University of São Paulo

Political Science Graduate Program

Perspectives on the executive prerogative: a brief introduction to discussions and disputes in the American literature

Working paper prepared to "IV Seminário Discente da Pós-Graduação em Ciência Política da USP", 2014, April 07-11.

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Abstract: This working paper briefly introduces perspectives on the executive prerogative, into the literature produced in the United States. The main proposition is to map some disagreements between relevant authors in this debate, considering Locke's prerogative theory lenses and its relationship and disputes of the American Constitution analysis, especially between the legal and extra-legal groups which polarized this discussion.

Key words: Prerogative, John Locke, American Constitution, Legal and Extra-Legal Approaches.

I. Introduction

This working paper broad objective is to bring a brief introduction and short presentation around the executive prerogative debate within the United States literature; the specific focus here relies on the contemporary state of art of this discussion considering the lockean prerogative theory approaches within the American Constitution. The American debate around the executive prerogative connects itself with two fundamental factors: (i) the summer of 1787 in the Philadelphia Convention, all of the discussion generated within the Founding Fathers (Framers) documented in the Federalist Papers and the American Constitution development; (ii) the discretionary use of the prerogative executive powers – especially used in times of emergency and/or war. The Founding Fathers had a special attention with an idea new to the world in the eighteenth century: the separations of powers[1], this is an important and essential concern, that goes along as a *continuum* through all the discussion within the Framers and the actual contemporary state of this debate.

Another important detail, is to bring up considerations of Locke's work. It is impossible to think of the executive prerogative without the book "Two Treatises of Government", especially Chapter XIV of the Second Essay, called "Of Prerogative"[2]. A special stating point in articles, researches and books that deal in some way with the executive prerogative, is to emphasize a possible influence of Locke's work. Different types of approaches takes into consideration the plausible fact that "Second Treatises" was the Framers' important[3] or most important[4] political source, and consequently had a significant impact into the American Constitution; in the other side of the table authors securely disagree with this statement[5]. There is lot of aspects into this debate, that goes along with concepts, ideas and designs proposed by the Framers, that dialogues not only

[1] Schlesinger (2004): "[But] the Founding Fathers, who saw conflict (of authority) as the guarantee of freedom, grandly defied the inherited wisdom. Instead of concentrating authority in a single institution, they chose to disperse authority among three independent branches of government, equipping the leaders of each, in words of the 51st Federalist Paper, with the 'necessary constitutional means and personal motives to resist encroachments of others'. These branches, as every schoolchild used to know, were the executive, the legislative, and the judiciary. The Constitution thus institutionalized conflict in the very heart of the American polity" ("Foreword to the 1973 Edition"; of the 2004 E-Book Edition by Kobo pages may vary).
[2] Locke, J. "Two Treatises of Government". Second Essay, Chap. XIV, "Of Prerogative", §159 to §168.
[3] According to Weaver (1997) and Fatovic (more explicity in 2004b).
[4] According to Schlesinger (2004): "the founding fathers were more influenced by Locke than any other political philosopher" (Chapter One, "What the Founding Fathers Intended"). And quotes, Lincoln and second Roosevelt ("was a Lockean without knowing it"), Jefferson ("was a student of Locke"; the Burr case), Truman ("lockean prerogative with a vengeance" in the "steel-seizure" case) and (Chap.8, Part. XIV).
[5] Langston and Lind (1991) disagrees of Locke' influence on the Framers and the Constitution itself: "Locke is not mentioned in the American Constitution" (p.51; more in this working paper part 2.2).

with Locke but also with Machiavelli, Hobbes, Blackstone, Montesquieu, Kant, Kelsen, Carl Schmitt, Agamben and other important classical and contemporary political and legal/constitutional theorists and analysts.

This is just one indication of a deeply extend range of the debate, which are involved in a significant broad picture, including: the separation of powers and its checks and balances horizontally between executive, legislative and judiciary, the vertical checks of public opinion and the society, possible relations between the king/god's-prince' prerogative and prerogatives of the American president, the circumstances of using the prerogative (case studies or historical moments, the so called "presidencialists debate[6]", mainly in times of emergency and war – the debate gained new strength after the 9/11 events), the legitimate use or its illegitimate abuse, its legal or illegal framework, altogether (or not) with its constitutionality or unconstitutionality, implying discussions within the risks of tyranny, the consolidation of the rule of law, and so on. All of this means that the literature reaches the classical and modern political philosophy, the legal and constitutional scholars altogether with political scientists across political analysis, historical moments and different approaches and readings of the formulation and design of the American constitution. What I am trying to say here is, this is a huge and complex debate, which I am not capable of capturing the broader picture, for a plenty and innumerous reasons.

The humble task of this working paper is just to bring a briefly and systematic organization of some short discussion within important aspects of the prerogative theory, which generated a considerably amount of relevant academic articles and books. The micro-cosmos of this working paper will have special attention of the recent state of art, the historical part will only be followed or sometimes reduced, through the debate of ideas between the authors relevant to the proposed discussion, towards these objects of study: the executive prerogative and the analysis of its use by different American presidents, particularly within times of emergency or war, considering the lockean prerogative

[6] According to Cronin and Genovese (2004), the executive prerogative (as emergency powers) have been discussed more with Lincoln and Roosevelt, with Nixon (Watergate scandal) and Reagan (Iran-Contra) both of them constituting the most pronounced contemporary examples, then latter with Clinton and more recently and intensely, the debate gained strength in the literature with George W. Bush antiterrorism initiatives post 9/11 (for more see: Chapter 8 in "The Paradoxes of American Presidency"). Trimble (1992) related that the executive prerogative have been controversial since the first administration of George Washington, when after he declared neutrality in 1793 in the war between France and Great Britain, A. Hamilton and J. Madison debated his authority under the pseudonyms Pacificus and Helvidius (p.950).

theory. The background still pretty complex and surround the discussions within the Framers (the Federalist Papers), the American Constitution, the legitimate aspect, political and philosophical analysis and, legal and constitutional frameworks. In order to better understand this fraction of the contemporary prerogative debate, the main objective of this study is to map some disagreements and disputes between authors through different perspectives, lenses and conceptual approaches.

II. Summarizing Locke's prerogative

It is impossible to begin to think about the American executive prerogative elements without bringing Locke to the table. There is of course a lot of discussion within aspects of the conceptual keys and sections of Locke' Second Treatise, Chapter XIV, called "Of Prerogative", which is constantly re-thought and re-discussed through the literature. The use of Yolton's (1993) analysis have the objective to present some essential elements in order to illustrate a little bit better the dynamics of the debate – this do not mean that all of his affirmations are consensual in the literature.

The author say that Locke favored the written law, so people could know what they and their rulers could and could not do; the law of nature where unwritten laws[7] operated in government. Yolton argues that Locke recognized that written law could not cover all contingencies and could not be specific enough to enable rulers or the executive body to decide every issue. Therefore, the executive branch of government has a power "to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it" (§160), this power is called "prerogative" (§160). Such power and discretion operate within the general proviso for the public good and, the end of government is, as Locke repeats often, "the preservation of all" (§159). Prerogative have another side to it: "Peoples permitting their Rulers, to do several things of their own free choice, where the law was silent, and sometimes too against the direct letter of law, for the public good" (§164). The people here can even take back some of the prerogative by instituting laws to cover some acts formerly done through the ruler's prerogative, but there will always be a need for discretionary action. The judgment to be made that some action done by the prerogative was or was not, for the public good, Locke openly recognized, that there is no criterion (or laws) the people can appeal against to prerogative, at least not on earth, the only appeal remains to heaven as it is the only resource is such disputes (§168).

[7] Yolton (p.174, 1993) says "it might be better to call them 'judgments'".

At the very end of *Two Treatises*, when addressing the topic of tyranny and the dissolution of government, Yolton (p.175, 1993) attests to the fact that Locke "mutes that stark conclusion about the only appeal being to heaven by saying": "The People shall be Judge" (§240), the 'body' ("the majority? Yolton, asks) of the people should be the "umpire" (§241), there Locke "seems to assume a case where there would be a little dispute among the people that the actions of the ruler or executive branch were against the public good". Yolton then finishes, "the issues here are delicate and complex, and have been the source of much debate", this working paper proposes to help bringing some of this discussion in order to better understand this issues.

III. Executive Prerogative and the American Constitution: a polarized relationship

There are several scholarly interpretations regarding the prerogative power and the Constitution. On one hand, Bailey (2004) suggests that there are a minimum understanding, in which scholars agrees that laws are imperfect with regard to the future, and must therefore be pushed aside if required to preserve the nation, the president then, "by virtue of his unity of office and duration, is the most convenient as well as the safest repository for emergency powers" (p.732). On the other hand, Fatovic (2004b) affirms that "they[8] have had great difficulty reconciling this power with the liberal constitutional commitment to the rule of law". Arnhart (1979) divided it into "three possible theories of how executive prerogative might apply to American Presidency": (i) the view of executive prerogative "within the Constitution" (Arnhart himself, Justices Nelson, Justices Davis and Chase, and Justice Frankfurter); the second view (ii) "outside the constitution" is taken by Schlesinger (1973) and also by Justice Jackson; and the third view (iii) namely that prerogative is "both inside and outside the Constitution" is defended by Lincoln. Yet Bailey (2004), sets the distinction respectively: (i) one reading argues that the article II, with the president into the commander-in-chief position, provide the legal foundation for the president to use the prerogative[9]; (ii) the opposite group argues,

[8] Fatovic (2004b) adds that "They [more specifically: Langston and Lind, 1991; Arnhart 1979; Corwin 1957, 3; Cox 1988; Cronin and Genovese 1998, 249–50; Franklin 1991; Pious 1979; Scigliano 1989], view prerogative as a disturbing anomaly in a normally rule-bound system of government, an embarrassing aberration from the principles of liberal constitutionalism that potentially undermines the political system it is sometimes called upon to save. Since it gives the executive discretion to act not only where the law is silent, but "sometimes even against it," prerogative is essentially an extralegal power whose proper exercise cannot be determined in advance with any reliable degree of specificity".

[9] First group is constituted by: Corwin, 1957; Arnhart, 1979; Sorenson 1989 Apud: Bailey, 2004.

that the Constitution is silent concerning the prerogative and, under this extra-constitutional approach, the prerogative power is outside the Constitution, so its occasional exercise, although illegal, must be controlled by politics rather by the Constitution[10]; and the last interpretation, (iii) rather than assessing the prerogative purely constitutional, or legal terms, this understanding holds that prerogative is left to institutional conflict under constitutional design, in other words, judging the prerogative involves a debate about premises[11]. Another author that works in the same methodological separation approach is Corbett (2004), he refers to the first group as the defenders of a "constitutionalist" interpretation thesis, which accounts a "near total subordination of prerogative to constitutional control"[12]; the second and opposite group "stands an account of prerogative that is extra constitutional"[13]. These dichotomies are always present in the debate, regarding specificities of authors and approaches. Some disputes will be brought below, as follows.

IV. Executive Prerogative Perspectives within the legal, constitutional and institutional checks

Arnhart (1979): the law are structural walls for the abuse of power

Arnhart's (1979) article is probably one of the most classical articles in this theme, altogether with Schlesinger's (1973/2004) book. One of the aims of Arnhart's critics is the Schlesinger himself, and both of them started in a certain way[14] the debate this working paper proposes. Arnhart is clear in the position he takes: "discretionary power

[10] Second group is constituted by: Wilmerding 1952; Schlesinger 1973; Robinson 1996; Fisher 1997 Apud: Bailey, 2004.
[11] The third group is constituted by: Thomas (2000) and Roche (1952) Apud: Bailey, 2004.
[12] Corbett (2004) includes in this first group: Weaver (1997), Faulkner (2001) and also Langston and Lind (1991).
[13] Corbett (2004) includes in the second group: Fatovic (2004a), Mattie (2005), and Josephson (2002), he adds that this group "owes its form to Harvey Mansfield treatment of Locke in Taming the Prince (1989)". Although it is clear Mansfield' great contributions to the debate, Fatovic (2004a) himself critics Mansfield thesis of Locke's non-instutitionalize nature of the prerogative "constitutionalizes the necessity of tyranny" (p.184,187 Apud Fatovic, 2004) for more see Fatovic (2004) page 287.
[14] A Previous and important author that already worked and debated fundamental issues around this theme (he will not be properly discussed but definitely deserves more attention) is Edward Corwin, a respected law professor of Harvard, there are many books and articles quoting him, some are the following: Edward Corwin (1917) "The Presidents Control of Foreign Relations" (N.J.: Princeton University Press); Edward Corwin (1953) "The Steel Seizure Case: A Judicial Brick Without Straw" Columbia Law Review, 53; Edward Corwin (1955) "The 'Higher Law' Background of American Constitutional Law" (Ithaca), Edward Corwin (1957) "The president: Office and powers, 1787-1957" (N.Y.: New York University Press), Apud: Roche (1952), Sorenson (1989), Langston and Lind (1991), Trimble (1992), Thomas (2000), Bailey (2004), Fatovic (2004), Cronin e Genovese (2004), Schlesinger (2004).

as such is not bad – indeed, it can be the source of the greatest good – but what is to be feared is the abuse of this power" (underlined is mine, henceforth). The author in this passage, concerns with the fact that the discretionary power might substitute the arbitrary will of one person for the impersonal rule of law, causing tyranny, that is why his concern aims to the limits of the prerogative executive power. The author here, analyzing Schlesinger, asserts that if the President have the power "to go beyond the Constitution, there is no way he can prevent the abuse of that power". Arnhart (1979) thesis rests in the fact that "the President does have emergency powers, he receives those powers from the Constitution, and must exercise them according to the Constitution". Before getting in the details of this argument, which is central, Arnhart introduces some arguments for limiting the executive prerogative power, regarding horizontal and vertical checks.

Arnhart (1979) discusses three ways of limiting the prerogative: (i) the people demand or question the prince's prerogative power, being the ultimate check the right of people to revolt; (ii) also to preserve the protection of property, the government has no other end but the "preservation of property" (§ 94); and, (iii) the establishment of a legislative body. The author referring to the point (i) and (ii), reminded that according to Locke people are "seldom" (§ 161) and the have "slowness and aversion" "to quit their old Constitutions" (§ 223). Arnhart reinforces that only the "weak prince" will be threaten by the people (when oppressed they will revolt), on the contrary, the "wise prince" "knows how to handle the people", following Machiavelli leads, he knows that "should base his power upon the people, because the people will not question his use of power as long as he keeps his hands of their property [is itself the source of increased power of the Prince] and their women". The third point (iii) refers to the separation of powers, and Arnhart arguments assets that the executive prerogative of the prince is necessarily less than the total prerogative it possessed, before the division of power into executive and legislative. The author in this path argues that the executive prerogative is a *supplement to law.* The author then, establishes the legislative power limitation in three ways (§ 160): (i) the legislature, because of the number of its members and slowness of its deliberations, prevent it from making quick decisions; (ii) a legislature cannot write its laws to cover every case because some future problems are always unforeseeable; and (iii) laws must be inflexible and therefore not always appropriate to change circumstances. Recognizing the legislative limitations, the author assets that when it is necessary for the legislature to act quickly and flexibly in response to some unexpected event, or in case of emergencies (especially in times of war), it must yield to the discretionary power of the executive –

Arnhart reinforces the prerogative power of the executive is greatest in foreign affairs because "such matters cannot be governed by law" (§ 88, 131, 146-147). It is clear that Arnhart notes particular attention to the "circumstances", and he points out that Locke remakes reference to the prerogative in the § 157 which says: "Things of this World are in so constant a Flux, that nothing remains long in the same State" and then, Arnhart shed light to his definition: "Executive prerogative is a political response to that flux in the world that runs against the fixity of law" (p.125), which in the following arguments will justify his thesis that "[the President] receives those [emergency] powers from the Constitution, and must exercise them according to the Constitution", that is why the Constitution will serve as a structure to inhibit the abuse of the executive prerogative in the hands of the President, and serves to block the natural forces of nature. This seems clearly when Arnhart (1979) concludes,

> "A political community is an attempt by men to construct a formal structure through which the chaos of the world can be ordered so as to achieve the security and stability necessary for human preservation and comfort. But the unruly forces of the universe always run contrary to this formal structure. The laws constitute the walls of this structure, which are continually being undermined by natural forces acting either by slow erosion or sudden floods. Executive prerogative is the exertion of human force against those natural forces (secs. 88, 124-31). Thus Locke's doctrine of executive prerogative is grounded on modern metaphysical doctrine that there are no natural ends for man: since is not at home in nature, he cannot maintain a secure political order for himself except by a continual exercise of force to conquer nature" (the underlined is mine, p.125).

Langston and Lind (1991): the legislative control and the executive accountability

The authors asserts that, under a lockean reading of the American Constitution, the Congress, even if it wants to, cannot legitimately delegate excessive discretion to the executive in areas of its legislative competence. Both authors thesis is that "a correct reading of Locke's Second Treatise leads to the conclusion that the President possesses limited discretionary powers and that any purely executive power is "subordinate and ministerial" to the legislative power of the Congress" (p.49). Langston and Lind (1991) confront the prerogative "plenary executive power" hypothesis and the fact that the "Congress cannot restrict or eliminate this residual 'executive prerogative' by law". They add that in Locke's historical period, the British Monarch had the absolute veto power, different from the American President, which have a qualified veto – the President is then obligated to obey laws that have been passed over his veto, whether he "join and consent" or not, so long as laws can be passed without the President's consent, he is "subordinate and accountable" to the legislature.

They bring to the debate the article II, section 1 of the American Constitution, alleging that (i) the Framers did not followed Locke's advice on the separation of powers (considering Locke' division of executive, legislative and federative, with the judicial subsumed in the executive); (ii) the Framers dissolute the federative[15] power in the U.S. Constitution to the "Congress alone" ("declaring war, authorizing privateering – "letters of marque and reprisal" – raising and supplying troops"), to the Senate and the President as a "joint agency" ("the treaty power"), or to the "President alone" (as commander-in-chief[16]), so the federative power cannot be found in the Constitution assignment of what Locke would have considered federative powers itself; and, (iii) the authors refuses the "presidentialist school" which affirms that the article II, section 1, "incorporates contemporary understandings" of the prerogative content, such as the theory of the executive that the Framers allegedly found in Locke[17]" (p.52). Regarding to this third point, Langston and Lind (1991) attack Locke's influences on the Framers in two grounds: first "many authorities, including James Madison, have denied that the first section of each of the first three articles is an independent grant of power[18]" (p.52); second, "the available evidence indicates that the Framers were careful to avoid granting the President traditional monarchical powers[19]".

The authors are also critics of Schlesinger' work "who believes the President has the Lincolnian duty to exercise an extra-constitutional prerogative and traces that

[15] Langston and Lind (1991) quote: "The federative power "contains the Power of War and Peace, Leagues and Alliances, and all the Transactions, with all Persons and Communities without the Commonwealth" (146:11 1-3). The executive and federative powers, though "really distinct in them-selves," should be combined in the same hands, according to Locke (148:11 2-4)" (p.51).

[16] The authors relates that the Framers were concerned with emergencies, so they empowered various parts of the government constitutionally to deal with it, the most relevant and debated provision is the President as Commander-in-Chief ("to order the nation's troops to repel a sudden invasion") until direction can be secured from the Congress, which alone possesses the power to declare war, this limitable prerogative was specifically written in the Constitution (Langston and Lind, p.58, 1991).

[17] Langston and Lind (1991): "Nevertheless, many presidentialists claim that his works, particularly the Second Treatise, are a reliable guide to the intent of the Framers in distributing powers between the branches of the federal government. Quincy Wright claims that the works of Locke, Montesquieu, and Blackstone were "the political Bibles of the constitutional fathers."[3] Glenn Fuller asserts that the Framers granted the President an "inherent power to act in any exigent circumstances," bounded only by the Lockean "good faith" requirement that "the Executive not abuse his prerogative."[4]By virtue of the vesting clause, according to Lawrence Block and David Rivkin, Jr., the President possesses "both the discretionary prerogative of Locke and any residual powers. This prerogative power is therefore grounded in the Constitution as an inherent power of the Presidency[5] (p.51)".

[18] In the following Langston and Lind (1991) quotes Corwin (1953) which "observes that "the records of the Constitutional Convention make it clear that the purposes of this clause were simply to settle the question whether the executive branch should be plural or single and to give the executive a title" (p.52-53)

[19] Langston and Lind (1991, p.53) related: "Madison, in Federalist 48, contrasts "the executive magistracy" in the proposed Constitution, which is "carefully limited, both in the extent and the duration of its power," with the British monarch, who enjoys "numerous extensive prerogatives"" [Alexander Hamilton, James Madison, John Jay, The Federalist Papers (New York: New American Library, 1961), p. 309].

prerogative to Locke, does not distinguish types of prerogative" (p.54). Both author's thesis is that, the "extra-constitutional" ("presidentialists") scholars do not consider the possibility in which *the prerogative is not a single power;* Langston and Lind' reading of Locke's Second Treatise consider *several distinct prerogative powers*. Into this several prerogative powers, they distinguishes the prerogative in two forms: (i) *general executive prerogatives* ("which are two and possibly three different kinds") and (ii) *specific executive prerogatives* ("which vary under different constitutional arrangements"). This distinction of *general* and *specific*, argument the authors, is clearly evident in section 160 of the "Second Treatise".

The Langston and Lind's *specific prerogative* ("or powers of the executive") varies from government to government[20]. By contrast, the *general prerogatives* ("or executive power"), take two other particular forms as follows: they define the first one as the (i) *prelegal prerorative* (located in lines 5-1, first section), "allowing discretion to act when the laws are silent". The "prelegal" definition, lies on Locke's examination of strengthen and weaknesses of the legislative ("not always being") and executive powers ("always being"), "that the executive must be allowed to act in the absence of legislative direction until the legislative power can be fully assemble" (p.57). Langston and Lind asserts that *prelegal prerogative* can be restricted or completely eliminated ("unwise though that might be") by the legislative power through ordinary legislation, although it might be possible to posit a third *alegal prerogative*[21]. The second kind of *general*

[20] Langston and Lind (1991): "The specific prerogative is the discretion of the executive to act between sessions of the legislature, or during a legislative session when an emergency prevents consulting a numerous legislature which, because it is not always in session and because of its numbers, is "too slow" for the dispatch requisite to Execution." This is not a general prerogative. It exists only in "some governments" where there is an executive branch distinct from a numerous legislature. Where there is a small legislative council continuously in session, for example, the first prerogative Locke describes could not exist" (underlined is mine, p.56).

[21] Langston and Lind (1991, p.60-61) here, constructed a third scenario: "If the plenary executive prerogative of the President cannot be found in Locke's antilegal prerogative, it must be sought in Locke's prelegal prerogative. In fact, if the presidentialist case is to be upheld by the Second Treatise, Locke must be found to distinguish a third kind of prerogative, which complements the prelegal.This third form of general prerogative can be described as "alegal"- a residuum of executive prerogative which cannot be limited by either statutory or constitutional law. Prelegal prerogative and this hypothetical alegal prerogative can be related in two possible ways, which we shall call the "void" and the "core" theories of prelegal prerogative. In the void theory, prelegal prerogative is nothing more than a vacuum of explicit legislation, which may be filled by the executive, using its discretion in the public interest. In short, the void theory does not recognize the existence of a residuum of alegal executive prerogative. A core theory of general executive prerogative, on the other hand, would recognize both prelegal and alegal prerogatives. The prelegal prerogative, from this perspective, is a limitable zone of executive discretion, between a statute and a core or residuum of alegal executive power, which cannot be restricted by law. In this view, the legislative power can eliminate prelegal prerogative altogether, but cannot reduce the executive's alegal prerogative".

prerogative, is also derived from a comparison of the relative merit and demerit of the executive and legislative power[22], the authors call this other general prerogative as (ii) *antilegal prerogative* (understood here strictly), which consists in the "pardoning power", identified in Locke as the executive discretion "to set aside the law in certain cases by pardoning offenders" who have broken the law in the public interest: "what is good for the individual citizen, such as the one in Locke's famous example who is pardoned for having torn down a house to stop the spread of a fire, may also be good for the ruler" (p.57). The broad *antilegal prerogative* interpretation, "the duty to take action under certain circumstances that would bring a person, including the executive, "within the reach of the Law," is not specifically an executive power"[23], contrasts the *antilegal prerogative* narrow interpretation, which is assigned as a *specific prerogative* to the President "with restrictions on its exercise" (it cannot be a source of an alleged lockean residual prerogative, because this issue is not clearly answered by Locke[24]). Langston and Lind (p.68, 1991) then concludes,

> "Close reading of Locke, then, leads to two conclusions. Because the President lacks an absolute veto in lawmaking, the executive power as such, apart from other specific "powers of the executive" assigned by the Constitution, is a subordinate and ministerial power, the content of which is determined by law. The President may, by virtue of the "executive power" clause, have a prelegal prerogative. If he does, this is found not in the Constitution, but in the acquiescence of the legislature which may at any time eliminate presidential discretion by law (again, this does not apply to specific constitutional powers of the President, such as the pardon power). The President may even, by virtue of membership in the society, though not by virtue of the Constitution, have a broad antilegal prerogative. […] The President, like a man who feels compelled "to pull down an innocent Man's House to stop the Fire, when the one next to it is burning," may feel obligated on extraordinary occasions to act contrary to law, but he brings himself thereby "within reach of the Law" (159) of impeachment, and may continue in office only if the people, as represented in the Congress, permit. <u>In short, any prerogative of the President to act in the silence of the laws, or against the laws, exists only at the sufferance of Congress</u>".

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[22] Langston and Lind (1991, p.57) reinforces that "the legislative, one might say most simply, lacks flexibility".

[23] Langston and Lind (1991, p.59): "The most precisely limited of the general prerogatives, the antilegal prerogative strictly construed, is assigned to the President by the Constitution, but again, not in the "executive power" clause. Rather, it is Article II, Section 2, Clause 1, which reads: "The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment." This is an important instance of the Constitution's resonance with Locke, but is not the plenary prerogative the presidentialists seek".

[24] Langston and Lind (1991, p.60): "Should Locke's loosely construed antilegal prerogative thus be found in the second article's vesting clause, the private will of the executive is not thereby "exalted or given any political status by his prerogative powers"[33]. Furthermore, should Corwin's influential reading of the higher law background of American Constitutional law be accepted, it would be impossible to find a broad antilegal prerogative anywhere in the Constitution. Insofar as the Constitution stands between statutory law and the higher law, it rightly constrains the exercise of the "anti-legal" prerogative[34]. If the plenary executive prerogative of the President cannot be found in Locke's antilegal prerogative, it must be sought in Locke's prelegal prerogative".

V. Executive Prerogative Perspectives within extra-legal, constitutional balance and legitimacy

Schlesinger (1973/2004[25]): "The Imperial Presidency"

Schlesinger (1973/2004) work is also a classical book in this theme, he have had a significant part of responsibility on promoting this debate, being quoted constantly in the literature, but also have been the aim of lots of critics for his propositions. Schlesinger (2004) thesis surround the respective issues,

> "[And in our own time it has produced a conception of] presidential power so spacious and peremptory as to imply a radical transformation of the traditional polity. In the last years presidential primacy, so indispensable to the political order, has turned into presidential supremacy. The constitutional Presidency – as events so apparently disparate as the Indochina War and the Watergate affair showed – has become the imperial Presidency and threatens to be the revolutionary Presidency. […] This book does not deal systematically with all facets and issues of presidential power. […] It deals essentially with the shift in the *constitutional* balance – with, that is, the appropriation by the Presidency, and particularly by the contemporary Presidency, of powers reserved by the Constitution and by long historical practice to Congress. This process of appropriation took place in both foreign and domestic affairs" (underlined is mine, "Foreword to the 1973 Edition").

After this passage, obviously, the discussion Schlesinger proposes talks directly with the American Constitution and its design constructed by the Founding Fathers. The author relates that drafting the Constitution, the Founding Fathers were concerned with the previous deficiencies of the articles of the Confederation (under which the rebellious colonies had been governed during the revolution). The articles he refers, had "bestowed executive as well as legislative authority on Congress, establishing in effect parliamentary government without a prime minister[26]". The Constitution on the other hand, was "founded on the opposite principle of separation of power"[27] and the men of Philadelphia therefore, had to work out a division of authority between the legislative and executive branches[28], which led the Framers[29] to favor more centralization of executive authority than they had known in the Confederation, although their experience under the British

[25] This working paper used the edition of 2004, Kobo E-Book, A Mariner Book, Houghton Mifflin Company. Pages may vary.
[26] Schlesinger (2004) continues: "Article VI gave Congress control over the conduct of foreign affairs, and Article IX gave it 'the sole and exclusive right and power of determining on peace and war" (Chapter One, Part I).
[27] Idem.
[28] Schlesinger (2004):"[…] in domestic policy, this division was reasonably clear. In foreign affairs, it was often cryptic, ambiguous and incomplete" (ibidem).
[29] Schlesinger (2004): "Many of them probably agreed with Hamilton's statement in the 70th Federalist that 'energy in the Executive is a leading character in the definition of good government" (op.cit.).

crown led them to favor less centralization than they perceived in the British Monarchy – the Presidency should be strong but still limited, to avoid "what they considered a tyrannical royal prerogative"[30]. The Founders then, in an important clause (Art. I, Sec.8 of the Constitution), were determined to deny the American president "the sole prerogative of making war and peace"[31], even Hamilton[32] recommended to leave the power to declare war to the Senate[33]. Although some interpretations of the drafts may vary[34], Schlesinger assets that "what does seem clear is that no one wanted either to deny the President the power to respond to surprise attack to give the President general power to initiate hostilities"[35]. The Founding Fathers were determined that the national government should have all the authority required to defend the nation, Hamilton, Schlesinger argues, "was not asserting these unlimited powers for the Presidency, as careless commentators have assumed[36]. Hamilton was asserting them for the national government *as a whole* – for, that is, Congress and the Presidency combined[37]. The Constitution, once Congress authorized war, vested the President as Commander-in-Chief, defined in the article II (having full power to conduct military operations – army and navy)[38].

The question of the emergency, allege Schlesinger (2004) that, "the founding fathers were more influenced by Locke than by any other political philosopher; and, as students of Locke, they were well acquainted with Chapter 14, "Of Prerogative", in the *Second Treatise of Government"*[39]. Schlesinger (2004) then defines his Locke's perspective,

> "In general, the authority of government was to be limited. But in emergency, Locke argued, responsible rulers could resort to exceptional power. […] Prerogative therefore was the exercise of the law of self-preservation. […] Locke's argument, restated in more democratic terms, was that, when the executive perceived what he deemed an emergency, he could initiate extralegal or even illegal action, but that he would be sustained and

[30] Schlesinger (2004), underlined is mine, In Chapter One, Part I, "What the Founding Fathers Intended".
[31] This quote is designed to Blackstone, in the reference there is a Corwin' work (In Chapter One, Part II).
[32] Schlesinger (2004) classifies Hamilton as "the most consistent advocate of executive centralization" (idem).
[33] Schlesinger (2004) quoted Hamilton that proposes in the Convention that the Senate "'have the sole power of declaring war' with the executive to 'have the direction of war when authorized or begun" (ibidem).
[34] Schlesinger (2004) here refers to the "Madison-Gerry" amendment which "Moved to insert 'declare', striking out 'make' war; leaving to the Executive the power to repel sudden attacks" (op. cit.).
[35] Op. Cit.
[36] Schlesinger (2004) relates "the resistance to giving a 'single man', even if he were President of the United States, the unilateral authority to decide on war pervaded the contemporaneous literature" (op. cit.)
[37] Op. Cit.
[38] Schlesinger (2004) adds "designated also with the concern to assure a civilian control of the military", In Chapter One, Part III.
[39] Schlesinger (2004) In Chapter One, Part IV.

> vindicated in that action only if his perception of the emergency were shared by the legislature and by the people" (Chapter One, Part IV).

The author argues that, although the idea of prerogative was not part of presidential power as defined in the Constitution; the Founding Fathers, which had lived with emergency, made no provision in the Constitution[40] because "the doctrine that crisis might required the executive to act outside the Constitution in order to save the Constitution remained in the back of their minds"[41]. Schlesinger distinguishes two forms of the doctrine of emergency prerogative: (i) that the official who thus acted so at his own peril; and (ii) that, having acted, he must report at once to Congress, which would serve as judge of his action. Yet the author claims, however the Founding Fathers lined up on this question, one cannot suppose that Presidents steeped in Locke would have entirely dismissed the idea of action beyond the Constitution if necessary to save the life of the nation:

> "There was of course, the Locke-Jefferson doctrine of the law of self-preservation, though this was presumably confined to the gravest national emergencies. Short of such emergency, there were ways by which Presidents could in fact alter the original constitutional balance – and do so without appearing to lay aside the Constitution at all. For the Convention, while it gave Congress the sole power to initiate offensive war, also allowed the President to initiate defensive war" (Chapter Three, Part I).

Fatovic (2004): the laws of the nature and the human nature, politics matter

Altough Fatovic (2004) combine history and the political conception on the lockean prerogative theory, this presentation of Fatovic analysis will focus only on his debate of Locke's ideas. The author proposition is that the "prerogative compensates for the shortcomings of law without abandoning the principles of legality altogether by allowing the executive to exercise extra-ordinary powers in accordance with the highest law of all: the good of the people as defined by the laws of nature" (p.276). The author reinforces that, on one hand, Locke defended that the powers of government "ought to be exercised by *established and promulgated laws* (§ 137)", on the other hand Fatovic (2004) says, "Locke permitted and even endorsed the occasional exercise of highly discretionary – and potentially arbitrary – extra-legal powers by the executive" (p.277). The author asks for caution interpreting lockean constitutional thought, asserting that Locke is skeptical about the ability of juridical rules and institutional forms to cope with the ("unforeseen and uncertain occurrences", § 158) contingencies of politics, which

[40] Schlesinger (2004) says "except in relation to *habeas corpus"* (Chapter One, Part IV).
[41] Schlesinger (2004) relates: "Even in the Federalist Papers Hamilton wrote of 'that original right of self-defence which is paramount to all positive forms of government' and Madison thought it 'vain to oppose constitutional barriers to the impulse of self-preservation'" (Chapter One, Part IV).

"exceed the capacity of human reason to predict and rectify them before they actually arise" (p.278). This unavoidable and uncontainable political human nature definitely have weight in Fatovic's thought, and he reinforces that it "hearkens back to Machiavelli's remark that politics is an area of life 'where so many unexpected things can happen'", Fatovic then take a step back from others scholars that approaches Locke within aspects generally associated with the liberal constitutionalism. The author imputes that the prerogative and the rule of law, "justified by the public good and substantive principles" are "derived from the laws of nature". Following this lead, excessive laws may conflict with the public good, and the extra-ordinary power entrusted in the executive have the role to interrupt regular operation of the law in cases of necessity[42], adds the author that "Prerogative is a double-edged instrument, sometimes merciful, at other times cruel" (p.284). Fatovic' (2004) then assets that "prerogative is predicated on the assumption that the extraordinary is an ordinary part of politics" (p.282). Although the author reminder of Arnhart's definition of executive prerogative[43], he significantly differ from Arnhart's legislature checks and balances position, as it is possible to see in this passage:

> "Consistent with the *raison d'état* tradition, Lockean constitutionalism does not constrain the executive from acting without legal precedent or the expectation of subsequent Parliamentary approval. Locke's innovation was to reconcile the seemingly antithetical doctrines of necessity and constitutionalism by showing that they both serve the same master: *salus populi*, as defined by the laws of nature. Also, the natural law unequivocally forbids the executive from engaging in any actions that violate the trust of the people" (Fatovic, p.284, 2004).

Fatovic (2004) emphasizes, "Locke's theory of prerogative authorizes the executive to act outside the law" (p.285), and then the author bring Locke's classical definition of prerogative, the discretion' power relationship to the public good[44]. Fatovic's statement also goes directly into Arnhart concern of the prerogative's being tyrannical, the author safely defends the fact that "prerogative often operates outside the ambit of positive law does not *ipso facto* make it an act of tyranny", he argues that "a violation of positive law

[42] Fatovic (2004) imputes that "Prerogative can be understood as an extra-legal means of promoting the same ends that the law advances in normal circumstances: it allows the executive to bring an inherently fallible (because humanly constructed) constitutional order into conformity with the ends it was designed to serve. Prerogative compensates for the shortcomings of the law without abandoning the principles of legality altogether by allowing the executive to exercise extra-ordinary powers in accordance with the highest law of all: the good of the people" (p.279).

[43] Fatovic (2004) quotes: "As Larry Arnhart puts it: 'Executive prerogative is a political response to that flux in the world that runs against the fixity of law'" (p.283).

[44] Adds Fatovic (2004, p.285): "By making the public good an essential criterion of prerogative, Locke abandoned legalistic definitions of prerogative that often amounted to little more than specific enumerations of exclusive powers and privileges belonging exclusively to the monarch in favour of substantive considerations irreducible to precise legal formulas[27]"

may be an indication that an executive might be a tyrant, but is not in and of itself dispositive". This arguments lands in the fact that violations of the positive law are justified as long as they secure vital ends, like preservation of life and liberty. Fatovic says this point is actually an innovation in the lockean thought: the disconnection of discretionary power from it traditional subordination to positive law, considering there are cases that no rule at all seems applicable, rests the justification why the executive cannot follow the 'spirit' of the law.

The author proposes a view into lockean prerogative that go to other prism of the debate, the fact that Locke constitutionalism respond to necessities and exigencies of the "political life" that the "strict legal formalism cannot accommodate", related to the fact that political power requires tight control but sometimes its demands expansion. This necessity of movement justifies why Locke left the prerogative domain indeterminate, it was better not describing it too narrowly in the law, leaving it unregulated, since it is impossible to know when the exercise of this discretionary power might be necessary for the public good. Fatovic defends that the executive prerogative is consistent with political aims, and informal discretionary power sometimes serves liberal ends better than do legal-institutional devices, which are often inadequate instruments. Fatovic (2004) concludes with important differentiations,

> "The target of his [Locke's] attack in *The Two Treatises of Government* is arbitrary rule, not discretionary action *per se*. The crucial difference is that arbitrary power conforms neither to stated rules nor to the legitimate ends of society, whereas discretionary power, however informal and indeterminate, can be instrumental to and should be exercised for the preservation of the community. […] The paradox of prerogative is that the discretionary judgment of the executive is offered as a necessary corrective to the deficiencies of laws that were instituted to eliminate dependence on personal power in the first place. The human element that is simultaneously the cause of and the remedy for the inconstancy of politics makes the character of the executive almost as critical to the preservation of liberty as are those impersonal mechanisms of constitutional government. […] Even a system of government dedicated to the rule of law must sometimes yield to the irrepressible exigencies of politics" (underlined is mine, p.296-297).

VI. Some final considerations

Although just a few authors were selected to construct this brief panoramic view, which do not capture the entire and broad context of the discussion, the central proposal here was to bring some disputes and disagreements between the authors with the objective to better understand perspectives of the executive prerogative, within Locke's influence having as background the Framers and the American Constitution. The actual state of the debate and constitutional government issues shed light directly to contemporary

discussions showing that the concern within lacks of checks and risks of an unbalanced separation of powers still alive. The perspectives of the executive prerogative appears on one hand, with more or less, the same political and normative basis of the eighteen century, which constitutes at the same time a core stone of the United States Constitution and political construction, and on the other hand presents complicated and sensible challenges, especially in times of emergencies or war, emerging simultaneously serious issues and questions in the normative and political arenas.

As I tried to present, Arnhart (1979) was central to embattle the extraconstitutional thesis and the proposition of the nature law, asserting that the Constitutional frame was an indispensable (positive law) barrier of the possible abuse of power and, consequently, tyranny. Langston and Lind (1991) proposition aims to the checks and balances issues of the prerogative use, and they alleged that the executive prerogative is not just accountable to the legislature, but have its powers divided, which compromise its (pure) "plenary executive power" and also not all of the prerogative fragmented powers concern to the executive domain. On the other side of the debate, Schlesinger (1973/2004) defended that the presidential executive prerogative may open windows and possibilities to the president to act and eventually, deal with the constitutional balance in certain circumstances (as the emergency powers of the prerogative infers). The theoretical statement of Fatovic (2004) goes deep into the critics of those scholars who impute "rationalist confidence in juridico-institutional mechanisms", so according to the unpredictable occurrences of the political circumstances and, due to inappropriate reach of the (positive) laws, the nature law (of self-preservation) should be used.

The significance of this dispute and elaborated debate still relevant on the academic agenda today, because "the modern constitutional democracy processes are inadequate to confront and overcome emergency"[45], which generates continually discussion with political and democratic theorists altogether with legal and constitutionalists scholars around those problems. Additionally, the perception of a tension between executive power and liberal constitutionalism is by no means confined to American political context, it is indicative of a more general problem faced by all constitutional democracies[46]. Evidently, the executive prerogative, Locke' interpretations and influence towards the Framers, and the American constitution, still be object of lots of debate and the discussion is not closed, as it is relates to: the weight and reach of the

[45] J. Malcom Smith and Cornelius P. Cotter Apud Cronin and Genovese (p.231, 2004).
[46] Rossiter 1948, Apud Kleinerman (p.209, 2007).

prerogative in times of emergency or war, the separation of powers and its institutional checks, vertical checks of the society, the mechanisms of legal control and constitutional design, the threats of (executive) tyranny, challenges to consolidates the rule of law and so many other elements, constitutes many factors which are central to develop and improve the actual forms and contents of the contemporary democratic government in the XXI Century.

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