

8-2014

Holding the President Accountable to Constitutional Limits

Louis Fisher

William and Mary Law School

Follow this and additional works at: <https://dc.law.utah.edu/ulr>



Part of the [Constitutional Law Commons](#), [Law and Politics Commons](#), and the [Legislation Commons](#)

Recommended Citation

Fisher, Louis (2014) "Holding the President Accountable to Constitutional Limits," *Utah Law Review*: Vol. 2014 : No. 4 , Article 5.
Available at: <https://dc.law.utah.edu/ulr/vol2014/iss4/5>

This Article is brought to you for free and open access by Utah Law Digital Commons. It has been accepted for inclusion in Utah Law Review by an authorized editor of Utah Law Digital Commons. For more information, please contact valeri.craige@law.utah.edu.

HOLDING THE PRESIDENT ACCOUNTABLE TO CONSTITUTIONAL LIMITS

Louis Fisher*

Abstract

As with Congress and the judiciary, presidents have access to powers expressly stated in the Constitution and those necessarily implied in those grants. In highly limited circumstances, presidents may also exercise a “prerogative” (i.e., unilateral action), but that authority is frequently misunderstood and subject to abuse. Unlike those in the other branches, presidents lay claim to a host of powers far beyond enumerated and implied powers. In seizing steel mills in 1952 to prosecute the war in Korea, President Harry Truman acted on what he called an “inherent” power that was not subject to judicial or legislative checks. Presidents Richard Nixon and George W. Bush relied on the same argument. All three presidents were rebuffed by Congress, the courts, and the general public. A lengthy list of other powers, all designed to broaden executive power beyond constitutional sources, include the “sole organ” doctrine; the “unitary executive”; and various powers called “emergency,” “plenary,” “residual,” “preclusive,” and “completion.” These vague categories need to be carefully analyzed to understand why they exceed constitutional limits and endanger self-government and the system of checks and balances.

INTRODUCTION

Presidential influence expanded after World War II in large part by asserting executive authority beyond powers expressly enumerated or implied in the Constitution. Over the past six decades, presidential studies have promoted a fictional and idealized model of the office, describing the President as someone devoted to the “national interest” and surrounded by advisers with uncanny

* © 2014 Louis Fisher. Visiting Professor, William and Mary Law School. From 1970 to 2010, Dr. Fisher served as Senior Specialist in Separation of Powers with Congressional Research Service and Specialist in Constitutional Law with the Law Library of Congress. He thanks David Gray Adler, Reb Brownell, Henry Cohen, Neal Devins, Chris Edelson, Nancy Kassop, Richard Pious, Mort Rosenberg, Mitch Sollenberger, and Robert Spitzer for their comments and advice on this Article. Portions of this Article are drawn from the Author’s treatise *The Law of the Executive Branch: Presidential Power*, published by Oxford University Press in January 2014. Some of the early sections of the book appear at <http://books.google.com/books?id=ZbBNAgAAQBAJ&printsec=frontcover#v=onepage&g&f=false>.

expertise and political judgment.¹ This Article argues that it would be constitutionally healthy to treat the presidency in a more realistic light and place greater value on the system of checks and balances. Few people idealize Congress. There are occasional efforts to idealize the Supreme Court as an institution with unrivaled competence to interpret the Constitution, but judicial errors throughout the last two centuries are widely known and acknowledged. The principal risk to constitutional government comes from conceptual mistakes about the source of presidential authority. Contributing to the increase of executive power is the failure of Congress to protect its institutional powers.

Part I of this Article provides a brief overview of the executive and legislative branches' enumerated and implied powers. Part II argues that the purported "inherent" presidential powers are distinct from implied powers and do not conform to the Constitution. Part III gives examples of presidents invoking their prerogative to take unilateral action. Parts IV and V argue that the Supreme Court has erroneously applied—and lower federal courts have confirmed—overly broad and defective doctrines of executive power. Part IV discusses the "unitary executive" doctrine; Part V discusses the "sole organ" doctrine. Finally, Part VI shows that presidents often overstep their constitutional powers by substituting the approval of international bodies for the approval of Congress when dealing with international disputes and military action.

I. ENUMERATED AND IMPLIED POWERS

On a regular basis, the Supreme Court describes the U.S. Constitution as one of "enumerated powers."² Those announcements suggest that every power granted to the national government is expressly stated in the Constitution and that anything beyond powers specifically enumerated lacks legitimacy. In *McCulloch v. Maryland*,³ Chief Justice John Marshall instructed, "This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted."⁴ The reality, however, is that the federal government has never been limited to enumerated powers. All three branches require and exercise implied powers.

The Framers fully understood the need for implied powers. James Madison wrote in Federalist No. 44, "No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included."⁵ When the First Congress debated the Bill of Rights, some

¹ Louis Fisher, *Teaching the Presidency: Idealizing a Constitutional Office*, 45 PS: POL. SCI. & POL. 17, 17 (2012).

² See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 1, 2 (2012); *McCulloch v. Maryland*, 17 U.S. 316 (1819).

³ 17 U.S. 316 (1819).

⁴ *Id.* at 405.

⁵ THE FEDERALIST NO. 44, at 322 (James Madison) (Benjamin Fletcher Wright ed., 1961).

lawmakers wanted to limit the national government to powers expressly delegated. The Articles of Confederation, which became effective in 1781, gave broad protection to the states, which retained all powers except those “expressly delegated” to the national government.⁶

A member of the First Congress proposed that the Tenth Amendment limit the national government to powers “expressly delegated.”⁷ The constitutional language would read, “The powers not expressly delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”⁸ Madison objected to the word “expressly” because the functions and duties of the federal government could not be delineated with such precision.⁹ It was impracticable to confine government to express powers, for there “must necessarily be admitted powers by implication, unless the Constitution descended to recount every minutiae.”¹⁰ Madison’s argument prevailed; lawmakers agreed to delete the word “expressly.”¹¹

Another constitutional dispute in the First Congress highlighted the need for implied powers. The Constitution does not give the President authority to remove executive officials, but lawmakers faced this question: What would happen if a department head was unwilling or unable to carry out a statutory duty? Could the President remove that individual? Legislative debate, frequently referred to as the “Decision of 1789,”¹² occupies almost 200 pages of the *Annals of Congress*. Madison proposed the creation of three executive departments: Foreign Affairs, Treasury, and War. At the head of each department would be a secretary appointed by the President with the advice and consent of the Senate and removable by the President.¹³ William Smith of South Carolina opposed giving the President the sole power of removal.¹⁴ Madison justified the removal power as a way to make the President responsible for the conduct of department heads.¹⁵ Theodorick Bland wanted the removal power shared with the Senate to make it consistent with the appointment process.¹⁶ The House rejected his motion.¹⁷

⁶ ARTICLES OF CONFEDERATION AND PERPETUAL UNION art. II, reprinted in MERRILL JENSEN, *THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION* 263 (5th prtg. 1963).

⁷ 1 ANNALS OF CONG. 761 (1789).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1022 (2006).

¹³ *Id.* at 1029–30.

¹⁴ *Id.* at 1030.

¹⁵ 1 ANNALS OF CONGRESS 387 (1789).

¹⁶ *Id.* at 397.

¹⁷ *Id.* For a summary of the leading arguments and the votes taken, see LOUIS FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* 57–62 (6th ed. 2014).

Lawmakers decided to acknowledge the President's removal power indirectly. Subordinate officers would be responsible for taking charge and custody of all records whenever the secretary "shall be removed from office by the President of the United States."¹⁸ Congressional support for the removal of department heads did not mean the President was at liberty to remove *all* subordinate executive officials. In debating the Treasury Department and its Office of the Comptroller, Madison said it was necessary "to consider the nature of this office."¹⁹ To him, its properties were not "purely of an Executive nature."²⁰ He maintained that "they partake of a Judiciary quality as well as Executive."²¹ Because of the mixed nature of the office, "there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the Executive branch of the Government."²²

Although implied powers were recognized in debates over the Constitution and in the early years of the national government, judicial rulings continued to describe the Constitution as one of enumerated powers. That position is not credible. If the federal government is limited to enumerated powers, where did the judiciary receive the power of judicial review? It is not expressly provided. In 1821, the Supreme Court decided whether Congress possessed authority to hold individuals in contempt, a power that does not appear in the Constitution.²³ A unanimous Court acknowledged that within the Constitution there is not "a grant of powers which does not draw after it others, not expressed, but vital to their exercise."²⁴ Without the power of contempt, Congress would be "exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may meditate against it."²⁵

The contemporary Supreme Court continues to champion the doctrine of enumerated powers. In 1995, in striking down a congressional effort to regulate guns in schoolyards, the Court announced, "We start with first principles. The Constitution creates a Federal Government of enumerated powers."²⁶ That is not a first principle. If it were, there would be no judicial authority to invalidate the statute. Two years later, the Court stated, "Under our Constitution, the Federal Government is one of enumerated powers."²⁷ Some powers are enumerated, but the federal government is more than that. In his decision in 2012 upholding the Affordable Care Act, Chief Justice Roberts made this claim: "If no enumerated power authorizes Congress to pass a certain law, that law may not be

¹⁸ Act of Sept. 2, 1789, ch. 12, 1 Stat. 65, 67 (1789).

¹⁹ 1 ANNALS OF CONG. 611 (1789).

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 611.

²³ *Anderson v. Dunn*, 19 U.S. 204, 224–25 (1821).

²⁴ *Id.* at 225–26.

²⁵ *Id.* at 228. For the implied power of federal courts to hold individuals in contempt, see *Michaelson v. United States*, 266 U.S. 42, 65–66 (1924).

²⁶ *United States v. Lopez*, 514 U.S. 549, 552 (1995).

²⁷ *Boerne v. Flores*, 521 U.S. 507, 516 (1997).

enacted”²⁸ Congressional power has never been limited in that manner. All three branches possess implied powers that can be drawn reasonably from enumerated powers.

II. POWERS SAID TO BE “INHERENT”

Scholars at times refer to “inherent” presidential power when the more accurate word is *implied*. For example, in a study on treaties and international agreements, Oona Hathaway states that “the President has the power to make international agreements entirely on his own inherent constitutional authority. Yet that power is not unlimited.”²⁹ The very definition of inherent power is that it inheres in an office and therefore is not subject to limits. She explains that limitations are not supplied by international law but by domestic law, and in the United States, “the central source to which we must turn is the U.S. Constitution, which is the source of both the President’s unilateral international lawmaking authority and the limits thereon.”³⁰ In other words, the authority is a mix of express and implied powers, not inherent powers.

Some scholars treat implied powers and inherent powers as the same.³¹ They are quite different. Implied powers are drawn reasonably from express powers. They are therefore anchored in the Constitution. By definition, inherent powers are not drawn from express powers. As the word suggests, they consist of powers that “inhere” in a person or an office. *Black’s Law Dictionary* has defined inherent power in this manner: “An authority possessed without its being derived from another [P]owers over and beyond those explicitly granted in the Constitution or reasonably to be implied from express grants.”³² Inherent power is clearly set apart from express and implied powers.

The Constitution is protected when presidents act under express and implied powers. It is at risk when they claim inherent powers. A constitution protects individual rights and liberties by specifying and limiting government. Express and implied powers serve that purpose. Inherent powers invite claims of authority that have no limits other than those voluntarily accepted by the President. What “inheres” in the President? At times the word “inherent” is cross-referenced to “intrinsic,” which can be something “belonging to the essential nature or construction of a thing.”³³ What is in the “nature” of a political office and “essential” to it? Nebulous words and concepts encourage unilateral presidential actions that lack constitutional authority and endanger individual liberties. Inherent powers move the nation from one of limited powers to boundless and ill-defined

²⁸ Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 1, 3 (2012).

²⁹ Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 210 (2009).

³⁰ *Id.* at 211.

³¹ See STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 20, 430 (2008).

³² BLACK’S LAW DICTIONARY 703 (5th ed. 1979).

³³ MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 614 (10th ed. 1965).

authority, undermining republican government, the doctrine of separation of powers, and the system of checks and balances.³⁴

Presidents who claimed inherent powers have been turned back by Congress, the courts, or both: Truman trying to seize steel mills in 1952 to prosecute the war in Korea, Richard Nixon impounding appropriated funds and ordering warrantless domestic surveillance, and George W. Bush after the 9/11 terrorist attacks claiming the right to unilaterally create military tribunals without first obtaining authority from Congress.

A. Truman's Steel Seizure

On April 8, 1952, President Truman issued Executive Order 10340, authorizing and directing the secretary of commerce to take possession of eighty-seven steel plants, facilities, and other property of private companies “as he may deem necessary in the interests of national defense.”³⁵ He acted to avert a nationwide strike of steel companies. The executive order referred to “American fighting men and fighting men of other nations of the United Nations . . . now engaged in deadly combat with the forces of aggression in Korea.”³⁶

On April 17, a reporter at a news conference asked, “Mr. President, if you can seize the steel mills under your inherent powers, can you, in your opinion, also seize the newspapers and/or the radio stations?”³⁷ President Truman responded, “Under similar circumstances the President of the United States has to act for whatever is for the best of the country. That’s the answer to your question.”³⁸ Public opinion turned against this definition of presidential power. Newspapers across the country warned that “dictatorial powers” were “dangerous,” “ugly,” “fear-inspiring,” and “a constitutional and political crisis.”³⁹

Several steel companies took the dispute to federal district court. Holmes Baldrige of the Justice Department defended the steel seizure as “a legal taking under the inherent executive powers of the President.”⁴⁰ For constitutional authority he cited the “executive power” that Article II vests in the President, the Take Care Clause, the Commander in Chief Clause, and “that [the President] shall

³⁴ See Louis Fisher, *Invoking Inherent Powers: A Primer*, 37 PRES. STUD. Q. 1, 1–2 (2007) [hereinafter *Invoking Inherent Powers*]; Louis Fisher, *The Unitary Executive and Inherent Executive Power*, 12 U. PA. J. CONST. L. 569, 586–90 (2010) [hereinafter *The Unitary Executive*].

³⁵ Exec. Order 10340, 3 C.F.R. 861, 862 (1949–1953).

³⁶ *Id.* at 861.

³⁷ The President’s News Conference of April 17, 1952, 98 PUB. PAPERS 269, 272–73 (Apr. 17, 1952).

³⁸ *Id.*

³⁹ 98 CONG. REC. 4033–34 (1952).

⁴⁰ The Steel Seizure Case, H.R. DOC. NO. 534, pt. 1, at 253 (1952). This document contains proceedings in district court and the D.C. Circuit.

be the sole organ of the nation in its external relations.”⁴¹ Judicial misconceptions about the sole-organ doctrine are covered in Part V.

In district court, Baldrige told Judge David A. Pine that the court had no authority to rule against the President: “Our position is that there is no power in the Courts to restrain the President”⁴² Baldrige agreed that the government was not asserting any statutory power. Instead, the President’s power was based on Sections 1, 2 and 3 of Article II “and whatever inherent, implied or residual powers may flow therefrom.”⁴³ He recognized only two limitations on the President: “One is the ballot box and the other is impeachment.”⁴⁴ Emphasizing how earlier presidents had successfully invoked “inherent” power,⁴⁵ Baldrige concluded his argument with two more references (for a total of eleven) to presidential inherent power.⁴⁶

On April 29, Judge Pine ruled against President Truman’s action in seizing the plants. He found no express or implied constitutional authority for the seizure. No “residuum of power” or “inherent” power, he said, existed to justify this exercise of emergency power for the good of the public.⁴⁷ To Judge Pine, the scope of presidential power described by Baldrige “spells a form of government alien to our Constitutional government of limited powers.”⁴⁸

On May 3, the Supreme Court granted certiorari and heard oral argument on May 12. Solicitor General Philip Perlman, presenting the case for the executive branch, did not refer one time to “inherent presidential power.”⁴⁹ On June 2, by a 6–3 vote, the Supreme Court struck down President Truman’s executive order.⁵⁰ The majority consists of the opinion by Justice Black,⁵¹ followed by concurrences from Justices Frankfurter,⁵² Douglas,⁵³ Jackson,⁵⁴ Burton,⁵⁵ and Clark.⁵⁶ All six Justices rejected the claim of inherent presidential power in this instance.⁵⁷ Chief Justice Vinson, joined by Justices Reed and Minton, defended President Truman

⁴¹ *Id.* at 255.

⁴² *Id.* at 362.

⁴³ *Id.* at 371.

⁴⁴ *Id.*

⁴⁵ *Id.* at 386.

⁴⁶ *See id.* at 426–27.

⁴⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 103 F. Supp. 569, 573 (D.D.C. 1952).

⁴⁸ *Id.* at 576.

⁴⁹ 48 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW (*Youngstown Sheet & Tube Co. v. Sawyer*) 877–995 (Philip B. Kurland & Gerhard Casper eds., 1975). With other parties, the Justices debated the existence of inherent presidential powers. *E.g., id.* at 986–94.

⁵⁰ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 667 (1952).

⁵¹ *Id.* at 582–89.

⁵² *Id.* at 593–628 (Frankfurter, J., concurring).

⁵³ *Id.* at 629–34 (Douglas, J., concurring).

⁵⁴ *Id.* at 634–55 (Jackson, J., concurring).

⁵⁵ *Id.* at 655–60 (Burton, J., concurring).

⁵⁶ *Id.* at 660–67 (Clark, J., concurring).

⁵⁷ *See supra* notes 51–56.

but largely on the basis of legislatively approved policies, treaty obligations (the UN Charter), and military appropriations.⁵⁸

B. Nixon's Impoundments

“From [1789] forward, Presidents were not required to spend every dollar that Congress appropriated. Some appropriation accounts were purely discretionary, such as contingency funds. Presidents had no obligation to spend all the money.”⁵⁹ An early precedent, cited by the Nixon administration in 1973 to justify its ambitious impoundment policy,⁶⁰ was the decision by President Thomas Jefferson in 1803 to withhold \$50,000 for gunboats.⁶¹ However, there was no controversy. He explained to lawmakers that the Louisiana Purchase made it unnecessary to immediately spend the money.⁶² He took time to study the most recent models of gunboats and later informed Congress that he was implementing the program.⁶³

Some impoundments challenge the ability of Congress to set national policy and decide budget priorities. House Appropriations Chairman George Mahon remarked in 1949 that members of Congress did not object to any reasonable economies in government: “But economy is one thing, and the abandonment of a policy and program of the Congress another thing.”⁶⁴ From 1940 through the 1960s, presidents collided with Congress by refusing to spend appropriated funds, with many impoundments affecting military programs.⁶⁵ Impoundments continued during the Eisenhower, Kennedy, and Johnson administrations, but political accommodations resolved the disputes.⁶⁶

The Nixon administration ratcheted up the stakes.⁶⁷ On January 31, 1973, President Nixon claimed that the “constitutional right for the President of the United States to impound funds—and that is not to spend money, when the

⁵⁸ *Id.* at 667–72 (Vinson, J., dissenting).

⁵⁹ LOUIS FISHER, *THE LAW OF THE EXECUTIVE BRANCH: PRESIDENTIAL POWER* 237 (2014); see also Roy E. Brownell II, *The Constitutional Status of the President's Impoundment of National Security Funds*, 12 SETON HALL CONST. L.J. 1, 27–30 (2001).

⁶⁰ *Impoundment of Appropriated Funds by the President: Joint Hearings Before the Ad Hoc Subcomm. on Impoundment of Funds of the Comm. on Gov't Operations & the Subcomm. on Separation of Powers of the Comm. on the Judiciary*, 93d Cong. 676–77 (1973) (statement of Joseph Cooper, Professor) [hereinafter *Impoundment Hearings*].

⁶¹ FISHER, *supra* note 59, at 237.

⁶² Thomas Jefferson, Third Annual Message (Oct. 17, 1803), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 345, 348 (James D. Richardson ed., 1897).

⁶³ *Id.* at 360. For a discussion of the historical background to President Jefferson's action, see *Impoundment Hearings*, *supra* note 60, at 676–77.

⁶⁴ 95 CONG. REC. 14922 (1949) (statement of Rep. Mahon).

⁶⁵ See Brownell II, *supra* note 59, at 38, 42–45.

⁶⁶ *Id.*

⁶⁷ See JAMES P. PFIFFNER, *THE PRESIDENT, THE BUDGET, AND CONGRESS: IMPOUNDMENT AND THE 1974 BUDGET ACT* 40–44 (1979); Louis Fisher, *Funds Impounded by the President: The Constitutional Issue*, 38 GEO. WASH. L. REV. 124, 125–26 (1969); Louis Fisher, *Impounded Funds: Uses and Abuses*, 23 BUFF. L. REV. 141, 141 (1973).

spending of money would mean either increasing prices or increasing taxes for all the people—that right is absolutely clear.”⁶⁸ He vowed not to spend money “if the Congress overspends.”⁶⁹ Officials in his administration claimed that impoundment was consistent with the President’s “constitutional authority in the area of foreign affairs, his role as Commander in Chief, and his constitutional duty to ‘take care that the laws be faithfully executed.’”⁷⁰ Deputy Attorney General Joseph Sneed insisted that the President’s constitutional powers to impound funds find their source not only in the Take Care Clause and his “express status as Commander-in-Chief” but as the “sole organ of the Nation in the conduct of its foreign affairs.”⁷¹

The Nixon administration repeatedly invoked President Jefferson’s withholding of funds for gunboats as a legitimate precedent. Questioned by a Senate committee on impoundment actions, Housing and Urban Development Secretary George Romney replied, “I guess Thomas Jefferson started this.”⁷² Actions by Presidents Jefferson and Nixon were worlds apart. President Jefferson delayed spending money but eventually purchased gunboats to carry out statutory policy. President Nixon claimed the constitutional right to cut programs in half and eliminate them altogether. The severity of those reductions prompted dozens of lawsuits, with the administration losing almost all of them.⁷³

Both houses worked on impoundment control bills. Title X of the Budget Act of 1974 created two categories of impoundment: “rescissions” (actions to terminate funds) and “deferrals” (proposals to delay spending).⁷⁴ Congress prohibited presidents from cancelling a program unless Congress specifically granted its approval by statute.⁷⁵ For deferrals, lawmakers agreed that Congress could disapprove by something short of a public law.⁷⁶ The choice of legislative action was a one-house veto.⁷⁷ The Supreme Court’s decision in *INS v. Chadha* struck down the legislative veto and thus invalidated the one-house veto for deferrals.⁷⁸ However, the D.C. Circuit, in a later decision, ruled that the one-house veto was tied inextricably to the deferral authority.⁷⁹ If one fell, so did the other. The

⁶⁸ The President’s News Conference of January 31, 1973, 1 PUB. PAPERS 53, 62 (Jan. 31, 1973).

⁶⁹ *Id.*

⁷⁰ *Impoundment Hearings*, *supra* note 60, at 271 (statement of Roy Ash, Director-Designate, Office of Management and Budget).

⁷¹ *Id.* at 369 (statement of Joseph T. Sneed, Deputy Att’y Gen.).

⁷² *Department of Housing and Urban Development; Space, Science, Veterans, and Certain Other Independent Agencies Appropriations for Fiscal Year 1973: Hearings on H.R. 15093 Before a Subcomm. of the Comm. on Appropriations*, 92d Cong. 565 (1972) (statement of Sec’y George Romney).

⁷³ LOUIS FISHER, PRESIDENTIAL SPENDING POWER 177, 189–201 (1975).

⁷⁴ *Id.* at 199; Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 1011(3)–(4), 88 Stat. 297.

⁷⁵ Congressional Budget and Impoundment Control Act of 1974, § 1012.

⁷⁶ *Id.* § 1013.

⁷⁷ *Id.*

⁷⁸ 462 U.S. 919, 959 (1983).

⁷⁹ *City of New Haven v. United States*, 809 F.2d 900, 906–09 (D.C. Cir. 1987).

President's authority to make policy deferrals thus disappeared. Only routine, nonpolicy deferrals are permitted. Congress promptly converted the judicial ruling into statutory policy.⁸⁰

C. Nixon's Domestic Surveillance

On June 5, 1970, President Nixon met with the heads of several intelligence agencies, including the National Security Agency (NSA), to initiate a program designed to monitor what the administration considered radical individuals and groups in the United States, particularly opponents of the Vietnam War.⁸¹ What became known as the Huston Plan directed the NSA to use its technological capacity to intercept—without judicial warrant—the communications of U.S. citizens using international phone calls or telegrams.⁸² Under pressure from FBI Director J. Edgar Hoover, President Nixon withdrew this plan.⁸³

However, the NSA had been targeting domestic groups for several years and continued to do so.⁸⁴ The Huston plan, kept in a White House safe, became public in 1973 after Congress investigated the Watergate affair and discovered that President Nixon had ordered the NSA to illegally monitor American citizens.⁸⁵ To conduct its surveillance operations, the NSA entered into agreements with U.S. companies, including Western Union and RCA Global.⁸⁶ U.S. citizens, assuming their telegrams were strictly private, learned that American companies had been turning them over to the NSA.⁸⁷

In 1972, a district court expressly dismissed the claim of a broad “inherent” presidential power to conduct domestic surveillances without a warrant.⁸⁸ The Sixth Circuit affirmed, rejecting the government's argument that the power at issue “is the inherent power of the President to safeguard the security of the nation.”⁸⁹ Unanimously, the Supreme Court affirmed the Sixth Circuit and held that the Fourth Amendment required prior judicial approval for surveillances of domestic organizations.⁹⁰

⁸⁰ Balanced Budget and Emergency Deficit Control Act of 1987, Pub. L. No. 100-119, § 206, 101 Stat. 785.

⁸¹ JAMES BAMFORD, *BODY OF SECRETS: ANATOMY OF THE ULTRA-SECRET NATIONAL SECURITY AGENCY* 430 (2002).

⁸² *Id.*

⁸³ *Id.* at 430–31.

⁸⁴ *Id.* at 431.

⁸⁵ *Id.*

⁸⁶ *Id.* at 434–38.

⁸⁷ *Id.* at 438–39.

⁸⁸ *United States v. Sinclair*, 321 F. Supp. 1074, 1077 (E.D. Mich. 1971).

⁸⁹ *United States v. U.S. Dist. Court for the E. Dist. of Mich.*, 444 F.2d 651, 658 (6th Cir. 1971) (internal quotation marks omitted).

⁹⁰ *United States v. U.S. Dist. Court for the E. Dist. of Mich.*, 407 U.S. 297, 318–21 (1972).

Building on those decisions, Congress passed legislation to provide statutory policy for the President's power to conduct surveillance over foreign powers. The result was the Foreign Intelligence Surveillance Act (FISA) of 1978.⁹¹ The assertion of inherent presidential power now faced a judicial check. FISA established a special court, the Foreign Intelligence Surveillance Court to ensure independent supervision of executive power. FISA made clear that the statutory procedures for electronic surveillance within the United States for intelligence purposes "shall be the exclusive means" for conducting such surveillance.⁹²

D. Bush's Military Tribunal

On November 13, 2001, President George W. Bush issued a military order to create military tribunals to try individuals who gave assistance to the terrorist attacks of 9/11.⁹³ The administration justified the order on the ground of presidential inherent power.⁹⁴ As with claims by other presidents, Bush's assertion of inherent power would fail.

The constitutionality of President Bush's action reached the Supreme Court in *Hamdan v. Rumsfeld*.⁹⁵ It held that President Bush's military order violated both the Uniform Code of Military Justice and the Geneva Conventions.⁹⁶ Congress had enacted the Uniform Code of Military Justice, and it was the President's duty to comply with it. No inherent presidential authority existed to circumvent statutory policy. In this litigation, I filed three amicus briefs to oppose the Bush administration: when the case was with the D.C. Circuit, when a motion had been filed for certiorari, and after the Court granted certiorari.⁹⁷

To the Bush administration, founding-era history justified independent presidential power to create military tribunals: "When the Constitution was written and ratified, it was well recognized one of the powers inherent in military command was the authority to institute tribunals for punishing enemy violations of the law of war" and that General Washington had appointed a Board of General

⁹¹ Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified as amended in scattered titles of U.S.C.).

⁹² *Id.* § 201(f). For more contemporary issues on electronic surveillance, see Louis Fisher, *National Security Surveillance: Unchecked or Limited Presidential Power?*, in CONTEMPORARY CASES IN U.S. FOREIGN POLICY 378–408 (Ralph G. Carter ed., 5th ed. 2014).

⁹³ Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

⁹⁴ See Fisher, *Invoking Inherent Powers*, *supra* note 34, at 12.

⁹⁵ 548 U.S. 557 (2006).

⁹⁶ *Id.* at 557–58.

⁹⁷ Brief for Louis Fisher as Amicus Curiae Supporting Petitioner, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-184); Brief for Louis Fisher as Amicus Curiae Supporting Petitioner [Commissions—History], *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-184) (on writ of certiorari); Brief for Louis Fisher as Amicus Curiae Supporting Petitioner-Appellee, *Hamdan v. Rumsfeld*, 415 F.3d. 33 (D.C. Cir. 2005) (No. 04-5393).

Officers in 1780 to try British Major John André as a spy.⁹⁸ The Justice Department asserted that “there was no provision in the American Articles of War for court-martial proceedings to try an enemy for the offense of spying.”⁹⁹

Those arguments were in error. As my briefs explained, the Continental Congress adopted a resolution in 1776 expressly providing that enemy spies “shall suffer death . . . by sentence of a court martial, or such other punishment as such court martial shall direct,” and ordered the resolution “be printed at the end of the rules and articles of war.”¹⁰⁰ A year earlier, Congress made it punishable by court martial for members of the Continental Congress to “hold correspondence with” or “give intelligence to” the enemy.¹⁰¹ The Bush administration displayed little understanding of history by relying on the John André trial of 1780. There was no President at that time. There was no separate executive branch. There was only one branch of government: the Continental Congress. In convening Major André’s trial, Washington did not act unilaterally as an executive possessing inherent power but as a military general carrying out procedures established by Congress. Other military tribunals were created after 1789, raising important questions about presidential power and judgment.¹⁰²

III. INVOKING THE PREROGATIVE

Inherent power is at times associated with the prerogative power: an independent executive power to act in a time of emergency. They are quite different. Under inherent power, the President claims authority to act without any interference from other branches. The prerogative accepts that the executive may at times take the initiative, but only with the understanding that the President recognizes he is not acting under the law and will need Congress to approve his action.

President Jefferson exercised the prerogative when he decided to exceed the instructions of Congress in purchasing territory from France. After receiving legislative authority to pay as much as \$10 million for New Orleans and the Floridas, he learned that Napoleon Bonaparte was prepared to sell all of Louisiana because he needed money to fight Great Britain. On April 30, 1803, France ceded the vast territory of Louisiana for \$15 million. The Senate approved the Louisiana

⁹⁸ Brief for Respondents at 58, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-184) 2006 WL 460875 at *21.

⁹⁹ *Id.*

¹⁰⁰ 5 JOURNALS OF THE CONTINENTAL CONGRESS 693 (1776).

¹⁰¹ *American Articles of War of 1775*, art. XXVIII, in WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 955 (2d ed. 1920); see also Brief for Louis Fisher as Amicus Curiae Supporting Petitioner [Commissions—History], *supra* note 97, at 19 n.6.

¹⁰² See generally LOUIS FISHER, *MILITARY TRIBUNALS AND PRESIDENTIAL POWER: AMERICAN REVOLUTION TO THE WAR ON TERRORISM* (2005) (reviewing the history of military tribunals in the United States and the use of military justifications to expand presidential power in time of war, at the cost of legislative and judicial control).

treaties, and the United States took possession of 828,000 square miles, doubling the size of the nation.¹⁰³

President Jefferson never claimed authority to act as he did. He wondered if a constitutional amendment might be required.¹⁰⁴ Instead of fabricating a strained constitutional theory to justify his action, he asked Congress for legal support and received it. Particularly because of the “constitutional difficulty,” he thought it might be best for Congress to engage in “as little debate as possible.”¹⁰⁵ In a letter to Attorney General Levi Lincoln, President Jefferson decided that a constitutional amendment was not necessary or advisable: “the less that is said about any constitutional difficulty, the better; and that it will be desirable for Congress to do what is necessary, *in silence*.”¹⁰⁶

John Yoo, in a study of executive power from George Washington to George W. Bush, stated that President Abraham Lincoln “never invoked the prerogative.”¹⁰⁷ Actually, the initiatives taken by President Lincoln at the start of the Civil War are best described as exercising the prerogative. In a separate study, Yoo said that when President Lincoln raised an army, withdrew money from the Treasury Department, and launched a blockade on the South, he acted “on his own authority.”¹⁰⁸ That is not correct. President Lincoln recognized that he did not have constitutional authority to act as he did. For that reason, he was required to go to Congress and seek retroactive authority.

When Congress returned on July 4, 1861, President Lincoln explained the emergency actions he had taken, including raising an army and withdrawing money from the Treasury. Clearly those powers are vested exclusively in Congress by Article I. President Lincoln’s admission that he acted outside the law was clear when he told lawmakers he believed his actions were not “beyond the constitutional competency of Congress.”¹⁰⁹ In other words, he acknowledged using both Article I and Article II powers. In this manner he relied on the following

¹⁰³ See generally ALEXANDER DECONDE, THIS AFFAIR OF LOUISIANA (1976) (documenting the chronological history of the Louisiana Purchase and its correlation with the ideology of expansionism in the Jeffersonian era.); MARSHALL SPRAGUE, SO VAST SO BEAUTIFUL A LAND: LOUISIANA AND THE PURCHASE (1974) (discussing the political, economic, and social factors that led to the Louisiana Purchase).

¹⁰⁴ 10 THE WRITINGS OF THOMAS JEFFERSON 410–11 (Andrew A. Lipscomb et al. eds., 1903); Letter from Thomas Jefferson to John C. Breckinridge (Aug. 12, 1803), available at <http://teachingamericanhistory.org/library/document/letter-to-john-c-breckinridge/>.

¹⁰⁵ 10 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 104, at 418; Letter from Thomas Jefferson to Wilson Cary Nicholas (Sept. 7, 1803), in LIBERTY AND ORDER: THE FIRST AMERICAN PARTY STRUGGLE 310 (Lance Banning ed., 2004).

¹⁰⁶ 10 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 104, at 417.

¹⁰⁷ JOHN YOO, CRISIS AND COMMAND: THE HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH 426 (2009).

¹⁰⁸ JOHN YOO, WAR BY OTHER MEANS: AN INSIDER’S ACCOUNT OF THE WAR ON TERROR 114 (2006).

¹⁰⁹ 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 3225 (James D. Richardson ed., 1897).

prerogative: the need in an emergency to act in the absence of law and sometimes against it, with the requirement that he seek statutory authority from the legislative branch. Congress passed legislation that “approved and in all respects legalized and made valid, to the same intent and with the same effect [all the acts, proclamations, and orders of the President, etc.] as if they had been issued and done under the previous express authority and direction of the Congress of the United States.”¹¹⁰

The destroyers-for-bases deal of 1940 is sometimes described as an example of presidential prerogative and even the exercise of inherent authority. In a message to Congress on September 2, 1940, President Franklin D. Roosevelt announced he had entered into an agreement to transfer fifty “over-age” destroyers to Great Britain in return for receiving ninety-nine-year leases to a number of British air and naval bases in North and South America.¹¹¹ Robert Shogan’s book *Hard Bargain* carries this subtitle: *How FDR Twisted Churchill’s Arm, Evaded the Law, and Changed the Role of the American Presidency*. It is an insightful study, but the theme of illegality that pervades the book is never substantiated. Nowhere does Shogan identify a law that Roosevelt evaded or violated.

The key law that Shogan discusses in some detail—the Walsh Amendment—was complied with in full. Signed by Roosevelt on June 25, 1940, the amendment provided that no U.S. military or naval weapon or equipment be transferred, exchanged, sold, or otherwise disposed of unless the chief of naval operations and the chief of staff of the Army “first certifi[ed] that such material [was] not essential to the defense of the United States.”¹¹² When Roosevelt sent his message to Congress announcing the destroyers-for-bases deal, he forwarded several papers, including the certification by Admiral Harold Stark.¹¹³

IV. THE UNITARY EXECUTIVE

Scholars offer varying accounts on what is called the Vesting Clause. Article II, Section 1 begins, “The executive Power shall be vested in a President of the United States of America.”¹¹⁴ What is the scope of that power? Does it include powers specifically identified in the Constitution augmented by necessary implied powers? Or is the “executive Power” a source of power that goes beyond enumerated and implied powers? Some scholars, such as Steven Calabresi and Kevin Rhodes, read the Vesting Clause to empower the President to exercise exclusive control over the executive branch, creating a “Unitary Executive” that

¹¹⁰ Act of Aug. 6, 1861, ch. 63, § 3, 12 Stat. 316, 326 (1861); see Louis Fisher, *Abraham Lincoln: Preserving the Union and the Constitution*, 3 ALB. GOV’T L. REV. 503, 528 (2010).

¹¹¹ 86 CONG. REC. 11354, 11354 (1940).

¹¹² An Act to Expedite National Defense, and for Other Purposes, Pub. L. No. 76-671, § 14(a), 54 Stat. 676, 681 (1940).

¹¹³ 86 CONG. REC. 11354–57 (1940).

¹¹⁴ U.S. CONST. art. II, § 1.

cannot be limited by Congress through means such as statutory provisions that restrict the President's power to remove executive officials.¹¹⁵

This interpretation is too broad because the President's removal power was restricted from the beginning. In 1789, when Congress created the Office of Comptroller in the Treasury Department, it established an executive official who did not serve at the pleasure of the President; instead, that official exercised an independent capacity to ensure the legality of expenditures.¹¹⁶ Moreover, the nature of U.S. government places certain agency actions beyond presidential control. That is especially true when statutory duties are vested with particular executive officers ("ministerial" actions), during agency adjudication, and during the rise of independent agencies.¹¹⁷ The Constitution does not empower the President to carry out the laws—that would impose an impossible assignment. Instead, the President's duty is to "take Care that the Laws be faithfully executed."¹¹⁸ Many decisions remain legitimately outside the President's direct control, provided officials discharge their statutory tasks.¹¹⁹ It would be impermissible for presidents or White House aides to interfere with judgments by executive officials regarding veterans' benefits, social security payments, and many other matters left to the departments and agencies assigned those statutory duties.¹²⁰

In *Marbury v. Madison*,¹²¹ Chief Justice Marshall drew an important distinction between two types of executive duties, ministerial and discretionary.¹²² With the latter, the heads of executive departments function purely as political agents of the President, and courts will not interfere.¹²³ But executive officers also receive legal duties assigned to them by Congress. Focusing on the secretary of state, Chief Justice Marshall said when the office exercises ministerial duties, it extends to the nation and the law.¹²⁴ By statutory command, Congress may direct executive officers to carry out certain activities. When a secretary of state performs

¹¹⁵ See Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1155, 1158 (1992).

¹¹⁶ 1 ANNALS OF CONG. 611–14 (1789).

¹¹⁷ See, e.g., A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346, 1347–49 (1994); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 106–19 (1994); Morton Rosenberg, *Congress's Prerogative over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627, 636–37 (1989); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 587–91 (1984).

¹¹⁸ U.S. CONST. art. II, § 3.

¹¹⁹ See Fisher, *The Unitary Executive*, *supra* note 34, at 574–78.

¹²⁰ *Id.* at 576.

¹²¹ 5 U.S. (1 Cranch) 137 (1803).

¹²² *Id.* at 162.

¹²³ *Id.* at 165–66.

¹²⁴ See *id.* at 149–50.

“as an officer of the United States,” he or she is “bound to obey the laws.”¹²⁵ Functioning in that capacity, the secretary acts “under the authority of law, and not by the instructions of the president. It is a ministerial act which the law enjoins on a particular officer for a particular purpose.”¹²⁶

Many opinions issued by attorneys general and federal courts have analyzed ministerial/legal duties. In 1823, Attorney General William Wirt advised President James Monroe about the scope of his control over agency accounting officers.¹²⁷ The laws regulating the settlement of public accounts required auditors in the Treasury Department to receive and examine accounts, and certify them to the comptrollers, who then examined them and reached a judgment.¹²⁸ Although the Constitution requires the President to “take care that the laws be faithfully executed,” Wirt said the President is not expected to execute each law by himself.¹²⁹ If officers under his supervision fail to carry out their duties, the President needs to see they are “displaced, prosecuted, or impeached.”¹³⁰ But it “could never have been the intention of the constitution, in assigning this general power to the President to take care that the laws be executed, that he should in person execute the laws himself,” a demand Wirt called “an impossibility.”¹³¹

If auditors and comptrollers “continue to discharge their duties faithfully,” the President “has no authority to interfere.”¹³² Any person dissatisfied with the comptroller’s decision may, under law, appeal within six months.¹³³ At that point, “the right of appeal stops; there is no proviso for an appeal to the President.”¹³⁴ In subsequent years, Wirt had frequent occasion to instruct President Monroe that he had no business being involved in the settlement of accounts.¹³⁵ He said that interference by the President “in any form would, in my opinion, be illegal.”¹³⁶ It “would be an unauthorized assumption of authority for [the President] to interfere in the case in any manner whatever.”¹³⁷ Two opinions by Wirt in 1825 reinforced that conclusion.¹³⁸

In 1831, Attorney General Roger Taney advised President Andrew Jackson that a dispute over the decision of the Treasury Department about a government contractor must be left to Congress. An appeal could not be submitted to the

¹²⁵ *Id.* at 158.

¹²⁶ *Id.*

¹²⁷ The President and Accounting Officers, 1 Op. Att’y Gen. 624 (1823).

¹²⁸ *Id.* at 626–27.

¹²⁹ *Id.* at 624.

¹³⁰ *Id.* at 625.

¹³¹ *Id.*

¹³² *Id.* at 624.

¹³³ *Id.* at 627.

¹³⁴ *Id.*

¹³⁵ *See, e.g.,* The President and the Comptroller, 1 Op. Att’y Gen. 636 (1824).

¹³⁶ The President and Accounting Officers, 1 Op. Att’y Gen. 678, 680 (1824).

¹³⁷ *Id.* at 681.

¹³⁸ The President and Accounting Officers, 1 Op. Att’y Gen. 705 (1825); The President and Accounting Officers, 1 Op. Att’y Gen. 706 (1825).

President. The power to provide relief “resides in Congress; and to them, in my opinion, the application must be made.”¹³⁹ Other attorneys general have provided the same advice to presidents.¹⁴⁰

Litigation requiring officials in the administration to comply with statutory duties are generally directed at the heads of executive departments.¹⁴¹ They can also be aimed at the President. In 1974, an appellate court held that President Nixon had violated the law by refusing to carry out a statute designed to regulate federal pay. It was his obligation either to submit to Congress a pay plan recommended by the salary commission or offer an alternative proposal. President Nixon failed to do either. The court said the law required him to do one or the other. President Nixon had no constitutional authority to ignore statutory policy.¹⁴²

V. SOLE-ORGAN DOCTRINE

In the 1936 *Curtiss-Wright* decision, Justice Sutherland included extraneous material to develop the doctrine that the President is the “sole organ” of foreign affairs and has a range of constitutional authority that is exclusive and plenary.¹⁴³ The doctrine seems to come with impressive credentials. It relies on a speech given in 1800 by John Marshall when he served in the House of Representatives.¹⁴⁴ A year later he became Chief Justice of the Supreme Court.¹⁴⁵ Yet Chief Justice Marshall never took the position that Justice Sutherland attributed to him. Justice Sutherland’s argument is not only mere dicta. It is also plain judicial error.

In defending the secret warrantless surveillance program that President Bush authorized after the terrorist attacks of 9/11, in violation of the FISA statute of 1978, the Justice Department relied in part on the sole-organ doctrine. It claimed that the activities by the NSA “are supported by the President’s well-recognized inherent constitutional authority as Commander in Chief and sole organ for the

¹³⁹ Duties of Accounting Officers—Forfeitures, 2 Op. Att’y Gen. 480, 482 (1831). For similar opinions by Taney, see Accounts and Accounting Officers, 2 Op. Att’y Gen. 507, 508–09 (1832); Appeals from Accounting Officers, 2 Op. Att’y Gen. 544, 544–45 (1832).

¹⁴⁰ See, e.g., Eight-Hour Law, 19 Op. Att’y Gen. 685 (1890); Charwin Land Grant, 18 Op. Att’y Gen. 31 (1884); Patent Extensions, 13 Op. Att’y Gen. 28 (1869); Appeal of Illinois to the President, 11 Op. Att’y Gen. 14 (1864); Rotation of the President to the Departments, 10 Op. Att’y Gen. 527 (1863); Bollman’s Case, 10 Op. Att’y Gen. 526 (1863); Office and Duties of Att’y Gen., 6 Op. Att’y Gen. 326, 341 (1854); Power of the President Respecting Pension Cases, 4 Op. Att’y Gen. 515, 516 (1846).

¹⁴¹ See, e.g., *Train v. City of New York*, 420 U.S. 35 (1975); *Kendall v. U.S. ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1938); *United States v. Schurz*, 102 U.S. 378 (1880); *Berends v. Butz*, 357 F. Supp. 143 (D. Minn. 1973).

¹⁴² *Nat’l Treasury Emps. Union v. Nixon*, 492 F.2d 587, 590–91, 604 (D.C. Cir. 1974).

¹⁴³ *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319–22 (1936).

¹⁴⁴ *Id.* at 319–20.

¹⁴⁵ CHARLES F. HOBSON, *THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW* 7 (1996).

Nation in foreign affairs.”¹⁴⁶ It might have been “well-recognized” by some Justice Department attorneys, but it has not been by anyone who has taken time to read Marshall’s speech.

The issue in *Curtiss-Wright* involved legislative, not presidential, power: How much may Congress delegate *its* power to the President in the field of international affairs? In upholding the delegation, Justice Sutherland claimed that the principle that the federal government is limited to enumerated and implied powers “is categorically true only in respect to our internal affairs.”¹⁴⁷ In arguing for independent and exclusive presidential powers in the field of foreign affairs, Justice Sutherland relied on Marshall’s speech.

What Justice Sutherland and the Justice Department failed to understand is Marshall’s purpose in giving his speech. Marshall never advocated inherent, plenary, exclusive, or independent powers for the President in foreign affairs.¹⁴⁸ Some members of the House of Representatives wanted to censure or impeach President John Adams for turning over to England a British subject charged with murder. In his floor address, Marshall explained why no grounds existed to sanction President Adams. The Jay Treaty provided for extradition in cases involving the charge of murder. President Adams acted not on the basis of plenary or inherent power but on express language in a treaty, with treaties under Article VI of the Constitution included as part of the “supreme Law of the Land.”¹⁴⁹ He was not making foreign policy independently. He was carrying out national policy decided by both elected branches.

Reviewing his service as secretary of state and Chief Justice of the Supreme Court, it is apparent that Marshall never advanced any notion of inherent, plenary, exclusive, or independent powers of the President in external affairs. As Chief Justice, he looked solely to Congress in matters of war.¹⁵⁰ Marshall understood that when a conflict arose between what Congress provided by statute and what a President announced by proclamation, in time of war, the statute represents the law of the nation.¹⁵¹

¹⁴⁶ Memorandum from Alberto R. Gonzales, Att’y Gen., to the Majority Leader of the U.S. Senate, on Legal Authorities Supporting the Activities of the National Security Agency Described by the President (Jan. 19, 2006), *available at* <http://www.justice.gov/olc/opiniondocs/nsa-white-paper.pdf>.

¹⁴⁷ *Curtiss-Wright*, 299 U.S. at 316.

¹⁴⁸ 10 ANNALS OF CONG. 596, 613 (1800).

¹⁴⁹ U.S. CONST. art. IV, cl. 2. For greater detail on Marshall’s speech, see Louis Fisher, *Presidential Inherent Power: The “Sole Organ” Doctrine*, 37 PRES. STUD. Q. 139 (2007) and Louis Fisher, *Study No. 1: The “Sole Organ” Doctrine*, in STUDIES ON PRESIDENTIAL POWER IN FOREIGN RELATIONS (L. Libr. Cong., 2006-03236) [hereinafter *The “Sole Organ” Doctrine*], *available at* <http://www.loufisher.org/docs/pip/441.pdf>.

¹⁵⁰ See *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801) (“The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this enquiry.”).

¹⁵¹ See *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177–79 (1804) (holding that a proclamation issued by President Adams during the Quasi-War was invalid because it conflicted with a congressional statute).

Although Justice Sutherland's dicta is clear judicial error, federal courts continue to cite the sole-organ doctrine to uphold broad definitions of presidential power in foreign relations and support extensive delegations of legislative power to the President.¹⁵² Lower court judges, Supreme Court Justices, and their law clerks appear never to read Marshall's speech to form an independent and informed judgment. The Supreme Court in 1972 described the President as authorized "to speak as the sole organ" of the national government.¹⁵³ Authority to *speak* is not equivalent to exclusive authority to *make* or *formulate* foreign policy.

A contemporary example of a court relying on the sole-organ doctrine to promote exclusive presidential power occurred on July 23, 2013. The D.C. Circuit ruled that congressional legislation in 2002 "impermissibly intrudes" on the President's power to recognize foreign governments.¹⁵⁴ The statute required the secretary of state to record "Israel" as the place of birth on the passport of a U.S. citizen born in Jerusalem if the parent or guardian so requests.¹⁵⁵ Four times the court cited Justice Sutherland's dicta in *Curtiss-Wright* describing the President as the "sole organ" in external affairs.¹⁵⁶

In citing *Curtiss-Wright* and other rulings, the D.C. Circuit acknowledged it was relying on judicial dicta. Citing language from one of its decisions in 2006, it stated, "To be sure, the Court has not *held* that the President exclusively holds the power [of recognition]. But, for us—an inferior court—'carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative.'"¹⁵⁷ There are two qualifiers: carefully and generally. Justice Sutherland's dictum was manifestly careless.

There is no doubt the Supreme Court regularly cites the sole-organ doctrine in *Curtiss-Wright*, but no matter how often the Court repeats an error, it remains an error and should not be used as an authoritative source to decide constitutional issues. An error, by repetition, does not emerge as truth. Instead of endlessly repeating errors, federal judges and the Supreme Court should take time to read Marshall's speech and correct Justice Sutherland's misrepresentation.¹⁵⁸ It may be embarrassing to admit that a Supreme Court decision issued in 1936 and cited regularly as valid authority over the decades is nonetheless wrong. Failure to do so, however, would reveal a Court willing to rest comfortably on faulty precedents.

¹⁵² See, e.g., Fisher, *The "Sole Organ" Doctrine*, *supra* note 149, at 23–27.

¹⁵³ *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 766 n.2 (1972) (citing *United States v. Belmont*, 301 U.S. 324, 330 (1937)).

¹⁵⁴ *Zivotofsky v. Sec'y of State*, 725 F.3d 197, 220 (D.C. Cir. 2013).

¹⁵⁵ *Id.* at 200.

¹⁵⁶ Louis Fisher, *Getting It Wrong Again and Again—Judicial Error's Compounding Effect*, NAT'L L. J., Nov. 18, 2013, at 31, 31.

¹⁵⁷ *Zivotofsky*, 725 F.3d at 212 (citation omitted).

¹⁵⁸ See Louis Fisher, *Judicial Errors that Magnify Presidential Power*, FED. LAW., Jan./Feb. 2014, at 66–72; Louis Fisher, *D.C. Circuit Court Adopts Old Judicial Error to Inflate Executive Power*, ROLL CALL (Sept. 13, 2003, 2:31 PM), http://www.rollcall.com/news/dc_court_adopts_old_judicial_error_to_inflate_executive_power_commentary-227606-1.html.

VI. EXTERNAL SUBSTITUTES FOR CONGRESS

From 1789 to 1950, presidents who wanted to take the country from a state of peace to a state of war knew the Constitution required them to come to Congress to obtain either a declaration or authorization.¹⁵⁹ That understanding radically changed in June 1950 when President Harry Truman went to war against North Korea without seeking congressional authority. President Truman did so by citing “authorization” not from Congress but from the United Nations Security Council. His precedent in circumventing Congress—and the Constitution—has been followed by other presidents, including George H. W. Bush, Bill Clinton, and Barack Obama. In addition to accepting the Security Council as a substitute for Congress, presidents also falsely claim “authorization” from NATO allies.

The constitutional issue can be appreciated by asking a series of questions. May a treaty amend the Constitution? No. May a President and the Senate through the treaty process (as with the UN Charter and NATO) create an international or regional body that functions as a constitutional substitute for Congress? No. May a treaty transfer the Article I authority of Congress to an organization outside the United States? Again: No.

Under the UN Charter, each nation enters into “special agreements” to commit troops and other military assistance to a UN force. On July 2, 1945, from Potsdam, President Truman sent a cable to Senator Kenneth McKellar, who placed it in the *Congressional Record*. The cable stated, “When any such agreement or agreements are negotiated it will be my purpose to ask the Congress for appropriate legislation to approve them.”¹⁶⁰ President Truman thus made a public commitment that he would not act unilaterally but would seek advance support from both houses of Congress through a bill or joint resolution.

Chapter VII of the UN Charter governs UN responses to threats of peace, breaches of peace, and acts of aggression. Special agreements concluded between the Security Council and member states “shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.”¹⁶¹ Each nation therefore needed to determine its “constitutional processes.” Parliamentary regimes might be inclined to vest that decision in the prime minister. The United States had to decide its constitutional requirements.

After the Senate ratified the UN Charter, Congress debated the meaning of “constitutional processes” for the United States. Section 6 of the UN Participation Act, enacted on December 20, 1945,¹⁶² authorized the President to negotiate a special agreement with the Security Council, “which shall be subject to the approval of the Congress by appropriate Act or joint resolution,” providing for the numbers and types of armed forces, their degree of readiness and general location,

¹⁵⁹ See LOUIS FISHER, PRESIDENTIAL WAR POWER 23–26, 32–44, 51–54, 65–67, 74–79 (3d ed. 2013).

¹⁶⁰ 91 CONG. REC. 8185 (1945).

¹⁶¹ U.N. Charter art. 43, para. 3.

¹⁶² United Nations Participation Act of 1945, ch. 583, 59 Stat. 619 (1945).

and other requirements.¹⁶³ Presidents could commit armed forces to the United Nations only after Congress explicitly granted its approval by statute.¹⁶⁴

Other limits on presidential authority to involve American troops in UN military operations were included in amendments to the UN Participation Act in 1949. The statute permitted the President to unilaterally provide military forces to the United Nations “for cooperative action,” yet this discretionary authority faces stringent limitations. U.S. troops serve only for “peaceful settlement of disputes and not involving the employment of armed forces contemplated by chapter VII of the United Nations Charter”¹⁶⁵ They could serve only “as observers, guards, or in any noncombatant capacity, but in no event shall more than a total of one thousand of such personnel be so detailed at any one time.”¹⁶⁶ Nothing in the text or legislative history of the UN Charter, the UN Participation Act, or the 1949 amendments authorized unilateral presidential decisions to commit U.S. troops to an offensive action without prior congressional approval.

With statutory safeguards supposedly in place to protect congressional powers and constitutional government, President Truman on June 26, 1950, spoke to the American public about “unprovoked aggression [by North Korea] against the Republic of Korea.”¹⁶⁷ He said the Security Council ordered a withdrawal of the invading forces to positions north of the 38th parallel.¹⁶⁸ At that point, President Truman did not commit U.S. forces to the conflict. A day later, however, after North Korea failed to cease hostilities and withdraw to the 38th parallel, he ordered U.S. air and sea forces to assist South Korea.¹⁶⁹

A July 3 memo by the State Department offered legal justifications for unilateral presidential exercises of military force, including, “The President, as Commander in Chief of the Armed Forces of the United States, has full control over the use thereof.”¹⁷⁰ From 1789 to 1950, no President argued that this clause empowered him to take the country from a state of peace to a state of war. The memo identified “many instances” where armed force was used by presidents to protect American lives and property.¹⁷¹ None of the examples involved offensive military operations against another country.

In addition to relying on Security Council resolutions as a means of authorizing military operations, presidents turned to NATO allies to sanction

¹⁶³ *Id.* § 6, 59 Stat. at 621 (codified as amended at 22 U.S.C. § 287d (2012)).

¹⁶⁴ *Id.*

¹⁶⁵ Act of Oct. 10, 1949, Pub. L. No. 81–341, § 7(a), 63 Stat. 734, 735 (codified as amended at 22 U.S.C. § 287d-1(a) (2012)).

¹⁶⁶ *Id.* § 7(a)(1), 63 Stat. at 736.

¹⁶⁷ Statement by the President on the Violation of the 38th Parallel in Korea, 1 PUB. PAPERS 491 (June 26, 1950).

¹⁶⁸ *Id.*

¹⁶⁹ Statement by the President on the Situation in Korea, 1 PUB. PAPERS 492 (June 27, 1950); *see also* GLENN D. PAIGE, *THE KOREAN DECISION: JUNE 24–30, 1950*, at 178 (1968).

¹⁷⁰ Authority of the President to Repel the Attack in Korea, 23 DEP’T STATE BULL. 173, 173 (1950).

¹⁷¹ *Id.* at 174–78.

armed force against other nations. The same issue of defining “constitutional processes” under Article 43 of the UN Charter applies equally well to language in mutual-defense treaties. The NATO treaty was signed in 1949 by the United States, Canada, and ten European countries.¹⁷² Article 5 provides that “an armed attack against one or more of them in Europe or North America shall be considered an attack against them all.”¹⁷³ It further states that, in the event of an attack, NATO countries may exercise the right of individual or collective self-defense recognized by Article 51 of the UN Charter and assist the country or countries attacked by taking “such action as it deems necessary,” including use of armed force.¹⁷⁴ Article 11 of the treaty provides that it shall be ratified “and its provisions carried out by the Parties in accordance with their respective constitutional processes.”¹⁷⁵

Mutual security treaties may not constitutionally transfer the war-making power from Congress to the President, acting through such organizations as NATO. Moreover, mutual security treaties were entered into for *defensive* purposes. President Clinton in Bosnia and Kosovo, and President Obama in Libya, used NATO military forces against countries that did not attack or threaten the United States.¹⁷⁶ The operations were offensive, not defensive. Mutual security treaties require action through “constitutional processes.”¹⁷⁷ Unilateral offensive wars by the President lack any constitutional support.

By providing that the NATO treaty be carried out in accordance with constitutional processes, the Senate Foreign Relations Committee “intended to ensure that the Executive Branch of the Government should come back to the Congress when decisions were required in which the Congress has a constitutional responsibility.”¹⁷⁸ The treaty “does not transfer to the President the Congressional power to make war.”¹⁷⁹ Congress reinforced that constitutional principle with section 8(a) of the War Powers Resolution of 1973.¹⁸⁰ It provides that authority to introduce U.S. forces into hostilities shall not be inferred “from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing” the introduction of American troops.¹⁸¹

As with President Truman, President George H. W. Bush claimed that a resolution from the UN Security Council provided sufficient constitutional authority to use military force against Iraq. After Saddam Hussein invaded Kuwait

¹⁷² NATO, NATO IN FOCUS 11 (2013), available at http://www.nato.int/cps/en/natolive/topics_81135.htm.

¹⁷³ North American Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ See Fisher, *supra* note 1, at 25–29.

¹⁷⁷ *Id.*

¹⁷⁸ Richard H. Heindel et al., *The North Atlantic Treaty in the United States Senate*, 43 AM. J. INT’L L. 633, 649 (1949).

¹⁷⁹ *Id.* at 650; see also Michael J. Glennon, *United States Mutual Security Treaties: The Commitment Myth*, 24 COLUM. J. TRANSNAT’L L. 509, 517–18 (1986).

¹⁸⁰ *Id.* at 543.

¹⁸¹ War Powers Resolution of 1973, § 8(a)(2), 50 U.S.C. §§ 1541–1548 (2012).

on August 2, 1990, President Bush sent several hundred thousand troops to Saudi Arabia and the Middle East for defensive purposes.¹⁸² His decision in November to double the size of U.S. forces enabled him to wage offensive war.¹⁸³ He made no effort to seek authority from Congress.

Instead, the administration sought support from the United Nations to take offensive action against Iraq. On November 29, 1990, at the urging of the Bush administration, the Security Council passed Resolution 678, authorizing member states to use “all necessary means” to force Iraqi troops out of Kuwait.¹⁸⁴ Thomas Franck, a specialist in international law, wrote an article for *The New York Times* entitled *Declare War? Congress Can't*.¹⁸⁵ In his view, once the Security Council acts, member states have no grounds to wait and seek authority from their legislatures.¹⁸⁶ Franck’s position is not supported by the language “constitutional processes” in the UN Charter, the legislative history of the Charter, the text of the UN Participation Act, or the U.S. Constitution.

On January 8, 1991, President Bush asked Congress to pass legislation supporting his use of the military. When questioned by reporters the next day whether he needed a statute from Congress, he replied, “I don’t think I need it. . . . I feel that I have the authority to fully implement the United Nations resolutions.”¹⁸⁷ Congress passed legislation authorizing offensive action against Iraq. In signing the bill, Bush claimed he could act without statutory authority:

As I made clear to congressional leaders at the outset, my request for congressional support did not, and my signing this resolution does not, constitute any change in the long-standing positions of the executive branch on either the President’s constitutional authority to use the Armed Forces to defend vital U.S. interests or the constitutionality of the War Powers Resolution.¹⁸⁸

His signing statement did not alter the fact that the resolution passed by Congress authorized him to act. Law depends on what a signed bill provides, not what a President says about it.

President Clinton circumvented Congress several times by citing “authority” from the United Nations and NATO. On July 31, 1994, the Security Council

¹⁸² Andrew Rosenthal, *Bush Sends U.S. Force to Saudi Arabia as Kingdom Agrees to Confront Iraq*, N.Y. TIMES, Aug. 8, 1990, at A1.

¹⁸³ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-B-254380, NAT’L SEC. & INT’L AFFAIRS DIV., REPORT TO THE SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT, COMMITTEE ON GOVERNMENTAL AFFAIRS, U.S. SENATE 1 (1993).

¹⁸⁴ S.C. Res. 678, para. 2, U.N. Doc. S/RES/678 (Nov. 29, 1990).

¹⁸⁵ Thomas M. Franck, *Declare War? Congress Can’t*, N.Y. TIMES, Dec. 11, 1990, at A27.

¹⁸⁶ *Id.*

¹⁸⁷ Exchange With Reporters on the Persian Gulf Crisis, 1 PUB. PAPERS 20 (Jan. 9, 1991).

¹⁸⁸ *Id.* at 40.

adopted a resolution authorizing all member states, particularly those in the region of Haiti, to use “all necessary means” to remove the military leadership on that island.¹⁸⁹ On this occasion, the Senate spoke promptly and clearly by passing a “sense of the Senate” amendment, stating that the Security Council resolution “does not constitute authorization for the deployment of United States Armed Forces in Haiti under the Constitution of the United States or pursuant to the War Powers Resolution (Public Law 93-148).”¹⁹⁰ The nonbinding amendment passed, 100 to 0.¹⁹¹

On September 15, in a nationwide televised address, President Clinton announced he was prepared to use military force against Haiti “to carry out the will of the United Nations.”¹⁹² He made no such commitment to the will of the United States or requirements of the U.S. Constitution. An invasion became unnecessary when former President Jimmy Carter helped negotiate an agreement to have the military leaders in Haiti step down.¹⁹³ House and Senate debates were strongly critical of President Clinton’s belief that he could act militarily against Haiti without statutory authority. Both houses passed legislation stating the “the President should have sought and welcomed Congressional approval before deploying United States Forces to Haiti.”¹⁹⁴

In 1993, President Clinton claimed legal support from both the Security Council and NATO to order air strikes in Bosnia. As he explained the next year, “The authority under which air strikes can proceed, NATO acting out of area pursuant to U.N. authority, requires the common agreement of our NATO allies.”¹⁹⁵ Through his reasoning, it was necessary to obtain approval from France, Italy, and other NATO allies, but not from Congress. On September 12, 1995, President Clinton claimed the bombing attacks were “authorized by the United Nations.”¹⁹⁶ Toward the end of 1995, Clinton ordered twenty thousand American ground troops to Bosnia. On no occasion did he request or receive statutory authority for these military operations.¹⁹⁷

¹⁸⁹ Julia Preston, *U.N. Authorizes Invasion of Haiti; Resolution Adds Pressure on Generals*, WASH. POST, Aug. 1, 1994, at A1.

¹⁹⁰ 140 CONG. REC. 19306-24 (1994).

¹⁹¹ *Id.*

¹⁹² William J. Clinton, *Address to the Nation on Haiti: September 15, 1994*, II PUB. PAPERS 1558, 1559 (1994).

¹⁹³ See Ann Devroy, *Clinton Halts Invasion as Haiti Leaders Agree to Quit; U.S. Forces Land Today*, WASH. POST, Sept. 19, 1994, at A1.

¹⁹⁴ 140 CONG. REC. 28239 (1994) (passing S.J. Res. 229); *id.* at 28565–78 (passing H. J. Res. 416). A day later the House, by voice vote, agreed to S.J. Res. 229. *Id.* at 29223–24.

¹⁹⁵ William J. Clinton, *Remarks and an Exchange with Reporters on Bosnia: February 6, 1994*, I PUB. PAPERS 183, 186 (1994).

¹⁹⁶ William J. Clinton, *Public Papers of the Presidents*, II PUB. PAPERS 1353 (1995).

¹⁹⁷ FISHER, *supra* note 159, at 185–91; RYAN C. HENDRICKSON, *THE CLINTON WARS* 73–77 (2002).

By October 1998, Clinton was threatening the Serbs with air strikes on the basis of NATO authority.¹⁹⁸ He did not request statutory support from Congress. The House and Senate took several votes on concurrent resolutions, but such votes have no legal value and cannot provide statutory authorization. Various votes were taken but did not become law.¹⁹⁹ The war against Yugoslavia began on March 24, 1999, without any statutory or constitutional support.

In 2001 and 2002, President George W. Bush received advance authority from Congress for the wars against Afghanistan and Iraq.²⁰⁰ In 2011, President Obama continued the pattern of initiating military action against another country without congressional authorization. Although Libya had not threatened the United States in any manner, he cited “authorization” from the Security Council to bomb air defense systems and Libyan forces as part of a no-fly zone policy.²⁰¹ Later, President Obama and administration officials spoke of receiving “authorization” from NATO allies.²⁰² President Obama was the first President to conduct offensive military operations beyond the ninety-day limit of the War Powers Resolution, eventually stretching to seven months.

The administration concluded that the military operations did not constitute “war” or “hostilities.”²⁰³ An Office of Legal Counsel memo, in April 2011, argued that in order to meet the constitutional meaning of war there had to be “prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period.”²⁰⁴ According to that interpretation, a nation with superior military force could pulverize another country—including through the use of nuclear weapons—and there would be neither war nor hostilities.

CONCLUSION

Federal courts continue to rely on judicial precedents that were false when first issued and continue to lack legitimacy. A prominent example is Justice

¹⁹⁸ William J. Clinton, *Remarks on the Decision of Certain Health Maintenance Organizations to Opt Out of Some Medicare Markets*, II PUB. PAPERS 1763, 1765 (1998).

¹⁹⁹ FISHER, *supra* note 159, at 197–200; HENDRICKSON, *supra* note 197, at 117–37.

²⁰⁰ See 116 Stat. 1498 (2002); 115 Stat. 224 (2001).

²⁰¹ Letter from President Obama to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (March 21, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/03/21/letter-president-regarding-commencement-operations-libya>.

²⁰² Harold Koh, Legal Adviser to the State Dep’t, Remarks at the American Society of International Law Annual Meeting: Statement Regarding Use of Force in Libya (March 26, 2011), *available at* <http://www.state.gov/s/l/releases/remarks/159201.htm>.

²⁰³ Louis Fisher, *Military Operations in Libya: No War? No Hostilities?*, 42 PRESIDENTIAL STUD. Q. 176, 180 (2012).

²⁰⁴ Memorandum from Caroline D. Krass, Principal Deputy Assistant Att’y Gen., Office of Legal Counsel, on the Authority to Use Military Force in Libya 8 (Apr. 1, 2011), *available at* <http://www.fas.org/irp/agency/doj/olc/libya.pdf>.

Sutherland's misleading account in *Curtiss-Wright* of the President as "sole organ" in external affairs, explained in Part V above. Although it is a favorite citation by courts, executive officials, and scholars to promote plenary, independent, exclusive, and inherent power for the President, nothing in John Marshall's speech provides any support for that position. A judicial error should not guide constitutional interpretation.

It is well known that courts frequently err when citing precedents. Justice Jackson observed in 1945, "Judges often are not thorough or objective historians."²⁰⁵ More recently, in 1989, Justice Scalia stated that the judicial system "does not present the ideal environment for entirely accurate historical inquiry."²⁰⁶ Relying on the experience with his own staff, he said courts do not "employ the ideal personnel."²⁰⁷ In addition, in a book published after he left the Court, Justice John Paul Stevens, observed that "judges are merely amateur historians" whose interpretations of past events "are often debatable and sometimes simply wrong."²⁰⁸ Even with these limitations, if federal judges want to rely on Marshall's sole-organ speech in 1800, they should take the time to read it and reach an independent judgment. Simply repeating erroneous dicta is irresponsible.

In the *Steel Seizure* case of 1952, Justice Jackson objected to "nebulous, inherent powers never expressly granted but said to have accrued to the [presidential] office from the customs and claims of preceding administrations."²⁰⁹ He added, "Loose and irresponsible use of adjectives colors all non-legal and much legal discussion of presidential powers. 'Inherent' powers, 'implied' powers, 'incidental' powers, 'plenary' powers, 'war' powers and 'emergency' powers are used, often interchangeably and without fixed or ascertainable meanings."²¹⁰ Contemporary scholars have added other supposedly independent presidential powers: "residual," "preclusive," "completion," the "sole organ" doctrine, and the "unitary executive."

Those vague and often historically false assertions attempt to inflate presidential power beyond the only legitimate sources of authority: enumerated and implied. When properly understood, on very rare occasions a President may exercise a prerogative power. For the last six decades, many scholars have advanced theories of presidential power that exaggerate executive virtues and pay little or no attention to presidential violations of public law, basic principles of republican government, separation of powers, and constitutional checks and

²⁰⁵ Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 6 (1945).

²⁰⁶ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 861 (1989).

²⁰⁷ *Id.*

²⁰⁸ JUSTICE JOHN PAUL STEVENS, *FIVE CHIEFS: A SUPREME COURT MEMOIR* 225–26 (2011).

²⁰⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring).

²¹⁰ *Id.* at 646–47.

balances.²¹¹ Other presidential scholars have effectively rejected this impulse for hagiography.²¹²

From World War II to the present, Congress has demonstrated little interest in protecting and comprehending its institutional powers, developing policy, exercising oversight of the executive branch, and fighting off encroachments by other branches.²¹³ From Harry Truman to Barack Obama, presidents repeatedly claim the right to take the country from a state of peace to a state of war without seeking authority from Congress. Unconstitutionally, they go to war by citing approval from the UN Security Council and NATO.

²¹¹ For studies on the pronounced academic bias that promotes presidential power, see 116 CONG. REC. 34914–28 (1970) (discussing Thomas E. Cronin’s, *The Textbook Presidency and Political Science*); David Gray Adler, *Textbooks and the President’s Constitutional Powers*, 35 PRESIDENTIAL STUD. Q. 376, 376 (2005); Louis Fisher, *Scholarly Support for Presidential Wars*, 35 PRESIDENTIAL STUD. Q. 590, 590 (2005); and Louis Fisher, *supra* note 1, at 17.

²¹² See FREDERICK A. O. SCHWARZ JR. & AZIZ Z. HUQ, UNCHECKED AND UNBALANCED 1–9 (2007); see also generally GENE HEALY, *THE CULT OF THE PRESIDENCY: AMERICA’S DANGEROUS DEVOTION TO EXECUTIVE POWER* (2008) (documenting the ways the political system has been corrupted by an unchecked executive branch); RICHARD M. PIOUS, *WHY PRESIDENTS FAIL: WHITE HOUSE DECISION MAKING FROM EISENHOWER TO BUSH II* (2008) (documenting presidential failures); JAMES P. PFIFFNER, *POWER PLAY: THE BUSH PRESIDENCY AND THE CONSTITUTION* (2008) (arguing that the Bush administration had consistently undermined constitutional principles); PETER M. SHANE, *MADISON’S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY* (2009) (arguing that modern presidentialism is contrary to the kind of governance that the founding fathers intended).

²¹³ See generally JASMINE FARRIER, *CONGRESSIONAL AMBIVALENCE* (2010) (analyzing the effect of congressional deference of power to the other governmental branches); LOUIS FISHER, *CONGRESSIONAL ABDICATION ON WAR AND SPENDING* (2000) (arguing that Congress has “repeatedly abdicated fundamental war and spending powers to the president”); BARBARA HINCKLEY, *LESS THAN MEETS THE EYE: FOREIGN POLICY MAKING AND THE MYTH OF THE ASSERTIVE CONGRESS* (1994) (discussing the debate over the balance of powers between the President and Congress over foreign policy); GEORGE I. LOVELL, *LEGISLATIVE DEFERRALS* (2003) (suggesting that legislatures defer to judicial judgment to make legislative decisions in order to avoid criticism for bad decisions); F. UGBOAJA OHAEGBULAM, *A CULTURE OF DEFERENCE* (2007) (exploring legislative deference to the executive branch on issues of foreign policy); STEPHEN R. WEISSMAN, *A CULTURE OF DEFERENCE* (1995) (arguing that Congress has failed in playing a proper role in foreign affairs).