1975

Executive Powers: The Role of the Supreme Court in an Expanding Presidency

Gale M. Filter
Governors State University

Governors State University

EXECUTIVE POWERS:
THE ROLE OF THE SUPREME COURT IN AN EXPANDING PRESIDENCY

A Research Paper

Submitted in Partial Fulfillment of the

Degree Requirements for

The Master of Arts in Public Service

by

Gale M. Filter

June, 1975

In the "Pacificus-Helvidius" debate of 1793, Alexander Hamilton locked horns with James Madison in a classic exchange of broadsides on the issue of express versus inherent executive powers. In his interpretation of presidential powers, Hamilton sows the seeds for an argument which justifies the exercise of executive powers in combating situations of domestic emergency and in matters concerning the general welfare or public interest. The seeds of this theory took firm root more than sixty years later in the administration of Abraham Lincoln. Subsequently, the growth of these roots was stimulated by the Supreme Court's decisions in the famous cases of In re Neagle (1890), In re Debs (1895), and United States v. Midwest Oil Co. (1915) and has blossomed into a fullblown, if not overblown, succession of "strong" Presidents during the last seventy years. Along with the spiraling development of executive power, volumes of critical material gushed forth in response to both the growth of presidential powers and its

budding "textbook Presidency" rationale;[1] however, the impact of this response has been slight, and as one author of the late 1950's put it, "the President of today is a creature of custom."[2]

Given the above introduction, the purpose of this paper is to discuss the role of the Supreme Court in an expanding Presidency by focusing on its decisions in Youngstown Sheet and Tube Co. v. Sawyer (1952), New York Times Co. v. United States (1971), and United States v. Nixon (1974). It is believed that the various opinions found in the three cases mirror the ever-increasing debate which surrounds the growth of executive powers. As rulings, the decisions not only provide the Supreme Court's views on the scope of inherent executive powers, but also provide a means with which to analyze the role of the Court in the expanding Presidency. Since each of the decisions turned on the special circumstances of the particular case, it is suggested that none of the rulings can be read as imposing any serious limitations on inherent executive powers. On the contrary, the burden and thesis of this paper is that the Court, in each of the three cases, paved the way for future presidential claims of implied powers.

---

[1]The term is borrowed from Thomas E. Cronin, "The Textbook Presidency and Political Science," a paper presented at the 66th Annual Meeting of the American Political Science Association in 1970. As Cronin sees it, the "textbook Presidency" rationale is the notion that the President is the chief architect of public policy and that only he, by interpreting his powers expansively, can engineer progressive change. Two classic texts which follow this framework are Richard Neustadt's Presidential Power (New York: New American Library, 1960); and Clinton Rossiter's The American Presidency (New York: Harcourt and Brace, 1956). For the recent responses challenging this rationale, see Theodore Lowi, The End of Liberalism (New York: Norton, 1969); Daniel P. Moynihan, Maximum Feasible Misunderstanding (New York: Macmillan, 1969); and Peter Drucker, The Age of Discontinuity (New York: Harper and Row, 1969).

[2]Robert G. McCloskey (ed.), "The Powers of th President," in Essays in Constitutional Law (New York: Knopf, 1957), p. 253.

An analysis of the three cases necessarily entails an examination of the events and writings that give the concept of inherent executive powers its initial focus.[3] In the "Pacificus-Helvidius" exchange, the argument invoked by Hamilton was a defense of President Washington's action in issuing a proclamation of neutrality upon the outbreak of war between England and France. Washington's action triggered charges by his political opponents, the Republicans, that the proclamation was without constitutional or statutory authority. Hamilton, writing under the pseudonym "Pacificus," responded to these charges by making a distinction between the legislative and executive grants of power found in the Constitution. The opening clause of Article I begins on one hand with the words "all legislative powers herein granted" and proceeds with an enumeration of these powers. On the other hand, the initial sentence of Article II states that "the executive Power shall be vested in a President of the United States of America." After enumerating the specified constitutional powers of the President--such as the power to grant pardons, to receive ambassadors and to make appointments, Hamilton contends that it would be unreasonable to assume that the executive powers were confined to these authorizations alone and concludes his argument by saying:

> The enumeration ought therefore to be considered as intended to specify merely the principle articles implied in the definition of executive power, interpreted in conformity with the other parts of the Constitution and with the principles of free government. The general doctrine of our constitution then is that the executive power of the nation is vested in the President, subject only to

---

[3]Arbitrarily, I begin the development of "executive powers" with the argument invoked by Hamilton in the "Pacificus-Helvidius" exchange. The concept of executive powers, however, can easily be traced to 1690, when Locke posited that "the law-making power is not always in being and usually too numerous, and so too slow for the dispatch requisite to

> the exceptions and qualifications which are expressed in the instrument.[4]

It was Hamilton's view, then, that the President possesses both inherent and express powers which are subject only to those qualifications found in the Constitution. Differentiating between these two types of power, he cites the removal power[5] and the power to recognize new governments as examples of inherent executive powers. According to Hamilton, the President's inherent power to judge the obligations of our treaties with foreign nations justified Washington's proclamation of neutrality.

Writing as "Helvidius," Madison rejected Hamilton's theory on the grounds that the notion of inherent powers was not based on American practices but borrowed from the royal prerogatives of British government.[6] The underpinnings of Madison's challenge were soon swept aside in both theory and practice. By 1840 Abel Upshur could observe that

---

execution. . . therefore there is a latitude left to the executive power to do many things of choice which the laws do not prescribe;" Of Civil Government (Book II, chap. xiv).

[4]Alexander Hamilton, The Works of Alexander Hamilton, Henry Cabot Lodge (ed.), Vol. IV (New York: Putnam, 1904), p. 144.

[5]Hamilton's citation of the removal power is probably derived from what has come to be known as the "decision of 1789." In the very first Congress to assemble under the Constitution, the initial sentence of Article II was invoked interestingly enough by Madison and other congressmen to support the contention that the President had the power to remove officers whose appointments were made with the advice and consent of the Senate. C. Herman Pritchett suggests that a majority in Congress felt the same way: "The language actually put into the statute. . . reflected the majority conclusion that the President already had the right of removal on the basis of his 'executive power' under the Constitution;" The American Constitution (2nd ed.; New York: McGraw-Hill, 1968), p. 334.

[6]Louis Fisher, President and Congress: Power and Policy (New York: Free Press, 1972), p. 33. For the full text of Madison's argument, see The Writings of James Madison, Gaillard Hunt (ed.) VI (New York: Putnam, 1900-1910), pp. 138-88.

it had been "gravely asserted in Congress that whatever power is niether legislative nor judiciary, is of course, executive, and, as such, belongs to the President under the Constitution. . . ."[7]

The high-water mark, if not the widest interpretation of executive powers, is found in the practices and policies of President Lincoln. As John P. Roche points out, "the administration of Abraham Lincoln provides . . . the first full display of non-constitutional, non-statutory authority applied to a domestic emergency."[8] Consequently, Lincoln's exercise of executive prerogative in situations of "domestic emergency" expanded the interpretation of "executive powers" by providing the concept with a new focus in rationale.

It was Lincoln's belief, that as the protector and defender of the Constitution, he had the responsibility to use any and all means to preserve the Union. When Confederate sympathizers interrupted rail and telegraph communications between Washington, D. C. and Annapolis, Maryland, Lincoln on April 27, 1861, seized the rail and telegraph installations. A week later, he ordered the regular army increased by 27,414 officers and men and the navy by 18,000. Such an obvious disregard of the expressed constitutional delegation of power to Congress "to raise and support armies," evoked one loyal Republican senator to comment, "I have never met anyone who claimed that the President could, by proclamation, increase the army or navy."[9]

---

[7]Cited by John P. Roche, "Executive Power and Domestic Emergency: The Quest for Prerogative," Western Political Quarterly, V (December, 1952), p. 598.

[8]Ibid., p. 598.

[9]W. E. Binkley, The Powers of the President (Garden City, New York: 1937), p. 116.

Although Lincoln did request a grant of retroactive authority from Congress for his actions, his request for authority was not made until he called Congress into special session on July 4th--more than two months after seizing the rail and telegraph installations. In his message to Congress, Lincoln justified his actions by saying, "These measures, whether strictly legal or not, were ventured upon what appeared to be a popular demand and a public necessity. . . nothing has been done beyond the constitutional competence of Congress."[10] On August 6, Congress accepted the request for retroactive authority by providing in statute that "all the acts, proclamations, and orders of the President respecting the army and navy of the United States. . . are hereby approved and in all respects made valid," but there was also the qualifier, "as if they had been issued and done under the previous express authority and direction of Congress."[11] Although the catch here suggests that the President had, in effect, been working for Congress all along, Lincoln's frequent exercise of executive powers throughout the Civil War simply undermined the assertion that there was a "previous express authority." Invoking his executive powers without the advice or approval of Congress, Lincoln turned government money over to private individuals, suspended the writ of habeas corpus, and authorized the military trial of civilians. The President's order to establish military commissions for the trial of civilians drew bitter criticism from various quarters and the question of its legality reached the Supreme Court in 1864 and again in 1866.

In a proclamation of September 24, 1862, Lincoln coupled the sus-

---

[10]Binkley, p. 117.

[11]Ibid., p. 117.

pension of habeas corpus with an order that authorized military commanders to seize and try by military commissions civilians who engaged in "disloyal practices," even in areas outside the actual fields of military operation. Although Congress ratified the habeas corpus suspension in a subsequent act (1863), it never provided statutory authority for the trial of civilians by military tribunals. While the war was still in progress, an attempt was made by Clement Vallandigham, a notorious agitator, to bring the validity of his arrest, trial and conviction by military authorities before the Supreme Court. The Court in Ex parte Vallandigham (1864) held that it was without jurisdiction and dismissed the case.

With the war over and Lincoln dead, the Court challenged the President's executive powers by entertaining a similar problem in Ex parte Milligan (1866). Lambdin Milligan, a citizen of Indiana, was arrested at his home in 1864, was found guilty of disloyal activities by a military commission in October of the same year, and was sentenced to be hanged on May 19, 1865. Nine days before the hanging, Milligan sued out a writ of habeas corpus to a federal circuit court in Indianapolis, claiming that his constitutional rights had been violated.

The Supreme Court unanimously ruled that the President had exceeded his constitutional and statutory authority by creating military commissions for the trial of civilians in areas where the civil courts were open and operating. The Court's ruling was weakened by the fact that a majority of five went further and held that Congress didn't have the authority to limit the constitutional rights of individuals either. Since Congress had not authorized the trial of civilians by military commissions, the issue was not properly before the Court. The majority opinion, delivered by Justice Davis, is more remarkable because it as-

serts in effect that the Supreme Court is the final judge of what constitutes a military "necessity."

Given the fact that the war was over, the Court's post mortem challenge to the President's executive powers can be viewed as an expected reaction. No President had ever invaded constitutional rights more flagrantly than Lincoln, but were not his motives most worthy? "Was it possible to lose the nation and yet preserve the Constitution?"[12] It becomes increasingly clear that what is perceived to be the limits of executive powers is largely determined by the situation at hand. Moreover, that rationale which dictates executive "prerogative" in cases of military necessity also serves as a springboard for the exercise of executive powers in "pressing" matters concerning the general welfare or public interest.

In the case of In re Neagle (1890), the Supreme Court strengthened the notion of presidential prerogative by applying a broad and authoritative interpretation to the executive power provision found in Article II, Section 3: the President "shall take care that the laws be faithfully executed." The Neagle case, to say the least, arose out of a very strange set of circumstances. Supreme Court Justice Field, whose judicial duties entailed the circuit court in California, had had his life threatened by a disappointed litigant, David S. Terry. The United States Attorney General assigned Deputy Marshal Neagle as a bodyguard when Field's circuit duties again carried him to California. Terry, following up on his threat, approached Field in a railroad restaurant and was about to draw a knife when Marshal Neagle shot and killed him.

---

[12]Lincoln's "Letter to A. G. Hodges" (April 4, 1864), cited in Binkley, p. 134.

Neagle was released upon a writ of habeas corpus that was issued from a federal circuit court under a provision of the federal statutes which made the writ available to one "in custody for an act done or omitted in pursuance of a law of the United States."

The "law of the United States" upon which Neagle acted was not an act of Congress, but an order issued by the Attorney General under the authority of the President. Speaking for the Court, Justice Miller began his opinion by asking the question of whether the "duty" of the President was "limited to the enforcement of Acts of Congress or of treaties of the United States according to their express terms," or whether it "include(s) the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution." In sustaining Neagle's release, the Court held that the "laws" found in the "faithful execution of the laws" clause were not confined by the acts of Congress, but included "any obligation fairly and properly inferable" from the Constitution or "any duty" which can "be derived from the general scope of. . . duties under the laws of the United States." For Miller and the Court, there was "a peace of the United States" and the President was the keeper of that peace.

Five years later, the Court took the same position in the case of In re Debs. When violence broke out during the American Railway Union's strike against railroads using Pullman cars, President Cleveland sent federal troops to quell the disturbance, which had obstructed interstate commerce and the mails, and ordered the Attorney General to obtain an injunction against the strikers. The validity of the injunction was appealed to the Supreme Court, since there was no specific statutory

basis for the injunction. The Court sustained the injunction on the grounds that it was sought by the President to protect matters which were "entrusted by the Constitution" to the care of the nation. The Court went on to hold that it is the obligation of the Executive "to promote the interest of all, and to prevent. . . wrongdoing. . . resulting in injury to the general welfare."

In his Autobiography (1913), Theodore Roosevelt expands on the theme of the Neagle and Debs cases by positing that the President was the "steward" of the people. His conception of the Presidency was that

> . . . every executive officer, and above all every executive officer in high position, was a steward of the people bound actively and affirmatively to do all he could for the people . . . I declined to adopt the view that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization to do it. My belief was that it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws. Under this interpretation of executive power I did and caused to be done many things not previously done by the President and heads of the departments. I did not usurp power, but I did greatly broaden the use of executive power. In other words, I acted for the public welfare. I acted for the common well-being of all our people, whenever and in whatever manner was necessary, unless prevented by direct constitutional or legislative prohibition.[13]

Reacting to this rather intrepid interpretation of executive powers, William Howard Taft denounced the idea that the President was to play the role of a "Universal Providence." In a series of lectures given at the University of Virginia after his Presidential term in 1915, Taft stated:

> The true view of the executive function, as I conceive it, is that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included with such express grant as proper and necessary to its

---

[13]Theodore Roosevelt, Autobiography (New York: Macmillan, 1913), pp. 388-89.

> exercise. . . . There is no undefined residuum which he can exercise because it seems to him to be in the public interest, and there is nothing in the Neagle case and its definition of a law in the United States or in other precedents, warranting such an inference.[14]

Later, in another section of the lecture, Taft returned to this theme saying that

> . . . the view of . . . Mr. Roosevelt, ascribing an undefined residuum of power to the President is an unsafe doctrine, and that it might lead under emergencies to results of an arbitrary character, doing irremediable injustice to private right. The mainspring of such a view is that the executive is charged with responsibility for the welfare of all the people in a general way, and that he is to play the part of a Universal Providence and set all things right and that anything that in his judgment will help the people he ought to do, unless he is expressly forbidden to do it. The wide field of action that this would give to the Executive one can hardly limit.[15]

What is posited as theory is not always carried out in practice. During his presidential term, Taft withdrew without statutory authority large tracts of oil lands in California and Wyoming from private appropriation. He did ask Congress to ratify his withdrawal of these lands, but Congress failed to comply with the request. In 1915, while Taft was busy building a strong case for an "express powers" theory at the University of Virginia, the Supreme Court sustained the President's order in United States v. Midwest Oil Co. on the grounds that "weight" be given to the "long-continued action of the Executive Department--on the assumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice." In other words, since Congress didn't challenge the President's action, the Presi-

---

[14]William Howard Taft, Our Chief Magistrate and His Powers (New York: Columbia University Press, 1916), pp. 139-140.

[15]Ibid., pp. 144-45

dent could, "in conformity with the tacit consent of Congress, withdraw in the public interest, any public land from entry or location by private parties."

In what seems to be a sharp contrast to the broad license the doctrine of inherent executive powers received in the Neagle, Debs, and Midwest cases, there stands the Supreme Court's decision in Youngstown Sheet and Tube Co. v. Sawyer (1952). The facts in the Steel Seizure Case were as follows. The United States had been at "war" in Korea for nearly eighteen months, when the negotiation of a collective bargaining contract between the steel industry and their employees reached an impasse. On December 18, 1951, the United Steel Workers of America gave notice that it would strike on December 31. On December 22, President Truman, acting under the Defense Production Act of 1950 (as amended), referred the dispute to the Wage Stabilization Board. The Wage Stabilization Board failed to bring a settlement, and the steel workers' union called for a strike on April 9, 1952. In a radio message on April 8, the President announced the issuance of Executive Order 10340 which directed Secretary of Commerce Charles Sawyer to seize the steel industry and maintain production. Truman went on to say that he did not invoke the "period of waiting" provisions of the Taft-Hartley Act, because the strike would have been averted if the steel industry had accepted the recommendations of the Wage Stabilization Board. The order, then, cited no specific statutory authorization, but rested on Truman's contention that a nation-wide strike of steel workers would imperil the national defense, and the President's invocation of the general powers 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 of the United States."[16] On April 9, Truman sent a message to Congress reporting his action, and, in effect, asked Congress to approve or supersede his order.[17] On April 21, the President again sent a message to Congress, saying that "Congress can, if it wishes, reject the course of action that I have followed in this matter."[18] Congress failed to take any official action.

Meanwhile, the steel industry was honoring the President's order, but under protest as several of the companies had brought suit against Secretary Sawyer in the District of Columbia district court, praying for declaratory judgment and injunctive relief. On April 30, District Court Judge David Pine ruled that Executive Order 10340 was unconstitutional. Later in the day, the District Court of Appeals, in a five-four decision, voted to stay the injunction ordered by the district court, pending a review by the Supreme Court. That Court granted certiorari on May 3 and handed down a six-three decision on June 2, which affirmed the lower court's ruling.

The complexity of the Steel Seizure Case is shown by the fact that nine justices filed seven opinions which filled 131 pages in the United States Reports.[19] Justice Black delivered the "opinion of the Court" with Justices Frankfurter, Douglas, Jackson, Burton and Clark concurring in separate opinions. Chief Justice Vinson, with whom Justices Reed and Minton joined, delivered the dissenting opinion.

---

[16]Cited in Alan F. Westin, The Anatomy of a Constitutional Law Case (New York: Macmillan, 1958), p. 17.

[17]98 Cong. Rec. No. 60, 3962-63 (April 9, 1952); cited in Roche, "Executive Power and Domestic Emergency," p. 612.

[18]98 Cong. Rec. No. 66, 4192 (April 21, 1952); cited by Roche, p. 612.

[19]343 U.S. 579-710 (1952).

In an article written for the Western Political Quarterly, Glendon A. Schubert notes that the Court's decision in the Youngstown case is "something considerably less than the sum of the parts."[20] The reason for the fragmentation of the majority opinion is primarily the result of Justice Black's rigid interpretation of the separation of powers doctrine. He sets up an exercise in deductive logic by first establishing the premise that "the President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself." Working on the first half of this proposition, Black deduces that the President's power didn't stem from an act of Congress because: there was no express statutory authority for the President's order; there were no statutes on the books from which such power could "fairly be implied;" the President could have applied the Selective Service Act of 1948, the Defense Production Act of 1950, or the "cooling-off" provisions of the Taft-Hartley Act; and finally, Congress had rejected an amendment for seizure authority when it was considering the Taft-Hartley Act in 1947. Therefore, an express delegation of power must be found in the Constitution which would authorize the President's seizure order. Black reasoned that the President had no claim to status as Commander-in-Chief, because the job of taking possession of private property in order to keep labor disputes from stopping production is "for the Nation's lawmakers, not for its military authorities." Nor could the President invoke the "faithful execution of laws" clause, because his lawmaking

---

[20]Glendon A. Schubert, "The Steel Case: Presidential Responsibility and Judicial Irresponsibility," Western Political Quarterly, VI (1953), pp. 63-4. An argument along similar lines is put forth by Edward S. Corwin, "The Steel Seizure Case: A Judicial Brick Without Straw," in Robert G. McCloskey (ed.), Essays in Constitutional Law, pp. 257-74.

functions are limited by the Constitution "to the recommending of laws he thinks wise and the vetoing of laws he thinks bad." Since only Congress can make statutes, the seizure order cannot stand because it is like a law--it proclaims policy as rules and regulations to be followed. In deviating from his deductive framework, Black concludes his opinion by saying:

> The Founders of the Nation entrusted the lawmaking power to Congress alone in both bad and good times. It would do no good to recall the historical events, the fears of power and hopes for freedom that lay behind their choice. Such a review would but confirm our holding that his seizure order cannot stand.

Justice Douglas was basically of the same view as Black, but added the consideration that a constitutional seizure under the Fifth Amendment would entail the power to make "just compensation." Congress, which has the power to raise revenues and thus pay compensation, "is the only one able to authorize a seizure or make lawful one that the President had effected." As Douglas saw it, if the Court sustained the steel seizure, "it would be reading Article II as giving the President not only the power to execute the laws, but to make some."

Justice Frankfurter had great difficulty accepting the hard-line stand taken by Black and Douglas, and prefaced his opinion with a warning to the other majority justices that "the consideration relevant to the legal enforcement of the principle of separation of powers seem to me more complicated and flexible than may appear from what Mr. Justice Black has written." He went on to suggest that the steel seizure issue could be met "without attempting to define the President's powers comprehensively." The advice given by Frankfurter was apparently taken by the other majority justices, since in the rest of the concurring opinions one not only finds a rejection of Black's rigid separation of powers in-

terpretation but also the issue of using executive powers in meeting an emergency either being avoided or dealt with in what might best be described as "open" terms.

For the most part, the thrust of Frankfurter's opinion is an analytical review of various congressional actions which pertained to the President's seizure powers. Frankfurter draws the conclusion that "Congress deemed seizure so drastic a power as to require that it be carefully circumscribed whenever the President was vested with this extraordinary authority." Focusing upon the proceedings which surrounded the passage of the Taft-Hartley Act, he suggests that Congress had "expressed its will" to withhold the seizure power from the President "as though it has said so in so many words." In the case of Executive Order 10340, Frankfurter didn't claim that the President was without the general powers to meet domestic emergencies, but avoided the issue by saying that Congress had preempted the seizure power when it had been considering the passage of the Taft-Hartley Act.

Justice Burton devoted his opinion to an analysis of the Defense Production Act and the Labor Management Relations Act of 1947. Burton reached the conclusion that the President's order had violated "the essence of the principle of the separation of governmental powers," because Congress had provided a policy, exclusive of seizure, which the President could have followed in meeting the emergency. Burton, like Frankfurter, avoided defining the scope of inherent executive powers by simply saying, "Congress has reserved to itself the right to determine where and when to authorize the seizure of property in meeting such an emergency."

Justice Clark argued that Congress had provided specific procedures

to deal with the emergency in the Taft-Hartley, Defense Production and Selective Service Acts. Under the provisions of the Selective Service Act. Clark maintained that the President could have ordered the steel industry to produce the necessary war material; and if this had failed, there would have been statutory authorization for a seizure. Congress, then, has the power to deal with emergencies, but in the absence of legislation "the President's independent power to act depends upon the gravity of the situation confronting the nation."

Perhaps, the most interesting opinion of the majority justices is that of Justice Jackson's.[21] Jackson suggested that the President's power could be weighed by considering the "practical aspects of the situation in which he acts.

1. When the President's action is consistent with and under the delegation of congressional authority, his constitutional power is the strongest.

> 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 Federal Government as an undivided whole lacks power.

2. When the President's action is without expressed legislative authority, the legitimacy of his power depends upon practical considerations.

> . . . 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

---

[21]Jackson's opinion is, to put it mildly, a source of deep controversy. For example, Corwin writes: "Justice Jackson's rather desultory opinion contains little that is of direct pertinence to the constitutional issue . . . ." "The Steel Seizure Case," p. 270. On the other hand, Roche claims that Jackson "wrote a superb concurring opinion which, it is to be regretted, was not the 'opinion of the court;'" in "Executive Power and Domestic Emergency," p. 615.

> 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.

3. Finally, Jackson states that when the President's action is in conflict "with the expressed or implied will of Congress," his power is at its "lowest ebb."

> . . . he can only rely upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case 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.

In two short paragraphs, Jackson found that the President's action in this case belonged in the third category. The President's action could not be placed in the first category, because there was no express statutory delegation of seizure power. It did not fall in the second category as the President's action was in conflict with the policies expressed by Congress in the Selective Service, Defense Production and Labor Management Relations Acts. Therefore, the Court could "sustain the President only by holding that seizure of such strike-bound industries is within his domain and beyond control by Congress."

Jackson then procedded to deal with what he considered to be the real dilemma of the Steel Seizure Case:

> The appeal, however, that we declare the existence of inherent powers 'ex necessitate' to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted. 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. . . .

What conditions necessitate the exercise of inherent executive powers in

an emergency? For Jackson, the constitutionality of the President's steel seizure was found by striking a balance among three related variables. First, did the steel workers' strike necessitate the President's seizure of the steel mills without specific statutory authorization? Second, did existing legislation provide the President with viable alternatives in which to combat the emergency? And finally, if the Court did sustain the steel seizure, would not its decision upset the workings of a government of "balanced" powers by affording the President a ready pretext for usurpation? Jackson was not refuting the claim of inherent executive powers but was suggesting that the gravity of the situation did not warrant the President's action.[22] In view of these considerations, Jackson closes his opinion by saying: "I cannot be brought to believe that this country will suffer if the Court refuses further to aggrandize the presidential office, already so portent and so relatively immune from judicial review, at the expense of Congress."

Chief Justice Vinson launched the dissenting opinion reproaching the majority: "Those who suggest that this is a case involving extraordinary powers should be mindful that these are extraordinary times." It was Vinson's view that although Congress had not declared war, it had provided military procurement and anti-inflation legislative programs in support of the Korean effort and any stoppage in steel produc-

---

[22]With the benefit of hindsight, Schubert sees the gravity of the situation in a different light: "The strike began immediately after the announcement of the Supreme Court's decision, and lasted almost two months. The Korean war also continued unabated; the elimination of steel production ahd obviously resulted in both a serious cut in defense and munitions production and widespread bottlenecks whose effect, in terms of the domestic economy, would be highly inflationary; the grave possibility of a full-scale war with the U.S.S.R. remained unchanged;" "The Steel Case," p. 61.

tion would seriously imperil these defense programs. He maintained that the purpose of the President's seizure 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." The President was not attempting to defy Congress, because he sent a message to Congress, immediately following the seizure order, explaining his action and expressing a "desire to cooperate with any legislative proposals, approvals, regulating or rejecting the seizure of the steel mills."

Vinson believed that the President exhausted the legislative remedies available to him for averting a strike, when he had referred the dispute to the Wage Stabilization Board under the authority of the Defense Production Act and settlement had failed. The argument, that an emergency did not exist until the Taft-Hartley procedures had been exhausted, was invlaid, since the settlement procedures of the Taft-Hartley and Selective Service Acts were "route(s) parallel to, not connected with, the WSB procedure." After mediation by the Wage Stabilization Board had failed to bring settlement, the President was "faced with immediate national peril through stoppage in steel production on the one hand, and faced with the destruction of the wage and price legislative programs on the other. . ."

In an argument similar to the ones found in the Neagle, Debs and Midwest cases, Vinson posited that the Article II grant of executive power gives the President the proper authority for seizing the steel mills. Although the President was without statutory authorization, his action "was consistent with his duty to take care that the laws be faithfully executed." After drawing a number of illustrations from past

presidential acts, Vinson concluded his opinion with the following comment on the history of "executive leadership:" ". . . the fact that Congress and the courts have consistently recognized and given their support to such executive action indicates that such a power of seizure has been accepted throughout our history."

Indeed, the Court's decision in the Steel Seizure Case imposed no serious limitations on the President's "emergency" powers. Justices Black and Douglas were the only members of the Court to deny the constitutionality of the President's power to meet an emergency by exercise of inherent powers. Justices Frankfurter and Burton, reserved judgment on the nature and scope of inherent executive powers. Justices Clark and Jackson gave their approval to the exercise of implied powers as long as there was an absence of express congressional policy. The three dissenting justices, as previously noted, fully accepted the doctrine of inherent executive powers and its application to the case. Therefore, a majority of at least five justices accepted the constitutionality of inherent executive powers. If this is so, why didn't the President's seizure of the steel mills stand?

In Youngstown the fundamental issue of express versus inherent executive powers was buried beneath the circumstances of the case. Schubert makes the point well when he says that there was an "assumption of a majority of the Court that the circumstances under which this case arose were those of normalcy . . ."[23] The majority's assumption of "normalcy" was a major factor why the question of inherent executive powers was avoided and the case decided on a less controversial issue.

---

[23]Schubert, "The Steel Case," p. 74.

The Court's decision in Youngstown was that the seizure power, a power the President might have otherwise had, was preempted in this particular case when Congress had considered and rejected an amendment for seizure authority in passing the Taft-Hartley Act.[24] As Edward Corwin puts it, the case was a "judicial brick without straw. . . That the president does possess 'residual' or 'resultant' powers over and above, or in consequence of, his specifically granted powers to take temporary alleviative action in the presence of serious emergency is a proposition to which all but Justices Black and Douglas would probably have assented in the absence of the complicating issue that was created by the president's refusal to follow the procedures laid down in the Taft-Hartley Act."[25]

Nearly twenty years after Youngstown, theissue of express versus inherent executive powers again returned to the Supreme Court in New York Times Co. v. United States.[26] This time the question was cloaked in a First Amendment issue, and it was the President who was seeking an injunction against a company, not "vice versa" as in Youngstown. Briefly, the facts of the case were as follows. On June 13, the New York Times published the first installment of what has become known as the Pentagon Papers--a previously top secret, forty-seven volume history of the United States' role in Indochina over a period of three decades. One June 15, the Justice Department requested an injunction to halt further publication, contending that it would cause "irreparable injury" to the national defense.

---

[24]Pritchett, The American Constitution, p. 341; and Schubert, "The Steel Case," pp. 72-4.

[25]Corwin, "The Steel Seizure Case: A Judicial Brick Without Straw," p. 273.

[26]403 U.S. 713 (1971).

The same day District Court Judge Gurfein in New York issued a preliminary restraining order against the Times pending a hearing. On June 19, Judge Gurfein denied the request to enjoin the Times, but the Federal appellate court in New York immediately reasserted the stay pending a hearing.

In the interim period, the Washington Post began printing more leaked sections of the Pentagon Papers on June 18. The Justice Department promptly sought an injunction against the Post, which Judge Gesell of the District Court for the District of Columbia declined to grant. The following day the Court of Appeals for the District of Columbia ordered the Post to halt publication of the papers and remanded the case to Judge Gesell for a hearing on the government's request for an injunction. On June 21, Gesell again denied a preliminary injunction and again the Justice Department appealed his decision. On June 23, the Court of Appeals affirmed the lower court's decision but extended the restraining order to permit the government to appeal to the Supreme Court. The same day the Court of Appeals in New York allowed the Times to resume publication of the papers, but remanded the case to Judge Gurfein for proceedings to determine those items in the papers that would be dangerous to the national security.

On June 25, the Supreme Court granted certiorari both to the Times and to the government in the Washington Post case. On June 30, the Court handed down a six-three decision which dissolved the injunctions and the newspapers were free to resume publication. As brief as the Court's three paragraph "per curiam" opinion was, it can be condensed to the following: "'Any system of prior restraints of expression . . . (bears) a heavy presumption against its constitutional validity,'"[27] and in this case the

---

[27]The Court here cites Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963); Near v. Minnesota, 283 U.S. 697 (1931).

government didn't meet the "burden of showing justification for the imposition of such a restraint."[28] In a maze of cross-concurrences, Justices Black, Douglas, Brennan, Stewart, White and Marshall each wrote a concurring opinoin, while Chief Justice Burger and Justices Harlan and Blackman each wrote a dissenting opinion, principally protesting the amount of time the justices had to think about the case.

The meat of Justice Black's opinion is a response to the oral argument made by Solicitor General Griswold. Griswold had asserted that "there are other parts of the Constitution that grant power and responsibilities to the Executive . . . the First Amendment was not intended to make it impossible for the Executive to function or to protect the security of the United States."[29] Suprisingly, Black did not cite from the Youngstown case, but responded to Griswold's assertion by saying that:

> The Government does not even attempt to rely on any act of Congress. Instead, it makes the bold and dangerously far-reaching contention that the courts should take it upon themselves to 'make' a law abridging freedom of the press in the name of equity, presidential power and national security, even when the representatives of the people in Congress have adhered to the command of the First Amendment and refused to make such a law. . . . To find that the President has 'inherent power' to halt the publication of new by resort to the courts would wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make 'secure.'

Black's position is quite clear: the First Amendment is absolute; neither Congress nor the President has the power, inherent or express, to abridge

---

[28]Here, the Court cited Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971).

[29]Griswold's quote is found in the text of Black's opinion; for Griswold's full statement, see The Pentagon Papers (New York: Quadrangle 1971), p. 721.

the freedom of the press.[30]

Justice Douglas concurred with Black and opened his opinion with the claim that the First Amendment "leaves, in my view, no room for governmental restraint on the press," and in any event, there were "no statute(s)" which barred the publication of the material the newspapers sought to use. Douglas proceeds to the proposition that "any power that the Government possesses must come from its 'inherent power.'" Quoting from Hirabayashi v. United States, he said that "(t)he power to wage war is 'the power to wage war successfully,'"[31] and added that "the war power stems from a declaration of war. The Constitution by Article 1, sec. 8, gives Congress, not the President, power 'to declare war.' Nowhere are presidential wars authorized. We need not decide therefore what leveling effect the war power of Congress might have."

Given the cross-concurrences of Black and Douglas and the persuasive language of their opinions in both this case and that of Youngstown, it seems fair to say that they subscribe to two separate principles: (1) the First Amendment absolutely forbids injunctions against the publication of news; and (2) in any event, the President has no inherent power to seek or obtain an injunction.[32] Like Youngstown, the other majority

---

[30]In a footnote, Black cites Madison: "If they (the first ten amendments) are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will naturally be led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights;" 1 Annals of Congress 439 (1834).

[31]320 U.S. 81, 93.

[32]Peter D. Junger, "Down Memory Lane: The Case of the Pentagon Papers," a reprint from Case Western Law Review 23 (November, 1971), p.20.

justices had a difficult time accepting the hard-line stand taken by Black and Douglas. It is suggested that in New York Times the Court's decision turns on the cross-concurring opinions of Justices Stewart and White. One one hand, White clearly disavows any absolute effect to the First Amendment. On the other, Stewart posits that the President has the rights, and the constitutional duty--"as a matter of sovereign perogative and not as a matter of law as the courts know law--through the promulgamation and enforcement of executive regulations, to protect the confidentiality necessary to carry out (his) responsibilities in the fields of international relations and national defense."

In an opinion with which Stewart joined, Justice White began with a summary of his conclusions:

> I do not say that in no circumstances would the First Amendment permit an injunction against publishing information about government plans or operations. . . . I am confident that. . . disclosure of these documents will do substantial damage to public interests. Nevertheless, ... the United States has not satisfied the very heavy burden which it must meet to warrant an injunction against publication in these cases, at least in the absence of express and appropriately limited Congressional authorization for prior restraints in circumstances such as these. (emphasis added)

Going further, he states:

> At least in the absence of legislation by Congress, based on its own investigations and findings, I am quite unable to agree that the inherent powers of the Executive and thecourts reach so far as to authorize remedies having such sweeping potential for inhibiting publication of the press.

Although it appears that the main support for Justice White's opinion is the lack of inherent authority in the Executive,[33] he goes on to discuss the First Amendment and the standards which should be applied in granting injunctions against the press. While the discussion

---

[33]For example, it is Peter Junger's view that White's opinion is "based clearly and solely on the lack of inherent power in the Executive;" op. cit., pp. 24-6 and pp. 38-9.

is dedicated to an analysis of the legislative history of the Espionage Act of 1917 and a summary of criminal provisions which might apply to the publication of the papers, it also suggests the existence of some inherent executive authority since White views the First Amendment as a constitutional prohibition on the extent of that authority. Moreover, because White concurred in Justice Stewart's opinion, his vote can best be understood by undertaking an analysis of that opinion.

Justice Stewart's opinion is concerned primarily with the inherent power of the Presidency. A review of the opinion leaves little doubt that the President does have inherent power. Stewart began his opinion by noting that "in the governmental structure created by our Constitution, the Executive is endowed with enormous power in the two related areas of national defense and international relations. This power, largely unchecked by the Legislative and Judicial branches has been pressed to the very hilt since the advent of the missile age." He proceeded to point out that in the absence of those"governmental checks and balances" which are normally present, the "only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry. . . ." For Stewart, then, there is a problem between the near absolute power of the President with respect to national defense and foreign affairs and a greater need in these areas for the freedom of the press that is assured by the First Amendment. But such a "problem" is not for the courts to resolve, at least not in the Post and Times cases.

> [I]n the cases before us we are asked neither to construe specific regulations nor to apply specific laws. We are asked, instead, to perform a function that the Constitution gave to the Executive, not the Judiciary. We are asked, quite simply, to prevent the publication of material that the Executive Branch insists should not, in the national interest, be published. I am convinced that the

> Executive is correct with respect to some of the documents involved. But I cannot say that disclosure of any of them will surely result in direct, immediate and irreparable damage to our Nation or its people. That being so, there can under the First Amendment be but one judicial resolution of the issues before us. I join the judgments of the Court.

Thus, the test of "direct, immediate, and irreparable damage" might overcome the obstacle of the First Amendment, but in this case one cannot see how it could authorize the courts without a law to enforce. And, since Justice White concurred in it, one can only conclude that he too would allow restraints in those cases where there was merit to the Executive's claim of damage to the national interest.

Justice Marshall concurred. His only reference to the First Amendment was to deny that it raises "the ultimate issue in these cases." Addressing himself to the separation of powers issue, he leaves no doubt as to the power of the President to restrain the disclosure of information in the interest of national security.

> The problem here is whether in this particular case the Executive Branch has authority to invoke the equity jurisdiction of the courts to protect what it believes to be the national interest. . . . [I]n some situations it may be that under whatever inherent powers the Government may have, as well as the implicit authority derived from the President's mandate to conduct foreign affairs and to act as Commander-in-Chief there is a basis for the invocation of the equity jurisidction of this Court as an aid to prevent the publication of material damaging to "national security," however that term may be defined.
>
> It would, however, be utterly inconsistent with the concept of separation of power for this Court to use its power of contempt to prevent behavior that Congress has specifically declined to prohibit. There would be a similar damage to the basic concept of these co-equal branches of Government if when the Executive Branch has adequate authority granted by Congress to protect "national security" it can choose instead to invoke the contempt power of a court to enjoin the threatened conduct. The Constitution provides that Congress shall make laws, the President shall execute laws, and courts interpret laws. (citing Youngstown) It did not provide for government by injunction in which the courts and the Executive Branch can "make law" without regard to the action of Congress.

Justice Brennan is the only remaining Justice concurring in the

majority opinion. Brennan's opinion is concerned only with the First Amendment. He stated that there are precedents indicating that in time of war, in an extremely narrow class of cases, prior restraints may be placed upon the press. He argued, however, that if there is such an exception to the absolutes of the First Amendment neither the proof or allegations made in New York Times place the case within the exception. "For if the Executive Branch seeks judicial aid in preventing publication, it must inevitably submit the basis upon which that aid is sought to scrutiny by the judiciary." Thus, this statement can be read as saying that if the executive branch had shown facts falling within the exception, then it might have been entitled to the injunction.

It is not necessary to consider the dissenting opinions of Chief Justice Burger and Justice Blackmun; as has been pointed out, they merely suggest that the Justices needed more time to think about the case. However, since Justice Harlan's opinion, in which the Chief Justice and Justice Blackmun concurred, does address itself to the merits of the case, it is appropriate to touch on that opinion here. Simply put, it was Harlan's opinion that the Executive had the power, without specific congressional sanction, to seek and obtain the injunction against the publication of the Pentagon Papers.

As Harlan saw it, the power to obtain the injunction was in the Executive's power to conduct the nation's foreign affairs. The Executive, then, had the right to the injunction since "the subject matter of the dispute was within the proper compass of the President's foreign relations power." For precedents supporting this position, Harlan cited (1) the executive's privilege to refuse to disclose to either Congress or the

courts information relating to foreign affairs or the national defense;[34] (2) relations with foreign powers which have no direct effect upon domestic interests;[35] and (3) matters which, to the extent they affect domestic interests, do so with the authorization of Congress.[36]

In New York Times, there were two constitutional questions that could have been answered. The first question was whether the Government as a whole could restrain the publication of the Pentagon Papers despite the First Amendment. Assuming that the Government could restrain publication, the next query was whether the Executive has the power to impose such restraints without congressional authorization. Since the Court did refuse to permit the restraint, it would seem that the basis for its decision has to be a negative answer to one or both of the questions posed. But when adding and subtracting the opinions of the various Justices, the synthesis which appears suggests that neither of the constitutional considerations standing by itself was determinative of the case.

What one does find in the synthesis is a weighing of the damage which might be suffered by the "national interest" against both the First Amendment and the separation of powers question. And it follows without close reading of the Times case that the damage did not warrant

---

[34] United States v. Reynolds, 345 U.S. 1 (1953).

[35] 10 Annals of Congress 613 (1800); a statement by John Marshall on the floor of the House of Representatives.

[36] United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); conviction of offense created by Joint Resolution of Congress was proper despite arguments that the Joint Resolution was an unconstitutional delegation of authority by Congress to the President.

the granting of an injunction against the publication of the papers. Perhaps, this was Justice White's position when he stated that "the United States had not satisfied the very heavy burden which it must meet to warrant an injunction against publication in these cases, at least in absence of express and appropriately limited congressional authorization for prior restraints in circumstances such as these." The Court's balancing of considerations in New York Times--and in Youngstown--has led Peter Junger to posit that there is only one principle that can be derived from the two cases: "The doctrine of the separation of powers denies the Executive the constitutional power to take action on his own authorization if that action would be of doubtful constitutionality had it been authorized by Congress."[37]

Junger's point, I believe, is well taken if one considers the similarities between the two cases. First, like Youngstown, there was a majority assumption that the circumstances of the Times case arose under a situation of "normalcy." Neither the Korean "war" nor the Vietnam "war" were declared by Congress and in both cases the Executive argued that the war made his actions necessary. In Youngstown, the steel plants were seized to prevent a strike that supposedly would have catastrophic effects on the war effort. In New York Times, the executive branch justified the censorship upon the grounds that the publication of the papers would have adverse effects on the conduct of the war, as well as our relations with other countries.

The second similarity is that in both cases the Court dealt with the problem of inherent executive powers on an ad hoc basis. In Youngs-

---

[37]Junger, "Down Memory Lane: The Case of the Pentagon Papers," p.38.

town the question was whether the Executive had the inherent power to seize the nation's steel mills. And, as pointed out above, one of the questions in New York Times was whether the Executive had the inherent power to censor the press.

A third and final similarity[38] between the two cases rests in Justice Holmes' famous admonition; "Great cases like hard cases make bad law. . . ."[39] Whereas Justices Harlan and Blackmun accused New York Times of being a great case, and therefore a maker of bad law, one commentator described Youngstown as "the legal battle of the century."[40] In terms of "greatness," both cases received massive attention in the press and appeared at the time to involve questions of major national importance. In New York Times, the press was understandbly enough almost unanimously opposed to the Executive's attempts to censor some of its members. Reminiscing about Youngstown in his Memoirs, President Truman recalled that there were

> few instances in history where the press was more sensational or partisan. . . . What was more disturbing was what amounted to editorial intervention by the press of America in a case pending before the Supreme Court of the United States. News stories and editorials. . . inflaming public opinion were pre-

---

[38]This is not to say other similarities do not exist. For example, the progression of Youngstown and New York Times were both remarkably swift, and in both cases, the decision of the Court was riddled with numerous opinions.

[39]". . . great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will ben;" dissenting in Northern Securities Co. v. United States 193 U.S. 197, 400-01 (1904).

[40]J. Banks, "Steel, Sawyer and the Executive Power," 14 U. Pitt L. Rev. (1953); cited by Junger, p. 29. Junger points out that Banks was counsel for Jones and Lauglin Steel Corporation in the Youngstown case.

judging and deciding the case at the very time the Court itself was hearing arguments for both sides.[41]

Despite the similarities between the two cases, one cannot read the opinions in New York Times without concluding that the First Amendment problem played a major role in the process by which the majority reached its decision that publication of the Pentagon Papers could not be enjoined. The argument made by Justices White, Stewart and Marshall concerning Congress' evident past refusal to authorize injunctive remedies[42] is one of two grounds forthe Court denying relief in Times. The other ground is Justice Stewart's argument that the Government did not prove that the publication of the papers would "surely result in direct, immediate and irreparable injury to (the) Nation or its people."[43] While the emphasis of this principle is on the importance of free expression, itoobviously does not hold the First Amendment absolute, and thus recognizes that substantial countervailing state interests may outweigh the values of expression. For this reason, the balancing principle, which a majority of the Court apparently accepted,[44] would in some situations sanction actions resulting from executive de-

---

[41]Harry S. Truman, Memoirs: Years of Trial of Hope II (1956), p. 475; cited by Junger, p. 30

[42]In 1917, Congress rejected an amendment to the Espionage Act which would have given the President the power to prohibit, on pain of fine or imprisonment, the publication of any material relating to the national defense.

[43]See supra, pp. 27-28.

[44]Justice Douglas, Brennan and White would presumably concur in the application of the standard proposed in Justice Stewart's opinion for purposes of denying an injunction.

terminations of threats to the national security.[45]

In sum, then, the Court's stress in Times on the First Amendment problem suggests that some constitutional questions are more to be avoided than others. As Justice Frankfurter pointed out in Youngstown, "It ought to be, but apparently is not, a matter of common understanding that clashes between different branches of the government should be avoided if a legal ground of less explosive potentialities is available." The Court could have decided that the Executive lacked the inherent power to obtain the injunction against publication, but instead Times turned on the question of whether a law passed by Congress authorizing such an injunction would be constitutional. Thus, in the end, the Pentagon Papers case imposes no serious limitations on the Executive in terms of asserted powers.[46] The case, as William Van Alstyne puts it, was a "constitutional anti-climax" in the respect that "in no sense can it be said to have belittled the executive power as that power was understood the day before the decision came down."[47]

Given the events called Watergate, the Supreme Court's decision in

---

[45]In an early analysis of the Pentagon Papers case, the Harvard Law Review viewed the balancing approach as an important development in constitutional law, supporting its assessment with the hypothetical situation where the publication of detailed plans of future military operations or of sophisticated scientific data of military importance would be of greater value to hostile foreign nations than to an informed critique of public policy; "Freedom of Speech, Press and Association," Harvard Law Review, 85 (1971), p. 205.

[46]As Junger notes, "An opponent of unrestrained executive power would presumably have been happier if the first amendment had never been mentioned in New York Times," in "Down Memory Lane: The Case of the Pentagon Papers," p. 52.

[47]William Van Alstyne, "A Political and Constitutional Review of United States v. Nixon," reprint from UCLA Law Review, 22 (October, 1974), p. 116.

United States v. Nixon[48] had its roots in New York Times. Philip B. Kurland, who stresses this point at the beginning of an article written for the UCLA Law Review's symposium on the Nixon case, states that it was the publication of the Pentagon Papers which "exacerbated the paranoia of the Nixon administration, that called forth the plumbers and other extraconstitutional devices by a chagrined executive. . . Hence the Ellsberg trial, the concealment of break-ins and wiretaps, and White House behavior that looked suspiciously like an attempt to bribe a trial judge with a different federal appointment."[49] Having contributed tangentially to the events of Watergate by its decisions in New York Times and the Democratic Convention cases,[50] Kurland maintains that the Court proceeded "to oust a President" in United States v. Nixon:

> The Nixon case was rushed to decision skipping adjudication, so that its effect would be plainly felt in the impeachment processes that were under way. Even before the event, it was easy to predict that the Court's decision would be determinative of the viability of the Nixon presidency. The decision was reached on July 24, 1974; the House Judiciary Committee voted impeachment articles on the 31st of July and the 1st of August; the President all but confessed his implication in the Watergate coverup when he published the tapes ordered produced by the Court, on August 5, 1974; the President resigned on August 9, 1974.[51]

In United States v. Nixon, the Supreme Court for the first time passed on the question of executive privilege for confidential communications to which the President is a party. While Kurland maintains

---

[48]94 S. Ct. 3090 (1974).

[49]Philip B. Kurland, "United States v. Nixon: Who Killed Cock Robin?" Symposium: United States v. Nixon (October, 1974; rpt. UCLA Law Review XXII), pp. 68-9.

[50]O'Brien v. Brown, 409 U.S. 1 (1972); Cousins v. Wigoda, 409 U. S. 1201 (1972).

[51]Kurland, op. cit., p. 69.

on one hand that the Court was instrumental in ousting a President, he concludes on the other that the Court's reasoning in United States v. Nixon was good for that case only; the Nixon decision "purports to justify a conclusion that the Court obviously thought necessary in the circumstances of the grim political situation with which the country was faced," but it "hardly explicated the complicated concept of executive privilege and its proper and improper use."[52] Along these lines, I think it can be said that United States v. Nixon, like New York Times, was a "constitutional anti-climax" for the simple reason that claims of inherent power always boil down to arguments based on necessity. In this case, the handwriting was on the wall. Thus, it is not surprising that the Court rejected President Nixon's assertion of a "generalized privilege of confidentiality" under the circumstances of Watergate, where it was not alleged that interests of national security or of foreign relations were in any way involved.

To recall what is recent and well-known history, the District Court for the District of Columbia issued a subpoena on the motion of the Watergate special prosecutor directing the President to produce certain tape recordings and documents relating to his conversations with White House assistants, which were in connection with the trial of seven individuals[53] indicted for various offenses, including conspiracy to defraud the United States and the obstruction of justice.

---

[52]Kurland, op. cit., p. 74.

[53]The seven defendants were John N. Mitchell, H. R. Haldeman, John D. Ehrlichman, Charles W. Colson, Robert C. Mardian, Kenneth W. Parkinson, and Gordon Strachan. Each had occupied either a position of responsibility on the White House staff or the Committee for the Re-Election of the President.

In response, the President's counsel filed a motion to quash the subpoena, essentially arguing that the Executive had an absolute, unreviewable, discretionary privilege to control the release of any presidential tapes and documents. The district court denied the President's motion to quash the subpoena, but stayed its order pending appellate review. The Supreme Court took the unusual step of granting a writ of certiorari before judgment.

Writing for an unanimous Court,[54] Chief Justice Burger affirmed the decision of the lower court, holding that the President's claim of absolute privilege to withhold tapes, unsupported by any claims of need to protect military, diplomatic or sensitive national security interests, could not prevail in view of the special prosecutor's demonstrated, specific need for the tape recordings and documents.

Before the Court dealt with the substantive issue of executive privilege, it had to establish its jurisdiction by dealing with the issues of whether it was an "intra-branch" dispute. Although the Court dealt with each of these issues separately, any question of possible presidential immunity from judicial process was simply subsumed into the substantive issues of the case. Needless to say, all of these preliminary matters were resolved in favor of the Court's jurisdiction, though the reasoning left a great deal to be desired.[55]

---

[54]Justice Rehnquist took no part in the consideration or decision of the case.

[55]For similar arguments along this line, see Kenneth L. Karst and Harold W. Horowitz, "Presidential Prerogative and Judicial Review;" Paul J. Mishkin, "Great Cases and Soft Law: A Comment on United States v. Nixon;" and Kurland, op. cit.; in Symposium: United States v. Nixon,

It is believed that an analysis of any particular issue going to the jurisdiction of the Court reveals the pattern of the Nixon opinion. For this reason, I will only examine one issue of this type, "Justiciability." The argument made by the President's counsel was that the conflict between the Chief Executive and special prosecutor was "an intra-branch dispute between a subordinate and superior officer of the Executive Branch and hence not subject to judicial resolution."[56] Carried a step further, the counsel asserted that since both officers were of the Executive Branch, the issue was a "political question," and not appropriate for the courts to decide.

In rejecting this conclusion, the Court first asserted that "a claim of an 'intra branch dispute,' without more, has never operated to defeat federal jurisdiction; justiciability does not depend upon such a surface inquiry." The question then becomes what does justiciability depend upon? What follows is not, as Kurland puts it, "a principled answer but an ad hoc response:"

> In light of the uniqueness of the setting in which the conflict arises, the fact that both parties are officers of the Executive Branch cannot be viewed as a barrier to justiciability. It would be inconsistent with the applicable law and regulation, and the unique facts of this case to conclude other than that the Special Prosecutor has standing to bring this action and that a justiciable controversy is presented for decision.

Obviously, there is no room for doubt about the "uniqueness of the setting, but, as Kurland and others[58] point out, one can question

---

[56]The counsel's argument is cited by Burger, 94 S. Ct. 3100.

[57]Kurland, op, cit., p. 71.

[58]For example, see Mishkin, "Great Cases and Soft Law . . . ," pp. 81-2; and Alstyne, "A Political and Constitutional Review of United States v. Nixon," pp. 131-9.

the relevancy of "the applicable law" in view of the Court's citations.[59] The Court did proclaim that because the power of the Attorney General was derived from Congress,[60] the special prosecutor had vested in him the "explicit power to contest the invocation of executive privilege in the process of seeking evidence deemed relevant to the performance of these specially delegated duties." Since the authority delegated to the special prosecutor had "the force of law," he had the power, pursuant to the regulations set by Congress, to take the action in question.

---

[59]For example, the Court, citing United States v. ICC, stated that "whatever the correct answer on the merits, these issues are 'of a type which are traditionally justiciable.'" 377 U.S., at 430. However, as Alstyne points out: "(United States v. ICC) may well have been appropriate for the Supreme Court to cite in United States v. Nixon as a first step in determining the Special Prosecutor's 'standing' to have applied for a subpoena, but it is without value as to whether his representation of an exclusively executive interest (i.e., whether judicial assistance should be sought to secure evidence for a prosecutive use) may be preempted by the President of the United States, once the President himself makes a direct assertion in court as Chief Executive that assistance by the court is not only not desired, but that he affirmatively opposes it." In the same reference, Alstyne goes on to say that "United States v. ICC said nothing whatever of course, as to whether the President of the United States might have authoritatively preempted the Attorney General in district court by entering an appearance on his own behalf, as Chief Executive, to move that the proceeding should be dismissed. Had he done so, the Court would then have had occasion to determine whether anything other than a purely executive interest was involved, a question not deemed necessary to consider at the time at all. The President had made no such assertion;" op. cit., n. 57, p. 134.

[60]The Court stated that "under the authority of Art. II, sec. 2, Congress has vested in the Attorney General the power to conduct the criminal litigation of the United States Government. 28 U.S.C., sec. 516. It has also vested in him the power to appoint subordinated officers to assist him in the discharge of his duties. 28 U.S.C., secs. 509, 510, 515, 533. Acting pursuant to these statutes, the Attorney General has delegated the authority to represent the United States in these particular matters to a Special Prosecutor with unique authority and tenure."

What the Court seemed to be saying, although not in so many words, was that the Attorney General's regulation [61] provided the special prosecutor with the special safeguards of independence and tenure, since Congress had validly vested in the Attorney General the power to prosecute and to appoint others to assist him. Therefore, an "intra-branch dispute" could not be settled within the Executive Branch, because the President had no authority over the special prosecutor with regard to the issue in question. Citing several cases which support a private individual's right to claim the benefit of federal regulations against government imposition,[62] Burger treats them as sufficient to establish the Attorney General's regulation as giving the special prosecutor adequate protection against the President. The opinion suggests, then, that the special prosecutor was not within the chain of command that leads to the President. Thus, the prosecutor had the proper authorization to seek assistance from the courts to secure evidence with respect to trails arising from the presidential election in 1972. In passing, Burger deemed it significant, according to a provision in the regulation, that "the Special Prosecutor was not to be removed without the 'consensus' of eight designated leaders of Congress." But the Court did not consider the possible constitutional separation-of-powers issues raised by such an arrangement.

In view of these propositions, it is important to point out that nowhere in the Nixon opinion does the Court deal with the significance of its previous decisions in such cases as Myers v. United States.[63]

---

[61] See supra, n. 60, p. 39.

[62] Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363, 388 (1957); Accardi v. Shaughnessy, 347 U.S. 260 (1954).

[63] 272 U.S. 52 (1926).

In the Myers case, the Court strongly asserted the inherent power of the President to control and remove subordinate policy-level officials in the Executive Branch despite congressional legislation seeking to limit it. The Court's decision in United States v. Nixon appears to implicitly overrule Myers with its holding that Congress may authorize the Attorney General to establish limitations on the President's power. Putting this problem in its proper perspective, Alstyne notes: "If one insists that the power to provide for the appointment and removal of an 'inferior' officer also carries with it the power to provide for the constitutional finality of an (article II) executive decision that such person may make, the officer is, to that extent, not an 'inferior' at all--and thus the clause is inoperative."[64] According to Alstyne, the real issue in United States v. Nixon was, as the Court put it, whether or not "a President's decision is final in determining what evidence is to be used in a given criminal case."[65] But he concludes that this issue "was buried and lost, subsumed in the mere determination of the Special Prosecutor's standing to sue and the justiciability of his claim."[66]

Having established that the special prosecutor did have standing

---

[64]Alstyne, op. cit., p. 137. On this point, Alstyne concludes: "Only to the extent that the supererogatory authority of the President of the United States is left free to assert itself (in any instance when the President resolves the proper use of article II in some manner contrary to the initial determination of another) can it fairly be said, that, in respect to that power, the other person is truly an 'inferior' officer;" p. 137.

[65]94 S. Ct. at 3100.

[66]Alstyne, op. cit., p. 139.

and that the issue was justiciable, the Court proceeded to deal with the ultimate issue of "executive privilege." The Court's handling of the executive privilege question repeats the pattern described above--an ad hoc response to the facts of the case which rises little above "ipse dixit." In essence, the Court held that the President has a privilege, "fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution," to protect and maintain confidential communications within the Executive Branch. However, that privilege in this case could not "prevail over the fundamental demands of due process of law in the fair administration of criminal justice. . . (I)t must yield to the demonstrated, specific need for evidence in a pending criminal trial."

There can be little doubt that the Court's reasoning in United States v. Nixon is good for this case only. We are told that there is executive privilege, but that the privilege is not absolute; it will defer at least to the needs of criminal justice. As Professor Kurland points out, given the reasoning of the Court, "it would be necessary to hold that none of the confidential communications privileges now extant, whether that of husband-wife, lawyer-client, physician-patient, priest-penitant, would protect against a subpoena for production of such materials."[67] While the opinion emphasizes that the process of decision is a balancing process, there are problems in its language, particularly if, as Kurland suggests, we substitute any of the other confidential communications privileges for that which is the subject of the Court's judgment:

---

[67]Kurland, op. cit., p. 73.

> In this case we must weigh the importance of the general privilege of confidentiality of presidential communications in performance of his responsibilities against the inroads of such a privilege on the administration of criminal justice. The interest in preserving confidentiality is weighty indeed and entitled to great respect. However we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occassions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution.
>
> On the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the function of the courts. A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of justice. Without access to specific facts a criminal prosecution may be totally frustrated.

If we were to accept these propositions, each of the confidential privileges (husband-wife,etc.) would fall when the contents of the privileged material were sought for used in criminal proceedings. Read in this light, the Court's reasoning in holding against President Nixon is sparse and at best rests on the grounds of surface plausibility. In view of the serious implications which the reasoning carries, it seems most unlikely that the narrow holding of United States v. Nixon will be applied in the future. Could there ever be another Wagergate?

Besides these problems in the Court's reasoning, there is also the problem of the Court assuming that executive privilege "is inextricably rooted in the separation of powers under the Constitution." In the face of strong, if not conclusive, evidence that executive privilege is a "myth," Professor Raoul Berger asserts that this assumption "legitimate[s] and anoint[s] presidential claims that are vitiated by historical facts and which have been perverted by the grossest

abuses."[68] Although the Court did hold that this constitutionally-based privilege must yield to the need for complete evidence in criminal prosecutions, the impact of the Nixon decision on the Executive Branch "is not inhibiting but life-giving."[69] To cite Professor Kurland once again, "(The Court's) holding that article II is the source of the confidential communication privilege, which the opinion validates for the first time, may create momentous problems."[70]

* * *

In spite of the understandable alarm so recently expressed about the spiraling growth of executive power,[71] the Court's decisions in United States v. Nixon, New York Times Co. v. United States, and Youngstown Sheet and Tube Co. v. Sawyer cannot be read as imposing any serious limitations on the principle of presidential executive supremacy. To recall what Justice Jackson in his eloquent Youngstown concurrence said: "With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law. . . ." But as I have suggested in this paper, the limits of the law found in each decision is only relevant to the circumstances surrounding the case. Indeed, what seems to emerge

---

[68]Raoul Berger, "The Incarnation of Executive Privilege," in Symposium: United States v. Nixon, p. 11.

[69]Karst and Horowitz, op. cit., p. 67.

[70]Kurland, op. cit., pp. 74-5.

[71]Rexford G. Tugwell and Thomas E. Cronin (eds.), The Presidency Reappraised (New York: Praeger, 1974); and, Arthur M. Schlesinger, The Imperial Presidency (Boston: Houghton-Miflin, 1973).

from the three cases are generalized constitutionally-based executive powers that are weighed against arguments based on "necessity." In view of Jackson's statement, the Court also seems to be aware of what Justice Brandeis said in his dissent in Myers v. United States: Such powers "might conceivably be deemed indispensable to democratic government." Thus, the role of the Court has been to walk a tight line between these two rationales, while an ever-exapnding Presidency continues to grow. But the rise of an imperial Presidency certainly does not rest with the Supreme Court. As Paul Mishkin notes in his closing comments on the Nixon case,

> The fundamental evil is that the Court was confronted with the issue. The basic failing was that the problem was not resolved by the political system, including the other two branches of government, before it reached the Court. But the causes of that failure, and possible cures, must be the subject of a different, larger inquiry.[72]

---

[72]Mishkin, op. cit., p. 91.

A SELECTED BIBLIOGRAPHY

Alstyne, William Van. "A Political and Constitutional Review of United States v. Nixon," UCLA Law Review, 22 (October, 1974).

Berger, Raoul. Executive Privilege: A Constitutional Myth. Cambridge: Harvard University Press, 1974.

_____. "The Incarnation of Executive Privilege," UCLA Law Review, 22 (October, 1974).

Binkley, W. E. The Powers of the President. Garden City, New York: 1937.

Corwin, Edward S. The President: Office and Powers 1787-1957. 4th ed. New York: New York University Press, 1957.

_____. "The Steel Seizure Case: A Judicial Brick Without Straw." Essays in Constitutional Law. Ed. Robert G. McCloskey. New York: Knopf, 1957.

Cronin, Thomas E., and Tugwell, Rexford G., eds. The Presidency Reappraised. New York: Praeger, 1974.

_____. "The Textbook Presidency and Political Science." (Unpublished paper.)

Drucker, Peter. The Age of Discontinuity. New York: Harper and Row, 1969.

Fisher, Louis. President and Congress: Power and Policy. New York: The Free Press, 1972.

Freund, Paul A. "Foreward: On Presidential Privilege," Harvard Law Review, 88 (1974).

Gunther, Gerald. "Judicial Hegemony and Legislative Autonomy: The Nixon Case and the Impeachment Process," UCLA Law Review, 22 (October, 1974).

Hamilton, Alexander. The Works of Alexander Hamilton. Ed. Henry Cabot Lodge. New York: Putnam, 1904, IV.

Henkin, Louis. "Executive Privilege: Mr. Nixon Lose But the Presidency Largely Prevails," UCLA Law Review, 22 (October, 1974).

Junger, Peter D. "Down Memory Lane: The Case of the Pentagon Papers," Case Western Law Review, 23 (November, 1971).

Karst, Kenneth L. and Horowitz, Harold W. "Presidential Prerogative and Judicial Review," UCLA Law Review, 22 (October, 1974).

Kurland, Philip B. "United States v. Nixon: Who Killed Cock Robin?" UCLA Law Review, 22 (October, 1974).

Lowi, Theodore. The End of Liberalism. New York: Norton, 1969.

Madison, James. The Writings of James Madison. Ed. Gaillard Hunt. New York: Putnam, 1900-1910, VI.

McCloskey, Robert G., ed. "The Powers of the President," Essays in Constitutional Law. New York: Knopf, 1957.

Mishkin, Paul J. "Great Cases and Soft Law: A Comment on United States v. Nixon," UCLA Law Review, 22 (October, 1974).

Moynihan, Daniel P. Maximum Feasible Misunderstanding. New York: Macmillan, 1969.

Neustadt, Richard E. Presidential Power. New York: New American Library, 1960.

The Pentagon Papers. New York: Bantam Books, 1971

Pritchett, C. Herman. The American Constitution. 2nd ed. New York: McGraw-Hill, 1968.

Ratner, Leonard G. "Executive Privilege, Self-Incrimination, and the Separation of Powers Illusion," UCLA Law Review, 22 (October, 1974).

Roche, John P. "Executive Power and Domestic Emergency: The Quest for Prerogative," Western Political Quarterly, 5 (December, 1952).

Roosevelt, Theodore. Autobiography. New York: Macmillan, 1913.

Rossiter, Clinton. The American Presidency. New York: Harcourt and Brace, 1956.

Schlesinger, ARthur M. The Imperial Presidency. Boston: Houghton-Miflin, 1973.

Schubert. Glendon A. "The Steel Case: Presidential Responsibility and Judicial Irresponsibility," Western Political Quarterly, VI (1953).

Taft, William Howard. Our Chief Magistrate and His Powers. New York: Columbia University Press, 1916.

Westin, Alan F. The Anatomy of a Constitutional Law Case. New York: Macmillan, 1958.

Wormuth, Francis D. "The Nixon Theory of the War Power: A Critique," California Law Review, 60 (1972).

CASES

Ex parte Milligan, 4 Wall. 2 (1866).

Ex Parte Vallandigham, I Wall. 243 (1864).

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

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

Myers v. United States, 272 U.S. 52 (1926).

New York Times Co. v. United States, 430 U.S. 713 (1971).

United States v. Midwest Oil Co., 236 U.S. 459 (1915).

United States v. Nixon, 94 S. Ct. 3090 (1974).

Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952).