THE POLITICAL ECONOMY OF PRESIDENTIAL FOREIGN POLICYMAKING: THE CONTEMPORARY THEORY OF A BIFURCATED PRESIDENCY

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War is in fact the true nurse of executive aggrandizement.[1]

The national security state consumes the presidency.[2]

War is the health of the State.[3]

INTRODUCTION

The following discussion assesses from a functionalist perspective the theory of a bifurcated presidency. By functionalism is meant social organization premised upon groupings or classifications ascertained via activity, use, or specific contribution.[4] Functionalism is expressed through the policymaking division of labor among the three branches of the federal government. By a bifurcated presidency is meant one which shares power with its two sister branches of the federal government in setting domestic policy, but need not share power in making foreign policy.

The bifurcated presidency proposition was elaborated upon last year by the Legal Advisor to the Counsel to the President, and the U.S. Justice Department's Office of Policy Development Senior Ad-

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1. Madison, *Letters of Helvidius, No. IV, reprinted in* 6 THE WRITINGS OF JAMES MADISON 171, 174 (G. Hunt ed. 1906).

> War is in fact the true nurse of executive aggrandizement. In war, a physical force is to be created; and it is the executive will, which is to direct it. In war, the public treasures are to be unlocked; and it is the executive hand which is to dispense them. In war, the honors and emoluments of office are to be multiplied; and it is the executive patronage under which they are to be enjoyed. It is in war, finally, that laurels are to be gathered; and it is the executive brow they are to encircle.

Id.

2. Moynihan, *The Peace Dividend*, N.Y. Rev. Books, June 28, 1990, at 3, col. 1, 4. U.S. Senator Daniel Patrick Moynihan speaks with the authority of a former U.S. Ambassador to India, and former U.S. permanent representative to the United Nations.

3. Bourne, *The State*, in WAR AND THE INTELLECTUALS: ESSAYS BY RANDOLPH S. BOURNE 1915-1919, at 65, 71 (C. Resek ed. 1964). "For war is essentially the health of the State." *Id.* at 69.

4. DICTIONARY OF SOCIOLOGY 126 (H. Fairchild ed. 1967).

visor. The following discussion addresses their presentation. This general proposition simultaneously was, in effect, criticized by Yale Law School Professor Harold Jongju Koh in his impressive treatise of last year, *The National Security Constitution*;[5] the substance of that treatise is descriptively, although not normatively, consistent with the Rivkin-Block presentation. The instant discussion draws upon his work to throw into perspective the Rivkin-Block bifurcated presidency theory.

I. THE THEORY OF A BIFURCATED PRESIDENCY

In their 1990 paper entitled *Legislative Power-Grab: The Anti-Federalist Counterrevolution in the Making*,[6] Legal Advisor to the Counsel to the President David B. Rivkin, Jr. and Justice Department Office of Policy Development Senior Attorney-Advisor Lawrence J. Block propound what elsewhere has been styled the theory of the "bifurcated presidency."[7] Such a presidency shares power with the other two branches of the federal government in domestic policymaking but, as already noted, refuses powersharing in foreign policymaking.[8] Their paper encompasses sweeping claims of executive power.[9] They contend that the President is to conduct foreign affairs subject only to specific congressional checks, Congress lacking authority to "codetermine"[10] foreign policy. They assail as "the neo-Antifederalist Party"[11] such politico-legal critics as Leonard Levy,[12] Anthony Lewis[13] and Theodore Draper[14] for arguing in

5. H. KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR (1990).

6. *'The Constitution in Danger': An Exchange*, N.Y. Rev. Books, May 17, 1990, at 50, col. 1. Lawrence J. Block and David B. Rivkin, Jr.'s half of this exchange they entitle *Legislative Power Grab: The Anti-Federalist Counterrevolution in the Making. Id.* This paper is a current version of Block & Rivkin, *The Battle to Control the Conduct of Foreign Intelligence and Court Operations: The Ultra-Whig Counterrevolution Revisited*, 12 HARV. J.L. & PUB. POL'Y 303 (1989). Only the former incorporates United States v. Verdugo-Urquidez, 110 S. Ct. 1056 (1990). The respected William Goldsmith styles Block and Rivkin "the two senior attorneys in the Bush Administration." Goldsmith, *Letter to the Editor*, N.Y. Rev. Books, Aug. 16, 1990, at 60, col. 4. Goldsmith is the author of W. GOLDSMITH, THE GROWTH OF PRESIDENTIAL POWER (1974).

7. This is its characterization by Theodore Draper. *'The Constitution in Danger': An Exchange*, *supra* note 6, at 52, col. 2.

8. *Id.*

9. Taylor, *Breaking Presidential Rule over Foreign Affairs*, Miami Rev., May 23, 1990, at 9, col. 1.

10. *'The Constitution in Danger': An Exchange*, *supra* note 6, at 50, col. 2.

11. *Id.* col. 1.

12. Historian Leonard W. Levy is the author of, *inter alia*, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY (1960); JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE (1963); ORIGINS OF THE FIFTH AMENDMENT (1968); JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY (1972); AGAINST THE LAW:

favor of a broader congressional role in foreign relations.

According to Rivkin and Block,[15] the Constitutional Convention limited congressional powers to those granted in article I,[16] and limited the federal judicial power to an enumerated set of cases and controversies in article III.[17] But article II vests the general executive power in the President alone.[18] The general vesting clause of executive power in article II vests in the executive alone any executive power inferrible from any part of the Constitution.[19]

Rivkin and Block submit: "[I]t is clear that actions and decisions of the Executive in the conduct of foreign policy are not subject to direct legislative control by Congress."[20] Again: "Congress does not have unlimited power to indirectly impede presidential authority by attaching conditions to appropriations that require the President to relinquish any of his constitutional discretion in foreign affairs."[21] And again: "[T]he real problem bedeviling the American body politic is not presidential aggrandizement of his foreign affairs powers; instead it is the imperial and highly partisan congressional foreign policy micromanagement."[22]

Rivkin and Block acknowledge that the President participates in the legislative process through the Presidential veto power.[23] The Senate exercises a limited executive power to confirm or deny executive appointments and to ratify or reject treaties. Congress as a whole has authority to declare war and to impeach and try executive and judicial officers.[24] Rivkin and Block assert, however, that "until the recent wave of neo-Antifederalist revisionism, it had been generally accepted that executive power does include a plenary power over foreign affairs."[25]

THE NIXON COURT AND CRIMINAL JUSTICE (1974); EMERGENCE OF A FREE PRESS (1985); CONSTITUTIONAL OPINIONS (1986); and THE ESTABLISHMENT CLAUSE (1986).

13. Anthony Lewis is the author of, *inter alia*, GIDEON'S TRUMPET (1964).

14. Theodore Draper is the author of, *inter alia*, THE ROOTS OF AMERICAN COMMUNISM (1957); AMERICAN COMMUNISM AND SOVIET RUSSIA (1960); CASTRO'S REVOLUTION: MYTHS AND REALITIES (1962); CASTROISM, THEORY AND PRACTICE (1965); ABUSE OF POWER (1967); ISRAEL AND WORLD POLITICS (1968); THE DOMINICAN REVOLT (1968); and A PRESENT OF THINGS PAST: SELECTED ESSAYS (1990).

15. *'The Constitution in Danger': An Exchange*, *supra* note 6, at 50, col. 4.

16. U.S. CONST. art. I, § 1.

17. U.S. CONST. art. III, § 2, cl. 1.

18. U.S. CONST. art. II, § 1.

19. *'The Constitution in Danger': An Exchange*, *supra* note 6, at 50, col. 4.

20. *Id.* at 51, col. 3 to 52, col. 1.

21. *Id.* at 52, col. 1.

22. *Id.* at 52, col. 2.

23. *Id.* at 50, col. 2.

24. *Id.*

25. *Id.* at 51, col. 1.

The *United States v. Curtiss-Wright Export Corp.*[26] opinion of 1936 inaugurated the contemporary period of a presidency, in effect, wholly unchecked in foreign policymaking by any judicially-enforced constitutional principle.[27] *Curtiss-Wright* is thereby analogous to *NLRB v. Jones & Laughlin Steel Corp.*[28] After *Jones & Laughlin*, Congress is, in effect, wholly unchecked in economic policymaking by any judicially-enforced constitutional principle.[29] Both are analogous to *United States v. Carolene Products Co.*[30] After *Carolene Products*, the federal judiciary (above all the Supreme Court) in effect makes social policy (especially over the states) wholly unchecked by any constitutional principle.

II. THE RIVKIN-BLOCK AUTHORITIES

Rivkin and Block understand the constitutional framework to preclude the location of power concurrently in two or three branches of government,[31] denying that "shared powers" exist.[32] Their concept of executive power they trace in part to Locke, Montesquieu and Blackstone,[33] all three of whom they suppose consti-

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

27. Swan, *The Political Economy of the Burger Court: A Study in Constitutional Functionalism*, 7 ST. LOUIS U. PUB. L. REV. 359, 398-99 (1988).

28. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

29. Lawyer-political economy analyst Charlotte Twight has been blunt: "[B]y 1975 the national government in the United States possessed the power to regulate every aspect of the national economy, however local a particular economic activity may appear, if it but chose to exercise that power." C. TWIGHT, AMERICA'S EMERGING FASCIST ECONOMY 50 (1975).

30. United States v. Carolene Products, 304 U.S. 144 (1938). "Faced with the threat of Franklin Roosevelt's court-packing plan, the Supreme Court found it prudent to abandon its ties to the conservative camp and to take up such issues as civil rights and civil liberties." B. GINSBERG & M. SHEFTER, POLITICS BY OTHER MEANS: THE DECLINING IMPORTANCE OF ELECTIONS IN AMERICA 19 (1990). "An alliance between the federal courts and liberal political forces emerged during the postwar decades." *Id.* at 149. "In the 1970s and early 1980s, liberal political forces came to rely even more extensively on judicial power." *Id.* at 20.

31. *'The Constitution in Danger': An Exchange*, *supra* note 6, at 50, col. 2 (citing Burns & Markham, *Understanding Separation of Powers*, 7 PACE L. REV. 575, 580 (1987)).

32. *Id.* at 50, col. 3. Theodore Draper points out the error in this view, citing a standard source to the effect that the 1787 Constitutional Convention erected a central government of separate institutions sharing powers. *Id.* at 52, col. 3 (citing R. NEUSTADT, PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP FROM FDR TO CARTER 170 (1980)). Draper's accurate point is a familiar one, even down to the authority Draper cites. *See, e.g.*, Swan, *The Political Economy of the Separation of Powers:* Bowsher v. Synar, 17 CUMB. L. REV. 795, 797 (1987) (citing R. NEUSTADT, PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP FROM FDR TO CARTER 26 (1980)). "Neustadt's point as made in this book has been echoed regularly." *Id.* at 797 n.15. Only last year legal scholars were reminded that the language of different institutions sharing powers in policymaking derives from Richard Neustadt. H. KOH, *supra* note 5, at 4, 69, 230 n.10, 260 n.7 (citing R. NEUSTADT, PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP 101 (rev. ed. 1976)).

33. *'The Constitution in Danger': An Exchange*, *supra* note 6, at 50, col. 3.

tuted an extraordinarily great influence upon the Founding generation.[34] Each of these three favored placing foreign policymaking authority exclusively within executive hands.[35]

Whatever the intrinsic merits of their case, Rivkin and Block are on somewhat thin ice in reliance upon all three of these thinkers in explicating the Constitution of 1787. A recent study of the political writings of Americans published between 1760 and 1805 included all books, pamphlets, newspaper articles and monographs printed for public consumption; it produced 3,154 references to 224 individuals.[36] Citations surrounding the 1787-1788 debate on the Constitution[37] reveal Montesquieu as the most heavily cited author, being cited in twenty-nine percent of their citations by Federalist writers and in twenty-five percent of their citations by Antifederalist writers; Blackstone is indeed in second place, being cited in seven percent of their citations by Federalist writers and in nine percent of their citations by Antifederalists.

Locke, however, was not at all cited by the Federalists, and was cited in only three percent of citations by Antifederalists.[38] (This latter is ironic in the face of Rivkin and Block's characterization of their opponents as Antifederalist counterrevolutionaries.) To be sure, Blackstone himself cites Locke a number of times.[39] Yet Locke, who is heavily cited in the 1770s to justify the break with England,[40] and who is profound concerning the bases for opposing tyranny, has little to say regarding institutional design[41] (e.g., the Constitution). Worse, while Rivkin and Block cite Locke for his *The Second Treatise on Government*,[42] Locke's two treatises had only about one-third the availability of Locke's *An Essay Concerning Human Understanding*[43] from the libraries and booksellers of

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34. *Id.* at 50 n.10.

35. *Id.* (citing J. LOCKE, THE SECOND TREATISE ON GOVERNMENT 83, 92 (Bobbs-Merrill ed. 1952); C. DE MONTESQUIEU, THE SPIRIT OF THE LAWS 151 (Hafner ed. 1949) (1748); and W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 244 (1979) (1765)).

36. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 189, 191 (1984).

37. *Id.* at 194.

38. *Id.* at 195.

39. *Id.* at 193. The framers "were raised on English and European ideas—on Locke, filtered through Blackstone, and on Montesquieu." L. HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 4 (1990).

40. Lutz, *supra* note 36, at 192.

41. *Id.*

42. *'The Constitution in Danger': An Exchange*, *supra* note 6, at 50 n.10 (citing J. LOCKE, THE SECOND TREATISE ON GOVERNMENT (Bobbs-Merrill ed. 1952)).

43. J. LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING (P. Nidditch ed.

the founding era.[44] References to Locke's *Second Treatise* often display a comparative dearth of comprehension thereof.[45]

Nothing daunted,[46] Rivkin and Block cite four judicial authorities in their text: *United States v. Curtiss-Wright Export Corp.*;[47] *United States v. Nixon*;[48] *United States v. Verdugo-Urquidez*;[49] and *Youngstown Sheet & Tube Co. v. Sawyer*.[50] They accurately assert that it was in *Curtiss-Wright* where the Supreme Court initially lent its imprimatur to the broad presidential discretion in foreign policymaking.[51]

A. United States v. Curtiss-Wright Corp.

United States v. Curtiss-Wright Export Corp.,[52] the judicial cornerstone of the Rivkin-Block theory of a bifurcated presidency, furnished a powerful impetus to the expansion of presidential power.[53] The basis for subsequent decisions, it frequently is cited for a plenary presidential authority over foreign relations.[54] Later presidents have bid to confirm *Curtiss-Wright* as an effective judicial amendment of the Constitution's Article II, to add to the enumerated powers therein an indeterminate reservoir of executive foreign affairs authority.[55] *Curtiss-Wright* crystallized the image of unchecked executive discretion encompassing virtually the whole array of foreign relations within inherent presidential authority.[56] The opinion is so frequently quoted as to be known as the "*Curtiss-Wright*, so I'm right" citation.[57] The *Curtiss-Wright* image of policymaking repudiates the axiom of institutional powersharing and participation.[58]

1975).

44. Lutz, *supra* note 36, at 196 (citing Lundberg & May, *The Enlightened Reader in America*, 28 AM. Q. 262 (1976)).

45. Lutz, *supra* note 36, at 196.

46. Rivkin and Block thank Bradford A. Patrick of Colgate University for invaluable aid in preparing their article, *'The Constitution in Danger': An Exchange*, *supra* note 6, at 52, col. 2.

47. *Curtiss-Wright*, 299 U.S. 304.

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

49. *Verdugo-Urquidez*, 110 S. Ct. 1056.

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

51. *'The Constitution in Danger': An Exchange*, *supra* note 6, at 51, col. 3.

52. *Curtiss-Wright*, 299 U.S. 304.

53. R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 110 (1974).

54. *Id.* at 100-101.

55. H. KOH, *supra* note 5, at 94.

56. *Id.* at 72.

57. *Id.* at 94; Cole, Book Review, 99 YALE L.J. 2063, 2082 (1990).

58. H. KOH, *supra* note 5, at 72.

In *Curtiss-Wright*, an indictment had been returned charging the *Curtiss-Wright* appellees with conspiracy to sell arms to Bolivia in violation of a Congressional Joint Resolution and of a Presidential proclamation issued under authority conferred by that Resolution.[59] Appellees had demurred on the ground that the Joint Resolution represented an invalid delegation of legislative power to the executive,[60] inasmuch as the Resolution's initial (and continuing) effect was conditioned upon unfettered presidential discretion.[61]

Justice Sutherland's opinion for seven Justices[62] emphasized that in the vast international arena, with its sensitive and complex challenges, the President alone is authorized to speak as national representative.[63] As would Rivkin and Block,[64] Justice Sutherland quotes Congressman John Marshall's argument of March 7, 1800, to the House of Representatives: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."[65]

Justice Sutherland found it crucial that the Court was dealing not merely with an authority vested in the President by an exercise of the legislative power, but with such an authority accompanied by the plenary and exclusive power of the President as sole organ of the federal government in the foreign policy field.[66] While this latter power must be utilized only consistently with the Constitution, it does not require as a prerequisite to its exercise any congressional enactment.[67] If the President is legislatively authorized to act respecting matters in a foreign land, Congress properly recalls that the mode of the President's action (or whether the President acts at all) hinges upon the President's confidential information, and upon its effect on American foreign relations.[68] These considerations demonstrate the folly of demanding that in the international policy field Congress lay down narrowly defined standards whereby the President is to be governed.[69]

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59. *Curtiss-Wright*, 299 U.S. at 311.
60. *Id.* at 314-15.
61. *Id.*
62. Justice McReynolds dissented, and Justice Stone took no part in the case. *Id.* at 333.
63. *Id.* at 319.
64. *'The Constitution in Danger': An Exchange*, *supra* note 6, at 51, col. 2 (citing E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1984, at 208 (5th rev. ed. 1984)).
65. *Curtiss-Wright*, 299 U.S. at 319 (citing Annals, 6th Cong., col. 613).
66. *Curtiss-Wright*, 299 U.S. at 319-20.
67. *Id.* at 320.
68. *Id.* at 321.
69. *Id.* at 321-22.

Holding the *Curtiss-Wright* Joint Resolution void as an unlawful delegation of legislative power would have called into question a multitude of comparable acts and resolutions enacted by virtually every Congress since the First.[70] This uniform, long-continued, and undisputed legislative practice flowing in a steady stream for a century and a half evidences the constitutionality of the practice as a matter of history, in addition to the practice's legitimacy as a question, in principle, of the very nature of the President's foreign policy authority.[71]

B. United States v. Nixon

In *United States v. Nixon*,[72] Chief Justice Burger's opinion (for a unanimous eight Justices)[73] recognized that, whatever the nature of the confidentiality of presidential communications in the exercise of the President's article II powers, privilege thereto derives from the supremacy of each branch of the federal government within its own sphere.[74] With certain privileges flowing from the nature of enumerated powers, protection of the confidentiality of presidential communications enjoys constitutional support.[75]

The Supreme Court held in *Nixon* that if the ground for asserting privilege regarding subpoenaed materials sought for utilization in a criminal trial is premised solely on a generalized interest in confidentiality, that privilege yields to the fundamental demands of the due process of law in fair administration of criminal justice.[76] The Court rejected the notion that even the critical interest in the confidentiality of presidential communications is diminished substantially by production of such material for *in camera* review, absent a claim of need to protect military, diplomatic, or delicate national security secrets.[77]

The Supreme Court observed that President Nixon had not premised his privilege claim upon the grounds of military or diplomatic secrets.[78] The judiciary traditionally has displayed the utmost deference to presidential responsibilities in those reaches of the

70. *Id.* at 327.
71. *Id.* at 327-29.
72. *Nixon*, 418 U.S. 683.
73. Justice Rehnquist took no part in that opinion. *Id.* at 716.
74. *Id.* at 705.
75. *Id.* at 705-06.
76. *Id.* at 713.
77. *Id.* at 706.
78. *Id.* at 710.

President's article II duties.[79] The *Nixon* opinion concedes that the need for confidentiality even as regards casual presidential chats with associates, wherein references might be made concerning foreign statesmen, is too obvious to demand further elaboration.[80] The *Nixon* opinion thereby comports with the post-*Curtiss-Wright* plenary presidential power in foreign policymaking, a power unchecked by any judicially-enforced rule of law.

C. *United States v. Verdugo-Urquidez*

Chief Justice Rehnquist wrote the February 28, 1990, opinion for the Supreme Court in *United States v. Verdugo-Urquidez*.[81] The question therein was whether the fourth amendment applies to the search and seizure by U.S. agents of property owned by a nonresident alien[82] and located abroad.[83] The dissenting judge below, Rehnquist observed,[84] had argued that the statement in *Curtiss-Wright*, that neither the Constitution nor laws passed in pursuance thereof are of any force in foreign territory except in respect to American citizens,[85] foreclosed any claim in *Verdugo-Urquidez* to fourth amendment rights.[86] *Verdugo-Urquidez* held the fourth amendment inapplicable to the searches and seizures at issue therein.[87]

Rehnquist added that applying the fourth amendment in *Verdugo-Urquidez* would have a deep and deleterious impact on U.S. activities outside our borders. Holding the fourth amendment applicable would hamper not merely law enforcement operations outside United States boundaries, but also other foreign policy undertakings which might encompass searches or seizures. The United States has employed its armed forces abroad more than 200

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79. *Id.*
80. *Id.* at 715.
81. United States v. Verdugo-Urquidez, 110 S. Ct. 1056 (1990). Five Justices joined in the Rehnquist opinion although Justice Kennedy, the fifth Justice, added his own concurring opinion. *Id.* at 1066 (Kennedy, J., concurring).
82. "René Verdugo-Urquidez, a Mexican trafficker also accused by the [U.S.] DEA [Drug Enforcement Administration] of participating in [D.E.A. agent Enrique] Camarena's murder, was shoved through a border fence by Mexican authorities in 1986 to waiting drug agents in Calexico, Calif." Hedges & Witkin, *Kidnapping Drug Lords*, U.S. NEWS & WORLD REP., May 14, 1990, at 28.
83. *Verdugo-Urquidez*, 110 S. Ct. at 1059.
84. *Id.* at 1060.
85. *Curtiss-Wright*, 299 U.S. at 318.
86. United States v. Verdugo-Urquidez, 856 F.2d 1214, 1230-31 (9th Cir. 1988) (Wallace, J., dissenting), *rev'd*, 110 S. Ct. 1056 (1990).
87. *Verdugo-Urquidez*, 110 S. Ct. at 1059.

times to protect its citizens or national security.[88] Applying the fourth amendment in such circumstances could substantially disrupt the two political branches' capacity to respond to foreign situations touching the national interest. Aliens unattached to the United States could launch actions for damages to remedy fourth amendment violations in international waters or in foreign lands.[89]

Justice Rehnquist continued that, for better or worse, the United States must function effectively in the world of sovereign nation-states. Circumstances menacing major U.S. interests may erupt on the far side of the globe, demanding the political branches reply with military might.[90] Any limits on searches and seizures arising incidentally to such U.S. moves must be imposed by the two political branches via diplomatic understandings, treaties, or legislation.[91]

Justice Kennedy, in his concurring opinion, defined the question as what constitutional standards apply when the government acts, in reference to an alien, within the sphere of foreign operations.[92] Citing *Curtiss-Wright*, he determined that one must interpret constitutional protections in light of the indisputable power of the United States to take measures asserting its legitimate power and authority overseas.[93]

In short, *Verdugo-Urquidez* comports completely with a post-*Curtiss-Wright* plenary presidential foreign policymaking power unchecked by any judicially-enforced rule of law. Domestic searches and seizures, at least by the states, are by contrast closely regulated by the post-*Carolene Products* Supreme Court making social policy unchecked by its two democratic partners in the federal government.

D. Youngstown Sheet & Tube Co. v. Sawyer

Rivkin and Block contend that the *Curtiss-Wright* analysis of executive prerogatives is sustained[94] through *Youngstown Sheet & Tube Co. v. Sawyer*.[95] In *Youngstown*, the Supreme Court was

88. *Id.* at 1065.
89. *Id.*
90. *Id.* at 1066.
91. *Id.*
92. *Id.* at 1067 (Kennedy, J., concurring).
93. *Id.* (Kennedy, J., concurring) (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936)).
94. *'The Constitution in Danger': An Exchange*, *supra* note 6, at 51, col. 3.
95. *Youngstown*, 343 U.S. 579.

asked to decide whether President Harry S. Truman had acted within his constitutional powers when he issued an order directing Secretary of Commerce Sawyer to take possession of and operate most of the country's steel mills.[96] Justice Black's opinion for the Court recognized that the President relied upon no statutory authorization for his seizure.[97] Indeed, when the Taft-Hartley Act had been considered in 1947, Congress rejected an amendment which would have authorized such seizures in cases of emergency.[98]

The President instead argued that sufficient power inhered in the aggregate of his constitutional powers,[99] especially through the article II vesting of executive power in the President,[100] and its requirements the President take care the laws be faithfully executed[101] and that he be Commander in Chief.[102] While Congress might enjoy the powers claimed by President Truman,[103] Justice Black's opinion for the Court held the powers not to be vested in the President.[104] The Black opinion for the Court underscores the deference of the post-*Jones & Laughlin* Supreme Court to Congress in economic policymaking (e.g., the Taft-Hartley Act).

Justice Jackson's famous[105]—if not classic[106]—concurring opinion is now embraced by the full Court as a lodestone of separation of powers jurisprudence.[107] It emphasized that if the President acts pursuant to congressional authorization, his authority reaches its zenith.[108] Yet when the President moves contrary to the implied will of Congress his authority touches its nadir.[109] The steel seizure fell within the latter category.[110]

Nonetheless, Jackson highlighted the deference of the post-*Curtiss-Wright* Supreme Court to the President in foreign, or at least in foreign and military, policymaking:

> We should not use this occasion to circumscribe, much less to

96. *Id.* at 582.
97. *Id.* at 585.
98. *Id.* at 586 (citing 93 CONG. REC. 3637-3645).
99. *Id.* at 587.
100. U.S. CONST. art. II, § 1, cl. 1.
101. U.S. CONST. art. II, § 3.
102. U.S. CONST. art. II, § 2, cl. 1.
103. *Youngstown*, 343 U.S. at 588.
104. *Id.*
105. H. KOH, *supra* note 5, at 72, 105.
106. *Id.* at 107.
107. *Id.* at 105.
108. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).
109. *Id.* at 637 (Jackson, J., concurring).
110. *Id.* at 640 (Jackson, J., concurring).

> contract, the lawful role of the President as Commander in Chief. I should indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society. But, when it is turned inward, not because of rebellion but because of a lawful economic struggle between industry and labor, it should have no such indulgence.[111]

Each participating Justice plainly recognized the external implications of the *Youngstown* opinion.[112]

Justice Burton's concurring opinion also was closely keyed to the Taft-Hartley Act:[113] "For the purposes of this case the most significant feature of that Act is its omission of authority to seize an affected industry."[114] This background distinguishes Truman's seizure emergency from one wherein Congress had outlined no policy:[115]

> The controlling fact here is that Congress, within its constitutionally delegated power, has prescribed for the President specific procedures, exclusive of seizure, for his use in meeting the present type of emergency. Congress has reserved to itself the right to determine where and when to authorize the seizure of property in meeting such an emergency. Under these circumstances, the President's order . . . invaded the jurisdiction of Congress. It violated the essence of the principle of the separation of governmental powers. Accordingly, the injunction against its effectiveness should be sustained.[116]

Justice Burton does not so much challenge an unchecked post-*Curtiss-Wright* presidential power in foreign policymaking as vindicate the post-*Jones & Laughlin* unchecked congressional power in economic policymaking.

Justice Clark likewise concluded that President Truman's steel seizure was unsustainable because the President had failed to follow congressionally-prescribed methods to meet the steel crisis.[117] Justice Douglas concurred that Truman's move was of a clearly legislative nature:[118] "We could not sanction the seizures and condemnations of the steel plants in this case without reading article II

111. *Id.* at 645 (Jackson, J., concurring).
112. H. KOH, *supra* note 5, at 107.
113. *Youngstown*, 343 U.S. at 656 (Burton, J., concurring).
114. *Id.* at 657 (Burton, J., concurring).
115. *Id.* at 659 (Burton, J., concurring).
116. *Id.* at 660 (Burton, J., concurring).
117. *Id.* at 662 (Clark, J., concurring).
118. *Id.* at 630 (Douglas, J., concurring).

as giving the President not only the power to execute the laws but to make some."[119]

Justice Frankfurter's concurrence recollected the close connection between the separation of powers and the system of checks and balances.[120] Frankfurter reviewed the Taft-Hartley Act[121] with a respectful acknowledgement of congressional authority: "It cannot be contended that the President would have had power to issue this order had Congress explicitly negated such authority in formal legislation."[122] Frankfurter climaxed his concurrence recognizing that the Supreme Court was not so much defying the President as refereeing between the President and Congress: "In reaching the conclusion that conscience compels, I too derive consolation from the reflection that the President and the Congress between them will continue to safeguard the heritage which comes to them straight from George Washington."[123]

The teaching of *Youngstown*, as the Clark, Douglas and Frankfurter concurrences reaffirm, is not denial of a post-*Curtiss-Wright* unchecked presidential foreign policymaking. The teaching of *Youngstown* as reaffirmed by these three concurrences, rather, vindicates the post-*Jones & Laughlin* unchecked congressional power in economic policymaking.

III. CONTEMPORARY PRESIDENTIAL FOREIGN POLICYMAKING

Today, numerous members of both the executive branch and Congress invoke a vision of the Constitution whereby virtually the entire range of foreign affairs falls exclusively within the presidential domain, devoid of the meaningful participation of either Congress or the judiciary.[124] The President's men have exploited the vision of unchecked discretion to override the crucial premise of shared power.[125]

The President has appeared almost always to win in foreign affairs because Congress ordinarily has acquiesced in what the president has wrought, through legislative shortsightedness, inadequate drafting, ineffective legislative tools, or plain want of political will

119. *Id.* at 633 (Douglas, J., concurring).
120. *Id.* at 593 (Frankfurter, J., concurring).
121. *Id.* at 598-602 (Frankfurter, J., concurring).
122. *Id.* at 602 (Frankfurter, J., concurring).
123. *Id.* at 614 (Frankfurter, J., concurring).
124. H. KOH, *supra* note 5, at 5.
125. *Id.*

on the part of that second branch of the federal government.[126] He likewise has triumphed because the federal judiciary usually has tolerated his efforts either by declining to hear challenges to his acts, or by hearing those challenges and then on the merits affirming his authority.[127]

Through recent decades the President prevails under practically every scenario. If the executive branch possesses statutory or constitutional authority to act and Congress acquiesces, he wins.[128] Should Congress not acquiesce, but lack the political will to cut off appropriations or to pass an objecting statute and override a veto, again the Chief Executive prevails. Should a private individual or a member of Congress sue to challenge the President's action, the judiciary probably will decline to adjudicate that challenge on the ground that the plaintiff lacks standing; the question is not ripe, or is moot, or political; the defendant is immune; or that relief is inappropriate.[129] And even if the plaintiffs somehow overcome each of these obstacles and persuade the courts to hear their challenge on the merits, the judiciary usually will rule in favor of the President.[130]

Particularly since the Indochina War, the judiciary has renounced policing the boundaries of executive-congressional authority over national security affairs. The courts instead have adopted a broad deference in foreign affairs to the executive, a deference arising as much from a complicated meld of cowardice and confusion as from legitimate concerns over competence and the Constitu-

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126. *Id.* at 5, 117.

127. *Id.*

128. *Id.* at 135, 148.

129. *Id.* Although the judiciary renounced policing the bounds of executive-congressional authority regarding national security, it simultaneously increased the reach of courts into American life by regarding a wider array of matters subject to judicial resolution:

> Since the 1960s, the Supreme Court has relaxed the rules governing justiciability-the conditions under which courts will hear a case-to greatly increase the range of issues with which the federal judiciary can deal. For example, the Court has liberalized the doctrine of standing to permit taxpayers' suits where First Amendment issues are involved. The Court has amended the Federal Rules of Civil Procedure to facilitate class-action suits. Claims that might have been rejected as *de minimis* if asserted individually can now be aggregated against a common defendant. The Supreme Court has also effectively rescinded the abstention doctrine, which had called for federal judges to decline to hear cases that rested on questions of state law not yet resolved by the state courts. The Supreme Court has relaxed the rules governing determinations of mootness and, for all intents and purposes, has done away with the political questions doctrine, which had functioned as a limit on judicial activism.

B. GINSBERG & M. SHEFTER, *supra* note 30, at 149-50.

130. H. KOH, *supra* note 5, at 135, 148.

tion.[131] Under the War Powers Act of 1973,[132] courts have, inexplicably on the surface, asserted judicial incompetence or separation of powers rationales for failing to determine whether hostilities exist for the purpose of triggering it.[133] Simultaneously with the judicial abstention from deciding whether the American government and officials have broken international law and the constitutional law of foreign relations, they regularly have passed judgment on whether foreign government officials have broken international and domestic law—especially in transnational commercial and human rights cases under the Act of State Doctrine, the Alien Tort Statute, and the Foreign Sovereign Immunities Act.[134]

Congress meanwhile shrinks from redressing the executive-legislative imbalance in foreign policymaking by more effectively wielding its appropriations power.[135] Congress could, at an earlier juncture during the appropriations process, demand greater executive accountability. That juncture is when Congress authorizes those programs to later consume appropriations.[136]

Congress simultaneously shrinks from more liberally unleashing its impeachment power against executive officers.[137] The Constitution empowers the House to impeach, and the Senate to try, not only the President and Vice-President, but all civil officers of the United States for high crimes and misdemeanors.[138] The President lacks the constitutional power to pardon those who have undergone impeachment.[139]

If Congress was to enact a framework statute geared to regulate and protect many facets of the foreign policymaking process,[140] it could declare that violations of key provisions must constitute high crimes and misdemeanors warranting impeachment and removal from office.[141] This impeachment remedy was constitutionally designed to be exercised by Congress against executive subversion of constitutionally mandated processes.[142] Since judgment of im-

131. *Id.* at 204-05. *Cf.* L. HENKIN, *supra* note 39, at 2, 70, 79, 80-81, and 104.
132. 50 U.S.C. §§ 1541-1548 (1983).
133. H. KOH, *supra* note 5, at 192.
134. *Id.* at 193.
135. *Id.* at 176.
136. *Id.* at 178.
137. *Id.* at 176.
138. U.S. CONST. art II, § 4.
139. U.S. CONST. art II, § 2.
140. An idea for such a statute was developed only last year. H. KOH, *supra* note 5, at 157-58.
141. *Id.* at 180.
142. *Id.*

peachment constitutionally reaches no further than removal from office and disqualification to exercise any office under the United States,[143] Congress could pursue its constitutionally authorized remedy of removal from office without prejudice to any subsequent criminal investigation.[144]

Yet all of the foregoing delineates the functional scope of presidential foreign policymaking. What are the policymaking functions assigned to the two remaining contemporary branches of the central government?

IV. THE CONTEMPORARY CONSTITUTIONAL DIVISION OF LABOR

The Supreme Court's April 4, 1937, opinion in *Jones & Laughlin* signalled the capitulation of the federal judiciary to the President and Congress in the face of President Franklin D. Roosevelt's February 5, 1937,[145] threat to pack the Supreme Court.[146] On May 18, 1937, Justice Van Devanter announced his retirement opening the way for a pro-New Deal Supreme Court majority and undercutting the court-packing bid.[147] To preserve its structural integrity, the Supreme Court retreated from substantive economic policymaking.[148] Between 1937 and 1941 the Supreme Court upheld broad federal exploitation of the commerce and taxation powers,[149] as was vividly underscored in its famous 1941 opinion in *United States v. Darby*.[150]

But in Justice Stone's renowned footnote four in *Carolene Prod-*

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143. U.S. CONST. art. I, § 3, cls. 6-7.

144. H. KOH, *supra* note 5, at 180. But recognize that Professor Koh is, like any mortal, a less than perfect guide to the Constitution. He thinks: "Precisely *because* federal judges enjoy life tenure and salary independence and owe nothing to those who appointed them, it is their business to say what the law is in foreign affairs." *Id.* at 224 (emphasis in original). Although he writes of impeachment, Koh is unaware that the Constitution commands: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour. . . ." U.S. CONST. art. III, § 1. Federal judges are, as Edward Keynes recalled two years ago, impeachable on any ground Congress likes. E. KEYNES & R. MILLER, THE COURT VS. CONGRESS: PRAYER, BUSING, AND ABORTION 305 (1989). On the other hand, Koh is not greatly to be censured. Keynes' co-author made Koh's very error in Keynes' own treatise, even anticipating Koh's misguided phrase. *Id.* at 232 ("life-tenure"). And "at common law 'life tenure' itself was conditioned on 'good behavior' and was determined by the grantee's misbehavior." R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 126 (1973).

145. Caldeira, *Public Opinion and the U.S. Supreme Court: FDR's Court-Packing Plan*, 81 AM. POL. SCI. REV. 1139, 1141 (1987).

146. *Id.* at 1142.

147. *Id.* at 1142, 1148-49.

148. *Id.* at 1150.

149. E. KEYNES & R. MILLER, *supra* note 144, at 168.

150. United States v. Darby, 312 U.S. 100 (1941).

ucts, the Supreme Court (presuming the validity of economic legislation) moved toward a more searching inquiry into legislation infringing fundamental rights or impairing a minority's access to the political process.[151] The outlines of the revised Supreme Court strategy had formed by 1948. In *Hague v. CIO*[152] during 1939, the Supreme Court initially held the first amendment's freedom of petition clause applicable to the states; in *Cantwell v. Connecticut*[153] during 1940, the Supreme Court initially held the first amendment's free exercise of religion clause applicable to the states; in *Skinner v. Oklahoma*[154]during 1942, the Supreme Court prevented the state sterilization of a felon; in *West Virginia State Board of Education v. Barnette*[155] during 1943, the Supreme Court held that public school children could not be compelled to salute the flag in violation of their religious beliefs; in *Ex Parte Mitsuye Endo*[156] during 1944, it interpreted a presidential executive order so as to curtail the government power to detain innocent Japanese-Americans following their evacuation and the evaluation of their loyalty; in *Smith v. Allwright*[157] during 1944, it ruled that a white primary violated the fifteenth amendment; in *Everson v. Board of Education*[158] during 1947, the Supreme Court initially held the first amendment's free exercise of religion clause applied to the states; in *In re Oliver*[159] during 1948, the Supreme Court initially held the sixth amendment right to a public trial applicable to the states; and in *Shelley v. Kraemer*,[160] also during 1948, it found state enforcement of a discriminatory housing deed or covenant violated the guarantee of the equal protection of the laws.

This decade through 1948 inaugurated the struggle within the Supreme Court between two late-1930s Roosevelt appointees to that Court who would serve together for twenty-three years.[161]

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151. *Carolene Products*, 304 U.S. at 152 n.4. The post-1938 Supreme Court-Congress division of labor was anticipated by Justice Holmes in Lochner v. New York, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting) (assigning economic policymaking to politicians, albeit therein state, not federal, politicians), *overruled*, Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952), and Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) (assigning social policymaking in the states to the federal judiciary).

152. Hague v. CIO, 307 U.S. 496 (1939).

153. Cantwell v. Connecticut, 310 U.S. 296 (1940).

154. Skinner v. Oklahoma, 316 U.S. 535 (1942).

155. West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

156. *Ex Parte* Mitsuye Endo, 323 U.S. 283 (1944).

157. Smith v. Allwright, 321 U.S. 649 (1944).

158. Everson v. Board of Education, 330 U.S. 1 (1947).

159. *In re* Oliver, 333 U.S. 257 (1948).

160. Shelley v. Kraemer, 334 U.S. 1 (1948).

161. J. SIMON, THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL

Roosevelt's first appointee, (who as U.S. Senator had supported the courtpacking scheme) Justice Black, led the activist wing, insisting that the Justices had a special obligation to protect minority rights. Justice Frankfurter became the Court's most prominent exponent of the judicial restraint philosophy.[162] (Strikingly, it is in the face of this post-*Carolene Products* (1938) judicial history through 1948 that the 1990-1991 President of the American Political Science Association, James Collins Professor of Management and Public Policy at the University of California at Los Angeles James Q. Wilson, last year declared: "Though the Supreme Court abandoned its early opposition to new federal initiatives, it did not take initiatives of its own, in the 1930s or 1940s, by discovering new rights or providing new grounds for citizen action against the state."[163])

Observe that *Hague, Cantwell, Skinner, Barnette, Allwright, Everson, Oliver*, and *Shelley* all represent Supreme Court social policymaking over the states; and *Endo* does not constitutionally challenge wartime presidential powers. Instead *Endo* interprets an executive order of President Roosevelt to evade any such constitutional challenge.

The years 1936, 1937, and 1938, producing respectively the opinions of *Curtiss-Wright*, *Jones & Laughlin*, and *Carolene Products*, established the unchecked policymaking in their respective foreign, economic, and social spheres by the federal executive, legislature and judiciary. Indeed, because most constitutional law casebooks open their discussion of the foreign relations authority with either *Curtiss-Wright* or *Youngstown*, newcomers to the topic might conclude that the issue of plenary presidential power in foreign policymaking first emerged in 1936.[164] This establishment defines the division of labor between the three branches of a federal government wielding power wholly unchecked by any judicially-enforced rule of law.

This timetable coincides with the considerable extension in the use of the executive agreement since 1933, and the employment of executive agreements for purposes contemplated by neither states-

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LIBERTIES IN MODERN AMERICA 9-10 (1989).

162. *Id.* at 10.

163. Wilson, *The Newer Deal*, The New Republic, July 2, 1990, at 34, 35. Professor Wilson's error is the more salient considering that Adamson v. California, 332 U.S. 46 (1947), marked the peak of support within the Supreme Court of Justice Black's theory that the Bill of Rights had been incorporated wholesale into the fourteenth amendment. F. GRAHAM, THE DUE PROCESS REVOLUTION 44 (1970). The functionalist logic of selective incorporation is explicated in Swan, *supra* note 32, at 823-25.

164. H. KOH, *supra* note 5, at 72.

men nor writers prior to 1930.[165] During the nineteenth century the United States entered approximately three treaties and one executive agreement annually.[166] Those figures waxed to twelve and twelve respectively by the historic year 1933.[167] Although the annual average of treaties remained at 12 thereafter, the number of agreements swelled to almost 183 yearly.[168] The Supreme Court largely vindicated presidential exploitation of the executive agreement.[169] Not coincidentally, the *Curtiss-Wright* opinion of 1936 forcefully contributed to the activist presidency model fostered by Franklin Roosevelt.[170]

This timetable likewise coincides with the post-1934 swelling stream of judicial inclusions of the Bill of Rights into the fourteenth amendment.[171] This timetable also coincides with the emergence, since the Supreme Court's opinion during 1935 in *Humphrey's Executor v. United States*,[172] of the federal administrative agencies as a politically unaccountable fourth branch of the central government.[173] This timetable similarly coincides with the Supreme Court's well-known pronouncement in *Darby* that the states rights amendment[174] declares but "a truism."[175]

Without any constitutional amendment whatsoever, the Constitution was dramatically revised between the March 4, 1933, inauguration of that President who openly threatened to solicit power "as great as the power that would be given to me if we were in fact

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165. Borchard, *Treaties and Executive Agreements—A Reply*, 54 YALE L.J. 616, 649 (1945).

166. H. KOH, *supra* note 5, at 41.

167. *Id.* at 41-42.

168. *Id.* at 42.

169. *Id.*

170. *Id.* at 135. *Cf. id.* at 197. "Since the administration of Franklin Delano Roosevelt, . . . the executive has launched an effort to undermine the principle of shared power by openly asserting and covertly exercising unilateral foreign policy authority." Cole, *supra* note 57, at 2065. "Roosevelt never overlooked the fact that his actions might lead to his immediate or eventual impeachment." R. SHERWOOD, ROOSEVELT AND HOPKINS: AN INTIMATE HISTORY 274 (1948). Only last year, Senator Moynihan recalled President Roosevelt's 1940 destroyer-naval base deal as wholly improper under the Neutrality Act of 1917, and clearly an impeachable offense. D. MOYNIHAN, ON THE LAW OF NATIONS 71-72 (1990). *Cf.* Burlingham, Thacher, Rubles & Acheson, *infra* note 223.

171. Swan, *The Political Economy of Supreme Court Social Policymaking 1987*, 8 ST. LOUIS U. PUB. L. REV. 87, 117 (1989).

172. Humphrey's Executor v. United States, 295 U.S. 602 (1935).

173. Swan, *supra* note 32, at 827-28. "Separation of powers and checks and balances have been reshaped by the emergence of the administrative state and the administrative 'fourth branch' of government." L. HENKIN, *supra* note 39, at 14.

174. U.S. CONST. amend. X.

175. *Darby*, 312 U.S. at 124.

invaded by a foreign foe,"[176] and the April 4, 1937, *Jones & Laughlin* surrender by the embattled Supreme Court. No longer engaged in its constitutional duty of protecting the people and the states by checking (and so balancing) those two creatures of the people in their states (the President and Congress), the Supreme Court since 1938 instead has made national social policy by checking the people in their states. The incorporation doctrine, for example, primarily represents federal judicial policymaking over the states (witness the progeny of *Cantwell* and *Everson*).

V. THE FEDERAL BRANCHES' MUTUAL REINFORCEMENT VIA DIVISION OF LABOR

A. Koh on Shared Foreign Policymaking

In his fine 1990 treatise,[177] Professor Koh explains Justice Jackson's opinion in *Youngstown* as affording the structural vision of a foreign affairs power shared through balanced institutional participation[178] of Congress, the courts and executive.[179] This he styles a counterimage to *Curtiss-Wright*.[180] Koh is displeased that the plenary presidential authority principle identified with *Curtiss-Wright* not only survived *Youngstown*, but nowadays revitalizes itself in its second half-century of existence.[181]

Koh recounts that during the Warren Court years (1953-1969) immediately following the *Youngstown* decision of 1952, the *Youngstown* theory of a balanced participation in foreign affairs[182] took a strong hold.[183] The Dwight D. Eisenhower (1953-1961)[184]

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176. Roosevelt, *Inaugural Address (Mar. 4, 1933), reprinted in* 2 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 11, 15 (1937).

> I am prepared under my constitutional duty to recommend the measures that a stricken Nation in the midst of a stricken world may require. These measures, or such other measures as the Congress may build out of its experience and wisdom, I shall seek, within my constitutional authority, to bring to speedy adoption.
>
> But in the event that the Congress shall fail to take one of these two courses, and in the event that the national emergency is still critical, I shall not evade the clear course of duty that will then confront me. I shall ask the Congress for the one remaining instrument to meet the crisis — broad Executive power to wage a war against the emergency, as great as the power that would be given to me if we were in fact invaded by a foreign foe.

Id.

177. H. KOH, *supra* note 5.
178. *Id.* at 72, 112.
179. *Id.* at 105.
180. *Id.* at 72, 108, 112-13.
181. *Id.* at 134-35.
182. *Id.* at 72, 112.
183. *Id.* at 136.
184. The Eisenhower administration, especially, appeared aware that the means of

and John F. Kennedy (1961-1963) administrations provoked comparatively few foreign affairs conflicts with Congress.[185] Most of the foreign affairs disputes that came before the Supreme Court during this period involved allegations that government conduct had infringed upon individual rights, rather than interbranch conflicts. Therein the Warren Court carefully scrutinized those statutes cited by the executive not merely for signs of legislative consent to presidential action, but to ascertain whether Congress and the President acting jointly had entrenched upon constitutionally protected rights.[186]

But since the *Pentagon Papers*[187] case of 1971, the *Curtiss-Wright* vision of executive foreign affairs supremacy reemerged[188] triumphantly.[189] It resurfaced not so much in constitutional interpretation as in the statutory construction realm.[190] Koh finds the Burger and Rehnquist courts have rejected virtually all doctrinal devices put forward to narrow the substantive scope of executive power.[191]

Urged to apply the nondelegation doctrine to invalidate a grant of power to the president, the Supreme Court declared in *Zemel v. Rusk*[192] that the doctrine did not apply equally to foreign affairs;[193] asked to construe the existence of a statute in the field to preclude any claim of inherent presidential foreign policymaking power, the Supreme Court in *Dames & Moore v. Regan*[194] refused.[195] Even when solicited to read narrowly the sweep of a statute impinging on

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meeting foreign crises properly may neither be undeclared presidential warfare nor declared war, but congressional authorization to the President to use the armed forces. R. BERGER, *supra* note 53, at 80-81; L. HENKIN, *supra* note 39, at 39. Unfortunately, this approach risks passing the President a lighted match to ignite foreign wars. S. AMBROSE, 2 EISENHOWER 234-35 (1984) (January 28, 1955, Formosa Strait Resolution). Eisenhower himself said he requested the Formosa Strait Resolution "to give the President unlimited authority to act in the Formosa Strait." D. EISENHOWER, MANDATE FOR CHANGE 468 (1963). Some members of Congress feared the comparable Middle East Resolution of March 9, 1957, "would confer on the President constitutional authority belonging to the Legislative branch." D. EISENHOWER, WAGING PEACE 180 (1965).

185. H. KOH, *supra* note 5, at 136.

186. *Id.*

187. New York Times Co. v. United States, 403 U.S. 713 (1971); Swan, *supra* note 27, at 395-96.

188. H. KOH, *supra* note 5, at 137.

189. *Id.* at 146.

190. *Id.* at 137, 144.

191. *Id.* at 146.

192. Zemel v. Rusk, 381 U.S. 1 (1965).

193. *Id.* at 17.

194. Dames & Moore v. Regan, 453 U.S. 654 (1981).

195. *Id.* at 684-86.

constitutional rights, the Supreme Court in *Regan v. Wald*,[196] *Haig v. Agee*,[197] and *Snepp v. United States*,[198] has refused, as Koh recounts, to apply the "clear statement" rule; urged to uphold as constitutional a congressional control device, the Supreme Court in *INS v. Chadha*[199] and *Bowsher v. Synar*[200] has invalidated it.[201]

Yet Professor Koh misconstrues his historical evidence. That the Eisenhower and Kennedy administrations picked few foreign policy scraps with Congress is, at best, simply negative evidence. It does not disprove a continuing post-*Curtiss-Wright* plenary presidential power in foreign policymaking. While the Eisenhower administration assuredly displayed some restraint (that soldier-President feeling no compulsion to publicly prove himself in foreign confrontations), President Kennedy's 1962 Cuban Missile Crisis reminded America of how much her fate depended upon the fallible choices of one man.[202]

More significantly, Koh recognizes that most of the foreign affairs disputes before the Warren Court were not about interbranch refereeing, wherein the continuing sway of *Curtiss-Wright* more readily could be measured, but concerned government infringements upon individuals' constitutional rights. This means their tendency was less about foreign policymaking than about social policymaking. This is precisely the field assigned the federal judiciary by the post-*Carolene Products* federal interbranch division of labor.

Professor Koh's (assuredly brief) review of the Warren Court years less demonstrates temporary eclipse of post-*Curtiss-Wright* plenary presidential authority in foreign relations by a *Youngstown* theory of interbranch partnership, than demonstrates that the

196. Regan v. Wald, 468 U.S. 222, 240-42 (1984).

197. Haig v. Agee, 453 U.S. 280 (1981).

198. Snepp v. United States, 444 U.S. 507 (1980).

199. INS v. Chadha, 462 U.S. 919 (1983).

200. Bowsher v. Synar, 478 U.S. 714 (1986); Swan, *supra* note 32.

201. H. KOH, *supra* note 5, at 146, 296 n.45.

202. "In 1962, John F. Kennedy stood up to Castro and Moscow and blocked the establishment on Cuban soil of a Soviet missile base capable of hurling nuclear weapons at the United States." R. REAGAN, AN AMERICAN LIFE 472 (1990). "The 1962 accord is valid and lawful, because President Kennedy was within his rights to declare the United States policy." Swan, *The 1962 Cuban Missile Agreement: Status and Prospects upon Its Second Quarter-Century*, 11 HASTINGS INT'L & COMP. L. REV. 391, 415 (1988). That 1988 study awaited "the yet-unwritten memoirs of Kennedy's Secretary of State Dean Rusk." *Id.* at 411. Rusk only last year hailed Kennedy's ability to remain "cool" in that October 1962 crisis. D. RUSK, AS TOLD TO R. RUSK, As I SAW IT 232 (1990). Soviet Foreign Minister Andrei Gromyko, who conferred with Kennedy on October 18, recalled him as "nervous." A. GROMYKO, MEMOIRS 178 (1990), but praised him as a statesman of intelligence and integrity. *Id.* at 179.

1953-1969 Warren Court too perceived a post-*Curtiss-Wright/Jones & Laughlin/Carolene Products* division of labor.

Before 1970, the judiciary simply declared the whole issue of the Indochina War nonjusticiable.[203] In fact, just four votes in *Regan v. Wald*[204] is the closest the Supreme Court has come to invalidating executive action in foreign affairs since *Youngstown*.[205] Except for *Youngstown* itself, the modern-day record of the judiciary in challenging foreign affairs activities is a disaster.[206]

Professor Lino Gralia asserts that, regarding the nature of society and quality of life, the Supreme Court meanwhile is the country's principal policymaking body.[207] He feels the turning point[208] was the Warren Court's 1954 opinion in *Brown v. Board of Education*.[209] The Block and Rivkin theory of a bifurcated presidency post-*Curtiss-Wright* is sustained through the jurisprudence of the Warren Court.

B. The Federal Branches Reinforce One Another

1. The Unchecked Power of the President. Article IX of the Articles of Confederation provided: "The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war. . . ."[210] This, of course, corresponds to Article I of our 1787 Constitution.[211] But it has been suggested that this assignment of authority has proved a futile effort. Never before then had a legislative branch held the declaration of war authority.[212]

The President, as Commander in Chief, can today unilaterally enter undeclared foreign wars even without Congressional resolution (Korea, 1950); wars actually entered in stealth[213] (North At-

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203. Cole, *supra* note 57, at 2083 (citing Luftig v. McNamara, 373 F. 2d 664 (D.C. Cir. 1967), *cert. denied*, 387 U.S. 945 (1967); United States v. Sisson, 294 F. Supp. 511 (D. Mass. 1968)).

204. Regan v. Wald, 468 U.S. 222 (1984).

205. Cole, *supra* note 57, at 2086 n.105.

206. *Id.* at 2085.

207. Graglia, *A Theory of Power*, NAT'L REV., July 17, 1987, at 33, 34.

208. Graglia, *The* Brown *Cases Revisited: Where Are They Now?*, BENCHMARK, Mar.-Apr., 1984, at 23, 24.

209. Brown v. Board of Education, 347 U.S. 483 (1954).

210. Arts. of Confederation art. IX.

211. U.S. CONST. art. I, § 8, cl. 11.

212. Cole, *supra* note 57, at 2075 (citing C. WARREN, THE MAKING OF THE CONSTITUTION 480-81 (1928)). "Above all, the President was not to have the King's power to go to war; that power was given to Congress." L. HENKIN, *supra* note 39, at 25.

213. In April 1941, President Roosevelt cabled British Prime Minister Churchill:

> We propose immediately to take the following steps in relation to the security of the

lantic, 1941); or merely waged by clandestine tactics (Cambodia, 1969); against a solemn treaty partner[214] (Panama, 1989); after his reelection campaign promising peace (North Atlantic,[215] 1941; Indochina,[216] 1965); with American regulars (Santo Domingo,[217] 1965; Grenada, 1983); or by proxy (Guatemala,[218] 1954; Cuba,[219]

Western Hemisphere, which steps will favorably affect your shipping problem. It is important for domestic political reasons which you will readily understand that this action be taken by us unilaterally and not after diplomatic conversations between you and us. Therefore before taking this unilateral action I want to tell you about the proposal.

This Government proposes to extend the present so-called security zone and patrol areas which have been in effect since very early in the war to a line covering all North Atlantic waters west of about west longitude 25 degrees. We propose to utilize aircraft and naval vessels working from Greenland, Newfoundland, Nova Scotia, the United States, Bermuda, and West Indies, with possible later extension to Brazil if this can be arranged. We will want in great secrecy notification of movement of convoys so our patrol units can seek out any ships or planes of aggressor nations operating west of the new line of the security zone.

ROOSEVELT AND CHURCHILL: THEIR SECRET WARTIME CORRESPONDENCE 137 (F. Loewenheim, H. Langley & M. Jonas eds. 1975). *See infra* note 215.

214. Panama (on March 22, 1951) and the U.S. (on June 19, 1951) both ratified the Charter of the Organization of American States. P. ROHN, 2 WORLD TREATY ANNEX 488 (2d ed. 1983). This Charter provides that "no State . . . has the right to intervene, directly, or indirectly, for any reason whatever, in the internal or external affairs of any other State." Charter of the Organization of American States, art. 18. Theodore Draper reports that the government of Panama attacked and overthrown in December 1989 had not, after all, declared war on the U.S. Draper, *Did Noriega Declare War?*, N.Y. Rev. Books, Mar. 29, 1990, at 13.

215. President Roosevelt promised in his October 30, 1940, Boston Arena speech: "And while I am talking to you mothers and fathers, I give you one more assurance. I have said this before, but I shall say it again and again and again: Your boys are not going to be sent into any foreign wars." R. SHERWOOD, *supra* note 170, at 191. *See supra* note 213.

216. "I thought the best answer to Goldwater's repeated suggestions that we consider using 'tactical' nuclear weapons on the battlefield was my relentless search for detente with the Soviet Union and my insistence on restraint in Vietnam." L. JOHNSON, THE VANTAGE POINT: PERSPECTIVES OF THE PRESIDENCY, 1963-1969, at 102 (1971).

217. Duke University Professor of Law and Director of the Rule of Law Research Center, Arthur J. Larson protested: "[T]here has not to this day been even an attempt to explain a possible legal justification for the Dominican intervention." A. LARSON, EISENHOWER: THE PRESIDENT NOBODY KNEW 122 (1968).

218. P. GLEIJESES, SHATTERED HOPE: THE GUATAMALAN REVOLUTION AND THE UNITED STATES 1944-1954 (1991); S. SCHLESINGER, BITTER FRUIT: THE UNTOLD STORY OF THE AMERICAN COUP IN GUATEMALA (1982).

219. A. LARSON, *supra* note 217, at 119.

The Bay of Pigs invasion was a grotesque violation of both international and domestic law. In the detailed accounts that promptly emerged after this fiasco, relating the discussions that went on behind closed doors between President Kennedy and his advisers prior to the Bay of Pigs invasion, the question whether the whole thing was illegal was mentioned only once and quickly dismissed. Every other consideration was elaborately argued and weighed—the military, the political, the psychological, the diplomatic—and on balance apparently the invasion was thought to be a good thing. How much simpler it would have been merely to say: we can't do this because it is clearly illegal. If the cynic is inclined to dismiss this as oversimplified or sentimental, let him face the pragmatic test of the end result.

Id.

1961; Nicaragua, 1981); with the blessing of the United Nations (Persian Gulf, 1990); or in the face of an International Court of Justice opinion that the war is illegal[220] (Nicaragua, 1986); for the unconditional defeat of a targeted regime (Panama, 1989); or for the mere status quo antebellum[221] (Korea, 1950); reinforcing a friendly regime (Vietnam, 1965); or throttling a contrary one (Grenada, 1983).

Senator Alexander Smith suggested to President Truman, shortly after American entry into the Korean War, that Truman recommend to Congress a resolution approving entry into those hostilities.[222] Secretary of State Dean Acheson disagreed, because Congress could "keep debating and delaying a resolution so as to dilute much of its public effect."[223] Also, "Congressional hearings on a resolution of approval at such a time, opening the possibility of endless criticism, would hardly be calculated to support the shaken morale of the troops or the unity that, for the moment, prevailed at home."[224] Parliaments impede kings. What need, then, for parliaments?

The post-1936 exercise of presidential power tends to exploit a military-industrial complex which, coincidentally, sprouted almost immediately post-*Curtiss-Wright* (the military-industrial complex[225] being then christened the arsenal of democracy).[226] Its in-

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220. Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nic. v. U.S.), 1986 I.C.J. 146 (Judgment of June 27, 1986). Subsequently, a United Nations General Assembly resolution called for full and immediate compliance with this judgment. G.A. Res 41/31, 41 U.N. GAOR Supp. (No. 53) at 23, 24, U.N. Doc. A/41/53 (1986).

221. "Brigadier General John Church, who had been sent to Korea by General MacArthur to report the situation, had signaled that the *status quo ante* could not be restored without the commitment of United States troops. . . ." D. ACHESON, PRESENT AT THE CREATION: MY YEARS IN THE STATE DEPARTMENT 411 (1969). "From the very start of hostilities in Korea, President Truman intended to fight a limited engagement there." *Id.* at 416.

222. *Id.* at 413.

223. *Id.* at 414. Acheson, a lawyer, had been likewise dismissive of congressional input into President Roosevelt's 1940 transfer of destroyers to Britain. Burlingham, Thacher, Rubles & Acheson, *Letter to the Editor*, N.Y. Times, Aug. 11, 1940, at 8, col. 5 to 9, col. 6. Admittedly, Acheson and his distinguished co-authors of this lengthy legal opinion added: "Whatever might be our views on the law, we would not suggest executive action without Congressional approval if we believed that a majority of the Congress was opposed to such action." *Id.* col. 5.

224. D. ACHESON, supra note 221, at 415. "Congress appropriated money for the conduct of the war without questioning the President's authority." L. HENKIN, *supra* note 39, at 28.

225. "In the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists and will persist." D. EISENHOWER, *supra* note 184, at 616. Compare the reference to "defense experts," in Roosevelt, *infra* note 226.

ternal dynamic was comprehended as early as 1919 by an expert, President Woodrow Wilson, the greatest military interventionist in American history:[227]

> You cannot handle an armed nation by vote. You cannot handle an armed nation if it is democratic, because democracies do not go to war that way. You have got to have a concentrated, militaristic organization of government to run a nation of that sort. You have got to think of the President of the United States, not as the chief counsellor of the Nation, elected for a little while, but as the man meant constantly and every day to be the Commander in Chief of the Army and Navy of the United States, ready to order them to any part of the world where the threat of war is a menace to his own people. And you cannot do that under free debate. You cannot do that under public counsel. Plans must be kept secret.[228]

This mankilling post-1936 exercise of presidential power is

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226. As planes and ships and guns and shells are produced, your Government, with its defense experts, can then determine how best to use them to defend this hemisphere. The decision as to how much shall be sent abroad and how much shall remain at home must be made on the basis of our over-all military necessities. We must be the great arsenal of democracy. For us this is an emergency as serious as war itself. We must apply ourselves to our task with the same resolution, the same sense of urgency, the same spirit of patriotism and sacrifice as we would show were we at war.

Roosevelt, *Fireside Chat on National Security. White House, Washington, D.C.* (December 29, 1940), *reprinted in* 9 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 633, 643 (1969). Compare the "unwarranted influence" within "councils of government" in D. EISENHOWER, *supra* note 225.

227. H. KOH, *supra* note 5, at 90 (citing W. LAFEBER, THE AMERICAN AGE 261 (1989)). President Wilson intervened militarily in Russia, Mexico, Haiti, Santo Domingo, Cuba, etc. H. KOH, *supra* note 5, at 90.

228. Wilson, *Address Delivered on Western Tour: At Coliseum, St. Louis, Missouri* (September 5, 1919), *reprinted in* WAR AND PEACE: PRESIDENTIAL MESSAGES, ADDRESSES, AND PUBLIC PAPERS (1917-1924) 634, 638-39 (1927). Wilson spoke only with the wisdom of hindsight, not of prophetic foresight. He threatened that were the U.S. to remain outside the League of Nations, the League's members would transform the League into an anti-American military alliance forcing America into a garrison state:

> I am telling you the things, the evidence of which I have seen with awakened eyes and not with sleeping eyes, and I know that this country, if it wishes to stand alone, must stand alone as part of a world in arms. Because, ladies and gentlemen — I do not say it because I am an American and my heart is full of the same pride that fills yours with regard to the power and spirit of this great Nation, but merely because it is a fact which I think everybody would admit, outside of America, as well as inside of America — the organization contemplated by the League of Nations without the United States would merely be an alliance and not a league of nations. It would be an alliance in which the partnership would be between the more powerful European nations and Japan, and the other party to the world arrangement, the antagonist, the disassociated party, the party standing off to be watched by the alliance, would be the United States of America.

Id. at 639-40. Sure enough, the post-*Curtiss-Wright* U.S. garrison state had arrived by 1940-1941 (under a four-term President not "elected for a little while"), although not from fear of a bellicose League but upon the failures of the League altogether.

hardly checked by Congress. The Senate during 1969 adopted the nonbinding National Commitments Resolution:

> *Resolved*, That (1) a national commitment for the purpose of this resolution means the use of the armed forces of the United States on foreign territory, or a promise to assist a foreign country, government, or people by the use of the armed forces or financial resources of the United States, either immediately or upon the happening of certain events, and (2) it is the sense of the Senate that a national commitment by the United States results only from affirmative action taken by the executive and legislative branches of the United States Government by means of a treaty, statute, or concurrent resolution of both Houses of Congress specifically providing for such commitment.[229]

No President has accepted, openly, even this restriction.[230]

Congress repealed the Tonkin Gulf Resolution of 1964[231] with an unobtrusive, solitary sentence in an amendment to the Foreign Military Sales Act.[232] This sentence is tucked between the definitions of "defense article," "excess defense articles," and "foreign country," and a prohibition on the transport of chemical munitions from Okinawa to the United States.[233] It conspicuously failed to correct the earlier presidential interpretation of the resolution, disapprove continued combat, or direct the termination of Indochina warfare.[234]

Pitifully, Congress in the War Powers Act[235] has expressly di-

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229. S. Res. 85, 91st. Cong., 1st. Sess., 115 CONG. REC. 17,245 (1969).

230. L. HENKIN, *supra* note 39, at 58.

231. H.R.J. Res. 1145, 88th Cong., 2d Sess., 78 Stat. 384 (1964). Former President Johnson referred to "the Southeast Asia Resolution (often miscalled the 'Gulf of Tonkin' Resolution). . . ." L. JOHNSON, *supra* note 216, at 117-18.

232. PUB. L. 91-672, § 12, 84 Stat. 2053 (1971).

233. *Id.* at §§ 11, 13.

234. Ratner, *The Coordinated Warmaking Power—Legislative, Executive, and Judicial Roles*, 44 S. CAL. L. REV. 461, 474 (1971).

235. 50 U.S.C. § 1547(a) (1983).

> Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred —
> (1) from any provision of law (whether or not in effect before November 7, 1973), including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this chapter; or
> (2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this chapter.

Id.

rected judges not to interpret appropriations as authorizing military moves (absent express directions to that effect in the legislation). The War Powers Act is not part of any criminal code.[236]

There were five Boland amendments[237] passed by Congress spanning the period between December 21, 1982, and October 17, 1986.[238] "The"[239] Boland Amendment provided that during

> fiscal year 1985, no funds available to the Central Intelligence Agency, the Department of Defense, or any other agency or entity of the United States involved in intelligence activities may be obligated or expended for the purpose of which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement, or individual.[240]

But none of the Boland amendments included any criminal (or civil) penalties.[241]

Congress flinches from shouldering responsibility for the offshore adventures it finances and fuels with Congress' cheaply-extracted blood of civilian conscripts:[242] The President, reciprocally, hardly

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236. Crovitz, *What If We Had a War and No One Invited the Lawyers?*, Wall St. J., Aug. 8, 1990, at A11, col. 6.

237. Pub. L. No. 97-377, § 793, 96 Stat. 1830, 1865 (1982); Pub. L. No. 98-473, § 8066, 98 Stat. 1837, 1935 (1984); Pub. L. No. 99-88, § 106(a), 99 Stat. 293, 328 (1985); Pub. L. No. 99-169, § 105, 99 Stat. 1002, 1003 (1985); and Pub. L. No. 99-569, § 106, 100 Stat. 3190, 3191 (1986).

238. Crovitz, *Crime, the Constitution, and the Iran-Contra Affair*, COMMENTARY, October 1987, at 23.

> In late 1982, Congressional opposition began to develop against our support of the Contras and the Salvadoran government. It was usually led by Tip O'Neill and his friend and fellow congressman from Massachusetts, Edward P. Boland, the Chairman of the House Select Committee on Intelligence. They began battling to limit virtually everything the administration was trying to do in Central America.

R. REAGAN, *supra* note 202, at 477.

239. Miami Herald, June 7, 1987, at 6C.

240. Pub. L. No. 98-473, § 8066, 98 Stat. 1837, 1935 (1984).

241. Crovitz, *supra* note 236, at A11: Crovitz, *supra* note 238, at 23.

> [I]nvestigations have suggested that under [Director of Central Intelligence William] Casey the CIA did a number of things that were improper, and that it exceeded limits imposed by the Boland Amendment. Because Casey is dead, he cannot defend himself and we may never know the truth—but I do know that, during part of this period, a fatal tumor was growing next to Casey's brain. Respected neurosurgeons have told me that this could have affected his judgment and behavior during the last part of his life.

R. REAGAN, *supra* note 202, at 486.

242. The Army proved the lot of 90% of Indochina War draftees. The threat of dying in Vietnam was 1,900% worse for the Army's soldiers than for Navy or Air Force men. L. BASKIR & W. STRAUSS, CHANCE AND CIRCUMSTANCE: THE DRAFT, THE WAR AND THE VIETNAM GENERATION 54-55 (1978). In 1969, 88% of infantry riflemen in Vietnam were draftees. Glass, *Defense Report/Draftees Shoulder Burden of Fighting and Dying in Vietnam*, NAT'L J., Aug. 15, 1970, at 1747.

Spending civilian conscripts remains the Defense Department's war plan: "[I]t must be

denies (via his veto) the congressional command over the economy. The post-1936 exercise of presidential foreign policymaking power is likewise unchecked by the judiciary: The President, reciprocally, never mounts his bully pulpit to summon passage of legislation either curbing inferior federal court jurisdiction, or curtailing the Supreme Court's appellate jurisdiction,[243] both now being channeled into making national social policy.

2. The Unchecked Power of Congress. The Congress can today set minimum wages and maximum employment hours throughout the economy, even over the states as employers themselves.[244] It can freeze every wage and price in America by invoking its power to regulate interstate commerce. It expends tax monies on a federal welfare state constitutionally open-ended. So casually all-embracing is the congressional taxing power that the Supreme Court openly supposes nowadays that Congress grants a taxpayer a subsidy if Congress permits the taxpayer to keep any of the taxpayer's own income.[245]

This post-1937 exercise of congressional power expands unchecked by a President reluctant to veto on constitutional grounds the bulk of such initiatives: The Congress, reciprocally, will not impeach presidents for undeclared wars of whatever variety.[246] This post-1937 brandishing of congressional economic authority likewise sweeps unchecked by the judiciary, which, not dissimilarly, never in all history has invalidated any congressional foreign affairs enactment:[247] Congress, reciprocally, recoils from impeaching Supreme Court Justices and from curtailing the jurisdiction of the federal courts.

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remembered, the present volunteer military is strictly a peacetime force. Any extended conflict is expected to require a return to the draft." B. MITCHELL, WEAK LINK: THE FEMINIZATION OF THE AMERICAN MILITARY 219 (1989).

243. Swan, *Article III, Section 2, Exceptions Clause Canadian Constitutional Parallels*, 13 CAL. W. INT'L L.J. 37 (1983).

244. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); Swan, *The Political Economy of Commerce Clause - Tenth Amendment Tensions:* Garcia v. San Antonio Metropolitan Transit Authority, 6 HAMLINE J. PUB. L. 199 (1985).

245. Regan v. Taxation With Representation of Wash., 461 U.S. 540, 544, 550 (1983); Bob Jones University v. United States, 461 U.S. 574, 591, 604 (1983).

246. In 1974 the U.S. House of Representatives Committee on the Judiciary refused to report to the full House a proposed article of impeachment charging President Nixon with unauthorized secret bombing in Cambodia. H. KOH, *supra* note 5, at 180 (citing House Comm. on the Judiciary, *Impeachment of Richard Nixon, President of the United States*, H.R. Rep. No. 1305, 93d Cong., 2d Sess., 217-19 (1974)). Concededly, this bombing was to be defended as merely ancillary to either success in, or unilateral withdrawal from, a prior President's undeclared war.

247. L. HENKIN, *supra* note 39, at 77.

3. The Unchecked Power of the Federal Judiciary. The Supreme Court can today erase the capital punishment statutes of most states and the abortion laws of all of them.[248] It can constitutionalize official state racial discrimination;[249] regulate public school curricula;[250] forbid voluntary, nondenominational student prayer in public schools; and protect flagburners.[251] As U.S. Senator-elect Dan Quayle told political scientist Richard F. Fenno, Jr., in 1980: "I know one committee I don't want—Judiciary. They are going to be dealing with all those issues like abortion, busing, voting rights, prayers. I'm not interested in those issues, and I want to stay as far away from them as I can."[252] Quayle, a lawyer, well understood that those Senators who really do have a social policy agenda implement it through not majority rule but the federal judiciary. This post-1938 exercise of Supreme Court social policymaking power waxes unchecked by the President and Congress, as just observed.

VI. THE STATES AND PRESIDENTIAL OVERSEAS MILITARY ADVENTURES

Since 1936-1938 the three branches of the federal government, which is of theoretically limited power, have arrived at an implicit accommodation mutually reinforcing each of their respective shares of the power of a central government completely unchecked (be-

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248. Harvard Law School's widely-respected Professor Laurence Tribe recalled:

> So it seems a serious mistake to assume that the partial success of legislative reform movements in a few key states would have been replicated elsewhere if *Roe v. Wade* had not intervened. . . . Indeed, it is instructive in this regard that between 1971 and 1973 not one additional state moved to repeal its criminal prohibition on abortion early in pregnancy. . . .
>
> There is little evidence that the United States was on the verge of emerging, in the early 1970s, from the long shadow of shame that had branded women as blameworthy for extramarital sex and nonprocreative sex and that condemned them for choosing abortion even when the choice was a painful and profoundly reluctant one.

L. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 51 (1990).

249. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978) (Powell, J.).

> In enjoining petitioner from ever considering the race of any applicant . . . the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed.

Id.

250. Edwards v. Aguillard, 482 U.S. 578 (1987).

251. United States v. Eichman, 110 S. Ct. 2404 (1990).

252. R. FENNO, JR., THE MAKING OF A SENATOR DAN QUAYLE 20 (1989). Richard Fenno is, of course, the author of R. FENNO, HOMESTYLE (1978), the "famous essay on participant observation." Pitney, *The Mixed Blessings of Graduate School*, 23 PS: POLITICAL SCIENCE & POLITICS 432, 433 (1990).

cause no longer checking itself). Each branch (within its own sphere) commands the defenseless states,[253] which created the central government,[254] but retain no machinery whereby to check any federal branch.[255]

A. Dukakis v. United States Department of Defense

For example, in *Dukakis v. United States Department of Defense*[256] an action was brought by Governor Michael Dukakis and the Commonwealth of Massachusetts against the U.S. Defense Department and other federal agencies and officials. Their complaint asked the district court to declare the Montgomery Amendment[257] unconstitutional under the Militia Training Clause[258] insofar as that federal statute restricts the authority of the Governor to deny consent to training outside the U.S. of members or units of the Massachusetts National Guard or the Massachusetts unit of the National Guard of the United States.[259]

The district court's *Dukakis* opinion is of particular value. Its judgment was affirmed on the basis of the District Court's "well reasoned opinion."[260] (The Supreme Court denied a petition for a writ of certiorari.)[261]

The Armies Clause of article I empowers Congress "To raise and support Armies."[262] But the Militia Clause of article I provides that Congress have the power:

> To provide for calling forth the Militia to execute the Laws of the

253. As was suggested in Swan, *supra* note 27, at 398-99.

254. U.S. CONST. art. VII.

255. Except that presidential electors are chosen in each state as determined by their respective state legislature:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

U.S. CONST. art. II, § 1, cl. 2. In South Carolina, both presidential electors and state officials were chosen not by popular vote but by the legislature until after the War Between the States. E. FONER, RECONSTRUCTION: AMERICAN'S UNFINISHED REVOLUTION 1863-1877, at 194-95 (1988).

256. Dukakis v. United States Dep't of Defense, 686 F. Supp. 30 (D. Mass. 1988), *aff'd*, 859 F. 2d 1066 (1st Cir. 1988), *cert. denied*, 109 S. Ct. 1743 (1989).

257. 10 U.S.C. § 672 (f) (1988).

258. U.S. CONST. art. I, § 8, cl. 16.

259. *Dukakis*, 686 F. Supp. at 31, 34.

260. Dukakis v. United States Dep't of Defense, 859 F.2d 1066, 1067 (1st Cir. 1988), *cert. denied*, 109 S. Ct. 1743 (1989).

261. Massachusetts v. United States Dep't of Defense, 109 S. Ct. 1743 (1989).

262. U.S. CONST. art. I, § 8, cl. 12.

> Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress. . . .[263]

In the *Selective Draft Law Cases*[264] the Supreme Court during 1918 vindicated the congressional power to compel military service in the face of the claim that the Militia Clause limited the congressional authority to conscript under the Armies Clause.

Governor Dukakis argued that members of the National Guard never cease to be members of the "militia," and so always are subject to the limitations of the Militia Clause: the Militia Clause reservation of power to the states limits congressional power under the Armies Clause. Otherwise Congress simply could circumvent the reservation to the states of militia-training power by calling the militia to active duty under the Armies Clause.[265] Since the only purposes for which Congress is authorized by Militia Clause (15) is mustering the militia to execute U.S. law, suppress insurrection, and repel invasion, under the plaintiff's rationale training missions in Central America would have been unconstitutional with or without Governor Dukakis's consent unless Militia Clause (16) is given a meaning beyond that of Militia Clause (15).[266]

Guided by the *Selective Draft Law Cases,* the Court concluded that the reservation of power to the states over training the militia (expressed in the Militia Clause) did not override the congressional power to raise armies.[267] The fact that after the *Selective Draft Law Cases* the militia may in some sense depend upon Congress for its existence does not render their relationship unconstitutional.[268]

B. Perpich v. United States Department of Defense

In his June 11, 1990, opinion for a unanimous Supreme Court in *Perpich v. United States Department of Defense,*[269] Justice Stevens defined the *Perpich* question as whether Congress may authorize the President to order members of the National Guard to active

263. U.S. CONST. art. I, § 8, cls. 15, 16.
264. Selective Draft Law Cases, 245 U.S. 366 (1918).
265. *Dukakis*, 686 F. Supp. at 35.
266. *Id.*
267. *Id.* at 37.
268. *Id.* at 38.
269. Perpich v. United States Dep't of Defense, 110 S. Ct. 2418 (1990).

duty for purposes of training outside the United States in peacetime without either the consent of a state governor or declaration of national emergency.[270]

A gubernatorial consent requirement which had been enacted in the Armed Forces Reserve Act of 1952[271] was partially repealed in 1986 by the Montgomery Amendment, enacted as part of the National Defense Authorization Act for Fiscal Year 1987, providing that such gubernatorial consent could not be withheld respective active duty outside the United States due to any objection to the locale, purpose, type or schedule of such active duty.[272] Governor Rudy Perpich of Minnesota challenged the constitutionality of the Montgomery Amendment as violative of the Militia Clauses. He alleged that the Montgomery Amendment had prevented the Governor from denying his consent to a training mission in Central America for certain members of the Minnesota National Guard during January 1987.[273]

Since 1933 all persons enlisting in a state National Guard unit have enlisted simultaneously in the National Guard of the United States. In this latter capacity they become a part of the Enlisted Reserve Corps of the Army, yet unless and until ordered to active duty in the Army, they retain their status as members of a separate state Guard unit.[274] Under "dual enlistment" provisions of the 1933 amendments to the National Defense Act of 1916,[275] a member of the Guard ordered to active duty in the federal service is thereby relieved of his status in the state Guard for his entire period of federal service.[276] In 1952 Congress broadly authorized orders to active duty or to active duty for training without any emergency requirement, but provided such orders could not be carried out absent gubernatorial consent.[277]

Gubernatorial consents to training missions were routinely obtained before 1985. The Governor of California in 1985 refused his consent to a training mission in Honduras for 450 members of the

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270. *Id.* at 2420.

271. Pub. L. No. 476, §§ 233(c), 233(d), 66 Stat. 481, 490 (1952) (current version at 10 U.S.C. §§ 672(b), 672(d) (1988)).

272. Pub. L. 99-661, § 522, 100 Stat. 3816, 3871 (1986) (current version at 10 U.S.C. § 672(f) (1988)).

273. *Perpich*, 110 S. Ct. at 2421.

274. *Id.* at 2425.

275. Ch. 87, § 8, 48 Stat 153, 156-57 (1933) (current version at 10 U.S.C. §§ 3261(b), 8261(b) (1988)).

276. *Perpich*, 110 S. Ct. at 2425.

277. *Id.*

California National Guard. The Governor of Maine denied his consent to a similar mission shortly thereafter. Those incidents led to the enactment of the Montgomery Amendment. The *Perpich* litigation ensued.[278]

Governor Perpich's assault against the Montgomery Amendment depended partly upon the traditional understanding that "the Militia" only can be called forth for limited purposes not including either foreign service or nonemergency conditions, and partially upon the explicit wording of the Militia Clause reserving to the states the authority of training the Militia.[279]

The members of the National Guard of Minnesota ordered into federal service with the National Guard of the United States lose their status as members of the state's militia during their active duty span.[280] The active duty affiliation is entirely federal.[281] After all, the Supreme Court recalled with approval that its decision in *Selective Draft Law Cases*[282] had held that the Militia Clauses do not restrict the congressional powers to provide for the common defense, raise and support armies, to make rules for the government and regulation of the land and naval forces, and to enact laws necessary and proper to executing those powers.[283]

Governor Perpich asserted that so interpreting the Militia Clause practically extinguishes an important state power expressly reserved in the Constitution. But Justice Stevens explained that it merely recognized the federal supremacy in the military affairs field. Were the federal training mission to interfere with the State Guard's capability to respond to local emergencies, the Montgomery Amendment itself would permit the Governor to veto the prospective mission.[284] Furthermore, Congress provides by statute that a state may, at its own expense, constitute a defense force additional to its National Guard, which defense force is exempt from being drafted into the United States Armed Forces.[285] Worse for Governor Perpich, Stevens offered that were it not for the Militia Clauses it actually might be possible to contend that the constitutional allocation of powers precluded formation of an organized state militia

278. *Id.* at 2426.
279. *Id.*
280. *Id.*
281. *Id.*
282. Selective Draft Law Cases, 245 U.S. 366, 375, 377, 381-84 (1918).
283. *Perpich*, 110 S. Ct. at 2427.
284. *Id.* at 2428.
285. 32 U.S.C. § 109(c) (1988).

altogether.[286]

The gubernatorial veto established in 1952 (and partially repealed in 1986) was not constitutionally compelled. The Montgomery Amendment, consistent as it is with the Militia Clauses, is constitutionally valid.[287] The Supreme Court affirmed the opinion of the U.S. Court of Appeals for the Eighth Circuit that the state's power to train the militia does not conflict with the congressional authority to raise armies for the common defense and to control the training of federal reserve forces.[288] *Perpich*, like *Dukakis*, evidences the helplessness of the states when their National Guard troops are sent abroad on presidential adventures or misadventures.

CONCLUSION

Rivkin and Block are correct as to the law in their articulation of the contemporary theory of a bifurcated presidency, at least insofar as the Constitutional law is defined descriptively and predictively. Post-*Curtiss-Wright*, the President indeed shares power in domestic lawmaking but fashions foreign policy wholly unchecked by any judicially-enforced rule of law. This concisely describes and predicts the Presidential foreign policymaking role as it has developed since 1936. In fact, Rivkin and Block understate their case.

Functionally speaking, they well could have added that since 1937 the post-*Jones & Laughlin* Congress makes national economic policy wholly unchecked by any judicially-enforced rule of law, and that since 1938 the post-*Carolene Products* Supreme Court makes national social policy wholly unchecked by any constitutional principle. Constitutional scholars need not examine articles I, II, and III to describe and predict the respective performances of Congress, the President, and the Supreme Court. Study of *Jones & Laughlin*, *Curtiss-Wright*, and *Carolene Products* suffices alone to crack the functionalist code.[289]

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286. *Perpich*, 110 S.Ct. at 2429.

287. *Id.* at 2430.

288. Perpich v. United States Dep't of Defense, 880 F.2d 11, 17-18 (8th Cir. 1989) (en banc), *aff'd*, 110 S. Ct. 2418 (1990).

289. Hence, the descriptive element of the instant analysis is contrary to the aspirations articulated by the respected Prof. Louis Henkin:

> Constitutionalism implies limited government. For our subject, that means that the Constitution should be expounded so that there can be no extraconstitutional government, that, in principle and in effect, no activity of government is exempt from constitutional restraints, not even foreign affairs: government cannot exercise unlimited authority in any large area - not even in foreign affairs. We have remained committed to limited government, if no longer from a priori commitment to the limited purposes of government then from abiding commitment to individual rights.

However, Rivkin and Block may be seriously incorrect as to the law insofar as the constitutional law is defined either normatively or explanatorily. Serious error normatively may be discerned in the Rivkin-Block paper if the appropriate constitutional norm is identified from the Framers' and Ratifiers' original intent. Correspondingly, serious error explanatorily is discerned in the Rivkin-Block paper through their understandable omission of exactly why the three (mutually reinforcing) federal branches of the federal government divide their labor (at the expense of state prerogatives) as they do. The contemporary interbranch division of labor having emerged step by step (i.e., branch by branch) in 1936, 1937, and 1938, future appraisal of the constitutional revolution of March 4, 1933 - April 4, 1937, is appropriate toward explaining today's long-postrevolutionary status quo.

We continue to revere checks and balances and some separation of powers, perhaps from habit or piety, perhaps from an underlying commitment to avoiding concentration of power. For us, as for the framers, no branch of government has authority that is so large as to be essentially undefined and uncircumscribed, that is "plenary," that is not checked, not balanced, not even the President, not even in foreign affairs.

L. HENKIN, *supra* note 39, at 36.

ESSAYS ON PIRACY

SYMPOSIUM ON PIRACY IN CONTEMPORARY NATIONAL AND INTERNATIONAL LAW

The California Western International Law Journal is pleased to publish the proceedings of a symposium on Piracy in Contemporary National and International Law, held in New York City on April 25-26, 1990, under the auspices of the American Bar Association's Law of the Sea Committee, Section of International Law and Practice. Professor John Noyes, Chair of the ABA Law of the Sea Committee, chaired the New York program and has written the introductory essay in this symposium. The essays by Eric Ellen, Alfred Rubin, Barry Dubner, and Samuel Menefee were originally prepared for the panel discussion in this symposium.

In his introductory essay on the international law of piracy, John Noyes explores such issues as defining "piracy," the inter-relationship between international law and municipal law and process, and jurisdictional and process issues that U.S. courts confront in piracy cases today. Eric Ellen examines examples of recent attacks on the high seas[1] and the involvement of the ICC International Maritime Bureau in the fight against "such malpractices afloat." Alfred Rubin and Barry Dubner examine at length the treatment of piracy under municipal and international law and suggest appropriate legal responses to the problems of piracy. Finally, Samuel Menefee analyzes the piracy statutes under title 18, chapter 81 of the United States Code and suggests alternative approaches in redrafting the statutes to resolve contemporary problems in the area of piracy.

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1. For a recent assessment of the problems of piracy, *see Pirates Setting Sail for New Plunder*, L.A. Times, Nov. 27, 1990, at H1.