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Administrative Powers of the President

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THE ADMINISTRATIVE POWERS OF THE PRESIDENT

PART II.

II. SPECIAL ADMINISTRATIVE POWERS

TURNING now to those particular branches of administration where the Constitution confers on the President special powers, we shall find that in these fields he has still more ample authority. Not only do the constitutional grants guard him from encroachment on the part of Congress, but they enable him at times to assume a large degree of legislative power.

Foreign Relations.[1]—By the Constitution all foreign relations are entrusted either to the President alone, or to the President in connection with the Senate; and the Congress as a whole has no control in these matters, except in certain instances to pass laws to carry out the provisions of treaties. Several distinct clauses of the Constitution deal with this subject. "He [the President] shall receive ambassadors and other public ministers accredited from foreign governments." "He shall nominate, and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers, and consuls." "He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." "All treaties made, or which shall be made under the authority of the United States shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

These powers may be differentiated into two main divisions: the power of communication and negotiation with foreign countries, which is under the complete control of the President; and the power of making formal and binding international agreements, having the force of law, which is shared by the President and Senate.

[1] Pomeroy: *Constitutional Law*, ch. 5, sec. 4.

The President has full control over all intercourse, communications and negotiations between the United States and all other governments. Foreign ministers and ambassadors present their credentials to him; and while communications and negotiations are for the most part carried on through the Secretary of State, that officer acts as the direct and personal agent of the President. The latter is kept more closely informed of the details of foreign negotiations than of other departments, and in important matters takes an active part in the negotiations. Ministers from the United States to foreign countries are nominated by the President; and while the nominations must be confirmed by the Senate, the President exercises a larger personal influence in these appointments than in others, while his power of nominating such officers cannot be transferred to any other official. In any case, the Senate's control over these ministers ends with their confirmation. Their duties are performed entirely under the direction of the Executive. Instructions are sent to them, claims and demands presented, replies to foreign governments forwarded from the President, acting through the State department. Moreover, all correspondence and negotiations are generally conducted in secret; and seldom published until after some conclusions have been reached. The degree of discretionary action left to the Secretary of State will naturally vary with circumstances, —such as the relative experience of that officer and the President in diplomatic affairs, the President's sense of propriety and his convictions on a given subject. But the responsibility in every case rests on the President alone; and the importance of the matters involved make essential his close personal attention.

Through this power over negotiations with foreign countries, the President has a momentous and far-reaching authority. He has the sole initiative in making treaties, determinining the subject matter, and proposing and agreeing to stipulations. Only after the formal draft of a treaty has bees accepted by the President is it submitted to the Senate, so that it is impossible for that body to dictate a treaty. Moreover, the President may so conduct diplomatic negotiations as to force the country into a war, without any possibility of hindrance from Congress or the Senate.

While in the conduct of negotiations the President has unlimited power, formal treaties with foreign countries can be concluded only "by and with the advice and consent of the Senate, providing two-thirds of the Senate present concur." In this matter, as in reference to appointments, there has been some question as to the rights

of the Senate under the clause providing for its advice and consent; and the established practice has been somewhat different with treaties than with appointments.

The "advice" of the Senate as a body, is not ordinarily called for or given before a formal treaty is presented for its consent. But there have been some instances of this; while it is more customary for members of the Senate committee on foreign relations to be kept informed of the progress of important negotiations. In any case, however, the Senate does not consider itself bound simply to accept or reject a proposed treaty; but has on various occasions introduced amendments as a condition of its consent. When the Senate makes such amendments, it is possible for the President to abandon the treaty, if he prefers such action to further negotiations for the amended treaty. If the President accepts the Senate amendments, it is necessary to carry on further negotiations with the foreign government and its consent to the changes before the treaty is definitely concluded. A recent notable instance of the Senate's influence was in the Hay-Pauncefote treaty, where the Senate's amendments led to renewed negotiations and the drafting of a new treaty.

There must next be noted the influence of Congress over treaties.

"Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department, and the legislature must execute the contract before it can become a rule for the court."[1]

Most generally the necessity for such Congressional action arises where a treaty provides for a payment of money, which can be made only by virtue of an appropriation regularly passed by both houses of Congress.

Where a treaty and a statute conflict, which prevails over the other? It has been clearly decided in a number of cases that if the statute is later in date the courts will be bound by the statute when it conflicts with an earlier treaty.

"So far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country,

[1] Foster *v.* Neilson, 2 Peters, 253.

it is subject to such acts as Congress may pass for its enforcement, modification, or repeal." [1]

Congress has thus power to amend the provisions of a treaty or to annul a treaty; and its acts for these purposes will be accepted by the United States courts. The only remedies open to a foreign government are those for the violation of a treaty,—a protest, and in the last resort, war.

If the treaty is later in date, there is evidence that the converse of the above rule would also apply. For in deciding cases under the rule stated, the courts have based their judgments on the general principle that the later expression of law should prevail over the earlier.

"By the Constitution a treaty is placed on the same footing and made of like obligation with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. . . . If the two are inconsistent, the one last in date will control, providing always the stipulation of the treaty is self-executing." [2]

But the application of this rule in favor of a treaty conflicting with an earlier statute does not seem to have been made as yet.

The execution of treaties, so far as it is not dependent on legislative action, comes—like the execution of other laws—under the direction of the President. One class of treaties—those providing for the extradition of criminals—generally impose on the President the function of surrendering fugitive criminals to foreign powers. An exception to this rule is found in the treaty between the United States and Mexico, which authorizes the chief executives of the frontier States and Territories to grant extradition in some cases. But, even in these cases, the President may intervene and make the final decision.

As a matter of practice the warrant of surrender for extradited criminals is issued not by the President in person, but by the Secretary of State. It is also dependent on the power of judicial magistrates to discharge a fugitive. Formerly it was held that where a fugitive was committed by a judicial magistrate for extradition, the action of the executive was purely ministerial; but more recently the President has exercised discretionary power to refuse to surrender fugitives even after commitment.[3]

[1] Head Money Case, 112 U.S. 580, 597; Whitney *v.* Robertson, 124 U. S. 190; Chinese Exclusion Cases, 130 U. S. 600; 149 U. S. 698.

[2] Whitney *v.* Robertson, 124 U. S. 190.

[3] J. B. Moore: Extradition and Inter-State Rendition, I., 549, 555.

Military Powers.—The President is by the Constitution, Commander-in-Chief of the Army and Navy, and also of the state militia when in the service of the United States. Congress, however, has the power of declaring war and of military legislation. It is thus difficult, if not impossible, to draw a strict line of demarcation between the authority of Congress and that of the President. But the general principles of demarcation can be indicated; and in practice there have been very few important conflicts. Congress regulates whatever is of general and permanent importance, while the President determines all matters temporary and not general in their nature. Thus Congress authorizes the total number of men in the army, their distribution among the different branches of the service, the number and kind of arms, the location and character of forts; and the President, as Chief Executive, must carry out the statutes on these matters. But the President, as Commander-in-Chief, decides where the different parts of the army and navy are to be stationed and moved, the strength and composition of garrisons and field forces, and the distribution of arms and ammunition. Congress has power to declare war (although hostilities may commence without such a declaration), and decides what means it will grant to conduct the war; but the President decides in what way the war shall be conducted, directs campaigns and establishes blockades,[1] and also may do whatever is necessary to weaken the fighting power of the enemy. It was on this last ground that President Lincoln issued the emancipation proclamation.

The war power of the President is not limited to matters directly involved in the conduct of war, but extends beyond purely military actions to the domain of the exceptional relations which arise as a result of war. Thus in the case of territory conquered or occupied in war, the President can appoint a military governor and establish a military government, which may end only upon the conclusion of peace, and (if there is ceded territory) upon legislation by Congress. The same power was exercised over the territory of the seceding states, after the Civil War. In both cases, too, the President may appoint a provisional civil government, with power to organize courts, and administrative officials, and levy taxes. But after the ratification of a treaty ceding territory, neither the President nor a government established under his military powers, can impose tariff duties on imports into the ceded territory from the

[1] The Prize Cases, 2 Black 635.

United States, nor on imports into the United States from the ceded territory.[1]

How far the military powers of the President extend over territory not directly involved in the military operations was a subject of discussion during and after the Civil War. At the outset of the war, the Attorney-General claimed for the President the right to refuse obedience to a writ of *habeas corpus;* and Lincoln afterward issued a proclamation suspending the writ. Later, however, the suspension of the writ of *habeas corpus* was authorized by Congress. Numerous military arrests were made during the war, not only in the neighborhood of military operations, but also in the northern states, and in some cases hundreds of miles distant from any field of action. After the war a case was brought to the Supreme Court involving the legality of military trials and punishment of civilians under such circumstances; and the court laid down the rule that martial law should be established only in such districts of the home country where the regular courts could not exercise their functions.

"It follows from what has been said on this subject that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power. *Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction.* It is also confined to the locality of actual war."[2]

Chief Justice Chase and Justices Wayne, Swayne and Miller dissented on the ground that in time of war Congress had power to determine the districts where martial law should be put in effect, even in places where the courts were in operation. The dissenting opinion also pointed out the difference between military law, military government and martial law.

It is worth noting that the rule thus laid down does not seem to have been put into force. The judgment of the court in the case in question was apparently not executed; and the question may therefore be raised whether the opinion of the court on this matter has

[1] De Lima *v.* Bidwell, Dooley *v* U. S., 182 U. S. 1, 222.

[2] *Ex parte* Milligan 4 Wallace 2.

the sanction necessary to constitute a rule of law. In any case it was too late to affect the powers exercised by President Lincoln. Nevertheless the opinion has value as showing the view taken by the Supreme Court; and would doubtless have a strong moral influence in restraining a future President from exercising similar powers.

While the President's military powers become vastly more significant during the conduct of war, they are also of large importance in maintaining internal order and suppressing resistance to law not amounting to war. For these latter purposes the army is actively employed under two sets of conditions: To protect a state against domestic violence, as guaranteed by the Constitution; and to enforce the laws of the United States and protect the instrumentalities of the federal government against unlawful interference.

The Constitutional guarantee to protect the States against domestic violence limits its application to cases where protection is sought by the legislature or the executive of the state. The guarantee is, however, expressed in the name of the United States, without indicating clearly which department of the federal government is entrusted with its enforcement. In reference to the guarantee of a republican form of government, the Supreme Court has held that it rests with Congress to decide what is the established government in a state and whether it is republican or not.[1] But Congress itself has authorized the President to act on applications from a state to suppress domestic violence. The Militia Act of 1795 provided that:—

"In case of an insurrection in any state against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such state, or of the executive (when the legislature cannot be convened), to call forth such number of the militia of any other state or states, as may be applied for, as he may judge sufficient to suppress such insurrection."

In case of invasion or imminent danger of invasion from any foreign nation or Indian tribe, the President was authorized to use the militia without application from the state authorities. The Act of 1807 authorized the use of the land and naval forces wherever the militia had been authorized, and the Revised Statutes provide for the use either of the army and navy or of state militia to suppress insurrection within a state.[2]

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[1] Luther *v.* Borden, 7 Howard 1; Texas *v.* White, 7 Wallace 700.

[2] R. S. § 5298.

In cases of domestic violence the President was restricted by the condition that he should act on application of the state authorities. But under other circumstances he was authorized to act without any such condition expressed. This larger power of independent action was provided for, on the one hand in cases of invasion or imminent danger of invasion, and on the other hand in cases of opposition to the laws of the United States. The former class of cases deal distinctly with the conduct of war, which has already been considered. In reference to the latter, it is important to notice the statutory provisions and questions that have arisen in the exercise of the authority. The Militia Act of 1795, already mentioned, authorized the President to call out the militia "whenever the laws of the United States shall be opposed, or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act." The Act of 1807 authorized the use of the army and navy under these same circumstances. Under this authority troops were used on various occasions to overcome resistance to the internal revenue laws[1] and for other purposes. And it was under these provisions that President Lincoln issued his first call for militia. By Act of July 29, 1861, the authority of the President was increased; and he was authorized to use the militia or the army and navy "whenever, by reason of unlawful obstructions, or assemblages of persons, or rebellion against the authority of the government of the United States, *it shall become impracticable, in the judgment of the President, to enforce by the ordinary course of judicial proceedings* the laws of the United States within any state or territory."

This provision in the statutes has been continued since the Civil War; and even after the process of reconstructing the southern states was accomplished, federal troops were stationed in these states and employed especially in enforcing the federal laws regulating the elections for Presidential electors and members of Congress, commonly known as the Force Bills. But opposition in Congress to this policy prevented the passage of the Army Appropriation bill in 1877 until four months after the expiration of the former appropriation, and led to the adoption next year of a statutory provision to limit the use of troops. The Army Appropriation Act of 1878 provided that "from and after the passage of this act it shall not be

[1] E. G. The Whiskey Rebellion in Pennsylvania, See 16 Opin. Atty.-Gen. 162.

lawful to employ any part of the army of the United States as a *posse comitatus*, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress."

Among the purposes for which the use of the army and navy is expressly authorized by Acts of Congress are in reference to Indian affairs, the protection of the public lands, the execution of neutrality laws, the protection of merchant marine and the suppression of piracy, the enforcement of judicial proceedings and the suppression of insurrections or unlawful combinations obstructing the laws of the United States.[1]

During the railroad strikes of 1894 federal troops were employed without request from the state governments to a much larger extent than formerly. The Governor of Illinois protested against action ignoring the state government; but it was shown that the employment of the troops was in accordance with the Constitution and laws of the United States. They were used to enforce the laws of prohibiting the obstruction of the mails[2] and conspiracies against inter-state commerce,[3] and to secure the execution of judicial processes of the federal courts. The broader scope of federal action at this time was due in part to a new interpretation as to what constituted an obstruction of the postal service. Formerly where strikers had cut out passenger and baggage cars from a mail train, but did not directly prevent the movement of the postal cars, it had been assumed that they were not obstructing the postal service. But it was now held that interference with any part of a mail train constituted an obstruction to the postal service. Another factor, however, in the extension of the field for the employment of the army was the recent statute prohibiting conspiracies against inter-state commerce.

The interpretation of President Cleveland as to the powers and duty of the executive under the circumstances was approved by the Supreme Court[4] and by the Senate and House of Representatives in resolutions adopted by both bodies.

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[1] Revised Statutes §§ 2118-2152, 2460, 4293, 4792, 5275, 5286, 5297-5299.

[2] Rev. Stat § 3995.

[3] Act of July 2, 1890.

[4] In re Debs, 158 U. S. 581:—

"If all the inhabitants of a State, or even a great body of them, should combine to obstruct inter-state commerce or the transportation of the mails, prosecutions for such offenses had in

The Pardoning Power.—The President is empowered by the Constitution, "to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." A pardon has been defined by Chief Justice Marshall, as "an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed."[1] It will be noted that the President's power to pardon is limited to offenses against the United States. But as to these offenses the power is complete. He can remit every punishment from a money penalty up to and including the death penalty. In a few respects, however, a pardon does not annul all the legal consequences of a sentence. In cases of forfeiture, as far as others have acquired a legal right to the goods forfeited, the pardon remains inoperative; and a pardon does not effect reinstatement in a forfeited office.[2] A pardon may be granted on certain conditions; and a remission of part of a sentence is regarded as a conditional pardon.[3] But a penalty of an entirely different kind from the one imposed cannot be inflicted by a pardon. The power of pardon may be exercised at any time after the offense has been committed, either before legal proceedings are taken, or during their progress, or after conviction and judgment.[4] Presidents have also issued general pardons, or amnesties, to a class of offenders without designating particular individuals by name.

In the exercise of these pardoning powers the President is snbject to no legal control. Congress has attempted to restrict the prac-

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such a community would be doomed in advance to failure. And if the certainty of such failure was known and the National Government had no other way to enforce the freedom of inter-state commerce and the transportation of the mails than by prosecution and punishment for interference therewith, the whole interests of the nation in these respects would be at the absolute mercy of a portion of the inhabitants of a single State.

"But there is no such impotency in the National Government. The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its cares. The strong arm of the National Government may be put forth to brush away all obstructions to the freedom of inter-state commerce or the transportation of the mails. If the emergency arises, the army of the nation, and all its militia, are at the service of the nation to compel obedience to its laws."

[1] United States *v.* Wilson, 7 Peters 150, 159.

[2] Von Holst: Constitutional Law, p. 210.

[3] *Ex parte* Wells, 18 Howard, 307.

[4] *Ex parte* Garland, 4 Wallace, 333, 380.

tical effect of a general amnesty, by a statute declaring that the acceptance of a pardon should be conclusive evidence of guilt, and persons thus established as guilty should be precluded from enforcing certain legal rights and claims against the government. But the Supreme Court pronounced this statute null and void, because it invaded the exclusive province of the President by restricting the force and effect of the power of pardon, and also of the judiciary by changing the legal import of their judgments.[1] The only remedy against the gross abuse of the pardoning power is the right of impeachment.

Limitations on Presidential Power.—This discussion has shown that the President has the means of exercising a thorough and far-reaching control over every branch of the federal administration, with still further authority over certain particular administrative services. A brief space may now be given to the limitations on his authority.

Attention has already been called to the limitations imposed by the executive powers of the Senate over appointments and treaties. Congress has also important means of controlling the administration and so limiting the President's powers. The effective methods of Congressional control are through the details of statutes, and especially through the minute enumeration of items in appropriation bills. These methods are made use of much more effectively by Congress than by legislative bodies in other countries; and close obedience to the statutes is aided by the system of reports to Congress and investigations into the different branches of administration by Congressional committees. But permanent statutes cannot deal with current problems of administration; and even in the field of expenditure, the custom of permanent appropriations for certain lines of public work is being extended, and to that extent relieving the administration from the control of each particular Congress.

By far the most important limitation on the President's administrative powers is the restricted scope of federal powers and federal administration. The large powers reserved to the states take out of the control of the federal government many administrative services which in other countries are either in the immediate management of the central government, or under its supervision. But in this country, both state and local administration are entirely beyond the powers of the President.

[1] U. S. *v.* Klein, 13 Wallace, 128.

In spite of these limitations the President's powers are of more importance than those possessed by the chief executives of most modern governments; and certainly within the sphere of federal administration his effective personal authority is of more value than that of most constitutional monarchs of Europe, or even of their prime ministers.

It remains to note briefly the forms of presidential action, and the legal remedies against an unconstitutional exercise of power by the President.

Forms of Presidential Action.—The acts through which the President exercises his powers are of two classes: those laying down general rules affecting numbers of persons under different circumstances; and those of special application to particular individuals. Of the former, three kinds may be noted: Announcements and decisions of the widest interest and broadest scope are issued by Proclamations, intended for general circulation. Matters of less importance, but affecting both government officials and private citizens are dealt with in Regulations or Rules. While general orders directed mainly or exclusively to government officials are known as Instructions. These different forms bear no relation to the sources of Presidential authority; but each of them is used in the exercise of different powers. Thus, Proclamations are issued by virtue of specific statutory provisions, or in the discharge of Constitutional powers, or even for such extra-legal acts as the announcement of the annual Thanksgiving Day. Acts of special application may be,—directions or orders issued to the head of a department; decisions on such appeals as go to the President, or on matters requiring his approval; or commissions appointing persons to office.

Remedies Against the Action of the President.—There seem to be only two legal methods of directly restraining the personal action of the President; the cumbrous process of impeachment, and the negative control exercised by the courts in declining to enforce unconstitutional orders and regulations.

In the case of *Marbury* v. *Madison*, Chief Justice Marshall pronounced the dictum, that so far as his political or discretionary powers were concerned, no action could be maintained against the President.

"It is scarcely necessary for the court to disclaim all pretentions to such a jurisdiction. An extravagance so absurd and excessive could not have been entertained for a moment. The province of the courts is solely to decide on

the rights of individuals, not to inquire how the Executive or executive officers perform duties in which they have a discretion. Questions in their nature political, or which are by the Constitution and laws submitted to the Executive, can never be made in this court."[1]

"The executive power is vested in a President, and as far as his powers are derived from the Constitution, he is beyond the reach of any other department, except in the mode prescribed by the Constitution through the impeaching power."[2]

No case has yet arisen where the courts have attempted to control the acts of the President where this would bring them into direct conflict with him. The Supreme Court has refused to consider the question of issuing an injunction against the President to restrain him from enforcing a law alleged to be unconstitutional.[3] And when a writ of *habeas corpus* was opposed by the orders of the President, the court declined to take further action.[4]

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[1] 1 Cranch, 170.

[2] Kendall *v.* United States, 12 Peters, 524, 610.

[3] Mississippi *v.* Johnson, 4 Wallace, 475.

[4] *Ex parte* Merryman, Taney, 246.