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NEW PATTERNS IN JUDICIAL CONTROL OF THE PRESIDENCY: 1950's to 1970's

P. ALLAN DIONISOPoulos*

INTRODUCTION

NEW PATTERNS IN JUDICIAL CONTROL of the presidency have emerged since the early 1950's, permitting us to question the validity of the usual commentaries of constitutional scholars.¹ For the most part, these commentaries have focused upon the infrequency and inefficacy of judicial checks upon presidential powers, claiming that they operate only upon minor issues or in cases arising under unique circumstances. For example, Professor Schubert has stated that Americans expect the Supreme Court to “uphold the majesty of the law against the pretensions of a usurper.” However, he adds that such an expectation is not supported by history, since “in every major constitutional crisis . . . the President has emerged the victor.”² Other scholars, such as Professor Rossiter, have found little in American constitutional history resembling a major victory for the Court, with the possible exceptions of Schechter Poultry Co. v. United States,³ and Youngstown Sheet and Tube Co. v. Sawyer.⁴

Distinguished from these negative commentaries is the claim offered herein that important changes in the pattern of executive-judicial encounters began to take place in the 1950’s. However, American constitutional scholars have not perceived this development, apparently because of a tendency to view the judiciary’s control of the presidency in terms of its own limitations rather than the restraints imposed by it on a co-equal branch. For example, the Youngstown decision of 1952⁵ was seen as a major but aberrant victory. However, hindsight permits us to herald this decision as having initiated a

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³295 U.S. 495 (1935).
⁵Id.
major break with the past. In fact, we may now characterize it in the terms used by Professor Westin in describing the most recent executive-judicial encounter, *United States v. Nixon.* That decision, Westin stated, was both predictable and atypical. Possibly, *Nixon,* may be characterized as typical of what has been occurring within the past quarter of a century.

I. *United States v. Nixon: Typical or Atypical?*

The predictability of *Nixon,* Westin reports, derives from the fact that since *Marbury v. Madison* the Court has followed "a set of basic, unwritten rules" in deciding whether it will accept jurisdiction over a case that questions the legitimacy of presidential action. If there is the likelihood of presidential defiance of a ruling or of reprisals against the prestige and powers of the judiciary, the Court will avoid involvement, leaving the resolution of the issue to the political process. On the other hand, if the Court anticipates popular and congressional approval of its ruling, it will accept jurisdiction in the belief that the President will not act in disobedience to its decision.

While the decision's predictability is in accord with other commentaries on judicial control of the presidency, its atypicality is in accord with the argument that the courts' power to check presidential actions may no longer be described by such narrow terms. Recent developments indicate that the situation is no longer the same as it had been prior to the 1950's, for, as Westin points out, *Nixon* "does not fit at all the general character of major executive-judicial encounters in our history." However, this decision does fit into the most recent history of such confrontations in that, since 1957, "and especially during the last two years of the Nixon Presidency, the federal courts did decide some important cases that curtailed presidential claims of authority."

For purposes of this study, that which is characterized as atypical is more important than that described as predictable. In fact, given the more recent history to which Westin refers, it is likely that *Nixon* is typical, not atypical, just as we may now say that the *Youngstown* decision of 1952.

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8 5 U.S. (1 Cranch) 137 (1803).

9 See A. Westin, supra note 6, at xii-xiii.

10 Id. at xiii.

11 See commentaries cited note 1 supra.

12 See A. Westin, supra note 6, at xvii-xix.

13 Id. at xix.

was not aberrant but a forerunner in a new era in which federal courts acted boldly in challenging presidential powers. The *Youngstown* decision was unique in that it deviated from other wartime cases in which the Supreme Court refused to question the President's role as Commander in Chief and to challenge his responsibility to fulfill America's military mission. At best, the Court acted to curb presidential powers only after the war had ended, or after the government had announced its intention to implement the very policy the Court now ordered.

The aberrant *Youngstown* and the atypical *Nixon* may yet prove to be no more than identifiable points on a time line, marking the beginning and the end of one era in which federal courts willingly questioned the legitimacy of presidential actions. On the other hand, there is also the possibility that these decisions will emerge as landmarks of a quite different kind, distinguishing the most recent historical record from that compiled earlier, and indicating that a change in the pattern of executive-judicial encounters is presently occurring. There are indications that federal courts are carving out areas wherein their involvement can be expected, while reserving to the executive branch other provinces into which the judiciary will not intrude, such as international politics and questions of war and peace.

A change in the pattern has occurred, even though the courts continue to hold that some questions are not amenable to the judicial process. Its visibility is marked by the fact that the Supreme Court and the lower federal courts have entertained a variety of questions about the legitimacy of claimed presidential prerogatives and powers regarding: (1) the scope of executive privilege; (2) the authority to order warrantless, electronic surveillance of domestic security risks, a practice which dates back to May, 1940; (3)...

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15 See, e.g., Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943); The Prize Cases, 67 U.S. (2 Black) 635 (1863).

16 See, e.g., Duncan v. Kahanamoku, 327 U.S. 304 (1946); Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866).

17 See *Ex parte* Endo, 323 U.S. 283 (1944).


19 Certiorari was denied in the following cases: Sarnoff v. Schultz, 409 U.S. 929 (1972); Da Costa v. Laird, 405 U.S. 979 (1972); Mora v. McNamara, 389 U.S. 934 (1967); Mitchell v. United States, 386 U.S. 972 (1967).


the power to cope with subversives; (4) the extent to which the executive branch may impose prior restraints upon publications in the name of national security; (5) the power to impound funds appropriated by Congress; (6) the exercise of the removal power over members of independent regulatory agencies; and (7) the boundaries within which the executive branch must conduct criminal prosecutions. The cases which raised these questions are significant in themselves for they appeared with some frequency and revealed a willingness by federal judges to curtail presidential powers in particular areas. They are also meaningful because many of the issues raised were ones of first impression, thereby permitting the courts to render landmark decisions and to set forth judicial guidelines to govern the policy makers. For example, in unanimously declaring that a president is without authority to order warrantless, electronic surveillance of domestic security risks, the Supreme Court voided a practice exercised by the executive branch for more than thirty years. At the same time, it cautioned members of Congress against violating the Fourth Amendment, should they decide to confer surveillance power on the presidency. The federal courts by entering into alliances with Congress, state and local authorities, and segments of the private sector, as in the impoundment and environmental cases, were able to provide judicial answers where none previously existed and made it possible for Congress to seize the initiative, as it did by limiting the President’s power to impound appropriated funds. Also noteworthy


29 Id. at 310-11, where it is reported that since May, 1940, Presidents had been authorizing warrantless wiretapping and surveillance “in matters involving the defense of the nation.” See also V. NAVASKY, KENNEDY JUSTICE 135-155 (1971).


31 See State Highway Comm’n v. Volpe, 479 F.2d 1099 (8th Cir. 1973).


is the fact that in a number of recent cases the President was named the defendant. This practice was unknown since Mississippi v. Johnson, and is contrary to an interpretation, reported less than a decade ago, regarding the stance adopted by the Supreme Court that, "while the President himself cannot be held liable to judicial process, the subordinates who carry out his orders can." Apparently federal courts are no longer reluctant to hold the President liable to judicial process.

II. PARALLELS IN RECENT CONSTITUTIONAL DEVELOPMENTS

Are recent circumstances responsible for whatever victories the courts have known in more recent years? This question should be answered, since scholars usually attribute any judicial victory over the presidency to the situation in which the case arose. For example, they state that the Supreme Court will act boldly after the emergency has passed, and after a policy change has been signaled by the government. The Supreme Court will also act when the judges can rely on popular and congressional approval of their ruling. Circumstances have been important in these more recent instances of federal courts' checking presidential power. However, they are not the usually identified ones. What should be noted is the parallel developments which have occurred on two fronts, since the courts have acted vigorously to curb congressional powers no less than the executive's. The incidents of congressional-judicial encounters have occurred within a larger time frame, dating back to 1943, in which federal courts have voided national laws at a rate and for purposes never before known in American constitutional history. For instance, between 1791 and 1965, not a single national law was voided on First Amendment grounds. Since 1965, twelve


55 71 U.S. (4 Wall.) 475 (1811).

56 W. WILLOUGHBY, CASES IN CONSTITUTIONAL LAW 92 (3d ed. 1968).


58 See C. Pritchett, supra note 1, at 381.


60 See Ex parte Endo, 323 U.S. 283 (1944).

61 See A. Westin, supra note 6.


63 See, e.g., Duncan v. Kahanamoku, 327 U.S. 304 (1946); Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866).
nullified for abridging First Amendment freedoms.\textsuperscript{44} Another fundamental freedom — the right to travel — was accorded the protection of the Due Process Clause in the Fifth Amendment;\textsuperscript{45} and the Supreme Court indirectly nullified the anti-abortion statute for the District of Columbia, which violated a woman’s right to privacy under several amendments.

Since World War II, other national statutes had been voided either because they abridged constitutional rights or because they denied equal protection to certain classes of Americans. The Supreme Court nullified ten laws on due process grounds\textsuperscript{46} between 1943 and 1974, and it voided others by making them virtually unenforceable\textsuperscript{47} or enforceable only in specified situations.\textsuperscript{48} The Court also voided five statutory provisions which forcibly deprived Americans of citizenship.\textsuperscript{49} It also declared that Congress has no authority to place civilians under the jurisdiction of military tribunals, whether they are former servicemen,\textsuperscript{50} dependents residing with service personnel overseas,\textsuperscript{51} or civil service employees at American military installations outside the United States.\textsuperscript{52}

\begin{itemize}
\item \textsuperscript{45}Aptheker v. Rusk, 378 U.S. 500 (1964).
\item \textsuperscript{48}Three sections of the Uniform Code of Military Justice (10 U.S.C. §§ 880, 930 and 934) were in issue in O'Callahan v. Parker, 395 U.S. 258 (1969). In holding that a soldier could not be tried by court martial for offenses committed away from military installation, the Court declined to nullify the laws themselves, and thereby impliedly affirmed the tradition that military personnel be tried by a military tribunal irrespective of the jurisdiction in which the offense was committed. This was underscored by Justices Harlan, Stewart and White in their dissenting opinion founded at 281-82.
\item \textsuperscript{50}See Toth v. Quarles, 350 U.S. 11 (1955).
\item \textsuperscript{51}See Kinsella v. Singleton, 361 U.S. 234 (1960); Reid v. Covert, 354 U.S. 1 (1957).
Between 1954 and 1975, the Supreme Court voided eight laws on equal protection grounds, and a ninth was declared unconstitutional by a district court panel for the same reason. Within the past few years, the Court also voided provisions in national laws in Oregon v. Mitchell and Department of Agriculture v. Murray. Finally, because of a spillover effect from state cases, the Court nullified all national laws that permitted the unequal imposition of the death penalty which had been possible under state laws.

This record since World War II exhibits a willingness of federal courts to protect civil liberties to a degree never before known in our history. More important, however, it sets a pattern within which the recent instances of judicial control over the presidency can be inserted. The assumption is offered that a more vigorous judicial response to questions concerning the legitimacy of presidential actions bears a direct relationship to these other recent developments in constitutional law. This response is not the result of the long, divisive, “presidential” war in Vietnam. In the search for circumstances to explain recent executive-judicial encounters, this larger judicial record will be seen to parallel the latest developments in American constitutional law.

III. Questions About the Alternatives Available to the Courts

To substantiate the claim that a new pattern in executive-judicial confrontations has been emerging, an examination and evaluation of decisions since the 1950's must be made. Before proceeding to that task, an even larger frame of reference must be established, one that both accepts Westin's idea of "a set of basic, unwritten rules," and rejects the narrow definition he provides. Westin contends that this set provides answers only for the jurisdictional question and is comprised of but two options. First, the Court will avoid acquiring jurisdiction if it is probable that the President will defy a ruling or that the prestige of the judicial branch will suffer. Second,
it will accept jurisdiction if it can rely upon popular and congressional support.\textsuperscript{61}

This "set of basic, unwritten rules" is deficient in significant respects. First, the judiciary is by no means limited to two alternatives in deciding jurisdictional issues. Second, as demonstrated in the cases challenging America's involvement in Vietnam,\textsuperscript{62} the fact that the Court may rely upon popular and congressional support is no guarantee that jurisdiction will be assumed. Moreover, what is necessary is an understanding of the relationship between the courts and the presidency, something that requires analysis beyond the question of when will the Court acquire jurisdiction. These points may be briefly elaborated before a different set of standards for understanding executive-judicial encounters is offered.

Federal courts may avoid confrontation with the executive branch for reasons other than that their prestige is at stake or that their rulings may be defied. For example, the judges may sincerely believe that the resolution of an issue should be properly left to the political process. With respect to this point, Judge Learned Hand once commented: "For myself, it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not."\textsuperscript{63} Also appropriate on this point is a statement by Justices Powell, Burger and Blackmun concurring in \textit{Frontiero v. Richardson}.\textsuperscript{64}

But democratic institutions are weakened, and confidence in the restraint of the Court is impaired, where we appear unnecessarily to decide sensitive issues of broad social and political importance at the very time they are under consideration within the prescribed constitutional processes.\textsuperscript{65}

Judicial self-restraint may thus come from a sincere commitment to making democratic institutions function responsibly. In that case, the likely response of the President and the possibility of approval from the general public and Congress have no relevancy as to whether the Court will involve itself.

On a number of occasions, beginning with \textit{Mitchell v. United States}\textsuperscript{66}

\textsuperscript{61} A. Westin, \textit{supra} note 6, at xiii.
\textsuperscript{63} L. Hand, \textit{The Bill of Rights} 73 (Atheneum ed. 1972).
\textsuperscript{64} 411 U.S. 677 (1973).
\textsuperscript{65} Id. at 692. \textit{See also} Holtzman v. Schlesinger, 414 U.S. 1304, 1314 (1973).
\textsuperscript{66} 386 U.S. 972 (1967).
and Mora v. McNamara and continuing through Holtzman v. Schlesinger, the constitutionality of America's military presence in Vietnam was questioned. In the late 1960's and early 1970's, our involvement in Vietnam and Cambodia was increasingly questioned by Americans for a number of reasons. The toll that the war took of men and material, the fact that neither a military nor political solution appeared possible, the unfavorable attitude that Americans expressed against continued involvement in Southeast Asia, and the increasing Congressional opposition to our military presence in Vietnam created precisely the climate in which the Court could have expected popular and congressional support for a judicial ruling on the constitutional issues raised. Nevertheless, with the exception of Justice Douglas and sporadic dissent from others, the Court steadfastly refused to review such cases. Popular and congressional support was foreseeable but irrelevant to the Court's decision against granting jurisdiction.

It is also possible for the judiciary to foresee victory for reasons other than the anticipation of popular and congressional approval of the ruling. In fact, there exists a class of issues over which the judiciary need not hesitate at all to determine issues of a peculiarly legal character arising in criminal cases. For example, the courts may dismiss indictments, as when Marshall found the charge of treason against Aaron Burr to be constitutionally defective. The courts may declare that the executive branch has no authority to obtain the evidence in the manner acquired. A federal judge may rule that continued prosecution is impermissible because of corruption of the case by the executive branch's tactics. The courts may dismiss cases because of the government's refusal to make portions of the evidence available to the

72 See, e.g., cases cited notes 18, 19, and 62 supra.
73 8 U.S. (4 Cranch) 469 (1807).
defense. On such issues, the judiciary may act with impunity, knowing that there remains nothing that the President can do to defy its rulings. The President may be able to use some other agency for bringing the accused to justice. Such was the case when Jefferson succeeded in having a co-conspirator of Burr, John Smith of Ohio, removed from the Senate, after prosecution of the Senator was dropped due to the dismissal of Burr's indictment. However, the options for circumventing the courts in such cases are extremely limited.

There are also matters of importance other than the judiciary's acceptance of jurisdiction. An understanding of judicial control of the presidency requires knowledge of the consequences of the courts' involvement. For example, it may be that the presidential action has been legitimized by the Supreme Court and henceforth serves as a precedent, albeit one that is later challenged in various forums. It may be that the decision comes too late to be of any benefit, other than compensatory, to the plaintiff, as in Humphrey's Executor v. United States and Wiener v. United States, but it may be that it serves as a deterrent to future Presidential actions. Judicial involvement and a subsequent decision rendered may also have a deterrent effect, even though the President responsible for the action or policy no longer occupies the office. These last examples point to the need to com-


78 The Prize Cases, 67 U.S. (2 Black) 635 (1863) sanctioned the President's committing the United States to hostilities, without a declaration of war, and of otherwise putting into effect policies considered necessary in achieving military goals. Undoubtedly, this became a precedent for other Presidents. That it may nonetheless be criticized is evident in the voluminous literature of recent years, questioning the validity of presidential wars. See especially Legality of United States Participation in the Viet Nam Conflict: A Symposium, 75 Yale L.J. 1084 (1966). Another example is Korematsu v. United States, 323 U.S. 214 (1944). In his dissenting opinion, Justice Jackson warned his colleagues against sanctioning "a military expedient that has no place under the Constitution." Korematsu v. United States, 323 U.S. 214, 248 (1944). See also V. Rosenblum & A. Castberg, Judges as Validators of Governmental Actions, Cases on Constitutional Law: Political Roles of the Supreme Court 144 (1973).


80 295 U.S. 602 (1935).


82 The deterrent effect may be questionable in view of Wiener which presumably should never have happened, given Humphrey's Executor. However, how many unauthorized removals might have occurred had these cases not been decided?

83 Lincoln's proclamation that civilians charged with aiding the Confederacy would be tried by military commissions was not voided until after the end of the Civil War and the assassination of President Lincoln. Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866). Similarly, an order issued by President Truman to prevent subversives from acquiring employ-
prehend not only when or whether the courts will become involved, but also the efficacy of their check upon the presidency. There are, then, "basic, unwritten rules" that encompass more than the two alternatives described by Westin.

IV. MEANS FOR UNDERSTANDING JUDICIAL CONTROL OF THE PRESIDENCY

A set of guidelines, similar to Brandeis' criteria which explains why the Court exercises the power of judicial review, can be drawn from American constitutional history. It can provide answers to a variety of questions with respect to confrontations between the executive and judicial branches. Some guidelines will help clarify those issues over which either the President or the judiciary may claim an exclusive power to make a final disposition. They will also direct our attention to the consequences, both immediate and long-term, of the courts' involvement. Still other guidelines will aid in determining the efficacy of judicial control of the presidency. Is judicial control operative only when minor issues are involved or because of peculiar circumstances? Or may we say that this judicial check is more efficacious than the literature would lead us to believe? The following are offered as more capable means for judging executive-judicial encounters than Westin's "set of basic, unwritten rules."

The judiciary can act boldly to curb presidential powers, however, the President can defy the ruling by maintaining the invalidated policy. The courts are powerless to provide a meaningful response. Ex parte Merryman is the sole example of this situation. It was one in which Chief Justice Roger Taney, while serving in his concurrent capacity as a circuit court judge, issued a writ of habeas corpus. The writ was defied by military authorities acting under presidential direction. Taney then declared this presidential order unconstitutional. Abraham Lincoln neither acknowledged receipt of Taney's opinion nor acted in a manner indicative of presidential compliance.

Secondly, there is also a strong likelihood that the Court will decline jurisdiction when it is apparent that the President would not abide by a judicial ruling. The reasons given, if an opinion is written, may entail such legal grounds as the doctrine of political questions, nonjusticiability, or the

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85 17 F. Cas. 144 (No. 9487) (C.C.D. Md. 1861).
86 See C. Pritchett, supra note 1; C. Rossiter, The Supreme Court and the Commander in Chief 25 (1951).
party's lack of standing to sue. *Ex parte Vallandigham* stands as a prime example of judicial avoidance, and probably occurred because President Lincoln would likely have reacted in the manner that he did following Taney's decision in *Ex parte Merryman*.

On other occasions, the Court may refuse to involve itself at all by its denial of certiorari without comment. This occurred in the cases which questioned the constitutionality of military involvement in Vietnam and the authority of former President Nixon to continue bombing of Khmer Rouge camps in Cambodia. The implications are that the Court will refuse to exercise jurisdiction and to adjudicate the issue by relying upon the political question doctrine or other "passive virtues." However, avoidance is actually prompted by fear of Presidential recalcitrance with the possibility of resulting diminution to judicial prestige. The true motivational reasons become evident when the underlying circumstances are evaluated or when dissenting statements of justices favoring the grant of jurisdiction are scrutinized.

There are instances that have the appearance of the foregoing cases. However, refusal to grant jurisdiction arises not from fear for its prestige, but from its sincere belief that the issue will be more properly resolved by political institutions. Although the issue may be constitutional in nature, such as what constitutes a republican form of government within the meaning of the Constitution, the Court declares that the question does not lend itself to a judicial response.

The judiciary involves itself in cases questioning the legitimacy of a presidential action. The Court renders a decision, declaring that the executive branch acted in an improper or illegal manner. The Court then avoids a decisive confrontation by declining to issue an order providing the plaintiff's

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88 17 F. Cas. 144 (No. 9487) (C.C.D. Md. 1861).
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requested remedy.\textsuperscript{95} The President is thereby assured victory although one
that may be modified by the Court's simultaneous assertion of its power of
judicial review.\textsuperscript{96} This will create a precedent upon which the judiciary may
subsequently rely.

The courts may assume jurisdiction in cases challenging the legitimacy
of an exercised presidential power, and ultimately decide the case in such
manner as to legitimize the presidential action.\textsuperscript{97} Although the decision may
later be questioned as to its constitutional validity,\textsuperscript{98} it nevertheless serves
as a precedent for similar actions by subsequent Presidents.\textsuperscript{99}

The judiciary may also acquire jurisdiction, and then transcend the
scope of the issues presented and actually enhance presidential power.\textsuperscript{100}
On the other hand, it may declare that the President has neither constitutional
nor statutory authority for the action exercised, thereby voiding the power.
However, the decision may be weakened by the fact that divergence of
opinions among the Justices exists. A majority of justices declare that the
President does have the power claimed, while others limit the power to certain
circumstances.\textsuperscript{101} Hence the determination of the invalidity of the power may
vary according to the factual setting.

\textsuperscript{95} Marbury v. Madison, 5 U.S. (1 Cranch) 137, 173 (1803).
\textsuperscript{96} Id. at 176. Ordinarily this decision is credited with establishing the power of judicial
review as inherent in the judicial power. However, the power to nullify laws was previously-
known and exercised in United States v. Yale Todd, a 1794 decision that was not
reported until it appeared as a footnote to United States v. Ferreira, 54 U.S. (13 How.)
42, 52 (1854), and in Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792). In Hylton v.
United States, 3 U.S. (3 Dall.) 171 (1796), it was proposed that the Court void a
carriage tax on constitutional grounds. By taking jurisdiction and validating the law, the
Court implied that it had the power to declare legislative acts null and void.
\textsuperscript{97} See, e.g., Korematsu v. United States, 323 U.S. 214 (1944). In his dissenting opinion,
Justice Jackson cautioned against the Court's sanctioning "a military expedient that has
no place under the Constitution." See also The Prize Cases, 67 U.S. (2 Black) 635
(1863), which sanctioned presidential war powers exercised in the absence of a declara-
tion of war by Congress.
\textsuperscript{98} See, e.g., textual materials cited note 79 supra. In recent years considerable literature
has been published questioning the validity of "presidential wars." E.g., Legality of United
\textsuperscript{99} See Department of State, Office of Legal Adviser, Legality of United States Participation
\textsuperscript{100} See, e.g., United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).
\textsuperscript{101} See, e.g., Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952). Even
though the Court, by a 6 to 3 decision, declared that President Truman had neither
constitutional nor statutory authority to order the seizure and operation of the steel
mills, this may also be seen as a 5 to 4 vote for exactly this executive power under
certain circumstances. There were a total of seven opinions presented, including five
concurred opinions and one dissent by Justices Vinson, Reed and Minton. To the
dissenters' support of this particular presidential power may be added the votes of
Justices Clark and Burton, for they stated that under certain circumstances the President
may act as Truman had on this occasion. Id. at 659 and 662. In a similar manner, New
York Times Co. v. United States, 403 U.S. 713 (1971), represents less of an impact to
The judiciary may grant jurisdiction. However, while it finds that a corrective remedy is available with respect to the executive action in question, it may then decide that the responsibility for curbing presidential power lies elsewhere.\textsuperscript{102}

The Court may even act to curb presidential power. However, its decision may become operative at a time when its impact is significantly lessened for the President responsible for the questionable action or order, since he may no longer reside in office and may even be deceased.\textsuperscript{108} Its importance is then determined by its effect as a deterrent to other Presidents.

A decision curbing presidential power may also be rendered too late to benefit the plaintiff, who dies while the case is making its way through the courts, \textit{Humphrey's Executor v. United States},\textsuperscript{104} or whose office may have terminated before the Court reviewed the issue, \textit{Wiener v. United States}.\textsuperscript{105} At best the plaintiff or his estate is compensated. But the President was able to effectively remove a member of an independent regulatory commission and to fill the vacancy with an appointee of his own choosing.

The presumed deterrent effect of the \textit{Humphrey} decision in 1935 may be of doubtful validity, as shown almost a quarter of a century later in \textit{Wiener}. The only effective check, should the President decide to act contrary to \textit{Humphrey} and \textit{Wiener}, would be the Senate's refusal to confirm any presidential nominee.\textsuperscript{106}

The Court may accept jurisdiction and feel secure in declaring that presidential power than may facially appear. The several concurring opinions by Brennan, White, Stewart and Marshall lend support to the argument that in some cases, as when national security is threatened, prior restraint of publications may be ordered.

\textsuperscript{102}See, \textit{e.g.}, \textit{Laird v. Tatum}, 408 U.S. 1, 15 (1972), wherein Chief Justice Burger remarked:

Carried to its logical end, this approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of executive action; such a role is appropriate for the Congress acting through its committees and the 'power of the purse'; it is not the role of the judiciary, absent actual present or immediately threatened injury resulting from unlawful governmental action.

\textit{See also} \textit{Environmental Protection Agency v. Mink}, 400 U.S. 73 (1973).

\textsuperscript{103}See cases cited note 83 supra.

\textsuperscript{104}295 U.S. 602 (1935).

\textsuperscript{105}357 U.S. 349 (1958).

\textsuperscript{106}U.S. CONST. art. II, §2 provides:

...[H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law ....

Of course, members of independent regulatory agencies are appointed in accordance with procedures established by law, however, the power to nominate is vested in the President, and the power to approve is in the Senate, as provided for in the Constitution.
the President exceeded constitutional or statutory authority, simply because
he is "on the ropes," battered by his several constituencies. 107

The judiciary can safely involve itself where questions are raised relative
to competing claims for power by the executive and legislative branches. 108
The request for the resolution of these claims may arise from a third party, 109
or it may be that Congress had withdrawn its objection before a decision
had been reached. 110

Federal courts can curb presidential power by entering into alliances
with Congress, the states, or other entities. The broad-based character of these
alliances may persuade the President to refrain from acting contrary to
the ruling. 111

Even though the situation may exist as just mentioned, since the
Supreme Court generally cannot be involved until the cases have come
through appellate channels, 112 the President may disregard the lower court
decisions rendered against him. 113 The implications are, as first suggested
in the Watergate tapes case, 114 that the President will comply only when there
is a "definitive" ruling by the highest tribunal. 115

The Court may act to curb presidential power and be reasonably
certain that the President will obey, providing it elicits the "definitive"

107 Principal examples include United States v. Nixon, 418 U.S. 683 (1974); Youngstown
111 The best examples are the several Watergate tapes and documents cases. See, e.g., United
However, it should be noted that the alliances in the impoundment cases (note 24 supra)
did not force President Nixon to comply with the many decisions against him. Possibly the
situation would have been different had the Court agreed to exercise its original jurisdiction
in Georgia v. Nixon, 414 U.S. 810 (1973), and had it ruled as lower federal courts did. The
impoundment decisions were at least a contributing factor in Congress' passage of the Budget-
getting Act of 1973 and Nixon's signing the legislation into law. The purpose of the act was
to impose curbs on presidential impoundment practices of long standing. Note, Impoundment
of Funds, 86 Harv. L. Rev. 1505 (1973).
113 See Glass, Presidential Impoundment of Congressionally Appropriated Funds: An Analy-
sis of Recent Court Decisions, Library of Congress, Congressional Research Service
(1974).
115 After the Court of Appeals ruled 5 to 2 against President Nixon, he expressed confidence
"that the dissenting opinions, which are in accord with what until now has always been
regarded as the law would be sustained upon review by the Supreme Court." Text of the
President's statement was reported in the press on October 20, 1973. See also A. Westin,
supra note 6, at xx.
ruling to which President Nixon spoke. Such a ruling is one in which there is a single opinion which is unanimously supported by all participating justices.\footnote{118}

Federal courts may also use legal devices such as a dismissal of an indictment,\footnote{117} or they may effectively block further prosecution through other means.\footnote{118} As shown by United States v. Burr\footnote{119} and United States v. Ellsberg,\footnote{120} prosecution may be the \textit{sine qua non} for the administration — a goal for which there is no peer.

As demonstrated by the foregoing, federal courts wield the capability to provide a variety of responses when the legitimacy of presidential actions is scrutinized. They may confirm presidential powers by refusing to grant certiorari.\footnote{121} They may acquire jurisdiction and sanction presidential actions by their approval of executive prerogatives and powers.\footnote{122} They may curb presidential powers, although the effects of their decisions must be variously evaluated.\footnote{123} Finally, there are situations in which federal courts may claim absolute supremacy, for no effective counterchecks exist among presidential powers.\footnote{124}

While not all of the previously stated guidelines are applicable to cases arising since 1957, those that are will enhance the understanding of when and how the courts become involved in confrontations with the presidency.

For purposes of this study, the cases arising since 1957 may be categorized as follows: 1) instances where the courts have strengthened presidential powers, either by declining to become enmeshed in the issue,\footnote{125}
or by indicating that the presidency may exercise power under certain circumstances, as in *New York Times Co. v. United States*;\(^{126}\) 2) cases in which federal courts have specified the limits of executive privilege and prerogatives;\(^{127}\) 3) the occasions in which the courts have prohibited, limited or sanctioned presidential powers to deal with subversives;\(^{128}\) 4) the instances where the courts have denied any power to the President, constitutional or statutory, to impound funds;\(^{129}\) and 5) the areas of judicial supremacy — criminal prosecutions that may be brought to a halt by application of a technical rule.\(^ {130}\)

V. JUDICIAL SANCTION OF PRESIDENTIAL POWERS

Federal courts have neither felt qualified to answer more than peripheral questions about international relations\(^ {131}\) nor disposed to regard central issues on war and peace as properly arising within the framework of the Constitution.\(^ {132}\) Their attitude is summarized in Justice Sutherland’s statement:

> ... the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.\(^ {133}\)

Thus disposed to regard these powers as inherent in sovereignty rather than granted by the Constitution, federal courts have been disinclined to acknowledge the questions arising therefrom as answerable by reference to the fundamental law.\(^ {134}\) Insofar as federal courts become involved at all, it is for the purpose of sanctioning presidential actions in these areas, as, for example, in protecting them against encroachment by state governments.\(^ {135}\) In defining these as powers inhering in sovereignty and therefore

\(^{126}\) 403 U.S. 713 (1971).

\(^{127}\) See, e.g., cases cited notes 20 and 21 supra.

\(^{128}\) See cases cited notes 21 and 22 supra.

\(^{129}\) See cases cited note 24 supra.

\(^{130}\) See cases cited notes 117-120 supra.


\(^{134}\) See J. Grossman & R. Wells, supra note 131, at 556-64.

in the national government, the judiciary claims no role for itself, even though it is one branch of a tripartite structure. Judicial self-restraint therefore becomes especially apparent with respect to foreign affairs and to questions of war and peace, although it also leads to bitter denunciations by some, such as Justice Douglas\textsuperscript{136} and several American scholars,\textsuperscript{137} who look upon this hands-off policy of the judiciary as nothing more than a subterfuge to avoid potentially embarrassing situations for the courts. As Justice Douglas stated in one of his dissenting opinions:

\textit{... there is a weighty view that what has transpired respecting Vietnam is unconstitutional, absent a declaration of war; that the Tonkin Gulf Resolution is no constitutional substitute for a declaration of war; that the making of appropriations was not an adequate substitute; and that “executive war-making” is illegal.}\textsuperscript{138}

Such views as these by Professor Wormuth, Douglas reports, are shared by others.\textsuperscript{139} For example, he cites Hughes, who spoke of the deleterious consequences for America by reason of the Court’s failure to answer the various questions about our involvement in Vietnam: \textit{“...to deny certiorari, to dismiss suits without a reasoned opinion has a tendency to arouse suspicion that the Court” is shirking its responsibility to apply the basic principles of the constitutional system.”}\textsuperscript{140}

Neither the prodding from Justice Douglas, the cynical expressions of various dissident groups, nor the form of the issue presented to the Court and by whom presented,\textsuperscript{141} could move the majority from its fixed position: questions about war and peace do not lend themselves to judicial solutions.

At one time, the Court had been no less adamant with respect to questions raised under the Guaranty Clause of the Constitution,\textsuperscript{142} which it saw as the sole source of political questions,\textsuperscript{143} including those raised about

\textsuperscript{136}See, e.g., Holmes v. United States, 391 U.S. 936, 948 (1968) (dissenting opinion).
\textsuperscript{139}Id.
\textsuperscript{140}Hughes, \textit{Civil Disobedience and the Political Question Doctrine}, 43 \textit{N.Y.U.L. Rev.} 1, 18 (1968).
\textsuperscript{141}Various litigants had sought standing to challenge the legality of the Vietnam War, including the Commonwealth of Massachusetts in Massachusetts v. Laird, 400 U.S. 886 (1970), private citizens caught up in the war by reason of service obligations, cases cited note 16 \textit{supra}, as well as a member of Congress in conjunction with members of the United States Air Force in Holtzman v. Schlesinger, 414 U.S. 1304 (1973).
\textsuperscript{142}U.S. Const. art. IV, §4.
\textsuperscript{143}See Luther v. Borden, 48 U.S. (7 How.) 581 (1849).
the apportionment of legislative seats.\textsuperscript{144} In time, however, questions not amenable to the judicial process under the Guaranty Clause became amenable by transferring them to a different constitutional source.\textsuperscript{145} Apparently no similar ruse could be employed by plaintiffs seeking to challenge United States involvement in Vietnam. Despite the form of the issue\textsuperscript{146} or the particular status of the litigants,\textsuperscript{147} the Court refused to assume jurisdiction. It remained adamant even though alliances were possible with members of Congress\textsuperscript{148} or state governments,\textsuperscript{149} and even though the Court could have anticipated popular and congressional approval, especially after public opinion polls registered increasingly greater opposition.\textsuperscript{150} The consequence was that a number of cases, dating from Mitchell \textit{v. United States}\textsuperscript{151} and Mora \textit{v. McNamara}\textsuperscript{152} to Holtzman \textit{v. Schlesinger}\textsuperscript{153} met similar responses — denial of certiorari\textsuperscript{154} or refusal to exercise original jurisdiction.\textsuperscript{155}

At best, Justice Douglas won occasional support from others, such as Justice Stewart in Mora and Justices Harlan and Stewart in Massachusetts \textit{v. Laird}\textsuperscript{156} for getting the Court to assume jurisdiction for the purposes of considering the more usual questions concerning political issues and standing and the specialized questions articulated by Douglas.\textsuperscript{157} These questions, he and Stewart contended, were “of great magnitude,” and included such matters as the status of individuals bringing suit, the “illegal” war conducted in Southeast Asia, the constitutionality of “presidential” wars, presidential power to order draftees to serve in Southeast Asia, the

\textsuperscript{144} See, e.g., cases cited note 94 supra.
\textsuperscript{147} E.g., conscientious objectors, Hart \textit{v. United States}, 391 U.S. 956 (1968), or draftees with orders to Vietnam, Mora \textit{v. McNamara}, 389 U.S. 934 (1967).
\textsuperscript{150} See 117 CONG. REC. 1191 (Feb. 1, 1971).
\textsuperscript{151} 386 U.S. 972 (1967).
\textsuperscript{152} 389 U.S. 934 (1967).
\textsuperscript{153} 414 U.S. 1304 (1973).
\textsuperscript{156} Id. at 900. Justices Harlan and Stewart briefly stated that the Court should consider the jurisdictional questions.
relationship of military intervention to treaty obligations, and the constitutional acceptability of the Tonkin Gulf Resolution as a substitute for a congressional declaration of war.\footnote{Mora v. McNamara, 389 U.S. 934, 935 (1967).}

No changes in executive-judicial relationships with respect to the responsibility of conducting American foreign and military policies had been introduced during the Vietnam conflict. The pattern of judicial responses corresponds with prior court inaction, and is in accord with the observations of Professors Grossman and Wells:

The functions of the Supreme Court in the formulation of American foreign policy are somewhat difficult to grasp, for several reasons. First, responsibility for the conduct of foreign relations has generally been considered an executive function, more or less immune from judicial interference.\footnote{See J. Grossman & R. Wells, supra note 131.}

Justice Marshall rationalized the Court's posture in \textit{Holtzman v. Schlesinger},\footnote{414 U.S. 1304 (1973).} attributing the reluctance to the Court's lack of expertise on military policy: "... we are on treacherous ground indeed when we attempt judgments as to its wisdom or necessity."\footnote{Id. at 1310.}

Apparently, in view of Marshall's additional comments about legislative involvement, as in Congress' attaching provisos regarding the spending of funds in military pursuits in Southeast Asia,\footnote{Id. at 1312.} any external checks upon presidential power must come from the legislature without an assist from the judiciary. Whether Congress is any better equipped to check presidential power in shaping foreign and military policy remains to be determined from the eventual application of the National Commitments Resolution of 1969\footnote{S. Res. 85, 91st Cong., 1st Sess. (1969).} and the War Powers Resolution of 1973.\footnote{87 Stat. 555 (1973).}

Another relevant decision, the per curiam opinion in \textit{New York Times Co. v. United States}\footnote{403 U.S. 713 (1971).} represented but a minor setback for the presidency, despite the notoriety attached to the publication of the Pentagon Papers. Seven justices\footnote{Id. at 724, 727, 730, 740, and 752.} justified prior restraint on publication under certain extreme circumstances; consequently, the decision did not operate as a severe

\footnote{156 Mora v. McNamara, 389 U.S. 934, 935 (1967).}
check upon presidential power. Had the absolutist position of Black and Douglas\textsuperscript{167} prevailed, prior restraint would have been prohibited at all times. As it was, the constitutional doctrine emerged unchanged from the proposition previously stated in \textit{Near v. Minnesota}\textsuperscript{168} and \textit{Bantam Books Inc. v. Sullivan}\textsuperscript{169} that the government bears a heavy burden in justifying prior restraint.\textsuperscript{170} While Brennan, Stewart, White and Marshall offered concurring opinions and could not agree upon common standards, they did not question the power of the executive to prohibit publication of sensitive, classified materials.\textsuperscript{171}

The \textit{Pentagon Papers} decision is an unlikely candidate for the ranks of precedents, since any similar curbing of executive power in the future would require a replication of the circumstances of this case, that someone accessible to classified materials reproduce them and make copies available to the press. The range of options available to the President by the multiplicity of opinions and the failure of the Court to produce a single, definitive statement regarding the scope of the power to impose prior restraints are reasons why \textit{New York Times Co. v. United States} cannot be judged anything more than a minor setback for the executive branch.

Late in 1974, the Supreme Court rendered still another decision\textsuperscript{172} which implicated both presidential power and the pardon President Ford granted to his predecessor. In holding that the President has the constitutional authority to reduce a death penalty to life imprisonment, and to make the recipient forever ineligible for parole,\textsuperscript{173} the majority broadly construed the powers to grant pardons and clemency. The President is at liberty, Chief Justice Burger stated, to render "acts of clemency [that] inherently call for discriminatory" decisions on his part.\textsuperscript{174} The decision's impact makes apparent the fact that no force in society — the courts, Congress or the electorate — may restrict the President in the exercise of this power.

The latter decision had been opportune for President Ford, whose pardon of former President Nixon and provoked much unfavorable criticism for various reasons, including the unequal treatment of others accused of

\textsuperscript{167} \textit{Id.} at 714 and 720.  
\textsuperscript{168} 283 U.S. 697 (1931).  
\textsuperscript{169} 372 U.S. 58 (1963).  
\textsuperscript{171} \textit{Id.} at 724, 727, 730, 740, 752.  
\textsuperscript{173} \textit{Id.} at 266. Actually, this decision varies little from \textit{Ex parte Grossman}, 267 U.S. 87 (1925).  
\textsuperscript{174} Id. at 268.
Watergate-related crimes. In fact, the decision came roughly in the closing moments of the Watergate cover-up trial of Haldeman, Ehrlichman, Mitchell, Mardian and Parkinson and underscored the unlimited character of this power and the possibility of granting presidential pardons in a discriminatory manner.

The foregoing cases have delineated certain subject matter areas — foreign and military policy-making, and granting pardons, reprieves and clemency — to which the President acts without interference from the judiciary. The Court had exercised a somewhat significant check upon the presidency in the Pentagon Papers Case, although not with the same boldness that it did in other cases of first impression. As noted, in deciding against prior restraint on that occasion, the Court failed to produce a major restraint on presidential power. In sharp contrast were the several instances in 1973 and 1974, when federal courts acknowledged the constitutional doctrine of executive privilege but limited presidential claims regarding this prerogative.

VI. SPECIFYING THE LIMITS OF EXECUTIVE PRIVILEGE

President Nixon vigorously contested congressional and judicial encroachment upon the executive branch throughout much of 1973 and 1974. Repeatedly, he argued that he was defending the presidency itself, not his administration, in asserting executive privilege with respect to tapes and documents demanded by the Grand Jury and by the Special Prosecutor's Office for use in the trial of the Watergate cover-up conspirators. His public pronouncements, reports in the press, and the briefs presented

\[175\] There is, of course, the specific limitation in the Constitution:

"...[A]nd he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment," U.S. Const. art. II, §2. Ford's pardon to Nixon for all federal offenses committed before the former President resigned his office on August 9, 1974, could not tie the hands of Congress should it proceed with impeachment. There is no definitive constitutional principle regarding the exercise of the impeachment power against a person who has resigned his office. However, what precedents there are fall on the side of the impeachment process ending with resignation. See J. Borkin, The Corrupt Judge: An Inquiry into Bribery and Other High Crimes and Misdemeanors in the Federal Courts (1962). See also P. Dionisopoulos, supra note 77, at 99.

\[176\] In his syndicated column of December 29, 1974, Jerald terHorst, who had resigned from President Ford's staff after the pardoning of former President Nixon, reported that he had received thousands of letters, some readers claiming that there was no authority for this action and others believing that it was "unfair of Ford to pardon his predecessor while doing nothing to help the former Nixon associates undergoing criminal prosecution for Watergate offenses."


179 See e.g., the text of President Nixon's statement regarding the tapes controversy as reported in the press, October 20, 1973.

in his behalf to the courts underscored his claim that the doctrine of executive privilege was derived from the constitutional principle of separation of powers, was sanctioned by precedents and was absolute and unqualified, thus not subject to question in other forums. Never before had there been an occasion in American constitutional history that the federal courts were forewarned about presidential defiance. The confrontation highlighted the apparent weakness with which the courts had previously shunned such issues. Nonetheless, the judges felt that they could not avoid involvement, no matter the consequences. "It is clear," the Court of Appeals stated in *Nixon v. Sirica*, "that the want of physical power to enforce its judgments does not prevent a court from deciding an otherwise justiciable case."

That presidential defiance failed to materialize may be attributed to the steadily worsening situation encircling the Nixon Administration. The demise was especially provoked by Alexander Butterfield's inadvertent revelation before the Senate Watergate Committee regarding a taping system installed in the White House and the existence of hundreds of recordings between the President and his chief advisers. Subsequent events steadily eroded the foundations of the administration, culminating one year later by the Supreme Court's ruling in *United States v. Nixon*. The President's resignation followed but two weeks after the highest bench unanimously ruled against him.

Certainly the circumstances surrounding *In re Grand Jury Subpoena Duces Tecum to Nixon*, *Nixon v. Sirica* and *United States v. Nixon* were of principal importance in the winning of such major victories by the federal courts. But it should be noted that the climate was not essentially

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182 See Brief for the Respondent, Cross-Petitioner Richard M. Nixon, President of the United States, *Id.* at 337.
185 487 F.2d 700 (1973).
186 *Id.* at 708.
190 487 F.2d 700 (D.C. Cir. 1973).
different from the period commencing in the late 1960's when dissatisfaction substantially increased with our continued involvement in Vietnam. Furthermore, the President could find little support in the federal courts for the constitutional position he asserted. The near unanimity of federal judges at all levels was as persuasive as any other factor in compelling presidential obedience. Certainly it was more so than President Truman's encounter in 1952 when his seizure order was invalidated.

Regardless of the reasons for the courts' victories in these encounters, the decisions were momentous in other respects. They provided judicial responses to questions that have long been present but at best have been only peripheral on other occasions, or, as in United States v. Burr, the consequences were so vague as to be variously interpreted. Is there a constitutional basis for executive privilege? If such a privilege exists, is it absolute and unqualified, as claimed by the Nixon administration, or is it subject to checks by the other branches of government?

"Usage and custom," federal courts have held, "are a source of law in all governments and have particular force where... the applicable written law is ambiguous or unclear." The validity of this principle is readily apparent to American scholars, who have only to point to such practices as the President's use of his department heads as an advisory body (a cabinet), or the President's circumvention of the explicit constitutional provision for treaty making by resort to executive agreements. As noted in Nixon v. Sirica, presidents have asserted executive privilege (without explicit reference to the terminology) from the moment that George Wash-

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193 In all, the tapes cases were heard by one District Court Judge, seven judges on the Court of Appeals, District of Columbia Circuit, and eight members of the Supreme Court. Justice Relinquist abstained. President Nixon won only two "votes" from the bench, Judges MacKinnon and Wilkey, who dissented in Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973).
194 See note 101 supra.
200 487 F.2d 700, 730 (D.C. Cir. 1973) (Appendix II).
ington refused to deliver documents demanded by the House of Representa-

tives in 1796. 201 There seems to be little doubt that this is a constitutional
doctrine buttressed by substantial precedent. 202 Nevertheless, there have
been those who have challenged the claims of presidents that documents
and materials within the control of the executive branch are not subject
to compulsory release. 203 Clearly, the view espoused by the federal judges
involved in the Watergate tapes cases were contrary, for they acknowledged,
in the words of Chief Justice Burger, that "[t]he President's need for complete
candor and objectivity from advisers calls for great deference from the
Courts." 204

While the federal courts recognized executive privilege as a constitutional
doctrine, they refused to permit the presidency the latitude asserted by the
Nixon Administration. The issue had been raised several months before
the existence of the Watergate tapes became public knowledge. 205 However, on
that occasion, a divided Court avoided a direct confrontation with the issue.
Representative Mink and several colleagues in Congress urgently requested
that President Nixon release data with respect to the "recommendations and
report by inter-departmental committee" on the advisability of nuclear tests
in the North Pacific. 206 This request was denied, compelling Rep. Mink
and thirty-two colleagues to institute a suit under the Freedom of Information
Act. 207 Significant breaches with tradition seemed imminent when the Court
of Appeals ordered the District Judge to examine the documents in camera
to ascertain if factual data could be separated and "disclosed without
impinging on the policy-making decisional processes intended to be protected
by" the exemption stated in the law. 208 However, the Supreme Court reversed
by narrowly construing the statutory provisions, thereby shunning the
executive privilege issue. 209 Justice Stewart concurred on the basis that the
case involved no more than an examination of "the meaning of two
exemptive provisions of the so-called Freedom of Information Act..." 210

Despite its narrow construction of the statute, the Court did provide

201 Id. at 732.
202 In its per curiam opinion, the Court of Appeals acknowledged "the long-standing judicial
203 See D. Frohnmayer, supra note 195 (passim as to various views on this matter).
206 Id. at 75.
207 Id.
210 Id.
an important opening wedge by stating that an *in camera* examination of the documents by the District Court was permissible. This was seized upon by the Court of Appeals in *Nixon v. Sirica* in the same manner that one of its decisions was seized upon by Judge Sirica in *In re Subpoena to Nixon*. The significant aspect in both these judicial pronouncements was that the judges were fashioning an answer to President Nixon's claim that executive privilege was absolute and unqualified. The final rejection of this argument of the Administration was delivered by Chief Justice Burger:

The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III. In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence.

By distinguishing the proper assertion of the privilege with respect to the constitutional responsibilities of the presidency, and the improper use of the doctrine to conceal evidence relevant to a criminal prosecution, the Court has provided definitive answers where none had previously existed. The scope of executive privilege questioned in the Watergate tape cases also pinpointed, apparently for the first time, the tensions between the two competing principles — separation of powers and the rule of law. As generally understood within the American constitutional system, the rule of law declares that all persons, the governors no less than the governed, are equally subject to the law's command. Insofar as any President could assert executive privilege as an absolute prerogative, subject to no limitations other than his own, there was doubt whether our governmental system was ruled by men rather than by law. There had always been the possibility that an absolute, unqualified or self-defined privilege, as asserted by Nixon and as understood by others, could be exercised in an arbitrary

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211 *Id.* at 92.
212 487 F.2d 700, 720 (D.C. Cir. 1973).
214 Along with the more tangentially related, United States v. Reynolds, 345 U.S. 1 (1953).
and capricious manner. Now, with the bold counter-assertions of the judiciary, this possibility seems less likely. The tensions between contending constitutional principles has been judicially resolved in favor of the rule of law. This point was expressed in the per curiam opinion of the Court of Appeals, wherein it acknowledged that the President is the only nationally elected official and the representative of all Americans. However, these peculiar conditions of his office make him neither the embodiment of "the nation's sovereignty" nor "above the law's commands." The Court of Appeals cited favorably to Justice Jackson's concurring opinion in the Steel Seizure Case in which he stated:

> With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law. . .

Although neither President Johnson nor President Nixon had created "the imperial presidency," for various reasons — not the least of which were Vietnam and Watergate — they seemed to various American scholars as the fulfillment of de Riencourt's warning in the 1950's about The Coming of the Caesars. If, in fact, there has been a redress in the checks and balances of the American political system, much of the credit must be attributed to the judiciary. It acted in the face of possible presidential defiance, and at a time in history in which all governmental actions were subjected to intense scrutiny and criticism. It accomplished:

the two things most beloved by American judges — uphold the "rule of law" against claims of prerogative or privilege by the executive, and expand still further the discretionary power of the judiciary in the American constitutional system.

VII. JUDICIAL LIMITS ON PRESIDENTIAL POWERS TO DEAL WITH SUBVERSIVES

Federal courts have maintained a hands-off policy with respect to the President's conduct of external affairs, thus responding in accordance with fixed, traditional patterns. On the other hand, while federal courts had traditionally refused to become involved in the somewhat related area of internal security, they have departed significantly from this pattern

221 Id. at 655.
223 A. Westin, supra note 6, at xiii.
since the 1950's, rejecting legislative and executive demands that domestic threats to national security be vigorously confronted and destroyed. They do not question the need for protection against subversive activities. What they have required is that the protective devices be tailored to constitutional standards.

From time to time, American courts have confronted a variety of constitutional issues born of fears that the American political system and institutions are about to be subverted. While the evidence is rather persuasive that this democracy is one of the most viable and stable in the world, these fears have resulted in the promulgation of statutes and executive orders intended to defend against the internal enemies of the social order. Presumably the constitutional issues raised thereby can be readily resolved by mere reference to the fundamental law. However, as indicated by our national history from the adoption of the Bill of Rights in 1791 to World War II, the pendulum was more likely to swing toward authority than toward liberty, a movement that was passively aided by a judiciary shackled by the belief that the political branches should have wide constitutional latitude to make the system and its institutions secure.

The situation evolved such that Americans may ask whether they have two constitutions — one for war and one for peace. In fact, the constitutional record prior to 1953 can be aptly characterized by reference to the phrase “the Fiction of the First Freedom.” In his critical appraisal of the Supreme Court, Richard Sklar wrote of the failure to protect left-wing sympathizers, especially in time of war. The Court was “the pre-eminent custodian of existing values” and the rostrum for expressing social orthodoxy’s resentment against those who threatened to establish a new order. Further support for such critical assessments was provided by Professor Dahl and other scholars, who found little in the record of American

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228 Id. at 318.

229 Id. at 319.


constitutional law to warrant any favorable comment on the Court as "Keeper of Our Liberties."^{232}

These negative assessments are useful for two reasons. First, they portray a more accurate appraisal of the Court's function throughout its historical existence. Secondly, they may help us appreciate the massive changes that have occurred on several constitutional fronts, beginning in the 1950's and continuing to the present.^{233}

In support of the latter point of view, we should recall that between 1943 and 1974, more than forty national statutes had been voided because they abridged fundamental freedoms,^{234} procedural safeguards,^{235} and other constitutional rights.^{236} Within this same time frame, and paralleling the nullification of national statutes, were the judicial impositions of restraints upon presidents, who believed that their constitutional obligation to safeguard the nation warranted virtually any action, irrespective of the consequences for civil liberties. For example, when the American Jacobins threatened,^{237} or when Unionists feared the Confederacy,^{238} the national government had acted. Small wonder that, after World War II, presidents exercised questionable powers in the belief that the Constitution sanctioned any policies consonant with the goal of preserving the system and its institutions. There was, however, one major difference. After World War II, the federal courts were not inclined to defer to the presidency. For purposes of protecting civil liberties, they were now willing to declare that the President had either exceeded statutory authority^{239} or was without the constitutional sanctions claimed.\(^{240}\)

The Warren Court (1953-1969) was primarily responsible for curbing legislative and executive powers in this post-war period. However, the momentum of the Warren Court continued in important areas with the accession of Burger to the highest judicial post. Many Americans perceived the Burger Court as created in the image of Richard Nixon, thereby com-

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^{232} See C. WARREN, CONGRESS, THE CONSTITUTION AND THE SUPREME COURT 149-50 (rev. ed. 1935) where in it is claimed that the Court played this role for approximately seventy years.


^{234} See cases cited notes 44 and 45 supra. See also Dionisopoulos, supra note 42.

^{235} See cases cited notes 46-48 supra.

^{236} See cases cited notes 49-57 supra.


^{238} The Oath of Office Act of 1862, ch. 128, 12 Stat. 502 (1862).


mitted to conservative philosophy and judicial self-restraint.241 But such impressions are superficial, since the Supreme Court under Burger has nullified more national laws on First Amendment and equal protection grounds than any predecessor,242 furthered the momentum established in civil rights cases,243 and administered severe defeats to the Nixon presidency.244 Certainly, these decisions must be ranked among the major victories achieved by the judiciary.

To understand the particular significance of the Court's ruling in behalf of individual liberties against the commands of the political branches, one need only recall the political climate that generally prevailed after World War II. Among the elements of that political climate were the Cold War, McCarthyism, anti-subversive policies,246 and Vietnam, the longest, most divisive foreign war in our national history. Since circumstances are important in determining whether the courts will become involved, judicial deference to the political branches was to be expected, especially at the outset of this era of national concern over subversive activities.247 However, it should also be noted that, even before these several forces disappeared, judicial deference yielded to judicial intervention in behalf of civil liberties. What made these incidents the more noteworthy was the fact that the judiciary was now willing to answer questions impacted by the war powers and national security, thus issues that it had traditionally avoided. This is illustrated in the following discussion.

The lack of protection for the political left prior to 1953, which was reported by Sklar, was soon overcome as federal courts began to impose a variety of limitations and restraints on legislative powers.247 All of these

242 See cases decided after 1968, notes 44 and 53 supra.
decisions were rendered within the period of America's involvement in Vietnam. These limitations, in addition to the fact that the First Amendment can no longer be regarded as a "fiction," distinguished the period following Sklar's comments in 1953. What had become apparent in these cases corresponds to the remarks of former Chief Justice Warren that "the phrase 'the war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit."\(^{248}\)

Warren's statements with respect to congressional power can be generalized to include executive power, for those of each branch were progressively subjected to judicially defined boundaries. Particularly susceptible to judicial response were the efforts of the executive branch to deal with subversives.\(^{249}\) Different in nature from the cases noted, which dealt principally with "security risks" in public service, was *United States v. United States District Court*.\(^{250}\)

Nearly all the post-war administrations shared roughly the same fears concerning the possible existence of subversives within the government. Thus, even before Senator McCarthy emerged on the national scene as a leading Cold Warrior, President Truman and his Attorney General initiated steps to forbid subversives from public service. Their efforts and those of their successors to create an effective security-loyalty scheme prompted many lawsuits. But as Professor Pritchett notes, the Court was reluctant to adjudicate the constitutional issues,\(^{251}\) preferring to dispose of these cases on other grounds. For libertarians, this was far from an entirely disappointing approach, since the Court voided several executive practices that 1) failed to meet procedural due process requirements;\(^{252}\) 2) comported with neither agency nor statutory guidelines;\(^{253}\) 3) were utterly devoid of statutory authorization;\(^{254}\) or 4) were in excess of the authority granted by

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\(^{250}\) 407 U.S. 297 (1972).

\(^{251}\) C. Pritchett, *supra* note 1, at 544.


statute.\textsuperscript{256} Thus, such elements as legislative intent, rather than constitutional authority, were determining factors in these decisions.

Only in part had \textit{United States v. United States District Court}\textsuperscript{257} turned on a question of legislative intent with respect to presidential power. Much more important than the intent of Congress was the question whether the President, in the fulfillment of his constitutional obligation to safeguard national institutions and the political system, could authorize warrantless, electronic surveillance of domestic security risks. This had been the practice of the executive branch since May, 1940.\textsuperscript{258} Because of the Cold War, this practice was further sanctioned more or less continuously by various Presidents and Attorney Generals since July, 1946.\textsuperscript{259} Apparently these several officials believed that they had to maintain electronic surveillance "of those who plot unlawful acts against the Government."\textsuperscript{260} Since none of the recent Presidents believed that it was necessary to obtain prior judicial approval before instituting a particular surveillance program, there was an implied presumption that this practice conformed to the executive's constitutional obligation to protect the nation against subversion.

These precedents had been an important part of the government's argument before the Court, especially since they seemed to be sanctioned by a proviso in the Omnibus Crime Control and Safe Streets Act of 1968.\textsuperscript{261} There, Congress stated that nothing in the law was to be interpreted as limiting:

\begin{quote}
the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government.\textsuperscript{262}
\end{quote}

This proviso seemed to imply exactly what the Nixon Administration argued: Congress had recognized and affirmed the President's constitutional authority to order warrantless, electronic surveillance of domestic security risks. However, it was an argument that the Court was not prepared to accept. By reconstructing the legislative history, the Court determined that there had been no such intent in Congress; not could it find any sanction for

\begin{itemize}
\item \textsuperscript{256} Schneider v. Smith, 390 U.S. 17 (1968).
\item \textsuperscript{257} 407 U.S. 297 (1972).
\item \textsuperscript{258} \textit{Id.} at 210 n.10.
\item \textsuperscript{259} \textit{Id.}
\item \textsuperscript{260} \textit{Id.}
\item \textsuperscript{261} 18 U.S.C. §§2510-20 (1968).
\item \textsuperscript{262} 407 U.S. at 302 (1972), citing 18 U.S.C. §2511(3).
\end{itemize}
this practice in the Constitution. The Court admitted that “domestic security surveillance may involve different policy and practical considerations from the surveillance of ‘ordinary crime’.” And while Congress could confer authority upon the executive branch, “prior judicial approval is required for the type of domestic security surveillance involved in this case. . . .”

The conclusion most forcefully supported by the various decisions identified was that the Court was no longer willing to defer questions of national security to the political branches. The Government had suggested that the Court practice self-restraint, since “internal security matters are too subtle and complex for judicial evaluation.” This suggestion was the same as one expressed several years earlier, and met a similar response from the Court. In 1967, the United States reminded the Court of its past practice of deferring to Congress on questions about legislation enacted under the authority of the war power. Former Chief Justice Warren, while acknowledging the past practice, stated that the Court would not defer merely because of “a talismanic incantation” of the phrase “the war power.” Obviously the same was now true of “national security.” While many of the Court’s responses to questions about the President’s power to handle subversives had been circumspect and even timid, on this particular matter of warrantless, electronic surveillance of domestic security risks, the judges disregarded executive policies and practices of considerable standing and flatly stated that there is no constitutional authority for them. “National security” no less than the “war power” would not prompt a judicial act of obeisance.

VIII. JUDICIAL PROHIBITIONS ON PRESIDENTIAL IMPOUNDMENT OF FUNDS

It was previously asserted that the Pentagon Papers Case had a major impact on the Nixon Administration but caused virtually no harm to the presidency. The reverse has been true of the many presidential impoundment decisions, for even in the face of a host of negative judicial responses, President Nixon successfully persisted in his refusal to spend

263 Id. at 320-24.
264 Id. at 322.
265 Id. at 324.
266 Id. at 320.
268 Id.
269 403 U.S. 713 (1971).
270 See text accompanying notes 131-76, supra.
the appropriated funds. Nevertheless, these decisions are significant in that they: 1) were the first instances of direct confrontation by the federal courts with the question whether a President may refuse to spend funds appropriated by Congress; 2) will probably have a significant deterrent effect in the future; and 3) are easily harmonized with congressional efforts to curb presidential power.

Only Kendall v. United States ex rel. Stokes related at all to the question of an executive officer's refusal to spend congressionally appropriated funds. Kendall had at most a tangential relationship to the issue raised in the recent impoundment cases. Thus, while the practice of impounding funds was preceded, not until 1971 had the issue of presidential power to do so been directly confronted in federal courts. As reported by one legal scholar, "... of the more than fifty cases that have been decided as of this date [March 25, 1974], less than half a dozen" have been in favor of the position asserted by President Nixon. What is revealed in Glass' study is the frequency with which these cases made their way into the courts and the regularity with which federal courts ruled against the presidency. However, it must also be noted their inefficacy in that at no time did President Nixon act in compliance with these decisions. Had the Supreme Court accepted Georgia v. Nixon under its original jurisdiction and provided therein as "definitive" an answer as in United States v. Nixon and United States v. United States District Court, the situation might have been different. Judicial control of the presidency on this particular matter could have been established, providing President Nixon had been as obedient as he was on those other occasions. In 1975, the Supreme Court added to the defeats President Nixon sustained in lower federal courts by unanimously

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271 See Glass, supra note 113, at 75. See also Note, Impoundment of Funds, 86 Harv. L. Rev. 1505, 1506 (1973).
272 Glass, supra note 113, at 9 and 75.
273 Id.
276 Glass, supra note 113, at 9: See also Note, Impoundment of Funds, 86 Harv. L. Rev. 1505, 1515 (1973).
279 Glass, supra note 113, at 81-140.
283 See generally the cases listed by Glass, supra note 113, at 81-140.
deciding against presidential impoundment of funds.\textsuperscript{284} However, since there had not been a formal “definitive” ruling while he was in office, President Nixon was in a position to act in the manner of his predecessors,\textsuperscript{285} claiming constitutional and statutory grounds for his refusal to spend federal funds.\textsuperscript{286}

The short-term results are not as important as the long-term consequences for presidential power. An issue of first impression had been introduced by these many impoundment cases. Despite the apparent sanctions of custom and usage, federal courts willingly ruled against the President. Judicially defined limitations on presidential impoundment powers had been offered where none previously existed. And the federal courts entered into an alliance with the legislative branch, which was in a position to make more definitive and effective the limits on the presidency in this specific area. That a combination of decisions having a deterrent effect and statutorily imposed restraints on presidential impoundment of funds was necessary to achieve this victory over the executive should not be minimized. The role of the federal courts is still impressive and made more so by the fact that the issue of presidentially impounded funds was one of first impression.

\textbf{IX. THE AREA OF JUDICIAL SUPREMACY}

Both the Marshall Court and John Marshall in his concurrent capacity as judge of the circuit court demonstrated the supremacy of the judiciary in one area — criminal prosecutions. The first incident was \textit{United States v. Burr},\textsuperscript{287} wherein Marshall undermined the Administration’s case against the former Vice President by dismissing the indictment. The charge against Burr had been treason. However, Marshall ruled that the charge could not be sustained since it failed to meet the constitutional definition of treason,\textsuperscript{288} the only acceptable definition of this particular offense. With the dismissal of the indictment of Burr, the Jefferson Administration was without means to proceed in a criminal prosecution, except for presidential action in influencing the Senate to force the resignation of Senator John Smith of Ohio.\textsuperscript{289} This, however, was much too unique a situation to serve

\textsuperscript{286} \textit{Id.} at 1513-16, and 1516-29.
\textsuperscript{287} 8 U.S. (4 Cranch) 469 (1807).
\textsuperscript{288} \textit{Id.} at 470-89.
\textsuperscript{289} \textit{See P. Dionisopoulos, supra note 77.}
as a precedent and as a means for the President’s countering an unfavorable judicial ruling.

Several years later, after Jefferson completed his second term in office, the Marshall Court administered still another legal lesson to the presidency. This case arose under conditions not too dissimilar from the Federalists’ efforts to punish their critics through journalism.

Jeffersonians had vigorously opposed the Sedition Act of 1798, arguing that these Federalist sponsored measures did violence to constitutional principles. Despite their earlier stance, the Jeffersonians proved to be no more thick skinned than President Adams and his party. Stung by the editorial barbs of the Federalist press, they proceeded in the courts against the culprits, but without benefit of statute. The prosecution of the publisher and editor of the Connecticut Currant had been indicted under the old common law rule of seditious libel. However, it was a prosecution that the Marshall Court would not permit. The Supreme Court declared the nonexistence of any federal common law crime. Therefore, a person may only be held to answer in federal courts for offenses that are defined by statute.

Burr and Hudson demonstrated that the judiciary is not powerless in the face of a vigorous executive. The latter was not permitted to proceed against any American, except upon a charge of treason within the definition of Article III of the Constitution, or under the offenses defined by statute.

The significance of those earlier instances of federal courts curbing presidential power should not be overlooked; nor should the more recent incidents in Jencks v. United States, the peripheral, yet relevant, Ellsberg v. Mitchell, and Judge Byrne’s dismissal of the case against Ellsberg and Russo by reason of the conduct of persons employed in the executive branch, be dismissed lightly. It may be, as William Buckley contended, Byrne’s dismissal of the case was without justi-

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290 Sedition Act of 1798, ch. 73, §1, 1 Stat. 596 (1798).
291 Virginia and Kentucky Resolutions, 4 Elliott’s Debates 529 (1888).
293 Id. at 34.
294 “Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.” U.S. Const. art. III, §3.
JUDICIAL CONTROL OF THE PRESIDENCY

His contention notwithstanding, the fact is that the judiciary is in a powerful position when encounters with the executive arise in this particular area. When the judiciary dismisses criminal actions for any of the several rationales stated, such as, an informant's statements must be made available to the defendant, or that evidence obtained under presidentially authorized warrantless surveillance is not admissible, or that the criminal prosecution may not be corrupted by the executive branch, the President may not be disobedient. In such matters, federal courts are supreme and not in any manner accountable to or reviewable by the executive branch.

CONCLUSION

The evidence is persuasive as to the correctness of the underlying thesis: There have been important changes in the pattern of executive-judicial encounters since the 1950's—changes that mark this most recent period as unique in American constitutional history. The new pattern began to emerge with the Steel Seizure Case in 1952, a decision that is usually described as exceptional and as an aberration. From the vantage point of 1976, a review of the past quarter of a century establishes this decision as inaugurating a new era in which federal courts acted boldly in challenging exercised presidential powers, including some that had the sanction of precedents. It is true that the Supreme Court declined jurisdiction over issues relating to war, peace and foreign relations, and that it sanctioned the pardoning power as the exclusive prerogative of the President. Whatever checks exist on the exercise of power in these areas must be left to the Congress and the electorate. They have not been imposed by the judiciary.

Although the courts have maintained their traditional roles in these areas, the extent of executive-judicial encounters does not end there. Eight classes of cases have been discovered in which the courts have acted in recent years in limiting presidential powers. The number of categories is significant in itself since it suggests a wide range of activities by the courts. Also significant is the fact that some of these cases involved issues of first impression. For the first time in American constitutional history the judiciary was providing answers where none previously existed. Moreover, federal

302 See N.Y. Times, supra note 298.
303 343 U.S. 579 (1952).
courts have been exercising their power of judicial review since World War II in a manner that is without parallel in American history.\textsuperscript{305} Thus, the parallels between two recent developments in American constitutional law materialize: the judiciary's more vigorous response to issues of presidential powers corresponds with its bolder action in voiding national laws.

It is evident that the Court's decision to grant or deny jurisdiction is dictated by factors other than the possibility of subsequent presidential defiance. Our inclination has been to be governed by the kinds of judgments made as early as 1788 by Alexander Hamilton\textsuperscript{306} and more recently by Professor Schubert.\textsuperscript{307} There is no doubt, as Hamilton observed, that the effectiveness of judicial rulings depends upon the willingness of the executive to enforce them. Therefore, since the responsibility for enforcing court decisions lies with the executive branch, there is a question whether the President would enforce any that undermine his own prerogatives. Because of this, and by reference to his view of the historical record, Professor Schubert claims that the presidency was victorious in all major encounters with the courts. The fact is, however, that only one instance which may properly be cited was Lincoln's defiance of Taney.

What should be recognized is the rarity of the few examples of defiance of the courts. Therefore, the rules identified by Professor Westin may not be assumed to be valid. The record since the 1950's suggests that the courts can confront the presidency on a multitude of questions. And, as shown in these many cases since the 1950's, President Truman's statement regarding his reaction to the Steel Seizure decision of 1952 must be deemed the position of his successors as well: "Like Franklin Roosevelt, I feel that the Supreme Court may at times have to be urged but it should never be defied."\textsuperscript{308}

\textsuperscript{305} See text accompanying notes 38 through 55 supra.  
\textsuperscript{306} The Federalist No. 78 (A. Hamilton).  
\textsuperscript{307} See G. Shubert, supra note 2.  
\textsuperscript{308} Comment, Review of the Presidency in the Courts, 1 Midwest Journal of Political Science 92 (1957).