

THE STEEL SEIZURE CASE AND INHERENT PRESIDENTIAL POWER

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The historic American debate on the nature and scope of executive authority, punctuated and dramatized by the renowned eighteenth-century exchange between James Madison and Alexander Hamilton,² and spiked in our time by sweeping assertions of unilateral presidential power in foreign affairs and warmaking,³ and by claims of privilege, secrecy and immunity in

1. Professor of Political Science, Idaho State University. This article is drawn from a forthcoming book, *The Steel Seizure Case and Presidential Power* (U. Press of Kansas, 2003).

2. The debate on the nature and scope of executive power has been canvassed by a vast and growing body of literature that defies illustration in a footnote, but see, for example, Thomas E. Cronin and Michael A. Genovese, *The Paradoxes of the American Presidency* (Oxford U. Press, 1998); Thomas E. Cronin, ed., *Inventing the American Presidency* (U. Press of Kansas, 1989); Louis Fisher, *Constitutional Conflicts Between Congress and the President*, (U. Press of Kansas, 4th ed. 1997); Louis Fisher, *Presidential War Power* (U. Press of Kansas, 1995); Arthur M. Schlesinger, Jr., *The Imperial Presidency* (Houghton Mifflin Co., 1973); Theodore J. Lowi, *The Personal President: Power Invested Promise Unfulfilled* (Cornell U. Press, 1985); Forrest McDonald, *The American Presidency: An Intellectual History* (U. Press of Kansas, 1994); Donald L. Robinson, "To the Best of My Ability" *The Presidency and the Constitution* (W.W. Norton & Co., 1987); Richard M. Pious, *The American Presidency* (Basic Books, Inc., 1979); Michael A. Genovese, *Presidential Powers* (Oxford U. Press, 2000); Mark J. Rozell, *Executive Privilege: The Dilemma of Secrecy and Accountability* (The Johns Hopkins U. Press, 1994); Robert J. Spitzer, *President and Congress: Executive Hegemony at the Crossroads of American Government* (Temple U. Press, 1993); David Gray Adler and Larry N. George, eds., *The Constitution and the Conduct of American Foreign Policy* (U. Press of Kansas, 1996)

3. These subjects have been examined and re-examined in an extensive literature. See, e.g., Fisher, *Constitutional Conflicts Between Congress and the President* (cited in note 2), Schlesinger, *The Imperial Presidency* (cited in note 2) and Adler and George, eds., *The Constitution and the Conduct of American Foreign Policy* (cited in note 2); Francis D. Wormuth and Edwin B. Firmage with Francis P. Butler, contributing author, *To Chain the Dog of War: The War Power of Congress In Hisotry and Law* (Southern Methodist U. Press, 1986); John Hart Ely, *War and Responsibility* (Princeton U. Press, 1993); Harold Koh, *The National Security Constitution* (Yale U. Press, 1990); Michael J. Glennon, *Constitutional Diplomacy* (Princeton U. Press, 1990); Edward Keynes, *Undeclared War: Twilight Zone of Constitutional Power* (Pennsylvania State U. Press, 1982); David Gray Adler, *The Constitution and Presidential Warmaking: The Enduring Debate*, 103 Pol. Sci. Q. 1 (1988); Louis Fisher and David Gray Adler, *The War Powers Resolution: Time to Say Goodbye*, 113 Pol. Sci. Q. 1 (1998); Adler, *The The Law: Clinton The-ory of the War Power*, 30 Presidential Studies Q. 155 (2000); Alexander DeConde, *Presi-*

domestic matters,⁴ took center stage once more in the extraordinary case of *Youngstown Sheet & Tube Co. v. Sawyer*.⁵ Justly celebrated in the pages of this volume, on the occasion of its 50th anniversary, for its landmark status and deserving rank in the pantheon of great cases—alongside *Marbury*,⁶ *McCulloch*,⁷ and *Brown*⁸—*Youngstown* has been assured of immortality in the annals of constitutional jurisprudence. The *Steel Seizure Case*, like the *Pentagon Papers Case*⁹ and the *Watergate Tapes Case*,¹⁰ was suffused with richly-textured historic dimensions. Moreover, it triggered high political drama and pitched conflict, generated great tides of public opinion, and plunged the Supreme Court into a white-hot cauldron of decision-making responsibility in which it faced issues of surpassing importance to the nation, including the fundamental question of the president's power, if any, to meet an emergency in the absence of statutory authorization. When measured against *Youngstown*, C. Herman Pritchett observed, "all other [separation of powers] cases pale into insignificance."¹¹ *Youngstown* featured the most thorough judicial exploration of presidential powers in the history of the Republic,¹² and it constituted the most significant judicial com-

dental Machismo (Northeastern U. Press, 2000); Louis Henkin, *Constitutionalism, Democracy, and Foreign Affairs* (Columbia U. Press, 1990); Louis Henkin, *Foreign Affairs and the United States Constitution* (Clarendon U. Press, 2d ed. 1996).

4. See, e.g. Raoul Berger, *Executive Privilege: A Constitutional Myth* (Harvard U. Press, 1974); Schlesinger, *The Imperial Presidency* (cited in note 2) and Rozell, *Executive Privilege: The Dilemma of Secrecy and Accountability* (cited in note 2). For a discussion of these issues as they arose in the Clinton administration, see David Gray Adler and Michael A. Genovese, eds. *The Presidency and the Law: The Clinton Legacy* (U. Press of Kansas, 2002).

5. 343 U.S. 579 (1952).

6. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

7. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

8. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

9. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

10. *United States v. Nixon*, 418 U.S. 683 (1974).

11. C. Herman Pritchett, *Civil Liberties and the Vinson Court* 206 (U. of Chicago Press, 1954). Robert Banks rightly observed that *Youngstown* "will jut out among the landmarks of constitutional law." Robert F. Banks, *Steel, Sawyer, and the Executive Power*, 14 U. Pitt. L. Rev. 467, 536 (1953).

12. Among contemporaneous commentaries noting the Court's extended discussion of executive power see, e.g., Banks, 14 U. Pitt. L. Rev. (cited in note 11); Paul Kauper, *The Steel Seizure Case: Congress, the President and the Supreme Court*, 51 Mich. L. Rev. 141 (1952); Edward S. Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 Colum. L. Rev. 53 (1953); Lucius Wilmerding, Jr., *The President and the Law*, 67 Pol. Sci. Q. 321 (1952), and Donald R. Richberg, *The Steel Seizure Cases*, 38 Va. L. Rev. 713 (1952). For more recent, and extended treatments of the case, see two excellent books: Maeva Marcus, *Truman and the Steel Seizure Case: The Limits of Presidential Power* (Duke U. Press, 1994); and Alan F. Westin, *The Anatomy of a Constitutional Law Case: Youngstown Sheet and Tube Co. v. Sawyer* (The MacMillan Co., 1958).

mentary in the 20th century on the limits of those powers.¹³ Indeed, it represented “one of the rare occasions when the Court has rebuked a presidential act in wartime.”¹⁴ Perhaps it is best remembered, as Justice John Paul Stevens declared in *Clinton v. Jones*, as “the most dramatic example” of the Court’s authority to review the legality of an executive action,¹⁵ for in the end it “struck a blow for the separation of powers” and reaffirmed the principle of presidential subordination to the rule of law.¹⁶

It is doubtful that even the most prescient of soothsayers could have foreseen the emergence of a landmark case—a case that would eclipse all other separation of powers cases—in President Truman’s announcement on April 8, 1952 that he had issued that day Executive Order No. 10340 directing Secretary of Commerce Charles Sawyer to seize the steel industry for the purpose of averting a nationwide strike, which he feared would jeopardize the United States’ prosecution of its military efforts in the Korean War as well as other foreign policy and national security interests in Europe.¹⁷ Chief Justice William H. Rehnquist, who at the time served as a clerk to Justice Robert H. Jackson, has observed that “the case had something of an O. Henry ending about it.”¹⁸ He wrote:

Using the traditional methods of predicting in advance how a court will decide a case, the result reached by the Supreme

13. Chief Justice Rehnquist has said of “the famous *Steel Seizure Case*”: “For those of you who have come later than I into the legal profession, I am sure the case simply represents one of several important judicial milestones defining the limits of the power of a President of the United States to act on his own, without congressional authorization.” William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 *Suffolk U. L. Rev.* 751, 752 (1986). The only Supreme Court decision that rivals *Youngstown’s* depth of analysis of presidential power is *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), but that opinion is confined to a discussion of presidential power in foreign affairs.

14. Louis Fisher, *Foreword*, in Marcus, *Truman and the Steel Seizure Case* at ix (cited in note 12). Fisher added: “To that extent it stands as a warning to occupants of the Oval Office that their actions are subject to judicial scrutiny and control.” *Id.*

15. *Clinton v. Jones*, 520 U.S. 681, 703 (1997).

16. Maeva Marcus noted: “The Supreme Court, by invalidating an act of the President, helped redress the balance of power among the three branches of government and breathed new life into the proposition that the President, like every other citizen, is ‘under the law.’” Marcus, *Truman and the Steel Seizure Case* at 228 (cited in note 12). Bernard Schwartz observed that U.S. Courts had been reluctant to review presidential acts and wrote that this reluctance stemmed from a “perverted construction of the separation of powers.” Schwartz, *Inherent Executive Power and the Steel Seizure Case: A Landmark in American Constitutional Law*, 30 *Can. Bar Rev.* 466, 478 (1952).

17. See *Youngstown Sheet and Tube Co. v. Sawyer*, 103 F. Supp. 569, 571-72 (D.D.C. 1952) for a description of the substance of Executive Order 10340. For a broader discussion see Marcus, *Truman and the Steel Seizure Case* at 58-82 (cited in note 12).

18. Rehnquist, 20 *Suffolk U. L. Rev.* at 753 (cited in note 13).

Court of the United States in the *Steel Seizure Case* was contrary to what one would have expected at the time the lawsuit was instituted. There were good reasons, amply supported by precedent, why the Court need never have reached the constitutional question in the case. If the Court were to reach the constitutional question, precedent did not dictate one answer in preference to another. The Supreme Court consisted of nine Justices appointed by two Democratic Presidents, reviewing a challenge to the actions of President Truman, himself a Democrat, who had appointed four of the nine justices. The Supreme Court has a commendable record of eschewing partisan politics in its decision making, but in a constitutionally uncharted area such as this, one might have at least thought that a tie would count for the runner, the runner being President Truman.¹⁹

In a national radio and television address, President Truman grounded his seizure order in the authority vested in him by "the Constitution and laws of the United States, and as President of the United States and Commander in Chief of the armed forces."²⁰ Despite his reference to the laws of the United States, Truman acted without statutory authority. In fact, on the very next day, Assistant Attorney General Holmes Baldridge asserted in federal court in response to the steel companies' motion for a temporary restraining order, that the seizure was based upon "the inherent executive powers of the President"²¹ and not on any statute. Throughout the subsequent legal proceedings, the Administration continued to adduce what it variously referred to as the president's "emergency," "inherent," or "residual" powers. Indeed, on April 18, Truman held a press conference for members of the Society of Newspaper Editors. The *New York Times* ran a story on the conference in which it reported the president's response to a reporter's question:

If it is proper under your inherent powers to seize the steel mills, can you, in your opinion, seize the newspapers and the radio stations?

19. *Id.* (citation omitted). For a broader discussion of the case, from his vantage point as a law clerk see William H. Rehnquist, *The Supreme Court: How It Was, How It Is* (William Morrow and Co., 1987).

20. Executive Order 10340, 17 Fed. Reg. 3139, 3141 (Apr. 10, 1952). Apparently, Truman ignored the views of his "top advisors" who doubted there was any "sound legal basis" for seizing the steel industry. *N.Y. Times* 10E, col. 5 (April 6, 1952), quoted in Westin, *The Anatomy of a Constitutional Law Case* at 7 (cited in note 12).

21. Transcript of Record, *Steel Seizure Case* 253.

Mr. Truman replied that under similar circumstances the President had to do whatever he believed was best for the country.

The President refused to elaborate. But White House sources said the President's point was that he had power in an emergency, to take over "any portion of the business community acting to jeopardize all the people."²²

The Administration's theory of an inherent power was rebuked by the judiciary. Federal District Court Judge David A. Pine declared the seizure invalid and stated that he found nothing in the Constitution to support the assertion of an undefined, inherent power in the presidency.²³ The Supreme Court, by a 6-3 vote, affirmed Judge Pine's ruling, and while there were five concurring opinions, Justice Hugo Black's opinion for the Court also rejected the claim of an inherent emergency power.²⁴

The explanation behind *Youngstown's* stature is not to be found in Oliver Wendell Holmes' famous maxim that "[g]reat cases like hard cases make bad law."²⁵ On the contrary, the Court's repudiation of President Harry Truman's claim of an inherent power to seize the steel mills spoke volumes for its commitment to constitutionalism and the principle of the rule of law. Nor is it to be found in Professor Gerald Gunther's generally sound observation that the "lasting impact [of the Court] ultimately turns on the persuasiveness of the reasons it articulates, not on the particular result it reaches,"²⁶ for it is nevertheless true that the celebration of *Youngstown* is as much a reflection of the Court's panoramic survey of presidential power as it is a function of what the Court did when it rejected President Truman's assertion of a broad emergency power.²⁷ *Youngstown's*

22. N.Y. Times 1 (April 18, 1952).

23. *Youngstown*, 103 F. Supp. at 576. Pine wrote: "Enough has been said to show the utter and complete lack of authoritative support for defendant's position. That there may be no doubt as to what it is, he states it unequivocally when he says in his brief that he does 'not perceive how Article II [of the Constitution] can be read . . . so as to limit the Presidential power to meet all emergencies,' and he claims that the finding of the emergency is 'not subject to judicial review.' To my mind this spells a form of government alien to our Constitutional government of limited powers. I therefore find that the acts of defendant are illegal and without authority of law." *Id.*

24. 343 U.S. 579-710 (1952). For discussion of the various opinions see *infra* notes 53-74.

25. *N. Sec. Co. v. United States*, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting).

26. Gerald Gunther, *John Marshall's Defense of McCulloch v. Maryland* 5 (Stanford U. Press, 1969).

27. The issues in the case, particularly the claim of an unfettered executive power to identify and meet an emergency not subject to the judicial process, transcended the im-

remarkable stature, its point of distinction, lies in the Court's commitment to the principle of executive subordination to the law, for if the Court could and would rebuke a presidential action vigorously defended and executed in the name of national security in the context of the Korean War, which itself was part of a larger, indeed global, campaign against the Cold War menace of communism, then the Court could and should restrain unfounded claims of presidential power in somewhat more tranquil settings, as it did in *New York Times v. United States* and *United States v. Nixon* and again, later, in *Clinton v. Jones*.²⁸

In fact, few issues in our long Anglo-American constitutional history can match the high drama, resounding importance and transcendent interest of the attempts by the judiciary to rein in executive power and subject it to the principle of the rule of law, an effort, of course, that lies at the core of constitutionalism. Indeed, the issue of the president's relationship to the law defined the *Steel Seizure Case* and confronted the Justices of the Supreme Court with an issue with which judges have grappled since Sir Edward Coke's bold declaration in 1608 to an outraged King James I that the King is indeed subject to the law.²⁹ *Youngstown* featured an effort by the Truman Administration to revive the Stuart conception of an emergency power of the King. In its defense of President Truman's actions, Bernard Schwartz observed, "the Government advanced arguments that had not been heard in an English-speaking court since the time of Charles I."³⁰ In fact, the sweeping assertions of presidential power that were adduced by Assistant Attorney General Baldrige in the courtroom of Federal District Judge Pine echoed those made on behalf of the Crown in 1642 in the famous case of the *Ship Money*, in which it was claimed that the King possessed an absolute prerogative to take any action he believed necessary for the welfare of the nation.³¹ Consider the following exchange between Baldrige and Pine:

mediate importance of resolving the dispute. Thus Paul Kauper fairly observed: "It is in the setting of these larger questions that the *Youngstown* case assumes a significance of large dimensions, a significance exceeding impact on the problems of the steel strike with all of its economic and political repercussions." Kauper, 51 Mich. L. Rev. at 143-44 (cited in note 12).

28. *N.Y. Times*, 403 U.S. 713; *Nixon*, 418 U.S. 683; *Clinton*, 520 U.S. 681.

29. Sir William Holdsworth, 5 *A History of English Law* 428-31 (Methuen, 1937).

30. Bernard Schwartz, 2 *A Commentary on the Constitution of the United States: Part I: The Powers of the Government* 66 (The MacMillan Co., 1963).

31. *Id.* at 66-67. Charles I asserted, before the judges of the court of Exchequer: "When the good and safety of the kingdom in general is concerned, and the whole kingdom is in danger . . . is not the king sole judge, both of the danger, and when and how

The Court: So you contend the Executive has unlimited power in time of an emergency?

Mr. Baldrige: He has the power to take such action as is necessary to meet the emergency.

The Court: If the emergency is great, it is unlimited, is it?

Mr. Baldrige: I suppose if you carry it to its logical conclusion, that is true. . . .

The Court: And that the Executive determines the emergencies and the courts cannot even review whether it is an emergency.

Mr. Baldrige: That is correct.

The Administration reaffirmed its position at a later juncture in the argument:

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. Baldrige: That is the way we read Article II of the Constitution.³²

In the *Case of Ship Money* the King's judges, predictably, not only embraced the King's argument but repeated it verbatim in the body of their opinions.³³ But Judge Pine, perhaps surpris-

the same is to be prevented and avoided?" *Case of Ship-Money*, 3 Howell's State Trials 826, 844 (1637), quoted in Banks, 14 U. Pitt. L. Rev. at 472 n.32 (cited in note 11).

32. The government's argument is reproduced in Westin, *The Anatomy of a Constitutional Law Case* at 59-65 (cited in note 12).

33. 3 *Howell's State Trials* at 826, 843 (cited in note 31), quoted in Banks, 14 U. Pitt. L. Rev. at 472 n.32 (cited in note 11). The reporter of *Ship-Money* wrote: "This Judgment . . . gave much offense to the nation, and occasioned great heart-burnings in the house of commons." *Id.* at 1254. In Parliament, Lord Falkland stated: "It seemed generally strange, that they [the judges] saw not the law which all men else saw but themselves. Yet though this begot the more general wonder, three other particulars begot the more general indignation. When they had allowed the king, the sole power in necessity, the sole judgement of necessity, and by that enabled him to take from us, what he would, when he would, and how he would, they yet continued to persuade us, that they had left us our liberties and our properties." *Id.* at 1260-61.

The House of Commons later resolved that the charges imposed by the King's writ, "the extrajudicial Opinions of the judges . . . the [King's] Writ . . . and the Judgment . . . are against the laws of the realm, the right of property, and the liberty of the subjects, and contrary to the former resolutions in parliament, and to the Petition of Right." *Id.* at

ingly,³⁴ refused to bow before the claims of presidential prerogative power. Indeed, he held, in simple but powerful terms, that there was nothing in the Constitution to support the Administration's assertion of an undefined, inherent emergency power in the president:

Enough has been said to show the utter and complete lack of authoritative support for defendant's position. That there may be no doubt as to what it is, he states it unequivocally when he says in his brief that he does "'not perceive how Article II [of the Constitution] can be read . . . so as to limit the Presidential power to meet all emergencies,' and he claims that the finding of the emergency is 'not subject to judicial review.' To my mind this spells a form of government alien to our Constitutional government of limited powers. I therefore find that the acts of defendant are illegal and without authority of law."³⁵

The central question raised in the proceedings—whether the president enjoyed an inherent or emergency power to seize the steel mills—triggered in the Supreme Court the most thorough and penetrating examination of presidential power to date. Indeed, it raised a question of profound importance to a nation committed to the rule of law. The delegates to the Constitutional Convention were entitled to believe that they had succeeded in subordinating the executive to the Constitution.³⁶ Still, there remained the problem of emergency and it confronted the principle of the rule of law with an awkward though undeniable challenge, one immortalized in the words of President Abraham Lincoln, who wrestled with the question in the

1262. For an outstanding discussion of the King's prerogative power see Francis D. Wormuth, *The Royal Prerogative 1603-49* (Cornell U. Press, 1939), and for a continuation of the discussion see his, *The Origins of Modern Constitutionalism* (Harper & Brothers, 1949).

34. Chief Justice Rehnquist has written: "A single district judge was thought very unlikely to be willing to take on the President of the United States in this fashion." Rehnquist, 20 Suffolk U. L. Rev. at 758 (cited in note 13). He believed that the case resembled an "O. Henry" ending. *Id.* at 753.

35. *Youngstown*, 103 F. Supp. at 576.

36. The subordination of the executive to the rule of law represented at the time of the founding period, the critical difference between republicanism and monarchy. The Take Care Clause of Article II commands the president to "take care that the laws be faithfully executed," a duty which includes enforcement of federal statutes, which are designated by Article VI as the "Supreme law of the land." Clearly, laws enacted by Congress are binding on the president. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 154-62 (1803), stressed the president's amenability to statutes by holding that an act of Congress required the Secretary of State to deliver Marbury's commission. The impeachment power of Congress would be irrelevant, moreover, if the president was not confined by the Constitution.

clamor and conflict of the Civil War: "Are all the laws but one," he asked, "to go unexecuted, and the Government itself go to pieces lest that one be violated? Even in such a case, would 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?"³⁷ If the president does in fact possess an emergency or prerogative power, which John Locke described in terms made famous, as the "[P]ower to act according to discretion, for the public good, without the prescription of Law, and sometimes even against it,"³⁸ What are its limits, if any? Does the existence of an emergency reallocate constitutional powers? As a corollary, may the president ignore or revise the Constitution? These thorny questions have long been the subject of debate among academics and practitioners.³⁹

President Truman's capacious view of the powers of presidency raised anew questions about constitutional purposes, powers, and limitations, and they invited reconsideration about judicial interpretation of presidential power. Before proceeding to a discussion of the Supreme Court's analysis of Truman's reliance on the claim of inherent executive power, let us return to the founding period. The debates in the Convention are illuminating, but so are the actions that the Framers took, as reflected in the text of the Constitution.

THE FOUNDERS AND EXECUTIVE POWER

Article II, section I of the Constitution provides: "The executive Power shall be vested in a President of the United States of America." Sections two and three enumerate presidential powers and responsibilities, including the duty that "he shall take care that the laws be faithfully executed."⁴⁰ An understand-

37. Message of July 4, 1861, quoted in Edward S. Corwin, *The President: Office and Powers 1787-1948* at 77 (New York U. Press, 3d ed. 1948).

38. For an excellent discussion of the Lockean Prerogative, and its application to American political thought, see Donald L. Robinson, *Presidential Prerogative and the Spirit of American Constitutionalism*, in Adler and George, *The Constitution and the Conduct of American Foreign Policy* at 114-32 (cited in note 2); Robert Scigliano, *The President's "Prerogative Power"*, in Cronin, *Inventing the American Presidency* at 236-56 (cited in note 2); Thomas S. Langston and Michael E. Lind, *John Locke and the Limits of Presidential Prerogative*, 24 *Polity* 49-68 (1991).

39. The essential differences in viewpoints may be gathered in the opinions held by Theodore Roosevelt and William Howard Taft, as discussed in Taft, *Our Chief Magistrate and His Powers* 141-47 (Columbia U. Press, 1916). See also the discussion in Banks, 14 *U. Pitt. L. Rev.* at 516-29 (cited in note 11); and the opinions set forth in the various essays in Cronin, *Inventing the American Presidency* (cited in note 2).

40. U.S. Const., Art. II, § 3.

ing of the Vesting Clause, long the subject of academic debate, may be gathered from debates in the Constitutional Convention and in the several state ratifying conventions. It is instructive as well to recall the understanding of the term, "executive power," on the eve of the Philadelphia Convention. The acclaimed legal historian, Julius Goebel, observed that "executive,"

as a noun . . . was not then a word of art in English law—above all it was not so in reference to the crown. It had become a word of art in American law through its employment in various state constitutions adopted from 1776 onward . . . It reflected . . . the revolutionary response to the situation precipitated by the repudiation of the royal prerogative.⁴¹

The use of the word "prerogative," as Robert Scigliano has demonstrated, was, among the founders, a term of derision, a political shaft intended to taint an opponent with the stench of monarchism.⁴² The rejection of the use of the word "prerogative" in favor of the new and more republic-friendly noun of "executive" necessitated discussion and explanation of its scope and content.

The meager scope of authority granted to state executives is illustrated by the provisions of state constitutions. Despite intrinsic flaws and deficiencies in an omnipotent legislature under the Virginia Constitution of 1776, Thomas Jefferson noted in his 1783 "*Draft of a Fundamental Constitution for Virginia*": "By Executive powers, we mean no reference to the powers exercised under our former government by the Crown as of its prerogative . . . We give them these powers only, which are necessary to execute the laws (and administer the government)."⁴³ This approach was reflected in the Virginia Plan, which Edmund Randolph introduced to the Constitutional Convention, and which provided for a "national executive . . . with power to carry into execution the national laws . . . [and] to appoint to offices in cases not otherwise provided for."⁴⁴ For the Framers, the phrase "executive power" was limited, as James Wilson said, "to executing the laws, and appointing officers."⁴⁵ Roger Sherman "considered the Executive magistracy as nothing more than an insti-

41. Julius Goebel, Jr., *Ex Parte Clio*, 54 Colum. L. Rev. 450, 474 (1954).

42. Scigliano, *The President's "Prerogative Power,"* in Cronin, *Inventing the American Presidency* at 248 (cited in note 2).

43. Quoted in Charles Warren, *The Making of the Constitution* 177 (Harvard U. Press, 1947).

44. Max Farrand, 1 *The Records of the Federal Convention of 1787* at 62-63 (Yale U. Press, 1911).

45. *Id.* at 66.

tution for carrying the will of the Legislature into effect.”⁴⁶ Madison agreed with Wilson’s definition of executive power. He thought it necessary “to fix the extent of Executive authority . . . as certain powers were in their nature Executive, and must be given to that departmt [sic],” and added that “a definition of their extent would assist the judgment in determining how far they might be safely entrusted to a single officer.”⁴⁷ The definition of the executive’s power should be precise, thought Madison; the executive power “should be confined and defined.”⁴⁸ And so it was. In a draft reported by Wilson, the phrase, “The Executive Power of the United States shall be vested in a single Person,” first appeared.⁴⁹ His draft included an enumeration of the president’s power to grant reprieves and pardons and to serve as commander-in-chief; it included as well the charge that “it shall be his duty to provide for the due and faithful execution of the Laws.”⁵⁰ The report of the Committee of Detail altered the “faithful execution” phrase to “he shall take care that the laws of the United States be duly and faithfully executed.”⁵¹ This form was referred to the Committee on Style, which drafted the version that appears in the Constitution: “The executive power shall be vested in a president of the United States of America . . . [H]e shall take care that the laws be faithfully executed.”⁵²

The debate on “executive power,” to the extent that there was one, centered almost entirely on whether there should be a single or plural presidency. Edward Corwin fairly remarked: “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.”⁵³ There was no challenge to the definition of executive power held by Wilson and Madison; nor was an alternative understanding advanced. And there was no argument about the scope of executive power; indeed, any latent fears were quickly allayed. For example, in response to the Randolph Plan, which provided for a “national executive” that would have “authority to execute the national laws . . . and enjoy

46. *Id.* at 65.

47. *Id.* at 66-67.

48. *Id.* at 70.

49. Farrand, 2 *Records* at 171 (cited in note 44).

50. *Id.*

51. *Id.* at 185.

52. See *id.* at 572, 574, 597, 600.

53. Corwin, 53 *Colum. L. Rev.* at 53 (cited in note 12).

the executive rights vested in Congress by the confederation,”⁵⁴ Charles Pinkney said he was “for a vigorous executive but was afraid the Executive powers of the existing Congress might extend to peace & war & which would render the Executive a Monarchy, of the worst kind, to wit an elective one.”⁵⁵ John Rutledge shared his concern. He said “he was for vesting the Executive power in a single person, tho’ he was not for giving him the power of war and peace.”⁵⁶ Wilson sought to ease their fears; he “did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace. The only powers he conceived strictly Executive were those of executing the laws, and appointing officers, not (appertaining to and) appointed by the Legislature.”⁵⁷ The absence of a challenge to the Madison-Wilson-Sherman understanding of executive power, the reassurance, moreover, that executive power did not constitute a source of warmaking authority or, more generally, a foreign affairs power, and that the concept of prerogative was ill-suited to a Republic, left little to fear about the office.⁵⁸

If it is true, as Corwin observed, that Wilson was the leader of the strong executive wing of the Convention, a remark made comprehensible perhaps by the unwillingness of any other member to espouse a conception of executive power more expansive than Wilson’s stated parameters—to execute the laws and make appointments to office—what, we may ask, was the understanding of the phrase held by members of the various state ratifying conventions? In South Carolina, Charles Pinckney reported that “we have defined his powers, and bound him to such limits, as will effectually prevent his usurping authority.” Similarly, Chief Justice Thomas McKean told the Pennsylvania Ratifying Convention that executive officers “have no . . . authority . . . beyond what is by positive grant . . . delegated to them.” In Virginia, Governor Randolph asked, “What are his powers? To see the laws executed. Every executive in America has that power.”

54. Farrand, 1 *Records* at 65-66 (cited in note 44).

55. *Id.* at 64-65.

56. *Id.* at 65.

57. Farrand, 1 *Records* at 62-70 (cited in note 44).

58. While various presidents and commentators have sought to squeeze from the Vesting Clause a presidential authority to make war, the claim was considered and rejected at the Convention; indeed, it caused much alarm. The Supreme Court, moreover, has never viewed the clause as a source of presidential power to initiate war or to conduct foreign policy. For discussion, see Adler, *Warmaking* at 14-17 (cited in note 3).

That view was echoed by James Iredell in North Carolina, and James Bowdoin in Massachusetts, who said the president's powers were "precisely those of the governors."⁵⁹

And the powers of the governors were strictly limited. The Virginia Constitution of 1776, for example, stated that the governor shall "exercise the executive powers of government, according to the laws of this Commonwealth; and shall not, under any pretense, exercise any power or prerogative, by virtue of any law, statute or custom of England."⁶⁰ As we have seen, moreover, Jefferson sought in 1783 in his "*Draft of a Fundamental Constitution for Virginia*," to place beyond doubt that "By Executive powers, we mean no reference to the powers exercised under our former government by the Crown as of its prerogatives . . ."⁶¹ In short, as Madison concluded, state executives across the land were "little more than cyphers."⁶²

It is not at all surprising that the founding generation would so sharply limit the power of its executives. In colonial America, the belief was prevalent, wrote Corwin, that "the 'executive magistracy' was the natural enemy, the legislative assembly the natural friend of liberty."⁶³ There was a deep fear of the potential for abuse of power in the hands of both hereditary and elected rulers. The colonial experience had laid bare the sources of despotism. "The executive power," said a Delaware Whig, "is ever restless, ambitious, and ever grasping at encrease of power."⁶⁴ Thus Madison wrote in *Federalist No. 48*: "The founders of our republics . . . seem never for a moment to have turned their eyes from the danger to liberty from the overgrown and all-grasping prerogative of an hereditary magistrate."⁶⁵

59. Jonathan Elliot, 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 540; 3: 201; 4: 107; 2: 128 (Washington: Printed by and for the Editor, 2d ed. 1836).

60. Ben Perley Poore, 2 *Federal and State Constitutions, Colonial Charters, and Other-Organic Laws of the United States 1910-11* (Washington, Government Printing Office, 1877).

61. Quoted in Warren, *The Making of the Constitution* at 177 (cited in note 43).

62. Farrand, 2 *Records* at 35 (cited in note 44).

63. Edward S. Corwin, *The President: Office and Powers, 1787-1984* at 5-6 (New York U. Press, 5th rev. ed. 1984).

64. Quoted in Gordon S. Wood, *The Creation of the American Republic 1776-1787* at 135 (U. of North Carolina Press, 1969), citing Moses Mathe, *America's Appeal to the Impartial World* 6 (Hartford, 1775). The colonists were virtually obsessed with power, "its endlessly propulsive tendency to expand itself beyond legitimate boundaries." Bernard Bailyn, *The Ideological Origins of the American Revolution* 56-57 (The Belknap Press of Harvard U. Press, 1967).

65. *Federalist* 48 (Madison), in Edward Mead Earle, Intro, *The Federalist Papers* 321-22 (Modern Library, 1937).

It was in this context, then, that the Framers designed the office of the presidency. Far from establishing an executive resembling a monarchy, the Framers, in fact, severed all roots to the royal prerogative. The Framers' rejection of the British model, grounded in their fear of executive power and their embrace of republican principles, was repeatedly stressed by defenders of the Constitution. William Davie, a delegate in Philadelphia, explained to the North Carolina Convention, that "that jealousy of executive power which has shown itself so strongly in all the American governments, would not admit" of vesting the treaty powers in the president alone, a principle reaffirmed by Hamilton in *Federalist No. 75*: "the history of human virtue does not warrant placing such awesome authority in one person."⁶⁶ Hamilton, in fact, was at the center of Federalist writings that attempted to allay any concerns about the creation of an embryonic monarchy. In *Federalist No. 69*, he conducted a detailed analysis of the enumerated powers granted to the president. In his capacity as commander in chief, for example, the president would be "first General and Admiral,"⁶⁷ a post that carried with it no authority to initiate war. The president's authority to receive ambassadors, moreover, "is more a matter of dignity than of authority," an administrative function "without consequence."⁶⁸ Thus Hamilton concluded that nothing was "to be feared" from an executive "with the confined authorities of a President."⁶⁹

The confined nature of the presidency, a conception reflected, for example, in Wilson's observation that the president is expected to execute the laws and make appointments to office, or in Sherman's remark that "he considered the Executive magistracy as nothing more than an institution for carrying the will of the Legislature into effect," represented a characterization that was never challenged throughout the Convention.⁷⁰ No delegate advanced a theory of inherent power. Madison justly remarked: "The natural province of the executive magistrate is to execute laws, as that of the legislature is to make laws. All his acts, therefore, properly executive, must presuppose the existence of the laws to be executed."⁷¹ The proposition that the

66. Elliot, 4 *Debates* at 134 (cited in note 59); *Federalist 75* (Hamilton) at 485, 487 (cited in note 65).

67. *Federalist 69* (Hamilton) at 445, 448 (cited in note 65).

68. *Id.* at 451.

69. *Federalist 71* (Hamilton) at 463, 468 (cited in note 65).

70. Farrand, 1 *Records* at 65 (cited in note 44).

71. James Madison, 6 *The Writings of James Madison* 145 Gaillard Hunt, ed., 9 vols.

president was subject to the law constitutes the essence of the rule of law, and “[a]t the time of the Revolution and in the early days of the Republic, it was thought that republican government differed from the monarchies of Europe in precisely this respect.”⁷²

Despite the clarity of the Convention’s aims, as reflected in the meager textual allocation of power to the president, aims reasonably illuminated by discussion and debate in Philadelphia, there is yet another tradition in America which is represented in a large body of literature that extols the virtues of presidential power, a school that has its foundation in a broader, more expansive interpretation of “executive power,” a school which, if it cannot find its footing in the debates in Philadelphia—in the arguments, discussion or train of thought of the Convention—does purport to find its footing in the arguments, debates and practices in the early days of the Republic. To borrow from Corwin again, if the Framers did not intend by virtue of the term “executive power,” to vest in the president a residual or inherent power, if they had no intent, by virtue of the “Vesting Clause,” to grant to the president a power to act beyond or in the absence of laws in what is commonly, though incorrectly, regarded as a Lockean prerogative, then perhaps the concept of inherent power was “grafted on the presidency” by presidents, jurists and scholars, among others.⁷³ Indeed, given the absence in the Convention of an understanding of executive power that challenged the Madison-Wilson-Sherman conception, it would seem fair to say that the broader, more expansive conception of executive power, as the embodiment of inherent, residual, prerogative, or emergency authority, represents a gloss on the Vesting Clause.

In his famous defense of President George Washington’s Proclamation of Neutrality in 1793, Hamilton, writing as “Pacifucus,” applied the initial gloss on “executive power” in his claim of an “inherent” presidential power. In the course of his de-

(Putnam, 1900-1910).

72. Wormuth and Firmage, *To Chain the Dog of War* at 165 (cited in note 3).

73. See Scigliano’s enlightening discussion of Locke’s understanding of prerogative, which required a legislative act indemnifying the executive who violated the law, in contrast with a substantial body of literature that perceives the Lockean prerogative as justification for unilateral executive action in violation of the laws in the response to an emergency, and which holds, as a consequence, that legislative indemnification is utterly unnecessary. Scigliano, *The President’s “Prerogative Power,”* in Cronin, *Inventing the American Presidency* at 236-56 (cited in note 2). See also, Adler, *Warmaking* at 32-33 (cited in note 3) for the argument that the Framers did *not* incorporate a so-called Lockean Prerogative; Langston and Lind, 24 *Polity* at 50-68 (cited in note 38); Wilmerding, 67 *Pol. Sci. Q.* at 321-38 (cited in note 12).

fense, Hamilton emphasized the differences between the Constitution's assignment to Congress in Article I of "all legislative powers hereinafter granted" and the more general grant in Article II of the executive power to the president. Hamilton contended that the Constitution embodies an independent, substantive grant of executive power. The subsequent enumeration of specific executive powers was, he argued, only "intended by way of greater caution, to specify and regulate the principal articles implied in the definition of Executive Power." He added: "The general doctrine then of our constitution is, that the EXECUTIVE POWER of the Nation is vested in the President; subject only to the *exceptions* and *qualifications* which are expressed in the instrument."⁷⁴ In *Myers v. United States*,⁷⁵ Chief Justice William Howard Taft seemed to embrace the Hamiltonian conception: "The executive power was given in general terms, strengthened by specific terms where emphasis was regarded as appropriate, and was limited by direct expressions where limitation was needed"

Hamilton's interpretive effort to adduce a substantive conception of executive power, particularly from differences in terminology between Article I and Article II, is fraught with difficulties. The Convention debates provide no basis for ascribing any significance to the difference in phraseology between the legislative powers "herein granted" and "The Executive Power." Indeed, it was only in the last days of the Convention—September 12, to be exact—that a change in the terms occurred through a report of the Committee on Style, which altered Congress's legislative powers to those "herein granted," but made no change in the phrase, "the executive power." The change likely represented an effort to reaffirm the limits of federalism and the regulatory authority of Congress, and allay concerns of states, which feared for their legislative authority, rather than an effort to recognize a substantive conception of executive power. The change in language affected Congress and, on its face, had nothing to do with the executive, but if it did, the route to a substantive conception of executive power could not have been more circumlocutory by design.

In fact, Hamilton's claim of an independent, substantive conception of executive power is vulnerable on several counts.

74. Hamilton, *Pacificus No. 1* (June 29, 1793), reprinted in Harold C. Syrett, et al., eds., 15 *The Papers of Alexander Hamilton* 33, 39 (Columbia U. Press, 1969).

75. 272 U.S. 52, 118 (1926).

First, there is no evidence from the Convention debates to support the claim. Given the Framers' aversion to executive authority, and their consequent enumeration of presidential power, one would expect to find in the Convention some comment, some argument or some shred of evidence to indicate that the Convention intended to vest the president with a broad grant of executive authority. Indeed, it is difficult to imagine that such a full swing of the pendulum, from a deep-seated fear of the executive to an abiding confidence in it, strong enough to warrant a grant of broad discretionary authority, could be accomplished without comment, and yet the record reveals no such shift in thinking. Hamilton's explanation that the Convention intended merely to specify and *regulate* what he termed the "principal" articles implied in the definition of executive power, raises additional questions. His use of the word "regulate" implies limitations, a concept at the core of the Framers' effort, in Madison's words, to "confine and define" executive power, but one at odds with a broad grant of undefined residual authority. Moreover, why would the Convention, from Hamilton's perspective, feel the need to enumerate a presidential power to require opinions in writing if the president possessed a broad residuum of executive authority? Pacificus's argument that only those executive articles that were "principal" articles seems at odds with the concept of inherent power, for is there anything more inherent in executive authority than the power to require a subordinate to place an opinion in writing? Justice James McReynolds' powerful dissent in *Myers v. United States* (1926), surely exposed this flaw in Hamiltonian theory of inherent power, for it was, he wrote,

beyond the ordinary imagination to picture 40 or 50 capable men, presided over by George Washington, vainly discussing, in the heat of a Philadelphia summer, whether express authority to require opinions in writing should be delegated to a President in whom they had already vested the illimitable executive power here claimed.⁷⁶

Let us briefly consider other problems with Hamilton's theory of inherent power. The argument he advanced as Pacificus, as Madison noted, contradicted his explanation of presidential power in *Federalist No. 69*. Hamilton was entitled to change his own mind, of course, but an apparent shift in his conception of executive power in 1793 does not alter the Convention's under-

76. 272 U.S. at 207.

standing, which Hamilton reported in *Federalist No. 69* in his analysis of each of the enumerated powers of the president, an analysis upon which delegates to the various state ratifying conventions, including his own in New York, relied in their adoption of the Constitution. His analysis in *Federalist 69* served to allay fears that the president would exercise the powers of an overweening executive. The president, as commander-in-chief, would not have the authority of authorizing war; that power, he wrote, was vested in Congress. Of the president's authority to receive ambassadors, Hamilton said, it "is more a matter of dignity than of authority . . . without consequence." In *Federalist No. 75*, as we have seen, he observed that the president was not granted the power to make treaties, because "the history of human conduct does not warrant that exalted opinion of human virtue."⁷⁷ But suddenly, as Pacificus, Hamilton asserted a broad, "comprehensive grant" of executive power to the president. One is left to wonder at the capacious scope and theoretical limits of an inherent power and how it might be reconciled with Madison's reminder in *Federalist No. 51* that "in republican government, the legislative authority necessarily predominates."⁷⁸ Manifestly, the Framers did not endow the president with more power than it vested in Congress, but with less; yet the allocation of power between the executive and legislative branches, presumably clarified by an enumerative scheme, may be blurred, and indeed corrupted, by an inherent executive power capable of overwhelming powers that are constitutionally enumerated and assigned to Congress. Unless we are willing, therefore, to abandon the concept of a *constitutionally-limited* inherent presidential power, however broad it may be, and to view it as a consuming, cannibalistic power, there remains the need to address some conceptual limits. Here, at least, Pacificus offered a benchmark: "The general doctrine then of our constitution is, that the *EXECUTIVE POWER* of the Nation is vested in the President; subject only to the *exceptions* and *qualifications* which are expressed in the instrument."⁷⁹ The "exceptions and qualifications" approach permits an understanding, at a minimum, that under the banner of executive power a president may not lay claim to any of the powers, express or implied, that are allocated to either Congress or the judiciary. Thus, it seems indisputable, for example, that the president derives from the

77. *Federalist 75* (Hamilton) 485, 487 (cited in note 65).

78. *Federalist 51* (Hamilton or Madison) 335, 338 (cited in note 65).

79. Hamilton, 15 *Papers* at 39 (cited in note 74).

Constitution no lawmaking authority, the quintessential congressional power.

EMERGENCY POWER

The Convention, it seems clear, did not entertain a doctrine of necessity or a theory of emergency power. There is no evidence, moreover, that the Framers intended to incorporate the Lockean Prerogative in the Constitution. And lacking a textual statement or grant of power to that effect, such an intent is indispensable to the claim of a constitutional power. In fact, as we have seen, the evidence runs in the other direction. Fears of executive power led the Framers to enumerate the president's power; they undertook to "define and confine" the scope of his authority. And clearly, an undefined reservoir of discretionary power in the form of Locke's prerogative would have unraveled the carefully crafted design of Article II and repudiated the Framers' stated aim of corraling executive power. But the Convention did not even look in the direction of prerogative power. Rather, the delegates imposed on the president a solemn duty to "faithfully execute the laws" and, as a necessary consequence, stripped him of the monarch's dispensing and suspending powers, powers which were utterly discordant with the president's duties under the Take Care Clause. Moreover, no early legal treatise, or commentary, from the pens of Wilson or Kent, Story or Rawle, spoke of an executive's authority to violate laws in the context of an emergency.⁸⁰

But if the Convention rejected the concept of an inherent executive power, what was the solution to emergency, for it was understood that the law could not provide an immediate remedy for every conceivable situation that the nation might encounter.⁸¹ And if the existence of an emergency did not serve to re-

80. The Framers followed Madison's advice that presidential power "shd. be confined and defined." Farrand, 2 *Records* at 65-70 (cited in note 44). See generally, Adler, *Warmaking* at 14-17 (cited in note 3); Scigliano, *The President's "Prerogative Power,"* in Cronin, *Inventing the American Presidency* at 236-56 (cited in note 2).

81. Justice Jackson pointed out in *Youngstown* that the Framers were familiar with emergencies: "They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies." 343 U.S. at 650. Jackson added that with the exception of the "suspension of the privilege of the writ of habeas corpus in time of rebellion or invasion, when the public safety may require it, they made no express provision for exercise of extraordinary authority because of a crisis." *Id.* (emphasis added; footnotes omitted). Jackson's opinion served to reaffirm Chief Justice Charles Evans Hughes' opinion of the Court in *Schechter*

distribute the powers of government allocated by the Constitution, what mechanism lay within the grasp of government to meet the emergency?

The solution to emergency was found in the doctrine of retroactive ratification, a practice rooted in England and one with which the founders were familiar. Lord Dicey explained the method that emerged in English law: "There are times of tumult and invasion when for the sake of legality itself the rules must be broken. The course which the government must then take is clear. The ministry must break the law and trust for protection to an act of immunity."⁸² This doctrine was adopted and followed in America. In its application, if the president perceived an emergency, he could act illegally and turn to Congress for ratification of his actions. Congressional ratification would hinge on the question of whether Congress shared the president's perception of emergency. The chief virtue in this practice was that it left to Congress, as the nation's lawmaking authority, the ultimate determination of the existence of an emergency, and it prevented the president from sitting as judge of his own cause, a principle of over-arching importance in Anglo-American legal history.⁸³ Only an exceedingly bold and arrogant declaration of High Prerogative could justify the view that a president might judge his own act of usurpation, for such a doctrine would place the laws of the nation at his mercy.⁸⁴ Further virtue in the practice of legislative immunity or indemnification may be drawn from the fact that it is likely to temper presidential claims of emergency. Since resort to Congress for vindication and exoneration represents an admission of executive usurpation, a president is unlikely to respond to an emergency with extra-legal measures, and as a consequence risk his own fate and fortune, unless he is confident that the legislature would likewise

Poultry Corp. v. United States: "Extraordinary conditions do not create or enlarge constitutional power." 295 U.S. 495, 528 (1935).

82. Albert Dicey, *Introduction to the Study of the Law of the Constitution* 513-14, (Liberty Classics, 1982).

83. For centuries, the common law had been known to prohibit a man from judging his own cause. Sir Edward Coke had stated the rule in *Dr. Bowham's Case*, 8 Co. Rep. 113b, 77 E.R. 646 (1610). Madison stated in *Federalist No. 49* at 328, that "neither [the executive nor the legislative] can pretend to an exclusive or superior right of settling the boundaries between their respective powers."

84. Lucius Wilmerding rightly observed: "For if the President is the judge of the necessity, his power is unlimited; he may apply his discretion to any instance whatever. . . ." Wilmerding, 67 Pol. Sci. Q. at 330 (cited in note 12). Members of Parliament lamented the Court's ruling in *The Ship Money Case* of 1637, which acknowledged the King's power as the "sole" judge of emergency and how to respond to it. 3 *Howell's State Trials* at 826, 843 (cited in note 31).

view his acts as an indispensable necessity. In any event, it is apparent that the doctrine of retroactive ratification, which incorporates elements of both the doctrine of separation of powers and doctrine of checks and balances, maintains a semblance of constitutional government.

Whether it is true, as Lucius Wilmerding observed, that "this doctrine was accepted by every single one of our early statesman,"⁸⁵ one will perhaps search the records in vain for expression of an alternative doctrine which asserts executive authority to violate the law.⁸⁶ Wilmerding, whom Arthur Schlesinger, Jr. has rightly characterized as a "careful scholar,"⁸⁷ has compiled an impressive record of incidents and controversies at the dawn of the Republic which reflect the founders' commitment to the practice of legislative immunity.⁸⁸ Representative Alexander White, a leader in the Virginia Ratifying Convention, addressed the practice of legislative indemnification in the First Congress:

I will relate an example. In Virginia, when the operations of the war required the exertions of the chief magistrate beyond the authority of the law, our late governor Nelson, whose name must be clear to every friend of liberty, was obliged to issue his warrants and impress supplies for the army; though it was well known he had exceeded his authority; his warrants were executed, his country was benefitted by this resolute measure, and he himself afterwards indemnified by the legislature. This corresponds with the practice under every limited government.⁸⁹

Two additional early episodes, one involving Alexander Hamilton and the other Thomas Jefferson, illustrate the breadth of philosophical and political support afforded the doctrine of legislative indemnification. Let a third example—the famous ratification of Abraham Lincoln's extra-constitutional actions taken in the Civil War—suffice to demonstrate the rich historical currency of the practice.

85. Wilmerding, 67 *Pol. Sci. Q.* at 122 (cited in note 12).

86. See Scigliano, *The President's "Prerogative Power,"* in Cronin, *Inventing the American Presidency* at 248 (cited in note 2).

87. Schlesinger, *The Imperial Presidency* at 10 (cited in note 2).

88. See Wilmerding's discussion, 67 *Pol. Sci. Q.* at 115-21 (cited in note 12). See also, Scigliano, *The President's "Prerogative Power,"* in Cronin, *Inventing the American Presidency* at 246-56 (cited in note 2).

89. 1 *Congressional Register* 525-26.

In 1793, Hamilton, as Secretary of the Treasury, was the subject of a House resolution that charged him with violations of the appropriations laws. Representative William B. Giles of Virginia introduced the resolutions, the first of which stated: "Resolved, that it is essential to the due administration of the government of the United States, that laws making specific appropriations of money should be strictly observed by the administrator of the finances thereof."⁹⁰ Hamilton denied any wrongdoing and the House vindicated his denial. But in the course of debate, both sides acknowledged the controlling weight of legislative indemnification. Representative William Smith of South Carolina, who acted as Hamilton's spokesman in the House, noted his agreement with the principle of the resolution, but added,

yet it must be admitted that there may be cases of a sufficient urgency to justify a departure from it, and to make it the duty of the legislature to indemnify an officer; as if an adherence would in particular cases, and under particular circumstances, prove ruinous to the public credit, or prevent the taking measures essential to the public safety, against invasion or insurrection.⁹¹

But a vote on such a "proposition," according to Smith, would require prior examination of all the surrounding "circumstances which would warrant any departure" from the law. He concluded: "let every deviation from law be tested by its own merits or demerits."⁹² Supporters of the resolution conceded the need for legislative ratification.⁹³

In 1807, a British warship attacked the Chesapeake. Because Congress was in recess, President Jefferson spent unappropriated funds in violation of the law. "To have awaited a

90. Journal of the House of Representatives, 2d Sess. at 147, quoted in Wilmerding, 67 Pol. Sci. Q. at 116-18 (cited in note 12).

91. 4 Gazette of the United States 321 (March 9, 1793), quoted in Wilmerding, 67 Pol. Sci. Q. at 117 (cited in note 12).

92. *Id.*

93. Rep. Findley, a strong supporter of the measure, acknowledged the point: I will admit that an executive officer, pressed by some urgent and unexpected necessity, may be induced to depart from the authorized path of duty, and have great merit in so doing. . . . But in such an emergency, the officer so acting will embrace the earliest opportunity to explain the matter and obtain a justification whilst the recent feeling arising from the occasion advocates his cause in the public mind. Has the Secretary done so in the present instance? No; his conduct has been the very reverse.

2 National Gazette 156 (March 13, 1793), quoted in Wilmerding, 67 Pol. Sci. Q. at 118 (cited in note 12).

previous and special sanction by law," he explained to Congress in seeking retroactive approval, "would have lost occasions which might not be retrieved. . . . I trust that the Legislature, feeling the same anxiety for the safety of our country . . . will approve, when done, what they would have seen so important to be done if then assembled."⁹⁴ In the debate that preceded congressional sanction of Jefferson's unauthorized expenditures, members duly emphasized the illegal character of his acts, of course, but they focused on the pivotal question underlying every request for ratification, as expressed on the House floor by the prominent Federalist, Representative Samuel W. Dana of Connecticut: "Would you . . . had you assembled at this time, with a knowledge of all the existing circumstances—would you have authorized these expenses to be incurred."⁹⁵ But if Congress did not share the president's perception of emergency, or the acts that he performed to meet it—if, indeed, "the Legislature condemns the procedure," Dana added, then "the officers must bear the loss."⁹⁶

The importance ascribed by the Founders to the practice of retroactive ratification, and its rationale, were underscored in Jefferson's correspondence. In 1807, when confronted with the Burr conspiracy, Jefferson wrote: "[o]n great occasions every good officer must be ready to risk himself in going beyond the strict line of the law, when the public preservation requires it; his motives will be a justification."⁹⁷ Whether or not Congress would grant immunity would hinge on its perception of the officer's "motives" or the "existing circumstances" that defined the emergency. In 1810, Jefferson provided a more detailed analysis of the virtue and value of the doctrine, in terms that anticipated and, perhaps, influenced Lincoln's own views on emergency, when he was asked: "Are there not periods when, in free gov-

94. James D. Richardson, 1 *A Compilation of the Messages and Papers of the Presidents, 1789-1902* at 428 (Bureau of National Literature and Art, 1903).

95. 17 *Annals of Cong.* 827. Congress granted the retroactive ratification in an Act of Nov. 24, 1807. Rep. G. W. Campbell affirmed Rep. Dana's point when he noted that "cases of exigency required extraordinary remedies," and the question before the House was "whether the House would sanction these expenditures or not: whether the exigency of the case would justify them." *Id.* at 829, 824.

96. The "loss" could certainly include impeachment, and removal from office at least for principal officers. See Raoul Berger, *Impeachment: The Constitutional Problems* 56-107 (Harvard U. Press, 1973).

97. Jefferson to W.C.C. Claiborne, Feb. 3, 1807, in Jefferson, 11 *The Writings of Thomas Jefferson* 151 (Andrew A. Lipscomb and Albert E. Bergh, eds., Thomas Jefferson Memorial Association, 1904).

ernments, it is necessary for officers in responsible stations to exercise an authority beyond the law. . . ?”⁹⁸ Jefferson 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.”⁹⁹

But Jefferson fully understood, as seen in the *Chesapeake* episode, that the “law of necessity” did not confer upon the executive any *authority* to violate the Constitution or the laws of the land. Thus, he was at pains to emphasize that an official who assumes the power to act illegally must seek exoneration from Congress:

The officer who is called to act on this superior ground, does indeed risk himself on the justice of the controlling powers of the Constitution, and his station makes it his duty to incur that risk. But those controlling powers, and his fellow citizens generally, are bound to judge [him] according to the circumstances under which he acted

. . . The line of discrimination between cases may be difficult; but the good officer is bound to draw it at his own peril, and throw himself on the justice of his country and the rectitude of his motives.¹⁰⁰

By virtue of its status as the nation’s lawmaking authority, Congress represents, in Jefferson’s words, the “controlling power” which possesses the capacity to make legal an action which was illegal at the time it was undertaken. A presidential claim to such authority would eviscerate the concept of legal restraint, for the president would be governed solely by his own compass; in that event, every question of emergency would be a matter of the executive’s political interest, discretion and will.

It is perhaps testimony to Lincoln’s commitment to constitutional government that while caught in the clutches of America’s

98. Letter from J.B. Colvin to Jefferson, Sept. 14, 1810, quoted in Wilmerding, 67 *Pol. Sci. Q.* at 120 (cited in note 12).

99. Letter from Jefferson to J.B. Colvin, Sept. 20, 1810, in Jefferson, 12 *Writings* at 418 (cited in note 97).

100. *Id.*

gravest crisis, he nevertheless refrained from laying claim to a theory of High Prerogative but, in fact, adhered to the practice and tradition of legislative ratification. In the context of defending the Union after the Confederacy attacked Fort Sumter on April 12, 1861, and initiated the Civil War, President Lincoln, it is familiar, assumed powers not granted to him by the Constitution. While Congress was in recess, Lincoln issued proclamations calling forth state militias, suspending the writ of habeas corpus, and instituting a blockade on the rebellious states. He also spent public funds without congressional authorization.¹⁰¹ When Congress convened, Lincoln explained that his actions, "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."¹⁰² After Congress reviewed the circumstances and concluded that Lincoln had acted out of necessity, it passed an act approving, legalizing, and making valid all "the acts, proclamations, and orders of the President . . . as if they had been issued and done under the previous express authority and direction of the Congress of the United States."¹⁰³

The courts have upheld the authority of Congress to grant immunity to executive officials who have violated the law in the name of emergency. In 1824, in *Appollon*, the Supreme Court for the first time addressed the practice of legislative ratification. The Court levied damages against an executive official for the seizure of a ship and cargo, despite the fact that he acted on the basis of what he perceived to be an emergency. In an opinion for a unanimous Court, Justice Joseph Story wrote:

It may be fit and proper for the government, in the exercise of the high discretion confided to the executive, for great public purposes, to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures which are not found in the text of the laws. Such measures are properly matters of state, and if the responsibility is taken, under justifiable circumstances, the Legislature will doubtless apply a proper indemnity.¹⁰⁴

101. Arthur Schlesinger fairly observed: "No President had ever undertaken such sweeping action in the absence of congressional authorization. No President had ever challenged Congress with such a massive collection of faits accomplis." Schlesinger, *The Imperial Presidency* at 59 (cited in note 2).

102. Richardson, 5 *Messages* at 3225 (July 4, 1861) (cited in note 94).

103. 12 Stat. 326 (1861). The Court took judicial notice of the retroactive ratification in the *Prize Cases*, 67 U.S. (2 Black) 635 (1863).

104. *The Appollon*, 22 U.S. (9 Wheat.) 362, 366-67 (1824).

In 1863, in the *Prize Cases*, the Supreme Court upheld the blockade of the southern states that had been ordered by President Lincoln in 1861. The Court, in an opinion written by Justice Robert Grier, held that the “sudden attack” on Fort Sumter constituted a state of war which provided constitutional justification for the blockade, but

If it were necessary to the technical existence of a war, that it should have a legislative sanction, we find it in almost every act passed at the extraordinary session of the Legislature of 1861 And finally, in 1861, we find Congress “*ex majore cautela*,” and in anticipation of such astute objections, passing an act “approving, legalizing, and making valid all the acts, proclamations, and orders of the President . . . as if they had *been issued and done under the previous express authority* and directions of the Congress of the United States.”

Without admitting that such an act was necessary under the circumstances, it is plain that if the President had in any manner assumed powers which it was necessary should have the authority or sanction of Congress, that on the well known principle of law, “*omnis ratihabitio retrotrahitret mandato equiparatur*,” this ratification has operated to perfectly cure the defect.¹⁰⁵

The Founders provided a solution to the problem of emergency. If the president perceives an acute emergency for which there is no legislative provision, he might, by virtue of his high station act illegally and then turn to Congress for ratification of his measures. But there is nothing in either the text or the architecture of the Constitution that suggests or even intimates that the executive possesses an inherent emergency power to violate the law on behalf of the welfare of the nation.

Yet there is some authority although very little in the way of judicial authority—and barely any that can withstand scholarly analysis—that will permit the erection of scaffolding to support a theory of inherent presidential power. Prior to *Youngstown*, advocates of a presidential prerogative adduced three Supreme Court cases which purported to locate in the executive an inherent emergency power to improvise legislative initiatives.

Perhaps the leading case cited by advocates of inherent power, *In re Neagle*, raised the question of whether the U.S. Attorney General, whose actions are imputable to the president,

105. 67 U.S. at 670-71.

had lawfully assigned a U.S. Deputy Marshall, David Neagle, to protect Justice Stephen Field, whose life had been threatened while he was on circuit duty in California.¹⁰⁶ The idiosyncratic fact pattern was, in the Supreme Court's own words, "of so extraordinary a character that it is not to be expected that many cases can be found to cite as authority upon the subject."¹⁰⁷ David Terry, a disappointed litigant, had made violent threats against Justice Field. When Terry attacked Justice Field in a railroad dining car, he was shot and killed by Deputy Marshall Neagle. Neagle was arrested and held on a charge of murder. A petition for a writ of habeas corpus was filed on his behalf to the United States circuit judge. The evidence established justifiable homicide, but the writ could not issue unless Neagle was "in custody for an act done or omitted in pursuance of a law of the United States." It was thus necessary to demonstrate that Neagle had been performing a duty imposed by national law when he killed Terry; otherwise, he would face murder charges in a California courtroom. The ultimate issue, then, hinged on whether the U.S. Attorney General had lawfully assigned Neagle to protect Justice Field. Neagle's attorneys, including the Attorney General, conceded that "[i]t is not pretended that there is any single specific statute making it [the Attorney General's] duty to furnish this protection."¹⁰⁸

In an artful opinion for the Court, Justice Miller finessed the absence of a specific statute. In effect, as a member of the Supreme Court, Justice Field was required by national law to ride circuit, a duty which assumed the presence of a law that provided him with protection in the performance of the duty. At this point, Justice Miller assumed that the absence of a statute did not imply the absence of a law; federal laws might be grounded in a complex of federal legal relations without explicit enactment. Miller stated:

Is this duty [to protect federal officials] limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms*, or does it include 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 Constitu-

106. 135 U.S. 1 (1890).

107. *Id.* at 56.

108. *Id.* at 80.

tion?"¹⁰⁹

For the Court, then, the "nature of the government," or the structure of the Constitution implied an executive power to protect federal officers in the performance of their duties.¹¹⁰ But if the duty to protect a Supreme Court Justice was based on federal law, why did the Federal Marshall require the president's authorization to execute it? The execution of the law lay at the core of his duties which, in fact, the president was powerless to prohibit. And yet the instructions to the Deputy Marshall, from the Attorney General, provided the foundation for Justice Miller's argument about executive power: "The correspondence . . . is sufficient, we think, to warrant the marshall in taking the steps which he did take, in making the provisions which he did make, for the protection and defence of Mr. Justice Field."¹¹¹ This reasoning, however, suggests that the executive created the law that Neagle enforced. Not content to rest its ruling on such a slender reed, the Court, in the end, purported to find sufficient *statutory* authority for the marshall's conduct. Congress, it said, had vested federal marshalls with the same authority possessed by local sheriffs, which the Court found sufficient to justify Neagle's action. This line of reasoning is less than convincing, not the least for its circularity. The sheriff would maintain the peace by enforcing California laws, while the deputy marshall would maintain "the peace of the United States" by enforcing the laws of the United States. Justice Lucius Lamar wrote a forceful dissent, joined by Chief Justice Melville Fuller, in which he anticipated the Court's opinion in the *Steel Seizure Case*: The president is not constitutionally authorized to make laws, which is the exclusive province of Congress. Moreover, the "peace of the United States" did not include the execution of the laws of California.

While there is little clarity, and even less merit in the Court's reasoning, what is clear is that the Court did not recognize a legislative power in the president. But it did want to save Neagle from charges of murder and so it improvised a theory which concluded that the executive simply enforced a law that emerged from the legal structure created by Congress. *In re Neagle* is not the only case that reflects judicial improvisation; judicial artistry can often be found behind the hard cases that

109. *Id.* at 64 (emphasis added).

110. *Id.* at 54-58.

111. *Id.* at 67-68.

make bad law. Such is the price to be paid by the Court so that it may avoid at all costs any attribution to the president of an inherent power to make law.

In re Debs arose out of the famous Pullman strike of 1894 which, behind the leadership of Eugene V. Debs, halted trains drawing Pullman cars in Chicago. Some violence ensued and the result was the physical obstruction of interstate commerce and blockage of the mails in the area surrounding Chicago.¹¹² President Grover Cleveland, over the vigorous protest of the Governor of Illinois, Peter Altgeld, sent troops to Chicago to restore order. At the same time, the U.S. Attorney General sought and obtained an injunction in the federal circuit court against Debs and other union leaders to cease further interference with the mails or with railroads engaged in interstate commerce. The injunction was issued on the theory that the Sherman Act had been violated, and for defiance of the injunction, the defendants were convicted for contempt and sentenced to imprisonment.

When Debs and his colleagues sought a writ of habeas corpus from the Supreme Court, the Court refused to grant the writ, but in its review it ignored the issue of the Sherman Act because, in all probability, it did not take seriously the allegation of the complaint that the defendants were attempting to assume "the entire control of the interstate, industrial and commercial business in which the population of the city of Chicago and of the other communities" along the lines of the roads were engaged.¹¹³ Moreover, the Court, in an opinion by Justice David Brewer, said it preferred to rest its judgment "on the broader ground which has been discussed in this opinion, believing it of importance that the principles underlying it should be fully stated and affirmed."¹¹⁴

There was no statute that expressly prohibited the alleged conduct or authorized the president to seek an injunction. As a consequence, the Court might have anticipated the criticism of the *Steel Seizure* Court that the president was enforcing a policy of his own creation. But the Court determined that the president was enforcing a complex of statutes and constitutional norms, which required protection of interstate commerce: "As, under the Constitution, power over interstate commerce and the transportation of the mails is vested in the national government,

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

113. *Id.* at 567.

114. *Id.* at 600.

and Congress by virtue of such grant has assumed actual and direct control, it follows that the national government may prevent any unlawful and forcible interference therewith."¹¹⁵

No one doubted that the "nation" and the "national government" had the power to protect interstate commerce and the mail from obstruction, but what were the *legal* grounds for the president's action? The Court observed that Congress might have passed a statute making obstruction a criminal act but, it asked, "is that the only remedy?" Beyond that, the Court said, "[t]he entire strength of the nation may be used," which implied that the president might use "the army of the Nation, and all its militia" to remove the obstruction to interstate commerce.¹¹⁶

This reasoning of the Court has been understood to stand for the proposition that the president has *inherent* power to use the military against breaches of "the peace of the United States." It may be viewed that way, but such a conclusion is gratuitous and overly broad. Debs's attorneys conceded the premise, but there was statutory authority for President Cleveland's decision to deploy the troops, statutory authority that he invoked, although not in a timely manner. Since 1792, with the passage of the Militia Act, the president has enjoyed the authority to use the military to enforce federal law when the execution of the laws of the United States is obstructed in any state by a combination too powerful to be suppressed by judicial proceedings or by the United States Marshal, if this fact is certified by a federal judge. But before using military force to prevent such an obstruction, the president must by proclamation "command such insurgents to disperse, and return peaceably to their respective abodes, within a limited time."¹¹⁷ In 1795, the statute was modified by the elimination of the judicial notice requirement.¹¹⁸ In another modification of the Act in 1807, Congress provided that in all cases in which the militia might be summoned for the purpose of suppressing obstruction of the laws of the United States, that the president would judge the necessity of employing such military force. However, the law retained the requirement that a president must first issue a proclamation calling upon the insurgents to disperse. When President Cleveland deployed troops to break the Pullman Strike over the protest of Governor Altgeld, on the altogether unpersuasive claim that the enforcement of

115. *Id.* at 581.

116. *Id.* at 581, 582.

117. 1 Stat. 264 (1792).

118. 1 Stat. 424 (1795).

federal laws was being obstructed, he forgot to issue the proclamation. Cleveland issued the proclamation in compliance with the statute five days later, but only after the Governor of Oregon reminded him of his duty in a sharp telegram.

It appears then that President Cleveland was acting on the basis of statutory authority, and not on a claim of inherent power. Congress had delegated to the president the authority to use military force to execute the laws in the face of powerful obstructionist forces. There is no reason to believe that the Court was intimating the presence of an inherent power to use force that conflicted with the constitutional power of Congress to govern the use of military force. Indeed, even if one embraces the concept of a "peace of the United States" that the president has a duty to protect, it is a concept that must be viewed in the context of a Constitution that assigns to Congress alone both the law-making power and the authority to govern the use of military force, unless one invokes the vague notion of an extra-constitutional emergency power, which the *Debs* Court avoided altogether. And within the context of the Constitution, the claim that the president possesses an inherent protective power—drawn perhaps from some combination of constitutional norms and statutory authorizations—to employ the military if necessary to execute the laws applies, as we have seen, only when powerful obstructionist forces overwhelm the capabilities of the civil process.

In sum, the fact that Congress has exercised its constitutional power to govern the use of military force through legislation statutorily precludes any claim of an inherent presidential power to use force to execute the laws. President Cleveland understood this limitation, for he invoked statutory authority for the deployment of troops in response to the Pullman strike. Of course, his decision rested on specious reasoning. Governor Altgeld, it will be recalled, objected to the use of force on the ground that no breakdown in the civil process had occurred. What had occurred was hysteria, panic among corporate chiefs, captains of industry and the affluent, who believed the strike marked the rise of Bolshevism in America.

There remained in *Debs* the unresolved question of why the Court said that the Attorney General of the United States had standing to institute a suit to protect interstate commerce and the mails from obstruction when there was no act of Congress that prohibited private obstruction of either the mails or interstate commerce. Justice Brewer stated the incontestable: the

“nation” and “the national government” possess the authority to protect interstate commerce and the mails against obstruction. Congress had legislative authority to prohibit private acts of obstruction in these areas, but it had not acted; the absence of a prohibition left the president with nothing to enforce. Justice Brewer seemed to say that the executive might create a law to protect interstate commerce and the mails which is enforceable by an injunction. But the implausibility of his position led Brewer, as it had Justice Miller in *Neagle*, to defend his argument about executive power with the claim that there was, indeed, legislative authority for the injunction. Apparently, the private obstruction of highways is a public nuisance, an act which the government may enjoin.¹¹⁹ This argument is unpersuasive, but it is at least superior to the claim that the executive might improvise a law. The executive power of the president applies to the execution of national laws. As we have seen, the president may enforce state laws only when the state legislature, or the governor if the legislature cannot be convened, requests protection against domestic violence. Not only was there no such request in *Debs*, but, as the Court has noted, the law of nuisance is a state law.¹²⁰

For all of the confusion surrounding *Debs*, at least it may be said that the Court attributed no substantive power to the president. It did not purport to locate a law-making power in the president, but only standing to sue. Even then the injunction must be issued by the courts, and not by the president.

United States v. Midwest Oil Co., decided in 1915, has been urged in support of the theory of inherent executive power.¹²¹ However, there is nothing in the opinion, or even in the dissent for that matter, to suggest that the Court embraced this theory. *Midwest Oil* involved an 1897 statute, in which Congress had provided that certain government lands containing mineral oils were “free and open to occupation, exploration and purchase by citizens of the United States [for a nominal fee] . . . under regulations prescribed by law.”¹²² In 1909, the Secretary of the Interior warned President Taft that oil lands were being depleted so rapidly that the United States would be obliged to repurchase what had been its own oil at higher, market prices, and he advised suspension of further grants as a conservation measure. Two day

119. *In re Debs*, 158 U.S. 591-93.

120. *United States v. Guest*, 383 U.S. 745, 769 (1966).

121. *Midwest Oil*, 236 U.S. 459 (1915).

122. 29 Stat. 526 (1897) (quoted in *Midwest Oil*, 236 U.S. at 566).

later, President Taft issued a proclamation and withdrew some of the California and Wyoming lands "[i]n aid of" legislation that would be proposed.¹²³ Taft's withdrawal order was challenged as a violation of the statute.

In his opinion for the Court, Justice Lamar upheld the withdrawal order, but based his opinion entirely on statutory grounds. Justice Lamar noted that the practice of making withdrawals dated back to the early days of the republic. More than 250 executive orders of this kind had been issued, and Congress, aware of the practice, tacitly approved of it. Lamar stated: "Its silence was acquiescence. Its acquiescence was equivalent to consent to continue the practice until the power was revoked by some subsequent action by Congress."¹²⁴ The Court might have improved its reasoning by arguing that, under the doctrine of "administrative construction" Congress had passed the Act of 1897 with full knowledge of the executive's interpretation of the statute, and that it had tacitly adopted that interpretation. In any event, the Court held that Taft had acted on the basis of the "implied consent of Congress."¹²⁵ There was no indication from the Court that the president possessed any constitutional authority to order the withdrawal of lands.

In the spirit of being thorough, there is an obligation to examine the Court's opinion in *Myers v. United States* which, although it has lost most of its currency and has been dismissed as "an embarrassment to the Supreme Court," purported to identify in the president an inherent power of removal.¹²⁶

In *Myers*, the Supreme Court, in an opinion by Chief Justice Taft, drew from the president's duty to "take care that the laws be faithfully executed," and the so-called "Decision of 1789," the conclusion "that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power

123. *Midwest Oil*, 236 U.S. at 467.

124. *Id.* at 481. The doctrine of administrative construction, which represents congressional approval of administrative construction of a statute, precisely because Congress is aware and knowledgeable of the construction, is distinguishable from the claim that by virtue of its silence Congress has approved of an administrative act. For a withering criticism of the practice of drawing legislative consent from its silence, see Joel L. Fleishman and Arthur H. Aufses, *Law and Orders: The Problem of Presidential Legislation*, 40, No. 3, L. & Contemp. Probs. 1,16-19 (Summer, 1976); Paul Gewirtz, *The Courts, Congress and Executive Policy-Making: Notes on Three Doctrines*, *id.* at 46, 79.

125. 236 U.S. at 478

126. *Myers*, 272 U.S. at 52. For commentary as to why *Myers* has been viewed as an embarrassment," see William 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, 803 (1975).

of removing those for whom he can not continue to be responsible."¹²⁷ The 1789 congressional debate involved the question of the president's power to remove the Secretary of Foreign Affairs, but Taft deduced from the debate an unlimited presidential power of removal that extended to *all* executive officers.¹²⁸ This broad interpretation of an executive removal power which, as Louis Fisher has pointed out, is "too broad, in fact, to withstand scholarly analysis and subsequent Court holdings," represented a departure from Taft's previous opinion in 1922 in *Wallace v. United States*.¹²⁹ In *Wallace*, he held that "at least in the absence of restrictive legislation, the President, though he could not appoint without the consent of the Senate, could remove without such consent in the case of any officer whose tenure was not fixed by the Constitution."¹³⁰ In *Myers*, Taft determined that an act of Congress which required the advice and consent of the Senate as a precondition to the removal of a postmaster was an unconstitutional interference with the president's "unrestricted power."¹³¹ Reliance on the Decision of 1789, as Dean Alfange has observed, "seems greatly misplaced."¹³² "[T]he record in 1789," as Louis Fisher has justly noted, "reveals deep divisions among members of the House and close votes on the Senate side. Moreover, many of the legislators supported presidential power because the office in question was Secretary of Foreign Affairs, an agent of the President and executive in nature. There was no reason why that principle had to be extended to postmasters."¹³³ There is merit in the argument that the president should not be required to retain a department head in whom he has lost confidence, for, as Professor Alfange has pointed out, "that would severely interfere with his ability to make and execute policies in areas in which he has discretion to do so. Yet very few executive officials work so closely with the President or are responsible for insuring that the President's political discretion is made effective. Many, in fact, are statutorily assigned duties and responsibilities with which the President has no power to inter-

127. *Myers*, 272 U.S. at 117.

128. *Id.* at 134.

129. Fisher, *Constitutional Conflicts Between Congress and the President* at 62 (cited in note 2).

130. *Wallace v. United States*, 257 U.S. 541, 544 (1922) (emphasis added). The debate in the House of Representatives is conveniently summarized in Louis Fisher, *Constitutional Conflicts Between Congress and the President* at 60-66 (cited in note 2).

131. *Myers*, 272 U.S. at 134.

132. Dean Alfange, Jr., *The Supreme Court and the Separation of Powers: A Welcome Return to Normalcy?* 58 *Geo. Wash. L. Rev.* 668, 696 (1990).

133. Fisher, *Constitutional Conflicts* at 61 (cited in note 2).

fere. And it is here that Congress's power to control by legislation the activity of the executive branch becomes most clear."¹³⁴

Chief Justice Taft's assertion of an unlimited removal power as a derivative of the Take Care Clause suffers from similar infirmities. We have known, at least since *Marbury v. Madison*, that Congress may impose statutory duties and responsibilities on members of the executive branch beyond control of the executive. It follows, therefore, as the Court noted in 1838 in *Kendall v. United States*, that not "every officer in every branch of [the executive] department is under the exclusive direction of the President."¹³⁵ However, if not every executive officer "is under the exclusive direction of the President," then Taft's reasoning in *Myers* that the president must, as a matter of constitutional principle, possess an "unrestricted power" of removal over every executive officer is insupportable. Taft recognized the untenability of his position, but anomaly drove him to a remote outpost of judicial reasoning. He said that although

[T]here may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance. . . . [E]ven in such a case [the executive] may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised. Otherwise he does not discharge his own constitutional duty of seeing that the laws be faithfully executed."¹³⁶

Taft's reasoning seems to mean that while Congress may by statute vest duties and responsibilities in an executive officer, the executive may remove that official for performance of the statutory duties. Therefore, Taft seems to conclude that: the president's duty to faithfully execute the laws implies the "power to insure that they are not faithfully executed."¹³⁷ It is little wonder that the *Myers* opinion has been described as an "embarrassment" to the Court, and it is unsurprising as well that it was overturned less than a decade later in *Humphrey's Executor v. United States*.¹³⁸

134. Alfange, 58 Geo. Wash. L. Rev. at 696 (cited in note 132).

135. *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 610 (1838).

136. *Myers*, 272 U.S. at 135.

137. Alfange, 58 Geo. Wash. L. Rev. at 697 (cited in note 132).

138. 295 U.S. 602, 626 (1935).

For all of its failings and deficiencies, at least the doctrine of inherent power perceives presidential power as constitutionally limited. There is but a single decision—*United States v. Curtiss-Wright Exp. Corp.*—that attempts to adduce an *extra-constitutional* basis for presidential action.¹³⁹ *Curtiss-Wright* gave rise to the narrow issue of the constitutionality of a joint resolution that authorized President Franklin D. Roosevelt to prohibit the sale of arms to Bolivia and Paraguay, then involved in armed conflict in Chaco, if it would “contribute to the re-establishment of peace between those countries.”¹⁴⁰ The Court, in an opinion by Justice George Sutherland, upheld the delegation against the charge that it was overly broad. Sutherland, however, strayed from the delegation question and, in some indefensible dicta, imparted an unhappy legacy—the theory that the external sovereignty of the nation is vested in the executive, and not derived from the Constitution.

Sutherland’s theory of inherent presidential power stems from his bizarre reading of Anglo-American legal history. According to Sutherland, domestic and foreign affairs are different, “both in respect of their origin and their nature.” The “domestic or internal affairs” are leashed by constitutional limitations. But authority over foreign affairs is not contingent upon constitutional grants since the powers of external sovereignty “passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America.”¹⁴¹ Sutherland’s historical excursion is without grounded in history. Scholars have exposed the poverty of his thesis by demonstrating that in 1776 states were sovereign entities. Conclusive evidence is found in the Articles of Confederation, approved by the Continental Congress in November 1777 and ratified in March 1781. Article II of that governing document stated: “Each State retains its Sovereignty, freedom and independence, and every power . . . which is not . . . expressly delegated to the United States, in Congress assembled.” Moreover, in Article III, it was provided, “The said states hereby severally enter into a firm league of friendship with each other, for their common defense. . . .” Finally, Article IX stated:

139. 299 U.S. 304 (1936). This discussion is drawn from Adler, *Court, Constitution and Foreign Affairs*, in Adler and George, *The Constitution and the Conduct of American Foreign Policy* at 19-56 (cited in note 2), and Adler, *Warmaking* at 29-35, (cited in note 3).

140. 299 U.S. 304, 312.

141. *Id.* at 315-16.

"The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war . . . [and of] entering into treaties and alliances."¹⁴² Those provisions make it pellucidly clear that the states entered into a "league of friendship"; they did not attempt to create a "sovereign" or "corporate" body. Indeed, the thirteen sovereign states, "which emerged from the principles of the Revolution," reluctantly *delegated* powers to the Continental Congress. This reluctance, Randolph explained to the Constitutional Convention, was attributable to the "jealousy of the states with regard to their sovereignty."¹⁴³ Thus the "states, in their highest sovereign capacity," expressly delegated powers to the Continental Congress, including the enumeration of Article IX, of the war and treaty powers, the specific assignment of which, by itself, is devastating to Sutherland's historical thesis.¹⁴⁴

Even if we were to assume that the power of external sovereignty had been by some method transferred directly from the Crown to the Union, it remains to be explained why that power would be vested in the president. As Justice Felix Frankfurter observed in *Youngstown*, "[T]he fact that power exists in the Government does not vest it in the President."¹⁴⁵ In fact, the Supreme Court has ruled on several occasions that the sovereign power in foreign affairs is held by Congress.¹⁴⁶ At any rate, there is nothing in Sutherland's theory that would explain the location of this power in the presidency.

Finally, Sutherland's claim that the conduct of foreign policy is not restricted by the Constitution. James Madison made it clear that foreign relations powers, like domestic powers, are derived from the Constitution when he wrote in *Federalist 45* that "the powers delegated by the proposed Constitution are *few and*

142. See, e.g., Charles Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 *Yale L.J.* 1, 3-5 (1973); David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 *Yale L.J.* 467 (1946).

143. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 470 (1793) (Jay, C.J.); Farrand, 1 *Records* at 19 (cited in note 44).

144. In *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 675, 720 (1838), the Court held that as a result of the revolution, the authority of the Crown and parliament devolved on the "states in their highest sovereign capacity." Raoul Berger has observed that the grant to Congress of the warmaking and treaty powers "alone undermines Sutherland's historical premise that these powers were derived from 'some other source' than the several states." Raoul Berger, *The President's Unilateral Termination of the Taiwan Treaty*, 75 *Nw. U. L. Rev.* 591-94 (1980).

145. *Youngstown*, 343 U.S. at 604.

146. See *Chae Chan Ping v. United States* (Chinese Exclusion Case), 130 U.S. 581, 603-04 (1889); *Perez v. Brownell*, 356 U.S. 44, 57 (1958).

defined . . . [they] will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce."¹⁴⁷ In addition, we we have seen, there is nothing in the Convention debates to suggest even the slightest flirtation with the theory of an undefined reservoir of presidential power.

Since *Curtiss-Wright* the Court consistently has reaffirmed the principle that government powers are grounded in the Constitution. In the *Steel Seizure* case, Justice Hugo L. Black, speaking for the Court, delivered a weighty rebuke to the assertion of extraconstitutional "executive power."¹⁴⁸ And Justice Jackson sharply dismissed Sutherland's discussion of inherent presidential power as mere "dictum."¹⁴⁹ In *Reid v. Covert*, the Court rejected the claim that the exercise of foreign policy authority is beyond the reach of the Constitution's due process clauses.¹⁵⁰ In his opinion for the Court, Black stated: "The 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."¹⁵¹

On the eve of the *Steel Seizure Case*, there was nothing in the annals of Supreme Court decisions that sustained a theory of emergency power that would justify presidential violation of constitutional provisions, and no decision that even looked in that direction, for such an opinion would scuttle our jurisprudence. As we have seen, however, courts had on occasion performed feats of improvisation in order to sustain presidential action, but those contortions speak volumes for the judiciary's recognition of the central importance of executive subordination to the rule of law. Even the grave legal and constitutional crises that arose from the Civil War, including President Lincoln's self-confessed illegal actions, were viewed, treated and resolved through constitutional mechanisms. Some of Lincoln's actions—the suspension of habeas corpus, for example—were denounced by courts, and not sanctioned in the name of necessity or emergency. Other military actions were sustained by courts that took judicial notice of the fact that Congress passed legislation conferring retroactive authorization on Lincoln's actions, which made his illegal acts legal. This principle of retroactive authorization, which was drawn from English legal history during our

147. Federalist 45 (Madison) 298, 303 (cited in note 65).

148. *Youngstown*, 343 U.S. at 587.

149. *Id.* at 635-36.

150. 354 U.S. 1 (1957).

151. *Id.* at 5-6.

founding period primarily, it should be said, for its virtue in recognizing and ensuring the principle that the legislature shall remain the lawmaker, maintains a semblance of constitutional government. And while not a perfect legal tool for the rationalization of unconstitutional actions, the only available alternative rationalization is the doctrine of necessity, a rationale that is foreign to our constitutional system, for it would exalt the executive abuse above the rule of law. Justice Jackson, in the *Steel Seizure* case, rejected the argument of necessity, the assertion that emergency situations license the executive to meet them as he pleases, for “[s]uch power either has no beginning or it has no end.”¹⁵²

From the beginning, the courts had held that the executive is bound by the law, and powerless to circumvent it, a judicial legacy that echoes James Wilson’s observation that, “the most powerful magistrate should be amenable to the law . . . No one should be secure while he violates the constitution and the laws.”¹⁵³ Moreover, the president’s acts, which must be grounded in either constitutional or legislative authorization, are within the compass of judicial review. In *Marbury v. Madison*, William Marbury sued the Secretary of State in his capacity as custodian of records in order to obtain a commission as justice of the peace for the District of Columbia; the commission had been duly signed by President John Adams before he left office. As part of his statutory obligations, it was supposed that the Secretary of State, James Madison, was required to deliver the commission to Marbury. Chief Justice Marshall agreed that, “a mere political act, belonging to the executive department alone, for the performance of which entire confidence is placed by our constitution in the supreme executive,” . . . could not be controlled by statute, but added that not “every act of duty, to be performed in any of the great departments of government, constitutes such a case”¹⁵⁴ When discretionary political powers are exercised, the acts of a subordinate executive officer are the president’s acts, “and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion.” However, Marshall declared: “[W]hen the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to

152. *Youngstown*, 343 U.S. at 653.

153. James Wilson, 1 *The Works of James Wilson* 425 (Robert Greeb McCloskey, ed., The Belknap Press of Harvard U. Press, 1967).

154. *Marbury v. Madison*, 5 U.S. (1 Cranch) at 164

perform certain acts; . . . he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others."¹⁵⁵ Therefore, the president could not lawfully interfere with the Secretary's performance of his statutory duty, and it was presumed that he had not done so. *Marbury* was entitled to his commission. The rationale behind the prohibition on presidential interference with an executive officer's performance of his statutory responsibility, has been ably supplied by Dean Alfange Jr.: "If the President has the constitutional authority, as the person to whom the 'executive power' is vested by the Constitution, to instruct any executive officer to disregard statutory obligations, then the power to 'take care that the laws be faithfully executed' includes the power to insure that they are not faithfully executed."¹⁵⁶ That cannot be the meaning of the Constitution, but if it were, "no barrier would remain to the executive ignoring any and all Congressional authorization."¹⁵⁷ In 1804, in *Little v. Barreme*, Chief Justice Marshall held invalid a presidential order to seize a ship contrary to the terms of a law passed by Congress.¹⁵⁸ In 1806, in *United States v. Smith*, Justice William Paterson, who had been a member of the Constitutional Convention, wrote an opinion while riding circuit, and declared: "The president of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids."¹⁵⁹

The principle affirmed in *Marbury* that the president may not forbid an officer to perform a duty imposed upon him by Congress, was reaffirmed in 1838, in *Kendall v. United States*.¹⁶⁰ In *Kendall*, the Court ruled that the Postmaster General, Amos Kendall, could be required by statute to pay the full amount that a government contractor claimed was owed him for services provided, despite an order from President Jackson forbidding Kendall from paying the bill. The Court, in an opinion by Chief Justice Roger Taney, reiterated the distinction between the power of the president in the political matters in which he was vested with discretionary authority under the Constitution, and

155. *Id.* at 166.

156. Alfange, 58 *Geo. Wash. L. Rev.* at 697 (cited in note 132).

157. Wormuth and Firmage, *To Chain the Dog of War* at 163 (cited in note 3).

158. 6 U.S. (2 Cranch) 170 (1804).

159. *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342).

160. 37 U.S. 524 (1838).

other matters in which legal obligations were imposed by Congress on executive officers. Taney wrote that

it would be an alarming doctrine, that congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the president.¹⁶¹

And he added, emphatically, “[t]o contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible.”¹⁶²

It would seem beyond dispute that presidential power is circumscribed by the Constitution. But constitutional limitations often have been challenged by assertive presidents in pursuit of political goals and policy agendas. This certainly was true of the Truman Administration, which not only held a capacious view of the executive powers, but which undertook to exercise those powers in an extravagant manner that surpassed previous claims of presidential power.

IN THE SUPREME COURT

The refusal of Congress to adopt an amendment to the Taft-Hartley Act that would have authorized presidential seizure of private property in emergency cases framed President Truman’s assertion of inherent power.¹⁶³ “The authoritatively expressed purpose of Congress to disallow such power from the President,” wrote Justice Felix Frankfurter, “could not be more decisive if it had been written into . . . the Labor Management Relations Act.”¹⁶⁴ In effect, Congress had imposed a statutory prohibition

161. *Id.* at 610.

162. *Id.* at 612.

163. The Taft-Hartley Act provided an alternative to the seizure or condemnation of property. Labor Management Relations Act, 29 U.S.C.A. §§ 176-180, 61 Stat. 136 (1947). During the debate in Congress, Sen. Robert Taft stated: “We did not feel that we should put into the law, as part of the collective-bargaining machinery, an ultimate resort to compulsory arbitration, or to seizure, or to any other action.” 93 Cong. Rec. S3835 (daily ed., Apr. 23, 1947). An effort to add seizure authority to the Act was defeated. *Id.* at 3637-45.

164. *Youngstown*, 343 U.S. at 602. Justice Jackson agreed: “Congress has not left seizure of private property an open field but has covered it by three statutory policies inconsistent with this seizure.” *Id.* at 639. Justice Burton stated: “Congress . . . has prescribed for the President specific procedures, exclusive of seizure, for . . . meeting the present type of emergency.” *Id.* at 660. Justice Clark added: “where Congress has laid

on executive seizure. It bears reminder then that Truman did not adduce an inherent power in support of the less ambitious proposition that the president enjoys a residual power to act in the absence of legislation, but on behalf of the bolder contention that the executive possesses, in Lockean terms, a prerogative power to act “against legislative prescription.”

Truman’s assertion of an inherent power—essentially a claim to improvise legislation—found sympathy in Chief Justice Fred Vinson’s dissenting opinion, joined by Justices Stanley Reed and Sherman Minton. Vinson’s dissent followed a two-track approach; he advanced constitutional text and history, but in each case, as we shall see, his arguments found an effective antagonist in Justice Frankfurter. Vinson’s first effort involved an effort to employ the Take Care Clause. He noted that Congress had engaged the nation in various military programs pursuant to U.S. foreign relations interests: The Truman Plan, the Marshall Plan and the Mutual Security Act of 1951; it had reinstated the draft and had passed substantial funding measures for national security and defense; the president had taken the nation into the Korean War; and the Senate had approved the United Nations Charter, the North Atlantic Treaty and other defense pacts.¹⁶⁵ Vinson declared: “The President has the duty to execute the foregoing legislative programs. Their successful execution depends upon continued production of steel and stabilized prices for steel.”¹⁶⁶ Accordingly, the president might seize the steel industry and maintain production. Chief Justice Vinson’s argument approximated the argument promoted in *Neagle* and *Debs*. The Court’s opinion in *Midwest Oil* was not helpful, and so he mined the government’s brief in that case and quoted liberally from its reasoning and passages on the ground that it was “valuable because of the caliber of its authors,”¹⁶⁷ one of whom, ironically, had been Solicitor General John W. Davis, who appeared before the Court in *Youngstown* on behalf of the steel companies.¹⁶⁸ The government’s brief in *Midwest Oil* had, in fact, adduced a theory of inherent executive power.

down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures.” *Id.* at 662.

165. *Youngstown*, 343 U.S. at 667-72.

166. *Id.* at 672.

167. *Id.* at 693.

168. *Id.* There is further irony to be found in the fact that Justice Jackson had to face arguments that he had developed as Attorney General on behalf of President Franklin Roosevelt that were contrary to his opinion in *Youngstown*. See *infra*, text accompanying notes 222-223.

There was, as Vinson himself noted, no "specific statute authorizing seizure of the steel mills as a mode of executing the laws . . ." ¹⁶⁹ But the "absence of a specific statute," ¹⁷⁰ he reasoned, did not prevent the president from executing the "mass of legislation" ¹⁷¹ in accordance with his duties under the Take Care Clause, "as he sees fit without reporting the mode of execution to Congress . . ." ¹⁷² The sole purpose of President Truman's action, Vinson wrote, was "to faithfully execute the laws by acting in an emergency to maintain the status quo, thereby preventing collapse of the legislative programs until Congress could act." ¹⁷³

In his effort to save Truman's seizure of the steel mills, Francis D. Wormuth explained, Chief Justice Vinson sought "to invent a second necessary and proper clause. According to the Constitution, Congress may pass all laws necessary and proper for carrying into effect its delegated powers; according to Vinson, the President may pass all laws necessary and proper for carrying into effect policies endorsed by Congress." ¹⁷⁴ But as Vinson recognized, his course faced an insuperable obstacle in the shape and form of the majority's embrace of a fundamental constitutional principle that Justice Oliver Wendell Holmes had articulated in his famous dissent in *Myers v. United States*: "The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power." ¹⁷⁵ Chief Justice Vinson's argument that the president might execute legislative programs by measures quite beyond the enforcement scheme envisioned by Congress amounts to the proposition that inherent executive power carries with it an inherent legislative power. But such a proposition would eviscerate the doctrine of separation of powers and deprive Congress of its fundamental legislative power. "Even if one concedes," as Professor David Currie has observed, "that the President may not be limited strictly to enforcement methods spelled out by statute, however, a line must be drawn somewhere if anything is to remain of the principle that only Congress shall make the laws." ¹⁷⁶ The ques-

169. *Youngstown*, 343 U.S. at 701.

170. *Id.*

171. *Id.* at 702.

172. *Id.* at 703.

173. *Id.*

174. Francis D. Wormuth, *The Nixon Theory of the War Power: A Critique*, 60 Cal. L. Rev. 623, 672 (1972).

175. 272 U.S. at 177.

176. David P. Currie, *The Constitution in the Supreme Court: The Second Century*,

tion remains: which branch of government is vested with the authority to draw that line? Justice Holmes's view, which echoed the Framers' conception of executive power, was clear enough: the executive power is a power and a duty to execute the laws, and the president is dependent upon Congress for the means to execute the laws. But Chief Justice Vinson would allow the president, under guise of an "emergency power," to improvise the scheme of enforcement and the point of distinction between legislative and executive power. This surely is a doctrine based on shifting sands. Paul Kauper rightly stated: "Perhaps in a time of emergency it might appear appropriate to conscript manpower for industry, to levy additional taxes to finance the legislative program, to impose more severe penalties on those who violate the laws. But it would hardly be contended that presidential prerogative would extend to these areas of legislative authority."¹⁷⁷ Although one may hope with Kauper that no president would contend that, as a matter of prerogative, the executive might, among other actions, levy taxes, such is the mischief inherent in the concept of a presidential emergency power that we are entitled to ask about its limitations. Chief Justice Vinson denied that President Truman's seizure of the steel mills was an exercise in "unlimited executive power"¹⁷⁸ but, in any case, he determined that the governing standard for presidential implementation of statutory schemes was simply left to the president's discretionary authority—"as the he sees fit."¹⁷⁹

A presidential claim, like Truman's, of authority to improvise legislation to substitute for legislation passed by Congress amounts to an assertion of a power to revise the Constitution. By what authority may a president lay claim to a revisory power? By what transformational means may a president engage in an act of self-conferral of the legislative authority? Even Alexander Hamilton, the darling of executive enthusiasts for his advocacy of a "strong" presidency, nevertheless stated that "a delegated authority cannot alter the constituting act, unless so expressly authorized by the constituting power. An agent cannot new-model his commission."¹⁸⁰ An effort by the executive to expand his authority without resort to the people attempts to cir-

1888-1986 at 368 (U. of Chicago Press, 1990).

177. Kauper, 51 Mich. L. Rev. at 181 (cited in note 12).

178. *Youngstown*, 343 U.S. at 701.

179. *Id.* at 703.

180. Alexander Hamilton, 6 *The Works of Alexander Hamilton* 166 (Henry Cabot Lodge, ed., G.P. Putnam's Sons, 1904).

cumvent the Constitution's amendatory clause. What is at stake here is nothing less than the rule of law, the very marrow of which consists of presidential subordination to the Constitution. The executive is a creature of the Constitution and has only that power granted to it by the Constitution;¹⁸¹ it may not undertake actions which it is not authorized to undertake and it must not do what it is forbidden to do. President Truman's claim to an emergency power to override what in Justice Frankfurter's opinion was a congressional prohibition on executive seizure of property ignores Article V and substitutes an amendment by presidential revision for the solemn deliberation of Congress and the people, as required by the amendatory machinery. Hamilton stated in *Federalist No. 78*: "Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge, of their sentiments, can warrant their representatives in a departure from it, prior to such an act."¹⁸²

At its foundation, President Truman's claim of a revisory authority, to borrow from Edward S. Corwin, sought "to set aside, not a particular clause of the Constitution, but its most fundamental characteristic, its division of power between Congress and the President, and thereby gather into his own hands the combined power of both."¹⁸³ The fusion of the legislative and executive powers, it is familiar, was antithetical to the Framers' perception of the principal virtue of the doctrine of separation of powers—the prevention of oppression, and even tyranny.¹⁸⁴ As Madison explained in *Federalist No. 48*, since "power is of an encroaching nature . . . it ought to be effectually restrained from passing the limits assigned to it."¹⁸⁵ But limita-

181. In *Reid v. Covert*, Justice Black wrote for the Court: "The 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." 354 U.S. 1, 5-6 (1957).

182. *Federalist 78* (Hamilton) 502, 509 (cited in note 65). James Iredell stated: "Where any act of the government is performed, it is not an act of the government merely, but in reality an act of the people whose trustee the government is . . . [The government's] powers . . . all originate from a system the people themselves have agreed to be governed by, and derive the whole of their validity from such system voluntarily established." Griffith J. McKee, 2 *Life and Correspondence of James Iredell* 411-12 (Peter Smith, 1949).

183. Edward S. Corwin, *Total War and the Constitution* 65 (Alfred A. Knopf, 1947).

184. Justice Black stated: "Ours is a government of divided authority on the assumption that in division there is not only strength but freedom from tyranny." *Reid v. Covert*, 354 U.S. at 40.

185. *Federalist 48* (Madison) 321 (cited in note 65).

tions imposed by the Constitution, primarily erected by the enumeration of powers, are reduced to mere parchment by the proposition of a presidential revisory power that redistributes the powers allocated by the Constitution. Fortunately, American law has not adopted such a mischievous proposition. In 1935, in *Schechter Poultry Corp. v. United States*, Chief Justice Charles Evans Hughes wrote for the Court: "Extraordinary conditions do not create or enlarge Constitutional power."¹⁸⁶ Nor does the desire for an additional power—even a presidential emergency power—create it. As Madison said of the treaty power, "Had the power of making treaties, for example, been omitted, however necessary it might have been, the defect could only have been lamented, or supplied by an amendment of the constitution."¹⁸⁷ Justice Frankfurter reaffirmed Madison's observation in his concurring opinion in *Youngstown*:

The utmost that the Korean conflict may imply is that it may have been desirable to have given the President further authority, a freer hand in these matters. Absence of authority in the President to deal with a crisis does not imply want of power in the Government. Conversely the fact that power exists in the Government does not vest it in the President. The need for new legislation does not enact it. Nor does it repeal or amend existing law.¹⁸⁸

Chief Justice Vinson's second argument in support of President Truman's seizure of the steel industry involved historical practice. He asserted the existence of a substantial record of presidential seizures of property as an exercise not only of executive leadership, but of the president's duty to faithfully execute the laws of the land, with or without legislative authorization. Vinson contended that the record included actions by the likes of George Washington, Abraham Lincoln and Franklin D. Roosevelt.¹⁸⁹ Justice Frankfurter proved, again, to be formidable nemesis. After a comprehensive review and examination of the record, Frankfurter concluded: "Down to the World War II period, then, the record is barren of instances comparable to the one before us."¹⁹⁰ Frankfurter added to his opinion a lengthy appendix that summarized the instances of seizures of industrial plants by the President, from the Civil War through World War

186. 295 U.S. at 528.

187. 1 Annals of Cong. 503 [1789] 1834.

188. 343 U.S. at 603-04.

189. *Id.* at 683-700.

190. *Id.* at 612.

II.¹⁹¹ His thorough analysis ably demonstrated that there were only three “executive assertions of the power of seizure in circumstances comparable to the present” which were “in the six-month period from June to December of 1941.”¹⁹² Frankfurter, however, determined, “[w]ithout passing on their validity . . . that these three isolated instances do not add up, either in number, scope, duration or contemporaneous legal justification” to adduce support for Truman’s seizure of the steel industry.¹⁹³

Chief Justice Vinson’s theory of an inherent presidential power was rejected by the six justices who formed a majority. In his opinion for the Court, which was grounded in separation of powers principles, Justice Hugo Black justly stated:

The President’s power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied. Indeed, we do not understand the Government to rely on statutory authorization for this seizure.¹⁹⁴

Since the president lacked statutory authorization, according to Black, the necessary authority “must be found in some provision of the Constitution.”¹⁹⁵ But as Black noted, Truman had “not claimed that express constitutional language grants this power to the President. The contention is that presidential power should be implied from the aggregate of his powers under the Constitution,” with “particular reliance” on the Vesting Clause, the Take Care Clause and the Commander in Chief Clause.¹⁹⁶ Justice Black easily disposed of the commander-in-chief argument¹⁹⁷ and trained his sights on the president’s assertion of an inherent power:

Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution

191. *Id.* at 620-28.

192. *Id.* at 613.

193. *Id.*

194. *Id.* at 585.

195. *Id.* at 587.

196. *Id.*

197. *Id.*

limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.¹⁹⁸

Justice Black rightly noted that the president may not displace the legislative acts of Congress. Manifestly, the Constitutional Convention stripped the executive of the prerogative powers to suspend and dispense with the enforcement of laws when it adopted the Take Care Clause. A presidential power to displace the laws of Congress, moreover, would constitute a rank act of usurpation,¹⁹⁹ and mortally wound the principle of separation of powers which insists that the nation should be governed by known rules of law. That principle can be maintained, however, only if those who make the law have no power to execute it and those who execute it have no power to make it.²⁰⁰ But that critical distinction would be eviscerated by an inherent executive power.

Justice Black's opinion has been disparaged as "oversimplified,"²⁰¹ but while other members of the majority disagreed with his approach they nonetheless agreed that President Truman possessed no inherent executive power to displace congressional control of the authority to seize property. It is true that Black's opinion lacks the dexterity of Justice Robert H. Jackson's concurring opinion, but that approach, too, is vulnerable to criticism.²⁰² In fact, there is considerable merit in Black's "clear conceptual categories of legal and illegal executive activity,"²⁰³ and it avoided the rigid formalism of separation of powers decisions

198. *Id.*

199. To calm fears of usurpation, James Iredell, a leader in the North Carolina Ratifying Convention and later a Justice of the Supreme Court, said that "if congress under pretense of executing one power, should, in fact usurp another they will violate the constitution" Elliot, 4 *Debates* at 184 (cited in note 66).

200. For a discussion of this point see Wormuth, *Origins* at 65-66 (cited in note 33).

201. Schwartz, *A Commentary on the Constitution of the United States: Part 1: The Powers of the Government* at 68-69 (cited in note 30).

202. While praising Jackson's opinion in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the Court, nonetheless criticized his tripartite analysis of executive power: "executive action . . . falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition." *Id.* at 669. See also Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 *Yale L.J.* 1385, 1410-12 (1989); Laurence Tribe, *American Constitutional Law* 239-41 (Foundation Press, 2d ed. 1988); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 *U. Chi. L. Rev.* 123, 190-93 (1994).

203. Lobel, 98 *Yale L.J.* at 1410-11 (cited in note 202).

delivered by the Burger Court.²⁰⁴ There is, after all, a difference between the Burger Court's conversion of the dictionary into a jurisprudential fortress,²⁰⁵ and Justice Black's adhesion to the over-arching principle of separation of powers, which enjoys the additional advantage of enumeration of powers in the Constitution. There is, moreover, no reason to confuse Black's argument that the Constitution prohibits the executive from "legislating" with the familiar practice of presidential proclamations, subordinate rule-making and, of course, executive orders, since those executive regulations are subordinate to the statutory authority of Congress and thus subject to analytical distinction.²⁰⁶

Justice Frankfurter wrote a concurring opinion in which he, too, repudiated Truman's claim to an inherent power to seize the steel industry. Justice Frankfurter noted his concurrence in Justice Black's opinion because he agreed that separation of powers principles governed the circumstances of the case, although he believed that the considerations relevant to the enforcement of the doctrine seemed "more complicated and flexible" than appeared in Black's opinion.²⁰⁷ While Frankfurter explained that the application of the separation of powers doctrine may engender differences in "attitude" and "nuance,"²⁰⁸ he was nevertheless on all fours in his agreement with Black that the Constitution vested in Congress the full authority to order a seizure of property: "In any event, nothing can be plainer than that Congress made a conscious choice of policy in a field full of perplexity and peculiarly within legislative responsibility for choice."²⁰⁹ And that "choice," as Frankfurter explained, was manifested by Congress in its refusal to amend the Taft-Hartley Act for the purpose of empowering the president to seize an "industry in which there is an impending curtailment of production."²¹⁰ Frankfurter stated: "On a balance of considerations, Congress chose not to lodge this power in the President."²¹¹ As a consequence, the president had no authority to "act in disregard of the

204. For an excellent discussion of the formalism of the Burger Court decision see, generally, Alfange, 58 Geo. Wash. L. Rev. at 722-40 (cited in note 132).

205. Judge Learned Hand observed that it is "one of the purest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary." *Cabell v. Markham*, 148 F.2d 737, 739 (1945).

206. For a fine discussion of executive orders, see Kenneth R. Mayer, *With the Stroke of a Pen: Executive Orders and Presidential Power* (Princeton U. Press, 2001).

207. *Youngstown*, 343 U.S. at 589.

208. *Id.*

209. *Id.* at 602.

210. *Id.* at 601, quoting 93 Cong. Rec. 3637-45.

211. *Youngstown*, 343 U.S. at 601.

limitation put upon seizure" in the Taft-Hartley Act.²¹² Moreover, as we have seen, Frankfurter reaffirmed his denial of an inherent executive power by adopting Justice Holmes's opinion that in the performance of his duty to faithfully execute the laws, the president is dependent upon Congress to determine the enforcement scheme.

In a separate opinion, Justice William O. Douglas announced his concurrence in Justice Black's application of the separation of powers doctrine. Douglas believed that there had been an emergency but "the fact that it was necessary that measures be taken to keep steel in production does not mean that the President, rather than Congress, had the constitutional authority to act."²¹³ The Court, he explained, "cannot decide this case by determining which branch of government can deal most expeditiously with the present crisis. The answer must depend on the allocation of powers under the Constitution."²¹⁴ Douglas added a powerful argument to support his conclusion that the president had no inherent power to effect the seizure:

The President has no power to raise revenues. That power is in the Congress by Article I, section 8 of the Constitution. The President might seize and the Congress by subsequent action might ratify the seizure. But until and unless Congress acted, no condemnation would be lawful. The branch of the government that has the power to pay compensation for a seizure is the only one able to authorize a seizure or make lawful one that the President had effected. That seems to me to be the necessary result of the condemnation provision in the Fifth Amendment.²¹⁵

Justice Jackson's opinion, often viewed as the weightiest and most impressive of the concurring opinions, dealt a crushing blow to the doctrine of inherent executive power:

The Solicitor General lastly grounds support of the seizure upon nebulous, inherent powers never expressly granted but said to have accrued to the office from the customs and claims of preceding administrations. The plea is for a resulting power to deal with a crisis or emergency according to the necessities of the case, the unarticulated assumption being that

212. *Id.* at 602.

213. *Id.* at 629.

214. *Id.* at 630.

215. *Id.* at 631-32 (citations omitted).

necessity knows no law.²¹⁶

But as Justice Jackson pointed out, the Convention did not grant emergency powers to the president. The Framers recognized, Jackson explained, “that emergency powers would tend to kindle emergencies.”²¹⁷ Jackson, for one, was unwilling to amend the work of the Framers and lodge an emergency power in the executive. On the contrary, “emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them.”²¹⁸ The proposition that the president might exercise an inherent power was alarming: “[s]uch power,” he wrote, “either has no beginning or it has no end. If it exists, it need submit to no legal restraints.”²¹⁹ As a consequence he joined Justice Black: “The Executive, except for recommendation and veto, has no legislative power. The executive action we have here originates in the individual will of the President and represents an exercise of authority without law.”²²⁰

Justice Jackson’s denunciation of the inherent powers thesis included a rejection of the argument that the Vesting Clause is a “grant in bulk of all conceivable executive power” Rather, it is to be regarded “as an allocation to the presidential office of the generic powers thereafter stated,”²²¹ a view that reflects the Framers’ aim, as Madison explained, to “confine and define” executive power. Jackson’s characterization of executive power might have caused him some slight embarrassment. As Attorney General he defended President Franklin D. Roosevelt’s seizure of the North American Aviation Company in 1941, in part, on “the aggregate of Presidential powers.”²²² When the Attorney General’s argument was advanced in *Youngstown* by counsel for the government, Justice Jackson drew upon his renowned wit:

216. *Id.* at 646. Jackson’s opinion has been viewed as the most influential of the Court. See, e.g. *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981) (Jackson’s opinion “brings together as much combination of analysis and common sense as there is in” the area of national security jurisprudence). In his Foreword to Marcus, *Truman and the Steel Seizure Case: The Limits of Presidential Power* at xxi (cited in note 12), Louis Fisher observed: “The part of *Youngstown* that has had the greatest impact on contemporary constitutional analysis is Justice Jackson’s concurring opinion.”

217. *Youngstown*, 343 U.S. at 650.

218. *Id.* at 652.

219. *Id.* at 653.

220. *Id.* at 655.

221. *Id.* at 641.

222. 89 Cong. Rec. 3993 (1943). In *Youngstown*, Jackson stoutly maintained, however, that Roosevelt’s action was “regarded as an execution of congressional policy.” 343 U.S. at 649 n.17.

“a judge cannot accept self-serving press statements of the attorney for one of the interested parties as authority in answering a constitutional question, *even if the advocate was himself.*”²²³

Justice Jackson’s rejection of the doctrine of inherent powers marked in his mind an obvious conceptual distinction between that discredited theory and his understanding of the fluid nature of presidential power, which he set forth in an influential analysis that has been embraced by jurists and scholars alike.²²⁴ Jackson’s essay, it is familiar, divided executive power into three categories:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

223. *Youngstown*, 343 U.S. at 647 (emphasis added).

224. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 381 (1989) (“Justice Jackson summarized the pragmatic, flexible view of differentiated government power to which we are heir . . .”); *Morrison v. Olson*, 487 U.S. 654, 694 (1988) (citing Jackson’s opinion favorably); *Bowsher v. Synar*, 478 U.S. 714, 721-22 (1986) (giving favorable treatment to Jackson’s opinion); *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 443 (1977) (observing that in *United States v. Nixon*, 418 U.S. 683, 707 (1974), “the unanimous Court essentially embraced Mr. Justice Jackson’s view, expressed in his concurrence in *Youngstown*.”). Michael Glennon has observed: “*Youngstown* is remembered mostly for the concurring opinion of Justice Robert Jackson.” Glennon, *Constitutional Diplomacy* at 10 (cited in note 3)

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.²²⁵

Justice Jackson's analysis led him to eliminate the seizure of the steel industry from the first two classifications. President Truman's act clearly did not fall within the first category, Jackson reasoned, because "it is conceded that no congressional authorization exists for this seizure."²²⁶ Nor was it possible to sustain the seizure under the "flexible tests" of the second category. Jackson explained that Congress had not "left seizure of private property an open field." Rather, it had "covered it by three statutory policies inconsistent with this seizure."²²⁷ As a consequence of congressional authority over the field, it followed that the seizure did not fall into the "zone of twilight"²²⁸ in which the president and Congress share authority or in which the allocation of power is uncertain.²²⁹ In fact, in terms that echoed Justice Black's opinion, Jackson rejected Truman's invasion of the legislative realm: "The Executive, except for recommendation and veto, has no legislative power. The executive action we have

225. *Youngstown*, 343 U.S. at 635-38.

226. *Id.* at 638.

227. *Id.* at 639. The seizure was inconsistent, Jackson explained, with the Selective Service Act of 1948, § 18, 62 Stat. 625, 50 U.S.C. App. (Supp. IV) § 468 (c); The Defense Production Act of 1950 § 201, 64 Stat. 799, amended, 65 Stat. 132, 50 U.S.C. App. (Supp. IV) § 2081.

228. The origins of the familiar phrase, "zone of twilight," are obscure. It appears in a memo analyzing presidential power that was prepared for Attorney General Homer Cummings by Assistant Solicitor General Bell and Special Assistant Townsend, dated November 10, 1937 in *The Papers of Robert H. Jackson*, Library of Congress, Box 82. Roy E. Brownell II, *The Coexistence of United States v. Curtiss-Wright and Youngstown Sheet & Tube v. Sawyer in National Security Jurisprudence*, 16 J. L. & Pol. 1, 45 n.170 (2000), has located the use of the phrase in John A. Fairlie, *Administrative Legislation*, 18 Mich. L. Rev. 181, 189 (1920): "Whatever the logical difficulties, the fact remains that there is a broad twilight zone between the field of what is distinctly and exclusively legislative and what is necessarily executive in character; that courts have recognized [as] 'no man's land.'" (emphasis added); (Supp. IV) § 2081; and the Labor Management Relations Act, 1947, §§ 206-210, 61 Stat. 136, 155, 156, 29 U.S.C. (Supp. IV) §§ 141, 176-180.

229. *Id.* at 639. Jackson thus denied the existence of both a concurrent power of seizure and an inherent presidential power to seize property.

here originates in the will of the President and represents an exercise of authority without law.”²³⁰

The seizure, then, fell into the third category. Since Truman had engaged in a measure that was “incompatible” with the will of Congress, it meant that the seizure could be upheld only if the Court determined that the president possessed constitutional authority over seizure in the first place and then subtracted the legislature’s constitutional powers by “disabling the Congress from acting upon the subject.”²³¹ But Jackson denied the existence of a concurrent power in this area and reaffirmed the absence of presidential power over seizure by noting that the executive “possesses only delegated powers,” the grant of which did not extend to the seizure of private property, and that he “does not enjoy unmentioned powers.”²³²

Justice Harold Burton wrote a concurring opinion in which he explained that the Constitution vests in Congress the authority to handle national emergency strikes.²³³ Congress has exercised its authority by establishing two procedures for dealing with such emergencies, but neither provided for seizure. Burton emphasized, with other members of the majority, that Congress had reserved to itself the authority to authorize a seizure in particular cases, and in the Taft-Hartley Act, it had effectively prohibited the president from exercising a seizure power.²³⁴ “The foregoing circumstances,” he stated, “distinguish this emergency from one in which Congress takes no action and outlines no government policy.”²³⁵ He added:

This brings us to a further crucial question. Does the President, in such a situation, have inherent constitutional power to seize private property which makes congressional action in relation thereto unnecessary? We find no such power available to him under the present circumstances. The present situation is not comparable to that of an imminent invasion or threatened attack. We do not face the issue of what might be the President’s constitutional power to meet such catastrophic

230. *Id.* at 655.

231. *Id.* at 637-38.

232. *Id.* at 640. The Framers, wrote Jackson, decried the concept of unlimited power: “The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image.” *Id.* at 641.

233. *Id.* at 656.

234. *Id.* at 657.

235. *Id.* at 659.

catastrophic situations. 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.²³⁶

This issue of whether the president, as commander in chief, possesses the authority to respond to a sudden attack on the United States has never been in doubt. The Framers of the Constitution anticipated that the president would indeed “repel invasions” of the country.²³⁷ In any event, Justice Burton concluded that since Congress had reserved to itself the right to decide when a seizure should be effectuated, Truman’s action violated the principle of separation of powers.²³⁸

Justice Tom Clark wrote a concurring opinion which represented a response to an issue that was brought before the Court, but also, strangely enough, an answer to a question that was not put to the Court. Clark stated:

I conclude that where Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis; but that in the absence of such action by Congress, the President’s independent power to act depends upon the gravity of the situation confronting the nation. I cannot sustain the seizure in question because . . . Congress had prescribed methods to be followed by the President in meeting the emergency at hand.²³⁹

Clark’s willingness to exalt congressional authority at the expense of an assertion of inherent executive power provides common ground with the other concurring Justices. But the issue of an unaided presidential power—the authority to act in the absence of legislation—was not an issue that was raised in *Youngstown*. Indeed, as we have observed, all six members of the majority, including Justice Clark, agreed that Congress had enacted legislation that effectively prohibited a presidential seizure property, and that the legislation controlled the executive. Perhaps Clark had in mind the rough proposition that the president enjoyed a concurrent power to act in a crisis, although Congress might preempt executive action by occupying the field.

236. *Id.*

237. See generally Fisher, *Presidential War Power* at 9-12 (cited in note 2); Adler, *Warmaking* at 8-13 (cited in note 3).

238. *Youngstown*, 343 U.S. at 660.

239. *Id.* at 662.

Justice Clark sought support in Chief Justice Marshall's opinion in 1804, in *Little v. Barreme*,²⁴⁰ in which Marshall ruled that President John Adams' order to commanders of public vessels to seize American vessels bound to or sailing from the French Republic violated the Nonintercourse Act of February 9, 1799, which limited presidential seizure powers, to ships sailing to the French Republic.²⁴¹ In his opinion, Marshall wrote:

It is by no means clear that the president of the *United States*, whose high duty it is to 'take care that the laws be faithfully executed,' and who is commander in chief of the armies and navies of the *United States*, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the *United States*, to seize and send into port for adjudication, *American* vessels which were forfeited by being engaged in this illicit commerce.²⁴²

Justice Clark viewed Marshall's statement as an acknowledgment that the president enjoys with Congress a concurrent power, albeit one that must yield to congressional legislation. Justice Clark wrote:

In my view—taught me not only by the decision of Chief Justice Marshall in *Little v. Barreme*, but also by a score of other pronouncements of distinguished members of this bench—the Constitution does grant to the President extensive authority in times of grave and imperative national emergency. . . . I cannot sustain the seizure in question because here, as in *Little v. Barreme*, Congress had prescribed methods to be followed by the President in meeting the emergency at hand.²⁴³

But Chief Justice Marshall made no mention of either a concurrent or emergency power in *Barreme*. It seems very clear that Marshall's reference to "the then existing state of things" was a reference to the other statutes that had been passed by Congress in the limited war with France. All Marshall said was that it was conceivable, but not at all certain, that in the absence of a statutory prohibition in the context of war, the president might have the authority to seize an American ship sailing from a French harbor.

240. 6 U.S. at 177-78.

241. See the discussion in Fisher, *Presidential War Power* at 17-20 (cited in note 2).

242. *Little*, 6 U.S. at 177.

243. *Youngstown*, 343 U.S. at 662.

In his concurring opinion, Justice Frankfurter was emphatic in his belief that the Court should limit its discussion to the precise issue before it, and avoid generalizations and hypotheses about the scope of presidential power. This was wise counsel. The proposition that dicta are often unreliable because they raise problems and issues to which the court may not have given sufficient attention seems vindicated by Justice Clark's opinion. Frankfurter wrote:

The issue before us can be met, and therefore should be, without attempting to define the President's powers comprehensively. I shall not attempt to delineate what belongs to [the Chief Executive] by virtue of his office beyond the power even of Congress to contract; what authority belongs to him until Congress acts; what kind of problems may be dealt with either by the Congress or by the President or both, . . . what power must be exercised by the Congress and cannot be delegated to the President. It is as unprofitable to lump together in an indiscriminating hotch-potch past presidential actions claimed to be derived from occupancy of the office, as it is to conjure up hypothetical future cases.²⁴⁴

CONCLUSION

The Framers' subordination of the executive to the principle of the rule of law represented a signal achievement in the development of constitutional government. The maintenance of that principle, long the challenge of constitutionalism, may be charged to the president, in the spirit of self-restraint, and to Congress, in the spirit of the need for checks and balances. But it falls to the Court, too, in the performance of its duty, as charged by Chief Justice Marshall in *Marbury v. Madison*, to say what the law is.²⁴⁵ The challenge to the judiciary to restrain the president through its interpretation of words on parchment is not always an altogether promising prospect. Many factors may impose themselves and preclude a satisfactory resolution in a case of executive excess: judicial philosophies of restraint, partisanship and friendship, loyalty, and a judge's affinity for presidential policies and goals, among others.²⁴⁶ In *Ex parte Milligan*,

244. *Id.* at 597

245. 5 U.S. 177 (1803).

246. See, generally, Walter F. Murphy, *Elements of Judicial Strategy* (U. of Chicago Press, 1964); Cornell W. Clayton and Howard Gillman, eds., *Supreme Court Decision-Making: New Institutional Approaches* (U. of Chicago Press, 1999).

Justice David Davis, a close personal friend of President Lincoln, authored an opinion which held Lincoln's actions unconstitutional. The maintenance of the rule of law was critical, for "[w]icked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln."²⁴⁷

The *Youngstown* Court, staffed with close personal friends of President Truman, surely felt the stress and strain inherent in the conflict between their affection and admiration for the former haberdasher from Missouri and their duty to declare the president's seizure of the steel industry unconstitutional.²⁴⁸ But the Court's repudiation of a presidential claim to an inherent emergency power proved a powerful reaffirmation of executive amenability to the judicial process, and provided a weighty and respected precedent for future courts to draw upon in restraining broad assertions of executive power.²⁴⁹

The status of the rule of law has never been particularly secure. Crises, real or imagined, have been adduced as justification for executive powers and governmental encroachment on rights and liberties.²⁵⁰ Emergencies, moreover, have diminished public concern about compliance with constitutional norms, and perhaps it is true that there is a correlation between a lapse in public scrutiny and constitutional corruption. In an era marked by clamor, conflict and terrorism, including attacks on the United States, and characterized by governmental reaction which, under the auspices of a temporary energy response,²⁵¹ re-

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

248. Justice Douglas referred to Truman as "a kindly President," 343 U.S. at 633; and Justice Frankfurter expressed his admiration for Truman when he stated: "it is absurd to see a dictator in a representative product of the sturdy democratic traditions of the Mississippi Valley." *Id.* at 593-94. Frankfurter lamented the task of declaring that Truman had exceeded his authority: "It is not a pleasant judicial duty to find that the President has exceeded his powers and still less so when his purposes were dictated by concern for the Nations's well-being, in the assured conviction that he acted to avert danger." *Id.* at 614.

249. See, e.g., *N.Y. Times*, 403 U.S. 713; *Nixon*, 418 U.S. 683.

250. See generally, Paul L. Murphy, *The Constitution in Crisis Times, 1918-1969* (Harper & Row, 1972).

251. In the wake of the September 11, 2001 attack on the United States, President George W. Bush came to wield powers not exercised by a president since Abraham Lincoln occupied the White House. The tremendous concentration of power in the president is one part usurpation and two parts abdication. Congress passed the "Authorization for Use of Military Force" Resolution, which essentially delegated the war power to the president, in defiance of the Constitution and the delegation doctrine. Pub. L. No. 107-40, 50 U.S.C. 1541 (2001). Congressional abdication of the war power has become a commonplace. On October 8, 2001, President Bush issued an executive order to create a "Homeland Security Office," a cabinet-level position to which he immediately appointed

sults in a virtually unlimited concentration of power in the president, the future of the rule of law may be in doubt.²⁵² In our time, we would do well to recall Justice Frankfurter's admonition in *Youngstown*: "The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority."²⁵³

Pennsylvania Governor Tom Ridge. Bush's creation of an office constituted a rank usurpation of the legislative power, and the appointment of Governor Ridge, without Senate approval, violated the Appointment Clause of Article II. For discussion of these points and the general overgrown nature of the presidency, see David Gray Adler, *The Condition of the Presidency: Clinton in Context*, in Adler and Genovese, eds., *The Presidency and the Law: The Clinton Legacy* at 175-92 (cited in note 4). Justice Jackson's derision of swollen executive powers is relevant to our time: "[a]nd if we seek instruction from our own times, we can match it only from the executive powers in these governments we disparagingly describe as totalitarian." *Youngstown*, 343 U.S. at 641.

252. Justice Jackson spoke derisively of "temporary" emergency measures. In commenting on the Framers' refusal to clothe the president with emergency powers, Jackson stated:

I do not think we rightfully may so amend their work, and, if we could, I am not convinced it would be wise to do so, although many modern nations have forthrightly recognized that war and economic crises may upset the normal balance between liberty and authority. Their experience with emergency powers may not be irrelevant to the argument here that we should say that the Executive, of his own violation, can invest himself with undefined emergency powers.

Germany, after the First World War, framed the Weimar Constitution, designed to secure her liberties in the Western tradition. However, the President of the Republic, without concurrence of the Reichstag, was empowered temporarily to suspend any or all individual rights if public safety and order were seriously disturbed or endangered. This proved a temptation to every government, whatever its shade of opinion, and in 13 years suspension of rights was invoked on more than 250 occasions. Finally, Hitler persuaded President Von Hindenberg to suspend all such rights, and they were never restored.

Youngstown, 343 U.S. at 650-51.

253. *Id.* at 594.