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Book Review: Emergency Presidential Power: From the Drafting of the Constitution to the War on Terror

Gregory Moore
Notre Dame College

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Review of *Emergency Presidential Power: From the Drafting of the Constitution to the War on Terror*

Edelson, Chris. *Emergency Presidential Power: From the Drafting of the Constitution to the War on Terror*. Madison: The University of Wisconsin Press. 2013. ISBN: 978-0-299-29530-1. pp. vii-xv, 3-273; notes, pp. 275-340; index, pp. 341-359.

In the foreword to this book, the author states that he wrote it because he could not find a suitable textbook for a new class he was teaching about emergency presidential powers and the war on terror. In doing so, he has produced a useful, balanced, and insightful discussion of the growing independence of the executive, and the implications the evolution of this increasing assertiveness has had on American foreign and domestic policy, particularly in the ongoing battle against international and domestic terrorism. Instructors offering classes in terrorism and counterterrorism, public policy and administration, or constitutional law and the presidency, among others, may want to give this volume serious consideration for use in their courses.

In the opening chapter the author offers a brief discussion on those provisions within the Constitution that deal with the issue of emergency presidential power, concluding that there is no specific article that authorizes the president to act unilaterally in times of crisis. Nonetheless, presidents have done so and each has offered justifications for his actions. This, the author notes, raises important questions particularly in regard to how the executive has defended his actions. Why does this matter? Professor Edelson notes that ultimately presidents must persuade others of the legitimacy of their actions, and, in doing so, they may establish precedents for future presidential decisions.

The next three chapters of the book discuss the early processes by which presidents such as Washington, John Adams, Polk, and Lincoln defended their right to assert emergency executive powers. Following these, the author provides an analysis of *Ex Parte Milligan*, noting the apparent rejection of implied emergency presidential powers by the Supreme Court. However, the author points out that the decision was rendered after the Civil War had ended and passions had cooled, and that the Court "...seemed to embrace the fiction that the Union was saved without any resort to implied presidential emergency power" (59). Professor Edelson notes that it can be argued that Lincoln's actions, along with retroactive congressional approval of them, created a precedent for emergency presidential authority.

The four chapters that follow trace the continuing evolution of emergency presidential power through World War II, the Youngstown Steel Seizure case, and Watergate. The author demonstrates how the Youngstown case and Watergate led to Supreme Court decisions that rejected presidential reliance on inherent powers and Nixon's grab for unlimited presidential power, noting, however, that not everyone agreed with the Court's viewpoint.

The last half of the book focuses on the issues that have arisen since 9/11 in regard to the conduct of the War on Terror and the degree to which the executive can act unilaterally. Of particular interest is the discussion of the unitary executive theory—the idea that all executive authority resides with the president alone and that the other branches of the government have no right to interfere with presidential actions arising from the use of those powers. Originating in the minority report regarding the Iran–Contra affair, the author notes that this was the justification used by the George W. Bush administration to support the expansion of presidential power it claimed were necessary to defend the nation after the terrorist attack of September 11, 2001.

However, the author continues, this point of view raises several constitutional issues, not least of which is the setting aside of the system of checks and balances as envisioned by the founders. Noting the extraconstitutional aspect of inherent powers, he states that such powers “...exist outside of and are not limited by the Constitution” (127). Moreover, the unitary executive view raises a number of questions ranging from whether or not such a view is justified within the text of the Constitution to the implications such a theory has for a constitutional form of government.

From this point forward, the author discusses the issues that have been raised by the War on Terror: detaining and trying alleged terrorists, the use of torture, warrantless wiretapping, the use of detention and military commissions, state secrets privilege, the targeted killing of Americans who have joined terrorist organizations, and the decision of the Obama administration to take military intervention in Libya. Relying mainly on primary documents, including court decisions and memoranda from the Office of Legal Council (OLC), Professor Edelson carefully dissects each issue, presenting the arguments for each side, critiquing them, and offering additional questions for consideration.

The author notes the ambiguities inherent both in interpreting the Constitution and in defining terms such as “hostilities;” both those who support expanding emergency presidential powers and those who wish to rein them in to utilize these ambiguities to support their arguments as they try to justify their points of view. The complexities of each of these issues are presented clearly and concisely, and in a manner that allows the reader to decide which opinion has the most merit. Rather than argue for a specific side, Professor Edelson offers an assessment of the arguments for and against inherent presidential power and presents questions that can be used for classroom discussion or for personal reflection.

Although the author intended the book for a classroom setting, it is a work that should draw the attention of scholars and the interested public. As a textbook, there are some aspects that instructors might find problematic. Questions about interpretations of the constitutionality of emergency presidential powers are spread throughout each chapter, rather than presented at the end of them. Readers, students in particular, might have found it more beneficial to include a synopsis of the major points and the questions about interpretations of the issues discussed at the end of each chapter.

The book also ends rather abruptly with questions about the Obama administration's interpretation of the War Powers Resolution of 1973. Readers may find the lack of a conclusion that summarizes the main points of the book to be unsatisfying. Students and instructors in particular may have benefited from a concluding chapter that not only provides a review of the book's arguments, but also its significant discussion points.

However, the book's strengths offset these concerns. This is a well-researched volume that makes excellent use of primary documents in formulating its discussion of what has become, in light of present and recent events, an area of concern, not only for constitutional scholars, but also for those involved in protecting the nation's security and the general public. Extended citations of court decisions, presidential commentaries, and other documents, along with secondary sources, supported by careful analysis and deconstruction of the arguments presented in them, give readers the opportunity to reach a considered opinion regarding the use of emergency power by the nation's chief executive and the justifications for its use. Practitioners in the intelligence and security communities will find much to consider as they digest the analyses offered in this volume. The questions raised by the author merit careful consideration by intelligence and national security professionals, scholars, and students, as well as the general public, especially with the rise of the Islamic State and other events that have taken place since the book's publication.

Gregory Moore, Ph.D.

Center for Intelligence Studies, Notre Dame College, South Euclid, Ohio