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THE CONSTITUTION AND THE PRESIDENCY

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Although events affecting the Nixon Presidency have intervened since Justice Fortas delivered this lecture on April 18, 1974, his basic thesis about the Presidency transcends recent events.

The American Presidency,[1] like slavery, is a peculiar institution. Many of our Chief Executives have sometimes felt that the Presidency is in fact a form of slavery. But they seem to resist emancipation; and most of them exercise considerable ingenuity to avoid being relieved of their splendid misery. The job has its compensations. Its trappings are regal; its fringe benefits are sumptuous; and the power which is attendant upon it is overwhelming. The President's finger can put vast events in motion—not just the firing of the nuclear bomb.

The Presidency has become the central, dominating factor in our collective lives, and a crucial factor in the world.

The Presidency does not induce humility. The President is coddled, cuddled and sheltered—even while he is denounced and abused. But he is still just a man: a fallible human being. His exalted position and his vast power constantly remind him that he has a great mission; and the splendid unreality of the White House residence, the airplanes, secret service agents and body servants—the retinue and trappings of

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1. In the studies preliminary to preparation of this paper, I have particularly appreciated ARTHUR SCHLESINGER, THE IMPERIAL PRESIDENCY (1973) (hereinafter cited as SCHLESINGER); EMMET HUGHES, THE LIVING PRESIDENCY (1973); RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS (1973) (hereinafter cited as BERGER); and CLINTON ROSSITER, THE AMERICAN PRESIDENCY (1960) (hereinafter cited as ROSSITER).

the office—constantly tell him that he is a chosen man, that he is uniquely endowed with wisdom and genius to determine the Nation's course.

His life is sheltered: He is criticized in public, sometimes viciously, but never to his face. In his presence, he is treated with reverence: He is never Harry or Lyndon or Dick. He is always "Mr. President."

To most Presidents, public criticism and the frustrations of our system are healthy reminders of their fallibility; but sometimes, and to some Presidents, they are incitements to use the enormous power of the office to punish in retaliation: To such Presidents, criticism is an unbearable interference with the great mission of the Presidency as they see it.

I. A FETTERED PRESIDENCY

The Framers of the Constitution tried to design a modest Presidency. They foresaw the danger of an Imperial Presidency, in Arthur Schlesinger's phrase.[2] They realized that the Presidency was capable of misuse and abuse: that it could be used to invade the constitutional liberties of private citizens; to weaken and enfeeble opposing political parties by illegal means; to operate secretly; to avoid accountability; and to circumvent and enfeeble the other institutions of government. We know now that their fears were justified.

The group of astonishing young men whom we call the Founding Fathers sought to devise a system that would not permit a runaway Presidency. They feared the corruption of power. They distrusted kings and Presidents. They distrusted legislatures[3] and they even distrusted the people themselves. As George Washington phrased it, they wondered whether "mankind when left to themselves are unfit for their own government."[4]

But they had reluctantly concluded that a strong central government was essential. They had learned, from their distressing experience under the Articles of Confederation, that feeble government was no government, and that no government meant chaos. They had learned that people need the restraining hand of government—just as

2. SCHLESINGER.
3. *See* BERGER at 100: "It is true that the Framers had come to fear legislative excesses as a result of the states' post-1776 experience . . . ."
4. ROSSITER at 112.

government requires the restraining hand of the people. They had not abandoned the revolutionists' exalted faith in the divine nature of man; but they had learned that man's divinity was still a seed which needed the help of an effective government.

So it was that in 1787, when the delegates to the constitutional convention met, they tried to create a government in which power would exist, but always in check. They devised a powerful government, but they fragmented its power. They built conflict and tension into the system that they created. No one—no official or branch of government—was given authority independent of the authority of others. No one was given power to decree. Their guiding principle was not efficiency, but advocacy and persuasion. The President could advocate and propose, and he could execute the laws, but he could not legislate. The Congress could legislate, but unless it could persuade the President or override him, it was subject to the President's veto power. And the Supreme Court could checkmate both of them.

Even this was not enough: They did not merely fragment power in three parts. They created not just a tripartite government, but a pluralistic political system. The checks and balances were not confined to the three estates of the Legislature, Executive and Judiciary. The architects of our Constitution decreed a fourth estate, the press, and a fifth estate, the people; and to both of these, they guaranteed rights to affect and even determine the course of government—rights which were placed beyond the reach of government. And they also carved out of the domain of government a sixth estate, untouchable by government or by a majority of the people: This was each person's fealty or nonfealty to God and to the institutions of religion. They knew that man's inner commitment and the vastly important establishments of the various faiths are the bedrock of political democracy because they are the ultimate—the irreducible essence—of personal freedom. They knew that no government could achieve absolute authority if the conscience of the people is free.

By the first amendment, guaranteeing individual liberty and freedom of the press and religion, the Founding Fathers sought to serve more than the cause of personal liberty. The first amendment is more than a charter of individual freedom; it is a fundamental *political* principle. It is the fundamental institution of political government in a democracy. A free people—and only a free people—protected in their persons, their conscience, their speech, their rights to act jointly,

and secure in their homes and offices, can effectively preserve a political democracy.

A management consultant, looking at the product of the Founding Fathers, would almost certainly have said that it could not possibly work. A realistic chart of the governmental system they created would look more like a hopeless maze, bound to frustrate the emergence of decision, than an orderly structure. But the remarkable fact is that this system, defying all management principles, has survived for about 200 years. Its longevity is unparalleled. No other nation has been governed for so long a period under a continuous written charter.

Our Constitution has survived because it is essentially and realistically a human document. It has survived because of, and not in spite of, its ambiguities and its managerial imperfections—because it is peculiarly adapted to the American character and to our institutions, of which it is both parent and child. A more perfect Constitution—efficiently designed, and free of the ambiguities and conflicts of our charter—would long ago have been shattered by the pressures and demands of the spectacular growth of our nation and the aggressiveness of its people.

But the very characteristics which made our Constitution viable were themselves the source of danger. The ambiguities of our Constitution are essential to its vitality; but an ambiguous charter is a temptation to the ambitious. The fragmentation of power in our Constitution is essential to its democratic design; but fragmentation of power carries with it conflict, confrontation and frustration; and the combination of power and frustration is hard for some leaders to accept. To some men in the Presidential chair, our system is a cage preventing them from accomplishing their herculean task; the peril that a President may seek to break through the bars of the cage is ever present.

The Founding Fathers realized this danger. They were acutely aware that Presidents might seek to breach the limitations upon their power. So it was, according to legend, that when Benjamin Franklin returned to his lodging from the constitutional convention, he was asked by his landlady: "Mr. Franklin, what have you given us, a republic or a monarchy?" And he replied, "A republic—if you can keep it."[5]

5. M. CUNLIFFE, *et al.*, THE AMERICAN HERITAGE HISTORY OF THE PRESIDENCY 24 (1968).

That is still our challenge, dramatized by the events of the past few years.

II. PRESIDENTIAL EXPANSION WITHIN THE CONSTITUTION

Despite their misgivings, the drafters of the Constitution concluded —and wisely—that they had no alternative, that a strong Presidential office is essential to effective government.[6]

They resolved that the President was to be the *only* "National Officer"—the only chosen official, along with his Vice President, representing the Nation as a whole. As Gouverneur Morris stated it, he was to be the only "National Officer, acting for and equally sympathizing with every part of the United States."[7]

The President was to be the Chief Executive of the government—the sole and ultimate repository of power to carry out the laws of the United States.[8]

He was to be the supreme military commander: Commander-in-Chief of the Armed Forces of the United States.[9]

He was vested with the power to conduct our foreign affairs.[10]

He was given a legislative function: He must report to Congress on the State of the Union, and recommend measures for their consideration.[11] He may veto bills passed by the Congress, in which event they do not become law unless passed over his veto by two-thirds of each House.[12] He may convene Congress and, in certain circumstances, adjourn them.[13]

He was given a vital role with respect to the Judiciary: He appoints Justices of the Supreme Court and judges of the other federal courts, with the advice and consent of the Senate.[14]

These are great powers, but they are incomplete. The President has power to administer, to initiate, to lead and to advocate. He can shape

6. I believe this characterization is justified despite the wide spectrum of opinion among the drafters. *Cf.* THE FEDERALIST No. 70 (A. Hamilton).
7. M. CUNLIFFE, *et al.*, *supra* note 4, at 38.
8. U.S. CONST. art. II, § 1.
9. *Id.* § 2.
10. *Id.*
11. *Id.* § 3.
12. *Id.* art. I, § 7.
13. *Id.* art. II, § 3.
14. *Id.* § 2.

events which determine the fate of the Nation. As Chief Executive and political leader, he has unique opportunity to summon the people to his support, to reward those who aid him and to punish his opposition.

But the ultimate power to make the rules, to legislate, is not the President's; it is the Legislature's. Our Constitution creates a President with formidable governmental power, but it does not authorize him to govern. The President is a *part* of the government; he is not *the* government.

There have been many instances in our history, dating from the earliest days of the Republic, when Presidents have taken action which was not authorized by the Congress, and which was, in greater or less degree, beyond the President's unilateral power. With few exceptions, these instances have been related to armed conflict and foreign affairs.[15] They have stemmed from the premise, which I believe to be erroneous, but which many Presidents have adopted, that the President, particularly as Commander-in-Chief, has implied and virtually unlimited emergency powers.

Even Lincoln and Truman, both of whom were sensitive to the meaning and genius of our Constitution, were guilty of exceeding their constitutional powers. Truman seized the steel mills in order to prevent interruption of production which might jeopardize conduct of the Korean War. Lincoln suspended the writ of habeas corpus during the Civil War. Both Presidents rationalized their acts by the claim, as Truman stated it, that "The President of the United States has very great inherent powers to meet great national emergencies."[16] The Supreme Court held that both of them had acted unconstitutionally.[17]

In considering the constitutional derelictions of past Presidents, however, it is important to realize that, without exception, their unconstitutional actions have been specific and isolated—taken to meet specific and emergency situations. Their derelictions have not challenged or implicated the basic constitutional structure of our govern-

15. "The Imperial Presidency was essentially the creation of foreign policy." SCHLESINGER at 208 and *passim*.

16. *Id.* at 142.

17. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866); Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952). *Milligan* was the occasion for Justice Davis' famous statement: "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." 71 U.S. (4 Wall.) at 120-21.

ment. They have not been part of a general course of action in the day-to-day conduct of government. They have not been based upon, nor have they constituted an assertion of general Presidential power to override the authority of Congress or to disregard the law. Presidents have not sought to prevent examination of their acts, or to avoid responsibility for them. They have not claimed that "executive privilege"[18] confers upon the President total immunity from legal process and absolute, comprehensive and exclusive authority to decide what he will and will not disclose in response to congressional demand or other lawful authority.

Obviously, most Presidents, under the pressure of events, have sometimes wished that our system was different. Every President is certain that he could do better if it were not for the Congress and the press, and sometimes, the Supreme Court. In the past, they have nevertheless endured the frustrations of the system; and within that system, some of them have nevertheless achieved greatness. Strong Presidents have found within the President's constitutional power the potential for powerful, daring, innovative action; but, with relatively few lapses,[19] they have done so by providing leadership and advocacy and by using the office to obtain the consensus that our Constitution requires.

The outstanding exemplar of this was Franklin Roosevelt. During his incumbency, Presidential power expanded to an unprecedented degree; but the expansion occurred despite, and not because of his abortive and unfortunate attempt to weaken the institution of the Supreme Court. It was the result of constitutional processes. The explosive increase of Presidential function and prerogative which revolutionized the Presidency was the product of congressional legislation, enacted under Roosevelt's extraordinary leadership. It was not a consequence of unilateral action, of the seizure of power.

Roosevelt deployed the tensions and conflicts built into our Constitution to achieve affirmative action *within* the system. Faced by a catastrophic depression and a World War, he sought and obtained from the Congress great and novel authority for the President to act. But he did not usurp the power of the Congress or invade the rights of the

18. *See* Goldberg, *The Constitutional Limitations on the President's Powers,* 22 AM. U.L. REV. 667 (1973).
19. *See* text accompanying notes 16–17 *supra.*

people or the press or even of the opposing political party in order to accomplish the vast programs that he initiated.[20]

III. AN ATTEMPTED CONSTITUTIONAL COUP D'ETAT

This sort of expansion of executive power has not been the method of the Nixon administration. Like all strong Presidents, President Nixon has sought to have the nation follow his leadership and accept his decisions. But his conception of the Presidency is radically different from that of his predecessors. It represents a sharp break with our history and constitutional tradition. The Nixon administration has challenged our constitutional institutions. It has not merely committed acts in excess of constitutional right and authority. It has boldly confronted us with a new and revolutionary concept of the Presidency.

President Nixon obviously believed that he had authority to impound funds appropriated by the Congress, and he did so.[21] He believed that he could refuse to carry out programs enacted by the Congress, and he did so. He claimed broad and final authority to withhold information from the Congress and to avoid accountability for his actions. Members of his staff, seeking to accomplish Presidential purposes, have used the powers of the Presidential office to plan or authorize fantastic acts of lawlessness, violating ancient and fundamental rights of the people.

He has presented us with a challenge to our Constitution—to our basic institutions and our way of life. However well-motivated the President may be, or however unaware he may be of the implications of his actions, the net effect of his actions has been an attempted constitutional coup d'etat: A fundamental alteration—a subversion—of our basic constitutional structure.

Thus, we are confronted with a constitutional crisis. The significance of this crisis does not stem from the incredible acts of alleged criminal or quasi-criminal conduct that have been the subject of massive investigation. These are merely the ugly manifestations of a conception of Presidential power and status which has no place in our constitutional system.

20. *See* SCHLESINGER 105–09.
21. *See* Comment, *Protecting the Fisc: Executive Impoundment and Congressional Power*, 82 YALE L.J. 1636 (1973).

The alleged criminal acts are, of course, of great national concern. They include charges to which the administration's former Attorney General vividly referred as "horrors":[22] Alleged complicity in burglary, unlawful electronic espionage, concealment of felonies, obstruction of justice, unlawful suppression and withholding of evidence.

I hope that the President's personal involvement in respect of these charges can be disproved. But the fact remains that if and when substantial allegations of misfeasance are made against a President, our system of government requires that the President respond to the allegations, like any other person so accused.[23]

Our Constitution does not give a President or his staff authority to participate in or to authorize criminal acts. Certainly it would be preposterous to argue that a President or his staff may engage in unlawful conduct in order that he may be re-elected. As a candidate for re-election, he has no more rights than his rivals. But even as to acts related to the conduct of his office, the President and his staff are subject to the law, including the prohibitions of the criminal code. Nor does our Constitution confer immunity upon a President or his staff for the consequences of their acts, or a right to withhold relevant evidence.

A President is accountable for criminal acts, if he has committed them, like any other citizen. He may be removed from office.[24] He may be prosecuted after impeachment and removal from office;[25] and, in theory, nothing in the Constitution itself would bar indictment and prosecution even while he is in office—unwise and infeasible as this may be in practice. There is no *constitutional* difference in this respect between a President or Vice President, a federal judge or any other civil officer of the United States[26]—despite assertions to the contrary.

22. *Hearings Before the Select Committee on Presidential Campaign Activities of the U.S. Senate*, 93d Cong., 1st Sess., Phase I, Book 4, at 1625 (1973) (testimony of Mr. Mitchell).

23. "Though the President is elected by nationwide ballot, and is often said to represent all the people, he does not embody the nation's sovereignty. He is not above the law's commands." Nixon v. Sirica, 487 F.2d 700, 711 (D.C. Cir. 1973).

24. U.S. CONST. art. II, § 4.

25. *Id.* art. I, § 3, cl. 7.

26. *See* the remarks of Raoul Berger: "The Constitution says they're all on a par [judges and the President]. . . . They can all be indicted without being impeached," Washington Post, Aug. 28, 1973, § A, at 12, col. 1. *See also* Bestor, Book Review, 49 WASH. L. REV. 255, 271–74 (1973); Berger, *Impeachment: A Countercritique*, 49 WASH. L. REV. 845 (1974).

But we shall be derelict in our duty if our response to the present crisis is merely punishment of the malefactors—if we neglect the underlying meaning and moral of the traumatic experience which we are enduring. The events of the past few years teach a lesson which we will ignore only at our great peril. They teach us the terrible consequences which can result from the exercise of unbridled power: That power exercised without constitutional restraint can destroy not only our democratic political system, but our personal, individual liberty.

Some of the criminal acts in which the Nixon administration was allegedly implicated involved violations of ancient and fundamental rights, enshrined in our constitutional guaranties: The right to privacy, to security of our homes and offices, to freedom from lawless action under cloak of governmental authority. It is not mere coincidence that these spectacular charges of criminal and unconstitutional invasion of the rights of individuals have been lodged against a White House which is also accused of disregarding the limitations of Presidential authority in governmental affairs: of disregarding congressional commands with respect to Cambodia and Laos, of unlawfully impounding appropriated funds and of refusing to implement programs enacted by the Congress.

The same inflated conception of Presidential power and immunity which provided the basis for Watergate and the other "horrors" also led to the exercise by the President of governmental power which our Constitution denies to him. All of these acts and events are the product of a conception and theory of the Presidency as an office with power to disregard the law to achieve Presidential objectives, with power to make law, rather than execute it, and with power to refuse to account for Presidential acts.

The history of political institutions warns us that the destruction of restraints upon political power and the destruction of individual liberty go hand in hand. Regimes that seize political power preserve and expand that power by the ruthless and lawless invasion of personal rights. Let us not delude ourselves into believing that we are immune, that we can tolerate the violation of the political restraints which our Constitution places upon the Presidency and nevertheless remain complacently secure that we retain our cherished freedoms.

We will not solve our problems merely by punishing those guilty of criminal acts. We will not save our nation merely by rebuffing this Administration's attempt to exercise unconstitutional authority. We

must ponder the fundamental problem of which we are now so dramatically warned: The problem of the adequacy and effectiveness of our machinery to restrain the Presidency.

We have experienced the incredible. The unprecedented, the unthinkable, have happened. They can happen again; and it is not inconceivable that if they occur again—if we fail to take measures to prevent their recurrence—the next time they will succeed. If they succeed, virtually unlimited Presidential power may replace our political democracy and undermine our personal liberty and our freedom from arbitrary, lawless governmental action.

We must, therefore, consider the following questions: Are our constitutional institutions adequate to confine the President's actions to the limits necessary for democratic government and to protect each of us against misuse of Presidential power; is our constitutional machinery adequate to make the President properly accountable for his acts; have the changes wrought by time and events, and the evolution of the power of the President, so enfeebled the checks and balances provided by our Constitution that fundamental revisions are essential?

In short, we must address ourselves to an examination of the adequacy of our machinery to protect the rights of the people and their institutions—the Congress, the press and our political system—against Presidential usurpation and abuse; to establishing proper and workable definitions for Presidential authority; and to creating effective machinery to ensure Presidential accountability for the President's actions.

IV. A REEXAMINATION OF THE PRESIDENCY

I should like, first, to clear away some of the dust that has recently been kicked up, by stating a few elementary principles:

1. The President is not above the law. He is subject to the Constitution and the laws enacted by the Congress—in all respects, not just some.

2. It is the President's constitutional duty to execute, to apply and to administer the laws duly enacted by the Congress, whether they are good, bad or indifferent, and whether they will balance the budget or break it. He cannot constitutionally impound funds which Congress has appropriated and directed him to spend, unless and except to the extent that Congress has authorized him to do so. He cannot refuse to

carry out programs which Congress has enacted, whether they relate to minority employment opportunities or to the sewage and water systems of our Nation.[27]

3. The President cannot constitutionally, even for a moment of time, authorize lawless programs of domestic surveillance, wiretapping, electronic espionage, or breaking and entering homes or offices, whether in the interests of internal security or otherwise. He can neither do these things, nor authorize or permit them to be done.[28] It is his duty to prevent any such acts, and to see that the perpetrators are prosecuted.

4. The President and the entire executive establishment must account to the Congress for their actions and, with extremely limited exceptions, must respond to authorized congressional, judicial and grand jury demands for relevant material and information, including memoranda and even tape recordings.[29] Our system does not recognize a general, royal or presidential prerogative incident to Presidential tapes or papers or communications, or to the person occupying the Presidency. "Executive privilege" is nothing more or less than the principle that, in limited situations, the courts will permit the President or a principal executive officer to decline to comply with subpoenas or congressional demands for his physical presence[30] or for the

27. *See* Comment, *Protecting the Fisc: Executive Impoundment and Congressional Power*, 82 YALE L.J. 1636 (1973).

28. *Cf.* United States v. United States District Court, 407 U.S. 297 (1972).

29. *Cf.* R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH (1974); Kramer & Marcuse, *Executive Privilege—A Study of the Period 1953–1960*, 29 GEO. WASH. L. REV. 623 & 827 (1961) (two parts).

30. But the Supreme Court in Branzburg v. Hayes, 408 U.S. 687 (1972), dealing with a grand jury subpoena directed to a newspaperman, includes the following footnote:

> Jeremy Bentham vividly illustrated this maxim [that the public has a right to every person's evidence]:
>
> "Are men of the first rank and consideration—are men high in office—men whose time is not less valuable to the public than to themselves—are such men to be forced to quit their business, their functions, and what is more than all, their pleasure, at the beck of every idle or malicious adversary, to dance attendance upon every petty cause? Yes, as far as it is necessary, they and everybody. . . . Were the Prince o Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach, while a chimney-sweeper and a barrow-woman were in dispute about a halfpennyworth of apples, and the chimney-sweeper or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No, most certainly." 4 The Works of Jeremy Bentham 320–321 (J. Bowring ed. 1843).
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> In United States v. Burr, 25 Fed. Cas. pp. 30, 34 (No. 14,692d) (C.C.Va. 1807), Chief Justice Marshall, sitting on Circuit, opined that in proper circumstances a subpoena could be issued to the President of the United States.

408 U.S. at 688–89 n. 26.

disclosure of certain restricted and reasonably well-identifiable types of documents or communications. This is not because of any explicit provision in the Constitution.[31] The Constitution says nothing about executive privilege; but the courts will recognize such a privilege, where and to the extent that it is a necessary incident to the performance of official duties, and where the recognition of the privilege is necessary to serve the national interest. In making these judgments, the courts will also take into account the reasons for the demand for disclosure, the purpose which disclosure would serve, and the materiality and importance of disclosure to the issues before Congress or the courts.

Executive privilege will almost always be recognized by the courts where and to the extent that the subpoenaed material contains secret and sensitive defense or foreign affairs information.[32] On the other hand, a claim of privilege by the President will not be sustained if the communication does not directly relate to his official duties, if it is otherwise material to the matter at issue.[33] This is true with respect to verbal as well as written or recorded communications between the President and his staff, or other persons. There is no basis, therefore, for a claim of executive privilege with respect to communications relating to such acts as campaign activities or actions which may violate the criminal laws. Even communications between the President and his personal lawyer are not privileged if they involve a conspiracy to commit a violation of law or to conceal a felony.

Obviously, this doctrine, correctly understood, refutes the claim that the President may himself finally decide whether or not he will produce evidence. The power to decide whether the President must or need not comply is in the courts; the President may claim the right to decline to comply; but only the courts can decide the question.[34] Obviously, the doctrine provides no basis for a claim of privilege by the President with respect to documents or tapes relating to the President's political activities or to any matter except those incident to his lawful, official duties, disclosure of which would be injurious to the

31. "The Constitution makes no mention of special presidential immunities." Nixon v. Sirica, 487 F.2d 700, 711 (D.C. Cir. 1973).

32. *See* United States v. Reynolds, 345 U.S. 1, at 6–7, 11 (1953).

33. *Cf.* Gravel v. United States, 408 U.S. 606 (1972).

34. Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 788, 792–94 (D.C. Cir. 1971); 8 J. WIGMORE, EVIDENCE § 2379, at 809–10 (McNaughton rev. 1961).

Nation or would hamper the President in the performance of his constitutional and lawful functions.[35]

Lawyers will recognize that the doctrine is not essentially different from the principles that govern decisions with respect to private citizens.[36] The basic principles are the same: Disclosure is required only where the communication is material to the issue at hand; but where it is material, claims of privilege must be decided on the basis of the subject matter of the communication—not the status of the participants. The difference between the treatment of the President and a private citizen is merely the consequence of the Executive's special constitutional and official duties.

This is fundamental to our democratic, constitutional system. The President of the United States is not above the law. He is subject to the law, like any other person; and he can claim only such immunity, such privilege, as is given to him by express legislation or by the application of universal legal principles incident to his particular role and responsibilities.

5. Under our Constitution, the President has no implied powers which enable him to make or disregard laws, except as specifically authorized by the Congress. The President has certain emergency powers, derived from his duties as Commander-in-Chief of the Armed Forces, but these powers are extremely limited. They do not authorize him to suspend or disregard laws, or to invade the constitutional rights of citizens, even when internal security is involved.[37] The President's powers as Commander-in-Chief are military, not legislative. He is the supreme civilian head of the Armed Forces. He controls their use and deployment, subject, however, like any other commander of military forces, to law and to congressional authorization. Like a field commander, he can take military action to meet an emergency, if such action is limited to the emergency; but it is the right and duty of the Congress, which it has sometimes cravenly avoided performing, to enact legislation, as promptly as possible, to direct that the military action continue or be terminated. The President, whether as Commander-in-Chief or otherwise, has no constitutional authority to use armed forces contrary to law and to congressional direction.

35. *Cf.* Gravel v. United States, 408 U.S. 606 (1972).
36. United States v. Burr, 25 F. Cas. 30 (No. 14,692) (C.C. Va. 1807); Branzburg v. Hayes, 408 U.S. 665 (1972).
37. *See* note 9 and accompanying text *supra*.

6. With respect to foreign affairs, the drafters of the Constitution understood that the President's role would, of necessity, be primary. The authority to deal with foreign governments had to be vested in an individual, not in the Congress; the drafters hoped that adequate checks upon Presidential power would be provided by the necessity of obtaining the Senate's advice and consent to treaties[38] and the exclusive power of Congress to declare war.[39] But the tidy, formal world that this arrangement postulated has long since vanished. Relations with foreign governments defy the neat constitutional categories. Wars are seldom declared; they develop and exist. International commitments are made without the formality of treaties. These commitments sometimes, in practical effect, inextricably involve the Nation in alliances of vast consequences, even leading to war. Presidents, sometimes unavoidably, present the Congress and the people with a *fait accompli*. A President can, for example, by diplomatic moves, create a situation of détente with the Soviet Union and China, in which Congress had no participation. Congress can decline to enact the measures to implement Presidential commitments, but often this is Hobson's choice—more theoretical than real.

As we saw in the Vietnam and Korean conflicts, a President can even commit the Nation to a course of action that, step by step, leads to major armed conflict far from our shores. Presidents Eisenhower and Kennedy began our Vietnam involvement by assigning "military advisers" to South Vietnam. They could perhaps justify this as part of their diplomatic function, as part of foreign intelligence gathering, or as an adjunct to military aid and the supply of weapons, authorized by the Congress. But as we have experienced, it is a dangerous process—simple to commence, difficult to limit, and hard to terminate.

7. As Chief Executive, the President is the head of the entire executive establishment of the United States. The departments are created by law of the Congress; the Congress defines their jurisdiction, duty, power and, within constitutional limits, their procedures; and they must render an accounting to the Congress for their administration. But Congress has no power to remove an executive officer from his position, even by the indirect means of using its appropriation power,

38. U.S. CONST. art. II, § 2.
39. *Id.* art. I, § 8.

except by the process of impeachment[40] under exactly the same constitutional provision and procedure that applies to the President and Vice President.

Accordingly, the ultimate responsibility for the quality of the vast federal bureaucracy—except as to the quasi-judicial agencies[41]—is in the President. His power, however, is limited by the terms of the legislation which an executive agency is administering. If the legislation places the authority to act in a particular agency or agency head, the President cannot supplant the agency and himself make the judgments. He may, and in a sense, he must, advise the head of the agency and oversee its work, but he cannot himself exercise power which Congress has vested elsewhere. Except in the case of quasi-judicial officials and agencies, he may remove an agency head whom he has appointed if he disagrees with him, and appoint more cooperative personnel. The President may not, however, himself take over the function or transfer it to another department, or create an agency or group to perform the function, because Congress has authorized the department, and not the President, to do so. In short, the President has the responsibility for the faithful execution of the laws, but he can bear this responsibility only within the terms and through the officials and agencies prescribed by the Congress. He cannot take over the powers of an agency without congressional authorization. An illustration of violation of this principle is presented by the creation in the White House of the so-called Plumbers and the attempt to invest them with authority which, if it existed anywhere, was in the FBI—certainly not in the White House. The President has authority and flexibility within the discretionary appropriation to him, to create a White House staff, but the functions of that staff are limited by the limitations of Presidential authority. They are to aid him in performance of his duties. They cannot be authorized to perform functions which the Congress has vested in another department or agency of the government.

V. PRESIDENTIAL RESTRAINT: INHERENT DEFECTS

As we consider and evaluate the complexities and problems of the Nation today, it seems beyond dispute that we need, we must have, a

40. United States v. Lovett, 328 U.S. 303 (1946); *see also* Myers v. United States, 272 U.S. 52 (1926).

41. Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).

strong Presidency. We must have a Presidency that has the power and status to lead the Nation, to speak effectively for us in the complex, difficult and dangerous area of relations with other nations, and to oversee effectively the enormous federal establishment. The President must be equipped with adequate powers to discharge these duties. To the extent that he does not have them by specific constitutional grant or existing legislation, Congress should enact new laws, carefully designed so as to subject the President to appropriate congressional controls. We should neither deny to the President the authority that he needs to do his job, nor should we, by failing to give him that authority, tempt him to exceed his constitutional powers.

But the Presidency must be controlled and restrained. We need restraints upon the President commensurate with the greatness of his powers and the potential of his office for expansion and misuse of these powers. The events of the past few years warn us that we cannot rely merely upon the self-restraint of the man who is President, or upon his sensitivity to the meaning and message of our constitutional system.

The controls that the Founding Fathers adopted are no longer adequate. The balance that the Founding Fathers ingeniously devised no longer exists. It has been destroyed by the complexities of modern life, the vast expansion of governmental function, the decline of Congress due to the growth in the number of its members and, principally, to its failure effectively to reorganize its management and procedures, and by the enormous increase in Presidential power and prestige. At the same time, we have adopted Constitutional amendments which have enfeebled the checks, the restraints, upon the President in which the drafters of the Constitution placed their ultimate reliance.

The primary check upon the President upon which the Founding Fathers relied was the power of the people to elect and reelect him, if they so decided. They believed that Presidents would seek to conduct themselves so as to win the favor of the people in order to assure reelection. If a President should die, resign or be removed from office prior to expiration of his term, the people's second choice for that great office—the Vice President—would succeed him. But both of these features of our constitutional system have been eroded. A President, in his second term, is no longer influenced by the possibility that he may decide or be called upon to stand for reelection. This change came about in 1951, when, in reaction to FDR's long tenure, we

adopted the twenty-second amendment to the Constitution, limiting the President to two terms. To some Presidents, this limitation can be an incitement to extreme action. In his second term, a President is admonished that, by law, this is his last chance to reshape the Nation in his own image. He sees the end of the road, and to a hard-driving man of vast ambition, the prospect of an incomplete mission may not be endurable. He believes that he knows what should be done; and he is immune from the restraining effect of the possibility that he may decide to run for reelection and that, if his program is not acceptable to the people, they may repudiate him at the polls. In our history, every President except Franklin D. Roosevelt has observed the tradition limiting a President to two terms; but until the adoption of the twenty-second amendment, the possibility, however theoretical, of another term has been a seasoning ingredient in Presidential psychology. Without the twenty-second amendment, the decision whether to run for a third term would most likely not be made until late in the second term, human nature and politics being what they are, and the possibility of another term thus would act as a restraint until that time.

The power of the people has also been diminished by changes in the manner of selecting the Vice President. Initially, the Vice President was the candidate for President who received the second-largest number of electoral votes. In 1804, we adopted the twelfth amendment which provided that the Vice President would be separately nominated and elected. Inevitably, this led to the present situation in which Vice Presidents are not, in fact, nominated or elected by the voters, but are designated by the Presidential nominees and elected as an appendage to the successful Presidential candidate. The result is that if a President dies, resigns or is removed from office, he is succeeded by a person who, realistically, is not the selection of the people, but the choice—usually for political or ticket-balancing reasons —of his predecessor. In 1967, we compounded this by ratification of the twenty-fifth amendment which includes a provision authorizing the President to fill a vacancy in the office of Vice President, with the concurrence of a simple majority of each House of the Congress.

Both of these amendments—the twenty-second, limiting the President to two terms in office, and those provisions of the twenty-fifth providing for Presidential designation of a Vice President to fill a vacancy in that office—have some merit, but on balance, I believe they were unfortunate. The fact—the important fact—is that both represent

a dilution of a fundamental part of the design of our Constitution: The power of the people, by their vote, to choose their President and the restraint which this reference to the people was designed to exercise upon the behavior of their Chief Executive.

The second and ultimate restraint which the Founding Fathers built into the Constitution was a mechanism for removal of a President prior to the expiration of his term. This mechanism was the formidable weapon of impeachment. The architects of the Constitution provided that the President, Vice President and any civil officer of the United States could be removed from office upon impeachment by majority vote of the House of Representatives and conviction by two-thirds of the members of the Senate present.[42] Upon conviction, not only is the President removed from office, but he may not thereafter hold any office of honor, trust or profit under the United States; and he is subject to indictment and prosecution for any criminal offenses he may have committed.[43]

Let me make a preliminary point about the impeachment provisions of the Constitution. A President may be impeached and convicted for treason, bribery or other high crimes and misdemeanors. The phrase "high misdemeanors" is and was understood to be a term of art, deliberately broad and ambiguous in specific application, but clearly embracing serious violations of public trust by officers of the government, including such acts as failure or refusal to execute faithfully the laws or any type of misconduct in office which constitutes an abuse of its authority or prerogatives.

There is simply no acceptable basis to argue that the impeachment provision of the Constitution restricts impeachment to acts in violation of the criminal laws. There is no support for this contention in the history of English impeachments, the understanding of the makers of the Constitution, or in the precedents in our own history.[44]

42. U.S. CONST. art. II,§ 4.

43. *Id.* art I, § 3, cl. 7.

44. Blackstone has been cited for the proposition that "impeachment must rest upon a violation of existing criminal law." BERGER at 55. Blackstone's observation would be of great significance as an indication of the intention of the framers of the Constitution, but the fact is that Blackstone defined "high misdemeanors," the Constitutional phrase, as "misprisions," "such high offences as are under the degree of capital, but nearly bordering thereon." He defined "the first and principal" of this category of "misprisions" or "high misdemeanors" as "the *mal-administration* [*sic*] of such high officers, as are in public trust and employment. This is usually punished by the method of parliamentary impeachment . . . ." 4 W. BLACKSTONE, COMMENTARIES 119–21 (14th ed. 1803). Blackstone's views are consistent with English practice and precedent with respect to the grounds for impeachment.

In the leisurely days of 1787, when the House of Representatives and the Senate were small bodies with little to do, impeachment may have been a practical procedure for removing a President from office. It is now staggering to contemplate the amount of time that a Senate trial of impeachment charges will require, the inevitable fury that it will provoke, and the divisions and hostilities that it will engender. Inescapable as an impeachment trial may be in the present situation, its dimensions—the disruption that it has caused and will cause—are disconcerting; and I submit that we must find a better way to supply the ultimate remedy for removing a President from office.

We must find a method that permits us to terminate a President's tenure which is not so easy and facile that he can be deposed because of political disagreement or policy opposition. We must find a way that preserves our system of conflict, tension, advocacy and consensus between the Congress and the President, and does not destroy it by permitting the Congress to terminate a President's tenure because of disagreement with him. The parliamentary system, in my opinion, is not suitable to our temperament. We do not seek a new constitutional balance. We seek to *restore* our constitutional balance: The balance that the Founding Fathers created and which has served us so well.

At the same time, we cannot, we should not have as our only choices the alternatives of enduring for four long years a President who has violated his trust and who threatens essential national values, or subjecting the Nation to the protracted, complex and destructive ordeal of impeachment proceedings.

VI. PROPOSALS FOR REFORM

I believe, then, that we are in need of some fundamental changes to restore the balance in our system, to protect our political democracy, and to safeguard our individual rights and liberties. I think we should consider the following:

First: While we have no present option except to proceed with the pending impeachment proceedings (unless the President decides to resign), we should provide an alternative method. Representative Edith Green of Oregon has proposed a joint resolution to amend the Constitution which seems to me to be well designed for this purpose.[45] It

45. H.R.J. Res. 708, 93d Cong., 1st Sess. (1973); *see also* H.R.J. Res. 547, 93d

provides that a special election shall be called for President and Vice President if the House and Senate, by two-thirds vote of each, shall enact a resolution that the President has failed or refused faithfully to execute the laws, or has willfully exceeded his powers, or has caused or willfully permitted the rights of citizens to be trespassed upon. The special election would be federally financed and would be held within 90 days; and the incumbent President and Vice President would be eligible to be candidates.

This plan has the following virtues: It avoids the procedural difficulties of impeachment. Its implications are not as degrading—it does not bar the President from re-election, nor does it necessarily imply the devastating moral judgment which is implicit in impeachment, that is, the disqualification of the President from any future position of public honor or trust. It does not require a trial of the President on charges, but it limits the House and Senate by requiring that they find specific and limited grounds for calling the special election. It makes possible a complete change in executive leadership, rather than merely a shift from the President to the Vice President. And finally, it remits the ultimate judgment as to whether the President is to continue in office to the people—which is where it belongs.

The Green resolution does not eliminate the Founding Fathers' idea of a fixed term for the President to assure his independence of the Congress and to carry out the basic constitutional idea that he would act as a check upon the Congress and would balance congressional power. It retains the American principle of fragmented power—of a government by consensus, conflict, advocacy and tension. It does not adopt the unitary parliamentary system. But it would provide a mechanism which would operate in extreme situations; and more importantly, it would provide a constant restraint upon the President, warning him that extreme misconduct may result in his having to submit to a special election.

Second: I believe that we should reconsider the twenty-second amendment. It is a good tradition that Presidents should not serve more than two terms;[46] but it is a dubious constitutional prohibition. It is bad psychology: There is a vast difference between the effect

Cong., 1st Sess. (1973) (Representative Bingham) and H.R.J. Res. 697, 93d Cong., 1st Sess. (1973) (Representative Obey).

46. Thirty Presidents held the office prior to Franklin D. Roosevelt. None of them sought a third term.

upon an incumbent President of a constitutional prohibition and of a voluntary decision that he will not run again. Presidents are people; essentially, they are just people; and the message of the twenty-second amendment, that they face the end of the road and their last chance to achieve their goals, can be an incitement to the extreme and willful use of power.

Third: We should amend the provisions of the twenty-fifth amendment relating to filling a vacancy in the office of the Vice President, and we should redefine the office and functions of the Vice President. The twenty-fifth amendment provides that when the office of Vice President is vacant because of death or resignation, the President nominates his successor who takes office upon approval by a majority of the House of Representatives and the Senate. This means that a person who has not been elected by the people of the Nation may become President, and it is possible that he may serve as such for more than three years, without having obtained a mandate from the people. It seems obvious to me that this is inconsistent with our basic democratic principles, and that if the Vice Presidential office becomes vacant, his successor should be elected in a special election.

Fourth: For somewhat the same reasons, I submit that we should revise the provisions of our Constitution with respect to the Vice President. Vice Presidents are not really chosen by the voters. They are selected by the Presidential candidates; they are elected merely as an appendange to the people's vote for President.

We should amend the Constitution in recognition of this reality, and provide that a Vice President, succeeding to the office of the President, should hold that office only until a President is selected by the voters in a special election to be held within 90 days. This would also go a long way towards reducing the significance of the present, and I think, unavoidable, inadequacies of the methods of the selection of Vice Presidential candidates, which were dramatized so vividly and sadly in the Eagleton incident at the last Democratic Convention.

I would also change the constitutional provisions concerning the duties of the Vice President. He should not preside at the sessions of the Senate, as the Constitution now provides. He should be an executive official entirely; and he should be available for such full-time executive responsibilities as the President may delegate to him, including the responsibility of head of a department such as the Department of State. Hopefully, this would permit the President to delegate some of

his excessive duties to the Vice President—and it would also make it possible to give the Vice President some useful work to do.

Fifth and finally: It is somewhat unrealistic to expect that Presidents will not invade the province of Congress unless Congress is effectively doing its job. The Congress simply must face up to its responsibilities and must put its house in order. Public confidence in the Congress is at a low ebb—and with some justification. Congress must redefine its mission so as to make it practical and manageable; it must legislate and appropriate in broad terms; it must delegate responsibility for details; it must meticulously require the executive agencies to account for their administration, but it must not intervene in their specific decisions; and it must reorganize its machinery and its procedures so that it can do its job.

A model, in a very difficult area, of constructive congressional action to preserve its authority but at the same time to permit effective government action, is available in the recently enacted War Powers Resolution.

In November 1973, the Congress enacted the "War Powers Resolution," which had been originated by Senator Javits.[47] It enacted this resolution over President Nixon's veto. The operative part of this resolution requires that, in any instance where armed forces are introduced, the President shall report to Congress within 48 hours, and that he shall terminate the use of United States forces in that situation within 60 days unless Congress otherwise provides.

This resolution is strong medicine. It warns the President that prolonged secrecy of military operations and studied exclusion of the Congress from participation in military decisions, such as we experienced in Laos and Cambodia, are not permissible. At the same time, it recognizes the reality that the Nation may be faced with situations where armed intervention is essential, and that only the President is in a position to act speedily; and it carefully preserves the ultimate control of the Congress.[48]

Another kind of example of the restructuring that is essential is presented in some of the impoundment bills presently under consideration by the Congress.[49] Congress has and must exercise the appropria-

47. Pub. L. No. 93–148, 87 Stat. 555 (1973).

48. *Cf.* the laws empowering the President to use military forces to suppress insurrection, domestic violence, etc., 10 U.S.C. §§ 331–34 (1970).

49. *See, e.g.*, S. 373, H.R. 7130, H.R. 8480, 93d Cong., 1st Sess. (1973); S. 3034, 93d Cong., 2d Sess. (1974).

tion power. The President may not refuse to expend appropriated funds, unless Congress has so authorized. But situations arise after Congress has acted, in which changed conditions or circumstances require reconsideration of appropriations. Present statutory provisions to permit the President to act in these circumstances are inadequate. Obviously, the Congress should enact an appropriate measure to achieve this result, for example, by enabling the President to suspend the expenditure of appropriated funds for a limited period during which he will request the Congress to reconsider.

VII. CONCLUSION: A TIMELY WARNING

In conclusion, I ask that you consider my thesis: The fantastic events that we label Watergate have profoundly shocked us. They would have been shocking if they had involved only the President's political party, or only a committee which he authorized to work for his re-election. The participation of the President's White House staff and close associates made them a calamity. And the possibility of the President's personal involvement made the events deeply traumatic—a national disaster.

But Watergate was more than a series of incredible assaults upon our political process; it was more than a series of patently lawless acts of a base, criminal nature. Watergate was the ugly excrescence of a theory of government which asserts the supremacy of the Presidency over the Congress and the law of the land. It makes little difference whether the theory was the President's or his associates'. It makes little difference whether the theory was conscious or articulated, or whether it is merely the unifying principle from which the various acts emerged.

This is an intolerable theory for a democratic society. Some years ago, Richard Nixon was a leader in combatting the alleged subversion of our institutions by those who, he said, advocated a foreign ideology; but foreign ideologies are not the only danger—and not the greatest danger—to our Constitution and our political democracy.

Watergate was the ugly, dreadful face of a theory which embraced the idea of a Presidency overriding congressional laws that conflicted with the President's conclusions as to the national interest, a Presidency inducing or tolerating lawlessness to promote its objectives, a Presidency immune from court processes and congressional inquiry.

We must remember this coupling of Watergate and political theory. We must remember that we can be reasonably confident of avoiding Watergate's criminal assaults upon our basic liberties only if we preserve our political democracy. Freedom is indivisible. If we permit a President to override the political restraints of our Constitution, to overrule the Congress, to ride roughshod over the limits upon his powers to govern which are prescribed by our Constitution, we invite a Presidency which may also ride roughshod over the sanctity of our homes and the privacy of our persons.

By the grace of God and good fortune, we have been saved—this time. If we are to avoid these dangers in the future, we must do more than punish those who participated in the current assaults upon us. We must restore the balance that our Constitution designed; and to do that, we must, I submit, revitalize the machinery of our government.