guaranteed by the same document. How are we able to maintain sovereignty as “we the people,” if our most powerful elected official is able to overstep the rules during a national security threat? The answer is because the constitution would not exist without a state, therefore the union must always be preserved. Niccolo Machiavelli, John Locke, Alexander Hamilton, and Carl Schmitt share very different views on democracy, but their insistence on national security is universally present. The views of the theorists are used to build a framework by which certain decisions can be compared on a scale of how much constraint the decision-maker was under.

This study is a unique analysis of three executive decisions in relation to their constitutionality. I not only explain why the president was constitutional in his decision-making, but also the limits set to prevent future presidents from making the same sort of decision without more constraint. The constitutional gray area of presidential prerogative is discussed with its role in national security issues.

Key Terms:

1. **Constraint:** Political forces (laws, other leaders, judicial decisions) which limit the leader’s ability to make a decision.
2. **Executive:** Pertaining to the Executive Branch of the U.S Government. It can include any part of the branch, but in this study will refer to the president.
3. **Prerogative:** The area of law not covered by the constitution/rules set for the leader, who has the authority to act when not constrained.

4. Writ of *habeas corpus*: A court summons to appear for trial that ensures the accused receives due process. The Constitution specifically outlines when a citizen's privilege to this writ is to be suspended.

Table of Contents

1. Introduction:	1
2. Methodology	4
3. Building the Framework	6
4. Introduction to Case Studies	23
5. Is Presidential Prerogative Legitimate?	28
6. Conclusions	50
7. Bibliography	54

Chapter 1: Introduction

This thesis examines the limits of presidential power. I analyze certain events in American history such as Abraham Lincoln's suspension of *habeas corpus*, Harry Truman's loyalty reviews in the Second Red Scare, and George W. Bush's handling of the USA PATRIOT Act. These are all situations in which the president has been accused of overstepping the Constitution in the name of security, under the belief it is their duty. Does a president have the authority to overstep the Constitution in the name of national security? If so, what limits prevent him from becoming a tyrant? I evaluate whether presidents should be allowed to do this through the views of political theorists in history such as Machiavelli, Locke, and Schmitt. I also incorporate three case studies in American history and qualitative analyses to argue that although these occurrences may point to a dictator, they are controlled by the American political system. This is evident in the legislative response to Lincoln's suspension of *habeas corpus* in 1861, legislative responses to Truman's Executive Order 9835 in 1946, and a Supreme Court response to Bush's imprisonment of American citizens without due process in 2004.

Another question I am asking is what sort of quality decisions were made by the various presidents in relation to the theorists being used for the framework? They represent a wide field of political theory, and do not match the American political system on many levels. Machiavelli, Locke, Hamilton, and Schmitt all deal with republics in different political formats and contexts that I must try and relate. I also contrast the views, to qualify how much constraint is apparent in each decision received.

Current literature on this topic contains a common theme; dismissal of executive power in the 21st century as overreaching. In "Historical Set Points," Daniel Tichenor argues the policies set by George Bush in the war on terror, and continued by Barack Obama derive from

the more constrained precedent set by earlier presidents. He quotes a former Bush legal consultant, John Yoo, as suggesting that “Lincoln’s greatness in preserving the Union depended crucially on his discovery of the broad executive powers inherent in Article II for use during war or emergency.”¹ Lincoln essentially acts as the first to use emergency power, albeit in a constrained manner, to set the precedent. Tichenor argues the expansion of executive power by the Bush administration did not follow the same process that Lincoln did, and that executive power has only amassed throughout the years. David Shipler, who takes a closer look at the Obama Administration to judge executive power in the present day, agrees.

In “Will Obama the Constitutional Lawyer Please Stand Up?,” Shipler presents the idea that the current president could give back the executive powers which villainized George Bush in American history, but he does not. “Obama could also reject indefinite imprisonment without trial,” argues Shipler, but the changes do not occur.² This article adds a present context to the questions I am asking, as well as an issue for continued discussion. My research goal is to clear up more of the past executive powers, because the discourse favors post-New Deal executive decisions.

Jason MacDonald argues in “Congressional Power over Executive Branch Policy Making” that Congress has a substantial hold on their various checks over the president. He states that “in the face of an ambitious executive branch, Congress has conducted oversight aggressively and reformed its rules to counterbalance the president.”³ Basically, they are able to retroactively respond to presidential gains in power to maintain the legislative branch. Congress

¹ Daniel J. Tichenor, “Historical Set Points and the Development of U.S. Presidential Emergency Power,” *Perspectives on Politics* 11, no. 3 (2013): 773.

² David K. Shipler, “WILL OBAMA THE CONSTITUTIONAL LAWYER PLEASE STAND UP?,” *The Nation*, February 2013, 15.

³ Jason A. MacDonald, “Congressional Power over Executive Branch Policy Making: Limitations on Bureaucratic Regulations, 1989-2009,” *Presidential Studies Quarterly* 43, no. 3 (2013): 524.

crafts legislation in response to presidential decisions that seem to breach the balance of power in the branches. In this thesis, I will be furthering this argument that the Constitution has set structures in place to prevent the president from becoming a tyrant by means of emergency powers.

Chapter 2: Methodology

The purpose of my research is not only to answer whether or not the president can legally overstep the law for national security, but to ask what limits there are on this power, and whose responsibility is it to protect democracy from him. I use a purposeful design in my analysis of three case studies in American history: Abraham Lincoln's suspension of habeas corpus in 1861, Harry Truman's signing of Executive Order 9835 to install loyalty reviews in 1947, and George Bush's abuse of detainment powers after the establishment of Guantanamo Bay in 2001. These are all situations in which the president has used his prerogative power to restrict the rights of citizens in the name of national security. I find this design to be most appropriate, because the implications behind the study specifically focus on the level of control the president has on citizens' rights. This can be difficult to measure throughout a quantitative analysis, especially considering that I am using a theoretical foundation for analysis.

I am performing an analysis on these case studies, as well as four theorists' positions on the questions I am asking. By noticing certain patterns or similarities in their views on presidential prerogative, I hope to gain a better understanding of how the political field interprets the subject and answer my first research question. The case studies will be analyzed in the framework of the theorists' opinions to answer whether or not their actions were politically legitimate. The theorists' views on democracy and prerogative thus set the foundation for the study that will be continued with the question of limits on prerogative as related to the case studies.

In response to what the theorists argue, I am furthering the research by noting specifics in the case studies relating to how the prerogative power was returned or diminished following the conflict. For the purpose of simplifying the question, I ask what limits are placed on presidential

emergency powers? Since limits can be defined as factors which place constraints on the subject in question (presidential prerogative), I am looking closely at the different sequence of events which resulted in citizens regaining their rights. The limits placed on prerogative power can be related back to the control that American citizens have over their government, even in times of crisis. This analysis also helps gauge whether or not prerogative is in itself tyrannical, or simply a standard feature of democracy.

I employ the use of a visual aid to demonstrate the spectrum of the various historical figures' views. By using a linear range, I can assist the reader in visualizing how stringent each theory is in relation to constitutional limits. The range is my impression of how each theorist and case fits into a society where the U.S. Constitution, which Hamilton has described in his Federalist papers, protects citizens. After placing my theorists into their current position (see Figure D), I continue the discourse by going through my three case studies from American history to determine how closely they fit into Hamilton's framework, and if not, which theorist they better reflect.

Ultimately, I hope to bring some light to the gray area of prerogative because if left unchecked, the president is no better than a dictator. The concept of America slowly transforming into an empire plagued the Bush-Cheney era of politics, because the people were finally questioning if the president had the right to restrict rights for national security. My results will help formulate a critique of checks on the president as well as the state of American democracy.

Chapter 3: Building the Framework

To answer the question of constitutional constraint on presidential prerogative, I draw from the works of Niccolo Machiavelli, John Locke, Alexander Hamilton, and Carl Schmitt. They serve as a starting point to create a framework of reference. Altogether, they represent four very different eras of politics, from which I can draw similarities to help discern the limits of constitutional prerogative. The framework is a synthesis of the four theorists' views that I analyze to determine the existing views on executive prerogative. It is important to do this in order to connect theorists of the past with the literature of the present. Biases, such as those held by authors who interact with the political leader being discussed, are avoided in choosing literature for the framework. Only one of the theorists was alive for any of the case studies, but it is highly doubtful Carl Schmitt used an American example for his book promoting fascism. The range of ideas I assemble, help set the foundation for theoretical limits on the executive branch.

Machiavellian Studies of Livy

I begin the analysis with The Discourses on Livy by Machiavelli to ask what decisions he feels the leader of a commonwealth should make in order to preserve its security. Machiavelli synthesizes arguments for a dictatorship with those of a republic to demonstrate effective ways of keeping control. This is certainly a rougher idea of republic, but nonetheless relevant because it represents an earlier version to relate with. For example, Machiavelli suggests the idea of using any force necessary to preserve the state. One of these methods is to kill the leader, and the leaders' sons, of an enemy faction because "he who sets up as a tyrant and slays not Brutus, and he who creates a free government and slays not the sons of Brutus, can never maintain

himself long.”⁴ These enemies would be, in the case of Lincoln, the Confederates; Truman, the Communists; and Bush, the terrorists operating inside America. The slaying of enemies can be translated to a modern sense as imprisonment, seeing as how punishments have grown milder throughout history with human rights.

Machiavelli also argues the leader “ought more to fear those men to whom he has been too indulgent.”⁵ In the Civil War, Lincoln had to be aware of the citizens living across the Potomac River in Alexandria, VA, Truman let Congress hunt some of the government’s most trusted workers during the Second Red Scare, and Bush’s treatment of privileges given by the USA PATRIOT Act made Guantanamo Bay a center for citizen and non-citizen accused terrorists alike.⁶ Claiming there is no greater enemy than conspiracy in the government, Machiavelli argues that a leader must do everything he can to avoid this, which I suggest boils down to suspending/violating rights. Preservation of the state also leads to manipulation of the citizens, which can be done in both public and private ways. Public accreditation is “when a citizen gains a great name by advising well or by acting still better for the common advantage.”⁷ They receive much attention and provide a reward for the citizen that others are aware of, and are influenced to emulate. Private accreditations, such as bribes or special favors, create instability for a public that is strengthened by merit-based reward, which makes a leader’s job more difficult. A citizenry that is able to get away with private accreditation has the potential to bring about tyranny, which could result in the death of the current state. Machiavelli, on behalf of the citizens in a rare acknowledgment of their personal existence, comments that their love of the country should bring them to forget private wrongdoings of the state, in order to serve the greater

4 Niccolo Machiavelli, *The Discourses on Livy* (Stilwell: Digireads.com Publishing, 2008), 150.

5 *Ibid.*, 155.

6 *Ibid.*

7 *Ibid.*, 192.

purpose of security.⁸ Machiavelli uses the example of Fabius, a Roman consul who was asked to nominate Papirius Cursor as a dictator to aid and assist the people led by Consul Manlius. Fabius was “moved by love of his country” to appoint his enemy Papirius Cursor, and the audience is addressed when Machiavelli states “at this juncture all who would be thought good citizens should take example.”⁹ The story highlights the importance of putting aside personal disputes for the greater good of the country. Sometimes this may result in restriction of personal rights. He discusses the citizens as factors in the leader’s tenure as opposed to the opposite, a position of power within the government most citizens in the United States would feel. Finally, Machiavelli provides an example of how to maintain respect as a leader through the method of killing one in every 10 citizens if the leaders of a rebellion cannot be brought forth.¹⁰

Overall, Machiavelli takes a “state first, people second” approach, in his guide for leaders of commonwealths. His attitudes are centralized on preserving the state for as long as possible, which he implies to the audience is the highest goal of any republican leader. Overstepping the Constitution/rights of citizens is discussed as something a leader must do in a time of emergency. Machiavelli would certainly support the actions of Lincoln, Truman, and Bush, as necessary for preservation of the United States’ security. He might even say their actions were not stringent enough, as the punishments provided to the citizens in the cases are not quite of the same caliber as those of Renaissance Italy.

In Machiavellian Democracy, John McCormick takes a narrower approach to analyzing Machiavelli by focusing on the relationship between the people and the government. He argues that the leader must derive his power from the people, as opposed to the nobility, because the

8 Machiavelli, *Discourses*, 212.

9 *Ibid.*

10 *Ibid.*, 214.

people are easier to appease.¹¹ To do this, the leader must fulfill the one need of the people: protection of their liberties from those who are oppressive, including the nobility.¹² Because of this, his analysis of Machiavelli takes a different turn; the people are responsible for making sure the leader caters to their needs, but the leader is also responsible for making sure their needs are met. Viewing Machiavelli from the citizens'-needs angle places him ideologically near John Locke, the theorist who is most concerned about the people, rather than preservation at all costs. Meeting the needs of the people by way of prerogative power is effective historically, as long as the threat is to national security, not a simple domestic issue. However, consolidation of prerogative power by a leader should be viewed as a sign to set barriers for keeping the executive at bay. This can be done through the other two branches in American government, but that will be discussed later.

McCormick argues that when liberty is threatened, the people are overcome with a need to make laws to help protect it in the future.¹³ Until then, it is the leader's duty to take care of his people and defend their liberties. However, McCormick also makes reference to the potential of the people to secede peacefully in order to maintain their liberties, a common defense for the American Confederacy.¹⁴ This is what happens when amendments and other political safety nets, designed to keep government power at bay, fail. The theme I am searching for in each theorist and case is the system of checking the executive branch, and how effective this is judged to be in serving the people's needs.

To further clarify the views of Niccolo Machiavelli, it is necessary that I provide a brief summary of how a Machiavellian America might look. Although the government would

11 John P. McCormick, *Machiavellian Democracy* (Cambridge: Cambridge University Press, 2011), 24.

12 *Ibid.*

13 *Ibid.*, 31.

14 *Ibid.*, 33.

certainly be a republic with public representation, the executive would have much more power in the instance of preserving the state. Citizens would look to their leader in times of crisis, and it would be the leader's duty to do whatever was needed to fulfill the security needs of the citizens and the state. This could range from unlawful imprisonment, to martial law or suspension of rights. As long as the people approve of their leader, and believe that they are better off with him than without him, the executive is stable. However, if the executive abuses these powers beyond the timeframe of the emergency, the people have the right to rebel and may use this to overthrow the newly-labeled dictator. Machiavelli describes more of a benevolent dictator/enlightened despot type leader with unlimited power to protect his people during national crises, accompanied by a legislative body to uphold public opinion.

For the purpose of building a common framework to generally compare how stringent each politician/political scientist's views are in relation to the others, I am progressively setting up a linear range to help organize them. Machiavelli, being the first discussed so far, will be placed at the center point for now because there are no other views to compare with at the moment. Following analysis of the other political theorists, I will add them to the range by placing them to either the left or right of Machiavelli. This placement depends on how stringent towards executive powers I find their ideas to be. A decision or attitude that promotes greater freedom for the executive would be viewed as less stringent, whereas a route promoting legality and more protections on rights would be more stringent. The range is meant to portray the level of constraint on the executive for each case. I have knowledge already that Locke has a much more stringent approach to handling the executive than Machiavelli, so it is very likely that he will be placed to the left of the first theorist.

Figure A.



Locke's Views of Prerogative

John Locke's Second Treatise of Government paints a more optimistic picture of leaders acting outside the law. I begin by defining prerogative in Lockean terms: "the executor of the laws, having the power in his hands, has by the common law of nature a right to make use of it for the good of the society, in many cases, where the municipal law has given no direction, till the legislative can conveniently be assembled to provide for it."¹⁵ The quote refers to the municipal, but we can interpret this to mean any particular political society. This unestablished power is defined as prerogative, and is deemed the right of an executive leader. He writes that it is the citizens' duty to enact laws which fix the particular power defined by prerogative so that the leader cannot use it again; this is the right of the people to check their leader, "for in so doing they have not pulled from the prince anything that of right belonged to him, but only declared that that power which they indefinitely left in his or his ancestors' hands, to be exercised for their good, was not a thing which they intended him when he used it otherwise."¹⁶ Public support for this overstepping of the law comes from Locke's belief that prerogative is derived from the will of the people.¹⁷ Therefore, it is also meant for the good of the people, seeing how the leader is meant to be a representation of their wishes and needs. I draw on my earlier mention of Locke to relate his view of meeting the citizens' needs to Machiavelli, in that Locke describes how the people are willing to overlook the mistakes of their leader because the decisions are made for

15 John Locke, *The Second Treatise of Government and a Letter Concerning Toleration* (Mineola: Dover Publications, Inc., 2002), 74.

16 *Ibid.*, 75.

17 *Ibid.*, 76.

their own good.¹⁸ The ideal “good” leader, in Locke’s eyes, would use prerogative only for answering to the people’s needs, and never for his own benefit, by means of hurting the population. Because of this, the regimes of “good” leaders must be heeded with caution because they set a precedent for prerogative that may be taken up by a “bad” leader.¹⁹ When the leader abuses a precedent, it is very difficult for the people to regain control in order to enact legislation, the citizens’ defense against the executive. However, according to Locke, if a leader’s decisions detrimental to the people, they cannot be judged as prerogative.²⁰ Locke challenges the executive when discussing decisions that go against the needs of the people saying, “this [executive decision] operates not till the inconveniency is so great that the majority feel it and are weary of it, and find a necessity to have it amended.”²¹ He is placing the burden on the executive, because this “thing of all others they have most need to avoid, as of all others the most perilous.” The leader holds this level of responsibility because their power is derived from the consent of the people, and the leader needs to maintain this trust to be successful. The underlying trust of the American people allowed Lincoln to imprison Confederate sympathizers, Truman to approve interrogation of suspected Communists, and Bush to order imprisonment of suspected terrorists without due process. The people entrust the leader to keep them safe and secure, which means removing threats. While Machiavelli insists the leader must act independently to maintain security, Locke argues the leader must make his decisions with the best interests of the people. Therefore, their needs cannot be cast aside. The gray area, in this situation, is the course of action a leader might take under the impression that they are doing

18 Machiavelli, *Discourses*, 212; Locke, *Second Treatise*, 76.

19 Locke, *Discourses*, 76-77.

20 *Ibid.*, 77.

21 *Ibid.*, 78.

what is best for the nation, for example, Lincoln as Commander-in-Chief of U.S. forces in the Civil War.

Brian Dirck's article, "Lincoln as Commander-in-Chief," helps tie in Locke's theory of executive service to the people with one of the case studies I am performing. The Constitution defines the president as head of the armed forces. However, before Abraham Lincoln, the role had never really been used. Lincoln uses his skills as a lawyer in crafting a precedent on the president's role in war.²² He establishes prerogative in America that allows him to suspend the privilege of the writ of *habeas corpus*, and enact martial law, to prevent the overtaking of Washington, D.C. by the Confederate Army. After the war, all rights were given back to the citizens of Maryland, thus ending Lincoln's reign of prerogative power. Therefore, Lincoln's overstepping of the Constitution may be seen as beneficial because it accomplished a political goal, and provided for the needs of the people while keeping within the definition Locke set. The most common fear held by citizens, at the time, mirrors Locke's views on future "bad" rulers who succeed an executive that set prerogative precedent. The basis of this paper analyzes the difference between Lincoln's actions, and those of Truman and Bush. Were the latter two's circumstances serious enough to necessitate the restricted civil liberties? Lincoln shall be discussed as an example of prerogative power that results favorably for the state; but did he set a precedent that Truman and Bush felt a right to with their respective security issues? From an early analytical standpoint, I do not think that Truman and Bush are representative of Locke's views on prerogative.

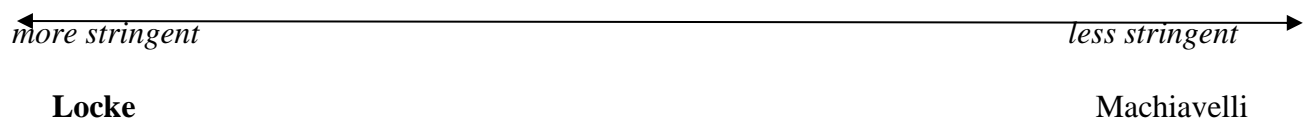
John Locke's America might look very similar to Machiavelli's, except in the intentions of the executive. Locke argues that prerogative is only used for the benefit of the nation;

22 Brian Dirck, "Lincoln as Commander-in-Chief." *Perspectives on Political Science* 39, no. 1 (2010): 25.

therefore a “good” Lockean executive would truly have the state’s best intentions in mind. His use of prerogative would not be to gain power for a personal agenda, but to strengthen the country. However, Locke’s optimistic description of a “good” leader makes it difficult to judge his definition of prerogative on a uniform basis for any given government. On one end, Lincoln and the other case studies might make sense as followers of Locke with America’s best interests at hand, when making decisions. It might be also argued that Adolf Hitler felt his dismantling of the German nation was in their best interest, including the massacre of millions. Essentially, Locke and Machiavelli describe very similar leaders; Locke however places more weight on the interests and needs of the citizen.

As previously hinted at, Locke will appear to the left of Machiavelli on the linear range I am constructing. His priorities in the citizens' rights, rather than the ruler's own personal power show a stark change from Machiavelli. Machiavelli discusses what a leader can do to his citizens for security, whereas Locke describes what the leader must do for his citizens. The idea of the leader as a servant of the people is much more profound in Locke's book, which is why I place him to the left of Machiavelli. So far, Locke provides the most stringent answer to the questions of presidential prerogative.

Figure B.



Hamilton Defends the Office of the President

Alexander Hamilton’s various essays in the Federalist Papers reflect his approach to the powers of a democratic leader. One of the problems associated with analyzing his arguments is the constant insistence that the president is in a decreased position of power from that of the

more prerogative-endowed British monarch.²³ Because of this, I must carefully take note of the purpose of Hamilton's papers, that being, to convince the colonies to ratify the Constitution. I will consider the context of the argument to emphasize how vague the listed constitutional powers are.

Historians argue over Hamilton's *de facto* classification as a monarchist, which Michael Federici derives from four comments that were not even directly quoted from Hamilton.²⁴ Regardless, it is clear that he was more of a practical man who believed in using the right form of government to create the most efficient state possible.²⁵ Although Hamilton had a personal admiration for the British monarchy, he strongly felt that this could not be duplicated in America, and thus urged for a republic.²⁶ Having seen what little power was available in the Articles of Confederation for regulating intrastate and interstate policy, he describes a new government that is capable of holding both power and permanency while still maintaining basic popular support. The executive branch, he argued, must have the potential to defend the state, as well as be flexible enough to act quickly and decisively.²⁷ However, the executive is burdened by limits imposed in the Constitution.

Hamilton takes Locke's stance on the leader's path of legitimacy through the consent of the governed. In this case, the leader must be independent of the other branches of government, and be dependent only on the people as his source of power, in order to prevent corruption.²⁸ He is a representative of the people and thus subject to common law as every American citizen

23 Alexander Hamilton, "Federalist 69," in *The Federalist Papers*, ed. Clinton Rossiter (New York: Penguin Putnam Inc., 1999), 383.

24 Michael P. Federici, *The Political Philosophy of Alexander Hamilton* (Baltimore: The Johns Hopkins U. Press, 2012), 125.

25 Forrest McDonald, *Alexander Hamilton: A Biography* (New York: W. W. Norton & Company, 1979), 103.

26 Federici, *Political Philosophy*, 128-129.

27 *Ibid.*, 135.

28 Alexander Hamilton, "Federalist 68," in *The Federalist Papers*, ed. Clinton Rossiter (New York: Penguin Putnam Inc., 1999), 381.

would be. However, in *Federalist 69*, titled “The Real Character of the Executive,” Hamilton divulges some of the prerogative powers given to the president, deliberately keeping them vague for interpretation. He labels the leader as Commander-in-Chief of the armed forces, a title with no actual description except that the officer must “take care that laws be faithfully executed.”²⁹ This statement, along with the powers to grant reprieves and pardons without the approval of any other body, gives the leader authority to decide friends and enemies for the United States; a duty to be discussed in later sections.³⁰ Hamilton does not place much emphasis on these powers in the essays, so as to not incite fears among the audience that their president could become a dictator. The purpose of the Federalist Papers was to convince the public that the Constitution would not bring about monarchy in the United States. To do this, Hamilton must outline the president’s powers in understated descriptions. Although he vocally supported a government that pushed republican principles as far as they would go, this would not have worked well among his Jeffersonian companions, or an anti-Federalist public.³¹ Hamilton even goes so far as to put into perspective that the president may or may not have less power than a state governor, depending on the laws of that state.³² Despite the compromise made in Hamilton’s support, his model follows current America almost identically.

At this point, I have provided a summary of Hamilton’s metaphorical weakening of the presidential powers; I will now look at them in depth. In *Federalist 84*, he discusses various pieces of the Constitution that give the president room for prerogative power. Article 1, section 9, clause 2 of the Constitution provides that “the privilege of the writ of *habeas corpus* shall not

29 Hamilton, *Federalist 69*, 385.

30 *Ibid.*

31 McDonald, *Hamilton*, 103.

32 *Ibid.*, 390.

be suspended, unless in cases of rebellion or invasion the public safety may require it.”³³ This allows potential leeway for the leader to determine what circumstances determine the requirements for suspension of this privilege. Furthermore, Hamilton discusses a proposed bill of rights, which he argues would weaken the power of the people, and strengthen the leader. He reasons that by listing the peoples’ rights, and forbidding the government to infringe upon them, they are setting up the government to infringe on any rights not named in the bill. Rights are the mere limitations on the powers of government and the people who accept a list of them are only giving legitimacy to the violation of those rights unnamed.³⁴ Also, a Bill of Rights is indicative that there are some laws that cannot be amended. This, he feels, is a threat to the permanence and stability found in all strong governments.³⁵ Hamilton’s view of the leader is one that must do what it takes to secure the state through powers in the Constitution, both executive and prerogative. Prerogative is given in very minute sections where he fails to admit how expansive the power of the president could be. This might be in order to push the success of the unratified Constitution but I will assume he is genuine. Overall, the system described by Hamilton shows a significant shift from that of Locke and Machiavelli, concerning executive constraint.

Hamilton provides the most accurate presentation of our current America, seeing as how the Federalist papers were written to help ratification of the Constitution. Hamilton was very supportive of the executive powers among the Framers, and shows this in his papers granting the president certain rights and responsibilities. He believes that the powers of the president will be limited, thus unlike the executive powers in monarchical Britain. However, the president needs the power to protect the state in times of emergency; powers that the new Constitution would

33 Alexander Hamilton, “Federalist 84,” in *The Federalist Papers*, ed. Clinton Rossiter (New York: Penguin Putnam Inc., 1999), 479.

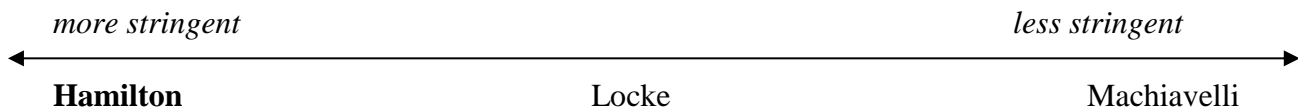
34 Hamilton, *Federalist 84*, 481.

35 Federici, *Political Philosophy*, 133.

grant him. It is very evident that Hamilton was convincing in his Federalist papers, because the Constitution was ratified by the thirteenth colony in 1790. The Constitution's status as a "living document" shows how a moderate view of executive constraint can spawn a lasting system.

Hamilton poses an interesting interpretation of prerogative power in relation to the range I am building because it is very specific on how stringent the executive's powers are. Because of this, I must place to the left of Locke. The purpose of this research is to determine whether or not the President has unlimited prerogative authority, and if it translates to tyranny for the people. By comparing Hamilton's ideas with other theorists, and then using the case studies to show how they might look in reality, I can paint a picture of what tyranny would look like for America. Hamilton's system is still working today, thus he will be the ideal representation of balanced, legitimate prerogative power. Hamilton's discussion on the powers of the leader, and what kind of rights he may suspend during a crisis, puts him to the left of Locke, who is vague on how the executive is to be constrained. He is left of Machiavelli because we are no longer a system that allows capital punishment without due process, significantly limiting executive power.

Figure C.



Schmitt's Argument for the Sovereign

To begin delving into Carl Schmitt's argument for the power of the state, I will define sovereignty from the Concept of the Political. Schmitt describes sovereignty in black-and-white terms when saying, "the specific political distinction to which actions and motives can be reduced is that between friend and enemy."³⁶ Schmitt also states, "in its entirety the state as an organized political entity decides for itself the friend-enemy distinction."³⁷ Power to manipulate the world landscape through war is given to the state, which every citizen is permanently attached to. The concept of the political emphasizes the role nationalism should have in a citizen's life, and how liberalism undermines this role.

People are categorized into groups in this theory. Schmitt argues that despite the various cultural, religious, or economic groups, the political categorization is superior because it controls the friend-enemy distinction.³⁸ The "winning for the entirety of the state all vital energies of the people" references how the people need to be made loyal to reflect the belief in a nationalist government.³⁹ The state has *jus belli* [just war], the likelihood that they will be responsible for determining the friend-enemy distinction, which is also the mark of sovereignty. By having *jus belli*, the state is assuming action for what is morally just to the people. However, when the war is just, it also tends to justify any wrongful actions that occur. These wrongs are overlooked by the invocation of *jus belli*. The state is the only category that a people can never fully be rid of, because they are participating at all times. Schmitt argues that liberalism is the movement attempting to deny this natural tendency to go to war and defend one's home. Liberalism here is

³⁶ Carl Schmitt, *The Concept of the Political* (Chicago: U. of Chicago Press, 2007), 26.

³⁷ *Ibid.*, 30.

³⁸ *Ibid.*, 38.

³⁹ *Ibid.*, 25.

the belief that people should have rights and privileges that grant certain freedoms and detach them from the state in Schmitt's view.

Throughout his argument, Schmitt makes reference to how liberalism is antagonistic to the purpose of a stable state. His description reflects a system that discourages war, the natural course of action for a state, in favor of negotiation. Schmitt suggests that "a world in which the possibility of war is utterly eliminated, a completely pacified globe, would be a world without the distinction of friend and enemy and hence a world without politics."⁴⁰ This is the world that liberalism supposedly is creating, where power is corrupted by multiple interests and the devaluing of the state. Citizens are encouraged to value their own personal freedom of expression without need to worry about how they might be negatively impacting the state. Schmitt believes that by limiting yourself to participation in the state, you are weakening their overall power, which is another consequence of liberalism. This focus on the value of the individual citizen, no longer dictated by sovereign, makes the "sacrifice of life" in "no way justifiable by the individualism of liberal thought."⁴¹ I make the connection to the American executive through Schmitt's evaluation of pluralist theory, which he argues will lead to a weakened federal entity.

Obviously the weakened federal entity is a shot at the United States government, which does not require nationalism of its citizens or demand that they place their loyalty above all other aspects of life. An executive, by Schmitt's standards, would have *jus belli* to declare the friend-enemy distinction, without burden by checks and balances or federalism. This form of government can be marketed as any sort of republic, but would ultimately be a dictatorship, in the form of a government similar to Nazi Germany. The leader would have the power to defend

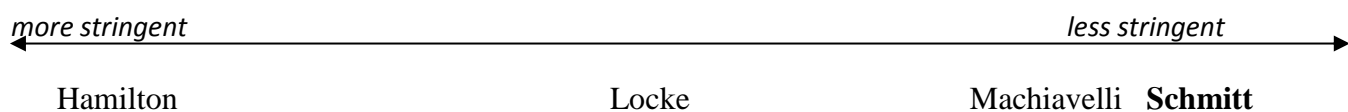
⁴⁰ Schmitt, *Concept of Political*, 35.

⁴¹ *Ibid.*, 71.

the state in a crisis, such as those being discussed here, because he has sovereignty. The leader's relationship with the people centers on the state, the only entity determining sovereignty. His decisions are expected to be viewed by the people as just, because he decides the friend-enemy relationship. The United States executive does not have power in the scope that Schmitt supplies, but there are certain areas of similarity where the American president oversteps his checks to secure the state.

In terms of the linear range I am developing, I feel it is quite obvious that Schmitt is the least stringent of the four theorists. His belief that the sovereign holds supreme power gives less weight to the other branches of government, rendering them useless to constrain the executive. If this were to happen in America, the citizens would lose their civil rights to enforced nationalism. The power of a leader to overturn the entirety of the law is one that holds tyrannical possibilities, especially coming from a fascist theorist in 1930's Nazi Germany. Schmitt represents the tyranny that Americans fear when laws such as the USA PATRIOT Act are signed, but do these laws and orders have the potential?

Figure D.



Theory at a Glance

So far, I have analyzed the four theorists' various works at face value in order to gain a basic understanding of what each man stood for. The various time periods used for sampling theory was for the purpose of synthesizing major works that discuss executive power. To answer my questions, I will need information from the different eras of modern history to show how some of the principles are applied today. Machiavelli recounts Livy's history of the Roman

Empire to express his theory of republican government mixed with the *realpolitik*, or political realism, of his day. Locke's theory reflects the potential for the executive to not only fulfill the needs of the state, but also the citizen. Hamilton had to integrate various aspects of a monarchy, such as a central executive figure, to ensure that the needs of the people could be met over a large area. Last, Schmitt argues the ultimate demise of a state is liberalism, and the sovereign needs to prevent that. Ultimately, the theorists share a common view in the executive needing some power to protect the sovereignty of the state. Further details will come from analysis of the case studies.

Chapter 4: Introduction to Case Studies

Case Study: Lincoln's Suspension of the Writ of *Habeas Corpus*

Abraham Lincoln was inaugurated as the sixteenth president of the United States on March 4, 1861.⁴² By this day, the Union held only four remaining forts in Deep South territory leaving them in a very cornered position. On April 12th, Confederate forces fired the first shots on Fort Sumter, thus inciting the Civil war and providing Lincoln an excuse to take extraordinary measures to ensure victory.⁴³ In upcoming weeks Arkansas, North Carolina, Tennessee, and Virginia would secede thus creating a border conflict with the rebel forces and the capital.⁴⁴ At this point, Washington remained a mostly unprotected city harboring a great number of Confederate sympathizers.⁴⁵ Because of this, Lincoln was compelled to suspend the writ of habeas corpus from Philadelphia to Washington on April 27th which was later extended to New York City.⁴⁶ This was done in spite of various court movements that claimed only Congress had the power to suspend the writ to which Lincoln argued that there would be no writ to suspend should he not act.⁴⁷ Another reason for suspension of habeas corpus dealt with the coercion of draftees to follow through with their duty.⁴⁸ By mandating imprisonment for draft dodgers, Lincoln could enforce the stability of his army and produce a fighting force that could defeat the Confederates. National security was the issue that pressed Lincoln to suspend constitutional rights as the enemy was literally on his doorstep.

42 William Gienapp, *Abraham Lincoln and Civil War America* (Oxford: Oxford U. Press, 2002), 78

43 *Ibid.*, 81.

44 *Ibid.*, 82.

45 *Ibid.*

46 *Ibid.*, 83.

47 *Ibid.*, 116-117.

48 *Ibid.*, 134.

Case Study: Truman's Investigation of Federal Employees' Loyalty

Following World War II in 1945, US-Soviet relations were quite strained. Various issues such as Soviet involvement in Iran helped to increase the friction held between the two states and further induced fears that the USSR would attempt world dominance.⁴⁹ The Communist issue took front stage as the Republican Party used it to take both houses in the 1946 elections. This era marked the Second Red Scare, a period of increased fear towards the threat of Communist revolution in the United States. The Truman Doctrine, a public denouncement of Communism and its spread throughout the world, would come to epitomize Truman's presidency and lead to the lingering fears of both the possibility that Communists might attempt a revolution in America as well as the government's attempt to invade the lives of federal employees.⁵⁰ The idea that Communists would "subvert their governments for the sake of Soviet expansion and conquest" was enough to alarm the American political community and push Truman to take action in ensuring national security. Weeks after the 1946 elections, Truman employed a committee to recommend what he should do to ensure the loyalty of all federal employees.⁵¹ The result was the signing of Executive Order 9835, which established loyalty review boards for federal employees to fulfill the mandate that all those employed were not, or never had been, in league with the Communist Party or close to those associated.⁵² Those accused were given the burden of proof to show that they were indeed not Communists. Defendants were not given any rights associated with a court proceeding and were at the whim of whatever limited due process the executive order granted.⁵³ These orders represented another attempt to subdue the political

49 Albert Fried, *McCarthyism, The Great American Red Scare* (New York: Oxford U. Press, 1997), 23.

50 *Ibid.*, 24.

51 *Ibid.*

52 *Ibid.*, 28.

53 *Ibid.*

community inside Washington in the name of national security. However, this threat was one of ideals, and not actual military strength.

Case Study: Bush's Detainment Orders

On September 11, 2001, America experienced the deadliest attack on home soil in the history of the nation. Four planes were hijacked and crashed into various sites in New York, Pennsylvania, and Washington, D.C., resulting in almost 3,000 casualties. On this day, President George W. Bush made a statement declaring a war on the idea of terrorism itself, rather than a specific state/organization.⁵⁴ Congress would later offer their full support to the President as their interference would slow the move to strengthen national security.⁵⁵ Opposition by any individual member would be viewed externally as weak so the president had almost free reign when creating and passing the USA PATRIOT Act; a group of emergency powers that would allow the president to suspend certain rights in the name of national security. Among these was the right to due process by detainees suspected to be terrorists. This allowed the government to detain any suspected terrorist under authorization of the president. Because torture is illegal in the United States, some detainees were sent to Guantanamo Bay where they were detained for interrogation.⁵⁶

The issue of torture arose in Guantanamo because the need for “enhanced interrogation techniques” brought officers to violate their prisoners’ international rights, specified by the Third Geneva Convention.⁵⁷ President Bush issued the “Executive Military Order requiring the detention and possible trial of any non-U.S. citizen whom he, as President, has reason to believe

54 Herbert Foerstel, *The PATRIOT Act: A Documentary and Reference Guide* (Westport: Greenwood Press, 2008), 25.

55 *Ibid.*

56 *Ibid.*, 99.

57 Laurel E. Fletcher and Eric Stover, *The Guantanamo Effect: Exposing the Consequences of U.S. Detention and Interrogation Practices* (Berkeley: U. of California Press, 2009), 9.

is or was a member of al-Qaeda, or has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor (sic), or who has knowingly harbored one or more such individuals.”⁵⁸ Martin Henn argues that this is an unconstitutional overstep of the legislative and judicial branches by the president. The order issued on November 13, 2001 allows the unlawful detention of detainees without due process, with President Bush at the helm to decide punishment for criminals in the “war on terror.” This included the imprisonment of two American citizens accused of terrorist activity, Yasser Hamdi and Jose Padilla.⁵⁹

In *Hamdi v. Rumsfeld*, the Supreme Court decided to reverse the decision of a lower court to dismiss Yasser Hamdi’s petition for *habeas corpus*.⁶⁰ Despite being an American citizen, Hamdi was being held in Guantanamo Bay Prison without due process. The ruling set a precedent in law that American citizens would never be stripped of their rights by the president. *Rumsfeld v. Padilla* did not work out as well for the second illegally imprisoned convicted American terrorist. The Supreme Court ruled an improper filing of a petition for *habeas corpus*, but allowed Padilla to file another one properly.⁶¹ Despite receiving illegal treatment, Padilla’s rights were not being forgotten. The Supreme Court kept the president from holding sole power over citizens’ rights.

In both *Hamdi* and *Padilla*, the Supreme Court is disputing Bush’s claim to hold unlimited power in the detainment of accused terrorists. They are able to limit his powers by restricting the detainment of U.S. citizens without due process. It is this specific issue that will

⁵⁸ Martin Henn, *Under the Color of Law: The Bush Administration’s Subversion of U.S. Constitutional and International Law in the War on Terror* (Plymouth: Lexington Books, 2011), 67.

⁵⁹ *Ibid.*, 79.

⁶⁰ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

⁶¹ *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

be examined to discuss the effects of the various orders the president uses to restrict the rights of potential enemies.

Transition to Analysis

The case studies will now be analyzed on a qualitative level to determine their legitimacy and to make leadership comparisons to the various theories. After this basic oversight to introduce each case study, I will go into detail underlining the various aspects which make each decision legitimate as well as the theorist they most closely resemble. It is important that I analyze not only what happened in each case, but what the intent of the leader was. This can change a leader from having a Lockean style of rule to that of Schmitt. How closely each president followed the Constitution, as well as the level of control they had at any given point, will be taken into account. I will then place the case studies into the range I developed in Chapter 2 as a guide to help further distinguish each case from the various theories. Finally, I will discuss the counter-balance to the seemingly tyrannical prerogative powers in the form of Congress, which has a constitutional check on the president.

Chapter 5: Is Presidential Prerogative Legitimate?

Theory Recap

The results of the theorists' findings have brought me not exactly to the question of if it is viable for the American president to overstep the Constitution, but what position he must take for legitimacy. Machiavelli brings up the perspective of protecting the state from its citizens, Locke, the protection of citizens from the state, Hamilton, the dominance of citizens over the state, and Schmitt, protection of the state at any cost. This topic is not only relevant to the study of the American Presidency but also the state of democracy in America. My qualitative analyses of these works will help add to the discussion of why a leader can do what he does and the power limits set in place be it time constraints, checks/balances, etc. By analyzing what others have said, I hope to gain a grasp on the wealth of information concerning this subject and formulate my own argument towards the president's use of prerogative power.

In summary, I have found out certain points to compare the four theorists in a sense that will connect them to answering my initial question. Machiavelli supports a republican government that has the tools set in place to protect the state in a crisis. Although this most certainly refers to a militaristic invasion of some sort, I am implying that it can be broadened to any sort of political crisis that threatens national security. For this purpose, I can apply it to the three case studies, all of which have some threat at the forefront of the policy decisions made by the significant presidents. Machiavelli believes the citizens should place the state first and that they should accept any policy decisions made by the leader in order to ensure their own security. Locke is significant in that any prerogative decisions made are automatically in the best interest of the people, or else they are not actually prerogatives. If any president is thought to be restricting citizens' rights for anything other than protection of their natural rights, then the

decision is no longer prerogative but despotic. For this reason, I can use his opinion to analyze the motives for each presidential decision and determine whether or not they were actually prerogatives. Hamilton supports the use of prerogative as it applies to the Constitution which his papers helped to gain support for. Each of the thirteen colonies, and the various states inducted afterwards, follow the U.S. Constitution as federal law. Because of this, I can include his view in determining how the decisions were made inside the constitutional boundaries. If the boundaries are broken, then the decision is illegitimate, therefore there must be citation from the Constitution to justify each action. Schmitt applies a more radical flair to the mix under the context that the Constitution will be suspended in times of war in favor of a new system that will bring about his prized fascist system. However, despite these radical end terms, Schmitt makes an argument that the people should put the state first and that the executive needs unconditional power to protect the state in times of crisis. This comes about because the sovereign of the nation, the U.S. government, determines friend-enemy relationships, and the executive must act in order to protect the state from the enemies. Through this view of Schmitt, it is possible to make the assumption that each decision was made by the president who viewed the Confederacy, Communists, and terrorist organizations as enemies of the state at their respective time periods. Each leader will certainly lean towards one theorist or another, and that will be noted, but the overarching similarity is that all four believe in the president's role to overstep civil liberties in times of crisis to protect the state. Without the state, there is no "people," and thus, no group for the executive to serve.

On another note, I hope to expand the gap left by the theorists in the aftermath of war. At what point should the leader give back his emergency powers when everything is said and done? If Schmitt argues that the Constitution is automatically suspended in times of crisis, what entity

is there to bring back its legitimacy? I ask this question most directly of Schmitt because his views open the door for the question. Machiavelli would argue that a leader can do whatever he wants whenever he wants if he feels it is in the best nature of security; this can occur in times of war or peace. Locke would argue that it is in the president's prerogative to keep power as long as he needs and that the people should assume he is doing the right thing because they have placed their faith in him. Hamilton would argue that the president's exceptions to the Constitution in times of war are not so big at all and would have little consequence because there are so many forces in place to check his power. Schmitt would view the leader as needing to make decisions which benefit the state (less so the people).

Based on the readings of the four theorists, we assume the president has the authority to do what is necessary to protect the sovereignty of the state. After all, what government will there be to protect if a situation arises where he is constrained by the limits of his own office? However, the legitimacy of prerogative is still debated as presidents throughout American history have pushed the envelope based on the circumstances of their term. What defines legitimacy when the rights of the governed are subject to be removed? Can the people effectively offer up any given right to be suspended for the purpose of their own security? To answer these questions, I am analyzing the case studies presented and the historiography which outlines the individual struggles to ensure security. The use of my linear range to visualize the discussion will also continue where we left off in Chapter 2, following the placement from left-to-right of Locke, Hamilton, Machiavelli, and Schmitt, to include the following case studies. This helps to clarify my findings as well as provide a model to set my conclusion later on.

Suspension of *Habeas Corpus*, 1861-1863

Article I, section 9, clause 2 of the United States Constitution proclaims 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.” It does not state who in the government has this power, but simply the limits in place to prevent its abuse. Following the attack on Fort Sumter, President Lincoln was able to see the Rebel flag flying across the Potomac River in Alexandria, VA.⁶² Riots erupted in Baltimore following the fall of the outpost by Confederate sympathizers on April 19 in an attempt to stop Union troops from reaching Washington to defend the city.⁶³ On April 22, a Baltimore committee requested that the President recognize southern independence as a peace offering.⁶⁴

This fear for public safety in 1861 reached a breaking point when the Maryland Legislature called for a special session, which the federal government believed to be an attempt at secession.⁶⁵ A special session of Congress had already been called for July 4 in response to the attack on Fort Sumter but this was too much time considering the geographic clutch Washington was in.⁶⁶ At the urging of Salmon Chase, Secretary of the Treasury, Lincoln instituted two suspensions of the writ to be carried out by General Winfield Scott; one from Philadelphia to Washington and the other from Key West to Santa Rosa in the Caribbean.^{67,68} Questions in Congress immediately arose due to the tyrannical nature of the order. No president had ever attempted to access the clause of the Constitution which allowed for suspension of a

62 Ronald C. White Jr., *A. Lincoln: A Biography*. (New York: Random House, 2009), 411.

63 *Ibid.*

64 *Ibid.*, 414.

65 George Sellery, *Lincoln's Suspension of Habeas Corpus as Viewed by Congress*. (Madison: Bulletin of the U. of Wisconsin, 1907), 221.

66 Brian R. Dirck, *Lincoln and the Constitution*. (Carbondale: Southern Illinois U. Press, 2012), 75.

67 *Ibid.*, 74.

68 Sellery, *Lincoln's Suspension*, 219-220.

citizen's most basic rights. Did the president have the authority to break his oath like this? In this case, the laws he was bound to were being resisted so Lincoln was forced to make the choice to uphold one law for the sake of the country, as opposed to upholding every other law and letting the government fall.⁶⁹

The American President, upon entering office, is required to take an oath swearing allegiance to the Constitution as well as his intention to "preserve, protect, and defend" it to the best of his ability. President Abraham Lincoln, in 1861, felt this could only be done by restricting the privilege of the writ of *habeas corpus*. The issue at hand for those in doubt of his authority to do this stems from the source of the authority. The Constitution not only does not name who has the power to suspend the privilege of the writ, but does not even appear in the article which outlines the powers of the executive branch. Suspension of the writ appears in the last section of the article defining the powers of the legislative branch which suggests that Congress would hold the authority as opposed to the president. However, because it is not listed in the duties of the legislature, Lincoln's claim to the authority can be discussed.

Initial questioning to the legality of Lincoln's orders arises not from whether they should have happened, but whether or not the president had the authority to do it.⁷⁰ Public opinion was sharply divided on the issue with much debate in the North over support of the suspension.⁷¹ One of the major cases from this era was that of *Ex parte Merryman*, where John Merryman, a Marylander, was charged with drilling troops to aid the rebel cause and held without the writ of *habeas corpus*.⁷² Merryman attempted to get a lawyer and was assisted by Chief Justice Roger

69 Sellery, *Lincoln's Suspension*, 221-222.

70 *Ibid.*, 228.

71 Dirck, *Lincoln and Constitution*, 77-78.

72 *Ex parte Merryman*, 17 F. Cas. 144 (1861).

Taney who sent a federal marshal to collect him from Fort McHenry prison.⁷³ The marshal was refused and the commanding officer who was requested in court did not appear under orders of the president. Taney issued a scathing ruling of Lincoln's use of prerogative which warned of the potential for presidential imperialism.⁷⁴ This was ignored by the president, and on July 4 he spoke before Congress to justify his actions.⁷⁵ At this point, Lincoln gave the speech where he asks, "are all laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?" in an attempt to draw Congress in and rid any suspicion of imperialism. Furthermore, he asks for legislation that might justify his actions in the eyes of Congress.⁷⁶

Congress is a collection of representatives of the people, and they feel that they should be the group to initiate desperate orders such as these. However, because of the bureaucracy involved with passing bills into laws, it took the expedience of a presidential order to carry out the actions needed to ensure national security. Congress from 1861-1863 was noted for their abundance of inaction, needing a special session and almost two full sessions before they passed the Habeas Corpus Act of 1863 on March 3rd.⁷⁷ The quick action of President Lincoln allowed for the Union Army to stop the special session of the Maryland legislature from potentially seceding and thus cutting off Washington from the North. The resulting catch-22 led Congress to end their prolonged inaction in passing the Habeas Corpus Act as they felt there was no sense in debating the orders two years after they had been in effect.

73 William C. Harris, *Lincoln and the Border States: Preserving the Union*. (Lawrence: U. Press of Kansas, 2011), 59.

74 Dirck, *Lincoln and Constitution*, 417.

75 Harris, *Border States*, 61.

76 Abraham Lincoln, "Message to Congress in Special Session," in *The Writings of Abraham Lincoln*, ed. Steven B. Smith (New Haven: Yale U. Press, 2012), 340.

77 Sellery, *Lincoln's Suspension*, 246.

The legitimacy of Lincoln's suspension of the writ is affirmed by the passing of the Habeas Corpus Act of 1863. It is the law passed by Congress which grants the president, as well as Congress, the power to suspend the writ of habeas corpus, thus clarifying the passage in the Constitution.⁷⁸ It is important to note that the suspension was used sparingly during the war and that there were very few imprisoned who were wrongfully accused.⁷⁹ However, Lincoln suspended this valued privilege because it fit the criteria for suspension in the Constitution: that there was a rebellion and the public safety required it. Because it was Congress who verified this power of the president, it is made legitimate because Congress is, in effect, representing American citizens in affirming the authority. Although it is admitted that Congress would rather be the body to suspend the act, they needed to include the president in order to verify his previous actions which worked successfully in preserving the state.⁸⁰

Communist Witch Hunt, 1947

Article II, section 1, clause 1 of the U.S. Constitution declares that "the executive Power shall be vested in a President of the United States of America." Article II, section 3, clause 5 states that one of the President's duties is that "he shall take Care that the Laws be faithfully executed," to which he swears an oath. This forms the basis of a presidential argument to the existence of executive orders, the unwritten executive power of the president to bypass Congress in order to enact policy. Unless found to be creating new law as opposed to clarifying or furthering a previous law, these executive orders allow for a significant amount of prerogative power granted to an individual. It is this form of power that President Harry S. Truman

78 Sellery, *Lincoln's Suspension*, 265.

79 Lincoln, *Message to Congress*, 340.

80 Sellery, *Lincoln's Suspension*, 258.

harnessed upon signing Executive Order 9835, establishing a Temporary Commission on Employee Loyalty as well as a spark for the incoming chaos that Congress would bring.

Following World War II (WWII), the Truman Administration was taking great care in deciding how the United States foreign policy with the Soviet Union would work. The U.S. ended lend-lease aid to the USSR, an early sign that Truman would not take kindly to the Communist state.⁸¹ President Truman's disdain for Russia actually originates before the peace treaties, following a war plan that involved helping either Germany or the USSR, depending on which side was more successful at the time.⁸² Some of the issues between the two superpowers were disputes over Eastern Europe, post-war Japan, the United Nations, control of atomic weapons, the future of China, reparations, and the future of Germany, thus forming a foreign policy nightmare for the now peaceful nations. The United States had just won a second world war and their status as the most powerful nation in the world was unquestioned, especially considering the immense casualties facing the young Communist state. Despite this, President Truman insisted that the Soviet Union was a nation too young to know how to behave, and the only way to maintain national security was to issue a tough foreign policy stance.⁸³ Compromise would be viewed as weakness, he argued, a position the greatest nation the world had ever seen would not take under any circumstance. The USSR was viewed as a foe that threatened the very core of the United States government.⁸⁴

On the basis that the Soviet Union had not fulfilled their promises made at the Yalta conferences, Truman began moving towards a tougher anti-communist stance propelled by his

81 Richard J. Walton, *Henry Wallace, Harry Truman, and the Cold War* (New York: The Viking Press, 1976),

39.

82 *Ibid.*, 41.

83 *Ibid.*, 42.

84 Walton, *Henry Wallace*, 43.

new State Department adviser, W. Averell Harriman.⁸⁵ Although little evidence suggested Russia was in the wrong, the U.S. viewed Soviet acquisition of pro-Moscow Lublin, Poland as a violation.⁸⁶ Evaluating the Soviet threat is important in analyzing what would become the historical stain of McCarthyism because of how avoidable it might have been. President Roosevelt had expected a long post-war transition period in which there would be areas of Eastern influence left in Europe; an analysis he did not inform his Vice-President of previous to his death.⁸⁷ Roosevelt was not only better at dealing with the Soviets personally, but he also refused to let cultural differences get in the way of progress. President Truman had to fill in the void left by the great leader's death, and thus prepared for a stringent Soviet foreign policy program. Following the detonation of "Little Boy" on August 6, 1945 in Hiroshima, Josef Stalin ordered a crash program in atomic research to set the stage for the greatest struggle the world had ever seen.⁸⁸

On top of foreign threats, there was much pressure from other new conservative advisers replacing FDR's cabinet as well as the Catholic Church which advocated a strong anti-communism program. In order to prevent an expanding Russia from achieving world dominance, the President would have to take action in defending the United States from an invasion on home soil. On March 21, 1947, following mounting pressure from J. Edgar Hoover, Director of the Federal Bureau of Investigation, and Tom Clark, United States Attorney General, Truman accepted the recommendation by the House Committee on Un-American Activities (HCOUA) in creating the Temporary Commission on Employee Loyalty and signed Executive

85 Walton, *Henry Wallace*, 45-46.

86 Frank Costigliola, *Roosevelt's Lost Alliance: How Personal Politics Helped Start the Cold War* (Princeton: Princeton U. Press, 2012), 320.

87 *Ibid.*, 316.

88 *Ibid.*, 366.

Order 9835.⁸⁹ The order established loyalty boards for any person entering employment in the executive branch and left responsibility of forming the boards to each individual department. This action seemed to please anti-communists at the time, but the President would soon find out that his order had armed Congress with the tools to assault the First Amendment rights of anyone suspected of associating with Communism. On June 23, 10 federal employees were the first to be charged and dismissed for being Communists without due process.⁹⁰

Executive Order 9835 did more to expand the influence of the HCOUA and the FBI than it did the executive branch. Hoover began developing lists of people and organizations that could be considered not-loyal, based on the definition of loyalty Truman provided in the Executive Order.⁹¹ Truman, despite not being overly supportive of the invasive proceedings, concurred with the FBI due to his need for public support to establish his foreign aid program.⁹² Hoover would later use the loyalty board precedent to expand the proceedings in deportation drives based on the narrow loyalty definition that made 91% of the people on his suspect lists vulnerable.⁹³ Truman's lack of strength in positioning on the Communist issue left room for the Republicans to obstruct civil liberties on a bipartisan basis.⁹⁴

In 1949, Republicans pledged to overhaul the loyalty boards in an attempt to make them much tougher on suspected Communists.⁹⁵ Senator Joseph McCarthy declared in a speech less than a week later that he had a list of names containing federal workers suspected of Communism, a charge that would ignite the firestorm. Truman was facing pressure at this time

89 Larry Ceplair, *Anti-Communism in Twentieth Century America* (Santa Barbara: Praeger, 2011), 86.

90 Richard M. Freeland, *The Truman Doctrine and the Origins of McCarthyism: Foreign Policy, Domestic Politics, and Internal Security 1946-1948* (New York: New York U. Press, 1985), 204.

91 *Ibid.*, 208.

92 *Ibid.*, 206.

93 *Ibid.*, 218.

94 Richard H. Rovere, "McCarthyism as a Bipartisan Doctrine," in *McCarthyism*, ed. Thomas C. Reeves (Malabar: Krieger Publishing Company, 1989), 84.

95 Ceplair, *Anti-Communism*, 92.

from the public to increase the anti-Communist activities of the executive although this did not stir him.⁹⁶ Legislation such as the Internal Security Act, which required every communist-action or communist-front to register with the Attorney General, and the McCarran-Walter Act, which allowed the executive branch to deport any immigrants or naturalized citizens accused of Communism, were vetoed by a regretful President Truman who saw his failure only increase as both pieces were overridden in Congress.⁹⁷

Truman's desire to protect the nation without "unduly" limiting individual freedoms could not hold against the system in place.⁹⁸ Fear of Communism would allow Congress to hold American citizens hostage of their civil rights until the Supreme Court ruled against the HCOUA in favor of a witness refusing to answer questions about Communism in *Barenblatt v. United States* (1959).⁹⁹ It is fair to argue that President Truman did not intend to have the loyalty boards go this far, as is evident in his grave disapproval of Senator Joseph McCarthy's witch hunts, but it is also fair to say that Executive Order 9835 created a snowball effect that allowed congressional committees to expand on the power to infiltrate the government, and soon to be country, of Communists.¹⁰⁰ McCarthy's wealth of public support for anti-Communist proceedings fueled his seeming takeover of the U.S. Government and any person or organization he felt resembled Communist ideals.¹⁰¹

96 Harry S. Truman, "Letter to Philip Graham," in *Strictly Personal and Confidential: The Letters Harry Truman Never Mailed*, ed. Monte M. Poen (Boston: Little, Brown and Company, 1982), 21.

97 Ceplair, *Anti-Communism*, 98.

98 Athan Theoharis, "Truman and the Red Scare," in *McCarthyism*, ed. Thomas C. Reeves (Malabar: Krieger Publishing Company, 1989), 72.

99 *Barenblatt v. United States*, 360 U.S. 109 (1959).

100 Harry S. Truman, "Letter to Joseph McCarthy," in *Strictly Personal and Confidential: The Letters Harry Truman Never Mailed*, ed. Monte M. Poen (Boston: Little, Brown and Company, 1982), 115.

101 William T. Walker, *McCarthyism and the Red Scare: A Reference Guide* (Santa Barbara: ABC-CLIO, 2011), 53.

One of the most influential cases of the McCarthyism era serves to represent the full scale of hysteria involved in national security. The trials and executions of Julius and Ethel Rosenberg for the alleged stealing and selling of atomic bomb secrets to the Soviet Union showed how dangerous flirting with Communism could be at this time.¹⁰² The lunacy of the trial which took place could be seen most clearly in the evidence against them. Without any credible witnesses or solid, concurring stories, the prosecution used the transfer of a Jell-O box to the Soviet informant as reason to convict the Rosenbergs of espionage.¹⁰³ Despite being given an opportunity to recant and call on all Jews to “get out of the communist movement and seek to destroy it,” the Rosenbergs stood to their beliefs and were the only citizens given the death penalty as a direct result of McCarthyism.¹⁰⁴

The question of legitimacy in Harry Truman’s Executive Order 9835 does not lie within the Constitutional passages concerning his prerogative power. Again, this question of constitutionality falls to Congress in whether or not it is legitimate, because they are the federal representation of the American people from which consent must be derived. Not only did Congress support the executive order, they used it to increase their own power in ridding the country of Communists. Even Truman’s attempts to backtrack the events taking place and veto legislation that intended to further violate human rights failed as both the Senate and the House of Representatives overturned the ruling with a two-thirds vote.¹⁰⁵ Express support of Congress makes Executive Order 9835 more than legitimate, despite the overwhelming violation of

102 *Rosenberg Et. Al. v. United States*, 346 U.S. 273 (1953).

103 Marjorie Garber, “Jell-O,” in *Secret Agents: The Rosenberg Case, McCarthyism, and Fifties America*, ed. Marjorie Garber and Rebecca L. Walkowitz (New York: Routledge, 1995), 12.

104 Blanche Wiesen Cook, “The Rosenbergs and the Crimes of a Century,” in *Secret Agents: The Rosenberg Case, McCarthyism, and Fifties America*, ed. Marjorie Garber and Rebecca L. Walkowitz (New York: Routledge, 1995), 25.

105 Ceplair, *Anti-Communism*, 97-98.

citizens' most basic rights. Executive Order 9835 may have been a reasonable response to the Communist threat perceived at the time. However, this does not justify the legal atrocities which took place over the next decade.

Rights to Due Process After the 9/11 Attacks, 2001

Article II, section 1, clause 8 of the Constitution marks the oath of office of the President of the United States stating, "I do solemnly swear that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States." The President is the only member of the federal government required to take this oath to carry out the laws of the land and uphold them to the best of his ability, whatever limit that may be. In times of a national security crisis, it is up to the President to choose which limits of the law he is willing to overstep, and whose rights he is prepared to suspend. History shows that Congress, in a time of emergency, will throw support behind the President in order to ensure that the state's sovereignty be maintained to the fullest degree. Because of this, legislation such as the USA PATRIOT Act is passed, granting power to violate First Amendment rights of anyone the government deems potentially dangerous.

The terrorist leader, Osama bin Laden, was an enemy of the United States years before the 9/11 tragedy. As the founder of al Qaeda, bin Laden has used Islam to fuel the ideology of Muslim fundamentalism into diabolical attacks on innocent people as well as western ideology. On August 23, 1996, he made a formal declaration of *jihad*, or holy war, against the United States, and has been responsible for the deaths of thousands of Americans since then.¹⁰⁶ Almost two years later, on August 7, 1998, the American embassies in Kenya and Tanzania were simultaneously attacked within minutes of each other by al Qaeda terrorists in what bin Laden

¹⁰⁶ Stephen F. Knott, *Rush to Judgment: George W. Bush, the War on Terror, and His Critics* (Lawrence: U. Press of Kansas, 2012), 94.

considered an attempted “Hiroshima” for the United States.¹⁰⁷ Retaliation by the Clinton Administration resulted in a cruise missile assault on various suspected al Qaeda camps but did not advance beyond that stage as the assaults were considered “too aggressive” at the time.¹⁰⁸ Public opinion was not in favor of stopping Osama bin Laden at the time despite his continuing declarations of hostility towards the United States. The issue was left for the Bush Administration to deal with, in the hopes that al Qaeda would not possess the strength for more deadly attacks.

The tragedy of September 11, 2001 is not one to be taken lightly, especially considering the enduring threat of terrorism from all nationalities, religions, races, creeds, and cultures. It is, to this day, the most horrific and deadly attack ever implemented on the continental United States by an outside force. National security on 9/11 was violated in a way that had never been seen before, causing both panic and fear among the American population. On September 14, 2001, President George W. Bush made a speech enacting the “war on terrorism,” a fight against any tactics used to promote the sort of fear and chaos used on 9/11, which spawned the creation of several pieces of legislation to promote national security.¹⁰⁹ The USA PATRIOT Act gave the federal government surveillance powers to monitor American citizens in the quest to stop terrorism from within U.S. borders. Stopping short of making terrorist group membership illegal, the law brought about the use of immigration law as antiterrorism law to detain thousands of non-citizens.¹¹⁰ The act passed through Congress with little to no opposition as the executive branch consolidated an immense level of power to conduct surveillance on phones, internet

107 *Ibid*, 95.

108 *Ibid*.

109 *Ibid.*, 113.

110 Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge: Cambridge U. Press, 2011), 161.

browsing history, and other forms of communication.¹¹¹ In *Hamdi v. Rumsfeld*, the President actually used an executive order to label an American citizen as an “enemy combatant” in an attempt to hold him in Guantanamo Bay without rights.¹¹² Some would argue that because there have been no major terrorist attacks on American soil since 9/11; the USA PATRIOT Act has been a success. However, I am arguing that the handling of power by the Bush Administration, with respect to detainees at Guantanamo Bay, was a severe violation of constitutional rights.

Thomas Poole’s article discusses the violation of habeas corpus rights during the Bush Administration, and the overturning of this prerogative power by judicial review. As discussed earlier, in the Dirck article, Lincoln used the suspension of *habeas corpus* as a way to stabilize national security when the public faced a geographically, and politically relevant threat. President George W. Bush followed this approach after the 9/11 attacks, when he overstepped his authority to detain suspected terrorists without due process. Fletcher and Stover make the point that “in the first years of operation, detainees had virtually no means to convince U.S. authorities they were wrongfully imprisoned and were not among “the worst of the worst.”¹¹³ One suspect, Yaser Hamdi, who was also an American citizen, was detained as a suspected terrorist without any of the rights granted to a citizen.¹¹⁴ The prerogative in this case was used to treat an American citizen as any other international criminal, under authority granted to the president by the USA PATRIOT Act. This sparked paranoia and fear, one of the earlier themes, among the American people, who had never considered being treated legally as a terrorist despite

111 Knott, *Rush to Judgment*, 69.

112 Justin J. Wert, *Habeas Corpus in America: The Politics of Individual Rights* (Lawrence: U. Press of Kansas, 2011), 203; *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

¹¹³ Laurel E. Fletcher and Eric Stover, *The Guantanamo Effect: Exposing the Consequences of U.S. Detention and Interrogation Practices* (Berkeley: U. of California Press, 2009), 84.

114 Thomas Poole, “Judicial Review at the Margins: Law, Power, and Prerogative.” *University of Toronto Law Journal* 60, no. 1 (2010): 84.

having American citizenship. Bush follows the precedent set by Lincoln to suspend *habeas corpus*, albeit, in a closed-door, secretive manner. This time, the power went unnoticed by Congress, and did not begin the process to resolution until the Supreme Court “ruled in *Rasul v. Bush* that detainees in Guantanamo should have access to U.S. courts to contest the legal basis for their detention.”¹¹⁵ One theme of Poole’s article, however, is the tendency for leaders to push new laws in order to get around judicial review cases that have outlawed previous prerogative powers.¹¹⁶ Judges throughout modern history have deemed themselves not wise enough to mark the line of prerogative and tyrannical power, so they are left to discover this on a case-by-case basis.¹¹⁷ However, high courts today are much more reluctant to take on cases dealing with prerogative, because of the underlying interest and specialty in national security they feel the president has in his decisions.¹¹⁸ Even when the courts take on cases dealing with national security prerogatives, the effect is minimal, unless Congress enacts legislation to reflect the Court’s ruling. The judicial branch has no power to enforce the Constitution. They must rely on Congress, the representative political body of America, to enact legislation which will honor the ruling.

Throughout American history, presidents have used the Constitution and the Oath of Office as a means to defend controversial decisions on the basis of carrying out the laws. Supreme Court cases such as, *In re Neagle* (1890), have defended the notion that going outside of the law is sometimes necessary to protect the sanctity of the law, as in the case of the Attorney General promoting David Neagle as a bodyguard for a federal judge despite not having the

¹¹⁵ Fletcher and Stover, *Guantanamo*, 85.

¹¹⁶ Poole, *Review at Margins*, 93.

¹¹⁷ *Ibid.*, 100.

¹¹⁸ *Ibid.*, 103.

constitutional authority to do so.¹¹⁹ Carrying out the law is the foundation of the Office of the President and thus takes center-stage importance when concerning national security. This is not to say that anything goes however. The President rarely is able to pass decisions without the consent of Congress, as is the case with the USA PATRIOT Act. President Bush called upon Congress to unite following the 9/11 tragedy, which brought about a speedy passing of the USA PATRIOT Act by both houses to which he signed into law. Congressional approval made the act legitimate, as they are the literal representation of the people who provided for record positive approval of the President at the time. Congress would eventually alter the USA PATRIOT Act to decrease the power given to the executive, but this is an example of the President making a controversial, yet legitimate, decision for national security purposes in a time of crisis.¹²⁰

Viewing Case Studies through the Framework

After analyzing the case studies it is clear that all of them were done based on a considered threat to national security. The presidents all had a strong reason to make their decisions and so far the country has not been destroyed because of them. In relation to the maintenance of the state, each leader ensured survival of the union. However, I must now compare their decisions to the framework set by the theorists and decide where each decision lies in relation to each. Some of the less constitutionally sound decisions will be separated from those perceived to be absolutely necessary for maintenance of the state. All of the decisions are legitimate, but here I will analyze which were good decisions in relation to the theory.

Abraham Lincoln's decision to suspend the privilege of the writ of *habeas corpus* certainly violated what many citizens would consider a right they are guaranteed by the

119 *In re Neagle*, 135 U.S. 1 (1890).

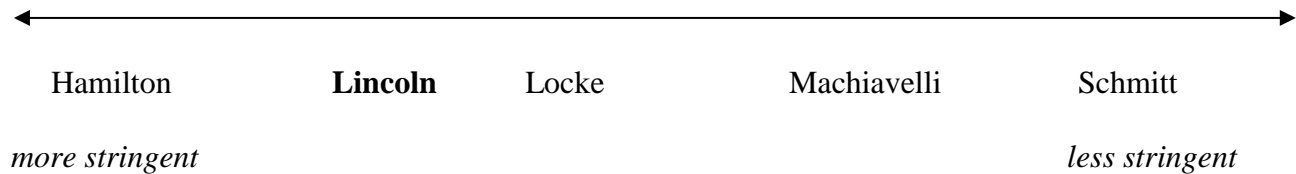
120 Jack Goldsmith, *Power and Constraint: The Accountable Presidency after 9/11* (New York: W. W. Norton & Company, 2012), 38.

Constitution. As Machiavellian as it may seem, I have found Lincoln to most closely resemble Locke in this situation. My reasoning follows that Lincoln had a pure and genuine threat at the doorstep of the Union, and he truly did what he felt was best for the nation. Doing nothing results in the invasion of Washington because of the geographical advantage the Confederacy had through support in Maryland. Not only did Lincoln approve of this measure, but Congress fully supported him in the sense that they agreed it was necessary to suspend the writ. The only problems ensuing had to do with whether or not he could legally do it. Because of the questioning by Congress and underlying pure intentions, Lincoln's decision can be declared a prerogative in the Lockean sense. Not only was the suspension for the good of the people, but Lincoln literally followed the Constitution word for word under the circumstances required before he could make such a decision. The privilege of the writ was not suspended except in case of rebellion or invasion where the public safety did require it. The issue marking this as a prerogative merely applied to the Constitution's lack of naming the official who can make the suspension, which Congress established in 1863. Lincoln's decision is certainly one that Locke would approve of.

In terms of placing Lincoln on the linear range, I find that Lincoln should be to the right of Hamilton, simply because there is no precedent set by an American figure at this point in preserving the security of the Union and its citizens during a Civil War. Hamilton did not calculate a Civil War into his Federalist papers, and thus, gives no explanation on how it should be handled either legally or through war. However, I only place Lincoln slightly to Hamilton's right because he has other political motives. For example, Lincoln does not engage in the Civil War solely for the purpose of protecting citizens, particularly slaves. Lincoln is a free-soiler who opposes the spread of slavery rather than supporting total abolition. Because of this ideology and

various statements backing Lincoln's belief in preserving the Union at all costs, I can infer that only certain citizens' security is being protected through the use of warfare and restriction of rights. Slaves are counted as part of the population by way of the 3/5 Compromise of 1787. Abolition of slavery only came to the political forefront after the Battle of Antietam when Lincoln decides it would provide a political advantage on an international scale to abolish slavery in the South leading to the Emancipation Proclamation. This progression of priorities shows that Lincoln was not completely genuine in protecting the citizens first although he may have viewed the war as a means for an end such as the 14th Amendment abolishing slavery. Lincoln's devotion to the Union as a whole places him further to the right than if he had gone into the war with the intention of protecting all American citizens, although this brings up another discussion completely that might also include women.

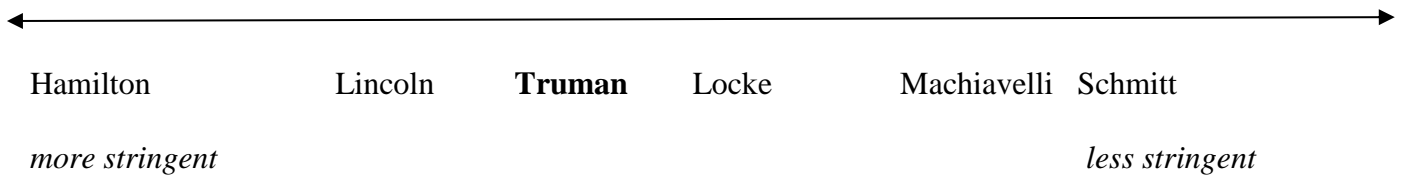
Figure E.



In the case of Harry Truman’s executive order, I find him to be legitimate in doing so, but for less pure reasons than Lincoln. Truman’s order came under intense pressure from a Congress that was eager to hunt down the deemed Communist threat and restrict any rights necessary in the process. Congress took their inch and went a mile in expanding the loyalty boards to impact all areas of the federal government. It was later extended to include public citizens and workers in Hollywood. The period of fear that followed was not one of outer prevention, but inner change. Figures such as Joseph McCarthy and J. Edgar Hoover wanted to morph the culture of America into one that outcasts Communists from all walks of life, very similar to the fascist

government set up by Adolph Hitler in Nazi Germany. In order to place Truman on the linear range, I must compare what happened with what Truman might have intended to happen, because this range is based on views and not necessarily the events themselves. Truman was heavily pressured into a position that led to Communists in America losing their rights. This pressure came from outside sources that seemed to conflict with Truman's view of the situation, thus causing him to act against his views to appease the bureaucracy. Because he acted under pressure, I feel Truman's stringency was quite high, although not quite as much as Lincoln. The decision represents what I feel is the greatest violation of rights of the cases, but the decision-making process reflects the level of stringency placed on the executive.

Figure F.



President George W. Bush's signing of the various executive orders takes a similar turn to Truman's order when comparing him to one of the four theorists. The Executive Military Orders allowed for the president to control the legal system for detained terrorists. Machiavelli argued for interrogation, a reason for which I believe George Bush can be compared to him. Despite my research showing that Bush fits into Machiavelli's framework quite specifically, I must place him closer to the right of Truman on the basis that he does not get away with imprisoning American citizens as he does with non-citizens. In *Hamdi v. Rumsfeld*, the court found that Americans declared enemy combatants must be given full legal due process before an

Is Presidential Prerogative Unlimited?

Each decision analyzed thus far has left a stamp on American history concerning what many citizens believe to be guaranteed rights. Some of these, such as the writ of *habeas corpus*, are not rights at all. The “Privilege” of the writ of *habeas corpus* is defined in Article I, but only in the sense of when it can be suspended. The power of the executive would seem to be, at least for a short period of time in any given situation, almost unlimited. However, the United States, up to the present day, has not evolved into a tyrannical dictatorship. The Presidency, despite countless periods of power consolidation throughout American history, has not become an autocratic office capable of suspending these “rights” for good. Based on other instances in world history, such as Adolf Hitler’s rise to power by constitutional means, I must assume there is a force stopping the President from reaching a führer status.

To analyze this limit to presidential power, it is first important to take note of the U.S. Constitution, which lists the President second while detailing the roles of the government. The first branch discussed is the legislative, consisting of the House of Representatives and the Senate, which is the source of protection the American people have from the President’s seemingly unlimited supply of emergency powers. Congress and the Supreme Court, in all three case studies, have stepped in to make sure the President’s decisions were legitimate and to place limits on his power. This insurance policy for the people was created by the Framers to not only establish an institution with more power than the office of the President, but to divide its power among as many individual men as possible. Because of Congress, the prerogative decisions of the past three discussed presidents were not eternal decrees (although in Truman’s case Congress expanded the monster created by the President) bound to the will of the next president.

Chapter 6: Conclusions

Throughout this study, it has been repeated several times the answer to the first question I asked. The President of the United States of America, in times of emergency or a national crisis, has considerably more power to make executive decisions in order to ensure the safety of the country. All in all, it is more important that there be a country tomorrow rather than rights today. The Constitution was written to allow the president this power to regulate the country and protect it from outside invaders. The Framers were not careless in granting the president this power however.

To answer how the president is able to do this legitimately, we must reexamine the Framers' intent while drafting the Constitution. They did not create a government that would be so focused on individual rights to let the nation die rather than hold to this promise for liberty. They did however, draft an entire article before the president is even mentioned in the Constitution. The authority of Congress vested in the House of Representatives and the Senate was created with the intent of balancing and sometimes blocking the powers of the other two branches. Because of this, Congress can be the big brother to the president in deciding how long his emergency powers should, and will, last. Congress protects the people from an imperial presidency. It is the duty of our local representatives to point out when the executive leader has held too much power for too long, and to respond accordingly. When the legislature fails to hold the president's power in check, it is the civil responsibility of the people to elect a new Congress who will perform the jobs they were chosen to do.

When discussing the quality of the decisions made according to the four theorists, I found that Abraham Lincoln's suspension of *habeas corpus* was most specifically in line with the Constitution and the principles set by Locke to benefit the people. He was careful to follow the

Constitution and only apply the suspension on citizens aiding the invaders across the Potomac River. Truman was found to be most similar to Schmitt with the lack of constitutional support for his executive order and the ensuing witch hunt that followed. McCarthy's attempt to rewrite the civil liberties of Communists represents an inherent threat to the Constitution and a *de facto* suspension of those rights protected by the First Amendment. Bush is most similar to Machiavelli in the portrayal of his suspension of rights, which were portrayed in such a way that made the president appear tyrannical. Following specific comparison of the leaders, I must pan out and look at the bigger picture defined by the framework.

The framework set up by the four theorists was ultimately correct. It applies to all three case studies and appropriately gives the executive leader authority to protect the nation in times of crisis when the elected legislature takes too long to deliberate. The purpose of Hamilton's careful description of the presidency in the *Federalist Papers* is to debunk the myth that the president will have the power of a king that he may exploit in any given crisis. This fear of monarchy is unwarranted because the chances of the American president becoming a dictator rest on a crisis which grants him an unheard of level of power, as well as the failures of 535 elected members of Congress in working to control his authority.

The decisions made by the men in the three case studies were not easy by any means. They faced both political and civil pressure that most citizens could not even imagine to make decisions that would determine the security of the world's most powerful country. These decisions were made more difficult by the fact that Congress is constantly in the way trying to slow down the process and create roadblocks to keep the president from gaining too much power. It is their duty to act this way, just as it is the president's duty to find ways around this to protect the nation. In all three studies, Congress backed the initial decision made by the

presidents in order to maintain national security. What occurred afterwards defined the role of Congress in preventing an imperial presidency. In Lincoln's case, Congress legitimized the authority of Congress and the president to suspend *habeas corpus*. Congress in Truman's era were able to fix the violation of rights caused by the executive order. Last, in Bush's situation Congress increased the visibility at Guantanamo Bay to prevent wrongful detainment.

The final linear range shows us the full scale of where each decision rests on the spectrum of radicalism. Of the three cases, two of them sit very close to the original Hamiltonian ideal of the US Constitution, both in their ability to counter a threat, as well as ensure justification through Congress or the US Supreme Court. Lincoln can be found on the left side of the grid for his optimistic handling of the American Civil War and the numerous civil rights that were granted in the long run. Bush is found slightly to the right of Hamilton because other powers stepped in to limit his tampering of citizens' rights, thus fulfilling the check on presidential prerogative power that is described in the Federalist papers. Truman's case is not particularly well suited in the long run because he personally did not push for the Second Red Scare or take part in the Communist witch hunt of the mid-20th century. However, it is his duty as President to take charge for his actions and reap the consequences. In Truman's case, Congress, specifically McCarthy Republicans, was the more radical body although he certainly holds a large share of responsibility for his executive order. Nazi Germany has showed history what impact one man can have with an incompetent president in power. Truman's decision was ultimately fixed through time, but he should be studied carefully when determining the course of events that could lead to tyranny.

Figure H.

Hamilton Lincoln Truman Locke Machiavelli Bush Schmitt

more stringent

less stringent

Overall, it is safe to say that in a modern context, the American president is not becoming a tyrant anytime soon. There are far too many institutions with more power that only have to do their jobs correctly to ensure the executive stays in line. Even when an emergency arises, Congress is there to keep the situation under control and reduce presidential power when they feel he has had it for long enough. The fear of an imperial presidency is unwarranted.

Bibliography

- Ceplair, Larry. *Anti-Communism in Twentieth-Century America*. Santa Barbara: Praeger, 2011.
- Cook, Blanche Wiesen. "The Rosenbergs and the Crimes of a Century." In *Secret Agents: The Rosenberg Case, McCarthyism, and Fifties America*, edited by Marjorie Garber and Rebecca L. Walkowitz, 23-29. New York: Routledge, 1995.
- Costigliola, Frank. *Roosevelt's Lost Alliances: How Personal Politics Helped Start the Cold War*. Princeton: Princeton U. Press, 2012.
- Dirck, Brian. "Lincoln as Commander-in-Chief." *Perspectives on Political Science* 39, no. 4 (2010): 20-27.
- Dirck, Brian R. *Lincoln and the Constitution*. Carbondale: Southern Illinois U. Press, 2012.
- Federici, Michael P. *The Political Philosophy of Alexander Hamilton*. Baltimore: The Johns Hopkins U. Press, 2012.
- Fisher, Louis. *The Constitution and 9/11: Recurring Threats to America's Freedoms*. Lawrence: U. Press of Kansas, 2008.
- Fletcher, Laurel E. and Eric Stover. *The Guantanamo Effect: Exposing the Consequences of U.S. Detention and Interrogation Practices*. Berkeley: U. of California Press, 2009.
- Foerstel, Herbert N. *The PATRIOT Act: A Documentary and Reference Guide*. Westport: Greenwood Press, 2008.
- Freeland, Richard M. *The Truman Doctrine and the Origins of McCarthyism: Foreign Policy, Domestic Politics, and Internal Security 1946-1948*. New York: New York U. Press, 1985.
- Fried, Albert. *McCarthyism, The Great American Red Scare*. New York: Oxford U. Press, 1997.

- Garber, Marjorie. "Jell-O." In *Secret Agents: The Rosenberg Case, McCarthyism, and Fifties America*, edited by Marjorie Garber and Rebecca L. Walkowitz, 11-22. New York: Routledge, 1995.
- Gienapp, William E. *Abraham Lincoln and Civil War America, a Biography*. Oxford: Oxford U. Press, 2002.
- Goldsmith, Jack. *Power and Constraint*. New York: W. W. Norton & Company, 2012.
- Hamilton, Alexander. "Federalist 67, 68, 69, and 84." In *The Federalist Papers*, edited by Clinton Rossiter. New York: Penguin Putnam Inc., 1999.
- Harris, William C. *Lincoln and the Border States: Preserving the Union*. Lawrence: U. Press of Kansas, 2011.
- Henn, Martin. *Under the Color of Law: The Bush Administration's Subversion of U.S. Constitutional and International Law in the War on Terror*. Plymouth: Lexington Books, 2011.
- Knott, Stephen F. *Rush to Judgment: George W. Bush, the War on Terror, and His Critics*. Lawrence: U. Press of Kansas, 2012.
- Lincoln, Abraham. "Message to Congress in Special Session." In *The Writings of Abraham Lincoln*, edited by Steven B. Smith, 334-347. New Haven: Yale U. Press, 2012.
- Locke, John. *The Second Treatise of Government and a Letter Concerning Toleration*. Mineola: Dover Publications Inc., 2002.
- MacDonald, Jason A. "Congressional Power Over Executive Branch Policy Making: Limitations on Bureaucratic Regulations, 1989-2009." *Presidential Studies Quarterly* 43, no. 3 (2013): 523-537.
- Machiavelli, Niccolo. *The Discourses on Livy*. Stilwell: Digireads.com Publishing, 2008.

- McCormick, John P. *Machiavellian Democracy*. Cambridge: Cambridge University Press, 2011.
- McDonald, Forrest. *Alexander Hamilton: A Biography*. New York: W. W. Norton & Company, 1979.
- Poole, Thomas. "Judicial Review at the Margins: Law, Power, and Prerogative." *University of Toronto Law Journal* 60, no. 1 (2010), 81-108.
- Rovere, Richard H. "McCarthyism as a Bipartisan Doctrine." In *McCarthyism*, edited by Thomas C. Reeves, 84-87. Malabar: Krieger Publishing Company, 1989.
- Schmitt, Carl. *The Concept of the Political*. Chicago: U. of Chicago Press, 2007.
- Sellery, George C. *Lincoln's Suspension of Habeas Corpus as Viewed by Congress*. Madison: Bulletin of the U. of Wisconsin, 1907.
- Shipler, David K. "WILL OBAMA THE CONSTITUTIONAL LAWYER PLEASE STAND UP?." *The Nation*, February 2013.
- Theoharis, Athan. "Truman and the Red Scare." In *McCarthyism*, edited by Thomas C. Reeves, 65-75. Malabar: Krieger Publishing Company, 1989.
- Tichenor, Daniel J. "Historical Set Points and Development of U.S. Presidential Emergency Power." *Perspectives on Politics* 11, no. 3 (2013): 769-788.
- Truman, Harry S. "Letters to Philip Graham and Joseph McCarthy." In *Strictly Personal and Confidential: The Letters Harry Truman Never Mailed*, edited by Monte M. Poen, 21-22 and 114-115. Boston: Little, Brown and Company, 1982.
- Walker, William T. *McCarthyism and the Red Scare: A Reference Guide*. Santa Barbara: ABC-CLIO, 2011.
- Walton, Richard J. *Henry Wallace, Harry Truman, and the Cold War*. New York: The Viking Press, 1976.

Wert, Justin J. *Habeas Corpus in America: The Politics of Individual Rights*. Lawrence: U. Press of Kansas, 2011.

White, Ronald C. Jr. *A. Lincoln: A Biography*. New York: Random House, 2009.