The Concept of Extra-Constitutional Executive Power in Domestic Affairs

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Introduction

A recurrent theme of the jurisprudence of the executive power of the United States is the attribution to the President of power to take whatever action he believes necessary for the welfare of the United States. The classic exposition of this doctrine—the "stewardship" theory of presidential power—is that of President Theodore Roosevelt.

> My view was that every executive officer, and above all every executive officer in high position, was a steward of the people bound actively and affirmatively to do all he could for the people, and not to content himself with the negative merit of keeping his talents undamaged in a napkin. I declined to adopt the view that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization to do it. My belief was that it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws . . . . In other words, I acted for the public welfare, I acted for the common well-being of all our people, whenever and in whatever manner was necessary, unless prevented by direct constitutional or legislative prohibition.[1]

Notwithstanding the opposition of ex-President Taft[2] and others,[3] subsequent Presidents have taken a similar view of their authority,[4] even

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1. T. ROOSEVELT, AN AUTOBIOGRAPHY 389 (1913).

2. W. TAFT, THE PRESIDENT AND HIS POWERS 139-40, 144 (1916).

3. *See, e.g.*, N. SMALL, SOME PRESIDENTIAL INTERPRETATIONS OF THE PRESIDENCY 43 (1932); Youngstown Sheet & Tube Co. v. Sawyer, 103 F. Supp. 569, 575-76 (D.D.C.), *aff'd*, 343 U.S. 579 (1952).

4. *See, e.g.*, President Truman: "[T]he power of the President should be used in the interest of the people, and in order to do that the President must use whatever power the Constitution does not expressly deny him," *quoted in* M. CUNLIFFE, AMERICAN PRESIDENTS AND THE PRESIDENCY 343 (2d rev. ed. 1976); A. SCHLESINGER, THE IMPERIAL PRESIDENCY 143 (1973); R. Longaker, in C. ROSSITER, THE SUPREME COURT AND THE COMMANDER IN CHIEF xv-xvii (Expanded ed. 1976). For a discussion of President Nixon's broad view of executive power, see A. SCHLESINGER, *supra*, at 263-66; note 84 *infra*. Judges, too, have

asserting, on occasion, a power to act in defiance of Congress.[5]

Apart from the authority delegated by Congress, there are three possible bases for a presidential power of "stewardship" proportions, and all have been relied upon by its proponents. It has, first, been asserted that the President has these broad powers because they are "executive" in nature and, hence, conferred upon him by article II of the Constitution,[6] which vests "[t]he Executive power" in the President of the United States.[7] Secondly, it may be argued that, even if the first clause of article II is not itself a grant of all powers by nature "executive," very broad authority can be implied from the powers expressly conferred upon the President by article II of the Constitution, especially his powers as commander-in-chief of the armed forces,[8] and his duty (and, hence, power) to "take care that the laws be faithfully executed."[9] Thirdly, if it is found that the first two sources are inadequate to support such broad presidential competence, it may be claimed that the power to act, at least until Congress provides otherwise, is derived from the people by means other than a constitutional grant.

Although it may be important to ascertain the source of an asserted presidential power when considering whether the President is subject to congressional supervision,[10] advocates of the "stewardship" theory have often been most unspecific on the question. An example is the exchange between Assistant Attorney General Baldridge and Judge

occasionally expressed executive power in very broad terms: *see, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 662 (1952) (Clark, J., concurring); *id.* at 691-92 (Vinson, C.J., dissenting, quoting the brief of Solicitor General John W. Davis in United States v. Midwest Oil Co., 236 U.S. 459 (1915)). In fact, Vinson based his decision on a narrower ground—the President's duty to "take care that the laws be faithfully executed" (U.S. CONST. art. II, § 3), 343 U.S. at 701-04, 708-10. *See also* New York Times Co. v. United States, 403 U.S. 713, 729-30 (1971), where Stewart, J., concurring, spoke of the President's constitutional duty "as a matter of sovereign prerogative" to protect confidentiality of information relating to foreign affairs and national defense.

5. *See* President Roosevelt's address to Congress regarding the Emergency Price Control Act, September 7, 1942, *quoted in* E. CORWIN, THE PRESIDENT, OFFICE AND POWERS 1787-1957 at 250-51 (4th ed. 1957).

6. U.S. CONST. art. II, § 1, cl. 1.

7. *See infra* Part II, section B(1).

8. *See* U.S. CONST. art. II, § 2, cl. 1.

9. *See id.* art. II, § 3.

10. As will be seen some executive powers are free from congressional control: this has been claimed (incorrectly, we believe) for the President's power to send troops abroad, *see, e.g.*, Secretary of State Dean Acheson, quoted by Longaker, *supra* note 4, at 135; and also for his power to negotiate with foreign governments, *see* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-20 (1936). *See also* Buckley v. Valeo, 424 U.S. 1 (1976); New York Times Co. v. United States, 403 U.S. 713, 727 (1971); Myers v. United States, 272 U.S. 52 (1926).

Pine in *Youngstown Sheet & Tube Co. v. Sawyer*.[11]

The Court:	And is it . . . your view that the powers of the Government are limited by and enumerated in the Constitution of the United States?
Mr. Baldridge:	That is true, Your Honor, with respect to legislative powers.
The Court:	But it is not true, you say, as to the Executive?
Mr. Baldridge:	No.
The Court:	So, when the sovereign people adopted the Constitution, it enumerated the powers set up in the Constitution but limited the powers of the Congress and limited the powers of the judiciary, but it did not limit the powers of the Executive. Is that what you say?
Mr. Baldridge:	That is the way we read Article II of the Constitution.[12]

The thesis that some presidential powers are conferred extra-constitutionally is surprising in the presence of a Constitution deriving its authority from the people.[13] Yet, the doctrine of extra-constitutional powers has, generally, been accepted in the area of foreign affairs,[14] the authoritative exposition being that of Justice Sutherland in *United States v. Curtiss-Wright Export Corp.*[15] in 1936. Speaking for seven members of the Supreme Court,[16] Justice Sutherland expounded generally upon the federal government's power over foreign affairs, although the specific issue before the Court was a narrower one: whether Congress may delegate broader authority to the President in foreign affairs

11. 103 F. Supp. 569 (D.D.C.), *aff'd*, 343 U.S. 579 (1952).

12. J. SMITH & C. COTTER, POWERS OF THE PRESIDENT DURING CRISES 135 (1960). *See also, id.* at 173-74 n.10. Pine, D.J., noted Mr. Baldridge's arguments on "inherent" power and rejected them, adopting ex-President Taft's view of executive power in the steel seizure case: 103 F. Supp. 569, 572-74 (D.D.C. 1952). For Mr. Baldridge's second thoughts regarding this argument, *see* M. MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER 306 n.89 (1977). On the widespread condemnation which greeted Baldridge's original argument, *see id.* at 124-26.

13. *See* U.S. CONST. preamble.

14. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 25-6 (1972). However, some judges have preferred to ground the foreign affairs powers of Congress and the President more securely on an implication from the express grants of power in the Constitution: *see* New York Times Co. v. United States, 403 U.S. 713, 728-29 (Stewart, J., concurring), 761 (Blackmun, J., dissenting) (1971); Afroyim v. Rusk, 387 U.S. 253, 257 (1967). For critical comment on extra-constitutional power in foreign affairs, *see* R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 100-08 (1974); L. HENKIN, *supra*, at 19-28; Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1 (1973).

15. 299 U.S. 304 (1936).

16. McReynolds, J., dissented without opinion; Stone, J., did not participate.

than in domestic matters.[17] Justice Sutherland held that Congress could delegate such authority,[18] the powers of the national government (Congress and the President) in foreign affairs having a juristic basis different from those in domestic matters.[19] Authority in the latter area is limited to that granted by the Constitution, expressly or by implication,[20] but the foreign affairs power is extra-constitutional,[21] because the powers of "external sovereignty" passed directly from the British Crown to "the colonies in their collective and corporate capacity as the United States of America."[22] The States (or colonies) severally never enjoyed power over foreign affairs.[23] Justice Sutherland concluded:

> [T]hat the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.[24]

Moreover, Justice Sutherland spoke of "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations."[25] Notwithstanding the description of the President's power as "exclusive,"[26] it has been

17. Lofgren, *supra* note 14, at 6-12; United States v. Butenko, 494 F.2d 593, 630 (3d Cir.), *cert. denied sub nom.* Ivanov v. United States, 419 U.S. 881 (1974).

18. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320-29 (1936).

19. *Id.* at 315-16. Hence, Justice Sutherland's observations on the foreign affairs power of the national government were not mere *obiter dicta, see* Lofgren, *supra* note 14, at 31, although comment on the powers of the President independent of Congress was. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 636 n.2 (1952) (Jackson, J., concurring).

20. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315-16 (1936).

21. *Id.* at 318.

22. *Id.* at 316-17.

23. *Id.* at 316. Whether Justice Sutherland was historically accurate in this assertion is still being debated. For support of Sutherland, *see* Morris, *The Forging of the Union Reconsidered: A Historical Refutation of State Sovereignty Over Seabeds*, 74 COLUM. L. REV. 1056, 1060-89 (1974); Morris, *"We the People of the United States": The Bicentennial of a People's Revolution*, 82 AM. HIST. REV. 1, 14 (1977). For opinions *contra*, *see* R. BERGER, *supra* note 14, at 101-08; Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467, 478-90 (1946); Lofgren, *supra* note 14, at 17, 18, 29-30, 32; Patterson, *In Re The United States v. The Curtiss-Wright Corporation*, 22 TEX. L. REV. 286, 445 (1944).

24. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936).

25. *Id.* at 320. Sutherland, J., added that this power was one "which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." *Id.*

26. *See id.*

recognized that, as in most domestic matters, the President is not independent of congressional control across the whole gamut of foreign affairs;[27] he would seem to be free from congressional control only where he can rely upon authority conferred by the Constitution, at least impliedly, such as the power to negotiate with foreign nations.[28]

While the Supreme Court has developed quite an expansive interpretation of the government's foreign affairs power over a number of cases,[29] it has never had to consider a situation where the President acted in that field against the will of Congress.[30] Moreover, in speaking of executive power over foreign affairs, the Court has usually been careful to link it with the President's powers regarding treaties,[31] recognition of foreign states and governments,[32] and national defense,[33] all

27. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 636 n.2 (1952) (Jackson, J., concurring); United States v. Butenko, 494 F.2d 593, 611, 627, 629-35 (3d Cir.), *cert. denied sub nom.* Ivanov v. United States, 419 U.S. 881 (1974); Consumers Union of U.S., Inc. v. Rogers, 352 F. Supp. 1319, 1322-23 (D.D.C. 1973), *varied sub nom.* Consumers Union of U.S., Inc. v. Kissinger, 506 F.2d 136, 149, 156 (D.C. Cir. 1974) (Leventhal, J., dissenting) *cert. denied*, 421 U.S. 1004 (1975); Sparkman, *Checks and Balances in American Foreign Policy*, 52 IND. L.J. 433, 443 (1977).

28. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936), referring to the treaty power, U.S. CONST. art. II, § 2, cl. 2. *See also* New York Times Co. v. United States, 403 U.S. 713, 727-29 (1971) (Stewart, J., concurring); United States v. Pink, 315 U.S. 203, 229-30 (1942); United States v. Belmont, 301 U.S. 324, 330 (1937); T. JEFFERSON, *Opinion on the Powers of the Senate Respecting Diplomatic Appointments* (1790), 16 THE PAPERS OF THOMAS JEFFERSON 379 (J. Boyd ed. 1961). Indeed, Justice Sutherland spoke only of the President as the "sole organ" of the national government "in the field of *international relations*" (United States v. Curtiss-Wright Export Corp., *supra*, at 320) (emphasis added), arguably a field narrower than that of "foreign affairs," and confined primarily to the international aspects of foreign relations, a situation not at issue in the *Curtiss-Wright* case. *See War Powers Legislation: Hearings on S. 731, S.J. Res. 18 and S.J. Res. 59 Before the Senate Committee on Foreign Relations*, 92d Cong., 1st Sess. 555 (1971) (statement of Professor Bickel), and *see generally* L. HENKIN, *supra* note 14, at 45-48, 92-94.

29. For the powers of Congress and the President, *see* L. HENKIN, *supra* note 14, at 45-50, 56-65, 74-76. *See also* Zweibon v. Mitchell, 516 F.2d 594, 604, 616, 706 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 944 (1976) (President's powers as commander-in-chief, and over foreign affairs, give authority to protect the United States from foreign aggression and subversion); United States v. Butenko, 494 F.2d 593, 603 (3d Cir.), *cert. denied sub nom.* Ivanov v. United States, 419 U.S. 881 (1974) (executive power over foreign affairs supports surveillance to prevent transmission of defense information to foreign governments).

30. *See* Zweibon v. Mitchell, 516 F.2d 594, 620 n.69 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). In the case which came closest thereto, executive subjection to Congress was reaffirmed in strident terms. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), which was not treated as involving the "foreign affairs" power. *See id.* at 636 n.2 (Jackson, J., concurring).

31. *See, e.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

32. *See, e.g.*, United States v. Pink, 315 U.S. 203, 229-30 (1942); United States v. Belmont, 301 U.S. 324, 330 (1937); Goldwater v. Carter, 48 U.S.L.W. 2388 (D.C. Cir.), *vacated and remanded for dismissal*, 48 U.S.L.W. 3402 (1979); L. HENKIN, *supra* note 14, at 47-48.

33. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713, 727-29 (1971);

of which rely upon authority conferred, at least impliedly, by the Constitution.[34] Above all, the Court has recognized that the historical reasons for an extra-constitutional foreign affairs power are wholly inapplicable in the domestic sphere;[35] there, it has frequently been said, the government's powers are limited to those granted by the Constitution, expressly or by implication.[36]

If, as is argued herein,[37] the powers conferred on the President by the Constitution, either in express terms or by reasonable implication, are insufficient to support an authority of the breadth claimed by some Presidents and their apologists, the only possible source of such power is a notional extra-constitutional grant by the people. Yet, despite a prolific literature on executive power, the notion of extra-constitutional power has rarely been subjected to close analysis.[38] This paper examines the concept of extra-constitutional presidential power in domestic affairs, discusses problems raised by it and considers whether such a concept should be recognized by the law.

I. "Extra-Constitutional," "Implied" and "Inherent" Powers

Proponents of extra-constitutional executive power usually derive support for their thesis from John Locke who, holding the purpose of government to be "the preservation of all,"[39] asserted that the executive could, when necessary for the fulfillment of this purpose, act contrary to law.[40] In fact, the general situations Locke cited to illustrate this

Zweibon v. Mitchell, 516 F.2d 594, 604 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). *See also* R. Longaker, *supra* note 4, at 139, 153, 161, 164-65 n.30, 168.

34. *See* U.S. CONST. art. II, § 2, cls. 1 and 2, § 3. *See also* authorities cited in note 14 *supra*.

35. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315-16 (1936). Definition of the ambit of the "foreign affairs" power is neither warranted nor possible in a paper, such as this, examining executive power in domestic affairs in general terms. But, clearly, the foreign affairs power must be limited to matters which have a realistic and proximate connection with relations between the United States and the international community. *See generally* L. HENKIN, *supra* note 14, at 76.

36. *See* Afroyim v. Rusk, 387 U.S. 253, 257 (1967); *Ex parte* Quirin, 317 U.S. 1, 25 (1942). Justice Black has observed that "[t]he United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution." Reid v. Covert, 354 U.S. 1, 5-6 (1957).

37. *See* Part II, section B *infra*.

38. One exception, though not a legal analysis, is Professor Arthur Schlesinger's excellent THE IMPERIAL PRESIDENCY (1973).

39. J. LOCKE, THE SECOND TREATISE OF GOVERNMENT 76, 82 (3d ed. J. Gough ed. 1966).

40. *Id.* at 81-82, 84.

proposition were not cases where the ruler acted contrary to law,[41] and he made it clear that the government may act contrary to law only in exceptional circumstances, when necessary for the presentation of society.[42] Locke, presumably, derived this "prerogative"[43] power of the executive from an implied term in the compact whereby the individuals living in a state of nature agreed with one another to join together to form a civil society.[44] Whether this reasoning can be applied to the United States Constitution[45] is considered later in this article; yet one suspects that Locke is quoted by advocates of extra-constitutional power not so much because of the influence of his ideas on the founding fathers—great though it was[46]—but rather because it is useful to have the support of a "civil libertarian," as Locke is usually regarded,[47] when advocating broad executive powers. Weightier support for an executive power to disregard the ordinary law in an emergency might be derived from the prerogatives of the English Crown.[48] Clearly, however, it would be impolitic to do so. Moreover, the royal prerogative is, usually (and wisely) considered irrelevant in fixing the ambit of presidential power.[49]

Despite its theoretical incongruity in a polity with a written, popularly-based constitution[50] (such as the United States), the doctrine of extra-constitutional power has historical roots in the process whereby

41. He advocated flexibility in law enforcement, and would allow the ruler to act "where the law was silent" *id.* at 82, 84. *But see* note 42 *infra.*

42. "[P]rerogative can be nothing but *the people's 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 the law, for the public good, and *their acquiescing* in it when so done. . . ." *Id.* at 83-84. (emphasis added). Locke generally emphasized executive compliance with law. Referring to the executive, he wrote: "[A]llegiance being nothing but an obedience according to law, which when he violates, he has no right to obedience, nor can claim it otherwise than as the public person vested with the power of the law. . .; and thus he has no will, no power, but that of the law. But when he quits the representation . . . he degrades himself, and is but a single private person without power. . . ." *Id.* at 76.

43. *See id.* at 82.

44. *See id.* at 49.

45. *See* text accompanying notes 260-70 *infra.*

46. *See* Gough, *supra* note 39 at xxxvi-xxxvii; B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 27-30 (1967); G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, 282-92, 601-02 (Norton Books 1972).

47. *See generally* Gough, *supra* note 39, at xxii-xl.

48. *See, e.g.*, Burmah Oil Co. Ltd. v. Lord Advocate, [1965] A.C. 75 (H.L. 1964). Viscount Radcliffe, dissenting, quoted with approval Locke's comments on prerogative. *Id.* at 117-18.

49. *See* R. BERGER, *supra* note 14, at 49-50 n.5, 51-52, 56; Fleming v. Page, 50 U.S. (9 How.) 603, 618 (1850).

50. *See* note 252 *infra.*

the United States was created.[51] Unlike later British colonies, the United States became an independent nation not by virtue of any action in accordance with the existing legal order, but by overthrowing the current constitution by an act of revolution[52] committed "in the Name and by Authority" of the people of the American colonies.[53] One cannot avoid skepticism in considering the finality of the declarations of "the People"[54] in adopting the new constitution, (apart from constitutional amendment). In fact, some judges have recognized the people's "right of revolution."[55] As recently as 1972 a Supreme Court justice regarded the First Amendment as "designed to allow rebellion to remain as our heritage."[56] Moreover, the Ninth and Tenth Amendments are an express constitutional recognition of the existence of potential governmental powers and civil liberties with which federal and state constitutions do not deal.[57] Predictably, constitutional theorists[58] and others[59] have sought to tap this extra-constitutional reservoir of power in support of their claims.[60]

51. *See* B. BAILYN, *supra* note 46, chs. IV, V; G. WOOD, *supra* note 46, chs. II, VIII, IX. *See also* a comment on the American-Whig theory of the legal justification for mob violence. Reid, *In a Defensive Rage: The Uses of the Mob, the Justification in Law, and the Coming of the American Revolution*, 49 N.Y.U.L. REV. 1043, 1059, 1061, 1062 (1974).

52. *See* Ware v. Hylton, 3 U.S. (3 Dall.) 199, 232 (1796); Penhallow v. Doane, 3 U.S. (3 Dall.) 54, 80 (1795); 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 201 (5th ed. 1891); Morris *supra* note 23, 82 AM. HIST. REV. at 11-15. Although the colonists purported to be restoring an ancient British constitution which had, allegedly, been corrupted by eighteenth century politicians (*see* B. BAILYN, *supra* note 46, at ch. IV; G. WOOD, *supra* note 46, at 32-36), in reality they were in revolution against the extant British Constitution. As Professor Wood has written: "Yet this continual talk of desiring nothing new and wishing only to return to the old system and the essentials of the English constitution was only a superficial gloss. The Americans were rushing into revolution even as they denied it, their progress both obscured and sustained by a powerful revolutionary ideology . . . ." *Id.* at 13. *See generally id.* at 12-14, 44-45. For a contrary view, *see* C. MCILWAIN, THE AMERICAN REVOLUTION: A CONSTITUTIONAL INTERPRETATION 15-17, 190-98 (Cornell ed. 1958).

53. DECLARATION OF INDEPENDENCE (1776). Arguably, under British law, the United States remained a colony until 1964. *See* Statute Law Revision Act 1964 (c.79) § 1, repealing the American Colonies Act 1766 (6 Geo. 3, c.12). *But see* 22 Geo. 3, c.46 (1782).

54. *See* U.S. CONST. preamble.

55. *See* Koehler v. Hill, 60 Iowa 543, 15 N.W. 609, 612, 615 (1883); Wood's Appeal, 75 Pa. 59, 66 (1874) (the judgment of Stowe, J., was questioned generally on appeal. *Id.* at 69); Wells v. Bain, 75 Pa. 39, 47-48 (1873). *See also* James Madison, Helvidius letter No. III (1793), quoted note 259 *infra*.

56. Laird v. Tatum, 408 U.S. 1, 28 (1972) (Douglas, J., dissenting).

57. For discussion of the Tenth Amendment, *see* text accompanying note 256 *infra*; for the Ninth Amendment, *see* note 289 *infra*.

58. *See* text accompanying notes 65-71 *infra*.

59. *See, e.g.*, E. CORWIN, *supra* note 5, at 494 n.91 (calls in 1932-1933 for a dictator and suspension of the Constitution).

60. The nature of the British Constitution, in contrast, makes resort to notions of extra-

Forty years ago, Professor C.H. McIlwain observed that "[i]n many ways the non-enumerated powers are more important practically than the enumerated, for they establish the boundaries of any government that can be called legitimate."[61] That observation is as apposite now as it was then, for it should not be doubted that executive authority is not confined to the powers specifically granted by the Constitution. There are four theoretical categories into which the non-enumerated powers can be placed.

At one end of the spectrum are powers which, although not conferred expressly by the Constitution, are derived from the express powers by reasonable implication.[62] One cannot question the validity, indeed necessity, of drawing reasonable implications from the constitutional text in this area, as in all others,[63] for the implied authority provides the means whereby the express powers are carried into execution.[64]

At the other end of the spectrum is the doctrine of extra-constitutional powers in its strictest sense. This thesis allows the President

constitutional power unnecessary. The common law can be interpreted judicially to adjust to the exigencies of the moment. *See, e.g.*, Burmah Oil Co. Ltd. v. Lord Advocate, [1965] A.C. 75 (H.L. 1964); *ex parte* Marais, [1902] A.C. 109 (P.C. 1901), and Parliament can grant the executive virtually unlimited powers. *See, e.g.*, Emergency Powers (Defence) Act 1939, 2 & 3 Geo. 6 c.62. Even the "Glorious Revolution" of 1688 was accomplished, from the legal point of view, by ordinary legislation. *See* the Crown and Parliament Recognition Act, 1689, 2 W. & M., c.1; the Bill of Rights, 1688, 1 W. & M. (sess. 2) c.2; the Parliament Act 1688, 1 W. & M., c.1.

61. C. MCILWAIN, CONSTITUTIONALISM AND THE CHANGING WORLD 244-45 (1939).

62. *See, e.g.*, Nixon v. Administrator of General Services, 433 U.S. 425, 447, 500-01, 514-15, 517-18 (1977); United States v. Nixon, 418 U.S. 683, 705 (1974); United States v. United States District Court, 407 U.S. 297, 310 (1972). We do not necessarily endorse the Supreme Court's decisions that the executive powers referred to in these cases were implied in article II of the Constitution.

63. *See* United States v. Nixon, 418 U.S. 683, 705-06 n.16 (1974); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315-16 (1936).

64. District Judge Pine aptly characterized implied executive powers as "those which are reasonably appropriate to the exercise of a granted power." Youngstown Sheet & Tube Co. v. Sawyer, 103 F. Supp. 569, 573 (D.D.C.), *aff'd*, 343 U.S. 579 (1952). Although both Judge Pine in *Sawyer* and Chief Justice Burger in United States v. Nixon, 418 U.S. 683, 705 n.16 (1974) cited McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819), that case is not wholly appropriate for a description of implied executive power, because Chief Justice Marshall was therein referring to the incidental power of Congress, which is express, not implied. *See* U.S. CONST. art. I, § 8 cl. 18. *See* Myers v. United States, 272 U.S. 52, 246-47 (1926) (Brandeis, J., dissenting); Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of "the Sweeping Clause,"* 36 OHIO ST. L.J. 788, 817 (1975). Professor Van Alstyne argues that implied executive power is limited to matters "literally indispensable" to performance of express powers. *Id.* at 794, 797, 823 n.101. We would not draw the line quite so narrowly, and would imply powers reasonably incidental to those expressly conferred.

powers derived from outside the Constitution, not by implying them from within it, and asserts that such powers are recognized by law.[65] In other words, the exercise of these powers, although not constitutional in origin, is not unlawful in character.[66] Such authority is derived, presumably, from a notional extra-constitutional grant by the people. It has never been claimed that such extra-constitutional power enables the President to act independently of Congress, but there is no logical reason why extra-constitutional power should be so confined. Once the Constitution ceases to be the criterion of legality, logically there is no limit to executive power, other than the balance of military force within the nation.[67]

Thomas Jefferson was an early exponent of the concept of extra-constitutional authority; having admitted that the Louisiana purchase was "an act beyond the Constitution," he hoped Congress would overlook such "metaphysical subtleties."[68] Some years later he wrote:

> A strict observance of the written laws is doubtless *one* of the high duties of a good citizen, but it is not *the highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.[69]

The resemblance to Locke[70] is obvious; both he and Jefferson were, in fact, merely restating the ancient maxim *salus populi, suprema lex*.[71]

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65. *See* Hurtgen, *The Case for Presidential Prerogative*, 7 U. TOL. L. REV. 59, 76, 84 (1975); *National Emergency: Hearings Before the Senate Special Committee on the Termination of the National Emergency*, 93d Cong., 1st Sess., pt. 3, at 753 (1973) (testimony of former Attorney General Elliot Richardson) [hereinafter cited as 1973 Hearings]. *Cf.* State *ex rel.* Mays v. Brown, 71 W. Va. 519, 535, 541, 77 S.E. 243, 250, 252-53 (1912). *See also* 1973 Hearings pt. 1 at 22, 319 (testimony of Professor C.P. Cotter).

66. *Cf.* Clifford and O'Sullivan, [1921] 2 A.C. 570, 589 (H.L. 1921) (Lord Sumner, dissenting). The military court, not established under the common law or statute, was "an extra-legal, I do not say an illegal, institution." *Id.* at 589.

67. *See* text accompanying note 291 *infra*.

68. L. HENKIN, *supra* note 14, at 398 n.79. *See also* N. SMALL, *supra* note 3, at 23.

69. Letter from Thomas Jefferson to J.B. Colvin (Sept. 20, 1810), 5 THE WRITINGS OF THOMAS JEFFERSON 542 (H. Washington ed. 1871) (emphasis in original). *See also* A. SCHLESINGER, *supra* note 4, at 24-25, 60. *Cf.* President Lincoln's Special Session Message to Congress, July 4, 1861: "[A]re all the laws *but one* to go unexecuted, and the Government itself go to pieces lest that one be violated?", 6 MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897 25 (J. Richardson ed. 1897) (emphasis in original). *See also* note 85 *infra*.

70. *See* note 40 *supra*. It has been said that for President Franklin Roosevelt's "conception of his powers one turns not to the 'stewardship theory,' but the Stuart theory, which is summed up by John Locke. . . ." E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 149 (14th ed. 1978).

71. For discussion and application of the maxim, *see* United States v. Pacific R.R., 120 U.S. 227, 234 (1887); Griffin v. Wilcox, 21 Ind. 370, 379-80 (1863); Johnstone v. O'Sullivan,

Thirdly, Presidents exercising powers beyond those constitutionally granted have, occasionally, asserted that it is proper (because necessary for the preservation of the government or the nation) for the executive to exercise powers not conferred on it by the Constitution, although the exercise of such powers is, nonetheless, unconstitutional and unlawful.[72] Proponents of this view concede that officers exercising such powers may incur civil liability therefor, but suggest that a grateful legislature will confer immunity (where constitutionally possible),[73] or grant an indemnity,[74] ex post facto, if it agrees that the action taken was necessary in the circumstances. In view of the courts' reluc-

[1923] 2 I.R. 13, 26 (C.A. 1922); R. (Childers) v. Adjutant-General, [1923] 1 I.R. 5, 14 (Ch.D. 1922); Attorney-General v. De Keyser's Royal Hotel Ltd., [1920] A.C. 508, 552 (H.L. 1920); J. LOCKE, *supra* note 39, at 80; Hurtgen, *supra* note 65, at 59-60 n.3; Letter from Thomas Jefferson to J.B. Colvin, *supra* note 69, at 544. *But see* 16 ANNALS OF CONG. 532-33 (1807) (remarks of Rep. Elliot): "[W]e are told that the *salus populi* may have required and may justify the *lex suprema* of military despotism. This doctrine is unknown to the Constitution. That sacred record of our rights proclaims itself and itself alone . . . the *lex suprema* . . . . It acknowledges no superior. It contemplates no case in which the law of arms can erect a throne upon its ruins." *See also* Gratwick v. Johnson, 70 C.L.R. 1, 11-12, 20 (1945); 16 THE PARLIAMENTARY HISTORY OF ENGLAND 284-86, 291, 313 (1766).

72. *See* former Justice Curtis, *Executive Power*, (1862) in 2 A MEMOIR OF BENJAMIN ROBBINS CURTIS, LL.D. 313-14 (B. Curtis ed. 1879); Remarks of Acting Secretary of War Alexander Dallas, *quoted in* Dennison, *Martial Law: The Development of a Theory of Emergency Powers, 1776-1861*, 18 AM. J. LEGAL HIST. 52, 64 (1974); 16 ANNALS OF CONG. 516, 564 (remarks of Rep. Bidwell), 518 (Rep. Early), 526 (Rep. Jackson), 570-71 (Rep. Smilie), 571, 576 (Rep. Randolph), 582-83 (Rep. Elmer) (1807); 1 ANNALS OF CONG. 516-17 (remarks of Rep. White) (Gales ed. 1789). *Cf.* Korematsu v. United States, 323 U.S. 214, 244-46, 248 (1944) (Jackson, J., dissenting).

73. *See* Pye & Lowell, *The Criminal Process During Civil Disorders*, 1975 DUKE L.J. 581, 651-53 n.209; University of Colorado Law Revision Center, *A Comprehensive Study of the Use of Military Troops in Civil Disorders with Proposals for Legislative Reform*, 43 U. COLO. L. REV. 399, 414-16, 445 n.166 (1972).

74. As happened in the case of Andrew Jackson 29 years after he was fined for contempt of court, *see* R. RANKIN, WHEN CIVIL LAW FAILS 5-25 (1939). *See generally* Mitchell v. Clark, 110 U.S. 633, 649 (1884) (Field, J., dissenting) (not on the question of indemnity); McCall v. McDowell, 15 F. Cas. 1235, 1243-45 (C.C.D. Cal. 1867) (No. 8,673); 16 ANNALS OF CONG. 518 (1807) (remarks of Rep. Early), 563, 564 (Rep. Bidwell), 566 (Rep. Quincy), *but see* 536 (remarks of Rep. Randolph); Wilmerding, *The President and the Law*, 67 POL. SC. Q. 321, 323-29 (1952). For a discussion of the operation of this principle in regard to federal spending, *see* L. FISHER, PRESIDENTIAL SPENDING POWER 229-56 (1975); L. WILMERDING, THE SPENDING POWER 3-19 (1943). Mr. Wilmerding concluded: "There are certain circumstances which constitute a law of necessity and self-preservation and which render the *salus populi* supreme over the written law. The officer who is called to act upon this superior ground does indeed risk himself on the justice of the controlling powers of the Constitution, but his station makes it his duty to incur that risk. As for Congress, when expenses are incurred without its sanction, it is discretionary with it to approve or disapprove the conduct of the officer concerned. . . . [T]he law of necessity still stands. The opinion that the executive departments must obey the appropriation laws even though some marked evil result to the country or some marked advantage be lost, is wrong. The high officers of the government, and a fortiori the President, have a right, indeed a duty, to do

tance to invalidate or even to review executive action during times of crisis,[75] there may appear to be little practical difference between this thesis and the theory of extra-constitutional presidential action outlined above. The latter, however, is not only less honest in denying the unlawfulness of the executive act; it also poses a far greater threat to the continued authority of the Constitution.[76] In any case, Presidents will continue to act on the basis of perceived necessity, without much regard for the niceties of constitutional theory. Whether or not their actions are strictly legal is unlikely to concern them unduly, as President Lincoln demonstrated when reporting to Congress in 1861 that measures taken to crush the rebellion "*whether strictly legal or not*, were ventured upon under what appeared to be a popular demand and a public necessity, trusting then, as now, that Congress would readily ratify them."[77]

Finally, some constitutional scholars have argued that the President has certain powers because they are "inherent" or "innate" in the offices of Chief Executive and Head of State of a nation.[78] It is claimed that these powers are ascertained by reasonable implication from—or, better, a filling out of—the first clause of article II of the Constitution.[79] That clause, it is said,[80] grants the President "[t]he Executive power"[81] in general terms, quite unlike the manner in which specific powers are conferred on Congress in article I.[82] The result is that the President has authority to do all acts "executive" by nature.[83]

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what they conceive to be indispensably necessary for the public good, provided always that they submit their action to Congress to sanction the proceeding." *Id.* at 12-19.

75. *See* Korematsu v. United States, 323 U.S. 214, 245-46, 248 (1944) (Jackson, J., dissenting); Bell, *Book Review*, 76 COLUM. L. REV. 350, 360 (1976); C. ROSSITER, *supra* note 4, at 37-38, 92, 126-29; E. CORWIN, PRESIDENTIAL POWER AND THE CONSTITUTION: ESSAYS 170 (R. Loss ed. 1976); 1973 Hearings, *supra* note 65, at 330 (testimony of C.P. Cotter); G. SCHUBERT, THE PRESIDENCY IN THE COURTS 188 (1957). *See also* E. CORWIN, *supra* note 5, at 256.

76. *See* conclusion *infra*.

77. 6 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 69, at 24 (emphasis added).

78. *See, e.g.*, R. Longaker, *supra* note 4, at 161, 168, 173 n.39, 182, 183, 203. *See also* text accompanying notes 160-165 *infra*.

79. U.S. CONST. art. II, § 1, cl. 1: "The Executive power shall be vested in a President of the United States of America."

80. *See* notes 160, 161 *infra*.

81. *See* U.S. CONST. art. II, § 1, cl. 1.

82. *See* U.S. CONST. art. I, § 8.

83. A. HAMILTON, Pacificus letter no. I (1793), in 15 THE PAPERS OF ALEXANDER HAMILTON 39-40, 42 (H. Syrett & J. Cooke eds. 1969); 1 ANNALS OF CONG. 463, 464, 500 (Gales ed. 1789) (remarks of Rep. Madison). *See also* 1 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES ch. XV (1953).

According to this thesis, the President may undertake *constitutionally* whatever is necessary for the preservation of the United States and its government.[84] Abraham Lincoln was one such exponent and practitioner; he believed that "measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation."[85] But it is notable that President Lincoln, like others who have regarded the opening words of article II as a grant of power,[86] preferred to rest his case on the surer foundation of more specific powers, such as the President's duty to "take care that the laws be faithfully executed,"[87] and his power as commander-in-chief of the armed forces.[88]

Notwithstanding the considerable following that can be mustered in support of an extra-constitutional presidential power, it is submitted that the concept is not an acceptable constitutional doctrine. First, there is no evidence that "the founders" conceived of government exercising powers derived from some source outside the Constitution; the

84. *See, e.g.*, Presidents Theodore Roosevelt and Truman, quoted in text accompanying note 1 and note 4 *supra*; 1973 Hearings (testimony of Senator Pell), pt. 1, *supra* note 65, at 259. *See also* President Roosevelt's address to Congress regarding the Emergency Price Control Act, September 7, 1942, *quoted in* E. CORWIN, *supra* note 5, at 250-51. President Nixon saw his power in even wider terms. He told the Senate Select Committee on Intelligence that "[i]t is quite obvious that there are certain inherently governmental actions which, if undertaken by *the sovereign* in protection of the interest of the nation's security, are lawful but which, if undertaken by private persons, are not. . . . [I]t is naive to attempt to categorize activities a President might authorize as 'legal' or 'illegal' without reference to the circumstances under which he concludes that the activity is necessary.": N.Y. Times, March 12, 1976, at 14, col. 2 (emphasis added). *See also* E. CORWIN *supra* note 70, at 150; A. SCHLESINGER, *supra* note 4; at 263-66. *But see* United States v. Ehrlichman, 376 F. Supp. 29, 33 (D.D.C. 1974). Justice Frankfurter also would allow the President wide powers; for him the criterion for war-time military action was not necessity but reasonable expediency. Korematsu v. United States, 323 U.S. 214, 225 (1944) (Frankfurter, J., concurring). *See contra, id.* at 244 (Jackson, J., dissenting). *See also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 662 (1952) (Clark, J., concurring), 691-92 (Vinson, C.J., dissenting); J. SMITH & C. COTTER, *supra* note 12, at 135; Fairman, *The President as Commander in Chief*, 11 J. POLITICS 145, 167 (1949).

85. Letter from Abraham Lincoln to A.G. Hodges (April 4, 1864), 7 THE COLLECTED WORKS OF ABRAHAM LINCOLN 281 (R. Basler ed. 1953). With characteristic succinctness, Lincoln asked: "Was it possible to lose the nation, and yet preserve the constitution?".

86. *See, e.g.*, Hamilton, *supra* note 83, at 40, 42-43; 1 ANNALS OF CONG. 463, 496-97, 500 (Gales ed. 1789) (remarks of Rep. Madison); Myers v. United States, 272 U.S. 52, 163-64 (1926) (discussed at note 143 *infra*), all of which rely, to some extent, on the President's duty to "take care that the laws be faithfully executed." U.S. CONST. art. II, § 3. Indeed, "inherent" is often used loosely to describe powers derived from any clause of article II, including implied powers. *See, e.g.*, R. Longaker, *supra* note 4, at 214-18.

87. U.S. CONST. art. II, § 3.

88. *Id.* art. II, § 2 cl. 1. *See* E. CORWIN, *supra* note 5, at 229. *See also* R. Longaker, *supra* note 4, at 143, 155, 161, 163, 172-73.

idea is not alluded to in the reports of debates at the Constitutional Convention or in the Federalist Papers.[89] Certainly nothing in the Constitution itself supports it. In fact, a doctrine of extra-constitutional power runs counter to the implications of the Ninth and Tenth Amendments, for it would mean that the people would be dispossessed of some of the rights recognized by those amendments.[90] Secondly, as will be seen,[91] the doctrine has no acceptable theoretical basis.[92] In substance, therefore, if not in form, the designation of extra-constitutional powers as "lawful" contravenes a fundamental maxim of Anglo-American law, tracing its roots at least to Bracton,[93] that every person, no matter how high his office, is subject to the law[94] (which, obviously, includes the Constitution).

It must not be thought that there is any novelty in a debate about "extra-constitutional" executive powers. Only its American setting is new; the issue is one of the most ancient and fundamental in political jurisprudence and has exercised the minds of leading political philosophers.[95] In England, for example, the debate goes back to medieval times. By the early fourteenth century the English kingship is seen to have two aspects: the theocratic and the feudal.[96] The difference be-

89. L. HENKIN, *supra* note 14, at 24.

90. For discussion of the process by which it may be argued (we believe unconvincingly) that the people may have lost such powers, *see* Part III *infra*. Of course, once one is in the realm of extra-constitutionality, there is no greater reason to treat the Ninth and Tenth Amendments as "covering the field" of unenumerated (not including implied) powers and liberties than there is in regarding the rest of the Constitution as definitive of governmental powers and civil liberties. This point illustrates the danger of the concept of extra-constitutional powers; having entered the realm of unconstitutionality, where does one stop?

91. Part III *infra*.

92. *See ex parte* Milligan, 71 U.S. (4 Wall.) 2, 30 (1866) (D.D. Field); *id.* at 121 (Davis, J.); *id.* at 136-37 (Chase, C.J.); Beaver County Building and Loan Association v. Winowich, 323 Pa. 483, 510-11, 187 A. 481, 493 (1936); R. BERGER, *supra* note 14, at 101 n.211, 108.

93. *See* 2 BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE 33, 110, 305 (S. Thorne transl. 1968).

94. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 655 (1952) (Jackson, J., concurring); United States v. Lee, 106 U.S. 196, 220 (1882); Gouriet v. Union of Post Office Workers, [1977] Q.B. 729, 761-62, 766 (C.A. 1977) (reversed by H.L. on grounds not directly affecting these *dicta*, [1978] A.C. 435 (H.L. 1977)); Burmah Oil Co. Ltd. v. Lord Advocate, [1965] A.C. 75, 147 (H.L. 1964); Cox, *Watergate and the Constitution of the United States*, 26 U. TORONTO L.J. 125, 133, 134 (1976).

95. *See* comments by Machiavelli, Rousseau and J.S. Mill, *quoted in* A. SCHLESINGER, *supra* note 4, at 321-22; J. SMITH & C. COTTER, *supra* note 12, at 6-8; J. LOCKE, *supra* note 40.

96. W. ULLMANN, PRINCIPLES OF GOVERNMENT AND POLITICS IN THE MIDDLE AGES 150-92 (4th ed. 1978) [hereinafter cited as ULLMANN, GOVERNMENT]; W. ULLMANN, MEDIEVAL POLITICAL THOUGHT 145-55 (1975) [hereinafter cited as ULLMANN, POLITICAL THOUGHT].

tween them, so far as concerns the subject of this paper, was that the theocratic king, being the anointed of God,[97] was considered not to be subject to human law,[98] whereas the feudal king was.[99] Political theorists of the day reconciled the contradictory aspects of English kingship, as did Locke[100] three centuries later, by holding that the king should obey the law except when it was necessary for the welfare of the country that he do otherwise.[101] But the courts were unsure how to rule in specific cases, emphasizing first the older[102] theocratic strand[103] and, later, the feudal one.[104] In Stuart times the absolutist (or theocratic) aspect achieved a brief ascendancy in the courts,[105] but the revolutionary settlement of 1688-89 established the rule that the Crown is always

97. ULLMANN, GOVERNMENT, *supra* note 96, at 121-23; ULLMANN, POLITICAL THOUGHT, *supra* note 96, at 53-58, 149.

98. ULLMANN, GOVERNMENT, *supra* note 96, at 173.

99. *Id.* at 152; ULLMANN, POLITICAL THOUGHT, *supra* note 96, at 147. For the position in the thirteenth century, *see* 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 181-83, 515-18 (2d ed. 1923).

100. *See* notes 40 and 42 *supra*.

101. *See* W. FARR, JOHN WYCLIF AS LEGAL REFORMER, 141, 142, 143-44, 149-50 (1974); ULLMANN, GOVERNMENT, *supra* note 96, at 184-85. *See also* Professor McIlwain's discovery in Bracton of a distinction between *gubernaculum* (where the king's authority was absolute) and *jurisdictio* (where he was bound by law). C. MCILWAIN, CONSTITUTIONALISM ANCIENT AND MODERN 76-77, 78-79, 85, 87 (rev. ed. 1947); ULLMANN, GOVERNMENT, *supra* note 96, at 177-78. For a criticism of McIlwain's thesis, see Tierney, *Bracton on Government*, 38 SPECULUM 295, 307-08 (1963). *See generally* D. HANSON, FROM KINGDOM TO COMMONWEALTH 97-133 (1970).

102. *See* ULLMANN, GOVERNMENT, *supra* note 96, at 117 et seq.; ULLMANN, POLITICAL THOUGHT, *supra* note 96, at 130 *et seq.*

103. *See* D. HANSON, *supra* note 101, at 211-13. *See also* the dialogue between master and pupil in DIALOGUS DE SCACCARIO (Dialogue of the Exchequer) (probably written by Richard FitzNeal ca. 1179), THE COURSE OF THE EXCHEQUER 101-02 (C. Johnson transl. 1950), *quoted in* C. MCILWAIN, *supra* note 61, at 249-50.

104. *See, e.g.*, Case of Proclamations, 12 Co. Rep. 74, 76, 77 Eng. Rep. 1352, 1354 (K.B. 1611); Case of Monopolies, 11 Co. Rep. 84b, 77 Eng. Rep. 1260 (K.B. 1602); Cavendish's Case, 1 And. 152, 123 Eng. Rep. 403 (C.P. 1587); Willion v. Berkley, 1 Plow. 223, 75 Eng. Rep. 339 (C.P. 1561). *See also* Prohibitions del Roy, 12 Co. Rep. 63, 65, 77 Eng. Rep. 1342, 1343 (1608).

105. *See, e.g.*, Bate's Case (the Case of Impositions), 2 St. Tr. 371, 389 (Ex. 1606); R. v. Hampden (The Ship Money Case), 3 St. Tr. 825 (1637). Berkeley, J., said: "I never read nor heard, that lex was rex; but it is common and most true, that rex is lex, for he is 'lex loquens,' a living, a speaking, an acting law." *Id.* at 1098. Similarly, Vernon, J.,: "[A] statute derogating from the prerogative doth not bind the king; and the king may dispense with any law in cases of necessity. . . ." *Id.* at 1125. *Accord, id.* at 1235 (Finch, C.J.); Godden v. Hales, 11 St. Tr. 1165 (1686). *See generally* F. WORMUTH, THE ROYAL PREROGATIVE 1603-1649 (1939); T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 49-51 (5th ed. 1956) (a perceptive comment). But these views did not prevail long. Parliament reversed the decision in the Ship Money Case (Abolition of Ship Money Act 1640 (16 Car. I, c.14)), and impeached six of the judges involved in it, 3 St. Tr. 1260 (1641); Bate's Case, *supra*, had already been reversed by the Petition of Right 1628 (3 Car. I, c.1).

subject to the law.[106]

However, the victory of "feudal" kingship was not complete, for the fact that the royal prerogative, which originally defined the sphere left to theocratic kingship,[107] remains part of the common law allows traces of theocratic kingship to remain without detracting from the rule that the Crown can never act contrary to law. Thus, although the royal prerogative allows the Crown to contravene the usual rules of common law in certain emergency situations,[108] the executive, when so acting, is still complying with the law, because "the law" includes the prerogative.[109] All this, of course, is consistent with the fundamental rule of the British Constitution, the supremacy of Parliament, because Parliament can amend or abolish the royal prerogative at any time,[110] and the Crown may never contravene an Act of Parliament.[111] Unfortunately for American Presidents, the presence of a written constitution with the status of "supreme law"[112] tends somewhat to curtail their theocratic tendencies and aspirations.

II. Constitutional Executive Power

A detailed consideration of the constitutional powers of the President is beyond the scope of this paper. Rather the discussion will be confined to those aspects of the powers which serve to explain why concepts of "extra-constitutional" presidential power have developed, for, if an asserted executive power was neither delegated by Congress nor conferred by the Constitution, either expressly or impliedly, logically

106. *See* Gouriet v. Union of Post Office Workers, [1977] Q.B. 729, 761 (C.A. 1977), reversed by H.L. on grounds not affecting this *dictum*, [1978] A.C. 435 (H.L. 1977); Burmah Oil Co. Ltd. v. Lord Advocate, [1965] A.C. 75, 147 (H.L. 1964); Fitzgerald v. Muldoon, [1976] 2 N.Z.L.R. 615. *See also* Bankers' Case, 14 St. Tr. 1 (Ex. Ch. 1690-1700); Pawlett v. Attorney-General, Hardres 465, 469, 145 Eng. Rep. 550, 552 (Ex. 1668); J. MITCHELL, CONSTITUTIONAL LAW 174 (2d ed. 1968). Lord President Bradshawe quoted Bracton to King Charles I at his trial in 1649. 4 St. Tr. 1009.

107. *See* ULLMANN, GOVERNMENT, *supra* note 96, at 184-85.

108. *See* Burmah Oil Co. Ltd. v. Lord Advocate, [1965] A.C. 75 (H.L. 1964); Attorney General v. De Keyser's Royal Hotel Ltd., [1920] A.C. 508, 565 (H.L. 1920); Commonwealth v. Colonial Combing, Spinning and Weaving Co. Ltd., 31 C.L.R. 421, 442 (1922).

109. *See* Laker Airways Ltd. v. Department of Trade, [1977] Q.B. 643, 704-06 (C.A. 1976). *Cf.* N. MACHIAVELLI, THE DISCOURSES 194 (B. Crick ed. 1970).

110. Laker Airways Ltd. v. Department of Trade, [1977] Q.B. 643, 707, 718-22, 727-28 (C.A. 1976); Barton v. Commonwealth, 131 C.L.R. 477 (1974); Egan v. Macready, [1921] 1 I.R. 265 (Ch. D. 1921); Attorney General v. De Keyser's Royal Hotel Ltd., [1920] A.C. 508 (H.L. 1920).

111. *See* note 106 *supra*. *See also* Province of Bombay v. Municipal Corp. of Bombay, [1947] A.C. 58 (P.C. 1946).

112. U.S. CONST. art. VI, § 2.

its only possible source is some extra-constitutional authority. Only those powers conferred on the President by the Constitution itself will be considered, although these are of less practical importance than the extensive powers delegated to him by Congress.[113] But, before examining executive powers, it is appropriate to consider their relationship to congressional power.

A. Legislative-Executive Overlap

Had the United States Constitution been regarded as embodying a very rigid conception of the separation of powers doctrine there might have been no problem of overlap of the powers of Congress and the President,[114] except, perhaps, when presidential power derived by reasonable implication from express powers coincided with an exercise of congressional power under the "necessary and proper" clause.[115] Even that problem of concurrent power could have been avoided by interpreting the "necessary and proper" clause restrictively, for example by limiting it to matters in which *a law* is necessary to implement an executive power[116] or by denying the validity of implying executive powers.[117] Although traces of an uncomplicated, strict separation of powers doctrine appear occasionally,[118] the presently accepted concep-

113. *See* J. SMITH & C. COTTER, *supra* note 12, at 2; Black, *The Presidency and Congress*, 32 WASH. & LEE L. REV. 841, 849-50 (1975); SENATE SPECIAL COMMITTEE ON THE TERMINATION OF THE NATIONAL EMERGENCY, EMERGENCY POWERS STATUTES, S. REP. NO. 549, 93d Cong., 1st Sess., iii and *passim* (1973). *But see* National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976). Delegation of power to the President need not be express. It can be inferred from appropriation of funds, *see* G. SCHUBERT, *supra* note 75, at 291, or from prolonged congressional silence (implying acquiescence) in the face of executive initiative, *see id.*; L. HENKIN, *supra* note 14, at 105, 299 n.17; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952); United States v. Midwest Oil Co., 236 U.S. 459 (1915). It is wise to interpret the ambit of express and reasonably implied presidential powers in the light of current constitutional developments, and not according to some fixed conception of what the founding fathers intended 200 years ago. But one must be wary of inferring congressional acquiescence from insufficient evidence, especially if Congress might thereby be estopped from reversing its earlier decision. *See* Myers v. United States, 272 U.S. 52, 152 (1926). *See generally* R. BERGER, *supra* note 14, at 88-100. The Supreme Court has refused to infer congressional consent from silence in response to presidential action followed by a challenge to Congress to reverse it. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

114. *See* E. CORWIN, *supra* note 5, at 122; L. HENKIN, *supra* note 14, at 341 n.11.

115. U.S. CONST. art. I, § 8 clause 18.

116. *See* Van Alstyne, *supra* note 64, at 823 n.101, interpretation 5.

117. *See* Calhoun, *quoted in* Myers v. United States, 272 U.S. 52, 181, 246 n.7 (1926); *In re* Neagle, 135 U.S. 1, 83 (1890) (Lamar, J., dissenting).

118. *See, e.g.*, Nixon v. Administrator of General Services, 433 U.S. 425, 508-14 (1977) (Burger, C.J. dissenting) (*but see* opinion of the Court at 441-44); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587, 589 (1952) (per Black J.) (*but see id.* at 589 Frankfurter, J.,

tion of the doctrine is a much more realistic one, recognizing the interdependence between the legislature and the executive.[119] In what may be seen as the "substantive" counterpart of the device of "checks and balances,"[120] it is now recognized that Congress and the President have concurrent authority (not necessarily co-extensive) in many areas of national concern, and that complete regulation of them, or intelligent action in them, is possible—at least in practice—only through cooperation between both branches,[121] with their efforts complementing, rather than cancelling, one another.[122] However, in such fields of concurrent legislative and executive authority, inconsistent exercises of power will occur, and these raise the question of the relative supremacy of the two branches.

It probably was not inevitable that the executive should be seen to

concurring); Springer v. Gov't. of the Philippine Islands, 277 U.S. 189, 201-02 (1928) (*but see* Holmes, J., dissenting, joined by Brandeis, J., *id.* at 211). *Cf.* James Madison, Helvidius letter no. II (1793), 6 THE WRITINGS OF JAMES MADISON 155-56 (G. Hunt ed. 1906).

119. *See* Nixon v. Administrator of General Services, 433 U.S. 435, 441-44 (1977); Buckley v. Valeo, 424 U.S. 1, 121-22 (1976); United States v. Nixon, 418 U.S. 683, 707 (1974); Myers v. United States, 272 U.S. 52, 291 (1926) (Brandeis, J., dissenting); Cotter, *supra* note 65, at 335; Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451, 470-71, 487 (1979). In Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952), Justice Jackson, concurring, recognized a "zone of twilight" where the powers of the President and Congress are concurrent. *Accord, id.* at 597, 690. *See also* Alexander Hamilton, Pacificus letter no. I, *supra* note 83, at 40, 42; C. THACH, THE CREATION OF THE PRESIDENCY 1775-1789 169-70 (1922). For a historical discussion of this "zone of twilight," *see* CONGRESSIONAL RESEARCH SERVICE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA 566-67 (L. Jayson & J. Killiam eds. 1973).

120. *See* THE FEDERALIST, No. 47 at 302-03, No. 48 at 308, No. 51 at 322 (Madison), No. 66 at 401-02 (Hamilton) (Mentor Books 1961); Sparkman, *Checks and Balances in American Foreign Policy*, 52 IND. L. J. 433, 439, 447 (1977); Comment, *United States v. AT & T: Judicially Supervised Negotiation and Political Questions*, 77 COLUM. L. REV. 466, 474 n.42, 475 n.44, 477 (1977). *See also* Atkins v. United States, 556 F.2d 1028, 1067 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978). *See generally* M. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 147-75 (1967).

121. An example is the War Powers Resolution, 87 Stat. 555 (1973). *See also* United States v. Am. Tel. & Tel. Co., 551 F.2d 384, 392 (D.C. Cir. 1976), *continuation in* 567 F.2d 121, 127-28, 130 (D.C. Cir. 1977); L. HENKIN, *supra* note 14, at 108-10, 276; 1973 Hearings, *supra* note 65, pt. 2, at 520 (remarks of former Justice Clark and former Attorney General Katzenbach).

122. But this must not be taken too far. As Justice Brandeis wrote: "The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting). *Accord* H. TRUMAN, TRUMAN SPEAKS 8 (1960). The separation of powers doctrine may have been an application of the *laissez-faire* philosophy that "that government is best which governs least." *See* Levitan, *The Responsibility of Administrative Officials in a Democratic Society*, 61 POL. SC. Q. 562, 563 (1946).

occupy any field inviolate from congressional interference. Although responsible government on the British model was constitutionally excluded,[123] had Washington, Hamilton and the first Congress desired it, the President could possibly have become a mere figure-head, with actual power vested in the hands of ministers politically responsible to, but not members of,[124] the legislature.[125] The United States would then have had a system of congressional government. In such a system, Congress would exercise all political power and could effectually legislate on all matters of national concern, provided it could override a presidential veto[126] (which would probably not have been difficult in the circumstances). The country vaguely approached this position in 1867,[127] and indeed in 1885 Woodrow Wilson described the national political system as one of "congressional government."[128] If the de facto supremacy of Congress had been maintained into this century, the "gloss which life [had] written"[129] on the separation of powers doctrine might well have resulted in the Supreme Court ruling that no field of executive power was independent of congressional control.[130] But

123. U.S. CONST. art. I, § 6, cl. 2: "[N]o person holding any office under the United States shall be a member of either House during his continuance in office." *But see* E. CORWIN, *supra* note 70, at 164, and ESSAYS, *supra* note 75, at 172.

124. *See* note 123 *supra*.

125. *See* E. CORWIN, *supra* note 5, at 17, 371 n.45; M. CUNLIFFE, *supra* note 4, at 55. *See also* C. THACH, *supra* note 119, at 157. For Professor Corwin's interesting proposals for strengthening the Cabinet, *see* E. CORWIN, *supra* note 5, at 297-98, 489 n.87, and ESSAYS, *supra* note 75, at 171-72.

126. *See* U.S. CONST. art. I, § 7, cls. 2 and 3.

127. In that year Congress purported to confer on General Grant some of President Johnson's powers as commander-in-chief of the armed forces, and passed the Tenure of Office Act purporting to restrict the President's power of dismissing members of his cabinet. *See* L. HENKIN, *supra* note 14, at 350 n.42; A. SCHLESINGER, *supra* note 4, at 71-72.

128. W. WILSON, CONGRESSIONAL GOVERNMENT (1885).

129. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

130. *Cf.* L. HENKIN, *supra* note 14, at 106. The Australian Constitution makes an interesting comparison because, although it confers on the executive many powers similar to those of the President, (AUSTL. CONST. §§ 51 (xxxix), 61, 64, 67, 72(i), 68; *cf.* U.S. CONST. art. I, § 8, cl. 18, art. II, § 1, cl. 1, art. II, § 2, cl. 2, art. II, § 2, cl. 1) it seems that Parliament can control the executive in all matters. *See* Victoria v. Commonwealth, 134 C.L.R. 338, 362, 379, 406 (1975). *Contra*, Richardson, *The Executive Power of the Commonwealth*, in COMMENTARIES ON THE AUSTRALIAN CONSTITUTION 50, 66 n.43, 67 n.45, 72, 82, 85 (L. Zines ed. 1977); Sawer, *The Governor-General of the Commonwealth of Australia*, 52 CURRENT AFF. BULL. (Univ. of Sydney), No. 10, 20, at 25 (March 1976). This is held to be so because the British principle of responsible government operates in Australia. (*see* Victorian Stevedoring & General Contracting Co. Pty. Ltd. v. Dignan, 46 C.L.R. 73, 114 (1931); Commonwealth v. Colonial Combing, Spinning & Weaving Co. Ltd., 31 C.L.R. 421, 446 (1922); Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd., 28 C.L.R. 129, 146-47 (1920)), even though it is only implied in the Constitution. *See* AUSTL. CONST. §§ 56, 62, 64.

the ever-fluctuating balance of power between the two branches changed soon after Wilson wrote his description.[131] Indeed, just before the 1973 Watergate affair[132] the balance was almost the exact opposite of what Woodrow Wilson had described in 1885.[133]

The strict legal position alone does not, by any means, determine the political balance of power between the President and Congress, but it continues to have an important impact on the nation's political life.[134] Judicial resolution of conflicting claims of power by Congress and the President has not been simple[135] and has seemed at times to be undertaken on an ad hoc basis, without resort to any fundamental principle.[136] Nonetheless, it is helpful to distinguish two kinds of legislative/executive conflicts—those involving matters of "substance,"[137] and other conflicts, usually involving the "machinery of government."[138]

(*Contrast* U.S. CONST. art. I, § 6, cl. 2.) *See also* Ansett Transport Industries (Operations) Pty. Ltd. v. Commonwealth, 139 C.R. 54, 87 (1977); New South Wales v. Commonwealth, 135 C.L.R. 337, 364-365 (1975).

131. *See* Wilson, Preface to the fifteenth edition of CONGRESSIONAL GOVERNMENT xi-xiii (1900).

132. For a discussion, *see* A. SCHLESINGER, *supra* note 4, at 266-77.

133. *See* A. SCHLESINGER, *supra* note 4 *passim*, and Epilogue, 454 (Popular Library ed. 1974). For some of the reasons why the President grew so powerful, *see* Cox, *supra* note 94, at 125-27. As early as 1948, Professor Corwin—by no means niggardly in regard to his interpretation of executive power—had characterized the position of the Presidency as one of "unhealthy dominance in the system, one which instead of expediting the formation of national policy often stands in the way of it." E. CORWIN, ESSAYS, *supra* note 75, at 176.

134. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 121-35 (1976).

135. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976); Wiener v. United States, 357 U.S. 349 (1958); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Humphrey's Executor v. United States, 295 U.S. 602 (1935); Myers v. United States, 272 U.S. 52 (1926); Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804); United States v. Am. Tel. & Tel. Co., 551 F.2d 384 (D.C. Cir. 1976), *continuation in* 567 F.2d 121 (D.C. Cir. 1977); Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974). *Cf.* Nixon v. Administrator of General Services, 433 U.S. 425 (1977); Springer v. Government of the Philippine Islands, 277 U.S. 189 (1928).

136. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 128-37 (1976). *See also* Henkin, *Constitutional Fathers—Constitutional Sons*, 60 MINN. L. REV. 1113, 1119 n.14 (1976); Comment, *supra* note 120, at 477: "Every situation involving competing functions of two branches must be considered independently to see whether separateness or interdependence would best accommodate the interest of a workable yet balanced government;" Bruff, *supra* note 119, at 479, 488, 495-99.

137. Such conflicts involve a confrontation between an asserted executive power to act in an area and a congressional claim to regulate that area. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976); Wiener v. United States, 357 U.S. 349 (1958); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Humphrey's Executor v. United States, 295 U.S. 602 (1935); Myers v. United States, 272 U.S. 52 (1926); Little v. Barreme 6 U.S. (2 Cranch) 170 (1804).

138. *See, e.g.*, Nixon v. Administrator of General Services, 433 U.S. 425 (1977); United States v. Am. Tel. & Tel. Co., 551 F.2d 384 (D.C. Cir. 1976), *continuation in* 567 F.2d 121 (D.C. Cir. 1977); Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974).

It is submitted that, on matters of "substance," the area of executive inviolability from congressional control[139] comprises the expressly enumerated executive powers[140] and, possibly,[141] any implied executive powers[142] which fall outside the ambit of congressional power, including the "necessary and proper" clause.[143] Statutes which seek to im-

139. "Congressional control" is probably not confined to the enactment of legislation; a Concurrent Resolution or a successfully vetoed Bill or Joint Resolution may suffice to confine the exercise of executive power. *See* Black, *supra* note 113, at 852; Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983, 1085-86 (1975). *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Frankfurter, Burton, Jackson and Clark, JJ., concurring).

140. *See* Buckley v. Valeo, 424 U.S. 1, 124-36 (1976); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936); *Congress, the President, and the War Powers: Hearings Before the Subcommittee on National Security Policy and Scientific Developments of the House Committee on Foreign Affairs*, 91st Cong., 2d Sess. 33, 36, 49 (statement of Professor Mallison), 47, 79 (Professor Bickel), 216 (Assistant Attorney General Rehnquist), 226, 228 (Mr. Stevenson) (1970); 1 ANNALS OF CONG. 463, 464, 582 (Gales ed. 1789) (remarks of Rep. Madison). *See also* Nixon v. Administrator of General Services, 433 U.S. 425, 500 (1977) (Powell, J., concurring) 509, 510, 514-16, 525 (Burger, C.J., dissenting) 558-61 (Rehnquist, J., dissenting).

Five justices in the Steel Seizure case acknowledged that there are executive powers beyond congressional control, but none of them was prepared to specify these powers. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 597, 637, 690 (1952). *See also* Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 610 (1838); United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1871). It would be unconstitutional for Congress to deny the President funds needed to execute his *express* powers, for that would enable Congress effectually to negate the express intention of the Constitution. *See* opinions *quoted in* E. CORWIN, *supra* note 5, at 401 (Rep. Bayard), 402 (Daniel Webster, President Buchanan), 403 (Senator Root), 403-04 (Senator Borah). *See also* L. HENKIN, *supra* note 14, at 79, 108-10, 113-15, 161-62; *Congress, the President, and the War Powers, supra* at 225 (Mr. Stevenson); King & Leavens, *Curbing the Dog of War: The War Powers Resolution*, 18 HARV. INT'L. L. J. 55, 88 n.152, 89 (1977). *But see* Franck, *After the Fall: The New Procedural Framework for Congressional Control Over the War Power*, 71 AM. J. INT'L. L. 605, 622 n.74, 623 n.80, 633 (1977).

141. *But see* note 143 *infra*.

142. As to the ambit of these, *see* note 64 *supra*. For a narrower view, *see* Myers v. United States, 272 U.S. 52, 246-47 (1926) (Brandeis, J., dissenting).

143. U.S. CONST. art. I, § 8 clause 18. *See* Myers v. United States, 272 U.S. 52, 231 (1926). Presumably, Professor Henkin had in mind a conflict between implied executive power and legislative power when he asserted that "[e]ven where the President's authority is *clear and perhaps primary*, his acts will bow before an act of Congress for purposes of domestic law. . . ." L. HENKIN, *supra* note 14 at 106 (emphasis added).

Notwithstanding Chief Justice Taft's endorsement of Hamilton's view that art. II, § 1, cl. 1 of the Constitution confers on the President a "general" executive power, *see* Myers v. United States, 272 U.S. 52, 118, 138-39 (1926), *Myers v. United States* should not be interpreted as holding that Congress cannot control the exercise of "inherent" executive powers (if they exist). Taft stated his conclusion without relying directly on a "general" executive power derived from art. II, § 1, cl. 1; instead, he based it substantially on the President's express power of appointment, art. II, § 2, cl. 2, and his duty to "take care that the laws be faithfully executed," art. II, § 3. 272 U.S. at 117, 135, 163-64. *See* Buckley v. Valeo, 424 U.S. 1, 135-36 (1976); Wiener v. United States, 357 U.S. 349, 352 (1958); Atkins v. United

pinge on this rather narrow area of exclusive executive authority will be invalid,[144] but in all other areas of conflict over matters of substance Congress will prevail.[145] This result is due to the nature of the competing values. Since the executive lacks an express incidental power,[146] all cases of inconsistency on matters of substance, except those mentioned, present a conflict between an express power of Congress and an implied power of the President.[147] In such a contest, it is submitted, the expressly conferred power ought to prevail.[148] But the apparent simplicity of these propositions for the resolution of conflicts between Con-

States, 556 F.2d 1028, 1069 n.35 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978); Youngstown Sheet & Tube Co. v. Sawyer, 103 F. Supp. 569, 574 (D.D.C.), *aff'd*, 343 U.S. 579 (1952). *Cf.* 1 ANNALS OF CONG. 463, 496-97, 500 (Gales ed. 1789) (remarks of Rep. Madison). Accordingly, on a careful reading, the *Myers* case is seen to have brought legislative power into conflict with an *express* executive power—the President's duty to "take care that the laws be faithfully executed." With respect, the opinion of Professors Pye and Lowell that the area of executive inviolability from congressional control includes "lesser powers necessarily included within the express powers" is too broadly stated. Pye & Lowell, *supra* note 73, at 628 n.132.

144. Buckley v. Valeo, 424 U.S. 1 (1976); Myers v. United States, 272 U.S. 52 (1926). As to whether the President may disregard such an "Act," *see* R. BERGER, *supra* note 14, at 307-09; E. CORWIN, *supra* note 70, at 156.

145. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Little v. Barreme, 6 U.S. (2 Cranch) 170, 177-78 (1804). In the former case Justice Jackson wrote: "When the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon *his own constitutional power minus any constitutional powers of Congress* over the matter." 343 U.S. at 637 (emphasis added). We would not interpret this *dictum* as an assertion that Congress can detract from the *express* powers of the President. *See id.* at 644; note 140 *supra*.

On a number of occasions, Presidents have disobeyed the will of Congress. *See* E. CORWIN, *supra* note 5, at 120 (Presidents Theodore Roosevelt and Taft), 270 (President Wilson); Note, *Honored in the Breech: Presidential Authority to Execute the Laws with Military Force*, 83 YALE L.J. 130, 131 (1973) (Presidents Lyndon Johnson and Nixon). President Franklin Roosevelt threatened to disobey a statutory provision if Congress did not repeal it; Congress obliged. *See* E. CORWIN, *supra* note 5, at 250-51.

146. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588-89 (1952); Myers v. United States, 272 U.S. 52, 246 (1926) (Brandeis, J., dissenting); *War Powers Legislation, supra* note 28, at 551 (statement of Professor Bickel).

147. Hence Congress is under no constitutional duty to appropriate funds needed to execute *implied* presidential powers; there the conflict is between an implied executive power and the express congressional power in art. I, § 8, cl. 1.

148. *But cf.* Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022, 1029 n.40, 1035 n.73 (1978). In the event of conflict between the exercise of implied substantive powers by both the President and Congress (assuming there are implied legislative powers beyond the ambit of the "necessary and proper" clause), Congress should prevail. *See* note 145 *supra*. This accords with the Founding Fathers' intention to give the legislature primacy. *See* R. BERGER, *supra* note 14, at 50, 52; L. HENKIN, *supra* note 14, at 33. *See also* Myers v. United States, 272 U.S. 52, 183-84 (1926) (McReynolds, J., dissenting). It is submitted that the separation of powers doctrine, if not the interpretation of the constitutional text itself, will ensure that inconsistency between the exercise of express legislative power (other than the spending power) and express executive power does not arise.

gress and the President on matters of substance is deceptive, for there is much scope for disagreement as to what executive authority is conferred by the express grants in the Constitution[149] and what powers are implied.[150]

As yet, there has been little judicial formulation of standards for resolving legislative/executive conflict involving the "machinery of government." Indeed, in the most recent controversy of this kind, the court sought resolution by negotiation between the two branches, rather than by judicial fiat.[151] Conflicts over the "machinery of government" usually involve implied powers on both sides, in which case courts have to weigh the competing interests of the two branches[152] to the best of their ability.[153] It is submitted that, in weighing or balancing these interests, the judiciary must base its reasoning on two fundamental axioms of the American political system: first, preservation of the integrity and efficacy of all branches of government, including the executive, and secondly, the general primacy of Congress.[154] Recently, the Supreme Court, speaking through Justice Brennan,[155] enunciated the general criteria for resolving such conflicts:

> [I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.[156]

149. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 124-33 (1976).

150. *See* United States v. Nixon, 418 U.S. 683, 705-06, 708, 711 (1974); Van Alstyne, *supra* note 64, at 809-17.

151. *See* United States v. Am. Tel. & Tel. Co., 551 F.2d 384 (D.C. Cir. 1976), *continuation in* 567 F.2d 121 (D.C. Cir. 1977). For a favorable review, see Comment, *supra* note 120, at 489-94.

152. *See* Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977); United States v. Am. Tel. & Tel. Co., 551 F.2d 384, 391-94 (D.C. Cir. 1976), *continuation in* 567 F.2d 121, 131-33 (D.C. Cir. 1977); Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731-33 (D.C. Cir. 1974). *Cf.* United States v. Nixon, 418 U.S. 1083, 711-13 (1974). *But see contra*, Nixon v. Adm'r of Gen. Servs., 433 U.S. at 547, 558-59 (Rehnquist, J., dissenting).

153. As to the courts' difficulty in performing this task, see Comment, *supra* note 120, at 480-83; United States v. Am. Tel. & Tel. Co., 551 F.2d 384, 394 (D.C. Cir. 1976). *See also* United States v. Am. Tel. & Tel. Co., 567 F.2d 121 (D.C. Cir. 1977).

154. *See* note 148 *supra*.

155. Nixon v. Adm'r of Gen. Servs., 433 U.S. 425 (1977) (Brennan, J., for the majority, joined by Stewart, White, Marshall and Stevens, JJ.).

156. *Id.* at 443 (citations omitted). Justice Rehnquist, dissenting, rejected what he called the Court's "novel 'balancing test;' " for Justice Rehnquist it was a "fundamental proposition" that "any substantial intrusion upon the effective discharge of the duties of the Presi-

This reasoning would plainly seem to implicate both of the relevant interests, the general presumption being that in such instances congressional interests are paramount.

B. Principal Express Powers

1. The "Executive Power" Clause

The Constitution adopted a rather simple format for creating and defining the powers of the new federal polity, one clearly demonstrating the founding fathers' adherence to the notion of the separation of powers. Article I dealt with the legislative power, article II with the executive power and article III with the judicial power. The first clause of each article created the organ of government which was to exercise the power. Thus, article I created a Congress, article II a President and article III a Supreme Court.

The first clause of article II provides that "*[t]he Executive power* shall be vested in a President of the United States of America,"[157] whereas the equivalent section in article I states: "All legislative powers *herein granted* shall be vested in a Congress of the United States. . . ."[158] The absence of the phrase "herein granted," or its equivalent, in article II (and article III[159]) has been the cause of debate for many years. One side argues that the absence of the limiting words "herein granted" in article II is significant and cannot be overlooked in interpreting that article.[160] In addition to the specific powers conferred

dent is sufficient to violate the principle of separation of powers, and our prior cases do not permit the sustaining of an Act such as [the Presidential Recordings and Materials Preservation Act of 1974] by 'balancing' an intrusion of substantial magnitude against the interests allegedly fostered by the Act." *Id.* at 546, 547, 559. Chief Justice Burger, dissenting, adopted a criterion even less favorable to Congress: the Act was invalid for violating the separation of powers principle "because it exercises a coercive influence by another Branch over the Presidency." *Id.* at 514.

157. U.S. CONST. art. II, § 1, cl. 1 (emphasis added).

158. *Id.* art. I, § 1 (emphasis added).

159. *See id.* art. III, § 1. For the significance of the absence of such words in article III, see Kansas v. Colorado, 206 U.S. 46, 81-82 (1907).

160. *See* Myers v. United States, 272 U.S. 52, 128 (1926) (Taft, C.J.); note 12 and accompanying text *supra*. The classic exposition of this view—the so-called "inherent power" doctrine, *see* text accompanying notes 78 and 79 *supra*,—is Alexander Hamilton's in his first Pacificus letter: "It would not consist with the rules of sound construction to consider this enumeration of particular authority [in article II] as derogating from the more comprehensive grant contained in the general clause, further than as it may be coupled with express restrictions or qualifications; . . . the difficulty of a complete and perfect specification of all the cases of Executive authority would naturally dictate the use of general terms—and would render it improbable that a specification of certain particulars was designd [sic] as a substitute for those terms, when antecedently used. The different mode of expresssion employed in the constitution in regard to the two powers the legislative and the Executive

by sections 2 and 3 of article II, it is said, section 1 expressly confers on the President "the executive power."[161] This power, it is asserted, must at least enable him to do whatever is necessary to preserve the United States and its constitution.[162] But, once it is alleged that the concept "executive power" has some inherent content, there is no reason to limit it to presidential action taken when the nation is *in extremis*. A more sensible interpretation would be that the President may do anything not forbidden by the Constitution (presumably forbidden by being expressly confided to another branch of government or prohibited by the Constitution).[163] This was, in fact, the opinion of Presidents

serves to confirm this inference. . . . The enumeration ought rather therefore to be considered as intended by way of greater caution, to specify and regulate the principal articles implied in the definition of Executive Power; leaving the rest to flow from the general grant of that power; interpreted in conformity to other parts [of] the constitution and to the principles of free government." Hamilton, *supra* note 83, at 39, *quoted in* Myers v. United States, 272 U.S. at 138. *But see* THE FEDERALIST, No. 77, at 463 (Mentor Books 1961) (A. Hamilton). It should also be borne in mind, first, that, as Hamilton himself admitted, his opinion was based on grounds wider than necessary; he argued that the duty to "take care that the laws be faithfully executed" "might alone have been relied upon." *See* Hamilton, *supra* note 83, at 42-43. Secondly, the executive action (the Proclamation of Neutrality) concerned foreign relations, where the President's authority is concededly wider than in domestic affairs. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319, 320 (1936).

Although Madison, as Helvidius, replied to Hamilton's defense of Washington's Proclamation, he failed to address the issue whether the first clause of article II was itself a grant of power; on the constitutional question, he contented himself with "denying that the powers to make war and peace were executive in nature." C. ROSSITER, ALEXANDER HAMILTON AND THE CONSTITUTION 327 n.106 (1964). There are passages in Madison's reply which assume that the first clause of article II grants power (*see* Helvidius letter no. I, *supra* note 118, at 143, 146, 149, 153), and that there are powers "executive" in nature (*id*, at 146-47), a view he had taken four years earlier in the House of Representatives. *See* 1 ANNALS OF CONG. 463, 464, 496, 500 (Gales ed. 1789). But, as in the earlier debate (*see id.* at 463, 496-97, 500), and Chief Justice Taft's opinion in Myers (*see* note 143 *supra*), the emphasis was always on the President's express obligation to "take care that the laws be faithfully executed." *See* Helvidius letter no. I, *supra* note 118 at 145, 149, 152 ("To see the laws faithfully executed constitutes the essence of the executive authority."). Moreover, when he listed the executive powers conferred by the Constitution, Madison significantly omitted the first clause of article II (*see id.* at 148-50); he also began his second letter with a strong attack on "constructive prerogative" and, it seems, the "inherent power" thesis. *Id.* at 152.

161. *See* Hamilton *quoted in* note 160 *supra*; 1 ANNALS OF CONG. 382 (remarks of Rep. Clymer), 463, 496 (Rep. Madison) (Gales ed. 1789). *See also* C. THACH, *supra* note 119, at 151-65.

162. *See* note 84 *supra*; Assistant Attorney General Baldridge in argument before the District Court in the Steel Seizure case, *quoted in* J. SMITH & C. COTTER, *supra* note 12, at 174 n.10 (the argument was rejected: Youngstown Sheet & Tube Co. v. Sawyer, 103 F. Supp. 569, 573-74 (D.D.C.), *aff'd*, 343 U.S. 579 (1952)). *See also* Duncan v. Kahanamoku, 327 U.S. 304, 345-46 (1946) (Burton, J., dissenting); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 662 (1952).

163. *See* Hamilton, Pacificus letter no. I, *supra* note 83, at 39, 40. Myers v. United States, 272 U.S. 52 (1926) does not adopt an interpretation of art. II, § 1, cl. 1 as broad as that stated here. *See* note 143 *supra*.

Theodore Roosevelt[164] and Harry Truman.[165]

The opposing and more persuasive view denies the existence of "inherent" presidential power[166] and attributes no importance to the difference in wording between the two articles.[167] This position rests primarily on two arguments. First, an examination of the format of article II reveals that the first section deals with procedural matters such as the eligibility and method of election of the President, while the second and third sections list his powers and duties. An unbiased reading of article II as a whole suggests that the purpose of its first clause was merely to create the office of the President who was to exercise the powers conferred in subsequent sections. The historical evidence confirms this interpretation. As Professor Corwin has written: "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."[168] Comparison with articles I and III supports this view. The first section of article I merely defines the Congress it creates, and that of article III provides that there shall be "one Supreme Court." Neither specifies the powers conferred on the branch; that task is left to subsequent sections.[169]

There would have been little point in granting specific executive powers in sections 2 and 3 of article II if those and other powers had already been conferred by way of a grant of "executive power" in section 1.[170] Even if it were possible to construe the first clause as vesting all "executive power" in the President, a common-sense interpretation of article II[171] would suggest that it be read as a unit, with the first

164. *See* Roosevelt, *quoted in* text accompanying note 1 *supra*. *But see contra* notes 2 and 3 *supra*.

165. *See* note 4 *supra*.

166. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 632, 641 (1952) (Douglas, J., concurring); Myers v. United States, 272 U.S. 52, 177, 183, 205, 228-29, 246-47 (1926) (Holmes, McReynolds and Brandeis, JJ., dissenting); W. TAFT, *supra* note 2, at 144; R. BERGER, *supra* note 14, at 55-59; 1 ANNALS OF CONG. 513-14 (Gales ed. 1789) (remarks of Rep. White). *See also* Madison, Helvidius letter no. II, *supra* note 118, at 152.

167. *See* Myers v. United States, 272 U.S. 52, 230-31 (1926) (McReynolds, J., dissenting); 1 ANNALS OF CONG. 545 (Gales ed. 1789) (remarks of Rep. Smith).

168. Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 COLUM. L. REV. 53 (1953).

169. *See* U.S. CONST. art. I, §§ 8, 9; *id.* art. III, § 2.

170. *See* Myers v. United States, 272 U.S. 52, 228-29 (1926) (McReynolds, J., dissenting). *Cf.* Madison, speaking of legislative power, in THE FEDERALIST, No. 41, at 263 (Mentor Books 1961).

171. "That the general words of a grant are limited when followed by those of special import is an established canon. . . ." Myers v. United States, 272 U.S. 52, 229 (1926) (McReynolds, J., dissenting).

clause merely referring in a general way to the powers which are conferred specifically in later sections.[172]

Secondly, the phrase "the executive power" in clause 1 of article II is in itself meaningless. "The executive power" comprises those matters which the executive is empowered to undertake;[173] the abstract concept "executive power" has no fixed or certain content.[174] Few have

172. The danger involved in attributing too much significance to minor differences in wording between sections of the Constitution is illustrated by comparing the first sections of articles II and III with one another. The latter provides that "[t]he judicial power *of the United States* shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time . . . establish." U.S. CONST. art. III, § 1 (emphasis added). Surely the absence of the phrase "of the United States" in clause 1 of article II does not indicate that the President can exercise *all* executive power, both of the federal and the state governments. Yet attributing unrealistic importance to minor differences in wording could lead one to that absurd conclusion.

173. *See* Senator Henry Clay (1835), *quoted in* Myers v. United States, 272 U.S. 52, 180 (1926).

174. This point is demonstrated by the "limitations" on executive power seen by those who read the "vesting clause" as a grant of power. U.S. CONST. art. II, § 1, cl. 1. *See, e.g.*, C. THACH, *supra* note 119, at 165: "Executive power is under a definite restriction, even if the vesting clause be considered a grant, and one of a severe character. The national government is one of restricted powers. The President may do nothing that the national government may not do. But where, by the terms of the Constitution, the national government is vested with control over a certain sphere of action, that portion of the field is the President's which is *executive in character*" (emphasis added). *Cf.* Hamilton's vague limitation on the power conferred by the vesting clause: "Interpreted in conformity to other parts [of] the constitution and to the principles of free government," *quoted in* note 160 *supra*.

Thach's proposition is unsatisfactory because, first, if the vesting clause is a grant of power, as he argues, where are the supposed restrictions on the *national government* found? They are certainly not in article I, which deals only with Congress; nor in the Tenth Amendment, which reserves only "[t]he powers not delegated to the United States" and, hence, does not refer to power conferred by article II. Secondly, even if this aspect of Thach's argument were accepted, and the President might act on any subject-matter falling within congressional power, it simply begs the question to define the sphere of permissible presidential action as that which is "executive in character." As Daniel Webster asked, "executive" on what "model or example?" *See* text accompanying note 175 *infra*.

It is noteworthy that Thach refers to the field of foreign affairs to illustrate his proposition; that field is exceptional, the authority of the national government being derived extra-constitutionally. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315-16, 318 (1936).

Australia, again, provides an informative comparison; while the subject-matters on which the Commonwealth executive may act are, generally, those falling within Commonwealth legislative power, action within that sphere is limited to that authorized by Parliament or the Constitution itself *interpreted in the light of the royal prerogative*. AUSTL. CONST. § 61. *See* Victoria v. Commonwealth, 134 C.L.R. 338, 405-06 (1975); Johnson v. Kent, 132 C.L.R. 164, 169 (1975); Barton v. Commonwealth, 131 C.L.R. 477 (1974).

Professor Crosskey, an adherent of the "inherent power" thesis, seemed to recognize the need for some frame of reference for the definition of the "executive power" conferred by the vesting clause; he employed the royal prerogative. *See* W. CROSSKEY, *supra* note 83, at ch. XV. For a trenchant criticism of Crosskey's thesis, *see* Goebel, *Ex parte Clio*, 54 COLUM. L. REV. 450, 473-76 (1954). *See also* note 181 *infra*.

expressed this as eloquently as Daniel Webster in addressing the United States Senate on February 16, 1835:

> It is true, that the Constitution declares that the executive power shall be vested in the President; but the first question which then arises is, *What is executive power? What is the degree, and what are the limitations?* Executive power is not a thing so well known, and so accurately defined, as that the written constitution of a limited government can be supposed to have conferred it in the lump. What *is* executive power? What are its boundaries? What model or example had the framers of the Constitution in their minds, when they spoke of 'executive power?' Did they mean executive power as known in England, or as known in France, or as known in Russia? Did they take it as defined by Montesquieu, by Burlamaqui, or by De Lolme?[175]

The untenability of the "inherent power" thesis is emphasized by its implications for the inter-relationship of congressional and presidental powers. If, as has been submitted,[176] executive powers conferred *expressly* by the Constitution are immune from congressional control, the "inherent power" thesis, maintaining that the vesting clause is an *express* grant of power, would create a vast field in which the executive was independent of congressional supervision. But, quite obviously, that is not the legal position; there is no field of "inherent" executive power free from congressional control,[177] and even the proponents of "inherent power" have rarely claimed more than a presidential power to act in the absence of a contrary expression of will by Congress.[178] Hence, the most that the vesting clause could be said to confer is "executive power" subject to congressional control, for instance under the "necessary and proper" clause.[179] But, as discussed above,[180] in such an event this power cannot be more than an implied power. Once this fact is accepted, the whole thesis that the first clause

175. 4 D. WEBSTER, THE WORKS OF DANIEL WEBSTER 186 (1851) *quoted in* Myers v. United States, 272 U.S. 52, 229-30 (1926) (emphasis in original). Justice McReynolds regarded Webster's argument as "exhaustive" and "conclusive." *Id.* at 229. *See also* 1 ANNALS OF CONG. 545 (Gales ed. 1789) (remarks of Rep. Smith).

176. *See* text accompanying note 140 *supra*.

177. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

178. *See, e.g.*, the brief for the government in United States v. Midwest Oil Co., 236 U.S. 459 (1915), *quoted in* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 690 (1952) (Vinson, C.J., dissenting). *But see* Sofaer, *The Presidency, War, and Foreign Affairs: Practice Under the Framers*, 40 LAW & CONTEMP. PROB. 12, 37 (1976); 1 ANNALS OF CONG. 463, 464 (Gales ed. 1789) (remarks of Rep. Madison).

179. *See* Myers v. United States, 272 U.S. 52, 231 (1926). *See also* Roche, *Executive Power and Domestic Emergency: The Quest for Prerogative*, 5 W. POL. Q. 592, 610 (1952).

180. *See* text accompanying notes 140-43 *supra*.

of article II itself confers "[t]he executive power" collapses.[181]

Accordingly, executive claims to "inherent" powers cannot properly be based on the first clause of article II. Presidents who purport to derive powers from their position as "President"[182] or "Chief Executive"[183] or even "Head of State"[184] are in fact asserting the existence of executive powers derived from outside the Constitution.

2. The Oath of Office

The oath or affirmation which the President is required to make before entering office[185] is sometimes claimed as a source of broad executive power enabling him to take whatever action he considers necessary to "preserve, protect and defend the Constitution of the United States."[186] The earliest exponent of this view, as of other broad "constructions" of executive power, was President Lincoln, who rhetorically asked Congress in his Special Session Message of July 4, 1861: "would

181. It might be argued, in reply, that this is not an all-or-nothing situation, whereby the clause either confers some vast authority called "the executive power" or is not a power-conferring provision at all; in short, that the difficulty of defining "the executive power" is not a conclusive reason for giving it no content whatever. Proponents of this view might see the power conferred by the clause as comprising a "core" of expressly-conferred power and a "penumbra" of implied power flowing therefrom. *Cf.* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 159 (1978). It might be said, in reply to Webster, that there is no reason to seek some abstract definition of "executive power;" as Hamilton suggested (Pacificus letter no. I, *quoted in* note 174 *supra*), "the executive power" might be defined by reference to the Constitution as a whole, the history and context of its creation, subsequent governmental practice, and "the principles of free government." But even these criteria lend no support to the "inherent power" thesis; the records of the Federal Convention "make it clear" that the vesting clause was not intended as a grant of power, Corwin, *supra* note 168, at 53, and the constitutional framework and "principles of free government" indicate that Congress has a general primacy over the Executive—so the vesting clause contains no "core" of executive power immune from congressional control. *See* note 148 *supra*. As Justice Jackson wrote: "With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 655 (1952). Nor does governmental practice support the "inherent power" thesis; even the asserted executive power to take any action necessary to defend the nation—the strongest claimant to represent the "core" of authority allegedly conferred by the vesting clause—is subject to congressional control. *See* War Powers Resolution, 50 U.S.C. §§ 1541-48 (Supp. 1979); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 668 et. seq. (1952) (a decision rendered in wartime, concerning executive action taken during war and related to the war effort) (*see* Vinson, C.J., dissenting).

182. *E.g.*, President Franklin Roosevelt's Executive Order No. 9066, 3 C.F.R. 1092-93 (1942).

183. *See* Duncan v. Kahanamoku, 327 U.S. 304, 345 (1946) (Burton, J., dissenting); Note, *Honored in the Breech, supra* note 145, at 133.

184. Note, *Honored in the Breech, supra* note 145, at 134 n.34.

185. *See* U.S. CONST. art. II, § 1, cl. 7.

186. *Id.*

not the official oath be broken if the Government should be overthrown when it was believed that disregarding the single law would tend to preserve it?"[187] Lincoln ultimately found it unnecessary to rely upon his oath of office,[188] but others have seen it as a source from which broad executive powers may be implied. Justice Powell, for instance, relied upon the presidential oath of office in finding an executive power to indulge in electronic surveillance of persons allegedly plotting domestically to overthrow the government by unlawful means.[189]

It is submitted that the presidential oath of office is not a source of power.[190] The case for reading clause 7 of article II[191] as a grant of power is even weaker than that regarding clause 1[192] because the former, unlike the latter, does not refer to executive power at all. Unlike section 3 of article II, clause 7 does not even expressly impose a duty on the President, although such duty can obviously be inferred.

Even if one were to accept the proposition that clause 7 imposes on the President the vague duty to "preserve, protect, and defend the Constitution," it does not imply, as Justice Powell seemed to believe,[193] that the powers needed to fulfil that duty are conferred in the same clause. The Constitution must be viewed as a whole, and there is no reason to examine the presidential oath in isolation. It is reasonable to assume that the founding fathers saw the oath as obliging the President to use whatever powers were granted to him for the purposes expressed in the oath, but did not regard it as itself conferring any power on him.[194] It is submitted that clause 7 confers no power on the President, and the obligation imposed therein is to be discharged by executing the powers given him by the Constitution and by Congress. Once he has employed those powers, the President has acted "to the best of [his] ability" and,

187. *See* 6 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 69, at 25. Lincoln interpreted his oath of office as imposing upon him "the duty of preserving by every indispensable means, that government—that nation—of which that Constitution was the organic law." Letter to A.G. Hodges, Apr. 4, 1864, *supra* note 85, at 281.

188. "But it was not believed that this question was presented. It was not believed that any law was violated." 6 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 69, at 25.

189. *See* United States v. United States Dist. Ct., 407 U.S. 297, 310 (1972) (Powell, J.). The Fourth Amendment, however, requires the prior issue of a warrant. *Id.* at 320. *But cf.* Griffin v. Wilcox, 21 Ind. 370, 383 (1863).

190. *See* CONGRESSIONAL RESEARCH SERVICE, *supra* note 119, at 448; *In re* Kemp, 16 Wis. 359, 391-92 (1863).

191. U.S. CONST. art. II, § 1, cl. 7.

192. *Id.* art. II, § 1, cl. 1.

193. Note 189 *supra*.

194. The historical evidence supports this interpretation. *See* E. CORWIN, *supra* note 5, at 63.

therefore, fulfilled his constitutional duty.[195]

3. The Commander-in-Chief Clause

Yet another constitutional provision which has been employed as a foundation for expansive executive power is article II, section 2, which states: "[t]he 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."[196] Once again, the first important exponent of a broad interpretation of this clause was President Lincoln, who combined it with his duty to "take care that the laws be faithfully executed"[197] to create a so-called presidential "war-power."[198] Lincoln asserted that as commander-in-chief he had "a right to take any measure which may best subdue the enemy"[199] and put this claim into effect when he freed the slaves of the rebel states "as a fit and necessary war measure for suppressing [the] rebellion."[200] In issuing his Emancipation Proclamation of January 1, 1863, Lincoln expressly relied upon his power as commander-in-chief of the army and navy at a time of armed rebellion[201] and claimed that his action was "warranted by the Constitution upon military necessity."[202] Although Lincoln's conception of his powers as commander-in-chief was contrary to contemporary constitutional jurisprudence[203] and was strenuously criticized in a pamphlet by former Justice Curtis,[204] the patriotic fervor of the nation was such that his views received judicial endorsement[205]—at least until the war was over.[206] Claims of wide presidential powers derived from the commander-in-chief clause

195. *See In re* Kemp, 16 Wis. 359, 391-92 (1863). Although the United States undoubtedly has power to preserve, protect and defend the Constitution, "the fact that power exists in the Government does not vest it in the President." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 604 (1952) (Frankfurter, J. concurring). *Accord id.* at 629 (Douglas, J., concurring).

196. U.S. CONST. art. II, § 2, cl. 1.

197. *Id.* art. II, § 3.

198. *See* E. CORWIN, *supra* note 5, at 229.

199. Reply to Emancipation Memorial Presented by Chicago Christians of All Denominations, September 13, 1862, 5 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 85, at 421.

200. Proclamation of January 1, 1863, 6 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 69, at 158. *See also* E. CORWIN, *supra* note 5, at 405 n.72.

201. 6 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 69, at 158. *See also* President Lincoln's proclamation of September 22, 1862. *Id.* at 96.

202. *Id.*, at 159.

203. *See* Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850).

204. *See* Curtis, *Executive Power, supra* note 72, at 306-35.

205. *See Ex parte* Vallandigham, 28 F. Cas. 874, 922 (C.C.S.D. Ohio 1863) (No. 16, 816). *But see* Jones v. Seward, 40 Barb. 563, 572 (1863). *See also* Prize Cases, 67 U.S. (2 Black)

continue to be heard occasionally, especially in time of war.[207]

However, an examination of the clause in its constitutional context, taking into consideration the related and complementary powers of Congress, does not warrant executive claims to a broad power to do whatever is thought necessary for national defense. After all, it is Congress, not the President, which is to create and regulate the armed forces,[208] pay for them,[209] declare war[210] and enact laws "necessary and proper" to execute these powers.[211] The only power which the clause expressly vests in the President is that of acting as commander-in-chief of the armed forces—and even that power is conferred by way of assigning him an office, rather than by an express grant of power.[212] As Alexander Hamilton wrote, this power amounts "to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral" of the United States.[213] The clause gives

635, 668, 670 (1863)*but see id.* at 698-99 (Nelson, J., joined by Taney, C.J., Catron & Clifford, JJ., dissenting).

206. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866) (decided after the Civil War had ended).

207. *See* Ken-Rad Tube & Lamp Corp. v. Badeau, 55 F. Supp. 193, 197-98 (W.D. Ky. 1944). *See also* Dean Rusk, *quoted in* A. SCHLESINGER, *supra* note 4, at 169; Richard Nixon's reply to the Senate Select Committee on Intelligence, N.Y. Times, March 12, 1976, at 14, col. 2; R. Longaker, *supra* note 4 at 164-65 n.30; A. SCHLESINGER, Epilogue, *supra* note 133, at 450-52.

208. U.S. CONST. art. I, § 8, cls. 12-16.

209. *Id.* art. I, § 8, cl. 1; § 9, cl. 7.

210. *Id.* art. I, § 8, cl. 11.

211. *Id.* art. I, § 8, cl. 18.

212. Ascertaining just what power is conferred *expressly* by this clause, and what is implied therefrom, is especially difficult. These uncertainties have been responsible for some assertions of far-reaching executive power immune from congressional control. *See, e.g.*, Secretary of State Acheson, *quoted in* R. Longaker, *supra* note 4, at 135; R. Longaker, *id.* at 165 n.30. *See also* King & Leavens, *supra* note 140, at 60, 62, 79, 80, 88 n.152, 90. The ambit of the President's power as commander-in-chief must be determined by "[its] nature, and by the principles of our institutions." *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J.). Accordingly, recourse must be had to the usual sources of constitutional interpretation to amplify the rather cryptic words of this clause: the opinions of the Framers, governmental practice, judicial *dicta*, and "the principles of our institutions." On perusing the records of the Federal Convention, for instance, it is seen that it was intended that, as commander-in-chief, the President would have power "to repel sudden attacks" upon the United States. *See* 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 318-19 (rev. ed. 1937). *See also* Prize Cases, 67 U.S. (2 Black) 635, 668 (1863); *Congress, the President, and the War Powers, supra* note 140, at 216 (statement of Assistant Attorney General Rehnquist); King & Leavens, *supra* note 140, at 69-71, 85-86, 90 (a questionable analysis).

213. THE FEDERALIST No. 69, at 418 (Mentor Books 1961). *Accord*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 645-46 (1952); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 139 (1866); Curtis, *Executive Power, supra* note 72, at 321-23; Jones v. Seward, 40 Barb. 563, 572 (1863).

the President no authority over civilian affairs[214] and certainly does not authorize him "to do anything, anywhere that can be done with an army or navy."[215]

Although within these modest bounds the President is legally independent of congressional control,[216] it would be politically and, we believe, constitutionally improper for him to regard his military role as anything more than a protective device to ensure civilian control of the armed forces.[217] Presidents should find no inconsistency between the office of President and that of commander-in-chief of the armed forces;[218] but, if they do, the former must always prevail. The existence of a military force is, after all, merely a means for protecting the nation and its government, including the office of the President. However, it is a means only, not an end in itself.[219] A "first general and admiral"[220] cannot constitutionally have objectives or policies different from those of the nation's government.

214. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 632, 643-44 (1952); Curtis, *Executive Power, supra* note 72, at 328. *But cf.* Burton, J., *obiter* in the Youngstown case: "Nor is it claimed that the current seizure is in the nature of a military command addressed by the President, *as Commander-in-Chief, to a mobilized nation* waging, or imminently threatened with, total war." 343 U.S. at 659 (emphasis added). For examples of the sort of action Justice Burton presumably had in mind, *see* CONGRESSIONAL RESEARCH SERVICE, *supra* note 119, at 453-58; *but see* E. CORWIN, *supra* note 70, at 149, 158-59. *See also* General Haig's comment to Deputy Attorney General Ruckelshaus at the "Saturday night massacre," *quoted in* R. BERGER, *supra* note 14, at 349. (For a slightly different version of this comment, and a later comment by Haig, *see* B. WOODWARD & C. BERNSTEIN, THE FINAL DAYS 77, 211 (Coronet ed. 1977, orig. publ. 1976).

215. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 642 (1952) (Jackson, J., concurring).

216. *Id.* at 644; *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 139 (1866); Swaim v. United States, 28 Ct. Cl. 173, 221 (1893), *aff'd*, 165 U.S. 553 (1897); *Congress, the President, and the War Powers, supra* note 140, at 33, 36, 49 (statement of Professor Mallison), 47, 79 (Professor Bickel), 216 (Assistant Attorney General Rehnquist), 226, 228 (Mr. Stevenson). *Cf.* President Lincoln: "I conceive that I may in an emergency do things on military grounds which cannot be done constitutionally by Congress." 3 C. SANDBURG, ABRAHAM LINCOLN: THE WAR YEARS 132 (1939) (comment to Senator Zachariah Chandler, July 4, 1864), 4 J. RANDALL & R. CURRENT, LINCOLN THE PRESIDENT 194 (1955). For the content of this independent presidential sphere, *see* R. BERGER, *supra* note 14, at 108-16.

217. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 646 (1952). Other constitutional provisions are designed to keep the army in check. *See* U.S. CONST. art. I, § 8, cl. 12; amends. II and III.

218. *See* the remarks of President Johnson when signing the Tonkin Gulf Resolution in 1964, *quoted in* 1973 Hearings, pt. 1, *supra* note 65, at 50, and Senator Frank Church's comment thereon. *Id.* at 55.

219. *See* United States v. Robel, 389 U.S. 258, 264 (1967), *quoted in* Zweibon v. Mitchell, 516 F.2d 594, 604 n.5 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). *Cf. Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 126 (1866).

220. *See* Hamilton, *supra* note 213.

4. Execution of the Laws

The fourth peg upon which claims of "inherent" executive power have been hung is the President's constitutional duty to "take care that the laws be faithfully executed."[221] The liberal interpretation of the "take care" clause[222] would include within the word "laws" not only statutes, the Constitution,[223] and treaties,[224] but also "the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution."[225] Proponents of this view do not restrict the President to execution of the statutes in accordance with their terms.[226] They would allow the President wide authority to take any action necessary to ensure maintenance of the peace[227] and national interests.[228] Thus, the Supreme Court, relying on this interpretation of the clause, has held that, without statutory authority, the President may afford protection to a Supreme Court justice,[229] request the courts to enjoin action interfering with interstate commerce and the transportation of the mails[230] or himself use force to the same end.[231] Moreover, the President has been conceded great flexibility in choosing the manner in which to implement legislation. He has been allowed to employ virtually any means not forbidden by Congress,[232] even military force.[233] Typically, the greatest claim was made by President Lincoln,

221. U.S. CONST. art. II, § 3.

222. *Id.*

223. *See In re* Neagle, 135 U.S. 1, 64 (1890) (opinion of the Court), 83 (Lamar, J., dissenting).

224. *See id.*, at 64; Hamilton, Pacificus letter no. I, *supra* note 83, at 43; W. TAFT, *supra* note 2 at 85-88.

225. *In re* Neagle, 135 U.S. 1, 64 (1890). This *dictum* of Justice Miller, delivering the opinion of the Court, expressed in the form of a rhetorical question, was broader than was necessary for the decision of the case, and Miller stated his conclusion in more modest language. *See id.* at 67. Indeed, the President's power to appoint Supreme Court judges, U.S. CONST. art. II, § 2, cl. 2, may imply a power to protect them from assassination. *Accord* 10 Op. Att'y. Gen. 74, 82 (1861).

226. *See In re* Dugan, 6 D.C. 131, 145 (1865); opinions of Attorney General Cushing (1853-1854) *discussed in* E. CORWIN, *supra* note 5, at 149; notes 227-233 *infra*.

227. Justice Miller held that there is a "peace of the United States." *In re* Neagle, 135 U.S. 1, 69 (1890).

228. E. CORWIN, *supra* note 70, at 191.

229. *In re* Neagle, 135 U.S. 1, 67 (1890).

230. *In re* Debs, 158 U.S. 564, 599 (1895).

231. *Id.* at 582, 599 (*obiter dictum*).

232. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 701-02 (1952) (Vinson, C.J., dissenting). *See also* note 228 *supra*.

233. *See In re* Debs, 158 U.S. 564, 582, 599 (1895). *See also Ex parte* Siebold, 100 U.S. 371, 395 (1879); The Parkhill, 18 F. Cas. 1187, 1197 (D.C.E.D. Pa. 1861) (No. 10,755a); W. TAFT, *supra* note 2, at 97; Pye & Lowell, *supra* note 73, at 621. *But see* Campisi, *The Civil*

who maintained that he could disregard some laws if he believed it necessary for the preservation of the great bulk of them, including the Constitution.[234] As he put it, with characteristic eloquence, "often a limb must be amputated to save a life; but a life is never wisely given to save a limb."[235]

Although the "take care" clause is expressed in the form of a duty, not a power, the provision must, by implication, authorize the President to exercise the authority necessary to ensure "that the laws be faithfully executed." In the case of statutes, the duty imposed on the President by the clause is one that "does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power."[236] The clause leaves no room for the exercise of presidential power beyond congressional control; one does not execute a law by disobeying it.[237]

Disturbance Regulations: Threats Old and New, 50 IND. L.J. 757, 777 (1975); Engdahl, *The New Civil Disturbance Regulations: The Threat of Military Intervention*, 49 IND. L.J. 581, 607-17 (1974); Comment, *Executive Military Power: A Path to American Dictatorship*, 54 NEB. L. REV. 111 (1975); Note, *Honored in the Breech, supra* note 145, at 132-37. *See also* U.S. CONST. art. I, § 8, cl. 15.

234. *See* Lincoln, Special Session Message to Congress, *quoted in* note 69 *supra*. *But see* note 237 *infra*.

235. Letter to A.G. Hodges, April 4, 1864, *supra* note 85, at 281.

236. Myers v. United States, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting). *Accord id.* at 184, 292 (McReynolds and Brandeis, JJ., dissenting); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610, 633 (1952) (Frankfurter and Douglas, JJ., concurring).

The President's duty, under this clause, to "take care that the [Constitution] be faithfully executed," (*see* note 223 *supra*) extends no further, it is submitted, than to carrying out the obligations imposed upon him by the Constitution either expressly or by necessary implication. An example may be the actual decision in *In re* Neagle, 135 U.S. 1, 67 (1890). Some commentators, referred to above, have suggested that his duty—and, hence, his power—is wider, but the relevant Supreme Court *dicta* were not only *obiter*, but were also far wider than was necessary for determination of the cases. *See, e.g., In re* Debs, 158 U.S. 564, 582, 599 (1895); *In re* Neagle, 135 U.S. 1, 64 (1890); *Ex parte* Siebold, 100 U.S. 371, 395 (1879). Moreover, they run counter to later comments by leading Supreme Court judges: *see* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610, 633 (1952) (Frankfurter and Douglas, JJ., concurring); Myers v. United States, 272 U.S. 52, 292 (1926) (Brandeis, J., dissenting). *See also* N. SMALL, *supra* note 3, at 123.

In taking care that treaties are "faithfully executed," the President can rely on the "take care" clause, *see* note 224 *supra*, together with his "very delicate, plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations." *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936). This subject is beyond the scope of this paper.

237. The "take care" clause imposes on the President a duty to execute *all* laws; the word "faithfully" itself suggests this. *See* Myers v. United States, 272 U.S. 52, 187 (1926); Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 613 (1838); President Jackson's Nullification Proclamation, *quoted in* L. HENKIN, *supra* note 14, at 356 n.59. In our opinion, where the President believes that a statute unconstitutionally invades executive powers which are immune from congressional control, he must comply with it until it is declared invalid by the courts, although he is entitled "to take appropriate steps to have the law tested." Assis-

III. Extra-Constitutional Executive Power

It has been seen that, upon proper construction, none of the four constitutional provisions suggested as a basis for a broad executive power to do whatever is thought necessary for the preservation of the nation and its constitution will support that claim. Hence, if the notion of "inherent" executive powers is to have any legal validity, it must rely on some extra-constitutional source of power. Yet, none of the proponents of "inherent" executive power has explained how a doctrine of extra-constitutional power might be legally justified. We propose to consider two arguments upon which an advocate of extra-constitutional executive power might rely, and to examine whether they have any legal validity. Our discussion is confined to the claim that the exercise of extra-constitutional powers is lawful. Those who admit its unlawfulness, yet advocate it nonetheless, are arguing in the realm of practical politics, not law, and such matters lie beyond the scope of this paper.

The first argument in support of extra-constitutional executive powers is that the exercise of powers which the Constitution does not confer would not be unlawful if, for some reason, the Constitution were "suspended." No doubt an argument could be constructed along these lines, employing the few judicial dicta to the effect that the Constitution,[238] or its guaranty of civil liberties,[239] may be suspended in time of war or insurrection. But these dicta do not represent the prevailing doctrine of the Supreme Court, which recognizes that, although the Constitution (including its amendments) must be interpreted in the light of changing circumstances,[240] it is never "suspended."[241] The

tant Attorney General Rehnquist, *quoted in* R. BERGER, *supra* note 14, at 309. *See generally id.* at 306-09; E. CORWIN, *supra* note 5, at 65-66; E. CORWIN, *supra* note 70, at 156.

238. *See* State v. Brown, 71 W. Va. 519, 521, 522, 554-55, 77 S.E. 243, 244, 245, 258 (1912). This case dealt with the West Virginia Constitution.

239. *See* Duncan v. Kahanamoku, 327 U.S. 304, 330 (1946) (Murphy, J., concurring); Constantin v. Smith, 57 F.2d 227, 240 (E.D. Tex.), *aff'd sub nom.* Sterling v. Constantin, 287 U.S. 378 (1932); State *ex rel.* Cleveringa v. Klein, 63 N.D. 514, 249 N.W. 118, 124 (1933). *Cf.* Yakus v. United States, 321 U.S. 414, 485, 487-88 (1944). Some of the many cases dealing with "martial rule" (or "martial law")—most of them in state courts, and frequently displaying considerable confusion on the subject—also lend support to the notion that in time of war or insurrection the Constitution, or part of it, may be suspended. *See generally* Pye & Lowell, *supra* note 73, at 605-07 n.66, 624-26 n.122, where some of the authorities are referred to; Comment, *Martial Law*, 42 S. CAL. L. REV. 546 (1969).

240. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 442-43 (1934).

241. *See* United States v. Robel, 389 U.S. 258, 264 (1967); Duncan v. Kahanamoku, 327 U.S. 304, 342 (1946) (Murphy, J., concurring); Yakus v. United States, 321 U.S. 414, 460 (1944); Hirabayashi v. United States, 320 U.S. 81, 110 (1943); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 120-21 (1866); Zweibon v. Mitchell, 516 F.2d 594, 627 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); Beaver County Bldg. & Loan Ass'n v. Winowich, 323 Pa. 483,

existence of war or other crises is a relevant factor in construing the constitutional text,[242] but "[t]he Constitution is for all seasons."[243] It was framed by men who had experienced war. They wrote a document which recognized that the nation would be faced with problems of war,[244] invasion,[245] insurrection,[246] rebellion[247] and domestic violence,[248] and they gave Congress and the President power to deal with them. The suggestion that, if and when these vicissitudes arise, the Constitution should be suspended, because it was not intended to operate in times of crisis, is not only factually incorrect,[249] but also subversive of the system of constitutional democracy practiced in the United States.[250]

The second argument is that "the People of the United States,"[251] from whom the Constitution derives its authority,[252] have transferred powers to the President in addition to those given him in article II of the Constitution.[253] Consideration of this thesis must begin with an

511, 187 A. 481, 493 (1936); Johnson v. Jones, 44 Ill. 142, 155, 165 (1867); Corbin v. Marsh, 63 Ky. (2 Duv.) 193, 194 (1865); Jones v. Seward, 40 Barb. 563, 566, 573 (1863); Johnson v. Duncan, 3 Martin (O.S.) 530, 549 (La. 1815). *But see* E. CORWIN, *supra* note 5, at 252, and ESSAYS, *supra* note 75, at 167.

242. *See* Korematsu v. United States, 323 U.S. 214, 220 (1944); Yasui v. United States, 320 U.S. 115 (1943); Hirabayashi v. United States, 320 U.S. 81, esp. at 111-112 (1943) (Murphy, concurring); Moyer v. Peabody, 212 U.S. 78, 84 (1909); United States v. Ford, 265 F. 424, 425 (S.D. Ohio 1920), *aff'd*, 281 F. 298 (6th Cir. 1922), *rev'd on other grounds*, 264 U.S. 239 (1924). *See also* Letter from James Madison to Thomas Jefferson, October 17, 1788, in 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 614 (1971).

243. Ramsey Clark in 1973 Hearings, *supra* note 65 at pt. 2, 509.

244. *See* U.S. CONST. art. I, § 8, cl. 11; § 10, cl. 3; art. III, § 3, cl. 1; amends. III and V.

245. *See id.* art. I, § 8, cl. 15; § 9, cl. 2; art. IV, § 4.

246. *See id.* art I, § 8, cl. 15.

247. *See id.* art. I, § 9, cl. 2.

248. *See id.* art. IV, § 4.

249. *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 425 (1934).

250. *See* remarks of Congressman James M. Beck, January 10, 1934, *quoted in* Clark, *Emergencies and the Law*, 49 POL. SC. Q. 268, 279 n.46 (1934).

251. *See* U.S. CONST. preamble. On the origin of this wording in the preamble, *see* M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 190-91 (1913).

252. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 403, 404-05 (1819); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 324 (1816); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 470-71 (1793); THE FEDERALIST, No. 49, *supra* note 213 at 313-14 (J. Madison); 2 M. FARRAND, *supra* note 212, at 476 (remarks of James Madison). *See also* G. WOOD, *supra* note 46, at 532-36, 539-42, 596-600.

253. *See* President Roosevelt's address to Congress regarding the Emergency Price Control Act, September 7, 1942, *quoted in* E. CORWIN, *supra* note 5, at 250-51, and Professor Corwin's comment thereon, *id.* at 252. The political essence of this idea was brilliantly explained by Professor Arthur Schlesinger in his exposition of Richard Nixon's revolutionary concept of the "plebiscitary presidency." *See* A. SCHLESINGER, *supra* note 4, at 254-66. Professor Schlesinger wrote: "The mandate, it was alleged, justified the President in doing anything that he believed the interests of the nation required him to do . . . . The mandate

examination of the constitutional text. The Constitution declares that it "shall be *the* supreme law of the land,"[254] together with the statutes and treaties made in accordance with it. This declaration implies that the validity of any claim to exercise governmental authority must be tested by its compatibility with the provisions of the three components of "the supreme law of the land."[255] This understanding is strengthened by the Tenth Amendment to the Constitution, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The people, accordingly, retain powers which have not been "delegated to" the United States, but which the states nevertheless lack. Potential executive powers of the United States, executive powers beyond those conferred on the President by the Constitution, clearly fall within this category;[256] hence, they were retained by the people. If the President is to claim successfully that these powers now belong to him, he must explain when and by what means the people have transferred them to him—either expressly or by implication.[257]

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became the source of wider power than any President had ever claimed before. Whether a conscious or unconscious revolutionary, Nixon was carrying the imperial Presidency toward its ultimate form in the plebiscitary Presidency—with the President accountable only once every four years, shielded in the years between elections from congressional and public harassment, empowered by his mandate to make war or to make peace, to spend or to impound, to give out information or to hold it back, superseding congressional legislation by executive order, all in the name of a majority whose choice must prevail till it made another choice four years later. . . ." *Id.* at 255. The legal implication of this doctrine is nicely captured in Michels' comment that, with Napoleon III, "[t]he plebiscite was a purifying bath which gave legitimate sanction to every illegality." R. MICHELS, POLITICAL PARTIES 231 (E. & C. Paul transl. 1915), *quoted in* A. SCHLESINGER, *supra* note 4, at 264. *See also* M. WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 387-88 (A. Henderson & T. Parsons transl., T. Parsons ed., Free Press, 1964); Introd. by T. Parsons, *id.* at 74.

254. U.S. CONST. art. VI, § 2 (emphasis added).

255. *See* Afroyim v. Rusk, 387 U.S. 253, 257 (1967); Reid v. Covert, 354 U.S. 1, 5-6 (1957); *Ex parte* Quirin 317 U.S. 1, 25 (1942). But this proposition may not apply fully to foreign relations, power over which was, supposedly, transferred to the national government prior to adoption of the Constitution. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315-16, 317, 318 (1936). *See also* note 23 *supra*. However, even in that field, the government must not contravene the provisions of the Constitution (*see* Curtiss-Wright, 299 U.S. at 320), and some judges have preferred to rest the foreign affairs power on an implied constitutional grant. *See* Afroyim v. Rusk, 387 U.S. 253, 257 (1967) (Black, J.). In *Reid v. Covert*, Justice Black held that "[t]he United States is *entirely* a creature of the Constitution. Its power and authority have *no other* source." 354 U.S. 1, 5-6 (1957) (emphasis added).

256. The states lack these powers because they (obviously) did not possess them prior to the establishment of the United States, and have not subsequently been granted them. *Cf.* Uther v. Federal Commissioner of Taxation, 74 C.L.R. 508, 530-31 (1947); Commonwealth v. Cigamatic Pty. Ltd., 108 C.L.R. 372, 378, 389, 390 (1962).

257. *Cf.* note 255 *supra* (President's power in the area of international relations).

The Constitution, in its amendment provision,[258] provides a method by which the people may add to, or subtract from, the powers of the President, but they have not availed themselves of this power. Whether or not the people may transfer powers to the President—or anyone else—by a procedure other than that specified in article V,[259] and whether or not such a process would result in a constitutional "amendment," are questions which, although interesting, need not detain us. There is no evidence whatsoever that the people have expressly granted any powers to anyone by any means other than the Constitution, as amended.

If the President cannot establish that the people have expressly conferred these powers on him, he may yet rely on an implied grant. Three arguments could conceivably be made to this effect. First, it may be contended that implied in the nature of the presidency are the prerogatives of the British Crown, which include some of the alleged broad executive powers.[260] It would be argued that this implication represents an implied constitutional grant of power and, hence, is consistent with the Tenth Amendment.[261] The short answer to this contention is that the historical evidence overwhelmingly indicates that, if the founding fathers were certain of anything, it was that the President should not inherit the prerogatives of the British monarchy.[262]

A related argument is that the President has wide powers, not

258. U.S. CONST. art. V.

259. Although art. V does not expressly stipulate that the procedures specified therein are the only method by which the Constitution may be amended, the maxim *expressio unius est exclusio alterius* may apply, with the result that the article would be interpreted to provide so by implication. *See* L. ORFIELD, THE AMENDING OF THE FEDERAL CONSTITUTION 38-39 (1942). *Cf.* Hawke v. Smith, 253 U.S. 221, 227 (1920); *see* J. JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS 623-24 (4th ed. 1887). *But see* E. CORWIN, *supra* note 70, at 271; James Madison, Helvidius letter no. III (1793), 6 THE WRITINGS OF JAMES MADISON, *supra* note 118, at 164: "If there be a principle that ought not to be questioned within the United States, it is, that every nation has a right to abolish an old government and establish a new one. This principle is not only recorded in every public archive, written in every American heart, and sealed with the blood of a host of American martyrs; but it is the only lawful tenure by which the United States hold their existence as a nation."

260. *See* Burmah Oil Co. Ltd. v. Lord Advocate, [1965] A.C. 75 (H.L. 1964). The powers of the Crown are, of course, subject to statute, whereas advocates of "inherent" presidential powers may claim that the latter are immune from congressional control.

261. *See* M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406 (1819). But it is seriously open to question whether such executive power would be one "delegated to the United States *by the Constitution*."

262. *See* Thomas Jefferson's Draft of a Constitution for Virginia (1783), 6 THE PAPERS OF THOMAS JEFFERSON 298-99 (J. Boyd ed. 1952): "By Executive powers we mean no reference to those powers exercised under our former government by the Crown as of its prerogative. . . ." *See also* R. BERGER, *supra* note 14, at 56; E. CORWIN, *supra* note 5, at 6.

through succession to the royal prerogative, but by virtue of the common law (or even "natural law") "principle of necessity." By this principle, action normally unlawful becomes lawful if it is necessary for the preservation of society.[263] A plethora of judicial dicta could be mustered in support of a claim that, by drawing an analogy with the individual's right of self-defense, American constitutional jurisprudence has recognized a "principle of necessity,"[264] sometimes expressed in the form of the maxims "necessity knows no law" and "*salus populi, suprema lex*."[265] To take merely one such dictum, Justice Holmes, speaking for a unanimous Supreme Court, proclaimed that "[w]hen it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process."[266]

The argument based upon the concept of "necessity" is that, because the United States was born into a common law environment, to the extent that the Constitution does not provide otherwise, its people have impliedly granted the President powers which would inhere in the executive by virtue of common law doctrines (other than the royal prerogative, of course). Clearly, the President could not rely on such implied powers in the face of contrary legislation, for the Constitution expressly requires him to ensure that the laws be executed.[267] More-

263. *See* J. LOCKE, *supra* note 40; text accompanying note 101 *supra*. *See also* Burmah Oil Co. Ltd. v. Lord Advocate, [1965] A.C. 75, 100, 106, 118, 156 (H.L. 1964); B. NWABUEZE, CONSTITUTIONALISM IN THE EMERGENT STATES 180-214 (1973); B. NWABUEZE, JUDICIALISM IN COMMONWEALTH AFRICA ch. VII, esp. at 175 (1977). *Cf.* Madzimbamuto v. Lardner-Burke, [1969] 1 A.C. 645, 732-33, 740 (P.C. 1968) (Lord Pearce, dissenting). For an exhaustive discussion of this doctrine, *see* F.M. BROOKFIELD, SOME ASPECTS OF THE NECESSITY PRINCIPLE IN CONSTITUTIONAL LAW (D. Phil. thesis, Balliol College, Oxford, 1972).

264. *See* United States v. Pacific R.R., 120 U.S. 227, 234 (1887); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 127 (1866); Mitchell v. Harmony, 54 U.S. (13 How.) 115, 134-35, 139-40 (1851); Constantin v. Smith, 57 F.2d 227, 240 (E.D. Tex.), *aff'd sub nom.* Sterling v. Constantin, 287 U.S. 378 (1932); *Ex parte* Vallandigham, 28 F. Cas. 874, 921 (C.C.S.D. Ohio 1863) (No. 16, 816); *In re* Boyle, 6 Idaho 609, 612, 57 P. 706, 707 (1899), *appeal dismissed sub nom.* Boyle v. Sinclair, 178 U.S. 611 (1900); Griffin v. Wilcox, 21 Ind. 370, 377-78 (1863); Commonwealth v. Blodgett, 53 Mass. (12 Met.) 56, 84, 88-89 (1846). *See also* Letter from Thomas Jefferson to J.B. Colvin, *supra* note 69, at 542.

265. *See* note 71 *supra*.

266. Moyer v. Peabody, 212 U.S. 78, 85 (1909). Subsequent Supreme Court decisions have narrowed this *dictum*, holding that the question whether the action taken was reasonably necessary in the circumstances is subject to judicial review. *See* Duncan v. Kahanamoku, 327 U.S. 304, 336 (1946); Korematsu v. United States, 323 U.S. 214, 234 (1944); Sterling v. Constantin, 287 U.S. 378, 401 (1932). *See also* United States v. Chalk, 441 F.2d 1277, 1281 (4th Cir.), *cert. denied*, 404 U.S. 943 (1971); Middendorf v. Henry, 425 U.S. 25, 67 (1976).

267. U.S. CONST. art. II, § 3.

over, the President cannot employ the "principle of necessity" even when Congress is silent; even if the principle were part of the law of the United States, why should the "necessary" powers inhere in the President, rather than Congress?[268] Bearing in mind the presence in the Constitution of a clause conferring on Congress power to enact laws "*necessary* and proper for carrying into execution" the powers of the United States,[269] it is reasonable to suppose that Congress is the beneficiary of any common law "principle of necessity." The submission based on necessity is simply far too tenuous to support an aggrandizement of presidential power,[270] especially as it would result in the President exercising the royal prerogative by a "back-door" method.

A third argument for recognition of an implied grant of executive power is that the Constitution has been amended in effect by governmental practice.[271] Proponents of this view may seek to rely on a dictum of Justice Frankfurter in the Steel Seizure case:

> It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of Congress and never before questioned, . . . making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II.[272]

Properly understood,[273] this dictum is merely a reminder that the Constitution was "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."[274] It should be interpreted in the light of modern conditions, without slavish adherence to the intentions of the founding fathers.[275] However, powers do not vest in a governmental branch merely because they have been claimed by it.[276] Nor can it be said that presidential claims to "inher-

268. "[T]he fact that power exists in the Government does not vest it in the President." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 604 (1952) (Frankfurter, J., concurring).

269. U.S. CONST. art. I, § 8, cl. 18 (emphasis added).

270. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 649-50 (1952) (Jackson, J., concurring). *See also* Wilmerding, *supra* note 74 at 333-38.

271. *See, e.g.*, Bowman, *Presidential Emergency Powers Related to International Economic Transactions: Congressional Recognition of Customary Authority*, 11 VAND. J. TRANSNAT'L L. 515, 522, 528-34 (1978).

272. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring).

273. *See* R. BERGER, *supra* note 14, at 98.

274. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819).

275. *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 442-43 (1934).

276. *See* The Floyd Acceptances, 74 U.S. (7 Wall.) 666, 677 (1868). Similarly, Lord

ent" powers have "never before [been] questioned;"[277] it has been seen that every broad interpretation of provisions in article II of the Constitution has been matched by a narrower one. A long period of congressional silence, in regard to a particular executive practice of which it has knowledge, leads, at most, to the inference that Congress has acquiesced in that specific exercise of power.[278] But this acquiescence results only in an implied (and revocable) delegation of power by Congress, not in an implied constitutional amendment. Hence, this argument, like the others based upon express or implied extra-constitutional grants of executive power, must be rejected.

The danger presented to constitutional democracy by theories built on an imaginary popular grant is obvious, especially when it is recalled that such theories formed the basis of the absolute power of the political structure in Hobbes' *Leviathan*[279] and of the later Roman emperors. Justinian's Digest, referring to such a fictitious[280] grant of power, shows where such theories lead: "What the Emperor has determined has the force of a statute; seeing that by a *lex regia* which was passed on the subject of his sovereignty, the people transfer to him and confer upon him the whole of their sovereignty and power."[281]

Conclusion

It has been argued that outside the area of foreign relations, the President has no powers beyond those expressly or impliedly granted him by the Constitution, and that the Constitution does not confer any "inherent" executive power. It is appropriate to conclude this discussion of the nature of extra-constitutional powers with some observations on the danger they present to American constitutional democracy.

Denman, C.J., once observed that "[t]he practice of a ruling power in the State is but a feeble proof of its legality." Stockdale v. Hansard, 9 Ad. & E. 1, 155, 112 Eng. Rep. 1112, 1171 (Q.B. 1839), *quoted in* R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 375 (1977).

277. *See* text accompanying note 271 *supra*.

278. *See* United States v. Midwest Oil Co., 236 U.S. 459, 475, 481 (1915).

279. T. HOBBES, LEVIATHAN 227 (C. Macpherson ed. 1968).

280. *See* ULLMANN, POLITICAL THOUGHT, *supra* note 96, at 215.

281. 1 THE DIGEST OF JUSTINIAN 23 (I.4.1) (C. Monro transl. 1904). *Accord* THE INSTITUTES OF JUSTIANIAN 5 (I.2.6) (J. Thomas transl. 1975). For a discussion of Bracton's use of these passages, *see* ULLMANN, GOVERNMENT *supra* note 96, at 176-77; D. HANSON, *supra* note 101, at 102-13. Some medieval writers employed these passages to restrict royal absolutism and develop theories of popular sovereignty. *See* ULLMANN, GOVERNMENT *supra* note 96, at 223, 297; W. ULLMANN, LAW AND POLITICS IN THE MIDDLE AGES 249-50 (1975); 2 Q. SKINNER, THE FOUNDATIONS OF MODERN POLITICAL THOUGHT 130-34 (1978). *See also id.* at 331-32, 341-43.

It has been observed that there are two approaches to the exercise of executive powers beyond those conferred by the Constitution. At first, the action taken by the President is admitted to be unconstitutional and unlawful, but is said to be practically necessary, and hence politically—though not legally—justified. The alternative thesis is that the exercise of such powers is lawful, although non-constitutional, because these powers are derived from a source (or sources) outside the Constitution. The latter is the much more dangerous of the two.

When the first approach is adopted the legal continuity of the nation's constitutional system is not challenged directly, for the admission that the exercise of power is unlawful is also a recognition of the continued authority of the Constitution. Action taken in such circumstances, especially if only temporary, may not seriously weaken governmental or public respect for the Constitution, beyond creating a degree of disenchantment due to its apparent failure to cope with the crisis. The Constitution and the institutions established by it will remain legally intact despite the immediate lack of legislative or judicial control over the actions of the President. But the fact that executive officers realize that they will be held liable in the courts (and, perhaps, in Congress also) for their unlawful actions, and will rely on Congress for indemnification, affords a restraining influence on them during the crisis.[282] Moreover, the acknowledgement that the executive is acting unlawfully underlines the extraordinary nature of the action taken, so that the occasion should not be a precedent for like conduct except in similarly exceptional circumstances.[283]

One difficulty with such executive action is that any notion of legally binding "precise guidelines"[284] governing the occasions when the executive may act unlawfully would be inherently contradictory. At most, such guidelines exert political or moral influence on the executive, especially if the courts or Congress employ them at a later date in fixing responsibility and damages. For this reason some commentators prefer to invest the executive with legal powers adequate to meet any

282. *See* Luther v. Borden, 48 U.S. (7 How.) 1, 69 (1849); Wilmerding, *supra* note 74, at 329, where a useful distinction is made between abuse of power and usurpation of power.

283. *See* Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting); Schlesinger, *The Imperial Presidency*, in POWER AND THE PRESIDENCY 269, 275-77 (P. Dolce & G. Skau eds. 1976); L. FISHER, THE CONSTITUTION BETWEEN FRIENDS 49 (1978); *But see* THE FEDERALIST, No. 25, *supra* note 213, at 167 (A. Hamilton); President Washington's Farewell Address, September 17, 1796, 1 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 69, at 220.

284. *See also* Hurtgen, *supra* note 65, at 83.

crisis.[285] This reasoning would grant the executive power to take whatever action is considered necessary in the circumstances. But the wisdom of this thesis as a question of political science need not concern us, for we have seen that the United States Constitution does not grant the President such broad authority.[286]

Presidential claims to exercise *lawfully* powers beyond those conferred by the Constitution, strike at the very foundations of American constitutional democracy.[287] They challenge the continued existence of every constitutional provision and doctrine—the separation of powers, democratic government, federalism,[288] judicial review and the constitutional protection of civil liberties.[289] It is not an exaggeration to describe such claims as "revolutionary,"[290] for, if successful, they would

285. *See* N. MACHIAVELLI, *supra* note 109, at 194, 195. *See* THE FEDERALIST, No. 25, *supra* note 213, at 167 (A. Hamilton). *Cf.* Korematsu v. United States, 323 U.S. 214, 225 (1944) (Frankfurter, J., concurring); Fairman, *Government Under Law in Time of Crisis*, in GOVERNMENT UNDER LAW 117, 120-21 (A. Sutherland ed. 1956); and Friedrich & Sutherland, *Defense of the Constitutional Order*, in STUDIES IN FEDERALISM 693 (R. Bowie & C. Friedrich eds. 1954).

286. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 649-50 (1952) (Jackson, J., concurring).

287. *See* A. SCHLESINGER, Epilogue, *supra* note 133, at 450-52.

288. *See also* L. HENKIN, *supra* note 14, at 23.

289. *Cf.* Curtis, *supra* note 72 at 320. In United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) Sutherland J. held that the United States government's extra-constitutional foreign affairs power, "like every governmental power, . . . must be exercised in subordination to the . . . Constitution," but gave no reason for this view. *Accord* Zweibon v. Mitchell, 516 F.2d 594, 619-620, 626-627, 627 n. 85, 699, 702 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); United States v. Butenko, 494 F.2d 593, 603, 611, 631 (3d Cir.), *cert. denied sub nom.* Ivanov v. United States, 419 U.S. 881 (1974). *See also* Reid v. Covert, 354 U.S. 1, 6 (1957). *But see* Dr. Levitan's narrow interpretation of Justice Sutherland's *dictum:* Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467, 490 (1946). On the ground that they envisaged extra-constitutional powers in the field of foreign relations, it may be argued that the Bill of Rights applies to those powers because "the framers of the Bill of Rights might well have sought to protect the people even against excesses in the exercise of sovereign, extra-constitutional powers.": L. HENKIN, *supra* note 14, at 253. But the framers of the Bill of Rights did not contemplate extra-constitutional domestic powers, and since Sutherland J. denied their existence, *supra* 299 U.S. at 315-16, he cannot have intended his *dictum* to apply to them.

The Ninth Amendment to the Constitution has been regarded as a recognition that the rights guaranteed by the Bill of Rights predate it and do not owe their existence to it (*see* Kauper, *The Higher Law and the Rights of Man in a Revolutionary Society*, 18 LAW QUADRANGLE NOTES (Univ. of Michigan), No. 2, p.8, at 11, 13-14 (1974), P. KAUPER, THE HIGHER LAW AND THE RIGHTS OF MAN IN A REVOLUTIONARY SOCIETY 8, 16-17 (1974); Griswold v. Connecticut, 381 U.S. 479, 488-493 (1965); *but see id.* at 520), so an argument that even extra-constitutional powers are subject to the Bill of Rights might derive some support from that amendment. Yet, it may be asked, why should the Ninth Amendment operate in the realm of extra-constitutional authority when other constitutional provisions are ignored?

290. *See* A. SCHLESINGER, *supra* note 4, at 266.

effectively change the *grundnorm* of the American constitutional system from the supremacy of the United States Constitution to the supremacy of the President.

It might be argued that matters would never reach that extreme stage, because there is no reason to adopt an all-or-nothing approach to the exercise of extra-constitutional power. Theoretically, that may be true; but the difficulty, indeed illogicality, of defining limitations to the exercise of such power must be recognized. Once the President has lawfully entered the realm of extra-constitutional power there is no logical legal limit to his authority.[291] Only the Constitution (and statutes enacted pursuant to it) can fix the legal boundaries of the exercise of executive power. Once the Constitution is removed as the frame of reference for the lawful exercise of authority, the only substitute is the balance of political—and, ultimately, military—power in the nation. No one can suppose that such powers are compatible with American constitutional democracy as we know it.[292]

Nor should it be imagined that political and party influence would prevent the President becoming a despot. Abraham Lincoln may have "successfully demonstrated"—to a grateful posterity, if not to his contemporaries—"that, under indisputable crisis, temporary despotism was compatible with abiding democracy."[293] But not every leader shares Lincoln's integrity and idealism. Governments have been known to foment disorder deliberately in order to find an excuse for the employment of arbitrary powers in suppressing it.[294] Clearly, the credence ultimately attached to political controls on the President will vary with one's conception of the lessons taught by Watergate.[295] As

291. *See also* Thomas Jefferson, *Opinion on the Constitutionality of the Bill for Establishing a National Bank* (1791), 19 THE PAPERS OF THOMAS JEFFERSON 276 (J. Boyd ed. 1974): "To take a single step beyond the boundaries . . . specially drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition;" 1 ANNALS OF CONG. 514 (Gales ed. 1789) (remarks of Rep. White).

292. *See* Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467, 493, 494, 497 (1946). *Cf.* the concern at the width of the powers presently delegated by Congress to the President voiced by the Senate Special Committee on the Termination of the National Emergency and by witnesses appearing before it. *See* EMERGENCY POWERS STATUTES, *supra* note 113, 1973 Hearings, *supra* note 65. *See also* National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976); International Emergency Economic Powers Act, Pub. L. No. 95-223, 91 Stat. 1626, (1977).

293. *See* A. SCHLESINGER, *supra* note 4, at 65. In Lincoln's pithy metaphor, he could not believe "that a man could contract so strong an appetite for emetics during a temporary illness as to persist in feeding upon them during the remainder of his healthful life." E. CORWIN, ESSAYS, *supra* note 75, at 23-24.

294. *See* 4 L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW 243 (1968).

295. For optimistic views of such controls, *see* Hurtgen, *supra* note 65 at 75-76; Roche, *supra* note 179, at 611. We are less sanguine, and would argue, with Justice Jackson, that

Justice Davis observed, with greater prescience than was realized at the time, "[w]icked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln."[296]

"emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 652 (1952). *See also* Friedrich & Sutherland, *supra* note 285, at 693; National Emergencies Act, Pub. L. No. 94-412, § 202, 90 Stat. 1255 (1976); International Emergency Economic Powers Act, Pub. L. No. 95-223, §§ 204, 207, 91 Stat. 1626, 1627-29 (1977).

296. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 125 (1866).