BIG BROTHER IS WATCHING YOU: ESTABLISHING THE CONSTITUTIONALITY OF THE POST-9/11 USA PATRIOT ACT

by

Brittlin M. Richardson

HONORS THESIS

Submitted to Texas State University
in partial fulfillment
of the requirements for
graduation in the Honors College
May 2020

Thesis Supervisor:

Thomas Varacalli

FAIR USE AND AUTHOR'S PERMISSION STATEMENT

Fair Use

Duplication Permission

ACKNOWLEDGEMENTS

This thesis would have never been possible without the support from my family, friends, and colleagues. I would like to first and foremost thank Dr. Thomas Varacalli for his endless guidance and feedback which made this thesis possible. He encouraged me every step of the way and I am thankful to have learned so much from him. I would also like to thank my mother, Dana Richardson, my two brothers, Hunter Richardson and Greyson Holliday, and my second family, Candace, Chris, and Alyssa Streib.

I would be remiss not to acknowledge the impact which Model Arab League has had on myself and my passions for the topics covered in this thesis. I am extremely privileged to say I was a part of this organization and would like to thank my executive board including Kierah Shirk, Aaron Gaul, Kele Isibor, Sandra Sadek, and Devin Barrett. In addition, I would like to thank my friends, namely Geoff Sloan, N'Deye Ndiaye, Mohammad Al-Rousan, Coffey McCurdy-Sauve, Patrick Moloney, Macy Birdwell, Manuel Zapata, Catherine Wicker, Kelly Torpey, Alauna Padelford, Kia Taylor, Liz Clowser, and Alexis Duran. Lastly, to Dr. Elizabeth Bishop, Dr. Hassan Tajalli, Twister Marquiss, and Dr. Ron Haas, thank you for pushing me to be the best I can be.

TABLE OF CONTENTS

Page

ABSTRACT

Since the founding of the United States of America, Congress has consistently passed legislation to expand the federal government's power in wartime and conflict. Following the September 11, 2001 terrorist attacks committed by al-Qaeda, the executive branch of the government and numerous federal agencies were granted a huge increase in power with The USA PATRIOT Act, or The 2001 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act. It allowed the government an easier avenue to surveil those within their borders, specifically those they believed to be potential terrorists, in order to prevent similar devastating attacks. This thesis applies the political ideology and constitutional philosophy of Founding Fathers Alexander Hamilton and Thomas Jefferson, who often had competing political beliefs, to establish the constitutionality of The USA PATRIOT Act through published primary sources such as the Federalist Papers and individual advocacy for legislation. In addition, a historical analysis of America's response to war is utilized in order to establish the chain of events that allowed for the creation of the broadening of powers, including the Alien and Sedition Acts of 1798, the Espionage Act of 1917, and an exploration of The Red Scare and internment of Japanese Americans during World War II. As it explores some of the broadest powers granted to federal government in five sections of The PATRIOT ACT, each will be applied utilizing Hamilton and Jefferson's background and philosophical beliefs to determine the constitutionality of the legislation and why it came to be.

“The essential act of war is destruction, not necessarily of human lives, but of the products of human labour. War is a way of shattering to pieces, or pouring into the stratosphere, or sinking in the depths of the sea, materials which might otherwise be used to make the masses too comfortable, and hence, in the long run, too intelligent.”

-George Orwell, 1984

CHAPTER 1: THE USA PATRIOT ACT AND THE CONSTITUTION

The purpose of this thesis is to examine The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act, a controversial piece of legislation passed following the September 11, 2001 terrorist attacks on the United States. In addition, it will determine its constitutionality utilizing the political ideology and theories of Founding Fathers Alexander Hamilton and Thomas Jefferson. The USA PATRIOT Act of 2001 passed into law on October 26, 2001, forty-five days after the September 11 terrorist attacks. Broadly, the legislation granted federal law enforcement organizations, such as the Federal Bureau of Investigation and National Security Agency, enhanced ability to surveil the public in order to curtail future acts of terrorism and punish those who had already conspired to or committed attacks on American soil. Specifically, this thesis will focus solely upon the specific authorities granted within The USA PATRIOT Act entitled:

> TITLE II—ENHANCED SURVEILLANCE PROCEDURES
>
> Sec. 215. Access to records and other items under the Foreign Intelligence Surveillance Act. (and)
>
> TITLE V—REMOVING OBSTACLES TO INVESTIGATING TERRORISM
>
> Sec. 505. Miscellaneous national security authorities.[1]

[1] U.S. Congress, House, *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001*, HR 3162, 107th Cong., 1st sess., introduced in House October 23, 2001, https://www.gpo.gov/fdsys/pkg/BILLS-107hr3162ih/pdf/BILLS-107hr3162ih.pdf.

Each section will be examined for its increased surveillance abilities granted to the federal government and its constitutionality will be determined utilizing Hamilton's and Jefferson's established constitutional theories. The constitutional theory of Alexander Hamilton, a staunch advocate for Federalism, the belief in a strong centralized federal governance, is clear throughout his advocacy for the ratification of the U.S. Constitution in his many essays published within the *Federalist Papers* (1788). Thomas Jefferson, the third President of the United States and co-author of the *Declaration of Independence* (1776), believed in the limited power of a federal government and advocated for a Bill of Rights enumerating civil liberties in the original Constitution.[2] By utilizing the historical documents of the time such as the *Federalist Papers*, *Notes on the State of Virginia*, and inaugural addresses, this thesis will determine the constitutionality of the two specific sections of The USA PATRIOT Act listed above.

SEPTEMBER 11, 2001: A TRANSFORMED AMERICA

On September 11, 2001, four commercial American Airlines planes were highjacked by nineteen operatives al-Qaeda, an Islamic fundamentalist terrorist organization. Two of the planes were flown into the Twin Towers in New York City, one into the Pentagon, the headquarters of the U.S. Department of Defense outside of Washington, D.C., and the last which was headed for D.C. was overtaken by passengers and subsequently crashed in Shanksville, Pennsylvania. The death toll resulting from these attacks reached nearly 3,000, resulting in sitting U.S. President at the time, George

[2] "Thomas Jefferson Establishing A Federal Republic," Exhibitions (Library of Congress, April 24, 2000), https://www.loc.gov/exhibits/jefferson/jefffed.html#skip_menu).

W. Bush declaring the ongoing 'war against terrorism' and ultimately the passage of The USA PATRIOT Act.[3]

The day after the attacks, President Bush wrote to Dennis Hastert, the Speaker of the U.S. House of Representatives, requesting emergency funding totaling $20 billion from Congress in order to adequately address the attacks. Congress seemed to be increasingly motivated by cooperation between the legislative and executive branches and members were eager to punish those responsible and prevent such an act from occurring again. Bush went on to create the Department of Homeland Security on October 10, 2001, and within one year it was transformed into a cabinet-level organization of the executive branch.

Sixteen days after the creation of the DHS, The USA PATRIOT ACT, a one-hundred and thirty page piece of legislation that would forever change America, was signed into law and the Department of Justice announced that almost 1,500 persons had already been detained or arrested by either the FBI or immigration authorities covertly.[4] The fear of the government's ability to infringe upon civil liberties was not unique to the PATRIOT Act. Similar debates also occurred after the passage of the 1996 Antiterrorism Act following the Oklahoma City domestic terrorist attacks. While there were some objections to the broad powers entrusted with the federal government, 9/11 had shocked

[3] Howard Ball, *The USA Patriot Act of 2001: Balancing Civil Liberties and National Security: A Reference Handbook* (Santa Barbara, CA: ABC-CLIO, Inc., 2004)).
[4] Ibid, 2004.

Americans to their core that it resulted in a nearly bipartisan passage of the law with ninety eight votes in favor and only one nay in the U.S. Senate.[5]

The legislation provided the enhancement or modification of pre-existing federal criminal statutes including Title III of the Omnibus Crime Control Act of 1968, the Pen Register and Trap and Trace Statute, the Electronic Communications Privacy Act of 1986, the Bank Secrecy Act, the Money Laundering Act, the Immigration and Nationality Act, the Right to Financial Privacy Act, and the Foreign Intelligence Surveillance Act of 1978.[6] The United States identified its weakness against terrorists as asymmetrical warfare, or when unconventional or unusual tactics are utilized by a force making a similar attack unable to be carried out by the receiving nations, [7] and sought to fix it with the legislation.

On November 13, 2001, nearly two months after the attacks, Bush had established a secret military order in charge of covert detentions and military tribunals for noncitizens involved in terrorist activity as believed by the DoD, one of the victims of the attacks. The DoD, who conducted the trials, determined the criteria for them, known as the "Crimes and Elements" regulations.[8] Within two months, the federal government had accumulated unprecedented amounts of power in the war against terrorism making it one of the most formative moments of American history concerning civil liberties.

[5] "H.R. 3162 (107th): Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act)," GovTrack.us (Civic Impulse, LLC, October 25, 2001), https://www.govtrack.us/congress/votes/107-2001/s313).
[6] Ibid, 2004.
[7] Ellen Sexton, "Asymmetrical Warfare," Encyclopædia Britannica (Encyclopædia Britannica, inc., November 17, 2016), https://www.britannica.com/topic/asymmetrical-warfare).
[8] Ibid, 2004.

THE FIRST AMENDMENT: A TENET OF AMERICAN LIFE

The First Amendment constitutes what is known as the Bill of Rights, or the first of ten amendments added to the U.S. Constitution (1789) on December 15, 1791.[9] Many look to this amendment as one of the most fundamental tenets to American life in protecting civil liberties and freedom. The importance of this amendment can be seen through the continuous debates and judicial cases seen today concerning its reach. The First Amendment is stated as:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition Government for a redress of grievances.[10]

Free speech rights during times of war has been a product of disagreements between the American people and the federal government. Numerous pieces of legislation created to suppress some of what civilians believe to be their First Amendment rights can be shown through the Alien and Sedition Acts (1798) and the Espionage Act of 1917. The USA PATRIOT Act involves First Amendment questions because of the federal government's ability to intercept speech and correspondence to identify terrorist threats. The historical laws that helped pave the way for the USA PATRIOT Act, as well as other restrictions placed on the American people during times of war such as the Red Scare 1919-1920, post-World War II Japanese internment camps,

[9] "The 1st Amendment of the U.S. Constitution," First Amendment Freedom of Religion, Speech, Press, Assembly, and Petition (National Constitution Center), accessed April 29, 2020, https://constitutioncenter.org/interactive-constitution/amendment/amendment-i).
[10] Ibid, "The First Amendment of the US Constitution."

and anti-Muslim sentiments following September 11, will be explored later within this thesis.[11]

ORIGINALISM VS. LIVING CONSTITUTIONALISM THEORIES

The two main interpretations of the U.S. Constitution have continued to evolve following the initial ratification of it. Most attribute the differences in interpretations to just another facet of American democracy which results in an overall disagreement of how the powers should be granted to the federal governments, state governments, and the individual. Originalism can be defined broadly as theory in which it is believed the U.S. Constitution should be interpreted utilizing the original meaning intended by the Framers when it was written and adopted.[12] In contrast, living constitutionalism is the theory that the U.S. Constitution should be interpreted based upon the common sentiments of the time American society exists in now, essentially making it an ever-changing and living document amenable to change.[13]

The battle of these sentiments can be seen through differences in how Supreme Court justices have come to their decision involving constitutional cases and have resulted in disagreements across the political spectrum as to which laws are and are not constitutional. Today, constitutional theories are heavily tied with political ideology. This lends the following not only to a constitutional debate, but ultimately an inherently democratic one as well. For the purposes of this thesis, originalist theory will be applied

[11] Geoffrey R. Stone, *Perilous Times:Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* (New York, NY: W.W. Norton & Company, Inc., 2005)).
[12] "Originalism," Merriam-Webster (Merriam-Webster), accessed April 29, 2020, https://www.merriam-webster.com/dictionary/originalism).
[13] David A. Strauss, "The Living Constitution (Excerpt)," The Living Constitution University of Chicago Law School (Oxford University Press, September 27, 2010), https://www.law.uchicago.edu/news/living-constitution).

by utilizing Hamilton and Jefferson's constitutional theory as historically established to determine their opinion on the USA PATRIOT Act.

CHAPTER 2: A HISTORICAL ANALYSIS OF THE UNITED STATES DURING WARTIMES

The passage of the USA PATRIOT Act is not a random legal statute anomaly. It is a product of the conglomeration of actions and laws established throughout the history of the United States during wartime and conflict. In order to understand the reason for the passage of the USA PATRIOT Act, it is inherent to explore the history of the United States' actions during wartime in addition to the differences in Alexander Hamilton's and Thomas Jefferson's political ideologies and constitutional theories. This section will analyze the history of the United States' wartime actions which sought to further increase the power of the executive branch or limit enumerated rights granted to those in the Constitution. Those governmental actions in wartime include the Alien and Sedition Acts of 1798, the Espionage Act of 1917, the Red Scare 1919-1920, and the internment of Japanese Americans during World War II. All will be examined as a steppingstone in the creation and passage of the USA PATRIOT Act, including some of its most controversial powers granted to the federal government.

THE ALIEN AND SEDITION ACTS OF 1798

Diversity may now be a revered trait of the general composition of the American populous, but a mass immigration of Europeans to America between 1790 and 1798 struck the fear of disloyalty amongst the immigrants into the hearts of the Federalists. While most members of Congress were Federalists during this time, the election of Federalist John Adams as the second President of the United States in 1797 solidified the Federalists' concentration of power in the government.[14] Immigrants were generally known to identify with the Republican party, the opposition of the Federalist party. In the first Congress, they were able to obtain citizenship after two years of residency within the states. In response to the potential threat of power, the Federalists extended the residency requirements of citizenship to five years in 1795 and fourteen years in 1798, making the prospect of immigration overall less desirable and limiting their ability to hold elected office.[15] These sentiments and fears led directly to the passage of the Alien and Sedition Acts of 1798.

The Alien Enemies Act of 1798 granted the President discretionary power, allowing for the detention, confinement, and/or deportation of any immigrants or citizens of an enemy nation during times of declared war. The fear of war associated with the passage of this law correlated with the XYZ Affair, or the attempt by the French government to demand a bribe of American delegates sent by President John Adams to restore diplomatic ties through a meeting with France's foreign ambassador, Charles Talleyrand. France was upset with the U.S. after they signed a treaty with Great Britain

[14] "John Adams," The White House (The United States Government), accessed April 29, 2020, https://www.whitehouse.gov/about-the-white-house/presidents/john-adams/).
[15] Ibid, 2005.

who was at war with France. Upon hearing of the demand for a $250,000 bribe and $10 million loan to France for this meeting, many Americans called for the beginning of war against France.[16] Federalists worried that allowing the French immigrants to remain in America during times of war would make espionage for their potential enemy increasingly easy. The overall bipartisan support for this legislation exemplifies the fear felt concerning the fragility of the new country and their ultimate will to protect themselves. This law however, established a precedent in the government's ability to intern Japanese citizens within the United States during World War II.

The Federalists' continued fear associated with the rising immigrant population and lingering threat of war contributed further to the enactment of the Alien Friends Act of 1798. This act created powers granted specifically to President Adams set to expire upon the end of his tenure as President, allowing him complete discretion over the detainment or deportation of any non-citizen he deemed to be a danger to the new country. This provided an unchecked power to President Adams, devoid of any oversight by Congress or the judicial branch of the federal government.[17] The Fifth Amendment of the Constitution, ratified as the Bill of Rights in 1791, provides that, "No person shall be… deprived of life, liberty, or property, without due process of law…"[18] while providing for exceptions in times of war or public danger. Through the Alien Friends Act, the removal of due process rights of those immigrants deemed to be dangerous alarmed the Republicans.

---

[16] History.com Editors, "Alien and Sedition Acts," History.com (A&E Television Networks, November 9, 2009), https://www.history.com/topics/early-us/alien-and-sedition-acts).
[17] Ibid, 2005.
[18] "Fifth Amendment," Legal Information Institute (Legal Information Institute), accessed April 29, 2020, https://www.law.cornell.edu/constitution/fifth_amendment).

While the makeup of Congress during the passage of these laws consisted was concentrated in the Federalist Party, the Republican Party led by Thomas Jefferson was against the passage of the Alien Friends Act. They regarded it as a blatant constitutional violation of the Fifth Amendment which also concentrated power in the executive branch, essentially mimicking the monarchy which they had just escaped from in England.[19] However, the Federalists believed that the Constitution did not apply to immigrants. The Republicans retorted that the Constitution does not actually make the distinction between a citizen or immigrant. Therefore, the Constitution should apply dually to immigrants as it does to citizens. Ultimately, it was passed in Congress and President Adams utilized his power to inscribe numerous blank warrants for immigrants, although none were purportedly apprehended, with the law ending in 1801 after losing the election to Thomas Jefferson.[20]

The Federalists' fear was not directed to solely immigrants. It included the fear that unchecked speech against the government had a sway upon public opinion. The Sedition Act of 1798 was passed in response to the Federalists belief that the Republican party was publishing slanderous or intentionally damaging sentiments against the government. It aimed to provide protection to the public against misrepresented statements published within popular publications which often diverged from the beliefs held by the Federalist party. These popular publications included Benjamin Franklin Bache's *Aurora*, the *Gazette of the United States*, and *Porcupine's Gazette.* They were well known to speak overtly and frankly about their beliefs of the Federalist party's

[19] Ibid, 2005.
[20] Ibid, 2005.

wrongdoings and often criticized President Adams.[21] The fifth Congress passed the Sedition Act amongst party lines stating:

> **SECT. 2.** …if any person shall write, print, utter, or publish, or shall cause or procure to be written, printed, uttered, or published, or shall knowingly and willingly assist or aid in writing, printing, uttering, or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either House of the Congress of the United States, or the President of the United States, with intent to defame the said government… or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States, or to stir up sedition within the United States; or to excite any unlawful combinations therein, for opposing or resisting any law of the United States, or any act of the President of the United States, done in pursuance of any such law, or of the powers in him vested by the Constitution of the United States; or to resist, oppose, or defeat any such law or act; or to aid, encourage or abet any hostile designs of any foreign nation against the United States, their people or government, then such person, being thereof convicted before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.[22]

Dissent committed against the government or their actions was disallowed and sought out to insulate the United States governments from criticisms in order to more easily control public opinion. The passage of the Sedition Act coincided with the passage of the Alien Acts, both allowing the ability to concentrate power in the executive in granting powers to President Adams including the ability to detain or deport those he believed to be in opposition of the government. In addition, they placed a gag order on any published or uttered criticism in violation of the First Amendment. Until World War I, nearly one hundred and twenty years

[21] Ibid, 2005.
[22] "Sedition Act of 1798," Constitution Society: Everything needed to decide constitutional issues (Constitution Society), accessed April 29, 2020, https://www.constitution.org/rf/sedition_1798.htm).

after the Sedition Act of 1798, it was no longer in effect. There was no federal legislation concerning seditious expression.[23]

THE ESPIONAGE ACT OF 1917

Once President Woodrow Wilson made the decision to involve the United States in World War I following the German submarine blockade for shipping to England and France, hundreds of thousands of people had already lost their lives. Germany declared the surrounding waters of the British Isles to be a war zone on February 2, 1915 and any ships that entered there to be fair game. The British *Lusitania*, traveling from New York to Liverpool, was sunk by a German boat, effectively drowning more than 1,200 passengers of which 128 were Americans. Following the tremendous backlash for this, Germany decided to take a more *laissez-faire* attitude concerning its submarine attacks. However, after an increase in weaponry shipment to the Allies Germany once again decided to re-up its efforts in January of 1917. By March of 1917, President Wilson immediately sought Congress' approval for the United State's entrance into World War I.[24] In Wilson's address to the 65th Congress in April of 1917 asking for their approval of his declaration for war, he states:

> (Germany) has filled our unsuspecting communities and even our offices of government with spies and set criminal intrigues everywhere afoot against our national unity of counsel, our peace within and without, our industries and out commerce. Indeed, it is now evident that its spies were

[23] Ibid, 2005.
[24] Ibid, 2005.

> here even before the war began; and it is unhappily not a matter of conjecture, but a fact proved in our courts of justice.[25]

The declaration of war was approved on December 7, 1917 with only six Senate members and fifty House members voting against.[26] In his proposal for the Espionage Act of 1917, President Wilson feared that if dissent concerning the entrance of war was allowed, it would greatly disadvantage the war efforts and decrease American morale. Barring the original Sedition Act of 1798, the Espionage Act was the only other federal legislation passed in order to prevent against what the government considered to be disloyal expression against American war efforts. Within the legislation, introduced in Congress just three weeks following the approval for the declaration of war, many similar provisions included were provided for in the Sedition Act of 1798. Three main provisions in the Act caused great debate amongst Congress and the American people which sought to limit free speech rights as apportioned within the Bill of Rights.

In the first provision, it made it illegal for any person or publication to state or write anything that the President deemed would benefit America's enemies, while it also stated that it was not a limit on any free speech rights apportioned in the Constitution. The second provision made it illegal for any person, in a time of war, to make any false reports or statements that would be deemed to interfere with military operations against enemies or those which may benefit them. The last provision would grant the postmaster general the ability to

[25] "Wilson's War Message to Congress," Wilson's War Message to Congress - World War I Document Archive (Brigham Young University Library), accessed April 29, 2020, https://wwi.lib.byu.edu/index.php/Wilson's_War_Message_to_Congress).
[26] Ibid, 2005.

prevent the mailing of any writing or publication that would be considered treacherous or anarchist in nature against the government.[27] Within six months following the signing of the armistice for WWI, most pending prosecutions under the Espionage Act were no longer pursued by the federal government.[28] The Espionage Act remains in effect today.

THE RED SCARE 1919-1920

In the weeks following the end of WWI with the signing of an armistice on November 11, 1918, America found itself thrust into the Red Scare of 1919-1920. The Bolshevik revolution of 1917 led by party leader Vladimir Lenin in Russia successfully overthrew the Provisional Government in only two days through a strategic *coup d'état*. Lenin was quickly installed as the new head of government, later to be known as the Union of Soviet Socialist Republics, or the USSR.[29] Throughout WWI in the United States, labor and workers established and upheld a truce of cooperation, lending itself to largely to the establishment of economic liberalism. However, following the armistice, labor managers wished to return to the status quo of the pre-war economy which was met with large and sometimes violent strikes by workers throughout the nation to prevent this from happening.[30] In 1919, a strike for higher wages and shorter hours by 35,000 Seattle shipyard workers evolved into a general strike in the city following labor's refusal to negotiate with the workers. Panic quickly wove its way through the

[27] Ibid, 2005.
[28] Ibid, 2005.
[29] "Bolsheviks Revolt in Russia," History.com (A&E Television Networks, February 9, 2010), https://www.history.com/this-day-in-history/bolsheviks-revolt-in-russia).
[30] Ibid, 2005.

streets of Seattle causing its citizens to make a rush on food, medicine, and clothing.[31] For the nation and the media, the fear of bolshevism began to take root in America and was not to be quelled soon.

On April 28, 1919, a packaged bomb arrived at the Seattle mayor's office with no resulting injuries. The next day, a bomb was detonated at a former U.S. Senator's Atlanta home resulting in the injuring of two people. Only two days following this incident, a New York post office intercepted thirty-four packages addressed to prominent American politicians and industry tycoons inciting more fear and demands for action against bolshevism by the general public.[32] As this fear settled neatly into the makeup of America and riots, strikes, bombings, and generally more chaos ensued, the Senate Judiciary Committee created a subcommittee to investigate the threat of bolshevism, naming it the most significant threat to the continuance of the Republic.[33]

The Lusk Committee, formed by the New York legislature, raided the offices of known radical organizations, seizing documents which included mailing lists. Many individuals were targeted, labeled with the term "radical," and accused of aiding the Bolsheviks in their perceived goal to dismantle American democracy from the inside out. Attorney General of the United States Alexander Mitchell Palmer's home was damaged in an anarchist bombing on July 2, 1919.[34] Palmer,

[31] Ibid, 2005.
[32] Ibid, 2005.
[33] Ibid, 2005.
[34] "Palmer Raids: Topics in Chronicling America," Introduction - Palmer Raids: Topics in Chronicling America - Research Guides at Library of Congress (Library of Congress), accessed April 29, 2020, https://www.loc.gov/rr/news/topics/palmer.html).

anticipating a run for President, established the General Intelligence Division, or GID, within the Bureau of Investigation led by J. Edgar Hoover to investigate radical individuals and institutions. Hoover quickly identified the names of 200,000 individuals in America he believed the be involved in radical ideas or beliefs and unleashed undercover spies and informants to infiltrate groups believed to be perpetuating bolshevism with the goal of deportation. By November, 650 individuals were arrested and 249 were deported on December 21, 1919.[35] In early January, 4,000 more individuals were arrested on suspicion in addition to 3,000 deportees. The state and local governments took it upon themselves to create statutes against criminal anarchy or criminal syndicalism, otherwise known as advocating for the American government to be overthrown, as well as thirty-two states which made it illegal to display a red flag as a symbol of opposition to the government. Under these statutes, 1,400 found themselves arrested and as many as 300 were convicted and imprisoned for varying terms of confinement, up to twenty years.[36]

Following the political success of bolshevism in Russia, the Communist Party of America was founded on September 1919 in Chicago, Illinois.[37] In response to perceived criticisms of his ordered mass arrests and deportation of radicals, Attorney General Palmer published "The Case Against 'Reds'" in *The Forum* on February 1920. In addition to his beliefs which he cited the necessity to

[35] Ibid, 2005.
[36] Ibid, 2005.
[37] Victor G. Devinatz, "Communist Party of the United States of America," Encyclopædia Britannica (Encyclopædia Britannica, inc., October 12, 2014), https://www.britannica.com/topic/Communist-Party-of-the-United-States-of-America).

prevent anarchy in America, he included the Communist Party of America's manifesto written in Chicago which summarily stated the purpose and beliefs of the movement in America:

> The world is on the verge of a new era. Europe is in revolt. The masses of Asia are stirring uneasily. Capitalism is in collapse. The workers of the world are seeing a new light and securing new courage. Out of the night of war is coming a new day. The spectre of communism haunts the world of capitalism. Communism, the hope of the workers to end misery and oppression. The workers of Russia smashed the front of international Capitalism and Imperialism. They broke the chains of the terrible war; and in the midst of agony, starvation and the attacks of the Capitalists of the world, they are creating a new social order. The class war rages fiercely in all nations. Everywhere the workers are in a desperate struggle against their capitalist masters. The call to action has come. The workers must answer the call! The Communist Party of America is the party of the working class… The Communist Party insists that the problems of the American worker are identical with the problems of the workers of the world.[38]

The Red Scare quickly came to an end after the New York legislature expelled five of its socialist members who were then all subsequently reelected by their constituents in the following election cycle. Judge George Bourquin, a United States District Judge for Montana, rendered his decision in two 1920 cases which blocked the deportation of an immigrant on the belief that he was a communist and against the unconstitutional searches, seizures, and arrests of those suspected of being communists.[39] Following the Red Scare's swift end, many politicians and newspapers recognized the excessive and extraconstitutional efforts undertaken by the government to prevent radicalism which was believed to be public enemy number one. The raids and deportation committed under the

[38] A. Mitchell Palmer, "The Case Against the 'Reds.'" (The Forum), accessed April 29, 2020, https://www.marxists.org/history/usa/government/fbi/1920/0200-palmer-redscase.pdf).
[39] Ibid, 2005.

guidance of Attorney General Palmer, later to be referred to as the Palmer Raids, went on to be investigated for their legality by the Senate Judiciary Committee between January 19, 1921 through March 3, 1921.[40] The Red Scare would later be revived as the Red Menace between 1945 and 1954 during The Cold War, under J. Edgar Hoover's leadership as the Director of the Federal Bureau of Investigation.[41]

WORLD WAR II: JAPANESE AMERICAN INTERNMENT CAMPS

Franklin Delano Roosevelt, 32nd U.S. President, watched from the White House as the world fought around the U.S. in World War II, dedicated to maintaining neutrality after the devastating losses seen in WWI. On December 7, 1941 Japan's attack on Pearl Harbor, a U.S. naval base in Hawaii, resulted in the loss of much of the Pacific vessels, battleships and airplanes and the death of over 2,400 Americans.[42] Mere days following the attack upon Pearl Harbor the U.S. declared war against Japan, Germany, and Italy, which squashed any previous notions of neutrality and committed the nation to entering a war waged nearly two years earlier. Within the six weeks directly following the attack, President Roosevelt insisted that no one of Japanese descent should be detained.[43]

President Roosevelt's sentiment quickly changed after previously long withstanding racial prejudices against the Japanese in America only intensified with fears of espionage. For example, in 1913 and 1920, California passed the

[40] Ibid, "Palmer Raids: Topics in Chronicling America."
[41] Ibid, 2005.
[42] History.com Editors, "Pearl Harbor," History.com (A&E Television Networks, October 29, 2009), https://www.history.com/topics/world-war-ii/pearl-harbor).
[43] Ibid, 2005.

Alien Land Laws, directed largely at Japanese immigrants, which prohibited those ineligible for citizenship from purchasing or leasing land, which remained in effect until 1952.[44] Fifteen other states quickly adopted similar laws and the Supreme Court of the United States ordered the laws as constitutional in *Takao Ozawa v. United States (1922)* which held that those of Japanese descent were not eligible for naturalization.[45] On February 17, 1942, in a plea to encourage President Roosevelt against the internment of Japanese Americans, Attorney General of the United States Francis Biddle wrote:

> For several weeks there have been increasing demands for evacuation of all Japanese, aliens and citizens alike, from the West Coast states. A great many of the West Coast people distrust the Japanese, various special interests would welcome their removal from good farm land and the elimination of their competition, some of the local California radio and press have demanded evacuation… My last advice from the War Department is that there is no evidence of imminent attack and from the FBI that there is no evidence of planned sabotage… It is extremely dangerous for the columnists, acting as 'Armchair Strategists and Junior G-Men,' to suggest that an attack on the West Coast and planned sabotage is imminent when the military authorities and the FBI have indicated that this is not the fact. It comes close to shouting FIRE! in the theater…[46]

However, Attorney General Biddle's pleas went unanswered as public opinion swayed largely in favor of detaining those of Japanese descent on the West Coast. Only two days later, on February 19, 1942, President Roosevelt

[44] "Alien Land Laws in California (1913 & 1920)," Immigration History (The University of Texas at Austin College of Liberal Arts Department of History, January 1, 1970), https://immigrationhistory.org/item/alien-land-laws-in-california-1913-1920/).
[45] "TAKAO OZAWA v. UNITED STATES.," Legal Information Institute (Cornell Law School), accessed April 29, 2020, https://www.law.cornell.edu/supremecourt/text/260/178).
[46] Francis Biddle, "Memorandum to the President from Attorney General Francis Biddle, February 17, 1942," FDR and Japanese American Internment (Franklin D. Roosevelt Presidential Library and Museum), accessed April 29, 2020, http://www.fdrlibrary.marist.edu/archives/pdfs/internment.pdf).

issued Executive Order no. 9066 authorizing the Secretary of War powers which stated the following:

> Whereas the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities… Now, therefore, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War… whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent… from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War…may impose in his discretion. The Secretary of War is hereby authorized to provide for residents of any such area who are excluded therefrom, such as transportation, food, shelter, and other accommodations as may be necessary, in the judgment of the Secretary of War… and until other arrangements are made, to accomplish the purpose of this order.[47]

Within eight months of the publication of Executive Order no. 9066, 120,000 people of Japanese descent were forced from their homes and made to abandon practically everything they owned in California, Washington, Oregon and Arizona. Contained within this group was ninety percent of the Japanese-American population with two thirds being American citizens.[48] For three years, barbed wire and military police surrounded the ten permanent internment camps where many were forced to sleep in horse stalls or cots in filthy surroundings.[49]

Subsequently, numerous legal cases challenged the constitutionality of the massive restrictions and internment requirements placed upon those of Japanese

[47] "Transcript of Executive Order 9066: Resulting in the Relocation of Japanese (1942)," Our Documents - Transcript of Executive Order 9066: Resulting in the Relocation of Japanese (1942) (OurDocuments.gov), accessed April 29, 2020, https://www.ourdocuments.gov/doc.php?flash=false&doc=74&page=transcript).
[48] Ibid, 2005.
[49] Ibid, 2005.

descent were heard in the Supreme Court of the United States. Most cases, founded on the logic that uncertain times of war required the government to forego some civil liberties to protect the nation, were made in favor of the government. However, on December 17, 1944, the day before a decision was rendered on a petition for a writ of habeas corpus in *Ex parte Endo (1944),* it was announced that the detainment of those of Japanese descent would end. *Ex parte Endo (1944)* found that a citizen with loyalty to the United States could not be detained by the military under Executive Order no. 9066. Despite a recommendation from Secretary of War Henry L. Stimson stating that the safety of the U.S. would not be at risk if internment had ended nearly six months before the announcement, Roosevelt held off to maintain his political hold on the West Coast for the 1944 elections.[50]

[50] Ibid, 2005.

CONCLUSION

In the United States' relatively short history, war has remained a stark reality for most generations. It is clear to see the lasting implications of laws enacted during wartime which have influenced one another from the Alien and Sedition Acts of 1798 to the internment of Japanese-Americans in 1942. In response to some of the most unique challenges of wartime, including maintaining homeland morale, it seems the protection against dissent is the most effective weapon which could be deployed to protect against espionage or sabotage fears. Perhaps the first ten amendments to the Constitution must remain either the most devastating or necessary casualty during American wartime.

The USA PATRIOT Act remains a conglomeration of the laws passed throughout America's wartime history. It is necessary to not only understand the influence of the history upon the law, but also as the direct influence in expanded executive power exemplified under President George W. Bush's tenure. Wartime policies are a direct reflection of the racial and political sentiments present at the time, and the War on Terrorism must be reviewed with the same historical lens to accurately depict Alexander Hamilton's and Thomas Jefferson's constitutional beliefs concerning the identified sections of The USA PATRIOT Act.

CHAPTER 3: HAMILTON'S AND JEFFERSON'S CONSTITUTIONAL IDEOLOGY CONCERNING THE EXECUTIVE AND PREROGATIVE

While it is easy to review the string of historical events which have occurred due to the U.S. Constitution, the Framers did not have the luxury of such foresight. After the American Revolution (1765-1783) resulted in the victory of the thirteen colonies against Great Britain, the Framers were left to create a nation meant to withstand the tests of tyranny and anarchy. Thomas Jefferson's *Declaration of Independence* (1776), John Locke's *Second Treatise of Government* (1689), and Jean-Jacques Rousseau's *The Social Contract* (1762) served as important roadmap in creating such a nation for both Alexander Hamilton and Thomas Jefferson.

While the Framers of the Constitution are often thought to be singular body, Hamilton and Jefferson often stood at odds over the powers which should be granted to the new government. Hamilton was a Federalist who advocated for a strong federal government and a centralized executive branch.[51] Jefferson was a Democratic-Republican, or Anti-Federalist, who advocated for a weakened federal government with an emphasis on civil liberties.[52] The failures of the Articles of Confederation and Perpetual Union (1781) are attributed to the lack of an executive branch amongst there being no ability to collect taxes or enforce laws. The Framers gathered in Philadelphia, Pennsylvania in the summer of 1787 under the pretense of amending the Articles of

[51] History.com Editors, "Federalist Party," History.com (A&E Television Networks, November 9, 2009), https://www.history.com/topics/early-us/federalist-party).
[52] "Democratic-Republican Party," Federalists, Jefferson, Republicans, and American - JRank Articles, accessed April 29, 2020, https://law.jrank.org/pages/6058/Democratic-Republican-Party.html).

Confederation but instead emerged with the current U.S. Constitution.[53] The idea of creating an executive branch was often a fraught one amongst the Framers, weary of creating a form of the tyrannical monarchy which they had just recently won their independence from. However, they recognized the necessity of creating an executive which is outlined in Article II of the Constitution, granting broadly defined powers as follows:

> Section 1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected, as follows:
>
> Each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.
>
> The electors shall meet in their respective states, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President, the votes shall be taken by States, the representation from each state having one vote; A quorum for this purpose shall consist of a member or members from two thirds of the states, and a majority of all the states shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice President. But if there

[53] History.com Editors, "Articles of Confederation," History.com (A&E Television Networks, October 27, 2009), https://www.history.com/topics/early-us/articles-of-confederation)

should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice President.

The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty five years, and been fourteen Years a resident within the United States.

In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President, and the Congress may by law provide for the case of removal, death, resignation or inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.

The President shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

Before he enter on the execution of his office, he shall take the following oath or affirmation:--"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States.

Section 2. The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of

> such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.
>
> The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.
>
> Section 3. He shall from time to time give to the Congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.
>
> Section 4. The President, Vice President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.[54]

The Framers, often unable to come to a general agreement about the executive branch, left the powers broadly defined in hopes that George Washington, the first U.S. President, would set precedents for the ambiguities. While the trust in President Washington was complete, their methodology in his presidency providing for those ambiguities was mostly ineffective.[55] Some actions taken did create precedents, such as enforcing a two-term limit which was later ratified in the Constitution as the 22nd Amendment in 1951, the ambiguities of the executive allowed for its powers to grow incrementally throughout history.[56]

---

[54] "Article II," Legal Information Institute (Legal Information Institute), accessed April 29, 2020, https://www.law.cornell.edu/constitution/articleii).
[55] Michael A. Genovese, *Presidential Prerogative: Imperial Power in an Age of Terrorism* (Stanford, CA: Stanford University Press, 2010)).
[56] "The 22nd Amendment of the U.S. Constitution," National Constitution Center – The 22nd Amendment of the U.S. Constitution, accessed April 29, 2020, https://constitutioncenter.org/interactive-constitution/amendment/amendment-xxii).

The empowered executive branch experienced in modern-day America is attributed to an unspoken presidential prerogative or, "the power of a president in an emergency to take extraordinary actions without explicit legal authority… (being) extra-constitutional… it exists outside the rule of law…"[57] This borrows largely from the British's royal prerogative where, "the king owed his power to God, not to the people, or even the aristocracy. And if God was your source of power, you could 'legitimately' do just about anything."[58] While this idea has been intentionally not provided for in the Constitution, the ambiguities of Article II have allowed the prerogative powers to be injected into the executive during times of crisis or war. To better understand the constitutional theory concerning the executive and prerogative of Hamilton and Jefferson, Locke's *Second Treatise of Government* and Rousseau's *The Social Contract*, Hamilton's *The Federalist Papers* (1788), and Jefferson's *Notes on the State of Virginia* (1785) and *First Inaugural Address* (1781) will be examined in this chapter.

JOHN LOCKE AND JEAN-JACQUES ROUSSEAU: *SECOND TREATISE OF GOVERNEMENT* (1689) AND *THE SOCIAL CONTRACT (1762)*

John Locke (1632-1704) is one of the most influential philosophers and political theorists of his time. Locke's ideas expressed in his *Second Treatise of Government* included that men were born with inalienable rights to life, liberty, and property and it was a just government's duty to uphold those rights. This idea of a social contract, where the government is empowered by the will of the people, would later be exemplified in

[57] Ibid, 2010.
[58] Ibid, 2010.

Jean-Jacques Rousseau's *The Social Contract.*[59] Rousseau (1712-1778) was a Genevan philosopher and another highly influential political theorist. His ideas of general will required that a government's laws may only be considered justifiable if it is accepted by the people.[60] On the first line of Chapter I of *The Social Contract*, Rousseau states, "man is born free; and everywhere he is in chains."[61] Both Locke and Rousseau were highly influential to the Framers in creating a nation, however their ideas of prerogative never found their way into Article II of the Constitution and suggests the Framer's rejection of these ideas completely.

For Locke, it was imperative that the executive be allowed prerogative as there are instances, such as in crisis or war, which the law does not adequately apply to nor could the legislature meet and pass laws to deal with instances within a timely manner. The function of the prerogative would allow for the executive to conduct the nation for the benefit of the people. If this intention were breached, it would rely upon an "appeal to Heaven."[62] Locke's ideas, outlined in his *Second Treatise of Government*, follows in part:

> WHERE the legislative and executive power are in distinct hands, (as they are in all moderated monarchies, and well-framed governments) there the good of the society requires, that several things should be left to the discretion of him that has the executive power: for the legislators not being able to foresee, and provide by laws, for all that may be useful to the community, the executor of the laws having the power in his hands, has by the common law of nature a right to make use of it for the good of the society, in many cases, where the municipal law has given no direction, till the legislative can conveniently be assembled to provide for it. Many things there are, which the law can by no means provide for; and those

[59] Alex Tuckness, "Locke's Political Philosophy," Stanford Encyclopedia of Philosophy (Stanford University, January 11, 2016), https://plato.stanford.edu/entries/locke-political/).
[60] Christopher Bertram, "Jean Jacques Rousseau," Stanford Encyclopedia of Philosophy (Stanford University, May 26, 2017), https://plato.stanford.edu/entries/rousseau/).
[61] Jean Jacques Rousseau, *The Social Contract and Discourses*, 1762, http://oll-resources.s3.amazonaws.com/titles/638/Rousseau_0132_EBk_v6.0.pdf).
[62] John Locke, *Second Treatise of Government*, 1690, https://english.hku.hk/staff/kjohnson/PDF/LockeJohnSECONDTREATISE1690.pdf).

> must necessarily be left to the discretion of him that has the executive power in his hands, to be ordered by him as the public good and advantage shall require: nay, it is fit that the laws themselves should in some cases give way to the executive power, or rather to this fundamental law of nature and government, viz. That as much as may be, all the members of the society are to be preserved: for since many accidents may happen, wherein a strict and rigid observation of the laws may do harm; (as not to pull down an innocent man's house to stop the fire, when the next to it is burning) and a man may come sometimes within the reach of the law, which makes no distinction of persons, by an action that may deserve reward and pardon; 'tis fit the ruler should have a power, in many cases, to mitigate the severity of the law, and pardon some offenders: for the end of government being the preservation of all, as much as may be, even the guilty are to be spared, where it can prove no prejudice to the innocent.
>
> Sect. 160. This power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it, is that which is called prerogative: for since in some governments the lawmaking power is not always in being, and is usually too numerous, and so too slow, for the dispatch requisite to execution; and because also it is impossible to foresee, and so by laws to provide for, all accidents and necessities that may concern the public, or to make such laws as will do no harm, if they are executed with an inflexible rigour, on all occasions, and upon all persons that may come in their way; therefore there is a latitude left to the executive power, to do many things of choice which the laws do not prescribe.
>
> Sect. 161. This power, whilst employed for the benefit of the community, and suitably to the trust and ends of the government, is undoubted prerogative, and never is questioned: for the people are very seldom or never scrupulous or nice in the point; they are far from examining prerogative, whilst it is in any tolerable degree employed for the use it was meant, that is, for the good of the people, and not manifestly against it: but if there comes to be a question between the executive power and the people, about a thing claimed as a prerogative; the tendency of the exercise of such prerogative to the good or hurt of the people, will easily decide that question.[63]

Rousseau shared Locke's idea of the necessity of employing a prerogative in the executive. However, in lieu of Locke's "appeal to Heaven,"[64] Rousseau advocates that in order to safeguard a nation against a permanent installation of

[63] Ibid, 1690.
[64] Ibid, 1690.

monarchical rule it is necessary to create strict time constraints on the prerogative power. Rousseau's ideas, outlined in *The Social Contract,* are as follows in part:

> The inflexibility of the laws, which prevents them from adapting themselves to circumstances, may, in certain cases, render them disastrous, and make them bring about, at a time of crisis, the ruin of the State. The order and slowness of the forms they enjoin require a space of time which circumstances sometimes withhold. A thousand cases against which the legislator has made no provision may present themselves, and it is a highly necessary part of foresight to be conscious that everything cannot be foreseen.
> It is wrong therefore to wish to make political institutions so strong as to render it impossible to suspend their operation. Even Sparta allowed its laws to lapse.
> However, none but the greatest dangers can counter-balance that of changing the public order, and the sacred power of the laws should never be arrested save when the existence of the country is at stake. In these rare and obvious cases, provision is made for the public security by a particular act entrusting it to him who is most worthy. This commitment may be carried out in either of two ways, according to the nature of the danger. If increasing the activity of the government is a sufficient remedy, power is concentrated in the hands of one or two of its members: in this case the change is not in the authority of the laws, but only in the form of administering them. If, on the other hand, the peril is of such a kind that the paraphernalia of the laws are an obstacle to their preservation, the method is to nominate a supreme ruler, who shall silence all the laws and suspend for a moment the sovereign authority. In such a case, there is no doubt about the general will, and it is clear that the people's first intention is that the State shall not perish. Thus the suspension of the legislative authority is in no sense its abolition; the magistrate who silences it cannot make it speak; he dominates it, but cannot represent it. He can do anything, except make laws.[65]

The Framers were well acquainted with the concept of war and crisis which may plague a nation after the American Revolution. Despite this, ideas concerning prerogative were never included in Article II of the Constitution. It is apparent the ideas expressed by Locke and Rousseau were highly influential for the Framers, with many of them functioning as basic tenets of governance in

[65] Ibid, 1762.

America today. However, examining the intentions of the Framers necessitates an understanding of ideas which were included in the Constitution and those which were explicitly excluded. While the wheels of democratic government turn intentionally slow, the Framers fear of employing a similar tyrannical government in which they had just escaped had greatly influenced their decision to exclude prerogative from Article II. While Hamilton and Jefferson stood in political opposition, both shared a common goal against employing a tyrannical government in the U.S.

ALEXANDER HAMILTON: THE FEDERALIST FIGHT

Alexander Hamilton (1755/57-1805) was an influential Framer whose Federalist ideology heavily influenced the U.S. Constitution. Hamilton was one of the three authors of the *Federalist Papers* and served as the first secretary of the treasury.[66] In addition to Locke and Rousseau, Hamilton studied the works of classical philosophers Plato, Aristotle, Polybius, and Cicero. He was heavily influenced by their mixed government theory which stated that any singular form of government identified by Plato—democracy, aristocracy, or monarchy—would lead to the tyranny of the many, the few, and the one.[67] Hamilton believed that in order to form a perfect government free from tyranny, it was necessary to employ all three forms to stand as checks against one another. In addition, Hamilton believed that energizing the executive was necessary to protecting a nation. To further establish Hamilton's constitutional ideology concerning the USA PATRIOT Act, this section will analyze the *Federalist Papers* No. 23, 25 and 70.

An advocate for employing a British form of government in the new U.S. Constitution, Hamilton's greatest critics were the Democratic-Republicans, or Anti-Federalists, who often published their retort against the *Federalist Papers* in the *Anti-Federalist Papers* under the pseudonym Cato.[68] However, Hamilton stood dedicated to

[66] Alexander DeConde, "Alexander Hamilton," Encyclopædia Britannica (Encyclopædia Britannica, inc., December 23, 2019), https://www.britannica.com/biography/Alexander-Hamilton-United-States-statesman).
[67] Jeffrey Rosen, "Hamilton Would Not Have Stood for Trump's New Constitutional Theory," The Atlantic (Atlantic Media Company, April 17, 2020), https://www.theatlantic.com/ideas/archive/2020/04/hamilton-would-not-have-stood-trumps-new-constitutional-theory/610177/).
[68] Ibid, 2010.

his ideals concerning the executive and advocated in *Federalist* No. 70 (1788), stating in part:

> Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy…
>
> …A feeble Executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government.
>
> Taking it for granted, therefore, that all men of sense will agree in the necessity of an energetic Executive, it will only remain to inquire, what are the ingredients which constitute this energy? How far can they be combined with those other ingredients which constitute safety in the republican sense? And how far does this combination characterize the plan which has been reported by the convention?
>
> The ingredients which constitute energy in the Executive are, first, unity; secondly, duration; thirdly, an adequate provision for its support; fourthly, competent powers.[69]

Hamilton advocates for a centralized executive power, consolidated with energy, in order to better protect the nation against outside attack or influence. This justification was utilized in the creation of the Alien and Sedition Acts of 1798, which allowed a majority Federalist legislature and President John Adams to consolidate power in fear of war with France. While this energy is not to be construed as explicit prerogative, Hamilton goes on to state the following in part in *Federalist* No. 23 (1787):

> The authorities essential to the common defense are these: to raise armies; to build and equip fleets; to prescribe rules for the government of both; to

[69] Alexander Hamilton, "The Federalist Papers No. 70," The Avalon Project Documents in Law, History and Diplomacy (Yale Law School), accessed April 29, 2020, https://avalon.law.yale.edu/18th_century/fed70.asp).

> direct their operations; to provide for their support. These powers ought to exist without limitation, BECAUSE IT IS IMPOSSIBLE TO FORESEE OR DEFINE THE EXTENT AND VARIETY OF NATIONAL EXIGENCIES, OR THE CORRESPONDENT EXTENT AND VARIETY OF THE MEANS WHICH MAY BE NECESSARY TO SATISFY THEM. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defense.
>
> Whether there ought to be a federal government intrusted with the care of the common defense, is a question in the first instance, open for discussion; but the moment it is decided in the affirmative, it will follow, that that government ought to be clothed with all the powers requisite to complete execution of its trust. And unless it can be shown that the circumstances which may affect the public safety are reducible within certain determinate limits; unless the contrary of this position can be fairly and rationally disputed, it must be admitted, as a necessary consequence, that there can be no limitation of that authority which is to provide for the defense and protection of the community, in any matter essential to its efficacy that is, in any matter essential to the FORMATION, DIRECTION, or SUPPORT of the NATIONAL FORCES.[70]

Hamilton's argument bears great resemblance to those of Locke and Rousseau to ensure that the method by which a government must be saved during unexpected times may require extra-constitutional powers to be taken. However, Hamilton later states in *Federalist* No. 25 the following in part:

> …nations pay little regard to rules and maxims calculated in their very nature to run counter to the necessities of society. Wise politicians will be cautious about fettering the government with restrictions that cannot be observed, because they know that every breach of the fundamental laws, though dictated by necessity, impairs that sacred reverence which ought to be maintained in the breast of rulers towards the constitution of a country,

[70] Alexander Hamilton, "The Federalist Papers: No. 23," The Avalon Project Documents in Law, History and Diplomacy (Yale Law School), accessed April 29, 2020, https://avalon.law.yale.edu/18th_century/fed23.asp).

> and forms a precedent for other breaches where the same plea of necessity does not exist at all, or is less urgent and palpable.[71]

While in *Federalist* No. 23, Hamilton advocates for a presidential prerogative similar to those which Locke and Rousseau advocated for, he also states in the *Federalist* No. 25 that the breach of law, even for the good of the nation, could set dangerous precedent for the breach of law towards more nefarious intentions. Hamilton's ideological struggle in the *Federalist Papers* exemplifies the struggle in which America has dealt with since, simply being how does a nation both ensure it is prepared for times of crisis while upholding the rule of law and the Constitution? Jefferson struggled similarly with this question himself which has only perpetuated the general lack of understanding concerning the right course of action in the executive branch today.

THOMAS JEFFERSON: THE DEMOCRATIC-REPUBLICAN FIGHT

Thomas Jefferson (1743-1826) was another highly influential Founding Father whose Democratic-Republican ideology also heavily influenced the Constitution. Jefferson was the co-author of *Declaration of Independence* (1776), first secretary of state, second Vice President, and third President.[72] Often lauded as a champion of civil liberties, Jefferson was an advocate for the creation of a government by the people, one that was small and unimposing in nature.[73] An important facet to ensuring one's inalienable rights as stated by Locke was the creation of declarations of those rights,

[71] Alexander Hamilton, "The Federalist Papers: No. 25," The Avalon Project Documents in Law, History and Diplomacy (Yale Law School), accessed April 29, 2020, https://avalon.law.yale.edu/18th_century/fed25.asp).
[72] Joseph J. Ellis, "Thomas Jefferson," Encyclopædia Britannica (Encyclopædia Britannica, inc., April 17, 2020), https://www.britannica.com/biography/Thomas-Jefferson).
[73] Ibid, 2010.

otherwise joined in the Constitution as the first ten amendments. Jefferson is often criticized because his philosophy ventured from his actions, especially in his enslavement of more than six hundred people and his extra-constitutional actions taken during his presidency with the Louisiana Purchase in 1803.[74] To further establish Jefferson's constitutional ideology concerning the USA PATRIOT Act, this section will analyze *Notes on the State of Virginia*, his *First Inaugural Address*, and actions undertaken during his presidency.

Jefferson was largely considered to be an important voice for the Democratic-Republican Party, especially during times of the Federalists' expansion of power under the Alien and Sedition Acts of 1798. Upon Jefferson's election as the third President in 1800, he stated in his first inaugural address in part:

> About to enter, fellow-citizens, on the exercise of duties which comprehend everything dear and valuable to you, it is proper you should understand what I deem the essential principles of our Government, and consequently those which ought to shape its Administration. I will compress them within the narrowest compass they will bear, stating the general principle, but not all its limitations. Equal and exact justice to all men, of whatever state or persuasion, religious or political; peace, commerce, and honest friendship with all nations, entangling alliances with none; the support of the State governments in all their rights, as the most competent administrations for our domestic concerns and the surest bulwarks against antirepublican tendencies; the preservation of the General Government in its whole constitutional vigor, as the sheet anchor of our peace at home and safety abroad; a jealous care of the right of election by the people -- a mild and safe corrective of abuses which are lopped by the sword of revolution where peaceable remedies are unprovided; absolute acquiescence in the decisions of the majority, the vital principle of republics, from which is no appeal but to force, the vital principle and immediate parent of despotism; a well-disciplined militia, our best reliance in peace and for the first moments of war till regulars may relieve them; the supremacy of the civil over the military authority;

[74] NCC Staff, "The Louisiana Purchase: Jefferson's Constitutional Gamble," Constitution Daily (National Constitution Center, October 20, 2019), https://constitutioncenter.org/blog/the-louisiana-purchase-jeffersons-constitutional-gamble).

> economy in the public expense, that labor may be lightly burthened; the honest payment of our debts and sacred preservation of the public faith; encouragement of agriculture, and of commerce as its handmaid; the diffusion of information and arraignment of all abuses at the bar of the public reason; freedom of religion; freedom of the press, and freedom of person under the protection of the habeas corpus, and trial by juries impartially selected. These principles form the bright constellation which has gone before us and guided our steps through an age of revolution and reformation. The wisdom of our sages and blood of our heroes have been devoted to their attainment. They should be the creed of our political faith, the text of civic instruction, the touchstone by which to try the services of those we trust; and should we wander from them in moments of error or of alarm, let us hasten to retrace our steps and to regain the road which alone leads to peace, liberty, and safety.[75]

Jefferson's political beliefs are revolutionary in the context of the time in which they were formed. His ideology stated in his address is emblematic of the *Declaration of Independence* and in the interest of upholding the first ten amendments of the Constitution. His belief about upholding habeas corpus, which is, "used to bring a prisoner or other detainee (e.g. institutionalized mental patient) before the court to determine if the person's imprisonment or detention is lawful,"[76] stands as a controversial topic during times of war or crisis. Seen in numerous conflicts, the writ of habeas corpus is perhaps usually the first to go under fear of espionage or sabotage as seen in the Red Scare of 1918-1919 and the internment of Japanese Americans during WWII. In Jefferson's *Notes on the State of Virginia,* he states in part:

> Its fundamental principle is, that the state shall be governed as a commonwealth. It provides a republican organization, proscribes under the name of prerogative the exercise of all powers undefined by the laws; places on this basis the whole system of our laws; and by consolidating them together, chooses that they shall be left to stand or fall together, never providing for any circumstances, nor admitting that such could arise,

[75] Thomas Jefferson, "Thomas Jefferson First Inaugural Address," 1781, The Avalon Project Documents in Law, History and Diplomacy (Yale Law School), accessed April 29, 2020, https://avalon.law.yale.edu/19th_century/jefinau1.asp).
[76] "Habeas Corpus," Legal Information Institute (Cornell Law School), accessed April 29, 2020, https://www.law.cornell.edu/wex/habeas_corpus).

wherein either should be suspended; no, not for a moment… Our antient laws expressly declare, that those who are but delegates themselves shall not delegate to others powers which require judgment and integrity in their exercise. Or was this proposition moved on a supposed right in the movers, of abandoning their posts in a moment of distress? The same laws forbid the abandonment of that post, even on ordinary occasions; and much more a transfer of their powers into other hands and other forms, without consulting the people. They never admit the idea that these, like sheep or cattle, may be given from hand to hand without an appeal to their own will.—Was it from the necessity of the case? Necessities which dissolve a government, do not convey its authority to an oligarchy or a monarchy. They throw back, into the hands of the people, the powers they had delegated, and leave them as individuals to shift for themselves. A leader may offer, but not impose himself, nor be imposed on them. Much less can their necks be submitted to his sword, their breath be held at his will or caprice… The very thought alone was treason against the people; was treason against mankind in general; as rivetting forever the chains which bow down their necks by giving to their oppressors a proof, which they would have trumpeted through the universe, of the imbecility of republican government, in times of pressing danger, to shield them from harm. Those who assume the right of giving away the reins of government in any case, must be sure that the herd, whom they hand on to the rods and hatchet of the dictator, will lay their necks on the block when he shall nod to them. But if our assemblies supposed such a resignation in the people, I hope they mistook their character. I am of opinion, that the government, instead of being braced and invigorated for greater exertions under their difficulties, would have been thrown back upon the bungling machinery of county committees for administration, till a convention could have been called, and its wheels again set into regular motion. What a cruel moment was this for creating such an embarrassment, for putting to the proof the attachment of our countrymen to republican government! Those who meant well, of the advocates for this measure, (and most of them meant well, for I know them personally, had been their fellow-labourers in the common cause, and had often proved the purity of their principles,) had been seduced in their judgment by the example of an antient republic, whose constitution and circumstances were fundamentally different…Our situation is indeed perilous, and I hope my countrymen will be sensible of it, and will apply, at a proper season, the proper remedy; which is a convention to fix the constitution, to amend its defects, to bind up the several branches of government by certain laws, which, when they transgress, their acts shall become nullities; to render unnecessary an appeal to the people, or in other words a rebellion, on every infraction of

> their rights, on the peril that their acquiescence shall be construed into an intention to surrender those rights.[77]

For Jefferson, allowing a prerogative power to be exercised by the leader of a government would be the undoing of a republican form of government. Despite it specifically concerning Virginia, it is clear the ambiguities established in Article II were to be disastrous if exploited in favor of employing a dictator. Jefferson's beliefs about installing the government back to the people in times of an inability to handle a crisis or war, instead of into the hands of a monarch or constitutional dictator, was paramount to his philosophy. This exemplifies a difference of belief between Hamilton and Jefferson in their concerns of the continuation of government and maintenance of the States.

During President Jefferson's tenure he doubled the size of the nation through what is known as the Louisiana Purchase in 1803 after the Senate ratified Jefferson's treaty with France. However, Jefferson recognized that the ability to purchase the land from foreign powers was not an enumerated power granted to the President in the Constitution. In a letter to John Dickinson, Jefferson states the following in part:

> But there is a difficulty in this acquisition which presents a handle to the malcontents among us, though they have not yet discovered it. Our confederation is certainly confined to the limits established by the revolution. The general government has no powers but such as the constitution has given it; and it has not given it a power of holding foreign territory, & still less of incorporating it into the Union. An amendment of the Constitution seems necessary for this. In the meantime we must ratify & pay our money, as we have treated, for a thing beyond the constitution,

[77] Thomas Jefferson, *Notes on the State of Virginia*, 1785, https://www.thefederalistpapers.org/wp-content/uploads/2012/12/Thomas-Jefferson-Notes-On-The-State-Of-Virginia.pdf).

> and rely on the nation to sanction an act done for its great good, without its previous authority.[78]

His belief that the executive's power to purchase land from foreign entities should be made as a constitutional amendment never came to fruition. However, Jefferson saw the purchase as a necessary good for the nation which required him to employ extra-constitutional powers. Perhaps exemplary of a similar conundrum to Hamilton's, Jefferson was seemingly unable to rectify his political ideology of enforcing a strict constitutional interpretation of the executive and his actions taken once he entered the office.

[78] Thomas Jefferson, "Letter from Thomas Jefferson to John Dickinson," Envisaging the West: Thomas Jefferson and the Roots of Lewis and Clark (University of Nebraska-Lincoln, 1801), http://jeffersonswest.unl.edu/archive/view_doc.php?id=jef.00004).

CONCLUSION

The U.S. has not been able to reconcile the balance between exigencies in times of crisis or war and upholding the civil liberties and powers granted to the executive as laid out in the Constitution. Hamilton and Jefferson were unable to reconcile this in their own political philosophy as seen through their writings and speeches. Despite this, Locke's and Rousseau's ideas of presidential prerogative is well established and alive in American democracy today employed in an endless war against terror. While war and crisis has been a common happening since America's founding, the war on terror, through powers established The USA PATRIOT Act and employed by the executive, have allowed for a permanent fixture of prerogative.

In the final chapter, Hamilton's and Jefferson's ideology as established will be applied to the most scathing increases in the federal government's power concerning national security measures in The USA PATRIOT Act. In addition to the history of the executive's actions during wartime in America, it is increasingly important to understand what was and was not included in Article II of the Constitution in relation to Hamilton's and Jefferson's constitutional philosophies. This will not only carry one further in the understanding of the current impacts of The USA PATRIOT Act, but also the future implications which may result from it and providing prerogative in an endless war.

CHAPTER 4: THE WAR ON TERROR

The USA PATRIOT Act resulted from historical increases of executive power during wartime and crisis following the devastating terrorist attacks on September 11, 2001. The struggle to strike a balance between protecting civil liberties and adequately protecting the U.S. from similar attacks remains one of the most precarious questions yet to be solved. The U.S. possessed high functioning intelligence and surveillance powers prior to 9/11 but personnel, budgetary, and equipment deficits, prevented intelligence agencies from being able to adequately review all perceived threats on terrorism.[79]

In addition to the lack of resources available, bureaucracy and an air of secrecy between intelligence agencies led to a gridlock in information sharing between agencies. In late 2000 Justice Department lawyers sent a memorandum to the Attorney General's office and in July 2001 the General Accounting Office issued an audit in July 2001 stating these identified inadequacies and emphasized the importance of quickly fixing them.[80] However, these suggested actions were not acted upon in time, even as agencies were made aware that numerous al-Qaeda operatives, including two of the hijackers, were in the states. It was not until August of 2001, a month before the attacks, when an effort to locate the operatives began.[81]

The passage of the USA PATRIOT Act granted numerous increases in the federal government's power to surveil in the interest of national security. After fear and confusion crept into the American psyche following 9/11, the inadequacies of preexisting

[79] Stephen J. Schulhofer, *Rethinking the Patriot Act: Keeping America Safe and Free* (New York, NY: Century Foundation, Inc., 2005)).
[80] Ibid, Schulhofer.
[81] Ibid, Schulhofer.

statutes became an easy scapegoat for the government's inability to stop such an attack on American soil. Through Section 505 and 215 of the USA PATRIOT Act, relaxed restrictions and broadened powers granted to intelligence agencies and the executive allowed civil liberties to become a right of convenience, subject to the executive and the continuance of the war on terror. Utilizing originalist theory, Hamilton's and Jefferson's constitutional ideology will be applied to Section 505 and 215 in order to establish their constitutionality.

SECTION 505: "NOT CONDUCTED SOLELY UPON THE BASIS OF ACTIVITIES PROTECTED BY THE FIRST AMENDMENT"

Section 505 entitled, "Miscellaneous National Security Authorities," amended section 2709(b) of title 18 of U.S.C., section 1114(a)(5)(A) of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3414(a)(5)(A)), and section 624 of the Fair Credit Reporting Act (15 U.S.C. 1681u) which increased instances in which the FBI could issue national security letter, or NSLs.[82] In an effort maintain the ability to act quickly on issues of national security, NSLs operate similarly to a Foreign Intelligence Surveillance Court order authorized under FISA in which it, "directs the recipient to turn over designated records of a client or customer… (and) allows no opportunity for the affected client to contest the demand and prohibits the recipient from ever revealing to anyone that the records had been sought."[83]

NSLs, unlike the Foreign Intelligence Surveillance Court order, only require the signature of a qualified FBI official. Unless challenged by the recipient, there is no judicial oversight. Prior to 9/11, NSLs were only able to be utilized to acquire, "bank records, telephone billing records, and certain credit agency reports,"[84] and was subject to restrictions requiring, "investigators… to certify that the records sought pertained to a suspected foreign agent and that the FBI had specific, objective facts supporting those positions."[85] Under the PATRIOT Act, this requirement was lessened by amending the existing statutes and code to state similarly that,

[82] Ibid, 2001.
[83] Ibid, Schulhofer.
[84] Ibid, Schulhofer.
[85] Ibid, Schulhofer.

> …the information sought is relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States.[86]

Congress also made numerous additions to the documents which could be obtained through an NSL. In Sec. 505, First and Fourth Amendment rights are considerably at risk of being infringed upon. As clearly stated in the statute, the FBI is granted the ability to pursue an investigation against first amendment rights in part, without any external oversight forces, barring instances where a recipient challenges the NSL in court. Those rights thought to be paramount to preserving individual freedom in America including freedom of speech, religion, and press are subject to investigation concerning believed relevancy of involvement in international terrorism or clandestine intelligence activities.

In addition, the ability to obtain documents with a decreased burden of proof subject to internal review would cause, in cases of abuse by the intelligence agencies, an infringement upon Fourth Amendment rights provided in the Constitution. The Fourth Amendment grants, "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[87] Later, the FBI was found to be abusing their scope in issuing NSLs and the eventual passage of H.R. 3166 The USA PATRIOT Improvement and Reauthorization Act of

[86] Ibid, 2001.
[87] "Fourth Amendment," Legal Information Institute (Cornell Law School), accessed April 29, 2020, https://www.law.cornell.edu/constitution/fourth_amendment).

2005 by the 109th Congress attempted to enforce congressional oversight upon this provision.

Many sections within the USA PATRIOT Act included sunset provisions, providing for their immediate expiry upon a given date unless otherwise renewed in a different piece of legislation. To address the discovery of some improper issuances of NSLs, Hon. Patrick J. Leahy, U.S. Senator from Vermont and Chairman of the U.S. Senate's Committee on the Judiciary, stated in part during a committee meeting concerning NSLs that,

> Now, for 2 years, the reports by the Inspector General have revealed extremely troubling and widespread misuse of NSLs… In the reports, the Inspector General has found some very, very disturbing misuse of this authority. The Inspector General's report found widespread violations, including failure to comply with even the minimal authorization requirements, and more disturbingly, that the FBI requested and received information to which it was not entitled under the law. The reports found some rampant confusion about the authorities, and virtually no checks to ensure compliance or correct mistakes. But what I found very significant, is the Inspector General found that NSL use has grown to nearly 50,000 a year, and nearly 60 percent of those NSLs are used to find information about Americans. It is a major change in the years since 9/11.[88]

In lieu of the misuse by the FBI in issuing NSLs, Congress attempted to provide legislative oversight in The USA PATRIOT Improvement and Reauthorization Act Section 119 which stated in part that,

> The Inspector General of the Department of Justice shall perform an audit of the effectiveness and use, including any improper or illegal use, of national security letters issued by the Department of Justice… Not later than one year after the date of the enactment of this Act, or upon completion of the audit under this section for calendar years 2003 and 2004, whichever is earlier, the Inspector General of the Department of

[88] "National Security Letters: The Need for Greater Accountability and Oversight Hearing before the Committee on the Judiciary United State Senate 110th Congress Second Session" (Federation of American Scientists), accessed April 29, 2020, https://fas.org/irp/congress/2008_hr/letters.html).

> Justice shall submit to the Committee on the Judiciary and the Permanent Select Committee on Intelligence of the House of Representatives and the Committee on the Judiciary and the Select Committee on Intelligence of the Senate a report containing the results of the audit conducted under this subsection for calendar years 2003 and 2004.[89]

This provision was a necessity in preventing the further misuse of NSLs by the FBI and to protect civil liberties. The same sentiments were shared by the Framers of the Constitution who believed that a system of checks and balances between the different branches of government prevented against tyranny. However, when signing the bill into law, President Bush stated in part that,

> The executive branch shall construe the provisions of H.R. 3199 that call for furnishing information to entities outside the executive branch, such as section 106A and 119, in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to withhold information the disclosure of which could impair foreign relations, national security, the deliberative process of the Executive, or the performance of the Executive's constitutional duties.[90]

Despite President Bush's assertion of upholding his executive authority granted to him in Article II of the Constitution, none of these powers are explicitly granted to the executive branch under Article II. President Bush's stated executive authority is the presidential prerogative in action, a result of extraconstitutional powers granted to the executive during America's wartime history. There should be no precedent more dangerous to democracy than that when a president is able to determine the laws which are applicable to themselves, their executive branch, or the departments they oversee. For

---

[89] U.S. Congress, House, *USA PATRIOT Improvement and Reauthorization Act of 2005,* HR 3166, 109th Cong., 1st sess., introduced in House July 11, 2005, https://www.congress.gov/bill/109th-congress/house-bill/3199/text.

[90] George W. Bush, "President's Statement on H.R. 199, the 'USA PATRIOT Improvement and Reauthorization Act of 2005,'" The White House President George W. Bush (National Archives and Records Administration), accessed April 29, 2020, https://georgewbush-whitehouse.archives.gov/news/releases/2006/03/20060309-8.html).

the Framers, specifically Hamilton and Jefferson, their ideals concerning the role of checks and balances, the executive's duty to ensure laws are upheld, and ideas concerning civil liberties, Sec. 505 would be deemed unconstitutional by both.

Hamilton would consider Sec. 505 of The USA PATRIOT Act to be unconstitutional because of the lack of checks against the issuances of NSLs. Despite endorsing a near-Lockean form of prerogative, Hamilton's ideas concerning the necessity of a mixed government to prevent against tyranny would be breached in Sec. 505. Again, Hamilton stated in *Federalist* No. 25, "…wise politicians will be cautious about fettering the government with restrictions that cannot be observed, because they know that every breach of the fundamental laws, though dictated by necessity, impairs that sacred reverence which ought to be maintained in the breast of rulers towards the constitution of a country."[91] When held to the standard of internal oversight, the FBI's power could not be checked as it could not be observed by external agencies. While national security requires a degree of secrecy, the inability of the legislative branch had to exercise oversight implies a dangerous precedent in accordance with Hamilton's views. In addition, while President Bush's statement on not upholding Sec. 119 of The USA PATRIOT Improvement and Reauthorization Act utilized prerogative, it did so to further prevent accountability against tyranny through checks and balances.

Unsurprisingly, Sec. 505 would be deemed unconstitutional by Jefferson as it infringes upon civil liberties protected in the first and fourth amendments in cases of reported misuse. Jefferson's demonstrated belief in Locke's ideas concerning the

[91] Ibid, "The Federalist Papers: No. 25"

inalienable rights to life, liberty, and property would require that any infringement on these rights be struck down as unconstitutional. Again, Jefferson states in his *Notes on the State of Virginia* that, "a republican organization, proscribes under the name of prerogative the exercise of all powers undefined by the laws; places on this basis the whole system of our laws; and by consolidating them together, chooses that they shall be left to stand or fall together, never providing for any circumstances, nor admitting that such could arise, wherein either should be suspended; no, not for a moment."[92] Jefferson's belief that the validity of the laws must be maintained through the observance of all the laws at all times, including in times of war or crisis, further establishes the necessity to uphold civil liberties amongst all else to prevent against tyrannical power wielded by the federal government. Under Sec. 505, the ability of the FBI to issue NSLs in accordance with an investigation not wholly reliant on actions protected by the first amendment is in direct contradiction of Jefferson's belief concerning the role of the government in protecting those rights in all instances.

SECTION 215: "REQUIRING THE PRODUCTION OF ANY TANGIBLE THINGS"

Section 215 entitled, "Access to Records and Other Items under the Foreign Intelligence Surveillance Act," amended title 5 of the FISA of 1978 (50 United States Code, or U.S.C.,1861 et. seq.) and increased powers related to obtaining Foreign Intelligence Surveillance court orders. FISA was enacted in 1978 to assist the government in obtaining clandestine information concerning issues of national security,

[92] Ibid, 1785.

"(providing) greatly simplified procedures for obtaining and executing foreign intelligence warrants… apply(ing) to physical searches as well as electronic surveillance."[93] Those orders issued under FISA were subject to approval by appointed federal judges in the Foreign Intelligence Surveillance Court which held little oversight outside of the decision[94] Before 9/11, the restrictions placed upon obtaining a FISA court order required probable cause stating, "that the target's activities 'may involve' a crime related to clandestine intelligence gathering, terrorism, or identity fraud."[95] This order, "directs the recipient to turn over designated records of a client or customer, but… the court order does not allow the client or customer to contest the demand. In fact, the order prohibits the recipient from ever revealing to anyone that the records had been sought by the government,"[96] and was only relevant for obtaining records from a narrow subset of travel-related businesses.[97] Similar to those requirements laid out for Sec. 505, Sec. 215 replaced previous standards of issuance with the following in part that intelligence agencies can:

> …make an application for an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution.[98]

Sec. 215 authorizes intelligence agencies to gather virtually any material related to those persons in which it is deemed relevant to an investigation

[93] Ibid, Schulhofer.
[94] Ibid, Schulhofer.
[95] Ibid, Schulhofer.
[96] Ibid, Schulhofer.
[97] Ibid, Schulhofer.
[98] Ibid, 2001.

concerning international terrorism or clandestine intelligence activities. Despite the oversight by the FISA court in obtaining these records, Edward Snowden, a former employee of a company privately contracted by the National Security Agency (NSA), disclosed to *The Guardian* and *The Washington Post* in 2013 the existence of an NSA surveillance program, PRISM. PRISM, "which allows officials to collect material including search history, the content of emails, file transfers and live chats,"[99] included companies such as Microsoft, Google, Yahoo, Facebook, Skype, Apple. In a leaked FISA court order requiring Verizon Inc. to furnish the NSA and FBI with all call detail records obtained in their communications, it was stated in part that:

> IT IS HEREBY ORDERED that, the Custodian of Records shall produce to the National Security Agency (NSA) upon service of this Order, and continue production on an ongoing daily basis thereafter for the duration of this Order, unless otherwise ordered by the Court, an electronic copy of the following tangible things: all call detail records or "telephony metadata" created by Verizon for communications (i) between the United States and abroad; or (ii) wholly within the United States, including local telephone calls. This Order does not require Verizon to produce telephony metadata for communications wholly originating and terminating in foreign countries. Telephony metadata includes comprehensive communications routing information, including but not limited to session identifying information (e.g., originating and terminating telephone number, International Mobile Subscriber Identity (IMSI) number, International Mobile station Equipment Identity (IMEI) number, etc.), trunk identifier, telephone calling card numbers, and time and duration of call. Telephony metadata does not include the substantive content of any communication, as defined by 18 U.S.C. § 2510(8), or the name, address, or financial information of a subscriber or customer.[100]

[99] Glenn Greenwald and Ewen MacAskill, "NSA Prism Program Taps in to User Data of Apple, Google and Others," The Guardian (Guardian News and Media, June 7, 2013), https://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data).

[100] "Verizon Forced to Hand over Telephone Data – Full Court Ruling," The Guardian (Guardian News and Media, June 5, 2013), https://www.theguardian.com/world/interactive/2013/jun/06/verizon-telephone-data-court-order).

The Court utilizes the belief that all call detail records or metadata in Verizon's possession falls under any tangible things provided for in Sec. 215 of the USA PATRIOT Act. When asked about the government's surveillance efforts following the release of this information President Barack Obama stated in part in California that:

> Now, the programs that have been discussed over the last couple days in the press are secret in the sense that they're classified. But they're not secret in the sense that when it comes to telephone calls, every member of Congress has been briefed on this program. With respect to all these programs, the relevant intelligence committees are fully briefed on these programs. These are programs that have been authorized by broad bipartisan majorities repeatedly since 2006… When it comes to telephone calls, nobody is listening to your telephone calls. That's not what this program is about. As was indicated, what the intelligence community is doing is looking at phone numbers and durations of calls. They are not looking at people's names, and they're not looking at content. But by sifting through this so-called metadata, they may identify potential leads with respect to folks who might engage in terrorism. If these folks -- if the intelligence community then actually wants to listen to a phone call, they've got to go back to a federal judge, just like they would in a criminal investigation… This program, by the way, is fully overseen not just by Congress, but by the FISA Court -- a court specially put together to evaluate classified programs to make sure that the executive branch, or government generally, is not abusing them, and that it's being carried out consistent with the Constitution and rule of law.[101]

The Senate Select Committee on Intelligence and House Permanent Select Committee on Intelligence function as those responsible organs for legislative oversight for intelligence agencies. In respect to the naturally secretive nature involving clandestine operations, it is believed Congressional oversight over intelligence operations is not as complete as President Obama had previously stated. There is a well-known naturally tenuous relationship between Congress and intelligence agencies due to, "distrust of the

[101] Barack Obama, "Statement by the President," The White House President Barack Obama (National Archives and Records Administration), accessed April 29, 2020, https://obamawhitehouse.archives.gov/the-press-office/2013/06/07/statement-president).

Congress runs deep in the intelligence agencies—the assumptions being that Congress can never fully appreciate what intelligence professionals do, that Congress is unable to keep secrets, that congressional members and staff are looking for information that they can misuse for political purposes, and simply that Congress is just 'not one of us.'"[102]

The USA FREEDOM Act of 2015, another reauthorizing version of the USA PATRIOT Act, was passed during President Obama's second term and effectively ended the NSA's previous data collection program. However, there was a recognition of the necessity of a surveillance program in the digital age subject to stricter restrictions and guidelines resulting in a new program being adopted. Despite the restrictions placed upon it, it was reported in 2017 that the NSA collected 534 million total records, (i.e. the who and when, not the contents) pertaining to phone calls and text messages from numerous American telecommunications providers.[103] The ability of the NSA to collect information on any person under Sec. 215, regardless of believed affiliation with a terrorist group such as those seen in the NSA's PRISM program, would be deemed unconstitutional by both Hamilton and Jefferson.

Hamilton's beliefs on maintaining a mixed government to prevent against tyranny thus necessitates the establishment of Sec. 215 as unconstitutional. Despite the FISA court's oversight, the ability of the government to obtain the records of all communications of millions not suspected of being involved in international terrorism or

[102] Marvin C. Ott, "Intelligence Oversight in Congress: Perilous Times," Foreign Policy Research Institute, April 17, 2019, https://www.fpri.org/article/2019/04/intelligence-oversight-in-congress-perilous-times/).
[103] Charlie Savage, "N.S.A. Triples Collection of Data From U.S. Phone Companies," The New York Times (The New York Times, May 4, 2018), https://www.nytimes.com/2018/05/04/us/politics/nsa-surveillance-2017-annual-report.html).

clandestine operations falls prey once again to the lack of checks and balances. Despite Hamilton's belief in a strong federal government, it is impossible to protect that strong institution against tyranny without effective checks between the branches. The Department of Justice, empowered by President Bush following 9/11, serves as the warning outlined by Hamilton in *Federalist* No. 25 that breaches in the law, especially those which are in place to prevent misuse or tyranny, are inherent to uphold in fear of setting dangerous precedents as seen in the executive branch during America's wartime history.

Jefferson's staunch support of civil liberties and complete rejection of presidential prerogative would have had him consider Sec. 215 unconstitutional as well. The government's obligations to uphold civil liberties above all, and in favor of a small government, Jefferson would disagree with a power granted which would allow an investigation based partly upon actions protected under the first amendment and also those which sought to maintain information outside of its purview prescribed by law. Jefferson as stated in his first inaugural address, "the support of the State governments in all their rights, as the most competent administrations for our domestic concerns and the surest bulwarks against antirepublican tendencies; the preservation of the General Government in its whole constitutional vigor."[104]

[104] Ibid, 1781.

CONCLUSION

The USA PATRIOT Act serves as a reminder of the dangers associated with granting extraconstitutional powers to the executive or enacting laws with little to no oversight in the interest of preserving civil liberties. After escaping the tyrannical rule of the monarch in Britain, the Framers sought out to provide a nation which can adequately prevent itself from succumbing to a similar fate. However, the ambiguities in Article II have allowed for an evolution of powers afforded to the federal government, specifically the executive, during times of crisis or war contradictory to the intentions of the Framers of the Constitution as seen through Alexander Hamilton and Thomas Jefferson's constitutional ideology.

Naturally, the Constitution must change in order to adapt to those needs of a nation which is constantly evolving. However, civil liberties must never come at the expense of a law or statute in order to protect against tyranny. It is necessary now for America to answer the question for itself: what kind of America do we want to be? Power is becoming increasingly concentrated in the executive and the precedents of employing sweeping measures such as Sec. 505 and Sec. 215 now exist. America soon will stand at a crossroads of values in which it must decide its commitment to civil liberties or confirm its faith in the executive to practice prerogative to employ a constitutional monarch.

REFERENCES

"Alien Land Laws in California (1913 & 1920)." Immigration History. The University of Texas at Austin College of Liberal Arts Department of History, January 1, 1970. https://immigrationhistory.org/item/alien-land-laws-in-california-1913-1920/.

"Article II." Legal Information Institute. Cornell Law School. Accessed April 29, 2020. https://www.law.cornell.edu/constitution/articleii.

Ball, Howard. *The USA Patriot Act of 2001: Balancing Civil Liberties and National Security: A Reference Handbook*. Santa Barbara, CA: ABC-CLIO Inc., 2004.

Bertram, Christopher. "Jean Jacques Rousseau." Stanford Encyclopedia of Philosophy. Stanford University, May 26, 2017. https://plato.stanford.edu/entries/rousseau/.

Biddle, Francis. "Memorandum to the President from Attorney General Francis Biddle, February 17, 1942." FDR and Japanese American Internment. Franklin D. Roosevelt Presidential Library and Museum. Accessed April 29, 2020. http://www.fdrlibrary.marist.edu/archives/pdfs/internment.pdf.

"Bolsheviks Revolt in Russia." History.com. A&E Television Networks, February 9, 2010. https://www.history.com/this-day-in-history/bolsheviks-revolt-in-russia.

Bush, George W. "President's Statement on H.R. 199, the 'USA PATRIOT Improvement and Reauthorization Act of 2005.'" The White House President George W. Bush. National Archives and Records Administration. Accessed April 29, 2020. https://georgewbush-whitehouse.archives.gov/news/releases/2006/03/20060309-8.html.

DeConde, Alexander. "Alexander Hamilton." Encyclopædia Britannica. Encyclopædia Britannica, inc., December 23, 2019. https://www.britannica.com/biography/Alexander-Hamilton-United-States-statesman.

"Democratic-Republican Party." Federalists, Jefferson, Republicans, and American - JRank Articles. Accessed April 29, 2020. https://law.jrank.org/pages/6058/Democratic-Republican-Party.html.

Devinatz, Victor G. "Communist Party of the United States of America." Encyclopædia Britannica. Encyclopædia Britannica, inc., October 12, 2014. https://www.britannica.com/topic/Communist-Party-of-the-United-States-of-America.

Ellis, Joseph J. "Thomas Jefferson." Encyclopædia Britannica. Encyclopædia Britannica, inc., April 17, 2020. https://www.britannica.com/biography/Thomas-Jefferson.

"Fifth Amendment." Legal Information Institute. Legal Information Institute. Accessed April 29, 2020. https://www.law.cornell.edu/constitution/fifth_amendment.

"Fourth Amendment." Legal Information Institute. Cornell Law School. Accessed April 29, 2020. https://www.law.cornell.edu/constitution/fourth_amendment.

Genovese, Michael A. *Presidential Prerogative: Imperial Power in an Age of Terrorism*. Stanford, CA: Stanford University Press, 2010.

Greenwald, Glenn, and Ewen MacAskill. "NSA Prism Program Taps in to User Data of Apple, Google and Others." The Guardian. Guardian News and Media, June 7, 2013. https://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data.

"Habeas Corpus." Legal Information Institute. Cornell Law School. Accessed April 29, 2020. https://www.law.cornell.edu/wex/habeas_corpus.

Hamilton, Alexander. "The Federalist Papers No. 70." The Avalon Project Documents in Law, History and Diplomacy. Yale Law School. Accessed April 29, 2020. https://avalon.law.yale.edu/18th_century/fed70.asp.

Hamilton, Alexander. "The Federalist Papers: No. 23." The Avalon Project Documents in Law, History and Diplomacy. Yale Law School. Accessed April 29, 2020. https://avalon.law.yale.edu/18th_century/fed23.asp.

Hamilton, Alexander. "The Federalist Papers: No. 25." The Avalon Project Documents in Law, History and Diplomacy. Yale Law School. Accessed April 29, 2020. https://avalon.law.yale.edu/18th_century/fed25.asp.

History.com Editors. "Alien and Sedition Acts." History.com. A&E Television Networks, November 9, 2009. https://www.history.com/topics/early-us/alien-and-sedition-acts.

History.com Editors. "Pearl Harbor." History.com. A&E Television Networks, October 29, 2009. https://www.history.com/topics/world-war-ii/pearl-harbor.

History.com Editors. "Federalist Party." History.com. A&E Television Networks, November 9, 2009. https://www.history.com/topics/early-us/federalist-party.

History.com Editors. "Articles of Confederation." History.com. A&E Television Networks, October 27, 2009. https://www.history.com/topics/early-us/articles-of-confederation.

Jefferson, Thomas. "Thomas Jefferson First Inaugural Address." The Avalon Project Documents in Law, History and Diplomacy. Yale Law School. Accessed April 29, 2020. https://avalon.law.yale.edu/19th_century/jefinau1.asp.

Jefferson, Thomas. "Letter from Thomas Jefferson to John Dickinson." Envisaging the West: Thomas Jefferson and the Roots of Lewis and Clark. University of Nebraska-Lincoln, 1801. http://jeffersonswest.unl.edu/archive/view_doc.php?id=jef.00004.

Jefferson, Thomas. *Notes on the State of Virginia*, 1785. https://www.thefederalistpapers.org/wp-content/uploads/2012/12/Thomas-Jefferson-Notes-On-The-State-Of-Virginia.pdf.

"John Adams." The White House. The United States Government. Accessed April 29, 2020. https://www.whitehouse.gov/about-the-white-house/presidents/john-adams/.

Locke, John. *Second Treatise of Government*, 1690. https://english.hku.hk/staff/kjohnson/PDF/LockeJohnSECONDTREATISE1690.pdf.

"National Security Letters: The Need for Greater Accountability and Oversight Hearing before the Committee on the Judiciary United State Senate 110th Congress Second Session." Federation of American Scientists. Accessed April 29, 2020. https://fas.org/irp/congress/2008_hr/letters.html.

NCC Staff. "The Louisiana Purchase: Jefferson's Constitutional Gamble." Constitution Daily. National Constitution Center, October 20, 2019. https://constitutioncenter.org/blog/the-louisiana-purchase-jeffersons-constitutional-gamble.

Obama, Barack. "Statement by the President." The White House President Barack Obama. National Archives and Records Administration. Accessed April 29, 2020. https://obamawhitehouse.archives.gov/the-press-office/2013/06/07/statement-president.

"Originalism." Merriam-Webster. Merriam-Webster. Accessed April 29, 2020. https://www.merriam-webster.com/dictionary/originalism.

Ott, Marvin C. "Intelligence Oversight in Congress: Perilous Times." Foreign Policy Research Institute, April 17, 2019. https://www.fpri.org/article/2019/04/intelligence-oversight-in-congress-perilous-times/.

Palmer, A. Mitchell. "The Case Against the 'Reds."." The Forum. Accessed April 29, 2020. https://www.marxists.org/history/usa/government/fbi/1920/0200-palmer-redscase.pdf.

"Palmer Raids: Topics in Chronicling America." Introduction - Palmer Raids: Topics in Chronicling America - Research Guides at Library of Congress. Library of Congress. Accessed April 29, 2020. https://www.loc.gov/rr/news/topics/palmer.html.

Risen, James, and Eric Lichtblau. "Bush Lets U.S. Spy on Callers Without Courts." The New York Times. The New York Times, December 16, 2005. https://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html.

Rosen, Jeffrey. “Hamilton Would Not Have Stood for Trump's New Constitutional Theory.” The Atlantic. Atlantic Media Company, April 17, 2020. https://www.theatlantic.com/ideas/archive/2020/04/hamilton-would-not-have-stood-trumps-new-constitutional-theory/610177/.

Rousseau, Jean Jacques. *The Social Contract and Discourses,* 1762. http://oll-resources.s3.amazonaws.com/titles/638/Rousseau_0132_EBk_v6.0.pdf.

Savage, Charlie. “N.S.A. Triples Collection of Data From U.S. Phone Companies.” The New York Times. The New York Times, May 4, 2018. https://www.nytimes.com/2018/05/04/us/politics/nsa-surveillance-2017-annual-report.html.

Schulhofer, Stephen J. *Rethinking the Patriot Act: Keeping America Safe and Free*. New York, NY: Century Foundation, Inc., 2005.

“Sedition Act of 1798.” Constitution Society: Everything needed to decide constitutional issues. Constitution Society. Accessed April 29, 2020. https://www.constitution.org/rf/sedition_1798.htm.

Sexton, Ellen. “Asymmetrical Warfare.” Encyclopædia Britannica. Encyclopædia Britannica, inc., November 17, 2016. https://www.britannica.com/topic/asymmetrical-warfare.

Stone, Geoffrey R. *Perilous Times:Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism*. New York, NY: W.W. Norton & Company, Inc., 2005.

Strauss, David A. “The Living Constitution (Excerpt).” The Living Constitution University of Chicago Law School. Oxford University Press, September 27, 2010. https://www.law.uchicago.edu/news/living-constitution.

“TAKAO OZAWA v. UNITED STATES.” Legal Information Institute. Cornell Law School. Accessed April 29, 2020. https://www.law.cornell.edu/supremecourt/text/260/178.

“The 1st Amendment of the U.S. Constitution.” First Amendment Freedom of Religion, Speech, Press, Assembly, and Petition. National Constitution Center. Accessed April 29, 2020. https://constitutioncenter.org/interactive-constitution/amendment/amendment-i.

“The 22nd Amendment of the U.S. Constitution.” National Constitution Center – The 22nd Amendment of the U.S. Constitution. Accessed April 29, 2020. https://constitutioncenter.org/interactive-constitution/amendment/amendment-xxii

“Thomas Jefferson Establishing A Federal Republic.” Exhibitions. Library of Congress, April 24, 2000. https://www.loc.gov/exhibits/jefferson/jefffed.html#skip_menu.

“Transcript of Executive Order 9066: Resulting in the Relocation of Japanese (1942).” Our Documents - Transcript of Executive Order 9066: Resulting in the Relocation

of Japanese (1942). OurDocuments.gov. Accessed April 29, 2020. https://www.ourdocuments.gov/doc.php?flash=false&doc=74&page=transcript.

Tuckness, Alex. "Locke's Political Philosophy." Stanford Encyclopedia of Philosophy. Stanford University, January 11, 2016. https://plato.stanford.edu/entries/locke-political/.

U.S. Congress. House. *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001*. HR 3162. 107th Cong., 1st sess. Introduced in House October 23, 2001. https://www.gpo.gov/fdsys/pkg/BILLS-107hr3162ih/pdf/BILLS-107hr3162ih.pdf.

U.S. Congress. House. *USA PATRIOT Improvement and Reauthorization Act of 2005*, HR 3166. 109th Cong., 1st sess. Introduced in House July 11, 2005.d https://www.congress.gov/bill/109th-congress/house-bill/3199/text.

"Verizon Forced to Hand over Telephone Data – Full Court Ruling." The Guardian. Guardian News and Media, June 5, 2013. https://www.theguardian.com/world/interactive/2013/jun/06/verizon-telephone-data-court-order.

"Wilson's War Message to Congress." Wilson's War Message to Congress - World War I Document Archive. Brigham Young University Library. Accessed April 29, 2020. https://wwi.lib.byu.edu/index.php/Wilson's_War_Message_to_Congress.