The Federalist Papers on The Constitutionality of Executive Prerogative

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Abstract

In this paper I attempt to clarify and resolve the current debate among scholars (Schlesinger, Pious, Berger, Epstein, Bessette and Tulis, etc.) on the issue of the constitutionality of executive prerogative, according to the Federalist Papers. *Among those who admit prerogative, some claim that it is an extra-constitutional not a constitutional power and some among these assert that it is a legislative not an executive power. I argue that both positions are in error due to a partial understanding of Publius' so-called doctrine of proportionate means. The former position admits the constitutionality of proportionate means but mistakenly concludes that the power of prerogative is not the culmination of that teaching. The latter position admits that the doctrine of proportionate means culminates in the power of prerogative but fails to note the evidence for both its constitutionality and its applicability to the executive as well as the legislature. Moreover, I contend that Publius argues for the constitutionality of executive prerogative.*

Several recent developments converge to indicate the relevance of an inquiry, based on the so-called "literary theory" of the Constitution, into original intent on the general theme of the formal extent and source of executive power. The steady movement of the subject of the presidency towards the forefront of American political studies; the recent rehabilitation of the notion that formal institutions, arrangements, and powers may be to a significant extent causal and explanatory of "real politics"; the ironic trend, since "Watergate" and even the "War Powers" Resolution, of Supreme Court decisions which have rendered constitutional an unprecedented extent of executive power; not to mention the renewed respectability of both the office of the presidency in the eyes of citizens and at least the issue among scholars of the present bearing of original intent—all converge to suggest the relevance of our theme.[1]

Even more important than formal relevance, however, is the intrinsic need for such a study especially given the disturbing disarray of opinion on this crucial theme. There is little agreement even among those authorities who work at the deepest, most illuminating, level of reflection on this theme, namely, at the level of the issue of executive prerogative, defined as the power to act without or even against the law or the Constitution to secure the public good or the proper ends of government, especially in the domestic sphere.

Presidents, the Supreme Court, and scholars since the very birth of the nation have differed to the point of contradiction both within their own ranks and among each other on this issue. Some claim that the only source of executive power is the Constitution and that it does not authorize prerogative.[2] Others agree that the Constitution denies prerogative but proceed to claim that the executive can appeal to an extra-constitutional source to derive prerogative power, namely, to what is variously called necessity or the law of nature or reason. According to this view, executive prerogative is allowed but not authorized by the Constitution.[3] Yet others insist that the Constitution is the sole source of executive power, but go so far as to contend that the Constitution itself incorporates the dictates of necessity and hence authorizes executive prerogative.[4]

If one, afflicted by contradiction, turns directly to the Constitution itself, one discovers to one's dismay the apparent source of the difficulty. For instance, the "executive power" clause and the ensuing enumeration can be interpreted to be either merely a designating clause (insuring a unitary executive) combined with an exhaustive enumeration or an indefinite, undefinable, grant of power, including the power of prerogative, combined with a merely illustrative enumeration.[5] The "take care" clause can be interpreted to mean either that the executive is simply to execute the laws of Congress or that the executive is also to secure the whole fabric of the laws, the Constitution as a whole, by, if necessary, the power of prerogative.[6] Similarly, the "oath" can be viewed as either a vow to "preserve, protect, and defend the Constitution" with other constitutionally granted powers or as a grant of power, being unique among official oaths, authorizing whatever means are required, even prerogative, to secure that end.[7]

Granting that Article II is ambiguous enough to allow contradictory interpretations largely derived from prior dispositions about what the executive ought to be (and hence is itself, in part, the cause of the history of contradictory opinion on the issue), a most reasonable way to determine the meaning of the Constitution on this issue is to discover which light or prior disposition one should bring to illuminate the reading of the Article. One way, perhaps the only way, to determine this discovery is to examine the opinion of the leading Founders on this question. Accordingly, this essay is an investigation of the issue of executive prerogative by referring it not directly to the Constitution or to the history of opinion and practice under the Constitution but rather to *The Federalist Papers*, considered by all as among the (and by some as pre-eminent among) authoritative accounts of the meaning and intention of the Founders' Constitution.[8]

Publius' Doctrine of Proportionate Means

Publius, i.e., the pen name of Hamilton, Madison, and Jay in *The Federalist Papers*, undeniably claims that formidable governmental powers are required to protect individual rights. Citizen rights are presented as most threatened not by governmental power but by weak, inefficient, and unstable government. Such government cannot protect the rights of citizens from their primary threats, namely, other citizens, state

governments and foreign powers. The fundamental protector of individual rights from these basic threats is neither a government of limited powers nor certain forms and arrangements of power, but rather an extensive national government with expansive powers.[9] As will be shown, there is evidence that Publius pushes this thought to the bold and, perhaps, shocking conclusion that government must possess unlimited power precisely in order to secure its proper ends.

Publius presents two seemingly innocuous premises from which he derives the rather striking conclusions that unlimited governmental power is both necessary and proper. Its necessity is derived from the premise that means must be proportionate to ends and its propriety is derived from the premise that ends are higher than means.

Necessity

Publius claims that it is a self-evident, "primary," truth that "means ought to be proportioned to the end."[10] According to Publius, it necessarily follows from this premise that "there ought to be no limitation of a power destined to effect a purpose which itself is incapable of limitation."[11] This is what can be called Publius' doctrine of proportionate means. If Publius does contend that the ends of our government are, in some sense, "incapable of limitation," then he must, by his argument, conclude that government must have unlimited power to secure those ends.

Publius does in fact claim that the ends of our government are, in a certain sense, unlimited. For instance, he argues that since one cannot limit the power of the offense of the enemy, one must possess unlimited powers of defense. The protection of peace, within and from without, is an end which is "illimitable" in (its) nature; which one "cannot limit;" which is subject to "no possible limits;" which is not "reducible within certain determinate limits." This is true because the "extent and variety of national exigencies" are "infinite" and, as such, are "impossible" to either "foresee or to define."[12]

Publius, following with rigor the unmistakable implications of his doctrine or proportionate means, states in clear and bold terms the inescapable, if unsettling, conclusion. Both the "extent" and "variety" of powers for peace must "exist without limitation." There can be "no limitation" on these powers. They are, as such, "indefinite" or impossible to foresee or define in advance. They are subject to "no precise demonstration" or "rule." They must include "any resource" or useful "weapon." They must be "free from every other control but a regard to the public good and to the sense of the people." The names Publius employs to denote unlimited power are "discretion" or "judgement" or "prudence."[13]

Publius extends his doctrine of "illimitable" power to embrace a variety of other goods or ends. The doctrine is said to apply to the plurality of ends or "objects" or "trusts" of government. It applies to "every . . . matter" to which the "jurisdiction" of the government "is permitted to extend" by the Constitution. Hence, the "federal government" must possess "an unconfined authority in respect to *all* those objects which are intrusted to its management." More specifically, the doctrine also applies to the "public necessities" or "necessities of society." It also applies to the "public

good," the "real welfare of the great body of the people." In particular, Publius does not deny that unlimited "absolute power" is sometimes required to protect "property" and "liberty" as well as life or peace.[14]

Moreover, any good or end of government must be secured in the present and the future in a practical context. That context, especially in the future, is not subject to infinite knowledge. These "circumstances" or "contingencies" or "exigencies" are impossible to know in advance. Therefore, the "variety" or kinds of powers and the "extent" of any given power which may, on occasion, be required to secure any given end, in the context in which it must be secured, must be unlimited. Publius claims to know that humans will always, to a certain extent, remain recalcitrant even to reasonable rule and tend to war or domination. What is unknowable is that which may be required by or available to government to protect its proper ends.

Propriety

Publius presents a second premise from which he derives the conclusion of the propriety of unlimited power or rule by discretion or prudence. He comes to this conclusion by means of an argument based on the premise that ends are higher than means. The conclusion is presented by Publius in Number 31. The following "maxims" are presented as true in *both* "ethics and politics": that every "effect" or "purpose" or "object" or "end" that is "incapable of limitation" "ought" to be accompanied by a "cause" or "means" or "power" on which there is correspondingly "no limitation."[15] The political expression of the doctrine of proportionate means is therefore presented as an ethical doctrine and hence is appropriately expressed in form of a duty or what "ought" to be. Consistent with this principle, Publius boldly describes his doctrine of proportionate, "commensurate," means as "proper" according to the "most obvious rules of prudence and propriety."[16]

Publius derives the conclusion of the propriety of his doctrine of proportionate means from the premise that proper ends justify required means. This, as will be shown, is ultimately the ethical ground of Publius' politics. Proper ends are presented as "absolute" or "supreme" or "paramount." Further, proper ends are said to give meaning or "value" to means. Hence, proper ends are "more important" than means which are "less important." Proper ends are higher than means. It is on the basis of this premise that Publius is able to boldly proclaim that if a proper "end is required, the means are authorized."[17] Means are, authorized precisely by virtue of being required to secure proper ends. Propriety authorized what prudence dictates. In politics one ought to do what one must to secure proper ends. Unlimited power is both necessary and proper: necessary to secure any end and proper to secure proper ends.

The Doctrine of Proportionate Means and The Executive

Granting the necessity and propriety of means proportionate to proper ends, it is an issue among scholars whether Publius' doctrine applies to the executive; whether it culminates in prerogative; and whether it is a constitutional or extra-constitutional doctrine. This and the following two sections treat, respectively, these three issues. A brief critical review of the representative range of opinion is in order.

The Range of Opinion

Arthur Schlesinger, Jr. claims that Publius holds that the executive possesses extra-constitutional not constitutional prerogative, but Schlesinger denies that it is derived from the doctrine of proportionate means which he claims applies only to the "national government as a whole" not to the executive in particular.[18] Only "careless commentators" read Publius to have applied the doctrine to the executive in order to, erroneously, conclude that it culminates in "unlimited powers for the presidency."[19] Mr. Schlesinger must hold this dual position because he is convinced that executive prerogative is necessary; that the doctrine of proportionate means is constitutional; but that it is proper to envision prerogative as an extra-constitutional not a constitutional power. However, the two crucial passages cited as evidence do not, at least as presented by Mr. Schlesinger, support his position. The critical passage claiming that "original right of self-defense which is paramount to all positive forms of government" is clearly said by Publius, when read in context, to apply to the "citizens" or "peoples" right to revolution not to the executive. And Publius' claim, also cited, of the propriety of breaking through "constitutional barriers" if required for the "self-preservation of the nation" does appear to support prerogative but, again, when carefully read in context is: 1) derived from the doctrine of proportionate means, precisely what Mr. Schlesinger denies; and 2) appears, at least on its face, to apply to the legislature not either to the executive or to the "government as a whole."[20]

Joseph Bessette and Jeffrey Tulis claim, on the other hand, that prerogative is derived from the doctrine of proportionate means and that it culminates in constitutional executive prerogative. However, like Mr. Schlesinger, the evidence, at least as presented by them, does not support all of the various elements of their position. Every citation employed has as its expressed subject "government" in general or a legislative power, in particular.[21] And, in fact, their last crucial citation, when read in context, claims that power proportionate to ends must reside "somewhere in government" but that "somewhere," in this instance, is expressly claimed by Publius to be "the legislature."[22] Though the idea that the power of prerogative is the culmination of the doctrine of proportionate means is given textual grounds by these authors, both its applicability to the executive in particular and its constitutionality in general remain mere assumptions or undemonstrated assertions.

David Epstein agrees with both commentators that Publius argues for prerogative; insists, with Bessette and Tulis, that it is the culmination of the doctrine of proportionate means; but argues, contrary to both, for legislative as opposed to either executive or governmental prerogative.[23] However, Mr. Epstein fails to note or explain why the doctrine is often expressed in general terms, as noted and explained by Schlesinger, even in the context of discussions of clearly legislative matters. And Epstein does not conclude, with Bessette and Tulis, that prerogative is a constitutional not an extra-constitutional power, as claimed by Mr. Schlesinger, even though he insists that prerogative is authorized by the "necessary and proper" clause from which it is necessarily follows that legislative prerogative must be a constitutionally authorized power.[24]

Publius on The Dual Applicability of His Doctrine of Proportionate Means

It is my contention that examination of Publius' argument reveals that Schlesinger is correct to note and to attempt to explain the undeniable textual fact that the doctrine of proportionate means is formulated, many times, in very general terms, terms which suggest a broad applicability to "government" in general.[25] However, Schlesinger is incorrect in the conclusion he draws, namely, that therefore the doctrine only applies to government as a "whole" and hence not to the executive in particular. Epstein also can be shown to be correct in his claim that the doctrine applies specifically to the legislature.[26] But by failing to note the passages indicating broader applicability, Epstein incorrectly relegates its application to the legislature alone. In fact, Publius does formulate his doctrine in general terms to indicate broad applicability but the form that broad applicability takes is twofold. Publius' doctrine of proportionate means applies separately and equally to both the legislature and the executive, and therefore it applies neither to the "whole" government nor to the legislature alone.

Publius indicates the dual applicability of his doctrine of proportionate means in four ways. First, Publius simply claims that the doctrine that "power" must be "commensurate" to its "end" applies "to each" of the "different . . . departments" or "provinces" of government, that is, it applies "in each case."[27] Consistent with what he says, Publius proceeds to expressly apply the doctrine to the legislature alone. It is applied both to certain general legislative powers and to the legislature alone, a fact best expressed, as demonstrated by Epstein, by the "necessary and proper" clause.[28] The doctrine therefore cannot have, as Schlesinger claims, only a general applicability to government as a "whole." And this fact itself means that the undeniable indications of broader applicability, not noted by Epstein, point to the dual not simply the legislative applicability of the doctrine.

Secondly, Publius introduces and concludes his papers on the theme of the doctrine of proportionate means (Numbers 23–26) with descriptions of the fundamental characteristic of a government constituted in accordance with the principles of that doctrine. Such a government, above all else, is characterized by "energy."[29] Not to possess powers required for ends is to be "destitute of energy." It is "powers" that "supply that energy." "Proportionate" means "energy" which not only "enter(s) into the very definition of good government" but is the "leading character" in the "definition of good government."[30] But Publius claims that each of the branches of the new government contribute a specific characteristic to government. Congress is to provide "stability" by its Senate and "republican liberty" by its House of Representatives; and "energy in government," the third crucial ingredient, is said to be provided by the "executive."[31] The conclusion is necessary and clear. To possess means proportionate to ends is to provide, above all else, energy to government. The executive, above all others, is to provide energy to government. Therefore, Publius' doctrine of proportionate means must apply, above all others to the executive.

Third, Publius confirms our point. Executive "energy" in government is presented as depending, essentially, on the power to direct or exert the national military forces. But that power is presented as exclusively executive in nature and as especially subject to the doctrine of proportionate means in its dimension of illimitable power. There-

fore, the doctrine must apply to the executive. More specifically, examination of the very passage employed by Epstein to derive unlimited legislative power reveals, upon full examination, that he omits or fails to notice a general power of great importance to Publius. Publius claims the doctrine of proportionate means applies not only to the "creation" and "support," as noted by Epstein, but also to the "direction . . . of the national forces."[32] This power must also "exist without limitation." There can be "no limitation" on this power to secure the "common defense" or "public Peace," both domestic and foreign.[33] However, Publius defines this power as neither governmental nor as legislative but, rather, as wholly a complete power of the executive alone.[34] Once again, the point is clear and unmistakable. Publius applies his doctrine of the proportionate means to the power to direct the national forces. Publius claims the power to direct the national forces is executive in nature. Therefore, the doctrine of proportionate means must apply to the executive.

Lastly, it is precisely in those very contexts in which Publius formulates his doctrine of proportionate means in very general terms, in terms that apply it to "government" in general, that Publius appears to take particular pains to specify his meaning. What Publius actually says is that the doctrine of proportionate means applies: to "*any* power" of "government," or "*where ever*" a "general power" is "given" to "government;" or to "*every* power" of "government."[35] Publius never says that his doctrine applies to government in general understood as a "whole." He says that the doctrine applies to each power, or to each "general" power of "government." These expressions by Publius of plural and distinct, hence dual, applicability would be impossible for him to make if he meant that the doctrine applied either only to the "whole" government or singularly to the legislature alone. Further, the extent of power authorized by the doctrine in the specific context of this evidence of dual applicability must apply to *both* the legislature and the executive. Both branches must ultimately possess the "capacity" or "indefinite power" to provide for "future contingencies" or "emergencies as they may arise," be subject only to the principle that "wherever the end is required the means are authorized," or be able secure the proper ends of government "free from every other control but a regard to the public good and the sense of the people."[36]

Publius' Doctrine of Proportionate Means and The Power of Prerogative

Publius' various presentations of his doctrine of proportionate means fail to mention a "control" of great importance, namely, the Constitution itself. Must one conclude that proportionate means culminate in the power to break the law or suspend constitutional restrictions to secure the proper ends of government?

Publius clearly claims several times that his doctrine of proportionate means culminates in the power of prerogative. In the very passage which Mr. Schlesinger employs to correctly conclude that Publius argues for executive prerogative, Publius himself actually derives that extent of power from his doctrine of proportionate means, precisely that which Mr. Schlesinger denies. One "necessary means" of attaining the "necessary end" of "safety" is the employment of the "force necessary for defence,"

or "exertions for . . . safety." This means must be proportionate to its end, "the means of security can only be regulated by the danger of attack." But the end of "safety" is unlimited since one "cannot limit the force" or the "ambition" of the enemy. Hence, the doctrine of proportionate means in its "illimitable" power dimension also applies. There can, therefore, be no "bounds" to "discretion" regarding "exertions" for "safety." The "limit" on the means for this end "will, in fact, be determined by these rules [the doctrine of proportionate means in its illimitable power dimension] and no others." It is at this point in the argument that Publius proceeds to include the power of prerogative as the peak of "discretion" and hence as the culmination of his doctrine of proportionate means in its illimitable dimension. Even "rules" in the form of "constitutional barriers" or restrictions will not and should not be observed if they contradict means proportionate to the end of the "self-preservation" of the nation. Moreover, "discretion" must have at its disposal "any resource which may become essential to . . . safety," even if such means constitute "necessary usurpations of power."[37] Publius' doctrine of proportionate means culminates in executive prerogative.

Publius employs a similar argument in similar language to derive the same conclusion in paper Number 25. "Rules and maxims" in the form of constitutional "parchment provisions," including, in context, limited enumerations and expressed "restrictions" or "fettering(s)," will not and should not be "observed" if they contradict "necessary" means to the "necessities of society."[38] Similarly, in paper Number 23, Publius insists that his doctrine of "proportioned" means culminates in the conclusion that not even "constitutional shackles can be wisely imposed on the power to which the care" of "safety" is "committed."[39] Moreover, since ends are higher and therefore "more important" than means which receive their "value" from ends and hence are "less important," it is sometimes appropriate (when the two conflict or do not 'coincide') that "means" including restrictions, including even "forms" and "institutions," be "sacrificed" or "give way" to secure "substance" or proper ends.[40] Ultimately, both powers and limits (limited enumerations, expressed restrictions, even forms and institutions) are means, either of which must give way to the other to secure the only thing which gives either of them any "value," namely, the proper ends of government. The ultimate extent of power expressly derived by Publius from his doctrine of proportionate means is the power of prerogative.[41]

The Constitutionality of Executive Prerogative

Among those who admit the intrinsic political necessity of the periodic employment of prerogative, most claim, with Mr. Schlesinger, that it is an extra-constitutional power. Prerogative is allowed but not authorized by the Constitution. Three kinds of support are offered for this position: constitutional evidence, founding opinion, and substantive argument.[42]

It is claimed that the Constitution does not, in so many words, either grant or deny executive prerogative but that constitutional silence was intentional and hence meaningful. The leading Founders, including Publius, it is argued, appealed to a most basic theme to resolve this issue, namely, the proper relation between necessity or nature and convention. Though nature is said to provide the end or standard for con-

vention (the end of political society, a convention, is the protection of inalienable, natural, rights) the necessary, natural or reasonable, means sometimes required to secure those ends should not be simply recognized by convention, by a Constitution. The most extreme dictates of nature, the laws of nature or reason, necessity as regards means, were understood by the Founders to be properly disjoined from and hence not authorized by our fundamental law, the Constitution.

That prerogative is naturally necessary yet constitutionally improper is said to explain constitutional silence. By not expressly denying prerogative the Founders recognized, quietly capitulated to, and intended to discourage simple irrational resistance to nature or necessity. By not expressly granting executive prerogative the Founders attempted to put the Constitution somewhat "above" nature, to encourage resistance to the easy capitulation to nature, to subject nature to law, and to maintain a salutary distinction between principled and unprincipled means. Constitutional silence means that the Constitution *allows* but does not *authorize* executive prerogative.

Three substantive arguments can be presented to support this position. First, constitutional prerogative is a contradiction in terms and therefore irrational. The meaning of a Constitution is rule by law. Prerogative is action without or against law. The very idea of constitutional prerogative offends reason. Further, only by envisioning prerogative as extra-constitutional can one save the Constitution from the disgrace of being, ultimately, an irrational, contradictory, document. Second, contradictory practices each sustained by appeal to contradictory principles can easily appear, from certain moral perspectives, as at best a form of hypocrisy and as at worst self-serving rationalizations. Acts of prerogative are better thought of as momentary lapses from principle than as having their source in and hence as being ennobled by principle. In fact, the constitutional incorporation of prerogative corrupts, distorts, and stains the purity of the principles of the Constitution, the rule of law and limited government. Lastly, it is claimed that to adorn such practices with constitutional principle is politically dangerous from the perspective of both public officials and citizens. It unnecessarily encourages the employment of prerogative in less than critical circumstances or for less than public spirited ends. And citizens learn from their government the potentially unsettling lesson that there is a principles ground of disobedience derived from their own, various, judgements of necessity as regards means alone.[43]

The position of extra-constitutional prerogative founders on its fundamental premise derived from founding opinion. Publius, at least, expressly denies the disjunction of fundamental, constitutional, law from the law of necessity or nature. Publius expressly presents the two forms of law as conjoined. The teachings that ends are higher than means; that means must, if required, "give way" to ends—that, in other words, prerogative is the culmination of the doctrine of proportionate means—are presented by Publius as "dictated" by or "founded on," both fundamental law, the nature of "law" (or "reason") and the "law of nature" (or "necessity").[44] Publius insists that fundamental, constitutional, law is oriented on those truths concerning both ends and means which have their source in nature and are grasped by reason. Our Constitution is presented as recognizing, incorporating, and authorizing that which reason dictates is necessary. Executive prerogative is one of those dictates.

Given the ultimate conjunction of necessity or nature and fundamental law, the advocates of extra-constitutional prerogative cannot maintain the claim that constitutional silence allows but does not authorize prerogative. Even granting the questionable premise of constitutional silence, Publius' conjunction of nature and law forces one to the necessary conclusion that silence both allows and gives constitutional sanction to executive prerogative.

Publius confirms our claim. Every one of his presentations of his doctrine of proportionate means is placed in the immediate context of discussions of the theme of the extent of constitutionally authorized powers. For instance, the teaching in Number 23 that powers must exist "without limitation" on the "extent" and "variety" is literally surrounded by evidence attesting to the constitutionality of that extent and variety of powers. That teaching is preceded by Publius' claim that he is speaking about the "necessity of a constitution" which provides the "quantity of power necessary to the accomplishment of its objects."[45] That "quantity" exists "without limitation."[46] That very teaching of unlimited power is succeeded by Publius' claim to be speaking of that amount of power which "a free people ought to delegate to . . . any government" via its "Constitution."[47] It is "Constitutions of civil government" that ought to be "framed upon" an unlimited "capacity to provide for future contingencies as they may arise."[48] Publius begins paper Number 31 with a presentation of his doctrine of illimitable power and concludes by claiming to have been confining his attention, all along, "wholly to the nature and extent of powers . . . in the Constitution."[49] He begins Number 41 with the claim that he is going to speak about the "quantity of power which it [The 'Constitution'] vests in government," and proceeds to indicate that the "quantity of power" includes "discretion," to break through "constitutional barriers," to engage in "usurpations of power," and to employ "any power" which is "essential to . . . safety" or the public "good" or "happiness."[50] Proportionate means culminate in prerogative and are presented by Publius as constitutionally authorized powers.

The question, then, is not whether proportionate means are constitutional means, whether the dictates of the law of nature are constitutionally authorized, but rather how the constitution authorizes those means or acts. Publius claims that the dictates of the law of nature or reason are authorized by the Constitution in two ways: they are authorized by the very nature of fundamental law and by expressed constitutional grants of power. For instance, even if the Constitution was "silent" or did not contain the "necessary and proper" clause or the "supremacy" clause, legislative action in accordance with them would, nevertheless, be constitutional because those powers are contained in the very nature of a federal government. At least with regard to the legislature the Constitution itself expressly grants those powers that flow to it from the very nature of a Constitution.[51]

The question is, which form of the constitutional authorization of acts dictated by the law of nature or reason applies in the case of the executive? Though one must conclude from the above argument concerning the relation of "reason" and "law" that executive prerogative flows to the executive from the very nature of fundamental law, there is some evidence which indicates that it is also derived from expressed con-

stitutional grants. Discretion, or that freedom "from every . . . control but a regard to the public good and to the sense of the people," is among those powers which Publius claims are "*delineated* in the Constitution."[52] The power of executive prerogative must be derived from some expressed constitutional grants of power.

There is evidence to conclude that proportionate means are constitutionally authorized means by both the very nature of law and by expressed constitutional grants of power. The Constitution expressly authorizes those powers that derive from its very nature as a Constitution. There does appear to be some evidence which at least strongly suggests that those who derive expansive powers including prerogative from the expandable dimensions of Article II—the "executive power" clause, the "take care" clause, and the "oath"—can claim the authoritative support of Publius.[53]

The constitutional power of prerogative is supported by authority. But substantive argument is to be distinguished from argument based on authority, at least to the extent that authority is not established by substantive argument. Hence, let me conclude with the substantive arguments which support constitutional as opposed to extra-constitutional prerogative.

There are certain crucial political advantages of constitutional prerogative which outweigh its philosophical, moral, and political disadvantages. Proper acts of prerogative typically occur in the context of the greatest, history-shaping, events in the life of a nation. They are among those awesome acts, those illustrious and memorable deeds, of the greatest political heroes. Philosophical nicety and moral hygiene momentarily set aside, such revered doers and their nation saving deeds should be sensed by a grateful nation, which prides itself as living under a Constitution, as suffused with not severed from constitutionality. A nation's reverence for its heroes should blur into, nurture and support, reverence for its Constitution. The great good for citizens of the consequences of the deed, their own awe of its doer, their hero who, as such, stands above them, and their witnessing of even their hero looking up to their Constitution for authorization, converge, combine and become one in the citizen-mind. If proper prerogative is envisioned as extra-constitutional, then the fact of rule by man would not come to be replaced by the salutary and restraining notion of the rule of law.

Not only does the stature of the Constitution gain from the constitutional status of properly employed prerogative but also, the argument continues, improper prerogative is better restrained when envisioned as constitutional. The possibility of congressional and Supreme Court restraint of executive prerogative is said to be enhanced by public support of their activity. But that support is said to be enhanced by the public's sense of the constitutional legitimacy of the employment of their countervailing powers. And that legitimacy, in turn, is said to be diluted if the executive claim itself is based on an extra-constitutional source of power. Hence, it can be claimed that Mr. Schlesinger's position, "foster(s) a public attitude that the Constitution must be 'set aside' during emergencies," which, in turn, undermines the "claim of Congress and the Courts to moderate presidential power."[54]

Our conclusion of the constitutionality of executive prerogative raises a necessary and concluding question. We take pride in ourselves as a people who live under a

Constitution which not only establishes the rule of law over man but also, and perhaps more importantly, institutes a limited government. We proudly believe that limited government, a government of limited powers, fundamentally distinguishes us from tyrannical or absolute government. This view appears persuasive on the basis of apparently unquestionable evidence, the authority of our political trilogy. Our revolutionary generation, expressing itself through its Declaration teaches us by its extensive list of grievances that excessive governmental power is the fundamental threat to our individual rights. And the foremost features of our founders' Constitution and Bill of Rights appear as limited enumerations of and expressed restrictions on governmental power to protect our rights.[55] Publius himself insists that our Constitution establishes a limited government.[56] Publius also claims that the Constitution embodies and authorizes his doctrine of proportionate means which culminates in a government with unlimited powers. Are Publius and our Constitution, once again, in contradiction?[57]

Notes

1. See Pious (1979, Chap., One); Bessette and Tulis (1981); Boyan (1986).
2. See Berger (1974) and Justice Black's opinion in the Youngstown Case (343 U.S. 579, 1952), Roger Sherman's position on executive power (Farrand, 1966, Vol., I., pp. 65, 68), and Madison's early view (Farrand, 1966, Vol., I., 67, Vol., II., p. 34).
3. See Schlesinger (1973) and Wilmerding (1952), Justice Davis (*Ex Parte Milligan* 4 Wall 2, 1866), Justice Jackson (*Korematsu* v. *U.S.* 323 U.S. 214, 1944), Jefferson (Lipcomb, 1904, p. 51 Koch and Peden, 1944, pp. 606–607, Padover, 1943, pp. 170–173) and Locke (Cook, 1966, paragraph numbers 160, 163, 166).
4. See Lincoln's speeches (Basler, 1953, Vol. I., pp. 261–264, 281, Vol., 4, pp. 428–431, Richardson, 1899, Vol., 6, pp. 24–25, Corwin, 1940, pp. 25–26, 49–50, Current, 1967, pp. 170–171, 179, 181–182, 187–188, 189, 192), Justice Miller (In Re Neagle 135 U.S. 1, 1890), Justice Brewer (In Re Debs 158 U.S. 564, 1895), Justice Hughes (*Blaidell* v. *U.S.* 290 U.S. 398, 1934), and Corwin's view of T. R. Roosevelt's position (Corwin 1940, pp. 29, 131–132, 134). For a complete list of cases up to the early 1950s in which the Supreme Court upheld various forms of prerogative, see Scigliano (1971, pp. 201–202). See also Pious, (1979, p. 45), Bessette and Tulis (1981, pp. 18–19, 22–26, 141, 143, 148–149) and Hale (1982, p. 269). See Larry Arnhart for a provocative account of the range of "possible theories of how executive prerogative might apply to the American Presidency" (1979, p. 126). Insightful conversations with Professor Arnhart on this theme proved an invaluable contribution to the formulations in this essay. Both of us, however, are indebted to the work of the late Herbert Storing.
5. See Corwin (1970, pp. 2, 29, 131–134), Corwin (1975, pp. 111–112), Scigliano (1971, pp. 5–6).
6. See Corwin (1975, pp. 149–150), Corwin (1940, pp. 114–115).
7. See Corwin (1975, pp. 119–120), Corwin (1940, pp. 59, 148–151), Scigliano (1971, p. 4). On the contradictory interpretations of the "Commander in Chief" clause, especially in relation to these passages see Justice Grier (Prize Cases 2 Black 635, 1963), Justice Black (*Korematsu* v. *U.S.* 323 U.S. 214, 1944), Justice Black and Vinson (*Youngstown Sheet and Tube* v. *Sawyer* 343 U.S. 579, 1952) and Justice Sutherland (*U.S.* v. *Curtiss-Wright Corp.* 299 U.S. 304, 1936). See also Pious (1979, pp. 41–46) for an interesting account of other various "Rules of Constitutional Construction" of these passages.
8. The text used is Rossiter (1961), cited hereafter H., for Hamilton, M., for Madison; and J., for Jay, followed by paper number and page. Part of my claim, demonstrated below, is that at least in the *Federalist Papers* these three authors substantially agree at least on the basic theses of this paper. Therefore, in the text I employ their, and hence my, name of preference, Publius. Thomas Jefferson, as President, claimed that the "meaning" of the Constitution is to be "found" in the

explanations of those who advocated, not those who opposed it." Further, he claimed that the *Federalist Papers* best expressed the advocates meaning, " . . . as to the general principles of liberty and the rights of man, in nature and society, the doctrine of Locke may be considered as . . . generally approved by our fellow citizens . . . and that on the distinctive principles of the government . . . the best guides are to be found in . . . the book known by the title of *The Federalist* being an authority rarely declined or denied by any as evidence of the general opinion of those who framed, and of those who accepted the Constitution of the United States, on questions as to its general meaning." The first citation is Rutledge quoting Jefferson (Eliott, 1901, Vol., 4, p. 446). The latter citation is from Padover (1943, pp. 1112 and see 1046). For another opinion on this subject see Pious (1979, pp. 39–40, 45). The teaching of Publius on this issue is also a subject of debate among the scholars. It is part of my purpose to show how that debate may be resolved.

9. Compare in order H., # 1, p. 35, J., # 4, p. 44, H., # 6, pp. 53–54, #'s 6–8, # 9, p. 71, M., # 10, pp. 79, 83, 84 # 14, p. 99, H., # 15, pp. 110–111, # 21, p. 139, # 24, pp. 156–157, # 26, pp. 168–170, # 27, p. 175, # 28, p. 178, # 31, pp. 195–197, M., # 41, p. 255, # 45, p. 288, # 51, pp. 322–325, # 63, p. 387, # 66, p. 401.
10. H., # 31, p. 193.
11. H., # 23, p. 153. See also M., # 38, p. 240, # 62, p. 377 and # 41, pp. 255–258 on "discretion" and "prudence." Compare with his "axioms" at # 44, p. 285 and # 40, p. 248.
12. H., # 34, p. 207; M., # 41, p. 257; H., # 31, p. 195; H., # 23, p. 154, # 23, p. 153.
13. H., # 23, pp. 153, 154, # 34, p. 207, # 23, p. 153, # 13, p. 97, M., # 41, p. 257, H., # 36, p. 223, # 34, p. 194, M., # 41, pp. 256, 257, 258, H., # 24, p. 162, # 25, p. 170. That which is presented as existing without limitation is sometimes stated as the general power to secure the end of preservation and other times as limited to "these powers," the particular powers enumerated to secure the end of the general power (Compare H., # 33, 203 top, # 29, p. 183 bottom, # 29, p. 182 top, # 31, pp. 194 bottom, 195 top, # 26, p. 168, # 29, p. 187 end, with # 23, pp. 153, 154, # 24, p. 157). Evidently, the latter formulation amounts to the former if "these powers" comprehend all of the kinds of powers required for preservation and they, in turn, exist without limitation. In this regard, note Hamilton's shift at # 23, p. 153 from "these powers" to "the" or "this power" to "care" for "safety;" and his subsequent shift from "all the powers requisite" as the meaning of "no limitation" to his claim that there can be "no limitation" that is, on "any matter essential to the formation, direction, or support of the national forces" (H., # 23, p. 153, 154). Hamilton even claims that "implied in the very act of delegating" the power of providing for the national defense" is the "necessity" of also delegating "judgement" as to "means," that is, that "power equal to every possible contingency." That "confidence" must be placed "somewhere in government" (Compare H., # 26, pp. 168, 170; M., # 41, pp. 255 bottom - 256 top).
14. Emphasis added. H., # 31, p. 194, # 23, p. 155, 156, M., # 41, p. 256, # 43, p. 279, H., # 25, p. 167, # 31, p. 194, M., # 41, p. 256, # 45, p. 289, H., # 70, p. 423. Emphasis added. In America, as in England, but by different techniques, national "force" can be "directed to any object which the public good requires." (M., # 14, p. 10). For instance, "Harmony and proper intercourse among the States" is placed among the general "objects" of government which Madison derives from an examination of the enumeration. In accordance with the doctrine of proportionate means, Publius correctly concludes that the national government may properly prohibit "whatever" might even "have a tendency to disturb . . . harmony" and, even further, properly require anything (or stop at "nothing") which even "tends to facilitate" intercourse among the States (H., # 80, p. 477, M., # 42, p. 271).
15. H., # 31, p. 193–194.
16. H., # 23, p. 155, M., # 41, p. 257.
17. Compare M., # 43, p. 279, # 45, p. 289, H., # 28, p. 180, M., # 40, p. 248, # 40, p. 253, # 44, p. 285.
18. See Schlesinger (1973, p. 5).
19. Schlesinger (1973, p. 5).

20. Compare in order, Schlesinger (1973, pp. 8, 9, 20, 23–25, 322, 324) with Publius (H., # 28, p. 180, M., # 41, p. 257). See my detailed account of the passage at issue in section four below.
21. See Bessette and Tulis (1981, pp. 18–19).
22. H., # 26, p. 170. Scigliano appears to agree with Bessette and Tulis in general but does not present evidence from the *Federalist Papers* (Compare Bessette and Tulis, 1981, pp. 141–143, 148–149 and Hale, 1982, p. 269). Pious also appears, in one place, to potentially agree with Scigliano on the basis of one quote from Publius, H., # 72, pp. 435–436 (1979, p. 40). The citation is also employed by Flamenhaft (Bessette and Tulis, 1981, pp. 81–84). However, neither author argues that Hamilton's wide view of "administration," the theme at issue, culminates in the power to break the Constitution or the laws. And Pious, after seemingly arguing for prerogative, as claimed by Lincoln, nevertheless proceeds to claim, oddly, that the executive can only act if "nothing in the Constitution or the laws of the land expressly prohibit the actions" (1979, pp. 55–60, 84).
23. See Epstein (1984, chap. two, especially pp. 35–50). There are, however, very ambiguous, unexplained, indications that Mr. Epstein may know not to interpret Publius as restricting the application of his doctrine of proportionate means to the legislature (1984, p. 35, note 3, p. 204; p. 171; p. 35, note 4, p. 204; p. 36, note 5, p. 204; p. 42, note 9, p. 205; p. 50, note 15, p. 205; p. 172). Epstein also appears to restrict the application of the doctrine to preservation or peace (1984, p. 42). Yet his position on this issue is not clear (1984, p. 205, notes 11 and 12).
24. Epstein (1984, p. 50).
25. The doctrine applies to "politics," to "political institutions," to "government" (H., # 31, p. 193, # 23, p. 155, M., # 41, pp. 252–256).
26. H., # 24, pp. 158, 160, # 25, p. 164, # 26, p. 170.
27. H., # 23, p. 155. Note Hamilton's distinctions between "compound" or "simple" and "confederate" or "sole" government and "provinces" or "departments," distinctions which indicate that his subject in this paragraph is both separation of powers and federalism.
28. Epstein argues, in a complicated manner, to Madison's simply stated conclusion that the "Constitution's famous 'necessary and proper' clause is only an unnecessarily explicit statement of Madison's 'axiom . . . in law, or in reason'" that "wherever the end is required, the means are authorized," Madison's general formulation of his doctrine of proportionate means (1984, pp. 43–44).
29. H., # 23, p. 152, # 36, p. 223. This claim is made throughout these papers as well (H., # 23, pp. 154, 155 on "vigor," 157, # 25, p. 167). The opposite of "energetic" government is "feeble" government (Compare with H., # 70, p. 423, # 26, pp. 168, 169, M., # 37, p. 224). One should also consider the relation or perhaps identity of the terms "energy," "efficiency" and "administration" (Compare the citations above with H., # 23 p. 156, 157, # 27, pp. 174, 177, # 36, p. 223, M., # 46, p. 295, H., # 68, p. 414, # 72, pp. 435–436).
30. H., # 15, pp. 108–109, # 70, p. 423. See the discussions of a "vigorous" executive or of the "vigor" of the executive (H., # 70, p. 423, # 73, p. 441, M., # 37, p. 226).
31. M., # 37, pp. 226, 227, H., # 70, pp. 423–424, # 72, pp. 435–436. The difficulty at the convention was to combine "energy in government" with the protection of "liberty" and the "Republican Form" (M. , # 37, pp. 226–227). Publius repeats this difficulty twice in the papers on the executive (also in the substantive introduction and conclusion of those papers.) In each instance, the contrasting term which is substituted for "energy in government" as a whole is a "vigorous" or "energetic" executive or particular (H., # 70, p. 423, # 77, pp. 463, 464). Since papers # 23–36 relate "more peculiarly to . . . energy" in government and the doctrine of proportionate powers in these papers means energy, these papers must be, primarily, about the extent and variety of executive as well as governmental or legislative powers. On the history of the meaning of the term "energy" and its possible link to the executive in general and to prerogative in particular see Mansfield (1965, p. 160); and Epstein (1984, p. 204, note 3) and Bessette and Tulis (1981, p. 74).
32. H., # 33, pp. 153, 155, # 34, p. 157, and Epstein (1984, pp. 44 f.f.).
33. H., # 33, pp. 153, 155, #24, p. 157.
34. H., # 74, p. 447, # 69, p. 418, # 78, p. 465, # 72, p. 436. The synonyms for "direction" are "command," "employ," and "exert" (H., # 69, p. 418, # 75, p. 450, # 69, p. 422). Compare the use

of those terms in other contexts (H., # 29 p. 182, 186, M., # 41, p. 257, # 24, p. 157, # 25, p. 167, H., # 15, p. 109). Publius claims that the extent of the change required of the Articles of Confederation is an "entire change" or "alteration" in the "first principles," "structure" and "mainpillars," of the "system." He emphasizes the change from forceless government over states to forceful government over individuals. He de-emphasizes the crucial change of adding the power of force and changing its locus from Congress to the Executive (H., # 14, p. 105, # 15, p. 108–109, # 23, pp. 153, 154, 157, # 24, p. 157). On the propriety of the executive ability to "find resources in that very force sufficient to enable him to dispense with supplies from acts of the legislature" see (H., # 26, p. 173). Evidently, the legislature must have unlimited power to raise and support forces only because the executive must possess unlimited powers and forces. And if Congress fails or denies to provide such forces, the executive can direct what force it possesses to secure the force required to protect the proper ends of government. On this subject see Scigliano (Hale, 1982, p. 266). On the propriety of the presidential exercise of congressional power see Scigliano (1982, p. 269). On the meaning of the difference between declaring, authorizing, and making or directing war, especially in foreign affairs see Scigliano (Bessette and Tulis, 1981, pp. 124, 137–140 and Hale, 1982, pp. 261–262, 266, 269).

35. H., # 34, p. 207, M., # 44, p. 285, # 31, p. 194, emphasis added.
36. H., # 34, p. 207, M., # 44, p. 285, H., # 31, p. 194.
37. M., # 41, pp. 255–258. In some instances Publius employs his general doctrine of proportionate means in certain specific contexts such as to argue against some proposed restriction like a standing army which was not adapted and against adhering to certain restrictions contained in "weak" constitutions, like the Articles of Confederation (M., # 41, H., # 25 M., # 20, # 40, # 43, # 45). One might, therefore, conclude that Publius conceived of our Constitution as containing no restrictions of the kind that ever need be suspended and hence did not intend the power of prerogative to be derived from his doctrine of proportionate means. However, this cannot be the case for the following reasons. First, Publius generalizes from his argument against certain specific restrictions that were not adapted to the conclusion of the questionableness of the unqualified ability to adhere to any given restriction or prohibition as such. The only "rules" are those dictated by the doctrine of proportionate means and "parchment provisions" as such are sometimes "unequal" to "public necessity" (M., # 41:257, H., # 25:167). It is on this basis that Publius can claim that, ultimately and properly, the only "control" is a "regard to the public good and to the sense of the people" (H., # 31:194). Our Constitution, perhaps a constitution as such, is a form of restriction which contains expressed prohibitions and therefore cannot always be simply compatible with the dictates of the doctrine of proportionate means. Secondly, if our Constitution contained no restrictions that ever need be suspended Publius certainly would have said so, especially in those precise contexts in which he attacks proposed restrictions and "weak" constitutions; and he would have never have formulated his doctrine of proportionate means in such general and expansive terms, terms which emphatically admit no exception to the possible extent and variety of means that may be required for proper ends (see especially H., # 25:153, # 31:194). Even Lincoln, who envisioned the Constitution as most unrestrictive, admitted, hypothetically, the possibility that it, nevertheless, contained some restrictions (not mentioned by him) which it may become indispensibly necessary to ignore (See note 4 above).
38. H., # 25, p. 167.
39. H., # 23–153.
40. Compare in order the following references: M., # 43, p. 279, # 45, p. 289, H., # 28, p. 180, M., # 40, p. 248, # 45, p. 289 # 40, p. 248, 253, # 45, p. 289, # 43, p. 279, # 40, pp. 248, 253, # 44, p. 285.
41. This dual applicability may not result in the same kind of prerogative for each branch. There is some evidence that the nature of each power, reflected in the constitutional division of powers, may limit the extent of prerogative, including usurpation, by each branch. The legislature may be limited to acting by means of making equally applicable law and the executive may be limited to doing or simply acting on individual cases (Compare H, # 33, pp. 201–202, # 78, p. 465, M.,

47, pp. 303–304, J., # 64, p. 394, H., # 75, p. 450 with H., # 75, p. 450, # 78, p. 465 and M., # 62, p. 381, H., # 83, p. 505, # 78, pp. 470–471, # 75, p. 450, # 78, p. 465, M., # 57, p. 352, H., # 80, p. 478, # 78, p. 465, 470, M., # 57, pp. 352–353). If this distinct applicability is true, the disproportion between the two forms of prerogative would be obvious. The legislature could make, ultimately, any law it thought required but would utterly depend upon the president for execution. Yet the executive could act as it thought appropriate without depending on the legislature, even, perhaps, for supplying force. See the end of Note 34 above.

42. These three categories can be derived from examination of the relevant sources cited in Notes 3 and 20.
43. For an account and critique of the extra-constitutional position, especially as advocated by Dr. Schlesinger Jr., see Bessette and Tulis (1981, pp. 18–26).
44. M., # 40, p. 248, # 44, p. 285, # 43, p. 279.
45. H., # 23, p. 152.
46. H., # 23, p. 153.
47. H., # 23, p. 156.
48. H., # 34, p. 207.
49. H., # 31, pp. 193, 194, 195.
50. M., # 41, pp. 255–258.
51. H., # 33, p. 202, M., # 44, p. 285, H., # 34, p. 205, M., # 39, p. 245.
52. H., # 31, pp. 194, 197. Emphasis added.
53. For the evidence which supports the wide interpretation of the potentially expansive clauses of Article II, as the correct meaning, as written, see Thatch (1969, pp. 115, 138, 139). Compare with Farrand (1966, Vol., 3, pp. 404, 419, Vol., 2, pp. 154, 52, 26–31). For an excellent account of this possibility see Sedgwick (1986, pp. 12–13). To the extent that these students of the founding are correct, it can be claimed that the "greatest student" of the "framers," Lincoln, can be defended as having grasped the true view of their teaching on our theme (See Scigliano in Hale, 1982, p. 269).
54. See Bessette and Tulis (1981, pp. 25–26).
55. For a full account of this traditional currently prevalent, but questionable view see Hugo Black, "The Bill of Rights," in McDowell (1981, pp. 253–266).
56. H., # 75, p. 449, # 78, p. 469, # 81, p. 482, # 84, pp. 510–520, M., # 39, p. 245, # 40, p. 251, # 44, pp. 282–283, # 45, pp. 292–293.
57. The answer to this question depends entirely upon the meaning of limited government, a question which I examine at length in an as yet unpublished paper entitled "The *Federalist Papers* on the Meaning of Limited Government" presented in various stages of development and from different perspectives to the Southwestern Social Science Association Conference, Spring 1986, San Antonio, Texas and the Midwest Political Science Association Conference, Spring 1986, Chicago, IL.

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