

Meaning versus Authority: A Defense

Extra-Constitutional Prerogative

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Introduction

An integral component of American civic culture is an unshakable belief in the maxim that no person is above the law. Acting illegally is perceived as inexcusable for a public figure, a cardinal sin for those who have asked for the trust of the American people. Yet, our civic culture has given iconic status to some leaders who did not hesitate to disregard the law in times when they believed the exigency of the moment gave them no other choice. Lincoln, in response to a bloody civil war, and Roosevelt, in response to a crippling depression and the march of a fascist empire, both asserted phenomenal degrees of executive power and acted unquestionably illegally. My goal is not to justify the emergency powers asserted by these and other leaders. Rather, I take it as an assumption, hopefully one validated by history, that in times of emergency, the executive will be required to violate both statutory and constitutional law. John Locke referred to executive claims to extralegal powers as “prerogative,” claiming that the right of the executive to act “without the prescription of the law, and sometimes even against it” is a “fundamental law of nature and government.”¹ My goal is to examine the question of whether the Lockean concept of prerogative ought to be understood as internal or external to the Constitution. Under one framework, the acts of executives who assert emergency powers are seen as consistent with the design of the American polity put forth by the Constitution's framers. An alternative framework views the same acts as a temporary suspension of the constitutional order where leaders willingly push aside the Constitution in defense of more immediate concerns. The former framework understands the Constitution to be a flexible governmental design which empowers, but never definitively restricts, state action. The latter framework understands the Constitution to resemble a legal code, which inflexibly restricts the actions of the state, in the same way statutory law restricts individual actions.

If the assertion of prerogative is both inevitable and necessary, then the dilemma between viewing prerogative as being a part of the constitutional design or as being a suspension of the Constitution becomes a conflict between having a constitution which is unquestionably authoritative but its meaning diluted, or one where its meaning remains intact, but its authority limited. In evaluating each framework, we ought to consider the risks the use executive prerogative entails, primarily the risk that practices initially understood as only acceptable under exigent

circumstances will become routine under normal circumstances. I maintain that we ought to view executive prerogative as external to the Constitution. Preserving a coherent understanding of the Constitution's meaning is more likely to minimize the risks of prerogative than clinging to the belief that the Constitution's authority can never be undermined.

The Risks of Prerogative

There are some potential circumstances where there would be little disagreement that the assertion of executive prerogative is appropriate and other circumstances where the assertion of prerogative would be universally condemned. The dilemma focuses on the question of how best to ensure that emergency powers are only claimed when they are truly necessary. There are three ways in which the assertion of prerogative can become problematic. First, an executive can assert an exceptional power claiming that the current circumstances constitute an emergency which requires ordinarily unacceptable uses of power, but in fact no real emergency exists. In this scenario, the executive recognizes the exceptional nature of what she is doing, and admits that in ordinary times her actions would be inappropriate, but either due to poor judgment or political ambition, overstates that exigent nature of the supposed emergency. This risk of this sort of assertion of prerogative is greatest when the executive is anticipating a future emergency, and claiming power in order to preempt the realization of the emergency. President Bush's claims to the possibility of global catastrophe if the United States did not intervene in Iraq and President Obama's claim to the possibility of a sustained depression if a massive stimulus bill was not passed are both examples of executives anticipating future emergencies. While the powers claimed in these particular circumstances may or may not have been appropriate, the point is that if the emergency is yet to be realized there is a heightened risk that the claim to emergency is inaccurate or overstated.

The second possible risk entailed by the assertion of prerogative is the possibility of a permanent state of emergency. Like the first risk, this entails the construction of a threat where none exists, but it differs in that the executive no longer recognizes that the emergency is limited to a particular moment in time. The executive constructs a threat that has no temporal limitations and as a consequence claims access to exceptional powers for an indefinite period. Slavoj Žižek explains this threat:

Every power structure has to rely on an underlying implicit threat, i.e. whatever the official democratic rules and legal constraints may be, we can ultimately do *whatever we want* to you. In the 20th century, however, the nature of this link between power and the invisible threat that sustains it changed...It became the invisible (and, for that reason, all-powerful and omni-present) threat of this enemy that legitimized the existing power structure's permanent state of emergency. Fascists invoked the threat of the Jewish conspiracy, Stalinists the threat

of the class enemy, Americans the threat of Communism-all the way up to today's "war on terror"...the omni-present *invisible* threat of Terror legitimizes the all too *visible* protective measures of defense-which, of course, are what pose the *true* threat to democracy and human rights.ⁱⁱ

Zizek's argument is that when the nature of the purported emergency is amorphous and intangible then it becomes impossible to know when the emergency comes to an end, allowing for the emergency to become permanent. In the same way that claims to emergency powers based on an anticipated, future emergency entail the risk that the emergency will be overstated, claims to emergency powers based on an "invisible threat" entail the risk that emergency will be overextended.

The final risk of prerogative differs from the first and second in that it is not defined by an inappropriate or overly expansive claim to emergency, but rather by the risk that powers which were originally intended only to be asserted in times of emergency become routine. This routinization of emergency powers and the creation of a permanent state of emergency coincide in that they both allow the perpetual assertion of power intended only for extraordinary circumstances. They differ in that the routinization of emergency powers does not require that the executive sustain an ostensible claim to the existence of an emergency. Society is not living in a constant state of fear. Rather, the assertion of emergency powers continues after the emergency subsides. The risk is that when a precedent is set that an assertion of power is acceptable, that precedent will be applied to justify the use of that power even when there is no corresponding emergency. Exceptional powers will become disassociated from the exceptional circumstances that served as their justification and will slowly become embedded into society's understanding of the ordinary role of the executive.

Of the three risks presented, the third poses the greatest danger that prerogative will be asserted in inappropriate circumstances. The first two risks are similar in that they both require the executive to make a claim to the existence of an emergency. Accordingly, the ability of the executive to successfully assert emergency powers is proportional the plausibility of his or her claim to emergency. As society begins to doubt the existence of the emergency, then the ability of the executive to assert emergency powers will fade. But if the legitimate use of prerogative powers during a real emergency allows those powers to become routine, then future executives will be able to assert those powers without being required to make a plausible claim to the existence of an emergency. Thus, the most severe risk entailed by the assertion of prerogative is not that an executive will construct an artificial emergency, but that powers originally intended for states of emergency will creep into states of normality.

All three of these risks entail violations of the rule that exceptional

powers should only be granted in exceptional circumstances. Of course, all powers granted to agents of the state are only appropriately employed in limited contexts. A police officer should not conduct a search at her whim, but rather only when there is probable cause. A municipal government should not condemn land unless it is to be put to a public use. These, and all other ordinary powers granted to the state, are easily regulated through the law. Legal parameters are established which dictate when it is appropriate to assert a power and when it is not. Limiting the assertion of prerogative only to the appropriate circumstances is more difficult. Because prerogative entails acting contrary to the law, attempting to directly limit its use through the law is a futile, possibly paradoxical, quest. If we want to limit the circumstances under which the executive can suspend the law, we have to employ tools other than the law. The way in which executive prerogative is understood, as either internal or external to the Constitution, is relevant to the project of ensuring that prerogative is only claimed in appropriate contexts. The focus of the remainder of the paper will be to compare these two ways of conceptualizing the relationship between prerogative and the Constitution and to evaluate them by assessing which is least likely to facilitate the routinization of emergency powers.

The Madisonian Perspective

In *Federalist #41*, James Madison writes:

If a federal Constitution could chain the ambition or set bounds to the exertions of all other nations, then indeed might it prudently chain the discretion of its own government, and set bounds to the exertions for its own safety. How could a readiness for war in time of peace be safely prohibited, unless we could prohibit, in like manner, the preparations and establishments of every hostile nation? The means of security can only be regulated by the means and the danger of attack. They will, in fact, be ever determined by these rules, and by no others. It is in vain to oppose Constitutional barriers to the impulse of self-preservation. It is worse than in vain; because it plants in the Constitution itself necessary usurpations of power, every precedent of which is a germ of unnecessary and multiplied repetitions.ⁱⁱⁱ

Madison believes that in order to prevent the erosion of the Constitution's authoritative power, we must see in it the flexibility necessary to allow for self-preservation and the threats posed by enemy states whose means know no bounds. Madison's concern, shared by many, is that if we don't view constitutional constraints as flexible, then we are forced to concede that leaders will usurp authority from the Constitution, act outside its bounds, and set precedents which will be applied even when the polity's preservation is not at risk. This view requires seeing the Constitution as something more malleable and less rigid than a legal code, but it is not motivated by disrespect for law. Abraham Lincoln explains this by arguing that an oath to execute the law can in fact be an oath to violate the law:

...the attention of the country has been called to the proposition that one who is sworn to “take care that the laws be faithfully executed,” should not himself violate them...The whole of the laws which were required to be faithfully executed, were being resisted, and failing of execution...Must they be allowed to finally fail of execution, even had it been perfectly clear, that by the use of the means necessary to their execution, some single law, made in such extreme tenderness of the citizen’s liberty, that practically, it relieves more of the guilty, than of the innocent, should, to a very limited extent, be violated? To state the question more directly, are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated? Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?^{iv}

The Madisonian view, shared by Lincoln, sees prerogative as stemming from and in service to the law. The executive must act as necessary where the will of the law is silent, or sometimes even against its clear will, in order to ensure the preservation of its authority.

Defenders of this perspective point to the fact that the Constitution does not just restrict power it also grants power to constitutional officeholders and gives these officeholders many tools which are helpful in responding to exceptional circumstances. Madison points to the power to declare war, to regulate a militia, and to provide armies and navies, as evidence that the Constitution is armed with the necessary tools to respond to political emergencies. Hamilton’s belief that the Presidency constitutes an “energetic executive” characterized by “decision, activity, secrecy, and dispatch”^v serves as evidence that the Framers understood the need to create a government that is adept at responding to crisis and accounted for that in its design. More recently, Harvey Mansfield points to the power the Constitution gives the executive branch and the oath the President must take to argue that prerogative ought to be viewed within the Constitution. He writes:

Yet the rule of law is not enough to run a government. Any set of standing rules is liable to encounter an emergency requiring an exception from the rule or an improvised response when no rule exists...‘Necessity knows no law’ is a maxim everyone knows and takes advantage of...In the Constitution, executive power represents necessity in the form of response to emergencies. It anticipates that events will occur or situations will arise that we cannot anticipate through our laws; it anticipates what we cannot anticipate.^{vi}

Mansfield is correct to argue that the Constitution creates and empowers an executive with the very intent of preparing for the unexpected. The Constitution anticipates the need for the state to respond to political emergencies; this is seen

not just in the powers granted to the executive, but also in the Presidential Oath, the Suspension Clause, and elsewhere. In circumstances where the President responds to an emergency by using power which is allocated to the executive then such an act is clearly internal to the Constitution. But where defenders of an internal view of prerogative err is in thinking that because the Constitution creates some tools for responding to emergencies, that it allows for every exertion of power that exceptional circumstances might require. Mansfield accurately argues that the Constitution is more than a strict legal code, but he fails to recognize that it does have many components which are characteristic of a legal code. It puts restrictions on what powers the federal government has and unequivocally dictates which branch can employ each power. While defenders of the internal perspective point to provisions of the Constitution which clearly anticipate emergency in order to argue that the Constitution ought not be read as a limitation on emergency power, the fact that the Constitution was designed with political emergencies in mind is not evidence that the Framers intended its restrictions on the exertion of executive power to be viewed as malleable. Rather, the fact that the Constitution clearly anticipates exceptional circumstances, in fact was created in the context of a political crisis, affirms the rigidity of the restrictions it imposes. As Justice Olsen wrote:

Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency, and they are not altered by emergency.^{vii}

The problem is that the Constitution's allocation of power might not always be sufficient to respond to a potential crisis. The explicit and rigid limitations on the executive's power imposed by the Constitution could paralyze the President in a state of emergency. For example, a President might need to usurp Congress's power to declare war, or Congress might need to suspend Habeas Corpus in response to something that is neither a rebellion nor an invasion. Even Mansfield admits that "any set of standing rules is liable to encounter an emergency requiring an exception from the rule," but he fails to recognize that the Constitution is itself "a set of standing rules." So defenders of an internal view of prerogative either must accept that prerogative has limitations—there are some lines which cannot be crossed—or being willing to accept a dynamic understanding of what the Constitution means. That is if Madison is correct in arguing that the Constitution cannot be understood to create "barriers to the impulse of self-preservation" then we must be willing to accept that the Constitution means different things in different circumstances, and that sometimes its true meaning conflicts with the clear dictates of its text and intentions of its framers. Defenders of the internal perspective must be willing to defend that the Constitution has no stable meaning, but rather its meaning is defined in reference to the present political environment. While, Madison audaciously states that prerogative must be viewed within the

Constitution, unless we invite usurpations of the Constitution's authority, he did not confront the fact that preserving the universality of the Constitution's authority, necessarily means diluting the integrity and coherency of its meaning.

The Jeffersonian Perspective

There is another option. If we wish to reconcile the desire for the Constitution to have a stable, coherent meaning with the necessity of prerogative, then we just have to be willing to deny the supremacy of the Constitution's authority. In other words, executive prerogative, if understood to be external to the Constitution, retains the intelligibility of the Constitution's meaning, while challenging the universality of its authority. From this perspective, prerogative is the ability of a leader to temporarily step outside the Constitutional order and operate from a state of exception. An external view of prerogative does not require that the leader suspend the Constitutional order in its entirety, but rather recognizes that any act which violates the dictates of the Constitution is illegal, regardless of circumstance or claims to necessity. Thomas Jefferson espoused such a view when he wrote:

A strict observance of the written laws is doubtless *one* of the high duties of a good citizen, but it is not *the highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means. When, in the battle of Germantown, General Washington's army was annoyed from Chew's house, he did not hesitate to plant his cannon against it, although the property of a citizen. When he besieged Yorktown, he leveled the suburbs, feeling that the laws of property must be postponed to the safety of the nation....the unwritten laws of necessity, of self-preservation, and of the public safety, control the written laws of *meum* and *tuum*.^{viii}

Jefferson, like Madison, recognizes the primacy of the duty to act on behalf of self-preservation, but unlike Madison, he views this duty as separate from the law. While Madison sees the executive's obligation to do whatever is necessary to preserve the state as a natural extension of the obligation to execute the law, Jefferson views these obligations as distinct. The law of necessity is a "higher obligation" which "control[s] the written law." This perspective leads him to ask, when pondering a hypothetical similar to the quandary he faced as to whether he should agree to purchase Louisiana without a Congressional appropriation, "Ought he, for so great an advantage to his country, to have risked himself by transcending the law and making the purchase?" Jefferson's understanding of prerogative is one of "transcending the law," which is all together separate from operating within the law.

Justice Robert Jackson affirmed the Jeffersonian understanding of

prerogative in his dissenting opinion in *Korematsu*. Jackson openly admitted that the internment camps created to detain Japanese-Americans might have been a military necessity but he insisted as a judge he had no way to make such an evaluation. Jackson could have ended there declaring that the dispute before him was not justiciable, but he went further, asserting unequivocally that the questionable policy had “no place in law under the Constitution.”^{ix} Jackson's decision recognized that necessity and constitutionality do not always align. It did not deny the potential importance of aggressive military policies but it recognized them as departures from the constitutional order. Jackson reaches this conclusion only after careful consideration of the implications of allowing claims to necessity to affect his understanding of the Constitution. He argues:

Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency...But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle...in criminal procedure...The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.

Jackson not only argues that rationalizing the Constitution to condone exceptional powers entails the risk that the use of those powers will “last longer than the military emergency,” he also believes that giving emergency powers constitutional approval leads to an expansion of the sorts of policies understood to be constitutional and ultimately to the approval of measures more abusive and less constitutional than those initially claimed. He writes:

Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. All who observe the work of courts are familiar with what Judge Cardozo described as 'the tendency of a principle to expand itself to the limit of its logic.' A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image.

This concern originates with the observation that the majority opinion in *Korematsu* cites the precedent of *Hirabayashi v. United States*, a case which sanctioned lesser forms of anti-Japanese discrimination. *Hirabayashi* explicitly warns that it is only approving the limited matters in front of the court (an imposed curfew) and should

not be read to condone any more expansive measures. Jackson rightfully notes that the fact the court used the precedent of a previous decision to answer a question that the previous opinion had explicitly claimed not to be answering as evidence of the risk involved in constitutionally condoning exceptional powers.

Meaning versus Authority

Jackson's understanding of prerogative is directly at odds with Madison's. Madison believes that the Constitution must be rationalized with claims to necessity in order to avoid derogating the Constitution's authority and setting a precedent that its dictates are not absolute. Jackson believes that the Constitution should never be rationalized with claims to necessity in order to avoid obfuscating its meaning and setting the precedent that exceptional policies are constitutionally acceptable. Both accept executive prerogative and both fear the normalization of the exception. The dispute is focused on whether preserving the coherency of our understanding of the Constitution's meaning or defending our belief in the supremacy of the Constitution's authority is more important in preventing the normalization of exceptional powers.

Here, I side with Jackson. I maintain that the Jeffersonian view of prerogative as external to the Constitution more effectively prevents the normalization of exceptional powers, and when power meant only for times of emergency does become routine, viewing prerogative as outside the Constitution better allows for criticism of the abusive executive. Justice Jackson is correct when he argues that rationalizing the Constitution to include claims of necessity leads to establishing dangerous precedents which could be used to justify similar exceptional measure even when not circumstantially justified. Jackson argues that "every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes." Jackson understands that the "generative power" of constitutionally validating a policy occurs in legal decisions where under the principles of stare decisis established precedent is the operative concept in determining a policy's constitutionality, but also in our "thinking"-- that is once an action is validated as constitutional it becomes etched into the public conscience as acceptable.

Critics might assert that precedents do not have this sort of "generative power" because the legal decisions encompass the conditions which are used to justify the expansionary interpretation of the Constitution. As long as the precedent is not just that some power is constitutionally acceptable, but rather that under some conditions defined by certain criteria the power is constitutional, then there is no concern that the precedent will be unnecessarily applied. This is problematic because it creates a needlessly complex, constantly shifting understanding of the Constitution's meaning. The clear textual meaning of the Constitution is obfuscated by exceptions and conditions which justify different interpretations. The exact parameters of what conditions justify reinterpretation are constantly expanding and detracting with the shift of political winds. Slowly, we lose the ability to understand the Constitution in any intelligible or coherent manner. This dilution of the

Constitution's meaning, which Bruce Ackerman refers to as the presence of a "legal fog," is just as likely to lead to a normalization of exceptional powers as setting a clear precedent that the exceptional power is acceptable. Ackerman explains in the context of the *Korematsu* decisions:

Roosevelt should never have allowed wartime hatreds to sweep an entire racial group into internment camps, without any individualized showing of collaboration with the enemy. But...what will the Supreme Court say if Arab Americans are herded into internment camps? Are we absolutely certain that the wartime precedent of *Korematsu* will not be extended to the war on terrorism...the legal fog is sufficiently obscure so that the president knows that sweeping emergency actions are under a cloud: the courts may well strike down his actions, but then again, they may not...Some justices denounce the president's assertion of power as flatly unconstitutional. Others write more cautiously...Maybe one or two dissent...the legal fog endures, leaving our constitutional future obscure. ^x

Justice Jackson dissented in *Korematsu* precisely to prevent creating such a fog and to avoid, as Ackerman says, "leaving our constitutional future obscure." Jackson worried that the decision in *Korematsu* would sit around "like a loaded weapon," and now, Ackerman confirms that the weapon is still loaded, and ready to be used.

If there is no clear, decipherable precedent as to what the Constitution means and no unequivocal public understanding as to what it means, the courts and any other actor involved in interpreting its meaning are likely to defer to the executive, not wanting to impede what might be a necessary policy, without unquestionable evidence that the policy is unconstitutional. This phenomenon is worsened by the fact that once exceptional powers have become the norm, the fog over our understanding of the Constitution makes it harder for the public to recognize that the assertion of prerogative has been taken too far and, thus, more difficult to criticize an abusive executive. A constitution serves as more than just the legal foundation of the state, but is also a common expression of a people's values. A constitutional text is used as a point of departure for criticism of government policies. Calling a policy "unconstitutional" is more than just a legal claim made by lawyers, it is a grievance asserted frequently by the people. Because injustices are recognized in the gap between constitutional dictates and the policies of the state, any dilution of the constitution's meaning is also a dilution of the ability of the people to criticize the state. This is illustrated by the Soviet constitution which most observers dismissed as inoperative and irrelevant. However, recent theorists have accurately recognized that critics of the Soviet government framed their criticisms in terms of the contrast between the promises of the inoperative constitution and the policies of the state. Sarah Davies explains:

The feeling that 'you are deceiving us' recurs time and time again. The deception of the people was represented as a

constant attribute of power...The much-vaunted moral precept in the new constitution, 'He who does not work shall not eat,' was treated with irony by many ordinary people, who argued on the contrary that 'he who works does not eat, and he who does not work eats.'^{xi}

Even though there was no relationship between the text of the constitution and the reality of Soviet government, the constitution lingered as a vestige of lost hopes and a reminder of broken promises. The Soviet constitution's authority was completely lost, but its meaning was intact, and it was the recollection of its meaning which illuminated Stalin's abuses of power and enabled the people to speak out. Understanding prerogative as internal to the Constitution allows a slow and subtle reshaping of the public understanding of the Constitution, such that the people might not recognize the extent to which exceptional powers have become the norm. The acceptability of the norm is reaffirmed when it is seen to be in line with the Constitution. A concept made clear by leaders who quell criticism with the claim "what I did was perfectly legal," as if legality is the only relevant basis for criticism. Under an understanding of prerogative as outside the Constitution, the potential normalization of exceptional powers comes as leaders more frequently act outside the Constitution and do so in broader ways and for longer periods of time. In this scenario, there is no shift in the way the people understand the Constitution. Even if inoperative, its meaning remains intelligible and coherent, illuminating the degree to which the policies of the state have changed. Preserving the integrity of the Constitution's meaning ensures that the grievance "this is unconstitutional" retains its potency.

Madison would likely be unhappy with this answer, feeling that it fails to seriously grasp the consequences of a society where leaders were forced to act unconstitutionally. The more frequently leaders step outside the constitutional order, the more the public will become numb to illegal actions. Outrage might be the initial reaction, but eventually people will accept the inevitability that leaders will act illegally, and the authoritative power of law will lose its force. However, this argument fails to appreciate the degree to which the rule of law is revered in American society, a concept that will not be easily eroded, and more importantly, it fails to recognize that illegal actions have consequences. An external understanding of prerogative does not necessitate advocating that executives who act from the state of exception should be acquitted of all responsibility. To the contrary, a critical component of an external understanding of prerogative is recognizing that when a leader chooses to disregard the constitutional order, she is also choosing to accept the corresponding consequences. The idea of viewing prerogative as external to the Constitution, but still holding public officials accountable when they disregard the Constitution is what Oren Gross calls "public disobedience."^{xii} Public disobedience parallels civil disobedience, in that it entails the conscious decision of a public official, rather than a civilian, to disobey the law in pursuit of a higher end. Gross writes that in truly catastrophic circumstances leaders must "consider the possibility of acting outside the legal order," while openly admitting to the "extralegal nature of such actions" and "assuming the risks involved in acting extra-

legally.” These risks entail everything from a diminished reputation and a stained legacy, to civil liability, criminal prosecution, impeachment, electoral defeat, and forced resignation. Holding leaders who act outside the constitutional order accountable creates a strong disincentive against asserting prerogative and ensures that exceptional means are only used in truly exceptional circumstances, so exceptional that the leader is willing to risk herself for the good of the nation. It provides an official and public affirmation that the act was illegal and unacceptable, diminishing any precedent that might be set condoning illegal actions.

Even if not every leader who asserts extra-constitutional prerogative is forced to face these consequences, the very threat is enough to ensure that leaders moderate their actions and only assert as much power as is absolutely necessary. Even while asserting phenomenal degrees of power in the prelude to World War II, Roosevelt was careful not to go too far, always aware of the lurking threat of impeachment. In this sense, while Roosevelt broke the law, he also paid homage to the law. For leaders such as Roosevelt, which society retroactively deems to have acted reasonably, there is no need for punishment. While an illegal act can be condemned after the fact, it can also be ratified. Gross writes, “Society retains the role of whether the actor ought to be punished and rebuked or rewarded and commended for her actions. It is then up to society as a whole, “the people” to decide how to respond ex post to such extralegal actions.” Gross’s view of public disobedience is in fact nothing more than a modern affirmation of Jefferson’s view that the leader who asserts prerogative risks “himself on the justice of the controlling powers of the Constitution, and it is his duty to incur that risk.”

Conclusion

Both the Madisonian view of internal prerogative and the Jeffersonian view of external prerogative are defended by referencing the need to ensure that polices meant only for the exception do not become the norm. The relevant question is whether diluting the coherency of the Constitution’s meaning is more likely to routinize exceptional powers than undermining the supremacy of its authority. While, both approaches entail risk, preserving the integrity of the Constitution’s meaning by understanding the assertion of prerogative to be a departure from the constitutional order prevents the establishment of dangerous precedents, provides the means for criticism of the state, and ensures that exceptional powers are only claimed in times of dire necessity.

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- i John Locke, *Second Treatise on Government*, Ch. XIV: “Of Prerogative”
ii Slavoj Zizek, *Give Iranian Nukes a Chance*, In *These Times*: August 11, 2005
iii James Madison, *The Federalist* #41
iv Abraham Lincoln, Message to Congress: July 4, 1961
v Alexander Hamilton, *The Federalist* #70
vi Harvey Mansfield, *The Law and the President: In a national emergency, who you gonna call?*, *Weekly Standard*, 01/16/2006, Volume 011, Issue 17
vii *Home Building & Loan Association v. Blaisdell* (1934)

viii *The Works of Thomas Jefferson*. Collected and edited by Paul Leicester Ford. Federal Edition. 12 vols. New York and London: G. P. Putnam's Sons, 1904--5.

ix *Korematsu v. US* (1944)

x Bruce Ackerman, *Before the Next Attack*, 2006

xi Sarah Davies, *Us against Them: Social Identities in Soviet Russia*, *Russian Review*: January, 1997

xii Oren Gross, *The Prohibition on Torture and the Limits of Law*, in *Torture: A Collection* edited by Sanford Levinson, 2004