THE UNITED STATES CONSTITUTION AND INTERNATIONAL RELATIONS: SOME POWERS AND LIMITATIONS EXPLORED

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The theory and practice of constitutional limitations entail, at least for the governments and officials of the United States and its fifty states, an inability to be truly competent for international purposes.[1] Perhaps even the term "incompetent" should be used in the United States situation. Practically every nation's official negotiator or representative eventually must report back to his home office for instructions or authority; that is, he ordinarily does not have the competency to conclude.[2] However, frequently in the United States, the home office, or the government itself, either lacks the power to be exercised in a particular situation, or must follow certain unduly restrictive procedures and limitations. Just why is this so? What are some of these constricting constitutional clauses? What are the judicial interpretations of them and the practices developed under them?

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1. We do not dwell extensively on "Internal sovereignty, . . . [for] the chief concern of international lawyers is external sovereignty. . . ." G. Butler, *Sovereignty and the League of Nations*, 1 BRIT. Y.B. INT'L L. 35, 38 (1920-21).

Adumbration, not exegetical interpretation is the purpose of this paper. Additionally, it is impossible to discuss limitations and constrictions without treating the question of powers. Therefore, powers and limitations are discussed together, although the concept of constitutional limitation is stressed.

2. *See*, UNITED STATES LIBRARY OF CONGRESS, 31 JOURNALS OF CONTINENTAL CONGRESS 1774-1789, at 611 (W. Ford, 1906), where Charles Pinckney inveighed against an allegedly unconstitutional removal of restrictions, in 1786, by the Congress on the authority of John Jay, Secretary for Foreign Affairs, in his negotiations with the Spanish envoy concerning navigation on the Mississippi River.

There enters, it may be immediately suggested, a problem created when a conflict occurs between international and municipal law. The superficially applicable principle, formulated by the World Court, is that a nation is estopped from pleading non-fulfillment of international obligations, or a violation of a treaty, because of its several organs or self-governing bodies under its control (for example, states of the United States). But the term "incompetent" strikes at the ability or authority of the contracting individuals to contract, not to fulfill their contracts.[3]

This article will not determine the basic problem so posed. It will, however, present some constitutional clauses and doctrines, and then provide a brief analysis of the manner in which the international relations of the United States may be subject to the limitations and restrictions found in those clauses.

I. THE CONSTITUTION

A. The Constitution's Clauses

The Constitution of the United States is not a lengthy document. It consists of seven articles and twenty-six amendments.[4] The fifth and seventh articles are not of importance to the present discussion.[5] Of the other five articles, the first three respec-

3. The initial problem assumes the existence of a treaty, validly contracted, and thereafter failing to be implemented because of a claimed constitutional (or statutory) inability, whereas when the contracting individuals are "incompetent," the initial and continuing incapacity of one (or both) parties to the agreement is in issue. The World Court, for example, found a contemplated customs union between Germany and Austria to be incompatible with the latter's prior treaty obligations, and a dissenting judge in another case felt that an agreement was an absolute nullity because its terms were contrary to public morality. *See* 1 G. SCHWARZENBERGER, INTERNATIONAL LAW 69 (3d ed. 1957), giving principle, and for these cases, see *id.* at 482, 486. *See also* text and note 95 *infra.*

4. There is also a Preamble which begins "We the People" but, according to the Supreme Court, this portion of the Constitution is not a source of power for the federal government. Jacobson v. Massachusetts, 197 U.S. 11 (1905). *But see* Forkosch, *Does "Secure the Blessings of Liberty" Mandate Governmental Action?*, 1970 LAW & SOCIAL ORDER 17, arguing the contrary as to that language, and also Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931).

5. Article VII merely states that the Constitution is established when ratified by nine states. U.S. CONST., art. VII. The term "states" is here used to denote one or more of the fifty states which together form the United States of America. (In international law the term is used for nations, but the restricted definition is adopted for our purposes unless the context discloses otherwise, as in a quotation). *See* text accompanying note 42, *infra.*

Article V describes the amendment process: its requirements, procedures and limitations. U.S. CONST., art. V. *See* Forkosch, *The Alternative Amending Clause in Article V: Reflections and Suggestions*, 51 MINN. L. REV. 1053 (1967).

tively create, empower, and limit a two-house Congress (the House of Representatives and the Senate),[6] a President (and, in effect, a presidential establishment),[7] and one Supreme Court (with inferior courts, and a judicial system as may be created by Congress).[8] With these provisions a federal government[9] is erected.[10] The fourth article sought to weld the earlier confederated[11] states into a more perfect union by requiring them to give full faith and credit to the public acts, records, and judicial proceedings of their sister states; and to give citizens of one state traveling into another state all the privileges and immunities the latter gives its own citizens.[12] The sixth article contains the famous supremacy clause.[13]

In one aspect, this amending clause is of exceeding importance. It could, for example, be used to grant powers which are (judicially) held not to exist (in the international field), and, *pari passu*, it could be used to withdraw powers, perhaps thereby nullifying a treaty or executive agreement already ratified or entered into, or at the least compelling the Executive to withdraw therefrom. In this sense, therefore, limitations on the federal powers in the international field indirectly stem from the fifth article.

6. U.S. CONST., art. I.

7. *Id.*, art. II.

8. *Id.*, art. III.

9. It is sometimes overlooked that each of these three departments is a part of the federal government, and that the federal government itself exercises all three: the legislative, executive, and judicial powers. The "government," therefore, is this total body, and when speaking of one of the departments, care must be taken that the meaning of the reference is clear. For example, the government acts through Congress in enacting bills, through the President in signing or vetoing them, or through the Supreme Court in declaring them unconstitutional. However, each such body lay, vis-à-vis the other(s), individually engage in internecine struggles.

10. Although it may be remarked that every one of the seven articles contains the word "state", without the existence of such states there could technically be no constitution, federal government, or concept or practice of federalism. *See* U.S. CONST., art. I-VII.

11. The background of the states, from their colonial to Revolutionary War experiences, need not be given. In 1777, the Articles of Confederation were proposed, and ratified in 1781. The states lived under them for almost one decade, until the Constitutional Convention of 1787 (in 1789 the new government took office). [reproduced in U.S. SENATE MANUAL, S. Doc. No. 1, 93d Cong., 1st Sess. 595 (1973)]. During this period, the looseness of the confederation, the weakness of the federal (national) government, and the political evils which resulted, found states vying with each other economically and otherwise. In practical effect they remained sovereigns except that, in articles VI-IX, they surrendered various (international) powers including the powers to send or receive embassies, to enter into alliances and treaties with other nations, and to engage in war (except when actually invaded). In general, these provisions were continued into the new Constitution.

12. U.S. CONST., art. IV, § 2, cl. 1, amend. XIV, § 1.

13. *Id.*, art. 6, cl. 2.

Strange though it may seem, those clauses in the articles which bear, directly or indirectly, upon the federal government's powers and limitations in the field of international relations are not many. Their direct genesis was the Articles of Confederation[14] in which the colonists' revulsion against the king and the judiciary found expression in the power given to the Congress, as the legislature, of almost complete authority in foreign relations and affairs. This affirmative grant of such powers was continued in the Constitution, together with the limitations placed upon the states in that field.

The several clauses in the Constitution bearing upon international relations can be summarized as follows:

1. The power of impeachment is vested solely within the Congress. The threat of use of this power may, perhaps, influence or control the presidential exercise of power in the area of international relations.[15]

2. Control of the funds for international relations is vested in Congress which enacts all revenue bills, which must originate in the House of Representatives.[16] Even though the President may exercise a veto, revenue bills are subject to re-passage by each legislative body by a two-thirds vote.[17]

3. Seventeen express powers of Congress are enumerated in article 1, § 8,[18] coupled with an additional power conferred by the necessary and proper clause.[19] These powers give the Congress a multiplicity and variety of muscle so that it may, if it exercises these fully and completely, dominate the federal establishment (in conjunction with other powers given elsewhere). Included are the following relevant items of congressional authority: to lay and collect taxes;[20] to provide for the common defense and general welfare;[21] to borrow money;[22] to regulate all interstate commerce, including foreign;[23] to coin money and regulate its

14. *See* note 11 *supra.*
15. U.S. CONST., art. I, § 2, cl. 5, and art. II § 4.
16. *Id.*, art. I, § 7, cl. 1.
17. *Id.*, art. I, § 7, cl. 2.
18. *Id.*, art. I, § 8.
19. *Id.*, art. I, § 8, cl. 18.
20. *Id.*, art. I, § 8, cl. 1.
21. *Id.*
22. *Id.*, art. I, § 8, cl. 2.
23. *Id.*, art. I, § 8, cl. 3.

value;[24] to establish post offices and roads;[25] to declare war;[26] to raise and provide for the armed forces and a militia to quell domestic insurrections and repel invasions;[27] and, "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested . . . in the Government . . . , or in any Department or Officer thereof."[28]

4. Certain limitations on the federal and state governments are found next.[29] Most notably, state governments cannot "enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal;"[30] or "without the Consent of the Congress[31] . . . enter into any Agreement or Compact . . . with a foreign Power."[32]

5. The Executive power of the government of the United States is vested in a President.[33] He is commander in chief of the armed forces.[34] He is empowered: to exercise the "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur";[35] to appoint ambassadors, consuls, judges of the Supreme Court, and others with like advice and consent;[36] to receive ambassadors and other public ministers;[37]

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24. *Id.*, art. I, § 8, cl. 5.

25. *Id.*, art. I, § 8, cl. 6.

26. *Id.*, art. I, § 8, cl. 11.

27. *Id.*, art. I, § 8, cls. 12-16.

28. *Id.*, art. I, § 8, cl. 18.

29. For example, the federal government cannot grant any title of nobility. Id., art. I, § 9, cl. 8.

30. *Id.*, art. I, § 10, cl. 1.

31. Regarding this point *see* note 129, *infra.*

32. U.S. CONST. art. I, § 10, cl. 3. It should be noted that clause 1 refers to an absolute prohibition concerning a "Treaty, Alliance, or Confederation," whereas clause 3 refers to a conditional one regarding "any Agreement or Compact with another State, or with a Foreign Power . . . ." Of these five terms, therefore, only the last two are within the power of a state *sans* an amendment to the Constitution. Even a treaty, as in Missouri v. Holland, 252 U.S. 416 (1920), cannot fly in the face of such express prohibition. To this writer's knowledge this consent has been exercised only for agreements or compacts with other states and never with any foreign power. *Quaere* for practical purposes, does it really exist in today's world? *See also* extended analysis in note 84, *infra.*

33. U.S. CONST., art. II, § 2, cl. 1.

34. *Id.*, art. I, § 2, cl. 1.

35. *Id.*, art. II, § 2, cl. 2.

36. U.S. CONST. art. II, § 2, cl. 2. The exact language here is to nominate "all other Officers of the United States whose appointments . . . shall be established by Law . . ." *Id.*, cl. 2. What of the power of removal? Since the Sen-

to take "Care that the Laws be faithfully executed";[38] to swear to "preserve, protect and defend the Constitution";[39] and to commission all officers of the United States.[40]

6. The federal judicial power extends: to legal and equitable cases and controversies arising under the federal Constitution, laws and treaties;[41] to admirality and maritime cases; and to all cases where "foreign States, Citizens or Subjects" are involved.[42] In those cases and controversies affecting the ambassadors, other public ministers, and consuls, or in which a state is a party, the Supreme Court of the United States has original jurisdiction, while in all others it has appellate jurisdiction as the Congress desires and determines.[43]

7. The states are federally guaranteed territorial integrity,[44] a republican form of government,[45] and equal suffrage in the Senate.[46]

8. The Constitution, federal laws, and all treaties,

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ate's concurrence is required for the appointment of these individuals, does this extend to removal? This question arose in George Washington's first term, when the executive departments were being organized and the House of Representatives took up the establishment of a department of foreign affairs. This was later denominated the department of state. Eventually one of the congressmen, when the report of the committee of the whole house was taken up, moved twice to amend a portion of the proposed bill; he was seconded by James Madison, and the amendments were adopted and became law. Their effect was said to be "so as clearly to imply the power of removal to be solely in the President. . . ." J. MARSHALL, IV THE LIFE OF GEORGE WASHINGTON 310 (1926).

37. No advice or consent is required for this purpose. U.S. CONST., art. II, § 3.

38. This directive and power is not limited to the enforcement of laws enacted by Congress, whether for domestic or foreign purposes, but comprehends "the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution . . . ." In re Neagle, 135 U.S. 1, 64 (1890). The question was put by the Court and not answered, and hence is obiter. It is not expressive of the law, as the President may not enforce a law entrusted for enforcement to others; he needs statutory authority to act.

39. U.S. CONST., art. II, § 1, cl. 7.

40. *Id.*, art. II, § 3.

41. These include cases affecting ambassadors, consuls, and other public ministers.

42. *Id.*, art. III, § 2. *See also* note 5, *supra.*

43. U.S. CONST., art. III, § 1, § 2, cl. 2.

44. *Id.*, art. IV, § 3, cl. 1.

45. *Id.*, art. IV, § 3, cl. 3.

46. *Id.*, art. V.

"shall be the supreme Law of the Land . . . ."[47]

In line with the preceding enumeration of the basic constitutional provisons relevant to the vesting of power over international relations, the amendments of the Constitution may be examined. Of the total of twenty-six, the first eight (sometimes the first ten) are referred to as the Bill of Rights. Ten of the following sixteen deal merely with internal political functionings of the government.[48] Of the six remaining, four have to do with matters not particularly relevant to international relations.[49] Among the amendments comprising the Bill of Rights, which constitute a series of limitations on the federal government,[50] only a few may be of significance in the area of international relations.[51] These few provisions include the first, fourth, fifth, sixth, and eighth amendments.[52] Their relevancy to foreign affairs is determined

47. *Id.*, art. VI, cl. 2. Prior to the ratification and adoption of the Federal Constitution in 1789, the states retained the power of refusing to enforce, or even repeal, treaties. The Constitution, while not increasing the substantive coverage or scope, did improve the status of treaties by preventing the states from any longer exercising such a power. *See* Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796). *See also* note 103, *infra.*

48. More specifically, the twelfth, part of the fourteenth, fifteenth, seventeenth, nineteenth, twentieth, and twenty-second through the twenty-seventh amendments, are concerned with internal domestic affairs; U.S. CONST., amend. XII, XIV, XV, XVII, XIX, XX, XXII-XXVII.

49. Those four concern: limiting the judicial power in suits against the states, giving Congress power to levy income tax, prohibition, and repealing prohibition. *Id.*, amend. XI, XVI, XVIII, XXI. The other two amendments respectively: outlaw slavery or involuntary servitude within the United States "or any place subject to their jurisdiction," *Id.*, amend. XIII; and give the definition of federal and state citizenship, with a series of limitations on the states, such as that they cannot abridge the privileges and immunities of federal citizens, nor deprive any person of life, liberty, or property without due process of law, nor to deny to any person within their jurisdiction the equal protection of the laws, *Id.*, amend. XIV, § 1.

50. Even though the first amendment opens with "Congress shall make no law" etc., the judiciary has interpreted it to apply to the entire federal establishment; so, too, with the entire Bill of Rights. *See* M. FORKOSCH, CONSTITUTIONAL LAW 325 (2d ed., 1969) [hereinafter cited as M. FORKOSCH].

51. For example, the seventh amendment guarantees rights to a jury trial in suits at common law where the amount in controversy is over twenty dollars. U.S. CONST., amend. VII.

52. Of these, the last four deal with procedures in criminal cases. *Id.*, amend. IV, V, VI, & VIII. The fifth amendment also contains a due process clause practically identical with that appearing in the fourteenth amendment, and a clause requiring just compensation to be given in exchange for private property taken for public use pursuant to the power of eminent domain. *Id.*, amend. V.

The first amendment contains the limiting substantive safeguards which, in effect, give all persons the right to the free exercise of religion, to freedom of

by the amount each amendment limits the power of the federal government to conduct international affairs in a manner which impermissibly diminishes the fundamental individual rights respectively protected by those amendments.

B. Constitutional Doctrines—The Separation of Powers

There are a few doctrines, political and judicial, which stem from and are part of the lore behind the Constitution, and which necessarily impinge upon this analysis. One already touched upon is the concept of a limited national government (and limited state government), restricted by amendments which protect certain basic rights of its citizens. "The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution . . . ."[53] Other doctrines may be referred to, including the system of checks and balances, which disclose that the Founding Fathers took to heart their experiences as colonists, and sought to provide cross-checks by and on each

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speech and of the press, and to the people the right peaceably to assemble and petition the government. *Id.*, amend. I.

By judicial interpretation, most of the clauses in the first, fourth, sixth and eighth amendments have become limitations on the states by way of the fourteenth amendment, the so-called incorporation doctrine. For extensive discussion and citation beyond the scope of this article *see* M. FORKOSCH, *supra* note 50, §§ 327-46.

53. Reid v. Covert, 354 U.S. 1, 5-6 (1957), per Black, J., for himself, Chief Justice Warren, and Justices Douglas and Brennan. Only Justices Douglas and Brennan remain today, 1975, on the bench. Of the other Justices, Whittaker took no part in the consideration or decision; Justice Frankfurter concurred separately, but rejected an outmoded judicial view in the case of *In re* Ross, 140 U.S. 453 (1891), and felt that "Governmental action abroad is performed under both the authority and restrictions of the Constitution . . . ;" *id.*, at 56; Justice Harlan also separately concurred in the result, and agreed with Justice Frankfurter's pertinent analysis, i.e., not to discard *In re Ross* entirely even though rejecting its limitation of the Court to the mainland. *Id.*, at 67. *See also* Kinsella v. Singleton, 361 U.S. 234, 252 (1960). Justices Clark and Burton dissented, the former writing that "four of my brothers would specifically overrule and two would impair the long-recognized vitality of an old and respected precedent . . ." *Id.*, at 78, 87. In his opinion Justice Clark did not treat the overseas applicability of the Constitution. Thus six Justices did agree on the idea quoted in the text to this note. In the light of the present composition of the Court, *quaere*: how valid is this holding; how binding is the opinion? Insofar as this quotation is concerned, it is suggested that it is good law, for Justice Stewart so agrees, Kinsella v. Singleton, *supra*, at 261 (joining in Whittaker's concurring-dissenting opinion). *See also* note 117, *infra*, and Justice Black's analogous language in *Afroyim v. Rusk*, 387 U.S. 253 (1967), a 5-4 decision in which the dissenters did not expressly reject such a view (J. Stewart and J. White in the dissent).

of the three branches of government. For example, the President has a veto power over bills, although he may then be overriden;[54] the judiciary is subject to presidential appointment, with the Senate's concurrence;[55] and within the Congress only the House may propose revenue measures.[56] While the states are ordinarily "impotent" for international affairs,[57] the doctrines of dual sovereignty and federalism may conceivably have important ramifications internally[58] and externally.[59]

The most important constitutional doctrine relevant to this discussion is that of the separation of federal powers.[60] Limitations of space permit only a brief observation. The concept, which traces back to Aristotle, was familiar to the colonists not only through the works of Locke and Montesquieu,[61] but also through the seventeenth century British experience when the Kings, Lords, and Commons emerged as separate institutions.[62] For example, the Declaration of Independence castigated King

54. U.S. CONST., art. I, § 7, cl. 2.

55. Such concurrence must be displayed by two-thirds vote. *Id.*, art. II, § 2, cl. 2.

56. *Id.*, art. I, § 1, cl. 1.

57. Of course exceptions may arise, as when actually invaded, a state could immediately defend itself, or when an attack (by the Indians) was so "imminent . . . as will not admit of delay." U.S. CONST., art. I, § 10, cl. 3. Although *see* notes 161 *et seq., infra*, where an assumed power, subject to congressional approval, impliedly exists.

58. *See generally* B. MARSHALL, FEDERALISM AND CIVIL RIGHTS (1964) for this area; in general, *see also Creative Federalism, Hearings Before the Senate Subcomm. on Intergovernmental Relations*, 89th Cong., 2d Sess., pt. I (1966), and 90th Cong., 1st Sess., pts. 2-A and 2-B (1967), as well as the continuing analyses in the area by the Joint Economic Committee of the Congress.

59. For example the United Nations is headquartered within the city and state of New York, and questions of "protection" against picketers and others exercising first amendment rights sometimes create problems. Neither the Charter of the United Nations, nor its Universal Declaration of Human Rights, may be enforced *sans* congressional action; Fujii v. State, 28 Cal. 2d 718, 242 P.2d 617 (1952); and *see also* notes 95 and 99 *infra*, as well as notes 129 *et seq. infra* on other aspects of federalism having ramifications externally.

60. See M. FORKOSCH, *supra* note 50, at 156-68; Forkosch, *The Separation of Powers*, 41 UNIV. OF COLORADO L. REV. 529 (1969) [hereinafter cited as Forkosch, *Separation*]; *see also* generally the forthcoming book A. BESTOR, THE POWER OF DETERMINING ON PEACE AND WAR: A HISTORICAL STUDY (Oxford U. Press, 1975). For a contrasting study of the English system *see*, W. WYATT, TURN AGAIN, WESTMINSTER (1974).

61. POLITICS 197-98 (B. Jowett, transl. 1943); J. LOCKE, AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT AND END OF CIVIL GOVERNMENT (1698); MONTESQUIEU, THE SPIRIT OF LAWS (T. Nugent, trans. 1900).

62. D. MINAR, IDEAS AND POLITICS: THE AMERICAN EXPERIENCE 124 (1964).

George because "He has made Judges dependent upon his Will alone . . . ."[63] The Massachusetts Constitution specified that each of the three departments "shall never exercise"[64] the power of the others, and at the Constitutional Convention these political theories became constitutional reality.[65] This reality arose not from any express statement found in that document, but as an implied doctrine through the opening few words in each of the first three articles,[66] and followed ever since to the point where it has become part of the judicial and political *mores* of the country.

One *caveat* must be mentioned with respect to the doctrine of separation of powers. Application of the doctrine refers to a refusal to permit, as James Madison put it in his exposition of the Constitution, "the *whole* power of one department [to be] exercised by the same hands which possess the *whole* power of another department."[67] The essential point is that there is not to be a complete, total, entire merger of two (or three) of the powers in practice,[68] which is a far cry from denying each department the ability to exercise some of the powers of the others. This is exemplified through the doctrine of checks and balances where each department does, at times, engage in another's functions.[69]

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63. Reproduced in U.S. SENATE MANUAL, S. DOC. NO. 1, 93d Cong., 1st Sess. 585, 587 (1973).

64. MASS. CONST. pt. 1, art. XXX.

65. *See* Forkosch, *Separation, supra* note 60, at 530-32 for references to the Virginia proposals, Wilson's notes, and other comments; *see also* Bondy, *The Separation of Governmental Powers in History, in Theory, and in the Constitution*, 5 STUDIES IN HISTORY, ECONOMICS, AND LAW, No. 14 (1896).

66. *See* U.S. CONST., art. I, II, III. The constitutional separation doctrine therefore does not bind the states, nor does the fourteenth amendment's due process clause require it. Dreyer v. Illinois, 197 U.S. 71 (1902).

67. THE FEDERALIST No. 47, at 314 (Mod. Lib. ed., undated) (A. Hamilton); and *see also* No. 48. Madison also observed that it is "the accumulation of all powers . . . in the same hands, whether of one, a few or many," which is the evil, and that this "may justly be pronounced the very definition of tyranny."

68. *See* the dissenting opinion of Justice Holmes (Justice Brandeis agreeing with this conclusion, and Justice McReynolds agreeing in part) in *Springer v. Phillippine Islands*, 277 U.S. 189, 211 (1928) for the correct view that "we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments . . . ."

69. The purpose was "not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy." Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

Fundamentally, as the Massachusetts Constitution's language concluded, the rationale behind the doctrine was "to the end it may be a government of laws and not of men."[70]

In the field of foreign relations the separation doctrine has been applied historically so "that the power to determine the substantive content of American foreign policy is a *divided* power, with the lion's share falling usually to the President, though by no means always."[71] For example, where the constitutional powers of Congress over foreign commerce and those of the President over foreign relations are pooled "to the end that commercial strategic and diplomatic interests of the country may be coordinated and advanced without collision or deadlock between agencies," then no review is available from "such provisions of the order as resulted from Presidential direction . . . ."[72]

C. *Judicial Review*

It may be said, generally, that every country's statesmen and political scientists know of the American doctrine of judicial review, and know something of its application. In effect, this doctrine may result in judicial supremacy. Because of its repercussions upon international relations, this overall limitation upon the powers of both the President and the Congress should be understood. In particular, and because of the separation doctrine, it might be argued that all three co-equal departments could interpret the written Constitution equally well. However, at an early date Chief Justice Marshall resolved the insoluble riddle by arrogating to the juidiciary the power to review and declare unconstitutional all legislative and executive acts and conduct.[73] Although

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And in the field of administrative law the legislative and executive departments may delegate "quasi-judicial" powers which permit their delegatees to exercise, for practical purposes, all three powers. *See* M. FORKOSCH, ADMINISTRATIVE LAW *passim* (1956).

70. Forkosch, *Separation, supra* note 60, at 530. *See also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), and for more recent emphasis on the doctrine, see New York Times v. United States, 403 U.S. 713 (1971); United States v. U.S. District Court, 407 U.S. 297 (1972); and, on the Watergate question on the construction to be given to "high Crimes and Misdemeanors" in the impeachment clause, *see* Forkosch, *Impeachment—Review*, 19 N.Y. L.F. 713 (1974).

71. E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 308 (3d ed. 1948) (emphasis in original).

72. *See* Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 110, 111 (1948), a 5-4 decision: the dissenters feeling that the President is acting here as a delegatee.

73. According to Chief Justice Marshall:

inveighed against by numerous individuals and officials, this judicial power is too institutionalized today to be disregarded or overturned.[74]

The federal judiciary thus exercises a superintending power in the field of international relations and even international law,[75] mostly indirectly but sometimes directly. Even though the Supreme Court feels that the President's conduct in this area should not be circumscribed (and sometimes, not even be inquired into), it frequently rules on the constitutionality of his actions, and those of Congress. One suggested limitation on this power of judicial review, which was significant in the post-civil War Reconstruction Period can be applied in the area of international relations. Because of the unlimited[76] power of Congress over the appellate jurisdiction of the Supreme Court, it can ordinarily permit[77] or deny[78] judicial review by that body.

> If an act of the legislature [or executive branch], repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law?

Marbury v. Madison, 5 U.S. (1 Cr.) 137, 177 (1803).

74. The most recent illustration is, of course, the Supreme Court's review of President Nixon's refusal to obey a lower court's directive to turn over tapes and documents to a special federal prosecutor, which tapes thereafter led to his undoing. United States v. Nixon, 418 U.S. 683 (1974).

75. The laws and decisions of the various states do not enter this area, and all questions involving international law are to be resolved by federal law, regardless of the doctrine of Erie Railroad v. Tompkins, 304 U.S. 64 (1938). *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), and *see also* Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024 (1967). For the post-Sabbatino situation see the Foreign Assistance Act of 1965 § 301(d)(2), 79 Stat. 653, in 22 U.S.C. § 2370(e)(2), upon which the federal district court, on remand, gave judgment for the defendant. Banco Nacional de Cuba v. Farr, 243 F. Supp. 957 (D.C. N.Y. 1965), *aff'd*, 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968).

76. *See* note 78, *infra*, but *cf.* United States v. Klein, 80 U.S. (13 Wall.) 128 (1872), questioning such unlimited power as was there involved.

77. While the original jurisdiction of the Supreme Court cannot be enlarged or diminished, Marbury v. Madison, 5 U.S. (1 Cr.) 137 (1803) its appellate jurisdiction has been statutorily or judicially altered. This is demonstrated by the numerous decisions judicially preventing taxpayers and others with little, if any, standing to sue. For an illustration of the Supreme Court's complicated specialty see Chapman v. F.P.C., 345 U.S. 153 (1953). A Senate Subcommittee on Constitutional Rights of the Judiciary Committee in 1966 held extended hearings on a proposed bill, S.2097, to provide for judicial review of the constitutionality of grants or loans under certain acts. These acts were related primarily to the issue of church-state separation. Since then, *Flast v. Cohen*, 392 U.S. 83 (1968) upheld a federal taxpayer's right to sue in this area under certain conditions; *see*, on state suits, Everson v. Board of Education, 330 U.S. 1 (1947) (per-

In the following examination of powers and limitations in international relations, this power of judicial review is nevertheless seen to be itself limited by not only the judiciary's self-imposed restrictions[79] but also by Congress' (seldom asserted) power over judicial appellate jurisdiction.[80] Throughout what follows, nevertheless, judicial decisions necessarily abound.

II. THE CONDUCT OF INTERNATIONAL RELATIONS

The applicability of the preceding exploratory comments can now be examined.[81] While each department might be treated separately, they cannot be so compartmentalized in practice; the clauses, departments, and officials overlap and intertwine. In large degree, as will be disclosed, there is a tripartite partnership in this area, even though the President is ordinarily *primus inter pares*. It seems to be somewhat generally accepted current thinking that constitutional history and clauses vest in the President virtually plenary power in international relations.[82] Although bear-

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mitting review for state taxpayers). In the field of international relations *see also* note 75, *supra*.

78. In *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869), an appeal to the Supreme Court from the lower court's denial of a writ of *habeas corpus* was brought directly, a preliminary motion to dismiss the appeal was denied and the Court asserted jurisdiction, 73 U.S. (6 Wall.) 318 (1868); thereafter oral argument on the merits was heard, including the constitutionality of the Reconstruction Acts, and the case was taken under advisement. While matters were in that posture, Congress repealed much of the basic jurisdictional statute (vetoed by President Johnson but repassed) that gave the Supreme Court appellate jurisdiction in habeas corpus cases, whereupon the Justices then heard argument on the effect of this new statute and accepted its constitutionality and scope. Thusly, the Supreme Court dismissed the appeal by McCardle because of a lack of appellate jurisdiction. *See also Ex parte* Yerger, 75 U.S. (8 Wall.) 85 (1869), distinguishing *McCardle* on the statutory facts but acknowledging its viability.

For other "controls" or "restrictions" on the power of Congress to declare statutes unconstitutional, not further discussed here, see proposals to require more than a scant majority so to do; enlarging the number on the bench when a Justice reaches a retirement age and does not retire; compelling Justices to retire at 75; and *see* Nagel, *Court-Curbing Periods in American History*, 18 VAND. L. REV. 925 (1965).

79. The doctrine of political questions is one judicially imposed restriction which is covered *infra* note 149.

80. *See* the discussion of the *McCardle* case, note 78, *supra*.

81. It may be noted that of a budget of over 300 billion dollars for fiscal year 1975, the total devoted to foreign relations, which includes not only foreign aid but also military expenditures and defense, is well over half. *See* H. Doc. No. 94-21, 94th Cong., 1st Sess. (1975).

82. See, e.g., Goldwater, *The President's Constitutional Primacy in Foreign Relations and National Defense*, 13 VA. J. INT'L L. 463, 465-66 (1973).

ing in mind Alexander Hamilton's questionable imprimatur,[83] there is little to commend it; indeed, there is respectable opinion to the contrary.

A. Treaties[84]

The President is not only the chief executive and commander in chief of the United States but, as expressly stated in the Consti-

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83. He first propounded these views in his 1793 "Pacificus" essays, conceding that he thereby contradicted his views of 1788 in THE FEDERALIST Nos. 69, 75, e.g., saying in the latter that "it would be utterly unsafe and improper to intrust" to a President "the entire power of making treaties" and therefore, *pari passu*, executive agreements. THE FEDERALIST, No. 75 at 477 (B. Wright ed. 1961) (A. Hamilton). For a selection of the early text writers and their statements agreeing with Hamilton's first views, *see* Bestor, *Separation of Powers in the Domain of Foreign Affairs: The Original Intent of the Constitution Historically Examined*, 5 SETON HALL L. REV. 529, 581-84, n.190 (1974).

84. No effort is made here to define this term as used in international law. *See, e.g.*, discussion of art. 1 of the draft articles on the law of treaties adopted by the International Law Commission at the eighteenth session, by the U.N. Conference on the Law of Treaties, 1st Sess., Vienna, 26 March-24 May 1968, Official Records, 11-20, U.N. Doc. A/CONF. 39/11, concerning inclusion of international organizations with States as entities capable of entering into treaties. *See* also [1968] 22 YEARBOOK OF THE UNITED NATIONS 843 (1971).

For the United States, the term may be contrasted with "agreement or compact" as found in the Constitution. *See also* note 32, *supra*. As given in the text of this paper, section I A. *supra*, article I, § 2, clause 2, empowers the President to make treaties, while article I, § 10, clauses 1 and 3, limit states from entering "into any Treaty, Alliance, or Confederation" or, "without the Consent of Congress . . . enter into any Agreement or Compact with . . . a foreign Power . . . ." The President is seemingly limited to "Treaties," if "Alliance, or Confederation" are to be deemed somehow different, and similarly with respect to "Agreement or Compact." U.S. CONST., art. I § 2. cl. 2, and § 10, cl. 1, 3. *See* language, perhaps different, in Virginia v. Tennessee, 148 U.S. 503, 519 (1893).

In effect this provides us with five different terms and, as next discussed, an "Executive Agreement" must also enter the lists. This paper will not resolve these domestic questions for the international scene, although see the discussion by Chief Justice Taney in Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 570-72 (1840) (an extradition case from Vermont to Canada pursuant to treaty provisions). *Quaere*: can the President be by-passed in the situation where a state enters into a compact with a foreign power combined with a majority of Congress? No presidential approval, as is ordinarily the case in the enactment of domestic legislation, seems to be required for such congressional approval—does this now permit a state to enter into an "international" agreement or compact without presidential intrusion? *See, e.g.*, the congressional implied approval *sans* presidential signature (although referring to legislation seemingly giving this implied approval) when two states so agreed, as in Virginia v. Tennessee, *supra*, upholding the implied consent. Thus, if an international agreement or compact is so entered into (albeit this has never yet occurred), is it the supreme law of the land under the supremacy clause of article VI? That clause refers to "Treaties made, or which shall be made, under the Authority of the United States . . . ." U.S. CONST. art. VI, ch. 2. In other words, if not made under that "Authority," a

tution, "The [meaning "All"] executive Power shall be vested in [him]."[85] What meaning was envisaged by the Constitutional Convention in the term "executive power" is ambiguous; what has developed since then may be analogized to a political see-saw; and what is encompassed or limited by the term is not only determined by judicial but also political interpretation.[86] Not only are powers and prerogatives found in the presidency and its office, but also limitations, such as: re-passage of legislation over his veto, overcoming him in his capacity as "the sole organ of the nation in its external relations, and its sole representative with foreign nations."[87] This is, however, merely a judicial recognition of a constitutional and practical fact of life, namely: that the President is the single and most important authority in the United States in the conduct of its foreign affairs. The nation is thus recognized and acts solely through the President in the field of foreign relations.[88] For example, one Justice has opined that "he

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so-called treaty is not the supreme law. *See, e.g.*, Missouri v. Holland, 252 U.S. 416, 433 (1920). Is such a document "made" by or under the authority of the United States only when made as per article II, § 2, clause 2? So that an agreement or compact made under article I, § 10, clause 3, being made ("enter into") between a state and a foreign power is not necessarily within articles II or VI, and especially since article I requires only "the consent of Congress."

Regardless, how binding is such a compact on the entering state, the other states, the foreign nation, the United States, the President, or the Congress? To what extent would it be enforced by the Judiciary? These intriguing questions are not here answered.

85. U.S. CONST., art. II, § 1, cl. 1. The doctrine of separation of powers, accompanying note 60, *supra*, permits replacing "The" by "All."

86. *See, in general,* C. THACH, THE CREATION OF THE PRESIDENCY chaps. 3-5 (1922); E. CORWIN, PRESIDENT, *supra* note 71, chap. I, and *specifically* 272-74.

87. Former Chief Justice Marshall, quoted by Justice Sutherland in United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936). The court felt that in the field of foreign relations the President had inherent powers, and that legislative delegations are judicially looked upon more favorably here than in the domestic scene.

Curtiss-Wright has been defended and castigated. Factually, a Joint Resolution of Congress, approved May 28, 1934, was the authority for the President's proclamation of the same day. *Id.* at 312-313. This proclamation was revoked on November 14, 1935, by another presidential proclamation, *id.* at 313, and the defense to the indictment contended, inter alia, that an unlawful delegation had occurred. "Whether, if the Joint Resolution had related solely to internal affairs it would be open to challenge that it constituted an unlawful delegation of legislative power to the Executive," responded Justice Sutherland, "we find it unnecessary to determine . . ." *Id.* at 315. The reason was that the resolution fell "within the category of foreign affairs . . ." *Id.* at 317. Justice Sutherland then went into an "elucidation of . . . the differences between the powers of the federal government" externally and internally, and at page 319, set forth the President's posi-

alone negotiates" treaties,[89] so that "[i]nto the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it."[90] So the President may or may not enter into negotiations, break them off at any time, and even hold off and never submit any documents to the Senate for its consent. In sum, there can be no "congressional" or "senatorial" treaty without the President, although the reverse is also true; nor can there be any presidential treaty without at least two-thirds of the senators present consenting.[91] In constitutional theory, the Senate is supposed to advise before it consents, but while George Washington's frustrated personal efforts toward this end have never been repeated, this is not to say that, for example, Jefferson did not so act in the Louisiana Purchase, or Tyler in the annexation of Texas.[92]

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tion; in other words, all of this material was dicta. Professor Francis D. Wormuth has remarked that this case "contains a famous though now rejected dictum that the rule against the delegation of legislative power does not apply in foreign affairs," Wormuth, *The Nixon Theory of the War Power: A Critique*, 60 CALIF. L. REV. 623, 685 (1972); although *see* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 23-4 (1972), who feels that while Justice Sutherland's history may be incorrect, this "does not necessarily destroy his constitutional doctrine," and so, Henkin feels, "his opinion . . . remains authoritative doctrine. . . ." *Id.* at 25-6. *See also*, in general, CORWIN, PRESIDENT, *supra* note 71, at 216-24, for arguments against the simplistic quotation in the text.

88. In practice, however, numerous Congressmen travel outside the country and are received by heads of state. The extent and degree of their influence is seldom a matter of record, but it is not conjecture that in 1974, United States Senator Edward M. Kennedy (D. Mass.) should be welcomed in Moscow, and United States Senator Henry M. Jackson (D. Wash.) in China, while they were leading presidential candidates. There is, of course, an innocuous statute making it a federal crime for any citizen of the United States to carry on any correspondence or intercourse with any foreign government "with intent to influence the measures or conduct of any foreign government . . . in relation to any dispute or controversies with the United States, or to defeat the measures of the United States . . . ." 18 U.S.C. § 953, 62 Stat. 744 (1948).

89. This article will not discuss treaties or other relations with the Indian tribes, on which *see, e.g.*, Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 595 (1823), and United States v. Coxe, 59 U.S. (18 How.) 100, 103 (1855).

90. Chief Justice Marshall in United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936); although *see* note 87, *supra*. The comment by Justice Sutherland that the President acts alone is incorrect. The Constitution gives him power to "make" a treaty, but there is supposed to be Senatorial "advice" beforehand, with "consent" at the end. For example, in the negotiation of the Jay Treaty the Senate did enter initially to approve the ambassadors; thus the usurpation by the President, and the abdication by the Senate, does not alter the Constitutional provision.

91. On other types of agreements, however, see text section II, *infra*, and concerning laws, which may be enacted by a two-thirds vote of both Houses overriding a veto, *see* section I(A), *supra*.

92. For an extended version of the Washington episode see 1 G. HAYNES,

Once negotiations are concluded, the Constitution requires submission to the Senate. At this juncture that body may do as it pleases. For example, Congress may: (1) hold hearings (and request officials to appear and provide information); (2) propose amendments by a simple majority vote of those present; (3) make its two-thirds consent of those present depend upon reservations enacted (by a simple majority), as with President Wilson and the League of Nations; (4) reject by a one-third plus one vote; or (5) consent by a two-thirds vote of those present. After such consent the President proceeds to effectuate the treaty.[93] These built-in constitutional and institutional procedures are sometimes confusing to others, but they are limitations in the area of foreign relations which other nations and diplomats must take into account.[94]

Separate from these procedural limtations, which are not overly-difficult to follow, are those now designated as substantive. Even though a treaty may be negotiated, consented to, signed and ratified by all concerned, is it nevertheless ineffective or inoperable because of other constitutional limitations?[95] For example, as the supreme law of the land, a treaty ordinarily supersedes a state statute,[96] but what of a federal law? The supremacy

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THE SENATE OF THE UNITED STATES 62-8 (1938), following closely the version of Senator William Maclay. For a discussion of the Jefferson, Tyler, and other items *see* Webb, *Treaty-Making and the President's Obligation to Seek the Advice and Consent of the Senate With Special Reference to the Vietnam Peace Negotiations*, 31 OHIO ST. L.J. 490 (1970).

93. He issues a "Full Power" authorizing the signing, after such Senate approval, but suppose he has second thoughts and refuses to proceed—can he be judicially compelled? The obvious answer is no, but impeachment may be the ultimate answer, as analogically hinted in *Ex parte* Grossman, 267 U.S. 87 (1925).

94. For an interesting analysis of the treaty provisions by Alexander Hamilton, who wrote sparsely on this subject, see his letter to William Smith, a congressman from South Carolina, on March 10, 1796, and that to Rufus King of March 16, 1796, 10 WORKS OF ALEXANDER HAMILTON, 147, 149 (H. Lodge ed. 1904) Works 147, 149 (H. Lodge ed. 1904), in the latter giving thirteen "propositions [which], in my opinion, amount to irresistible demonstration" of presidential competence.

95. The self-executing and non-self executing treaties are not here involved. These are ordinarily negotiated or judicially interpreted as such, and need not detain us. *See, e.g.* Forkosch, *Treaties and Executive Agreements*, 32 CHI.-KENT L. REV. 201 (1954); Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829); and Fujii v. California, 28 Cal. 2d 718, 242 P.2d 617 (1952), as well as note 59, *supra*, and note 100, *infra*. *See also* note 3, *supra*.

96. *See, e.g.*, Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796), reaffirmed in Hauenstein v. Lynham, 100 U.S. 483 (1880); in both cases a Virginia confiscatory statute was held invalid where it denied an alien certain rights which a treaty

clause does not prefer one over the other, even though "Laws" precedes "Treaties," and so the judiciary holds both to be of equal weight; *pari passu*, where any conflict between the two occurs, then the one more recent in time is to be preferred.[97] But, without detracting from this last statement, a curious anomaly may present itself. The President-cum-Senate may propose, but the House will financially dispose, as all revenue bills must originate in the House;[98] if the House rebels, there is nothing to be done to compel an appropriation.[99]

Another question pertains to the limits of the federal power: can the legislative periphery be extended by a treaty? Superficially yes, but this writer opines no, generally, and yes, particularly. In 1913 Congress sought to regulate the killing of migratory birds; two inferior federal courts held this unconstitutional; in 1916 a treaty was entered into with Great Britain whereby the United States and Canada agreed to protect such migratory birds and to propose legislation therefor; in 1918 such a United States law was enacted[100] and the state of Missouri now sued to enjoin

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guaranteed him; *see also* Missouri v. Holland, 252 U.S. 416, 434-35 (1920), where other illustrations are given. *See*, further, note 47, *supra*, and United States v. Pink, 315 U.S. 203, 230-34 (1941); Guaranty Trust Co. v. United States, 304 U.S. 126 (1938), caution that "Even the language of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them. . . ." *Id.*, at 143.

97. *See* Chae Chan Ping v. United States, 130 U.S. 581 (1889), The Head Money Cases, 112 U.S. 584, 599 (1884) (treaty superseded by later statute); Cook v. United States, 288 U.S. 102 (1933); United States v. Schooner Peggy, 5 U.S. (1 Cr.) 103, 109 (1801) (treaty nullifies prior statute); *see also* Geofroy v. Riggs, 133 U.S. 258, 267 (1890), and Reid v. Covert, 354 U.S. 1, 17-18 (1957). Of course such abrogation of a treaty does not necessarily relieve the government of any international obligations incurred, but further discussion on this point is not within the scope of this article.

98. U.S. CONST., art. I, § 7, cl. 1, and discussion accompanying note 47, *supra*.

99. *See* Wright, *The United States and International Agreements*, 38 AM. J. INT'L L. 341 (1944).

100. In *Missouri v. Holland*, 252 U.S. 416, 432 (1920), Justice Holmes stated that "If the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8 [clause 18], as necessary and proper means to execute the powers of the Government. . . ." If, however, a treaty's language unequivocally (or by implication, judicially accepted as such) makes it self-executing (see notes 59 and 84, *supra*), then ordinarily no statute is required. Thereupon, the President, plus the minimum two-thirds of a quorum of the Senate (at the very least, 34), can ignore the House, the Supreme Court, and the people and, if the text accompanying note 91, *supra*, is a correct statement, then such a minimum of 35 people (which includes the President) can constitutionally form a civilian junta and run the country, all within and in accordance with the Constitution. Here,

a federal game warden from enforcing it because her reserved powers, under the tenth amendment, were being infringed. Justice Holmes rejected this contention because "a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power . . . ."[101] In other words, it was something akin to a needed unifomity of national, not local, action, as well as the exercise of a form of the police power,[102] all of which compelled federal action, and the economic justification somehow still rings true fifty-

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of course, we may also quote Justice Holmes, in Buck v. Bell, 274 U.S. 200, 208 (1927), that "[i]t is the usual last resort of constitutional arguments to point out shortcomings of this sort."

101. Missouri v. Holland, 252 U.S. 416 (1920), two Justices dissenting. Holmes continued:

> The subject-matter is only transitorily within the state, and has no permanent habitat therein. But for the treaty and the statute, there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the states. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of opinion that the treaty and statute must be upheld.

Id., at 435. *See also* E. CORWIN, THE DOCTRINE OF JUDICIAL REVIEW 170, n.22 (1914), wherein Professor Corwin incorrectly felt that such a treaty would be unconstitutional because of the reserved powers of the state under the tenth amendment.

102. For example, under the commerce clause (article I, § 8, clause 3) the Congress has power where interstate commerce is involved. Such a power is plenary, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), and may be used not only for purposes of national regulation but also control. This is seen where the states find it diffucult to act alone, or to prevent evils in the federal or state jurisdictions. *See* extended discussions in M. FORKOSCH, *supra* note 50, chaps. 10 and 12.

In *Missouri v. Holland*, 252 U.S. 416 (1920), Justice Holmes also remarked that

> It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found. Andrews v. Andrews, 188 U.S. 14, 33 (1903). What was said in that case with regard to the powers of the states applies with equal force to the powers of the nation in cases where States individually are incompetent to act.

Id., at 433.

It may be remarked that this method of analogical extrapolition is not necessarily acceptable. For example, in Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 449 (1827), Chief Justice Marshall opined in that foreign commerce case that "we suppose that the principles laid down in this case, to apply equally to importations [interstate commerce] from a sister state. . . ." The consequences of this obiter's particular application were rejected in Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1869). So, it may be felt that Holmes' language is to be treated as a casual remark or improper utilization.

five years later. Numerous commentators have argued both sides of the coin as follows: (1) that under the decision of *Missouri v. Holland*, there is apparently no limit to the enhancing of the legislature's substantive powers by complying with the formal or procedural requirements of the treaty clause;[103] (2) that this decision is to be limited strictly to its facts and holding; and (3) even that the decision is a wishy-washy one permitting both of these views to be held simultaneously. The author espouses the second view, although leaning also to the first.

During the course of his opinion, Justice Holmes commented that "[t]he treaty in question does not contravene any prohibitory words to be found in the Constitution."[104] The central theme of the opinion, therefore, is that an express constitutional limitation cannot be overcome by a treaty, but leaves in abatement the question of implied limitations. Justice Holmes continued: "[t]he only question is whether it [the treaty] is forbidden by some invisible radiation from the general terms of the Tenth Amendment."[105] Unable to find such a penumbral limitation, Justice Holmes answered in the negative.[106] Put differently, is the treaty-making power free of limitations found in the Constitution or amendments?

Accepting the inapplicability of the tenth amendment, would it be proper to apply the first, fourth, fifth, sixth, etc.? One early series of seemingly definitive answers began in 1891 and continued into the turn of the century. These cases held that trial by jury (thus also the Bill of Rights) was not available to persons residing outside the United States except in incorporated[107] territories. Excluded areas included consular courts in Japan, and the

103. *See* note 100; *supra*, and discussion in note 92, *supra*, especially with respect to Holmes' comments on the validity of a treaty.

104. *Id.*

105. *Id.* at 433-34.

106. For the "penumbral" concept, as implied limitations with regard to the rights of marital privacy emanating from the first amendment, see the minority opinion of Justice Douglas in Griswold v. Connecticut, 381 U.S. 479 (1965).

107. *See* Rasmussen v. United States, 197 U.S. 516 (1965) (holding Alaska to have been so incorporated so that the sixth amendment could be used to denounce a jury of six in a misdemeanor trial). *See also*, in general, Couder, *The Evolution of the Doctrine of Territorial Incorporation*, 26 COLUM. L. REV. 823 (1926). In Williams v. Florida, 399 U.S. 78 (1970), a jury of six for a state criminal trial was upheld even though the sixth amendment applied via the fourteenth amendment (see note 59, *supra*), and so current validity of the *Rasmussen* case for this purpose is questionable, even though applied territorially.

unincorporated territory of Hawaii.[108] In a 1957 majority opinion, concurred in by only three other Supreme Court Justices, Justice Black properly rejected these cases and this approach, holding now that provisions of the Constitution[109] manifest "that constitutional protections for the individual were designed to restrict the United States Government when it acts outside of this country, as well as here at home . . . ."[110] Would the result vary if such overseas acts and conduct of the government were based upon written authority given to it by a treaty? In this 1957 case there was an executive agreement, if not a treaty,

> [W]hich permitted United States' military courts to exercise exclusive jurisdiction over offenses committed in Great Britain by American servicemen or their dependents. . . . [But] no agreement with a foreign nation can confer power on the Congress, or any other branch of Government, which is free from the restraints of the Constitution.[111]

The reasons for these conclusions may be condensed into two, namely: (1) "It would be completely anomalous to say that a treaty need not comply with the Constitution when such an agreement can be overridden by a statute that must conform to that

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108. *See*, respectively, *In re* Ross, 140 U.S. 453 (1891), and Hawaii v. Mankichi, 190 U.S. 197 (1903); *see also* the Insular Cases, De Lima v. Bidwell, 182 U.S. 1 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Dorr v. United States, 195 U.S. 138 (1904).

109. *See*, particularly, article III § 2 and the fifth and sixth amendments, all dealing with the right to a trial by jury in criminal matters. U.S. CONST., art. III, § 2, and amend. 5, 6.

110. Reid v. Covert, 354 U.S. 1, 7 (1957), and see discussion on the viability of this case in note 53, *supra*, especially the criticism by Justices Harlan and Frankfurter in Kinsella v. Singleton, 361 U.S. 234, 252 (1960), although Justices Whittaker and Stewart, quoted approvingly from it. *Id.* at 261.

Justice Black, in Reid v. Covert, *supra*, shortly again remarked that:

> This Court and other federal courts have held or asserted that various constitutional limitations apply to the Government when it acts outside the continental United States. . . .
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> . . .
>
> If our foreign commitments become of such a nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the method which it prescribes.

Id. at 8, 14. Of course this language, the opinion, and the case should be read in the light of the particular fact situation presented to the Court. This was a narrow case of a citizen abroad with a trial before an American tribunal, whereas we discuss a treaty between two or more nations and the effect thereof on the Bill of Rights.

111. *Id.* at 15-16.

instrument;"[112] and (2) the debates which accompanied the drafting and ratification of the Constitution:

> [M]ake it clear that the reason treaties were not limited to those made in "pursuance" of the Constitution was so that agreements made by the United States under the Articles of Confederation, including the important peace treaties which concluded the Revolutionary War, would remain in effect. It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI [the supremacy clause] as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V [the amending article]. The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.[113]

B. Executive Agreements

That a terminologically conceptual distinction exists between treaties and agreements is undeniable.[114] For example, the Constitution speaks not only of treaties but also of agreements or compacts; however, Article 102 of the Charter of the United Nations[115] literally couples international treaties and international

112. *Id.* at 18.

113. *Id.* at 16-17. *See also*, Geofroy v. Riggs, 133 U.S. 258, 267 (1890); Bishop, *Unconstitutional Treaties*, 42 MINN. L. REV. 773 (1958). Some of these express and absolute constitutional prohibitions are found in article I § 9, article IV, § 3, clause 1, the Bill of Rights and other provisions. On self-executing treaties, etc., see note 95, *supra*.

114. *See, e.g.*, [1965] 1 Y.B. INT'L L. COMM'N 9-10, U.N. Doc. A/CN. 4/Ser.A/1965/Add. (1965) on the terminology and the separate use, although it seems to be suggested that agreements are virtually always included in the discussions of treaties, an implication rejected by this writer. See also: A. MCNAIR, THE LAW OF TREATIES chap. 1 (1961), who gives several distinctions, and variations, such as treaty, convention, declaration, agreement, memorandum of understanding; E. BYRD, TREATIES AND EXECUTIVE AGREEMENTS IN THE UNITED STATES 166-167 (1960), who speaks of an aide memoire, exchange of notes, protocols, gentlemen's agreements, which "have often been realized under Presidential authority alone. . . ." *Id.* All digests, new or old, distinguish and discuss as a separate category such executive agreements. *See* for example G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 390 *et seq.* (1943).

115. U.N. CHARTER, art. 102.

agreements for the purpose of registration with and publication by the Secretariat.[116] A more important distinction is pragmatic, and arises from the clash between the needs of the ongoing industrial-technological-military revolution and the legalistic heritage of the past. This pragmatic distinction stems from the traditional view that treaties are akin to contracts[117] and are governed by a single set of rules, regardless of their adequacy or inadequacy, although they have differing functions and legal characteristics.[118] For example, a commercial need may be contrasted with an organizational (such as the United Nations), economic (such as the European Economic Community), humanitarian (such as United Nations Relief and Rehabilitation Administration)[119] or military[120] one. In each, different needs, requirements and functions militate against the use of the treaty method[121] at least for the United States.[122]

Whatever these distinguishing motivations were, they provided at least one rationale, and perhaps the impetus for the executive agreement. Over a recent twenty year period one survey disclosed that while 291 treaties were concluded among the na-

116. Failure to register an agreement will prevent its invocation before any United Nations organ. For the regulations of 1946 effectuating article 102, see 1 U.N.T.S. 20-31 (1946-47).

117. *See, e.g.*, The Bello Corrunes, 19 U.S. (6 Wheat.) 152, 171 (1821), although conceptually rejected almost a century ago by S. AMOS, POLITICAL AND LEGAL REMEDIES FOR WAR 124-27 (1880).

118. *See* Jenks, *State Succession in Respect of Law-Making Treaties*, 29 BRIT. Y.B. INT'L L. 105, 106 (1952), referring to McNair's articles in 11 BRIT. Y.B. INT'L L. 100-18 (1930).

119. "The United States became a member . . . by executive agreement. . . ." Briggs, *The UNRRA Agreement and Congress*, 38 AM. J. INT'L L. 650, 653 (1944).

120. *See* illustrations given by Baxter, *Constitutional Forms and Some Problems of International Military Command*, 29 BRIT. Y.B. INT'L L. 325, 344, n.1 (1952).

121. *See* the armistices of 1900, Boxer Protocol, Sept. 7, 1901, T.S. No. 397, 1 Bevans 302, of 1918, with Austria-Hungary, Nov. 4, 1918, 2 Bevans 1 and the 1943 one with Italy, Armistice with Italy, Sept. 3, 1943, 61 Stat. 2740, T.I.A.S. No. 1604 concluded by executive agreements, even though ordinarily accomplished by treaties.

122. This view was rejected by McDougal and Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181 (1945), who conclude that:

> [T]here are no significant criteria, under the Constitution of the United States or in the diplomatic practice of this government, . . . [between treaties and agreements] other than the single criterion of the procedure or authority by which the United States [the Senate's] consent to ratification is obtained.

Id. at 198-99.

tions of the world, their agreements totalled over 4,000, and their exchange of notes over 2,800.[123] In the first century and a half of United States existence, nearly two thousand international instruments were entered into, of which only about eight hundred were treaties.[124] The sad truth, therefore, is that the constitutional powers of Congress are not greatly involved in the current day-to-day details of international relations, save, possibly, for providing the legislative base (and limitations, if any); with a few exceptions, albeit sometimes of major importance, most of the business between the United States and the other nations seems to be conducted via executive agreements and understandings. As a result when a *fait accompli* was presented, Congress has, into 1975, sought to limit or control the use of executive agreements in a post-agreement syndrome (the War Powers Resolution). It may be opined, that even though the Senate and the House together were able to assert a degree of authority in the latter stages of the Vietnam war, and are (as of this writing) reluctant to permit the executive branch to negotiate and conduct certain international affairs (such as the trade agreement with Russia, and the Turkish-Greek Cypriote question) without some legislative guidance or limitations, in the long run, this adjunct effort to control even minimally the executive power in this area will probably fail.

What is meant by an executive agreement? The International Law Commission, in its 1962 Draft Articles on the Law of Treaties, defined a:

> "Treaty in simplified form" . . . [to mean one] concluded by exchange of notes, exchange of letters, agreed minute, memorandum of agreement, joint declaration or other instrument concluded by any similar procedure.
>
> . . . .
>
> In concluding such [executive] agreements, the executive branch of [any] government feels that it has the requisite authority *ipso jure* to bind the government in matters in which it alone is competent to act . . . .[125]

123. Hamzen, *Agreements in Simplified Form—Modern Perspective*, 43 BRIT. Y.B. INT'L L. 179, 182-83 (1970).

124. *See* table in Wright, *The United States and International Agreements*, 28 AM. J. INT'L L. 341, 345 (1944), who also raises and disposes of various arguments against the validity of executive agreements.

125. Report of the Commission to the General Assembly, [1962] 2 Y. B. INT'L LAW COMM'N 157, 161, 163 U.N. Doc. A/CN. 4/SER. A/1962/Add.1.

But this statement, while applicable generally for many nations of the world, had first to run the gauntlet of historical use and recent opposition[126] in the United States,[127] before making itself politically, and then judicially, acceptable. A brief discussion of the basic types of executive agreements available to the President, with limitations on each method, will highlight their use and constitutional parameters.

We may broadly classify the tools used to create United States-foreign relationships as: (1) treaties; (2) agreements by the President acting with congressional assent before conclusion (such as by a delegation)[128] or after (by ratification);[129] (3)

> Practically all States conclude nowadays a growing number of agreements in simplified form, namely without observing the formal requirements of their constitutions for the conclusion of treaties in due and proper form. Nevertheless, these agreements are akin to the most solemn treaties as to their content, and they embrace a wide variety of subjects, touching upon vital interests of the contracting parties.

Id. at 182. *See also* [1965] 1 Y.B. INT'L L. COMM'N 12-13, U.N. Doc. A/CN./4/Ser. A/1965/Add. for a discussion of "Treaty in simplified form."

Analogically, we may refer to the procedures for chartering a corporation: that is, if all goes well and all statutory conditions are complied with, a *de jure* corporation is formed, whereas if any material condition is omitted, but not sufficient to deny any validity to the corporation, then a *de facto* corporation emerges. So, here, what the simplified treaty, or treaty in simplified form, refers to, is in effect a *de facto* treaty. However, for the United States, there is a distinction: the executive agreement stands on its own footing and need not rely on the treaty power. Thus the executive agreement exists either in a *de jure* status or not at all, and will not take on a *de facto* nature, save, of course, as the parties may voluntarily adhere to their arrangements.

126. *See*, the proposed Bricker Amendment of 1952(3) to the Constitution, an effort to prevent a situation such as Missouri v. Holland, 252 U.S. 416 (1920), discussed in the text and notes 100-102, *supra*; *see also* Forkosch, *Treaties and Executive Agreements*, 32 CHI.-KENT. L. REV. 201, 217 (1954) [hereinafter cited as Forkosch, Treaties].

127. *See, e.g.*, Wright, *United States, supra* note 99, at 341, referring to Jefferson and Madison, as well as Senator J. William Fulbright's 1943 statement.

128. *See*, Field v. Clark, 143 U.S. 649 (1891), where the 1890 statute, 26 Stat. 567, authorized, and the Court upheld the power of, the President to suspend the free importation of designated items, and presidential (verbal) agreements with foreign nations were also upheld whereby reciprocal suspension of free imports would be lifted, the judicial reasoning being based upon a legislative contingent delegation of power. *See also* Altman & Co. v. United States, 224 U.S. 583 (1912), a legislative authorization, resulting in commercial agreements, was indirectly upheld in permitting "not a treaty . . . [but] an international compact." *See also* Hampton & Co. v. United States, 276 U.S. 394, 409 (1928), on which see further W. MCCLURE, INTERNATIONAL EXECUTIVE AGREEMENTS 175 (1941).

Reference may also be made to the spectacular Lend-Lease Act of 1941, on which *see* Forkosch, Treaties, *supra* note 126, at 217. Such a method of American participation in international affairs, even though humanitarian (*see* note 119, *supra*), or to promote United States national security, illustrates a situation where

agreements by the President acting solely within the capacity of the office,[130] either through powers claimed, such as those of the commander in chief, or as the primary-sole national organ in foreign relations; (4) agreements by the President acting in somewhat of a dual capacity, that is, as a delegatee and as President;[131] (5) agreements by the President acting in the absence of congressional legislation;[132] and (6) possible state-foreign agreements or compacts.[133]

Of present interest is the fifth category, where the President maneuvers in the absence of congressional legislation. An illustration of questionable use of such presidential power occurred during the administration of Ulysses S. Grant, when a request was

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bargaining and log-rolling are required. This political give and take in the area of foreign affairs is necessary, since treaties cannot do this on instant *ad hoc* bases. The influence exerted by the granting country on and in the domestic affairs of the recipients is also a factor in many respects. *See* Alpert and Bernstein, *International Bargaining and Political Coalitions: U.S. Foreign Aid and China's Admission to the U.N.*, 27 W. POL. Q. 314 (1974). The contemporary scene is, of course, dominated by the American aid given to South Vietnam, not here discussed.

129. *See* United States v. Pink, 315 U.S. 203, 228 (1941), that Congress, after the Litvinov Assignment (*see* text and notes 139 et seq., *infra*), "authorized the appointment of a Commissioner to determine the claims of American nationals against the Soviet Government. . . ." *See also* Wright, United States, *supra* note 99, at 342, n.4.2, who feels that there can be no congressional delegation to the President in the *making* of international agreements because Congress lacks such power of negotiating and making, but it may provide (give assurances) for the execution of any such agreement after it is made, and later quotes a Congressman that "When the consent of Congress is required to authorize a State to enter into an agreement or compact with a foreign state, it presupposes the existence of a power in Congress to do it." *Id.* at 228.

130. United States v. Belmont, 301 U.S. 324 (1937), apparently the first such decision, and *see* text and note 136, *infra*, and note 114, *supra*, as well as W. MCCLURE, INTERNATIONAL EXECUTIVE AGREEMENTS (1941), and S. CRANDALL, TREATIES, THEIR MAKING AND ENFORCEMENT 86 (1904).

131. *See* United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936), and discussion note 87, *supra*, and Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), where intimations in this area seemingly uphold such a presidential power, although as to the former (and the Russian bank cases, *infra* notes 140-43, and text accompanying), *see* the trenchant criticism by Prof. Borchard, *Shall the Executive Agreement Replace the Treaty?*, 38 AM. J. INT'L L. 637, 641-43 (1944). In the Steel Seizure case, Youngstown Sheet & Tube Co. v. Sawyer, the concurring opinion by Justice Jackson, stated that "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress. . . ." Youngstown Sheet & Tube Co. v. Sawyer, *supra* at 635-38. *See* the next text paragraph, sentence 2, for an elaboration upon the Justice's next comments. *See also* text paragraph and note 138, *infra*.

132. *See* text and note 136, *infra*.

133. *See* text and note 32, *supra*.

made by a French company to lay a submarine cable between that country and the United States. Because of a proposed monopoly feature, the President refused permission until the exclusive privilege was renounced. The question, however, remains as to the existence of a proper basis for such conduct and arrangement. In his annual message of 1875 to the Congress, President Grant referred to "the absence of legislation by Congress, [so that] I was unwilling"[134] to grant permission. The constitutional rationale, as explained in 1898 in a memorandum by the Acting Attorney-General to the Secretary of State, was that the President "rested his authority . . . upon his power to prevent its [the cable's] landing altogether . . . ."[135] But that official's conclusion did not go so far, and in effect agreed with the President: "I am of the opinion, therefore, that the President has the power, in the absence of legislative enactment, to control the landing of foreign submarine cables . . . ."[136] In other words, an analogy may be made to the concurrent power over certain types of interstate commerce. The States may act and regulate so long as and until the national government has not legislated thereon and thereby preempted the field. In this interstate commerce area, it is the Congress which has the ultimate power, and is thereby able to deny or permit the Executive to exercise such power so long as Congress wills.[137] However, the interstate commerce rationale is not here applicable, and is therefore rejected in the foreign commerce

134. 2 J. MOORE, A DIGEST OF INTERNATIONAL LAW 454 (1906).

135. *Id.* at 456.

136. *Id.* at 463. The memorandum from which these quotations appear are set out in full. *See also*, United States v. La Compagnie Francaise des Cables Telegraphiques, 77 F. 495 (S.D.N.Y. 1896), stating, as obiter, the view that the consent of the

> [G]eneral government [to the laying of cable] may be implied as well as expressed . . . which, in the absence of congressional action, would seem to fall within the province of the executive to decide.

Id. at 496. By statute in 1921, 42 Stat. 8, 47 U.S.C. §§ 34-35, Congress empowered the President to grant "a written license to land or operate such [a] cable . . . ." On the conduct of President Theodore Roosevelt with respect to the Santo Domingo treaty-executive agreement incident, see his autobiography T. ROOSEVELT, AN AUTOBIOGRAPHY 510-11 (1913, 1927 ed.), wherein after the Senate had rejected a treaty the President, in 1905, accomplished the same ends by executive agreement.

137. *See*, on all this under the concept of the preemption doctrine, M. FORKOSCH, *supra*, note 50, §§ 236-42. In effect, therefore, the President may also be said to be acting as a delegatee of the Congress and thus falls in the fourth such grouping given above, text and note 131, *supra*. *See also* MOORE, DIGEST, *supra* note 134, at 466-80, giving numerous illustrations of "International Cooperation" which encompass aspects of several of the groups.

area, as there exists a plenary congressional power to act in this field of foreign commerce.[138]

The third category is also of major interest; that is, where the President acts as such and without consulting any delegation from the Congress or where Congress acquiesces in his conduct (nay, even when they are in opposition to him), so that his powers derive solely from the Constitution. Generally, in this situation, a subsidiary series of questions intrudes, namely: is he acting because Congress has no power over the subject; is there a concurrent power able to be exercised by either or in conjunction; does presidential exercise disable congressional ability; is it presidential exercise minus whatever congressional power exists? Obviously the answers here will condition, if not determine, judicial response to the problem(s), if any, found in this third category. Regardless, it may be assumed that an executive contention of power will be asserted in the area, despite any legislative ability, and executive conduct will result from the claim of such presidential authority.[139]

The series of Russian bank cases is, perhaps, the best illus-

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138. A 1921 decision by Augustus N. Hand involved a contract between a British corporation and an American one, whereby the latter agreed to lay a cable between Barbados and Miami Beach, to be connected with a cable to be laid by the former from Brazil to the Barbados; when the American corporation was about to land its cable at Miami Beach the President forbade it. The American corporation thereupon proposed to splice this cable into one of three others it had laid between Key West and Cuba (two laid without permit, and one with a permit from the Secretary of War, with this latter permit having been revoked by the President), whereupon the United States sought an injunction against landing the proposed cable and preventing messages over the other one. In denying the injunction the Judge stated, *inter alia*, that

> There is no doubt that Congress, by virtue of its authority to regulate foreign commerce, could regulate the laying and operation of cables, and has often done this. I cannot regard a failure by Congress to exercise its undoubted powers as proof that some other branch of the government has the right to do what Congress might readily have authorized.

United States v. Western Union Telegraph Co., 272 F. 311, 313 (S.D.N.Y. 1921). The Second Circuit affirmed, 272 F. 893 (2d Cir. 1921), its *per curiam* opinion following the views of Judge Hand, although in the Supreme Court, pursuant to stipulation between the parties, there was a reversal and remand but "with directions to enter a decree dismissing the bill without prejudice. . . ." 260 U.S. 754 (1922).

139. *See* Forkosch, Treaties, *supra* note 95, wherein I wrote:

> These "executive" agreements, based on the first of the above mentioned sources, as distinguished from the "legislative" [delegated] executive agreements of the second type, have been used by McKinley, Theodore Roosevelt, Wilson, and Franklin Roosevelt.

Id. at 214-15. For earlier illustrations, see E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 259-65 (2d ed. 1948) [hereinafter cited as E. CORWIN].

tration of judicial acquiescence in a civil exercise of such executive powers. When Franklin D. Roosevelt became President one of his first acts was to effect an exchange of diplomatic correspondence with the Soviet Government so as to bring about a final settlement of the claims and counterclaims between the two nations. As part of the settlement the Soviet Government assigned (through the Litvinov Assignment) to the United States money on deposit with Belmont, a private banker in New York. The money had duly become the United States Government's property under its internal law. Coincident with the assignment "the President recognized the Soviet Government, and normal diplomatic relations were established . . . ."[140] A majority of the Supreme Court upheld the power of President Roosevelt so to act, and permitted the United States to obtain the moneys saying, *inter alia*, that "in respect of what was done here, the Executive had authority to speak as the sole organ of that [United States] government . . . ."[141]

A year later the same agreement was examined to ascertain whether it, expressly or impliedly, overrode a state statute of limitations; the Court negatived this, and said that whether such an overriding clause would have been valid if present was not required to be answered.[142] But three years afterward the overall area of executive agreements was explored again, and again was upheld *in toto*—at least "to determine the public policy of the United States with respect to the Russian nationalization decrees. . . ."[143] Justice Douglas[144] referred *inter alia*, to a treaty as being the "Law of the Land" under the supremacy clause,"[145] and then commented that "[s]uch international compacts and agreements as the Litvinov Assignment have a similar dignity . . . ."[146]

140. United States v. Belmont, 301 U.S. 324, 325, 330 (1937).

141. *Id.* at 330, also saying: "There are many such [executive] compacts, of which a protocol, a *modus vivendi*, a postal convention, and agreements like that now under consideration are illustrations. . . ." However, it should be noted that in support of its statement the court relied upon Altman & Co. v. United States, 224 U.S. 583 (1912) which involved a legislative authorization.

142. Guaranty Trust Co. v. United States, 304 U.S. 126, 136 (1938).

143. United States v. Pink, 315 U.S. 203, 229 (1941).

144. Writing for himself and three others, with Justice Frankfurter concurring "to add a few observations," *id.* at 234, with two Justices not participating and two dissenting. The dissenters, *inter alia*, referred to "confiscatory decrees," *id.* at 246-47 and urged full faith and credit as well as due process considerations.

145. *Id.* at 230.

146. *Id. See*, however, E. BYRD, JR., TREATIES AND EXECUTIVE AGREEMENTS IN THE UNITED STATES 120-31 (1960), who distinguished "similar" from "equal"

The Russian bank cases do not, of course, either exhaust the possibilities of the types of executive agreements or conduct, or disclose their outer limits.[147] For example, the President may not have power as such, on the domestic scene during peace, to order the seizure of private property alleged to be required to aid a "police action" (such as the Korean War) undertaken abroad under the aegis of the United Nations and approved by the Congress, especially where the Congress has statutorily provided for a procedure to be followed;[148] he nevertheless may, it is contended, have an inherent, or residual, or commander in chief, or executive power able to be utilized externally under certain conditions and requirements—although no exact judicial authority is found in support.

The nub of this ability and the inherent limitations, lies in the question of when and under what circumstances he may act, the kind and type and scope of such action, and the limitations otherwise imposed upon him. Eventually, these questions may[149] become judicially cognizable,[150] so that a few illustrations may clarify the problem. For example, in 1902 five justices pointed to the lack of authorizing legislation for a series of agreements with Mexico between 1882 and 1896, whereby each country could pursue marauders across the border; they felt, however, that insofar as permitting foreign troops into the country for purpose of parading was involved, such a power "was probably assumed to exist from the authority of the President as com-

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so as to highlight the differences in the testing of treaties and agreements to determine their validity; once held valid, however, then the executive agreement "has equal supremacy with a treaty. . . ."

147. *See*, note 174, *infra*. Also of interest are executive agreements requiring congressional funding for implementation (for example, the Vietnam situation), and those problems involving totalitarian nations. Representatives from these nations may, if they so desire, enter into binding commitments without the necessity of returning to their countries for confirmation and ratification of their actions, and, in addition, they can point to a continuity of policy which elected officials cannot have.

148. The Steel Seizure Case, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). *Quaere*: In this domestic, peacetime situation, these Congressional procedures were held binding, and therefore limitations, on the President; but what of a foreign, nonpeacetime situation? *See* text and note 192, *infra*.

149. For example, the Court may feel that a "political question" is involved and refuse to intrude, on which see discussion in Wormuth, *Nixon Theory*, note 87, *supra* at 678-88; *see also* notes 177 and 213, *infra*.

150. Perhaps an analogy may be made to the preemption aspects; *see* text and note 137, *supra*.

mander-in-chief."[151] In 1917 President Woodrow Wilson unilaterally ordered armed guards to be placed on merchant vessels even though the Congress had refused to authorize it.[152] Also, President Franklin D. Roosevelt's conduct belied his obeisance to the constitutional power of Congress to declare war, for his pre-World War II unauthorized agreements presented *fait accomplis*, which precipitated the United States into that conflagration.[153]

C. The Precipitation, Declaration, and Conduct of War.

The war powers of the President are seemingly found in but one short portion of article II § 2, clause 1, consisting of sixteen words[154] which make him the commander-in-chief of the armed forces. The war powers of Congress, however, embrace at least six expressly-stated clauses in article I, § 8, as well as others such as the necessary and proper clause.[155] Under these powers Congress may make rules and regulations to govern the armed forces which are binding upon the President.[156] However, the President

151. Tucker v. Alexandroff, 183 U.S. 424, 435 (1902), and see also dissent *id.* at 467; the minority of four justices felt such presidential exertion of power required an express treaty or statute as a base.

152. *See*, for one questionable basis, Little v. Barreme, 6 U.S. (2 Cr.) 170, 177 (1804), where a question is posed in a negative fashion; the case is no authority for Wilson's act, or threat so to act.

153. *See*, for a listing of dates and acts, E. CORWIN, *supra* note 139, at 246-48. Prof. Corwin refers to the agreement of July 7, 1941, 55 Stat. 1547, E.A.S. No. 232, with Iceland taking over from Great Britain the defense of that island, and the Atlantic Charter agreement with Winston Churchill. Atlantic Charter, Aug. 14, 1941, 55 Stat. 1603, E.A.S. No. 236. *See also* Forkosch, *Treaties, supra* note 126, at 215-16, for reference to

> [T]he 1940 series of executive agreements with Canada and Great Britain, following on the collpase of France, which established a Permanent Joint Board on Defense and led, under statutory authority, to the exchanging of fifty overage destroyers for a 99-year lease on British naval bases. . . . Even better known . . . are those [executive agreements] made at Teheran, Yalta, and Potsdam.

Hull-Lothian Agreement, Sept. 2, 1940, 54 Stat. 2405, E.A.S. No. 181, 203, L.N.T.S. 201; 39 Op. Att'y Gen. 484 (1940). To what extent this 50-destroyer exchange could be effectuated today is conjectural, although, perhaps, loans might be available as, for example are provided for in 50 U.S.C. § 1876 *et seq.*, being specific authorizations and general sections, including *inter alia*, sections such as § 1878h requiring the Secretary of Defense, after consultation with the Joint Chiefs of Staff, to make a determination that the transfers are in the best interests of the United States, and sections with extension and also termination dates.

154. An additional eighteen words give him command of the state militias "when called into the actual Service of the United States," which probably would follow automatically even if not so literally expressed, U.S. CONST., art. II, § 2, cl. 1.

155. *Id.*, art. I, 8, cl. 18. See section I(B) of this article, *supra*, although even here much more could be said.

156. Swai v. United States, 165 U.S. 553 (1897). These rules and regulations

may also call into play other powers given to him, such as the language in his oath of office, to preserve, protect, and defend the Constituion, as well as the directive to him to "take Care that the Laws be faithfully executed."[157] Abraham Lincoln's union of this last provision with his commander status justified, at least in his eyes, the series of "war" measures he ordered when Fort Sumter fell in 1861 and before Congress could assemble ten weeks later to ratify and continue these and other actions.[158] Whether because of such later congressional support, or because while "a civil war is never publicly proclaimed, *eo nomine* against insurgents, its actual existence is a fact in our domestic history which the Court is bound to notice and to know,"[159] the Supreme Court upheld these Lincolnian exercises (usurpations) of powers.

Upholding the President's powers unilaterally to suppress an internal insurrection differs, however, from sustaining his powers unilaterally to quell or precipitate an external "war."[160] There is no question that Congress has the sole power to *declare* war,[161]

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are also termed military law, and the armed forces proceed under these articles of war. Besides these

> [T]he military has, again by necessity, developed laws and traditions of its own. . . . Just as military society has been a society apart from civilian society, so "[m]ilitary law . . . . is a jurisprudence which exists separate and apart from the [civilian] law which governs in our federal judicial establishment."

Parker v. Levy, 417 U.S. 733 (1974), and *see also* notes 154-55, *supra*, and 178 and 181, *infra*. *See also* the Posse Comitatus Act of 1878, 20 Stat. 152, 18 U.S.C. § 1385, making it unlawful to use the Army or the Air Force as such "except in cases and under circumstances expressly authorized by the Constitution or Act of Congress. . . ."

157. U.S. CONST., art. II, § 3.

158. *See* J. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 49-50, 121, 149-150, 243-44 (rev. ed. 1951).

159. The Brig Amy Warwick (The Prize Cases), 67 U.S. (2 Black) 635, 667 (1863): although four Justices dissented, feeling that a declaration of war was necessary before the imposition of a blockade, and that only after Congress so acted on July 13, 1861, was there a legal beginning of war; *see also* note 148 *supra*. This general problem was early discussed by C. VAN BYNKERSHOEK, A TREATISE ON THE LAW OF WAR chap. II (P. Du Ponceau, transl. 1810), who also gave several references and, at one point declared: "Here then is a remarkable instance of a war carried on for a great length of time without ever having been declared. . . ." *Id.* at 14.

160. "Paradoxical as it may seem, the fundamental conceptions of international law can best be understood if it is assumed that they maintain and support the rule of force. . . ." G. KEETON AND G. SCHWARZENBERGER, MAKING INTERNATIONAL LAW WORK 32 (2d ed. 1946).

161. U.S. CONST. art. I, § 8, cl. 11. Dean Pound has written that " 'War' in international law does not necessarily mean the same as 'war' in the sense of

but it is also conceded that it is the President who thereafter has the sole power to *conduct* it as such.[162] Even though there may be no such declaration, when another nation attacks or invades, then factually[163] the United States is at war and the President's war powers attach.[164] Regardless, is such a power, however inaugurated, an unlimited one? Obviously not, for Congress, not

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Article 1, Section 8, paragraph 11 of the Constitution of the United States. . . . [W]ho can enforce against the executive a constitutional provision that only the legislative department can declare war? . . . ." Foreword to F. GROB, THE RELATIVITY OF WAR AND PEACE ix-x (1949). We may, perhaps, sarcastically paraphrase, war is war is war is . . . .

162. *Id.*; U.S. CONST., art. II, § 2, cl. 1. *See also* Alexander Hamilton's comments on such restricted powers of the President, comparing them to the greater powers of the English King, in THE FEDERALIST No. 69 (A. Hamilton).

163. *See* concurring opinion by Justice Jackson in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952): "Of course, a state of war may in fact exist without a formal declaration. . . ." *Id.* at 642. *See also* Dole v. Merchants'Mutual Marine Ins. Co., 51 Me. 465, 470 (1863).

164. The United States may also be at war when another nation attacks, as was the case on December 7, 1941, when the Japanese attack on Pearl Harbor precipitated the United States into war without an act of Congress, or when another nation declares war against the United States, as when Germany, four days later, did so. In both cases Congress reacted shortly thereafter by declarations of war, even though, constitutionally, these might be unnecessary. For stand-by legislation, however, and for emergency powers, such congressional declarations would be deemed necessary. *See* The Brig Amy Warwick (The Prize Cases), 67 U.S. (2 Black) 635, 668, 691 (1863), although here an act of Congress of 1795 had seemingly already supplied authorization, although the four dissenters disagreed. *See* note 167, *infra*. The language of the Court seemingly was limited to a "case of invasion by foreign nations [e.g. Japan, but what of Germany?], and to suppress insurrection. . . ." The Prize Cases, *supra*, at 668. Where the country is at war, regardless of how or why, the President is authorized and required to meet "force by force." *Id.* at 670. *See also* President Tyler's action in 1844 in rushing to mobilize troops so as to "protect" Texas (from Mexico) because of the pending treaty of annexation, informing the Senate that even though that body had not yet consented, still a "title" had been acquired which would justify employment of force "to drive back the invasion," (although he undertook no act of war). Quoted in Corwin, President, *supra* note 139, at 245. *See also* P. JESSUP, A MODERN LAW OF NATIONS 163 (1952).

We may note peripherally that in other areas the question of war or non-war (not necessarily peace) may be decided on different policy reasons. For example, insurance policies may have an exclusion of coverage (or other like clause) in the event of war; a declared war without a later declaration of peace does not make such exclusionary clause effective during factual peace, Bergera v. Ideal National Life Ins. Corp., 524 P.2d 599 (1974), although a combat soldier's death in Korea was held to be during a war although never so declared, Langlas v. Iowa Life Ins. Co., 245 Iowa 713, 63 N.W.2d 855 (1954), Zaccardo v. John Hancock Mutual Life Ins. Co., 20 Conn. 76, 124 A.2d 926 (1956); Weissman v. Metropolitan Life Ins. Co., 112 F. Supp. 420 (S.D. Calif. 1953). *See generally,* Comment, *Acts of Terrorism and Combat by Irregular Forces: An Insurance "War Risk"?* 4 CALIF. W. INT'L L.J. 315 (1973-74).

the President, has the express power to raise and support the armed forces, etc.[165] However, both departments may nevertheless engage in "a situation in which there has been joint action by the President and Congress, even if the joint action has not taken the form of a declaration of war."[166]

War is, of course, an emergency of such national and total magnitude that its existence is self-evident. While all declared or defensive wars against invasion[167] therefore precipitate emergencies, the converse is not always true; at least for legal and constitutional purposes, not all emergencies include wars. Here, of course, we assume the war-peace definitional dichotomy which pervades international law, from its ancient to its classical writers.[168] But modern conditions do not lend themselves to such a simplistic enunciation; for example, is the "cold war" of the past thirty years compatible with the classical shooting war? Or is there an intermediate status between and war and peace which should be recognized?[169] If so, what are, for us, the respective

165. U.S. CONST., art. I, § 8, cls. 12-16, and *see* text and notes 1 *et seq.*, *supra,* although *quaere*: the United States is actually and actively at war, and Congress refuses to raise funds; has the President the constitutional powers to become not only a Cincinnatus but also an Alexander, an Attila, or a Hitler? Obviously not, but will he nevertheless exercise the powers? Obviously a strong and determined President will do so; as for others, the question is, of course, hypothetical and need not be pursued further. We may analogize to the Revolutionary years when an impotent Congress, without an appointed or elected President, could do little, although now, *vis-à-vis* a President, it is a recalcitrant body.

166. United States v. Sisson, 294 F. Supp. 511 (D.C. Mass. 1968).

167. Although *see* note 200, *infra,* for an alleged justification of such a "defensive" war. Illustrations of Hitler's like claims, and later those of Stalin, need not be given. See also Von Elbe, *The Evolution of the Concept of Just War in International Law*, 33 AM. J. INT'L L. 665 (1939).

168. *See*, 2 Q. WRIGHT, A STUDY OF WAR 698 (1942), who examines the subject in great detail but eventually defines war as, at least in part, including a "conflict of armed forces. . . ."

169. For a negative response *see* Ronan, *English and American Courts and the Definition of War*, 31 AM. J. INT'L L. 642, 643 (1937), and *see* further Eagleton, *The Form and Function of the Declaration of War*, 32 AM. J. INT'L L. 19 (1938). On the other hand, the Korean "police incident" was, apparently and technically, a United Nations project; although the Charter provides for military action after agreements are made, and since these never materialized there was a violation of the United Nations Participation Act of 1945, 22 U.S.C. § 287(d); but what of Vietnam? *See also* Jessup, *Should International Law Recognize an Intermediate Status Between Peace and War?*, 48 AM. J. INT'L L. 98 (1954). According to von Clausewitz, war is only a prolongation or continuation of politics by special means, which logically requires that political needs determine the conclusion. However, recent "wars" have not lent themselves solely to this simple approach, as can be seen when economic (*see* note 198, *infra*), or sociological

powers of the President, or of the Congress, or of them both jointly? If not war, then at the very least an emergency arises—but of what kind, and in what degree, and do the President's congressionally-authorized stand-by emergency powers or war powers become effective? If so, what are the limitations which attach to these powers and their exercise,[170] and are the constitutional rights of persons impaired in any way?[171]

Insofar as there are distinctions made between emergencies and wars, there may thus be: economic,[172] sociological, or politi-

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reasons enter. *See e.g.*, L. KOTZSCH, THE CONCEPT OF WAR IN CONTEMPORARY HISTORY AND INTERNATIONAL LAW 20-22 (1956), and testimony of Zbigniew Brzezinski before a subcommittee of the Senate's Foreign Relations Committee, reprinted in Los Angeles Times, Sept. 8, 1974, as follows:

> The Soviet view of detente—explicitly and openly articulated by Soviet leaders—is that of a limited and expedient arrangement, which in no way terminates the ideological conflict even as it yields tangible economic benefits. On the contrary, it has been emphasized over and over again that "peaceful coexistence" is a form of class struggle and that ideological conflict, far from abating, is to intensify during detente. This intensified ideological hostility, however, is not to stand in the way of economic cooperation.

Id., part VII, at 3, col. 1.

170. The Vietnam war was neither a declared war by Congress, nor a defensive war and it was questionably authorized by presidential action and later by the 1964 Gulf of Tonkin Resolution; this Resolution was repealed in January, 1971, 84 Stat. 2053, as an amendment to the Foreign Monetary Sales Act. On further limitations *see also* text and note 186, *infra*, and also Forkosch, *The Constitutionality of the Vietnam Venture, and a Registrant's Right To Counsel Within the Selective Service System*, 22 S. CAROLINA L. REV. 287 (1970); Wormuth, *Nixon Theory, supra* note 87.

171. *See* discussion below of Reid v. Covert, 354 U.S. 1 (1957) and references therein, and note 207, *infra*, and text accompanying.

172. A current illustration of an economic war is also seen in the Trade Reform Act of 1973, passed by the House but hung up in the Senate because of opposition to trade concessions to the Soviet Union, and also because of an amendment by Senator Henry Jackson (D. Wash.) which would deny Export-Import credits and most-favored-nation treatment in tariffs so long as Russia prohibits the free emigration of Jews. Additionally, the Senate Finance Committee seeks a congressional veto power on administration agreements negotiated to ease non-tariff trade barriers. Of course the "oil war" still proceeding need not be expanded upon, and executive efforts and agreements in this area continue apace. Of interest here are the comments by President Ford and Secretary of State Kissinger which seemingly do not exclude resort to force in an oil emergency.

For an outstanding historical illustration of such an economic emergency which almost ran into some kind of "war" (Commodore Perry reputedly was ready so to engage in), see the discussion of the opening of Japan for trade in 1853. R. STRAUSZ-HUPÉ AND S. POSSONY, INTERNATIONAL RELATIONS 326 et seq. (1950), and see also the next subdivision on Protection of American Citizens, in text accompanying notes 195-219, *infra*. In this latter situation protection can easily merge into conflagration. At international law, the protection of a nation's citizens requires the meeting of a formula which, under American law, also requires an act of Congress.

cal[173] emergencies or "wars";[174] local or regional[175] ones; natural or man-made ones; and so on.[176] Also, the President's powers do not necessarily increase or adjust in each case; and even when so utilized there are limitations.[177] For example, while the President may immediately and unilaterally act to quell an internal insurrection or rebellion, he cannot, willy-nilly, impose martial law,[178] and economic and other emergencies require submission

173. A peripheral illustration is the use of the Central Intelligence Agency (C.I.A.) and like groups to penetrate, foment, and even engage in clandestine operations which, however, are not "war" and, even though excessive, have some initial basis in a statute. *See also* the program begun during the Kennedy Administration, whereby the International Police Academy (I.P.A.) in Washington, D.C. trains and aids foreign police officers (as of this writing, from 77 countries). TIME, May 28, 1973, at 27. In 1963 Venezuelan guerilla forces threatened to shoot a Caracas policeman daily, whereupon the I.P.A. provided weapons and training which enabled the Caracas police to defeat the guerillas and prevent disruption of the national elections scheduled for the following year. The I.P.A. operates under the public safety office of the Agency for International Development.

174. Throughout this article, discussions disclose conduct in non-war fields which, in certain respects, can nevertheless be and actually are classified as "wars." *See* notes 169-70, *supra.*

175. The Monroe Doctrine, enunciated by President James Monroe in his Message To Congress of December 2, 1823, and thereafter used in various connections, was renounced in 1949. The most outstanding (dangerous?) regional emergency was the Cuban Confrontation between President Kennedy and Secretary Kruschchev in 1962 (although here, of course, the safety of the United States was allegedly menaced by the unilateral and secret military installations). The Dominican intervention of 1965 to protect American citizens is still fresh, and it may be that the Caracas Resolution of 1954 has superseded such a unilateral concept. DOCUMENTS IN AMERICAN FOREIGN RELATIONS 412 (1955).

176. Congress and the President have given emergencies various descriptive and qualifying adjectives, such as "distressed emergencies," 48 Stat. 1 (1933), in preamble; "intensified", Proc. No. 2153, 49 Stat. 3489 (1936); "unprecedented", 60 Stat. 207 (1946); "acute", 48 Stat. 31 (1933); and "unlimited", Proc. No. 2487, 55 Stat. 1547 (1941).

177. There may even be limitations on these limitations, as is the case of judicial withdrawal from any adjudication because of the doctrine of political question, on which see notes 149, *supra*, and 213, *infra*, and United States v. Sisson, 294 F. Supp. 515, 518 (D.C. Mass. 1968). *See also* L. STURZO, THE INTERNATIONAL COMMUNITY AND THE RIGHT OF WAR 173-91 (B. Carter, transl. 1970); and Von Elbe, *Evolution, supra* note 167, and Finkelstein, *Judicial Self-Limitation,* 37 HARV. L. REV. 338 (1924).

178. For an early American distinction between military law and martial law see 1 KENT'S COMMENTARIES ON AMERICAN LAW 341, n.a (1926, 1884), and for a view on the three kinds of military jurisdiction which can be exercised under the Constitution see *Ex parte* Milligan, 71 U.S. (4 Wall.) 139 (1866); *see also* the concurring opinion of Justice Chase for a view that "the term 'martial law' carries no precise meaning," and that "the Constitution does not refer to 'martial law' at all and no Act of Congress has defined the term," see Justice Black's opinion in Duncan v. Kahanamoku, 327 U.S. 304, 315 (1946); and for an in-depth

to, or else separate, congressional action.[179] This does not mean that under proper circumstances the President may not proclaim martial law;[180] however, he is still subject to a judicial finding that there is no justification for it under the specific circumstances, as where the civilian courts are open and functioning.[181]

And yet, regardless of all the prior discussion in this area, the author still opines that today the power of the President, as President, encompasses an unauthorized, unilateral, and unlimited ability to precipitate and plunge the United States into a war, extra-legally, extra-constitutionally, and extra-internationally.[182] Because of his fixed constitutional four-year term in office, he could then, as commander-in-chief, conduct that war with or even without congressional acquiescence or support! In effect this could permit a dictatorship *sans* constitutionally enacted judicial, or electoral authority, and subject only to the loyalty and support of the armed forces. This Orwellian nightmare is a possibility, albeit an improbability, yet there appear to be no theoretical[183]

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analysis, *see* Dennison, *Martial Law: The Development Of a Theory of Emergency Powers*, 1776-1861, 18 AM. J. LEG. HIST. 52 (1974).

179. Such occurred with the Great Depression of 1929, and the Steel Seizure Case, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), and *see* note 184, *infra*, for references to legislation in these areas.

180. *See* Luther v. Borden, 48 U.S. (7 How.) 1 (1849), where Dorr's Rebellion in Rhode Island in 1942 provided the occasion for a discussion of upholding martial law when properly exercised in war or insurrection, and *see also* notes 178, *supra*, and 181, *infra*.

181. *See Ex parte* Milligan, 71 U.S. (4 Wall.) 139 (1866); *see also* discussion in Duncan v. Kahanamoku, 327 U.S. 304, 324, 343 (1946); regarding a Governor's like powers for his state, *see* Sterling v. Constantin, 287 U.S. 378 (1932); *see also* note 217, *infra* and *Ex parte* Quirin, 317 U.S. 1 (1942) (where Nazi saboteurs were landed on Long Island, captured, and tried by a military commission on United States soil, therefore appears incorrect).

182. This writer is of this opinion even though the War Powers Resolution of 1973, *infra* note 192, § 3, requires that "The President *in every possible instance* shall consult with Congress before introducing United States Armed Forces into hostilities" (emphasis added); still the House Report discloses that "possible" was inserted to recognize that "a situation may be so dire, e.g., hostile missile attack underway, and require such instantaneous action that no prior consultation will be possible. . . ." 2 U.S. CONG. & ADM. NEWS 1973, at 2350-51. In other words, there is still unlimited ability (deliberately) to misinterpret, and deliberate human error cannot be guarded against. Separately, what occurs when the Congress is technically not in session, even though committees and subcommittees may be available?

183. See the even more cogent situation during the Korean (de facto) War, when President Truman ordered the seizure of some steel mills and was denounced by the judiciary for this unilateral act. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). In the lower court a colloquy occurred between the

limitations upon such a strong-willed individual who is so supported.[184]

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judge and the government attorney during oral argument on the steel companies' motion for a preliminary injunction, Youngstown Sheet & Tube Co. v. Sawyer, 103 F. Supp. 569 (D.C.D.C. 1952). At one point the district judge sought to paraphrase the government's argument, and government counsel replied, both as follows:

> So, when the sovereign people adopted the Constitution, it enumerated the powers set up in the Constitution but limited the powers of the Congress and limited the powers of the judiciary, but it did not limit the powers of the Executive. Is that what you say?
>
> That is the way we read Article II of the Constitution.
>
> As I understand it, you do not assert any statutory power.
>
> That is correct.
>
> And you do not assert any express constitutional power.
>
> Well, your Honor, we base the President's power on Sections 1, 2 and 3 of Article II of the Constitution, and whatever inherent, implied or residual powers may flow therefrom. . . .
>
> So you contend the executive has unlimited power in time of emergency.
>
> He has the power to take such action as is necessary to meet the emergency.
>
> If the emergency is great, it is unlimited, is it?
>
> I suppose if you carry it to its logical conclusion, that is true.

Id.

That this exchange between counsel and court did not go unnoticed in the High Court is found in this sentence in the concurring opinion of Justice Jackson:

> But no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 642 (1952).

184. The "proof" of these assumptions need not be delineated—they are self-evident, as was the case with the unilatral decision to release the A-bomb, or actively to intervene in one of the numerous tinderbox wars in the world and thereby produce a confrontation. By so pulling himself up by his bootstraps to commander-in-chief status, and also when there is a declaration of war or an "invasion" by the other power(s), the President's stand-by emergency powers are activated, and the magnitude of these powers need not be touched upon. Although *see, e.g., Hearings on S. 731, S.J. Res. 18 and S.J. Res. 59 Before the Senate Comm. on Foreign Relations*, 92d Cong., 1st Sess. (1971), as well as the War Powers Resolution of 1973, *infra* note 192; *see also*, further, Special Committee on the Termination of the National Emergency, 93d Cong., 1st Sess. (1973); the opening statement at the hearings, and the report, asserting that the nation

> [H]as been in a declared state of national emergency since 1933. Very few are aware that over that period of time the United States Congress has enacted at least 580 separate sections of the United States Code delegating extraordinary powers to the President in time of war or national emergency.

Id. *See also* the Committee's (now, Special Committee on National Emergencies and Delegated Emergency Powers) interim report and proposed "National Emergencies Act," 120 CONG. REC. S. 15,784-94 (daily ed. Aug. 22, 1974).

Clark Clifford has written that the presidency is a chameleon which takes

On a realistic level, however, there are various constitutional and practical limitations imposed upon the President's ability so to act, other than those already explored. For example, major questions arise as to his ability to seize or authorize the seizure of property at home or abroad,[185] or to continue to conduct a shooting engagement when the congressional base is withdrawn.[186] Also, Congress may seek to control the executive, through measures such as: (1) cutting off appropriations for such congressionally unauthorized activities; (2) enacting statutes establishing the policy of the United States requiring conditional withdrawal of forces; or (3) passing a joint resolution which requires the President to comply with certain procedures in the event of undeclared wars.

To illustrate these situations, Congress unsuccessfully attempted several times to prevent involvement in Vietnam "unless specifically authorized" by Congress; the method attempted was designed to deny the President the use of appropriated moneys.[187]

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its pattern and color from the personality of the chief executive. Arthur Schlesinger, Jr. has written that any presidential accountability has one grave weakness, namely, in the field of foreign affairs, as not only the other two departments but also the people

> [F]elt much less sure of their ground, had much less confidence in their information and judgment, and were therefore much less inclined to challenge and check and balance, as they did so fully in domestic affairs.

Can Psychiatry Save The Republic?, SATURDAY REVIEW/WORLD, September 7, 1974, at 15.

185. The President is empowered to seize and destroy overseas property of Americans, without the imposition of just compensation (fifth amendment) requirements, when the property has "become a potential weapon of great significance to the invaders," United States v. Caltex (Philippines), Inc., 334 U.S. 149, 155 (1952); according to a dissent by Justices Black and Douglas, the President cannot seize property, even temporarily, within the United States, except in a zone of war for military use, under the guise of its being necessarily required for conducting a war, United States v. Pewee Coal Co., 341 U.S. 114 (1951), and this is especially true in times of peace, such as the Steel Seizure Case, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), and *see* text accompanying note 183 *supra*. However, during the pre-World War II emergency, in 1941, and basing his authority on the general powers constitutionally invested in him as President and commander-in-chief, Roosevelt seized an aircraft and a shipbuilding plant; during the following two years, after the war had begun, he likewise so seized a cable company, a shell plant, and thousands of coal companies. The War Labor Disputes Act of June 25, 1943, 57 Stat. 163, eventually provided a statutory base for these and other seizures.

186. *See* note 170, *supra*, and notes following.

187. *See* the Cooper-Church amendment to the Foreign Military Sales Act, H.R. 15628, 91st Cong., 2d Sess. (1970), approved by the Senate 58-37, in 1970 but not found in the act as finally adopted, 84 Stat. 2053. *See also* the effort in 1972, via H.R. 14055, 92nd Cong., 2d Sess. (1972) to cut off, within thirty

Finally, in 1973, a compromise was reached. In that year both Houses of Congress agreed that no moneys theretofore or now being appropriated were to be spent "to support directly or indirectly combat activity"[188] in Southeast Asia; but President Nixon successfully vetoed the bill; one week later, however, he signed a compromise bill providing for an August cut-off, and agreed to seek prior congressional approval for future military action in Indochina.[189] The congressional policy on conditional withdrawal was stated in 1971, when both Houses declared it to be "the policy of the United States."[190] to withdraw the armed forces from Indochina of American prisoners of war were released. Although he signed the bill, the President felt that it was "without binding force or effect . . . ."[191] The enacted War Powers Resolution of 1973[192] requires, *inter alia*, joint consultation by both departments, in "every possible instance"[193] prior to the use of American forces; if, nevertheless, such unilateral use occurs, within forty-

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days of enactment, all funds for military operations in Indochina; however, the proposal never reached the floor of the House. The text uses terms adopted by the Senate in June, 1973, as an amendment to a final authorization for the Department of State, also aborted.

188. 119 Cong. Rec. S12559 (daily ed. June 29, 1973). The text of the amendment to the appropriations measure appears as follows:

> § 108: Notwithstanding any other provisions of law, on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia.

189. This compromise bill was signed July 1, 1973. On July 25th Congresswoman Holtzman sued the Secretary of Defense Schlessinger, seeking to enjoin continued air operations in Cambodia, and obtained a temporary injunction, Holtzman v. Schlesinger, 361 F. Supp. 553 (E.D.N.Y. 1973); the intermediate Court of Appeals stayed this injunction pending an appeal, Holtzman v. Schlesinger, 484 F.2d 1307 (2nd Cir. 1973), and then Justice Marshall, appealed to as a circuit justice, refused to vacate that intermediate stay, Holtzman v. Schlesinger, 414 U.S. 1304 (1973). However, Justice Douglas thereafter did vacate the stay, Holtzman v. Schlesinger, 414 U.S. 1316 (1973), but on the same day Marshall entered a new stay over Douglas' dissent, Schlesinger v. Holtzman, 414 U.S. 1321 (1973). Thereafter, on the merits, the district court's ruling was reversed by the intermediate appellate court, Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973).

190. The Mansfield Amendment became part of the law found in 85 Stat. 423, 430 (1971).

191. 69 U.S. DEP'T STATE BULL. 662 (1973); NEWSWEEK, Nov. 19, 1973, at 39.

192. Over President Nixon's veto, Congress passed the War Powers Resolution of 1973, P.L. 93-148, 87 Stat. 555. For Background *see* H.R. REP. No. 93-287, 93d Cong., 1st Sess. (1973) and CONG. REP. No. 93-547, 93d Cong., 1st Sess. (1973), and *see also* note 190, *supra*.

193. War Powers Resolution of 1973, P.L. 93-148, 87 Stat. 555 (1973).

eight hours the President is required to submit to Congress a written report giving certain details; and, most importantly, within sixty calendar days after submitting the report, the President "shall terminate any use of United States armed forces"[194] unless Congress declares war, has specifically authorized such use, extended the 60-day period, or is physically unable to meet because of an armed attack on the United States.

D. The Protection of American Citizens and Property Abroad

The preceding illustrations have somewhat disclosed the powers and limitations on the President's external powers through executive agreements when questions of national survival, war, police action, and the like are involved. These powers may, perhaps, also be utilized abroad to protect American citizens and property, but in a degree and fashion limited somewhat to the peculiarities of the circumstances. The rationale seems to be based upon what one Secretary of State termed, in 1871, "the correlative rights of allegiance and protection."[195] There is authority which disclaims the exercise of Presidential powers as such for the protection of American property abroad; congressional authorization is a necessity, for in effect, an act of war is involved. Insofar as the lives of Americans in foreign countries are concerned, there seems to be a vacillating type of cavilling. However, this writer views this situation to be analogous, if not similar, to that concerning property abroad,[196] and this is true even

194. *Id.*

195. For the 1871 quotation see O. SVARLIEN, AN INTRODUCTION TO THE LAW OF NATIONS 244 (1955).

196. On the cavilling aspect see, for example, discussion of the Drago Doctrine with respect to Latin America, and the Second Hague Conference of 1907, in C. FENWICK, INTERNATIONAL LAW 295-96 (3d ed. 1948); *see*, further, text and notes 199 *et seq.*, *infra*, and the testimony of Henry Steele Commager on March 8, 1971, before the Senate's Committee on Foreign Relations, conducting hearings on S. 731:

> I do not know . . . whether even under the Constitution the President has full power to use Armed Forces to protect property abroad. As I understand the Drago Doctrine, that notion has been at least questioned if not repudiated. We subscribe to the Drago Doctrine and we would not now normally use Armed Forces to protect property. We would not do today, bombard Greytown, as we did in 1854. I would not myself include the term "property."
>
> Senator Aiken: Do you think that this wording could be construed to include investments by Americans abroad?
>
> Dr. Commager: I should hope not. If it were we would be at war with the Middle Eastern countries. . . . What is involved in protection of lives is another matter.

though individuals are ordinarily accorded short shrift for international and jurisdictional purposes.[197] Regardless, and perhaps because of this, in these situations numerous Presidents have justified their unilateral determinations and consequent use of power and force, with or without statutory authorization. Thus, they have aided U.S. citizens abroad because internal law apparently recognized or justified such action and because international law did not necessarily consider it an act of war.[198] This writer's *strictissimi* views do not, however, coincide in full with the conduct of nations and the decisions of the courts.

The aid rendered to American nationals may be direct or indirect. That is, it may be economic, as was the 1960 embargo placed by the United States on practically all exports to Cuba, as an explicit retaliation for its nationalization of property. Alternatively, the aid may be physical, as occurred in the Dominican intervention of 1965. Separately, there may be an economic confrontation of less-than-shooting proportions as with Commodore

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Hearings on S. 731, Before the Senate Comm. on Foreign Relations, 92d Cong., 1st Sess. 35-36 (1971). This was the War Powers Bill which was finally enacted in 1973. *See* text accompanying note 200 *infra*.

197. See P. JESSUP, A MODERN LAW OF NATIONS 1-42, 68-122 (1947), although where human rights are concerned a shift appears to be in progress. For example, the United Nations declares and "reaffirms faith in fundamental human rights," U.N. CHARTER Preamble, whereas the Charter of the League of Nations was silent; the International Court of Justice has recently lent support to the view that the Charter imposes such direct obligation, Advisory Opinion, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 276 (1970), [1971] I.C.J. 16, reprinted in 66 AM. J. INT'L L. 145 (1972); *see also* Schwelb, *The International Court of Justice and the Human Rights Clauses of the Charter*, 66 AM. J. INT'L L. 337 (1972).

Whether or not different justifications, powers, and juridical rationale are applied where ambassadors, consuls, etc., or governmental property, abroad are involved, is not here discussed. *See* H. BRIGGS, THE LAW OF NATIONS 960-64 (2d ed. 1952).

198. *See* the situations from 1798 to 1941 given by J. ROGERS, WORLD POLICING AND THE CONSTITUTION 92-134 (1945), and J. CLARK, RIGHT TO PROTECT CITIZENS IN FOREIGN COUNTRIES BY LANDING FORCES (1934) (a memorandum prepared while Solicitor of the Department of State).

There may have been much to say for this international attitude in past centuries and decades, but a much more sophisticated approach is required in these days of tinder-box conflagrations multiplied by the spread of atomic techniques and use. Reconsideration, re-evaluation, and re-casting may be in order today, whether or not under U.N. auspices, but the pace of events brings into focus new situations and new forces. *See* the combined Anglo-French-Israeli expedition against Egypt over the Suez in 1956, rendered innocuous because of United States intervention.

Perry and Japan, or an actual economic-political armed conflict as occurred in the Bay of Pigs "invasion" of 1961.[199] Other nations follow suit, as, for example, in the armed attack by England, France, and Israel on Egypt in 1956, where the Prime Minister's justification to Parliament included the statement that there was nothing in any treaty (or the United Nations' Charter) "which abrogates the right of a Government to take such steps as are essential to protect the lives of their citizens and vital [property] rights such as are here at stake . . . ."[200] But where no such rationale is presented then recourse may be found in other justifications.[201]

Whether done by others[202] or by the United States,[203] what internal limitations are found in the Constitution in these situations? "Now, as respects the interposition of the Executive abroad, for the protection of the lives or property of the citizen,"[204] cavalierly opines one 1860 lower court decision, "the duty must, of necessity, rest in the discretion of the President . . . ."[205] Today, one is tempted to take issue with this statement; but, accepting the quotation does not necessarily mean accepting an unregulated, uncontrolled, and unfounded discretion. Is an unauthorized

199. On this last point *see* A. SCHLESINGER, JR., A THOUSAND DAYS 233-97 (1965).

200. Quoted by Lauterpacht, *The Contemporary Practice of the United Kingdom in the Field of International Law—Survey and Comment*, III, 6 INT'L & COMP. L.Q. 301, 326 (1957), wherein it also appears that the Foreign Secretary commented that "self-defense undoubtedly includes a situation where the lives of the State's nationals abroad are in imminent danger. . .," (continuing, and giving illustrations where intervention might be necessary). *Id.* at 327. For a like expression by the Lord Chancellor in an extended analysis, *see Id.* at 328. The United States Secretary of State, John Foster Dulles, repudiated the particular use of force under these circumstances, although agreeing generally that there could be circumstances justifying the use of force. First Emergency Special Session, November 1, 1956.

201. This point will not be pursued further as it is not relevant to the present discussion. *See*, however, for the withdrawal by France, and the United States take-over of its role, in Vietnam, R. FALK, LEGAL ORDER IN A VIOLENT WORLD 224-323 (1968).

202. For example Great Britain invaded the waters of the United States and destroyed a boat, during the 1837 Canadian Rebellion; the boat was being used by Americans to carry arms to the rebels. *See* 2 MOORE, DIGEST, *supra* note 136, at 24, 409.

203. During the Boxer Rebellion in 1901, the Chinese government permitted foreign powers to defend their Peking legations, *Id.* at V, 478 *et seq.*, and *see* analysis by F. GROB, THE RELATIVITY OF WAR AND PEACE 64-79 (1949).

204. Durand v. Hollins, 8 F. Cas. 111 (No. 4, 186) (S.D.N.Y. 1860).

205. *Id.*

discretion subject to any rules or limitations? The reasoning is analogical. We begin with the division heretofore given between the power of the Congress and the President, respectively and ordinarily to declare and then conduct a war. These powers are not unlimited;[206] however, the one here discussed is found in the constitutional rights granted to an American citizen abroad, so long as the United States has jurisdiction (and control) over him. Assuming such jurisdiction, these constitutional rights are limitations upon the entire United States Government.[207] Put differently, the right to protection, as just mentioned, is not the only such right, for this assumes a form and substance of foreign jurisdiction over the American national or property abroad. But where the United States itself seeks to exercise jurisdiction outside its own territory and on that of another friendly nation, whether by force[208] or by agreement, one issue to be resolved is the extent to which the constitutional rights of the citizen limit the power of the President (through the armed forces overseas). Separately and additionally, it may be conceded that the "organizing . . . and disciplining"[209] of the armed forces, and their "[r]egulation,"[210] are confided to the Congress; but even so, that body cannot, at all times and places and circumstances, act without limitations.[211] *Pari passu*, the President is likewise so bound, so "that no [executive] agreement with a foreign nation can confer power on the Congress, or on any other branch of the Government, which is free from the restraints of the Constitution."[212]

Where a shooting war is in progress then, perhaps, different considerations may attach to both internal and external situations. The judiciary, in such a case, may defer to the other two political departments the decision of: when a war of belligerency has occurred;[213] whether on the west coast of the United States the

206. *See* note 165, *supra*, and authority cited therein.

207. *See* Reid v. Covert, 354 U.S. 1, 5-6, 16 (1947); *see also* note 57, *supra*, and text accompanying.

208. *See* note 203, *supra*, and for example the statutory authorization in the Joint Resolution of 1914, 38 Stat. 770, which alluded to "certain affronts and indignities committed against the United States in Mexico" and then authorized the President to employ "the armed forces . . . to enforce his demand for unequivocal amends . . . ." *Id.*

209. U.S. CONST., art. I, § 8, cl. 16.

210. *Id.*, cl. 14.

211. *See* note 207, *supra*.

212. Reid v. Covert, 354 U.S. 1, 16 (1947).

213. *See* The Brig Amy Warwick (The Prize Cases), 67 U.S. (2 Black) 635,

probabilities of an invasion by Japan are such as executively to question the loyalty, and judicially sanction the mass relocation, of Japanese citizens at the outbreak of World War II;[214] or a proper declaration of validly applied martial war.[215] But whether an invasion is threatened, actual, present and real, is not to be unilaterally determined and continued by the executive branch. Hence after the war and where the courts are open and available, such a presidential power may be challenged and found not to exist.[216] Although during the war the judiciary may, perhaps, lack eagerness to review the proceedings of a military commission,[217] still, as has occurred, writs of *habeas corpus* may be brought. And, while a seizure and destruction of the private property of Americans on foreign soil so as to prevent it from being captured and used by the advancing enemy will not authorize compensation,[218] a seizure within the United States requires the payment of just compensation under the fifth amendment's eminent domain clause.[219]

E. Executive Secrecy, Information, Privilege and the Legislature

The belief of Woodrow Wilson that international treaties and agreements could be open, as well as openly arrived at, was and is, of course, a delusion.[220] Every nation, domestically and inter-

170 (1863), and note 177 *supra*, although in that case, the Court determined the matter for itself on the facts before it.

214. Hirabayashi v. United States, 320 U.S. 81, 92 (1943); Korematsu v. United States, 323 U.S. 214 (1944), although this disgraceful episode was punctuated by the almost immediate softening of the impact, via judicial loopholes, these "concentration camps" were still upheld, *Ex parte* Endo, 323 U.S. 283 (1944). For retired Chief Justice Warren's regret at his share in this episode, when he was the attorney general for California, *see* Los Angeles Times, July 14, 1974, Part I, at 1, col. 2.

215. *See* discussion in *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 142 (1866).

216. *Id.* at 127, although see distinction made in *Ex parte* Quirin, 317 U.S. 1 (1942).

217. *Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243 (1864), although as to the power of a governor to proceed within his state, see the judicial reservation of power in Sterling v. Constantin, 287 U.S. 278 (1932).

218. *See* United States v. Caltex (Phillippines), Inc., 344 U.S. 149, 155 (1952), with two dissents.

219. U.S. CONST., amend. V; United States v. Pewee Coal Co., 341 U.S. 114 (1951); *see also* Mitchell v. Harmony, 54 U.S. (13 How.) 115 (1852), although compare with the Steel Seizure Case, Youngstown Sheet & Tube Co. v. Sawyer, 354 U.S. 579 (1952), where no war was in progress.

220. *See* C. FRIEDRICH, THE PATHOLOGY OF POLITICS 1 (1972), that conspiracy, espionage, etc. on the international scene are "political phenomena that are ubiquitous, though universally condemned. . . ." *Id.*

nationally,[221] practices secrecy. The only question is the extent and degree. Even the late Justice Robert H. Jackson, a foe of unregulated power, conceded that executive secrecy in foreign policy was a necessity, and that "[i]t would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret . . . . "[222] All three departments of the United States need, sometimes desperately, a degree of secrecy in their functionings; so do the people themselves.[223] Even the 1966 Freedom of Information Act[224] contains exemptions[225] as to its applicability, and has not been satisfactorily construed or applied.[226] A similar bill was recently introduced into both Houses

221. See the key finding made by the Senate Subcommittee on Multinational Corporations in its investigation of Aramco and its four American stockholders when, in May, 1973, and acting under orders of King Faisal of Saudi Arabia, these corporations sought to influence the American public and opinion in a variety of, and sometimes devious, ways, reporting all this back to the King. *See* Los Angeles Times, August 7, 1974, Part I, at 7, col. 1. *See also* the effort by the United Nations to have made public the executed documents, note 116, *supra*, and text accompanying.

222. Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948), although it should be noted that four Justices felt that in this case the President had no exclusive authority, *sans* legislative delegation, and so review was possible. Assuming, therefore, an "inherent" Presidential power, or proper delegation validly exercised, it would then appear that secrecy is a necessary companion to most such negotiations.

223. *E.g.*, statutes relating to the confidentiality of income tax returns, as well as other (private) information gathered by the government; the bank secrecy act; educational, arrest, credit, and other records and their necessitous secrecy. Although *see also* note 224, *infra*. The common, and additionally the statutory, law has recognized a variety of "secret" relationships, such as where the expectation of privacy has resulted in a confidentiality imposed and guaranteed by courts in and out of judicial proceedings wherever possible. For example, the relationship of lawyer-client, doctor-patient, priest-penitent, patient-psychotherapist, witness-grand jury testimony, husband-wife, accountant-client, as well as the records-situation above mentioned, *see, e.g.*, CAL. EVID. CODE §§ 930-1060 (West, 1975). This area of private "secrecy," whether from government or person, is so huge that volumes have dealt with it; it is here merely suggested so as to disclose a government's like required need.

224. Freedom of Information Act, 5 U.S.C. § 552 (1970). There is presently before the Congress a sheaf of amendments to this Act: specifically see that of Senator Philip Hart (D-Mich.) seeking to broaden citizen access to F.B.I. and other law enforcement files. This has been accepted by the House conferees. *See* specifically S. 1142.

225. These specific exemptions are to be narrowly construed in the light of the liberal disclosure requirement. Vaughn v. Rosen, 484 F.2d 820, 823, n.11 (D.C. Cir. 1973).

226. *See*, 5 U.S.C. § 552(b)(1-9), and Environmental Protection Agency v. Mink, 410 U.S. 73 (1973); Epstein v. Resor, 296 F. Supp. 214 (N.D. Cal. 1969), aff'd, 421 F.2d 930 (9th Cir. 1970), *cert. denied*, 398 U.S. 965 (1970).

of Congress to correct, by statute, the operation of the security classification system instituted under an executive order.[227] The first such exemption provides that the act does not apply to matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy."[228] Even though another section unequivocally states that the act "is not authority to withhold information from Congress,"[229] this exception to the limitation has been honored more in the breach than the observance.[230]

The entire area of governmental secrecy is still in a state of chaos, for there is no question but that the judiciary is most secretive in its deliberations, and the Congress operates primarily via committees whose deliberations are ordinarily secret. Even the impeachment subcommittee of the House Judiciary Committee so acted, despite some of its televised hearings. The brunt of the anti-secrecy approach by the legislative and judicial departments is the executive. Here any limitations and restrictions involving foreign and international relations are not only germane to our inquiry but clearly relate to proper conduct by the President and his advisers. For example, limitations on secrecy could be substantially detrimental to delicate negotiations by Secretary of State

227. The apparent intent is to replace Exec. Order No. 11, 652, 32 C.F.R. 1900 (Supp. 1974) by amendments to the Freedom of Information Act, *supra* note 224, via H.R. 12004, introduced December 18, 1973, and S. 3399 introduced April 30, 1974. *See also*, other bills introduced prior to S. 3399, and on all of which hearings were held and an analysis and compendium printed, *Hearings Before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations*, 93d Cong., 1st Sess. (1973), and STAFF OF SENATE COMM. ON GOVERNMENT OPERATIONS, REPORT ON FREEDOM OF INFORMATION ACT (Comm. Print 1970).

228. Freedom of Information Act, 5 U.S.C. § 552(c).

229. *Id.*

230. Although *see, e.g.*, Renegotiations Board v. Bannercraft Clothing Co., 415 U.S. 1 (1974), wherein the Court stated that Congress was primarily concerned with opening up the administrative agencies and their processes to the scrutiny of the press and the general public when it passed the act. The most widely-known incident is, of course, the Pentagon Papers Case, where the surreptitious copying and later publication of documents (and allegedly unlawful taking) relating to the background of the involvement and subsequent action by the United States in Vietnam, which at first resulted in a civil injunction action, was eventually dismissed because, for one reason, the papers were (for political reasons?) then history! New York Times v. United States, 403 U.S. 713, 717 et seq. (1971) (concurrence by Justice Black); a later criminal action against Daniel Ellsberg and his conferee, was also eventually dismissed (also for political reasons?). NEWSWEEK, May 21, 1973, at 25; TIME, May 21, 1973, at 28; NEW REPUBLIC, May 26, 1973, at 9.

Henry Kissinger in his efforts in the Near East, his Chinese diplomacy, and the interplay in Cyprus.

Besides the question of governmental (especially executive) secrecy, there emerges the parallel question of executive privilege. This is a broad, amorphous concept which also umbrellas presidentially appointed officials and aides within that establishment. The simplistic rationale is that the Chief Executive must be able to communicate in complete privacy and confidence with all persons, regardless of nationality, status, rank, and so forth, when engaged in his presidential functions.[231] This required executive confidentiality arises out of the nature of the President's position and may be analogized to the judiciary's and legislature's like needs.[232] For example, Senator Mike Gravel (D.-Alaska) as chairman of a Senate subcommittee, obtained all forty-seven volumes of the Defense Department's study of Vietnam policy, all bearing a top secret security classification, and placed them all in the public record at one of its meetings. He subsequently arranged with the aid of Leonard Rodberg, a member of his staff, for publication of the study by a private publisher, whereupon a federal grand jury, investigating possible criminal conduct in such release and publication, subpoenaed Rodberg. The Senator intervened and sought to quash the subpoena, relying on his privilege under the speech or debate clause.[233] The Supreme Court

231. There is an open question whether a President's private and non-governmental functions are not also so covered, and as of this moment, it appears that until disclosed not to be, or until the burden of proof is met by the one claiming non-confidentiality, all executive acts are within the ambit of the privilege. *See*, United States v. Nixon, 418 U.S. 683 (1974).

232. During the inquiry by the impeachment subcommittee (*see* notes 235-236 *infra* on other aspects), its chairman sought to impose limitations of confidentiality and secrecy on its hearings and deliberations, with leaked information and publication inveighed against. So too, the question of confidentiality was judicially rejected as a defense in a newspaperman's refusal to reveal the sources of his information. Branzburg v. Hayes, 408 U.S. 665 (1972) (involving three separate cases of refusals to appear and testify before federal and state grand juries and reveal sources or information because of first amendment rights, in all three cases the privilege being there denied). The State of California has expressly recognized this privilege. *See* CAL. EVID. CODE § 1060 (West 1975).

It is not amiss to conjecture on the ability of a President, during a period when his authority, integrity, and even honor are being questioned internally (with or without impeachment proceedings being initiated), to continue functioning in external affairs, on which *see, e.g.*, Roberts, *Foreign Policy Under a Paralyzed Presidency*, 52 FOREIGN AFFAIRS 675 (1974). The question is also pertinent for an incoming President under the twenty-fifth amendment, as is the case with President Gerald R. Ford.

233. U.S. CONST., art. I, § 6, cl. 1.

agreed that Rodberg was ordinarily shielded by the Senator's privilege, but not, in this instance, from responding to questions relevant to tracing the source of the document, because no legislative act or conduct or deliberation was involved.[234]

In the case of the Watergate records and tapes, President Nixon and his aides sought to assert this privilege in the name of "national security," also a term of indefinite meaning, claimed whenever a cover-up need was present. The invocation of a national security-executive privilege defense was used to repel efforts to obtain certain documents by the separate but somewhat parallel investigations of the special prosecutor and the Senate Select Committee investigating that incident, and the House subcommittee investigating grounds for impeachment. The right of the special prosecutor to compel production, despite the assertion of the privilege, was upheld, whereas that of the Senate and House Committees was denied.[235] However, in neither instance was there a Supreme Court review, and it was not until a *subpoena duces tecum* was issued in a criminal proceeding against the President's former attorney general (and others), directing the President to produce tapes and documents in that matter, that the Supreme Court finally entered the fray. It proceeded, *inter alia*, to hold: that a President indeed had and could assert an executive privilege for himself and his establishment; but, that the Chief Executive had no absolute executive privilege which could be interpreted, asserted, and maintained unilaterally as against the judiciary;[236] that such a claimed executive privilege was to be treated differently from a claimed layman's privilege, and in so proceeding against the President, his confidential presidential communications were "presumptively privileged;"[237] but, that the privilege, here based on confidentiality, had to be weighed against the legitimate needs of the judicial process and the competing interests re-

234. Gravel v. United States, 408 U.S. 606 (1972), although *see* Justice Douglas' dissenting views stating, *inter alia*, that

> Most discussions [on the secrecy of documents in the executive department] have centered on the scope of the executive privilege in stamping documents as "secret", "top secret," "confidential," and so on, thus withholding them from the eyes of Congress and of the press. The practice has reached large [and uncontrolled?] proportions.

Id. at 637-44.

235. *In re Subpoena* to Nixon, 360 F. Supp. 1 (D.D.C. 1973), upheld in an *en banc* decision (5-2) in Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973).

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

237. *Id.* at 708.

solved "in a manner that preserves the essential functions of each branch."[238] When such a balancing was performed in that case, the scales now tipped in favor of disclosure.[239]

Of particular interest here is one sentence by the Chief Justice:

> To read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to the enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of 'a workable government' and gravely impair the role of the courts under Art. III.[240]

Whether or not this may constitute a determination that "nondiplomatic discussions" are to be distinguished from "diplomatic discussions," so that now an absolute executive privilege may be asserted and respected is questionable; for we are back again in the Serbonian bog of unilateral determination, with secrecy and classifications now applying on a rubber-stamp basis. It is opined that a workable judicial approach would be to require an initial substantial and *prima facie* documentary showing by the person desiring the material that it is not within the realm of "diplomatic discussions," then to hold a preliminary hearing on the contrary contention raising such issue, unless the contrary papers are so convincing that nothing further need be shown. At such a preliminary hearing, evidence would be tendered on both sides and the issue resolved, with review thereafter possible on this determination; if the matter is finally resolved against the President, the procedures should be sufficiently tight to guard against undue and overly-sufficient disclosure. In all of this, one element in the scales should be the question whether foreign (and United States) diplomats and officials may be inhibited in their relations, discussions, and communications when such a judicial sword hangs suspended over their actions and deliberations.

III. CONCLUSION

Constitutional powers and limitations in the area of international relations abound, as has been seen, but there is no definitive

238. *Id.*

239. The Court then went into the manner of implementation in the District Court, at 418 U.S. 683, 711 (1974).

240. *Id.* at 707.

understanding of their meaning. The executive and judicial interpretations have conflicted, the legislative conflict with the executive over power and jurisdiction has flourished, and there comes through a hopeless feeling that no concrete resolution will ever occur. The classic "muddling through" which characterized the British Empire during the nineteenth and early twentieth centuries seems to have become American procedure in the area here explored; unfortunately, the judicial branch has not done much to cut these terminological and conceptual knots.

Certain basics in constitutional law do appear and sometimes do apply. For example, the Constitution's applicability in war and in peace, here and abroad (where American jurisdiction is found), is conceded; yet in practice the lip service by the executive seems to obscure much of the Constitution's actual usurpation. To the preceding must be added congressional immobility, acquiescence, and even cooperation in permitting this executive domination and unconstitutional arrogation of power. The murkiness of the judicial waters enables the determined executive branch to accomplish what it otherwise might be unable to do; however, this does not mean that such conduct thereby becomes haloed constitutionally.

Congressional awareness, sophistication, and seeming present determination augur a different future *vis-à-vis* executive action *sans* statutory authorization. The President's jurisdiction will undoubtedly be re-examined legislatively and judicially, and new values and emphases indicate new or modified decisions. Even if the Supreme Court hesitates to overturn its hoary holdings and language, and in effect gives its *imprimatur* to a continuation of past practices, still, in the long run, the power of Congress over the purse, over foreign commerce, and, ultimately, its war powers, denote a new balance in foreign relations and affairs. Whether or not a body comprising 535 individuals can ever involve itself in the day-by-day affairs of the nation overseas is not relevant; conceding that it cannot does not concede that it thereby abdicates its authority to paint with broad strokes the foreign policy and practices of the United States, or to grant authority to its presidential delegatee when so desired, or to limit all who drink at the legislative fount.

As a matter of national policy this reassertion, not redistribution, of powers is all for the good. A Cincinnatus may be required under certain circumstances, but even he was not contin-

ued. Whether by one man or many, the powers that are wielded must also be discontinued once their purposes have been accomplished. Emergencies do not last forever, else they no longer remain such; delegations do not result in transfers of power but only in utilizations as granted and limited temporarily. And, though not finally, the Constitution's underpinnings include a fear of unlimited power, of placing much power in the hands of one person, and of also insisting upon checks and balances for each branch of government. Whether by an individual, a body, a department, or a delegatee, there is a constitutional rejection of the unlimited, absolute, or uncontrolled exercise of any authority; power is feared and limited.

The major conclusion is that in the area of international affairs, the basic authority to formulate policy has been constitutionally placed in the hands of Congress; that while the nation's affairs in this area are handled directly and immediately by the President, still, in the end, he is subject to the Congress. Even in this atomic age of fear, confrontation, and preparedness there has been no inability on the part of the nation to act swiftly and competently, for Congress has delegated much and can delegate more—but conditionally, temporarily, and always subject to recall. The Constitution so provides and should be so construed.