

John Woo = director

Figure 5.2

Evolving Interpretations of the Presidents War/Emergency Powers

	Presidentialists	Constitutional/Political	Constitutionalists
Who:	John Woo	Thomas Cronin/ Michael Genovese	Harold Koh
Power:	Expansive Independent of Congress	Shared	Narrow
Primary Authority:	President	President (with Congress)	Congress
Source:	Practice / Necessity	Constitution/Politics/ Circumstances	Constitution
Desc:	Unitary Executive	Political Exec	Circumscribed Exec.
Goal:	Strength and Security in a dangerous world "Be tough"	Sound Policy in a dangerous world <i>Be tough, legal, and smart</i>	Rule of law "Chain the dog of war" <i>Be legal</i>
Model:	George W. Bush	George H.W. Bush	James Madison
Requirement:	Presidential decision/ action	Pres. Action / Cong. Approval	Cong. Decision
Ct. Case:	<i>Curtiss-Wright (1936)</i>	<i>Youngstown (1952)</i>	<i>Milligan (1866)</i>
Power is:	Inherent/Implied Article II	Inherent/Implied/Delegated Article II	Expressed Article II
Basis:	Necessity/function/ Structure	Combination	Rule of Law Constitution Will of Congress
Nutshell:	Imperial Presidency on Steroids	Presidential Leadership	President executes will of Congress

Pres = foreign policy

"Unitary Executive" Origins

The unitary executive consists of seven parts:

- 1) Executive Prerogative, based on John Locke's *Second Treatise*.
- 2) "Energy" in the Executives, grounded in Alexander Hamilton's defense of presidential authority. - 5 hour speech @ Convention
- 3) The "coordinate constitution" view of the Constitution, where the "executive power" is fused with the "Commander-in-Chief" clause.
- 4) The doctrine of "necessity," as practiced by Abraham Lincoln during the Civil War.
- 5) The "constitutional dictatorship as described by Clinton Rossiter in *Constitutional Dictatorship*. (Post WW II)
- 6) Precedent, past practices of U.S. presidents.
- 7) Supporting Court Decisions

John Locke's "Executive Prerogative"

When, if ever, is a president justified in stretching the Constitution? While the word *emergency* does not appear in the Constitution, there is some evidence to suggest that the Founders did envision the possibility of a president exercising "supraconstitutional powers" in a time of national emergency.⁴

⁴ Daniel P. Franklin, *Extraordinary Measures: The Exercise of Prerogative Powers in the United States*. Pittsburgh: University of Pittsburgh Press, 1991.



Civil Liberties and National Security

A Few Names and Cases

Alien and Sedition Acts, 1798 – 1799

Lincoln and Habeas Corpus

Chief Justice Taney in *ex parte Merryman*, 1861

Military Commissions

Justice Davis in *ex parte Milligan*, 1866

Espionage and Sedition Acts, 1917 – 1918

Holmes and the Clear and Present Danger Doctrine, 1919

Smith Act, 1940

ex parte Quirin, 1942 – German Saboteurs

Japanese-American Incarceration, 1942 –

McCarthyism

The Iraq War and the War on Terrorism

Patriot Act, 2001

Guantánamo Bay, Military Tribunals

Torture, the Geneva Convention

Extraordinary Rendition

Surveillance and Spying - Foreign Intelligence Surveillance Court (FISC), 1978

Extraordinary Secrecy

Hamdan vs Rumsfeld, 2006 →

Boumediene vs Bush, 2008

Cast of Some Principal Characters

Dick Cheney

John Yoo

David Addington

John Ashworth

Alberto Gonzales

The Court

Scalia, Thomas, Alito, Roberts

Kennedy

Stevens, Ginsburg, Breyer, Souter