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The Foreign Policy Role of the President: Origins and Limitations

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NOTES ON PRESIDENTIAL FOREIGN POLICY POWERS
(PART II)

THE FOREIGN POLICY ROLE OF THE PRESIDENT:
ORIGINS AND LIMITATIONS

I. INTRODUCTION

In the area of foreign affairs, the Supreme Court has consistently allowed the President broad power by either upholding his actions or refusing to decide cases that raise a "political question." No criteria have been devised to help make this determination.

1. The distinction between foreign and domestic affairs was emphasized in Zemel v. Rusk, 381 U.S. 1 (1965); Kent v. Dulles, 357 U.S. 116 (1958); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). The problem with this distinction is that the two areas tend to merge, making it difficult to determine if an action should be labeled "domestic" or "foreign." No criteria have been devised to help make this determination.


The terms "Executive" and "President" will be used interchangeably throughout this note. Whenever these terms are used, they refer to all officers of the executive branch.

3. In 1962, the Supreme Court purported to define the political question doctrine in Baker v. Carr, 369 U.S. 186 (1962):

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217.

As a result, history is replete with examples of presidents controlling foreign policy.\(^4\) Politically, there may be strong reasons to afford such vast power to the Executive.\(^5\) Constitutionally, however, the prescribed foreign affairs powers of the President are few.\(^6\) He is granted unilateral power only to “receive Ambassadors and other public Ministers.”\(^7\)

This seeming inconsistency between the broad power afforded the President in foreign affairs by decisions of the Supreme Court and the limited power expressly stated in the Constitution, has led to confusion for those who try to define presidential power in the external sphere. It is necessary, therefore, to determine the basis upon which the Court finds this broad power of the President. This note discusses both the origins and limitations of the President’s foreign affairs powers. It should be noted that there are no strict guidelines to delineate these powers.\(^8\) The focus of this note is an analysis of three theories that have attempted to do so.

The logical place to begin a search for the origin of presidential powers is in the text of the Constitution. The first section of this note is an overview of the powers enumerated in article II,\(^9\) which refer to the President’s role in foreign affairs.\(^10\) The purpose of this section is to delineate the powers and limitations expressly provided the President in the Constitution.

The second section continues the inquiry into the origin of presi-
dential authority through an analysis of three theories that have evolved to define presidential power: the Express Constitutional Provision Theory, the Inherent Powers Theory, and the Implied Concurrent Powers Theory. Each theory is discussed in terms of the source of power, the limitations that define the scope of that power, and the effect of the source and limitations on the doctrine of separation of powers.

II. CONSTITUTIONAL EXECUTIVE POWER IN FOREIGN AFFAIRS: AN OVERVIEW

Fearing a concentration of powers, the Framers of the Constitution were careful to divide the powers of the federal government among three branches—legislative, executive, and judicial. The Constitution, in three separate articles, grants each branch its powers: Article I establishes the Legislature, article II establishes the Executive, and article III establishes the Judiciary.

There are few express provisions in article II granting the President power in the area of foreign relations. The Constitution empowers the President to make treaties with the advice and consent of the Senate, to appoint and receive ambassadors and other public ministers, and to assume command of the armed forces as Com-

11. These are recognized theories of presidential power, but they have not previously been referred to by these titles. The titles are used for the purpose of convenience in this note.
12. The doctrine of separation of powers, which requires the government to be divided into separate branches with separate powers, is one of two basic concepts underlying the structure of our constitutional democracy. The other concept is federalism, which postulates a division of power between the state and federal governments. This note is concerned only with separation of powers within the federal government. It is taken as a given that, in the area of foreign affairs, the states must defer to the federal government. See, e.g., Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889) (“For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.”). For a discussion of the Framers’ conception of separation of powers, see Note, The Framers’ Intent and the Early Years of the Republic, 11 Hofstra L. Rev. 413, 423-28 (1982).
13. The Framers were strongly influenced by Montesquieu, who advocated the need for separate branches. See The Federalist No. 47, at 139 (J. Madison) (R. Fairfield ed. 1981) (describing Montesquieu as the “oracle . . . always consulted and cited.”).
14. See U.S. Const. art. I. In this note, article I will only be referred to for comparison with and limitation of the presidential powers delegated in article II.
15. See id. art. II.
16. See id. art. III. For a discussion of the authority of the judiciary to determine the power of the president in foreign affairs, see Note, supra note 3.
17. U.S. Const. art. II, § 2, cl. 2.
18. Id.
19. Id. § 3.
According to Alexander Hamilton, however, the enumerated powers of article II are only examples of the President's vast "executive power." Hamilton reached this conclusion by comparing the opening clause of article II, which states: "The executive power shall be vested in a President of the United States of America," with the opening clause of article I, which delegates to Congress "[a]ll legislative Powers herein granted." Hamilton insisted that because the article II clause did not contain the restrictive phrase "herein granted," the President was not restricted to the enumerated powers of the article. James Madison vehemently opposed Hamilton's view and accused him of wanting to create a monarchy. Debates on whether this clause confers power to the President or merely designates the title of the Executive Office did not end with the Framers.

In the early 1900's, Theodore Roosevelt advocated the view that the opening clause of article II was a grant of power and not a mere designation of title. Roosevelt called the President the "steward of the people" whose "duty" was "to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws." Contrarily, President Taft, who was a sharp critic of the "Stewardship Theory," stated "that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise." Presently, a consensus has not been reached on the effect and meaning of the opening clause of article II. Nonetheless, it is generally agreed that the express provisions of the article give the President broad power in the areas of negotiation and military control—areas that are vital to policymaking in the foreign relations sphere.

20. Id. § 2, cl. 1.
22. U.S. Const. art. II, § 1, cl. 1.
23. Id. art. I, § 1 (emphasis added).
25. Id. at 53-64.
27. Id.
29. See generally Berger, supra note 4 (discussing increase of presidential negotiation through executive agreements); Fulbright, Congress, the President and the War Power, 25 Ark. L. Rev. 71 (1971) (discussing increasing power of President in military matters); Goldberg, The Constitutional Limitations on the President's Powers, 22 Am. U.L. Rev. 667
However broadly these powers may be interpreted, the text of the Constitution does not allow for unilateral action by the President, except in receiving ambassadors and other public ministers. In treaty making and in the appointment of ambassadors, the President is subject to the “Advice and Consent” of the Senate. This limitation may give the impression that the Senate and the President confer throughout the treaty making process. Since George Washington’s administration, however, presidents have been reluctant to consult with the Senate during treaty negotiation.

Notwithstanding this lack of prior consultation, the requirement of the consent of two-thirds of the Senate is a very real and powerful limitation on the President’s negotiation power. The Senate may employ this constitutional requirement of consent to impose conditions or reservations on the President or to approve or reject a treaty outright. Still, the President’s power regarding treaties remains broad, although limited by senatorial action. As Alexander Hamilton wrote: “[T]reaties can only be made by the president and senate jointly; but their activity may be continued or suspended by the president alone.”

The treaty procedure, with its requirement of senatorial consent, has often been replaced by the executive agreement. The constitutional origin of executive agreements may be questionable, but,

(1973) (discussing centralization of power in Executive in areas of war and negotiation).

30. See U.S. CONST. art. II, § 3.
31. Id. § 2, cl. 2.
32. Early in his administration, President Washington attempted prior consultation with the Senate. The result was chaos; the Senators debated the provisions of the proposed treaty, questioned President Washington repeatedly and generally delayed ratification. For a more complete account of this episode, see Note, supra note 12, at 459-62.
33. U.S. CONST. art. II, § 2, cl. 2.
34. During the Senate’s consideration of a test ban treaty, for example, President Kennedy promised, in a letter to the Senate, that a vigorous weapons program would be maintained despite the treaty and that the treaty would only be amended by treaty procedure, not by executive action. The treaty was subsequently passed. Text of Kennedy Letter to Senators on Atom Pact, N.Y. Times, Sept. 12, 1963, at 20, col. 3.
35. PACIFICUS-HELVIDIUS LETTERS, supra note 21, at 13.
37. See Borchard, Shall the Executive Agreement Replace the Treaty?, 53 YALE L.J. 664 (1944); Mathews, The Constitutional Power of the President to Conclude International Agreements, 64 YALE L.J. 345 (1955); Note, Executive Agreements: Beyond Constitutional
having been accepted over the years, these agreements have now become commonplace.\textsuperscript{38} Even in this area, however, the President's power is not without limit, because most agreements depend upon congressional support.\textsuperscript{39}

In the diplomatic arena, international agreements are only one aspect of the President's negotiation powers. The President is empowered by the Constitution to "appoint Ambassadors, [and] other public Ministers,"\textsuperscript{40} a power that increases the President's control of foreign policy. As with treaties, the chief limitation upon the President's power of appointment is the constitutional provision requiring the advice and consent of the Senate.\textsuperscript{41} In practice, the Senate rarely objects to the President's choices for diplomatic posts. As evidenced by the instances when the Senate does object,\textsuperscript{42} however, the constitutional limitation is not ignored.

The President not only has the power to appoint United States ambassadors, but is also empowered by the Constitution to receive the ambassadors of other countries.\textsuperscript{43} With this power, the President can go so far as to recognize new governments without consulting Congress.\textsuperscript{44} Congress, however, can always withhold appropriations or pass resolutions\textsuperscript{45} to enforce its will.

The exercise of powers seemingly broader than the express provisions of the Constitution is even more evident in the area of military control. The President is designated Commander-in-Chief of the


\textsuperscript{39} When it becomes necessary to implement an executive agreement with government funds, Congress gains the power to decide the fate of the agreement. The Constitution grants Congress the power to raise funds in U.S. CONST. art. I, § 8, cl. 1. The President has no such power.

\textsuperscript{40} Id. art. II, § 2, cl. 2.

\textsuperscript{41} See \textit{supra} text accompanying notes 30-35.

\textsuperscript{42} For example, President Wilson was unable to secure United States membership in the League of Nations because of a lack of Senate support. For a discussion of this failure, see A. George & J. George, \textit{Woodrow Wilson & Colonel House: A Personality Study} 268-89 (1956).

\textsuperscript{43} U.S. CONST. art. II, § 3.

\textsuperscript{44} For example, Richard Nixon appointed David E. K. Bruce as a "contact point" in Peking, following his visit to China. Subsequently, George Bush was appointed by President Ford to succeed Bruce. Both men helped to expand relations with China. See Shabecoff, \textit{Ford Names Bush as Envoy to China to Succeed Bruce}, N.Y. Times, Sept. 5, 1974, at 1, col. 8.

\textsuperscript{45} U.S. CONST. art. I, § 8.
armed forces.\textsuperscript{46} The Constitution does not grant him any other war-making powers. Instead, Congress is granted the power:

- To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
- To raise and support Armies . . . ;
- To provide and maintain a Navy;
- To make Rules for the Government and Regulation of the land and naval Forces;
- To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
- To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States . . . the Authority of training the Militia according to the discipline prescribed by Congress.\textsuperscript{47}

Even though the balance of constitutional war-making powers is tilted toward Congress, the President has often taken the initiative in military matters without prior congressional approval.\textsuperscript{48} At one time, the Commander-in-Chief clause was considered to be the source of authority for these measures.\textsuperscript{49}

The scope of the Commander-in-Chief clause has never been clearly defined by the courts.\textsuperscript{50} The Framers had envisioned the clause as a designation of the President as head general.\textsuperscript{51} In their view, the President would carry out the policies determined by Congress pursuant to its constitutional powers.\textsuperscript{52} Due to the exigencies of

\textsuperscript{46} Id. art. II, § 2, cl. 1.
\textsuperscript{47} Id. art. I, § 8, cl. 11-16.
\textsuperscript{49} See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866); Prize Cases, 67 U.S. (2 Black) 635 (1862); Fleming v. Page, 50 U.S. (9 How.) 603 (1850).
\textsuperscript{50} For a discussion of the constitutionality of the President acting on his own initiative under the Commander-in-Chief clause, see Note, Congress, the President, and the Power to Commit Forces to Combat, 81 Harv. L. Rev. 1771 (1968); Lofgren, War-Making Under the Constitution: The Original Understanding, 81 Yale L.J. 672 (1972).
\textsuperscript{51} For examples of instances in which the Court has attempted to define the scope of the Commander-in-Chief clause, see cases cited supra note 49.
\textsuperscript{52} See Reveley, Constitutional Allocation of the War Powers Between the President and Congress: 1787-1788, 15 Va. J. Int'l L. 73, 130 (1974). See generally Sofaer, The Presi-
war, the courts have allowed the President to use the Commander-
in-Chief clause as a source of power, and have not restricted the
Executive to the Framers' narrow view. The President, of course,
may use his visible position in foreign affairs in such a way as to
make war inevitable, leaving Congress with no real discretion in de-
termining whether war should be declared.

The separation of powers intended by the Framers has not
been preserved by the express provisions of the Constitution. The
President's actual power in foreign affairs is much broader than a
strict interpretation of the article II provisions would allow. The con-
stitutional provisions, however, do offer limitations on presidential
power and keep the President from becoming the tyrant feared by
the Framers.

III. THREE THEORIES OF EXECUTIVE POWER IN FOREIGN
AFFAIRS

It is futile to search for specific guidelines to determine the
scope and breadth of executive power. Confronted by this problem in
a recent case, Justice Rehnquist noted that "decisions of the Court
in this area have been rare, episodic, and afford little precedential
value for subsequent cases." In view of this lack of case law, it may
be helpful for an understanding of when the President has the right
to act to look at three theories that attempt to determine the origin
of his power.

The first theory to be presented is the Express Constitutional
Provision Theory, which asserts that the President's powers are
strictly limited to the express provisions of the Constitution. The

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dency, War, and Foreign Affairs: Practice Under the Framers, 40 LAW & CONTEMP. PROBS.,
Spring 1976, at 12 (discussing views of Framers regarding President's powers in war).
53. See supra notes 49, 52.
54. Edward Corwin stated that it "is the ability of the President simply by his day-to-
day conduct of our foreign relations to create situations from which escape except by the route
of war is difficult or impossible." E. CORWIN, supra note 4, at 226.
55. See Bestor, Separation of Powers in the Domain of Foreign Affairs: The Original
Intent of the Constitution Historically Examined, 5 SETON HALL L. REV. 529, 577 (1974);
Note, supra note 12, at 426-28.
56. As Justice Jackson said: "The purpose of the Constitution was not only to grant
power, but to keep it from getting out of hand." Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579, 640 (1952) (Jackson, J., concurring in the judgment and opinion of the Court).
58. This view was advocated by the Framers. According to James Madison, the constitu-
tional powers of the President are "few and defined." THE FEDERALIST No. 45, at 137 (J.
Madison) (R. Fairfield ed. 1981). The same position was taken by Justices Black and Douglas
in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). Id. at 587-88; id. at 632-
President cannot act unless that act is prescribed by a specific constitutional provision. The words of the Constitution are the origin and limitation of the President’s power. This theory does not allow for overlapping among the branches of government—each branch has a separate set of powers and a distinct role to play. The brevity of this analysis is due to the fact that this theory has no validity in light of historical and present-day examples of presidential authority exercised outside the specific enumerated provisions. It is offered as a basis for comparison with the other two theories and because it finds support in early writings.

The antithesis of the Express Constitutional Provision Theory is seen in the Inherent Powers Theory. According to this second theory, the President’s powers do not come from the Constitution. As a result, he is free to act without guidelines and with few limitations. Unlike the Express Constitutional Provision Theory, legislative deference to executive action is acceptable under the Inherent Powers Theory. The President may exercise powers similar to those constitutionally granted to Congress because he is not limited to the provisions set forth in the Constitution.

The final theory to be explained will be the Implied Concurrent Powers Theory, which takes the middle road between the preceding theories. Contrary to the Inherent Powers Theory, this theory posits that the Constitution is the only authority for presidential action. Unlike the Express Constitutional Provision Theory, the Implied

33 (Douglas, J., concurring).
60. According to Justice Jackson:

Some clauses could be made almost unworkable, as well as immutable, by refusal to indulge some latitude of interpretation for changing times. I have heretofore, and do now, give to the enumerated powers the scope and elasticity afforded by what seem to be reasonable, practical implications instead of the rigidity dictated by a doctrinaire textualism.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 640 (1952) (Jackson, J., concurring in the judgment and opinion of the Court). See infra notes 118-55 and accompanying text.

61. The limitations on presidential power discussed in this note are constitutional limitations; the President, of course, may be limited by public opinion, through the press, the church, political parties, labor unions, and other groups applying political pressure. For a discussion of political limitations on presidential power, see E. HARGROVE, THE POWER OF THE MODERN PRESIDENCY (1974); L. KOENIG, THE CHIEF EXECUTIVE (3d ed. 1975); A. SAYE, J. ALLUMS & M. POUND, PRINCIPLES OF AMERICAN GOVERNMENT (8th ed. 1978).

62. In the Express Constitutional Theory, a strict adherence to the separation of powers doctrine is demanded. See infra notes 65-73 and accompanying text.

63. See United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936); infra notes 74-114 and accompanying text.
Concurrent Powers Theory postulates that the text of the Constitution is susceptible to interpretation and the President may be allowed to exercise power not specifically referred to in the document. Separation of powers, in this theory, takes on a different meaning than in the Express Constitutional Provision Theory, where each branch held different powers; here, foreign affairs powers are concurrent, but in areas not specifically delegated to the President, Congress, by its legislative authority, is supreme and may curtail presidential action.\textsuperscript{64}

All three theories are open to criticism and debate. There is no unambiguous theory that will explain the President's powers in foreign affairs and establish criteria for his future action. Perhaps it is because in dealing with other nations, preparation is tentative. Although history can be a guideline for future interactions, in the foreign relations sphere surprise is not uncommon. It is often difficult to predict whether another country will act in such a manner as to require a response from our Chief Executive. The purpose of the following discussion of theories of presidential power is to provide, at the very least, a loose framework from which to assess the actions of the President.

A. The Express Constitutional Provision Theory

The Express Constitutional Provision Theory, which allows the President only those powers expressly granted by the Constitution, has support in the writings of the Framers. James Madison wrote that the executive power should be specifically defined.\textsuperscript{65} Governor Randolph, speaking at the Virginia Ratification Convention in defense of the Constitution, said that the government's "powers are enumerated. Is it not, then, fairly deducible, that it has no power but what is expressly given it?—for if its powers were to be general, an enumeration would be needless."\textsuperscript{66} James Wilson was in accord with Governor Randolph when he spoke of a "government consisting of enumerated powers" at the Pennsylvania convention.\textsuperscript{67}

These same men who stressed the need for adherence to the enumerated powers, believed that to avoid the abuse of power, its

\begin{footnotes}
\item[64.] See infra notes 115-257 and accompanying text.
\item[67.] 2 id. at 436.
\end{footnotes}
exercise must be divided between three branches of government. Each branch was thus restricted to the powers enumerated in its respective article. In 1952, Justices Black and Douglas reiterated this view in *Youngstown Sheet & Tube Co. v. Sawyer.* Both Justices rejected the notion that the President could exercise legislative powers, because the Constitution explicitly grants all legislative powers to Congress.

This inflexible view, advocating a strict adherence to the express delegations of the Constitution, does not have any basis in historical or present-day presidential actions. The President has often exercised powers outside those expressly provided for by the Constitution, with approval from the Court. One major reason that this theory has no merit in practice is the ambiguity of many of the constitutional provisions. These provisions must often be interpreted by the Court to determine their scope. They cannot be taken at face value.

**B. The Inherent Powers Theory**

In direct opposition to the Express Constitutional Provision Theory is the Inherent Powers Theory, which does not depend upon the specific provisions of the Constitution. This theory posits that the President's power is inherent in his office and is not limited to his

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68. This is the separation of powers doctrine. See supra note 12.
69. 343 U.S. 579 (1952) (plurality opinion). For Justice Black's plurality opinion, see id. at 582-89; for Justice Douglas' opinion, see id. at 629-34 (Douglas, J., concurring). Three Justices, though joining Justice Black's opinion, wrote separate opinions; two Justices wrote separate concurring opinions. Id. at 593-667.
70. See id. at 588; id. at 630 (Douglas, J., concurring).
71. See, e.g., United States v. Pink, 315 U.S. 203 (1942) (President entered into agreement with Soviet Union without congressional approval); United States v. Belmont, 301 U.S. 324 (1937) (President, without congressional approval, recognized new government of Soviet Union and entered into agreement that affected states rights); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) (President issued proclamation that made it illegal for anyone to sell arms to warring factions of Chaco Region in South America). See infra notes 118-55 and accompanying text.
72. For examples of the Court interpreting the appointment power of the President, see Myers v. United States, 272 U.S. 52 (1926) (President’s power of appointment included power of removal); Humphrey’s Executor v. United States, 295 U.S. 602 (1935) (appointment power interpreted further and removal power of President limited to Executive officers only).
For examples of the Court interpreting the treaty-making power of the President, see United States v. Belmont, 301 U.S. 324 (1937); Missouri v. Holland, 252 U.S. 416 (1920).
For examples of the Court interpreting the Commander-in-Chief clause, see *Ex parte Milligan,* 71 U.S. (4 Wall.) 2 (1866); *Prize Cases,* 67 U.S. (2 Black) 635 (1862); *Fleming v. Page,* 50 U.S. (9 How.) 602 (1850).
73. See *Youngstown,* 343 U.S. at 640 (Jackson, J., concurring in the judgment and opinion of the Court); supra note 60.
few enumerated powers. The most comprehensive articulation of the Inherent Powers Theory is found in the majority opinion of Justice Sutherland in United States v. Curtiss-Wright Export Corp. This theory will be presented by discussion of Curtiss-Wright, because the analysis contained in the decision is so comprehensive and so widely cited when presidential powers are in question.

In 1936, President Franklin Roosevelt issued a Proclamation pursuant to a Joint Resolution of Congress, declaring an embargo on the sale of arms to Paraguay and Bolivia. The Resolution had given the President discretion to block the sale of arms to any of the warring factions in the Chaco region of South America, if he determined that such a prohibition would help to bring peace. The defendant company, indicted for conspiring to sell arms to Bolivia, challenged the constitutionality of Congress' delegation of legislative power to the President through the Joint Resolution.

The boundaries of permissible delegation had been tested the year before in A.L.A. Schechter Poultry Corp. v. United States and Panama Refining Co. v. Ryan. In both cases, the Court held broad delegations unconstitutional, ostensibly because they allowed

75. 299 U.S. 304 (1936).
79. Id. (quoted in 299 U.S. at 312).
80. 299 U.S. at 311.
81. Id. at 314.
82. 295 U.S. 495 (1935) (concerning President's right to regulate poultry industry through congressional delegation in National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933) (repealed 1935)).
83. 293 U.S. 388 (1935) (President attempted to prohibit interstate and foreign commerce transportation of petroleum and petroleum products in excess of amount prescribed by certain provisions of National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933) (repealed 1935)).
84. See 295 U.S. at 537-38; 293 U.S. at 433. In Schechter, the challenged delegation was promulgated under the "Live Poultry Code" of the National Industrial Recovery Act, which stated:
the President too much discretion without sufficient guidelines. Justice Sutherland circumvented this precedent by reasoning that the delegated authority in the Curtiss-Wright situation had its effect in the foreign relations sphere and, therefore, could not be judged by the same standards as the cases involving domestic matters. Making this distinction, the Justice took the opportunity to espouse his long held view of the origin of presidential powers in foreign affairs.

1. External Sovereignty as a Source of Power.—According to

CODER OF FAIR COMPETITION

Section 3(a). Upon the application to the President by one or more trade or industrial associations or groups, the President may approve a code or codes of fair competition for the trade or industry or subdivision thereof, represented by the applicant or applicants, if the President finds (1) that such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof, and (2) that such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of this title. . . .

. . . . (d) Upon his own motion, or if complaint is made to the President that abuses inimical to the public interest and contrary to the policy herein declared are prevalent in any trade or industry or subdivision thereof, and if no code of fair competition thereof has theretofore been approved by the President, the President, after such public notice and hearing as he shall specify, may prescribe and approve a code of fair competition for such trade or industry or subdivision thereof, which shall have the same effect as a code of fair competition approved by the President under subsection (a) of this section.

National Industrial Recovery Act, ch. 90, § 3(a), (d), 48 Stat. 195, 195-96 (1933) (repealed 1935).

The delegation challenged in Ryan stated:

Section 9(c). The President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any state law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State. . . .

Id. § 9(c), 48 Stat. at 200.

85. However, prior to these decisions, broad delegations of power had been allowed. See Hampton Jr., & Co. v. United States, 276 U.S. 394 (1928); United States v. Grimaud, 220 U.S. 506 (1911); Field v. Clark, 143 U.S. 649 (1892).

The Court may have invalidated the delegations in Schechter and Panama Refining Co. because of the lack of procedural safeguards noted by the Court. See Schechter, 295 U.S. at 533, 539-41; Panama Refining Co., 293 U.S. at 424-30.


Justice Sutherland, the standards for delegation in the international sphere are less stringent than those in the domestic sphere, because the express enumerated powers of the Constitution only prescribe the authority of the federal government in internal matters. In external affairs, the federal government was sovereign under the Articles of Confederation. The powers that stem from this sovereignty were not changed by the Constitution, except where express terms qualify their exercise.

Commentators have criticized Justice Sutherland's external sovereignty theory on the basis of his erroneous use of historical facts. Evidence has been produced to show that the Declaration of Independence created thirteen separate sovereigns and not, as Justice Sutherland insisted, a Union with external sovereignty. Even scholars who claim that Justice Sutherland was correct in asserting the sovereignty of the Union in international society, will not agree, however, that the federal government obtains its foreign affairs powers only from this sovereignty. One critic, rebutting Justice Sutherland's statement that the Constitution does not speak to external powers, points to a statement by James Madison that dispels the belief that the Framers did not include foreign affairs powers in the Constitution. According to Madison: "The powers delegated by the proposed Constitution to the federal government are few and defined . . . [they] will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce."

2. The President as Sole Organ in International Relations.—Scholars also question the validity of Justice Sutherland's statement that the exercise of power derived from external sovereignty is limited to the President. According to Justice Sutherland, the complicated area of foreign affairs is best left to the President because of the flexible nature of his office and its ability for secrecy.

88. 299 U.S. at 315-16.
89. Id. at 317.
90. Id.
92. See Berger, supra note 4, at 28-33; Levitan, supra note 91, at 478-90; Lofgren, supra note 91, at 17-20.
93. See, e.g., L. HENKIN, supra note 38, at 22-27; Berger, supra note 4, at 28-33.
94. Berger, supra note 4, at 27.
95. The Federalist No. 45, supra note 58, at 137.
96. See, e.g., L. HENKIN, supra note 38, at 27-33; Berger, supra note 4, at 27-28.
and caution. In describing the President’s plenary power in this field, the Justice borrowed a phrase from Chief Justice John Marshall, calling the President the “sole organ” of the federal government in the field of international relations. When Chief Justice Marshall referred to the “sole organ,” however, he was not suggesting that the Executive had exclusive power to make policy in the international arena. Instead, the President’s power to extradite a foreign citizen pursuant to a treaty was at issue and Chief Justice Marshall was merely explaining why the President had a right to determine how to execute a treaty. A look at the words following his “sole organ” statement will show that Chief Justice Marshall believed the President’s power could be superceded by Congress: “Congress, unquestionably, may prescribe the mode, and Congress may devolve on others the whole execution of the contract; but, till this be done, it seems the duty of the Executive department to execute the contract by any means it possesses.

3. Extra-Constitutional Power.—Even if it is conceded that the flexible nature of the President’s office makes the Executive the appropriate branch to predominate in foreign affairs, there is no indication within the Constitution that power comes from an inherent external sovereignty rather than from constitutional provisions. According to one commentator, explicit in the tenth amendment, which provides that “[t]he powers not 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,” is the conception that the federal government is one of enumerated powers only. The Framers had conceptualized a government with defined and limited powers. The Court itself has often reiterated that the government is given its powers by the Constitution.

97. See 299 U.S. at 319.
98. Id. (quoting 10 ANNALS OF CONG. 613 (1800) (statement of J. Marshall)).
100. 10 ANNALS OF CONG. 613 (1800).
101. Justice Sutherland had stated that power in foreign affairs “did not depend upon the affirmative grants of the Constitution.” 299 U.S. at 318.
102. U.S. CONST. amend. X.
103. See L. HENKIN, supra note 38, at 24.
104. See supra notes 65-73 and accompanying text.
105. See Ex parte Quirin, 317 U.S. 1, 25 (1942); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 528-29 (1935); Ex parte Milligan, 71 U.S. (4 Wall.) 2, 139-40
Justice Sutherland, however, did caution that the President's plenary power was subject to limitation by constitutional provisions, although the limitations were not explicitly prescribed. Critics of his theory have noted the apparent inconsistency in advocating constitutional limitations for extra-constitutional authority. They argue that if the provisions that limit power to one branch or the other, such as the article I delegation of all lawmaking power to Congress, do not apply to international matters, then the prohibitions that protect individual rights may be ignored as well. One scholar suggests that such an extreme result of the extra-constitutional theory may be avoided by political pressure. This scholar does warn, however, that without legal boundaries, "the only substitute is the balance of political—and, ultimately, military—power in the nation." The constitutional democracy that our system is based upon would be severely undercut if the President could act without definable limitation.

Finally, it is important to note that the extra-constitutional argument in Curtiss-Wright does not have precedential value because the outcome of the case did not depend upon this rationale. As a
result, subsequent cases have cited Curtiss-Wright merely as an example of the constitutionality of broad delegations.114

C. The Implied Concurrent Powers Theory

Of the three theories of presidential power discussed in this note, only the Implied Concurrent Powers Theory allows the basic ideals underlying our constitutional democracy to coexist with a flexible foreign relations field. Unlike the Express Constitutional Provision Theory, it recognizes that the enumerated powers of the Constitution may be given a broad interpretation when the situation demands; unlike the Inherent Powers Theory, it protects our democracy by acknowledging the Constitution as the origin and limitation of presidential power.

In order to obtain a comprehensive understanding of the Implied Concurrent Powers Theory, it is necessary to undertake a two-part analysis: first, a study of the potential source of implied powers,115 and second, a study of the permissible limits of presidential legislation,116 as seen through an analysis of Youngstown Sheet & Tube Co. v. Sawyer.117 The study of the potential source of implied powers provides valuable background on where the courts have previously found implied power. The study using an analysis of Youngstown presents the constitutional and congressional limits on presidential “lawmaking” to show that the President’s power may sometimes be concurrent with Congress, but in areas not expressly delegated to the President by the Constitution, Congress is supreme.

1. Implied Powers.—The President has been allowed, by the Court’s recognition of implied powers, broader authority than that expressly delegated to him in the Constitution. Powers have been implied from specific constitutional provisions,118 from statutory delegations by Congress,119 and from the silent acquiescence of Congress.120

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114. See supra note 76.
115. See infra text accompanying notes 118-55.
116. See infra notes 156-257 and accompanying text.
117. 343 U.S. 579 (1952).
118. See infra notes 121-30 and accompanying text.
119. See infra notes 131-32 and accompanying text.
120. See infra notes 138-55 and accompanying text.
Article II, section 2 of the Constitution provides the enumerated powers of the President.\textsuperscript{121} Powers may be implied from the specific provisions of that section, as exemplified by Chief Justice Taft's analysis in \textit{Myers v. United States}.\textsuperscript{122} Speaking for the majority of the Court, Chief Justice Taft upheld the right of the President to remove an officer appointed by the President, despite the lack of a grant of removal power from Congress.\textsuperscript{123} Although not specifically delegated by the Constitution, the President's removal power was deemed necessary for the execution of his constitutional power to appoint officers.\textsuperscript{124}

In addition to the specifically enumerated powers of the President, article II contains two phrases that may be the constitutional source that allows power to be implied where not specifically delegated. The first phrase, discussed earlier in this note,\textsuperscript{125} states: "The executive Power shall be vested in a President of the United States of America."\textsuperscript{126} It seems that Chief Justice Taft relied on this phrase in \textit{Myers}, when he acknowledged the President's implied power to remove officers.\textsuperscript{127} The second phrase states that the President "shall take Care that the Laws be faithfully executed."\textsuperscript{128} Powers implied under this phrase can be used to justify presidential authority derived from broad congressional statutory delegations\textsuperscript{129} or congressional policy when Congress has not expressly stated its will.\textsuperscript{130}

Courts also have often inferred presidential power by construing statutes to impliedly grant authority.\textsuperscript{131} Most cases where broad power has been upheld concern foreign affairs.\textsuperscript{132} Broad interpretat-

\begin{footnotesize}
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\item 121. U.S. Const. art. II, § 2.
\item 122. 272 U.S. 52 (1926).
\item 123. Id. at 119, 125.
\item 124. Id. at 119.
\item 125. See supra text accompanying notes 17-29.
\item 126. U.S. Const. art. II, § 1, cl. 1.
\item 127. Myers, 272 U.S. at 151, 161.
\item 128. U.S. Const. art. II, § 3.
\item 129. See infra text accompanying notes 131-32.
\item 130. See infra text accompanying notes 138-55.
\item 131. See, e.g., United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) (executive proclamation making unlawful sale of arms to certain countries permissible in light of historical delegation of power to President vis-a-vis foreign affairs); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (delegation of domestic legislative power to President would have been upheld if limitations had been placed on President's discretionary power); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935) (delegation to President would have been upheld if it had not been excessive).
\item 132. See, e.g., Dames & Moore v. Regan, 453 U.S. 654 (1981) (executive agreement cutting off claims of United States citizens against foreign entities); Haig v. Agee, 453 U.S.
\end{itemize}
\end{footnotesize}
tion of statutes will be readily applied in cases where the national security is in danger and foreign affairs are affected. According to the Supreme Court:

[B]ecause of the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature, Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas.

Additionally, the Court may allow broad delegation when constitutional rights of an individual are affected, if the Court determines that the individual has an alternative means of satisfying his rights. For example, in *Dames & Moore v. Regan*, an executive agreement that cut off claims of United States nationals against foreign entities in United States courts was upheld, even though there was no specific congressional delegation authorizing such an act. The Court noted that its decision was “buttressed by the fact that the means chosen by the President to settle the claims of American nationals provided an alternate forum, the Claims Tribunal, which is capable of providing meaningful relief.”

Just as power may be implied from congressional action, it may also be implied from congressional inaction. The courts will look for an expression of congressional will, either in a statute, as discussed above, or in the silent acquiescence of Congress. In *United States v. Midwest Oil Co.*, the Court found that Congress’ silent acquiescence had impliedly granted the President power to withdraw public


In two cases, the Supreme Court, although holding specific congressional delegations of power to the President to be unconstitutional, stated in dicta that broad delegations of domestic powers to the President could be constitutional if sufficient guidelines were prescribed. A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935).

133. See supra note 132.
136. Id. at 678.
137. Id. at 686-87.
land from private entry. 139 Although there had been no statutory authority prescribing such withdrawal, over a period of many years the Executive had made a practice of this and Congress had not enacted any legislation to the contrary. 140 The Court held that Congress’ silence may be taken as acquiescence, since Congress was aware of the executive practice and, therefore, had the opportunity to put an end to it, if it chose to do so. 141

The Court, however, will not always defer to presidential authority when congressional action is absent. 142 In Kent v. Dulles, 143 the Court disallowed an administrative policy, although Congress had not specifically done so. 144 The focus of the Court’s inquiry was on the enforcement of the claimed power, rather than on congressional inaction. 145 According to the Kent Court:

Under the 1926 Act and its predecessor a large body of precedents grew up which repeat over and again that the issuance of passports is “a discretionary act” on the part of the Secretary of State. . . . This long-continued executive construction should be enough, it is said, to warrant the inference that Congress had adopted it. . . . But the key to that problem, as we shall see, is in the manner in which the Secretary’s discretion was exercised, not in the bare fact that he had discretion. 146

In 1981, the Court, in Haig v. Agee, 147 qualified the holding in Kent. The issue was the revocation of a passport of a citizen who had admittedly tried to sabotage CIA activities in foreign nations. 148 Al-

139. Id. at 471.
140. Id. at 469-71.
141. Id. at 471-83.
142. See infra notes 143-46 and accompanying text.
144. Id. at 130. The Court had previously found congressional acquiescence where Congress was silent in the face of administrative policy. See, e.g., Udall v. Tallman, 380 U.S. 1 (1965) (disposition of public lands by Secretary of Interior pursuant to Executive Order); Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294 (1933) (parties before Tariff Products Commission entitled to only limited opportunity to cross-examine adversary); Costanzo v. Tillinghast, 287 U.S. 341 (1932) (administrative interpretation of deportation statute); United States v. Midwest Oil Co., 236 U.S. 459 (1915) (withdrawal by President of public lands from private acquisition).
146. Id. at 124-25. It should be noted that the Court implied that had there been a national emergency at this time, the case may have turned out differently. Id. at 128.
148. 453 U.S. at 283-85.
though the Court did not find a long-standing practice of executive
enforcement of revocation, it upheld the Executive's right to do so.\textsuperscript{149}
The Court reasoned that there was no long-standing enforcement practice because there were few instances of "serious damage to the
national security or foreign policy of the United States as a result of
a passport holder's activities abroad. . . ."\textsuperscript{150} According to the
Court, those few times when similar factual situations had arisen,
the Executive had withheld passports.\textsuperscript{151} Since Congress could have
acted to end this "'openly asserted' . . . power at issue,"\textsuperscript{152} the
Court found Congress' inaction to be acquiescence.\textsuperscript{153}

The dissent in \textit{Haig} intimated that the majority's holding was
influenced by the danger to our national security.\textsuperscript{154} Justice Brennan
wrote: "I suspect that this case is a prime example of the adage that
'bad facts make bad law.'"\textsuperscript{155} More accurately, this case is a prime
equation that the Court, unfortunately, is influenced by policy con-
siderations when foreign affairs are at issue, leaving the question of
presidential authority to be answered on a case-by-case basis.

2. \textit{Presidential Legislation—Constitutional and Congressional
Limits}.—To speak of the President having concurrent power with
Congress, is to imply that the President may exercise legislative pow-
ers. It is not unheard of for the President to legislate,\textsuperscript{156} and al-
though the Constitution expressly provides that Congress shall have
"All" legislative powers,\textsuperscript{157} presidential lawmaking has been held
constitutional in many cases.\textsuperscript{158} The Supreme Court has not estab-
lished a rule of law to determine the scope of this presidential legis-
lative power, and what has occurred is an ad hoc case-by-case deter-
mnation depending upon the situation at issue.\textsuperscript{159}

Although specific guidelines to determine the breadth of presi-

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\textsuperscript{149.} Id. at 302.
\textsuperscript{150.} Id.
\textsuperscript{151.} Id.
\textsuperscript{152.} Id. at 303 (quoting Zemel v. Rusk, 381 U.S. 1, 9 (1965)).
\textsuperscript{153.} 453 U.S. at 303.
\textsuperscript{154.} Id. at 310-21 (Brennan, J., dissenting).
\textsuperscript{155.} Id. at 319 (Brennan, J. dissenting).
\textsuperscript{156.} See infra note 158.
\textsuperscript{157.} U.S. CONsT. art. I, § 1, cl. 1.
\textsuperscript{158.} Any time the President acts pursuant to broad delegations from congressional legis-
lation or silent acquiescence, he is making law. See supra notes 132, 144.
\textsuperscript{159.} According to Justice Jackson: "A judge . . . may be surprised at the poverty of
really useful and unambiguous authority applicable to concrete problems of executive power as
they actually present themselves." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579,
634 (1952) (Jackson, J., concurring in the judgment and opinion of the Court).
dential power are unavailable, this section attempts to establish loose guidelines through an analysis of Youngstown Sheet & Tube Co. v. Sawyer.\textsuperscript{160} Youngstown is often cited in the area of presidential powers, and very recently was acknowledged by the Supreme Court as containing the best analysis of presidential power to date.\textsuperscript{161}

During the Korean War, President Truman authorized the seizure of domestic steel mills to prevent a strike that threatened to arrest steel production. The steel companies affected by the takeover sued to enjoin the Secretary of Commerce from enforcing the seizure, claiming the executive order authorizing the Secretary’s act had no statutory or constitutional basis.\textsuperscript{162} The Government argued that the President has an “inherent” power—as opposed to expressly granted or implied power—to seize private property in an emergency situation.\textsuperscript{163}

The district court held that the President could only find power in the provisions of the Constitution or in specific legislative grants.\textsuperscript{164} Presiding Judge Pine stated that article II did not grant the President emergency powers; quite the contrary, article I, section 8 of the Constitution expressly grants Congress the power to “‘provide for the common defense and general welfare.’”\textsuperscript{165} Judge Pine further distinguished all of the cases cited by the defendant in support of the inherent powers argument, on the basis that in each case where power did not stem directly from the Constitution, there was a statute from which it came.\textsuperscript{166} Apparently, Judge Pine was concerned about limits on emergency power, because he noted that Congress’ article I, section 8 power was “within constitutional limitations.”\textsuperscript{167} In Judge Pine’s view, the United States government is one of constitutionally limited powers.\textsuperscript{168} To the defendant’s claim that, in addition to inherent powers, there should be no judicial review of the President’s determination of an emergency, Judge Pine answered that such a view is “alien to our Constitutional government of limited powers.”\textsuperscript{169}

\textsuperscript{160} 343 U.S. 579 (1952).
\textsuperscript{162} Youngstown, 343 U.S. at 583.
\textsuperscript{163} See id. at 584.
\textsuperscript{165} Id. at 573-74 (quoting U.S. Const. art. I, § 8).
\textsuperscript{166} Id. at 574-75.
\textsuperscript{167} Id. at 574.
\textsuperscript{168} Id. at 576.
\textsuperscript{169} Id. For an extensive discussion of judicial review of the President’s actions in for-
The Supreme Court upheld the district court's decision by a vote of six to three; five Justices wrote separate concurring opinions. Justice Black, as author of the plurality opinion, stated unequivocally that the President's authority to seize the steel mills must come "either from an act of Congress or from the Constitution itself." According to Justice Black, not only did the President seize property without congressional authorization under the Taft-Hartley Act, but Congress had discussed and rejected seizure power as a method of solving labor disputes when it was drafting the Act.

Justice Black's search for constitutional seizure authority proved no more successful. Responding to the argument that authority may be implied, he discussed constitutional provisions granting presidential power and could not find any basis for the President's executive order. Justice Black found no relevant authority in the Commander-in-Chief clause, explaining that the theater of war concept could not be expanded to include seizure of private property in order to ensure production during war. "This," he stressed, "is a job for the Nation's lawmakers, not for its military authorities."

Espousing a strict adherence to the separation of powers doctrine, Justice Black rejected the argument that authority may be implied from any of the constitutional provisions granting the President power. These provisions, according to Justice Black, limit the President's function in legislation to recommending and vetoing laws. He concluded that, as Congress has exclusive constitutional power to make laws, the President had overstepped his constitutional powers.

170. See 343 U.S. at 593-667. Justices Frankfurter, Jackson, and Burton, though writing separate opinions, joined Justice Black's plurality opinion, id. at 589. Id. at 593 (Frankfurter, J., concurring); id. at 634 (Jackson, J., concurring in the judgment and opinion of the Court); id. at 655 (Burton, J., concurring in both the opinion and judgment of the Court).
171. Id. at 585.
173. 343 U.S. at 586. For Congress' discussions on this issue, see 93 Cong. Rec. 3637-45 (1947).
174. See 343 U.S. at 587-89.
175. U.S. Const. art. II, § 2, cl. 1.
176. 343 U.S. at 587.
177. Id.
178. For a discussion of separation of powers, see supra note 12.
179. See 343 U.S. at 587-88.
180. Id. at 587.
bounds by authorizing the seizure of the mills. 181

Edward S. Corwin, a noted authority on presidential powers, has pointed out that strict adherence to separation of powers would have precluded the Court from ending the seizure, because termination was within Congress' power. 182 In declaring the seizure illegal, the Court usurped congressional power, just as Justice Black claimed the President had done. 183 Scholars have also noted that Justice Black did not support his opinion with precedent from previous decisions or governmental practice. 184

Justice Frankfurter concurred in Justice Black's separation of powers argument on the facts of Youngstown, but stated that this doctrine is more flexible than Justice Black allowed. 185 Justice Frankfurter was careful not to commit himself to a comprehensive delineation of presidential powers. He noted that it was irrelevant to consider what powers the President would have had if there had been no legislation or if the seizure had been temporary. 186 Looking to prior congressional enactments granting the President seizure power, Justice Frankfurter demonstrated that Congress was careful to draw strict guidelines to circumscribe this power. 187 Justice Frankfurter then pointed to the legislative history of the Labor Management Relations Act 188 to show that Congress had considered and rejected seizure as a method of solving labor disputes. 189 Noting that the President would not have had seizure power if Congress had expressly negated it in legislation, Justice Frankfurter opined that Congress had, nevertheless, expressed its intent in this area. 190 In reply to the Government's argument that the conflict in Korea created a need for the President to seize the mills, 191 Justice Frankfurter stated:

Absence of authority in the President to deal with a crisis does not imply want of power in the Government. Conversely the fact that

181. See id. at 588-89.
183. See 343 U.S. at 588.
184. See, e.g., Corwin, supra note 182, at 56.
185. 343 U.S. at 589 (Frankfurter, J., joining in the opinion of the Court).
186. Id. at 597 (Frankfurter, J., concurring).
187. See id. at 598 (Frankfurter, J., concurring).
188. See supra note 172.
189. See 343 U.S. at 598-602 (Frankfurter, J., concurring); 93 CONG. REC. 3637-45 (1947).
190. 343 U.S. at 602 (Frankfurter, J., concurring).
191. See id. at 603 (Frankfurter, J., concurring).
power exists in the Government does not vest it in the President. The need for new legislation does not enact it. Nor does it repeal or amend existing law.\footnote{192}

According to Justice Frankfurter, to find authority where it has been "so explicitly withheld . . . is to disrespect the whole legislative process and the constitutional division of authority between President and Congress."\footnote{193} To explain the nature of the authority granted the President by article II, section 3, which provides that "he shall take Care that the Laws be faithfully executed,"\footnote{194} Justice Frankfurter quoted Justice Holmes: "'The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power.'"\footnote{195} Justice Black had conceived this clause as precluding the President's exercise of any legislative powers;\footnote{196} the Holmes quote merely emphasizes congressional limitations.

Citing United States v. Midwest Oil Co.,\footnote{197} Justice Frankfurter noted that a long-continued executive practice that had not been opposed by Congress, although within its knowledge, was an implied grant of authority to the President.\footnote{198}

Justice Douglas concurred in Justice Black's separation of powers argument, placing great emphasis on the "All" in article II, section 1, which grants Congress the legislative powers vested in the Constitution.\footnote{199} He stated that the President's seizure was an unlawful exercise of legislative power.\footnote{200} Further, according to Justice Douglas, the condemnation provision of the fifth amendment,\footnote{201} which requires compensation when the government takes property,\footnote{202} had an important bearing on the case. He reasoned that because

\begin{footnotes}
192. Id. at 603-04 (Frankfurter, J., concurring).
193. Id. at 609 (Frankfurter, J., concurring).
194. U.S. Const. art. II, § 3.
195. 343 U.S. at 610 (Frankfurter, J., concurring) (quoting Myers v. United States, 272 U.S. 52, 177 (1926)).
196. See 343 U.S. at 587-89.
197. 236 U.S. 459 (1915).
198. See 343 U.S. at 610-11 (Frankfurter, J., concurring). For more on implied powers, see supra notes 118-55 and accompanying text.
199. See 343 U.S. at 630 (Douglas, J., concurring).
200. Id. at 633 (Douglas, J., concurring).
201. "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.
\end{footnotes}
Congress has the constitutional power to raise revenues, "[t]he branch of government that has the power to pay compensation for a seizure is the only one able to authorize a seizure or make lawful one that the President had effected."\(^{203}\)

Edward S. Corwin suggested that Justice Douglas' analysis of compensation power overlooks cases where the right of compensation for the taking of property was upheld although the taking was based on the constitutional powers of the President.\(^{204}\) Justice Douglas' analysis is also inconsistent with an earlier opinion of his where he quoted from the Federalist: "All constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature."\(^{205}\)

Justice Burton, though joining Justice Black's plurality opinion, stated separately that because Congress had prescribed specific procedures for the President to meet the emergency in this case and had reserved to itself the power to seize, the President had invaded Congress' "jurisdiction."\(^{206}\) It is not clear whether Justice Burton meant to use the word "jurisdiction" in its strict sense to mean that seizure was solely within Congress' area of authority or whether he used it figuratively for want of a better word. If used in its strict sense, then there appears to be an inconsistency in the Justice's opinion, because he acknowledged that if Congress had not prepared for such an emergency, the President would have been able to act on his own.\(^{207}\)

Justice Clark acknowledged that in times of grave emergency, the President may have independent power to act.\(^{208}\) He qualified this power, however, by stressing that if Congress has outlined the specific procedures to handle the emergency, the President must comply with the congressional mandate.\(^{209}\) According to Justice Clark, three statutory procedures were available to the President: the Defense Production Act of 1950,\(^{210}\) the Labor Management Rela-
tions Act,211 and the Selective Service Act of 1948.212 The first two Acts did not authorize seizure in this type of situation and the Selective Service Act was not invoked.213

Justice Jackson, in a separate opinion, joined Justice Black's plurality opinion. He chose to analyze presidential authority through three types of interaction between the branches of the federal government. In the first situation, the President acts pursuant to an express or implied authorization from Congress and his power is at its strongest.214 According to Justice Jackson, if the President's act is declared unconstitutional, it would usually mean that the federal government as a whole lacks authority.215 Conversely, in the second situation, the President acts against the express or implied will of Congress and "his power is at its lowest ebb."216 To uphold the President's authority in this context would be to usurp that of Congress. Justice Jackson warned that caution must be used here, "for what is at stake is the equilibrium established by our constitutional system."217

The third situation, where the President acts in the absence of either a congressional grant or denial of authority,218 is not as easily dispensed with. According to Justice Jackson's analysis, in addition to relying on his own independent powers, the President may enter a "zone of twilight" where his power is concurrent with Congress or the distribution of authority between the branches is uncertain.219 In this "zone of twilight," the test of presidential power, at least in regard to the separation of powers problem,220 turns on the intent of Congress, as seen through "congressional inertia, indifference or quiescence."221 In Justice Jackson's view, "any actual test of power is likely to depend on the imperatives of events and contemporary im-
ponderables rather than on abstract theories of law.\textsuperscript{222}

As noted previously, the Supreme Court has recently acknowledged the usefulness of Justice Jackson's classifications for analytical purposes.\textsuperscript{223} The Court warned, however, that executive action will not always fall neatly into any one category.\textsuperscript{224} Justice Jackson, in introducing his classifications, acknowledged that they were an "over-simplified grouping,"\textsuperscript{225} although he found it very easy to pigeonhole the seizure into the second category, where the President acts contrary to express or implied congressional intent.\textsuperscript{226}

Noting the severity of the test that determines whether presidential actions should be upheld under his second classification, Justice Jackson proceeded to look for authority under article II provisions.\textsuperscript{227} He did not find power authorized by the broad executive clause,\textsuperscript{228} which provides: "The executive Power shall be vested in a President of the United States of America."\textsuperscript{229} He could not fathom why certain powers would thereafter be enumerated, leaving others merely to be implied by this provision.\textsuperscript{230} Justice Jackson stated that the executive clause was limited to "an allocation to the presidential office of the generic powers thereafter stated."\textsuperscript{231}

In discussing the Commander-in-Chief clause,\textsuperscript{232} Justice Jackson refused to concede that a President could turn his largely uncontrolled foreign affairs powers into power over internal affairs through his own commitment of armed forces to a foreign nation.\textsuperscript{233}

Justice Jackson also could not find seizure power in the clause authorizing the President to "take Care that the Laws be faithfully

\textsuperscript{222} \textit{Id.} (Jackson, J., concurring in the judgment and opinion of the Court).
\textsuperscript{223} Dames & Moore v. Regan, 453 U.S. 654, 668-69 (1981); \textit{see supra} text accompanying note 161.
\textsuperscript{225} 343 U.S. at 635 (Jackson, J., concurring in the judgment and opinion of the Court).
\textsuperscript{226} \textit{See id.} at 638-40 (Jackson, J., concurring in the judgment and opinion of the Court).
\textsuperscript{227} \textit{See id.} at 640-41 (Jackson, J., concurring in the judgment and opinion of the Court).
\textsuperscript{228} \textit{See id.} at 641 (Jackson, J., concurring in the judgment and opinion of the Court).
\textsuperscript{229} U.S. CONST. art. II, § 1, cl. 1.
\textsuperscript{230} 343 U.S. at 640-41 (Jackson, J., concurring in the judgment and opinion of the Court).
\textsuperscript{231} \textit{Id.} at 641 (Jackson, J., concurring in the judgment and opinion of the Court).
\textsuperscript{232} U.S. CONST. art. II, § 2, cl. 1.
\textsuperscript{233} 343 U.S. at 642 (Jackson, J., concurring in the judgment and opinion of the Court).
executed.\textsuperscript{234} According to Justice Jackson, this "authority must be matched against words of the Fifth Amendment that 'No person shall be . . . deprived of life, liberty or property, without due process of law.'"\textsuperscript{235} In regard to these clauses, Justice Jackson stated:

One gives a governmental authority that reaches so far as there is law, the other gives a private right that authority shall go no farther. These signify about all there is of the principle that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules.\textsuperscript{236}

Lastly, Justice Jackson looked to the argument that seizure power has accrued to the executive office because other presidents have used this as an emergency measure.\textsuperscript{237} He rejected this inherent emergency power; first, because he could distinguish previous seizure cases,\textsuperscript{238} and second, because the Constitution makes no provision for extraordinary authority of the Executive in terms of crisis.\textsuperscript{239} According to Justice Jackson, only Congress can grant the President emergency powers, in order to ensure restraint upon his authority.\textsuperscript{240}

\[a. \text{Reconciliation of the Opinions.} - \text{Although agreeing that the President was without authority to seize the steel mills, the Justices voting to uphold the district court were in harmony on only a few points respecting the constitutional powers of the President. All agreed that the President's powers in any area must be based on grants of authority under article II.} \textsuperscript{241} \text{There was not, however, a consensus on whether the opening sentence of section one of article II, which vests executive power in the President,} \textsuperscript{242} \text{is itself a grant of power or simply a designation of title to the Chief Executive. While Justice Jackson expressly stated that this clause was not a grant of}

\begin{footnotes}
\item[234.] U.S. Const. art. II, § 3.
\item[235.] 343 U.S. at 646 (quoting U.S. Const. amend. V) (Jackson, J., concurring in the judgment and opinion of the Court).
\item[236.] Id. (Jackson, J., concurring in the judgment and opinion of the Court).
\item[237.] See id. at 646-49 (Jackson, J., concurring in the judgment and opinion of the Court).
\item[238.] See id. at 648-49 & n.17 (Jackson, J., concurring in the judgment and opinion of the Court).
\item[239.] See id. at 643-46, 649-51 (Jackson, J., concurring in the judgment and opinion of the Court).
\item[240.] See id. (Jackson, J., concurring in the judgment and opinion of the Court).
\item[241.] See id. at 587 (Black, J., plurality opinion); id. at 610 (Frankfurter, J., concurring); id. at 632 (Douglas, J., concurring); id. at 640 (Jackson, J., concurring in the judgment and opinion of the Court); id. at 659 (Burton, J., concurring in both the opinion and judgment of the Court); id. at 662 (Clark, J., concurring in the judgment of the Court).
\item[242.] U.S. Const. art. II, § 1, cl. 1.
\end{footnotes}
power,\textsuperscript{243} Justice Frankfurter implied that this clause, in combination with section three regarding the duty to enforce the laws, could be considered as both a grant of power and a designation of title.\textsuperscript{244}

As a corollary to the consensus that authority of the President must be justified by article II grants of power,\textsuperscript{245} the Justices seem to agree that the President is always subject to constitutional limitations.\textsuperscript{246} They agree, as well, that by virtue of its legislative powers, Congress has the paramount authority to establish procedures to be followed in an emergency of this type.\textsuperscript{247} As a result, whatever authority the President has is also subject to congressional limitations. Congress, therefore, has preemptory powers over the Executive.

Justices Jackson, Frankfurter, Clark and Burton seem to be advocating the Implied Concurrent Powers Theory of presidential powers in foreign affairs.\textsuperscript{248} Justices Black and Douglas present a very strict view of the separation of powers doctrine, and it would be difficult to maintain that they adhere to this theory of implied concurrent powers.

The Implied Concurrent Powers Theory, apparently advocated by four of the six Justices voting to uphold the district court in \textit{Youngstown}, is in accord with the concept of a constitutional democracy, so far as it relies upon the Constitution as the source of presidential power.\textsuperscript{249} Power is implied from congressional policy\textsuperscript{250} or, in the absence of such policy, from the specific provisions of the Constitution.\textsuperscript{251} Congressional limitation of presidential action is evident in the text of the Constitution. The President’s powers under the Com-

\textsuperscript{243} See supra text accompanying notes 214-40.
\textsuperscript{244} See supra text accompanying notes 185-98.
\textsuperscript{245} See supra note 241.
\textsuperscript{246} These limitations include the article I delegation of power to Congress, U.S. Const. art. I, § 1, cl. 1. See supra note 241.
\textsuperscript{247} See 343 U.S. at 587-89 (Black, J., plurality opinion); \textit{id.} at 610-14 (Frankfurter, J., concurring); \textit{id.} at 630-34 (Douglas, J., concurring); \textit{id.} at 654-55 (Jackson, J., concurring in the judgment and opinion of the Court); \textit{id.} at 656 (Burton, J., concurring in both the opinion and judgment of the Court); \textit{id.} at 662 (Clark, J., concurring in the judgment of the Court).
\textsuperscript{248} See supra text accompanying notes 118-55.
\textsuperscript{249} The need to adhere to the Constitution was emphasized by each of the six Justices. See 343 U.S. at 585 (Black, J., plurality opinion); \textit{id.} at 610 (Frankfurter, J., concurring); \textit{id.} at 630 (Douglas, J., concurring); \textit{id.} at 640 (Jackson, J., concurring in the judgment and opinion of the Court); \textit{id.} at 659 (Burton, J., concurring in both the opinion and judgment of the Court); \textit{id.} at 662 (Clark, J., concurring in the judgment of the Court).
\textsuperscript{250} See supra text accompanying notes 118-55.
\textsuperscript{251} See supra text accompanying notes 118-30.
mander-in-Chief clause\textsuperscript{252} are limited by the vast war-making power granted to Congress in article I.\textsuperscript{253} Similarly, in article II, the Constitution imposes a requirement of senatorial advice and consent upon the President's power to make treaties and appoint federal officers or ambassadors.\textsuperscript{254} Finally, the Constitution contemplates Executive accountability to Congress in the article II, section 3 provision that the President "shall take Care that the Laws be faithfully executed,"\textsuperscript{255} while Congress is granted "All" lawmaking powers.\textsuperscript{256}

As far as the concurrent powers are concerned, it is in this area that the Implied Concurrent Powers Theory comes dangerously close to impinging upon the concept of a constitutional democracy. Presidential legislation, even in the absence of congressional policy, poses a serious threat to the doctrine of separation of powers, which the Constitution is based on.\textsuperscript{257}

In addition to the problem of overlapping branches, the Implied Concurrent Powers Theory does not provide clear guidelines for judging future presidential actions. How broadly the provisions of the Constitution or congressional policy may be interpreted, is left to the factual situation at issue.

IV. CONCLUSION

Executive acts must be performed within the boundaries prescribed by the Constitution. The chief constitutional limitation on executive power in foreign affairs is the dominant lawmaking role granted to Congress. Guidelines for the future exercise of presidential power should be created by legislation. If enactment of responsive legislation is made impossible by the circumstances of an unpredictable foreign relations situation, however, it will be the courts' duty to determine the constitutional validity of any action taken by the President. When making such a judgment, the court must first consider whether or not Congress has provided for such presidential action. If congressional expression is absent, the court must look to the specific prohibitions of the Constitution to determine if the President's act has denied any rights of the states or the people.

Of all the theories discussed in this note, only the Implied Con-

\textsuperscript{252} U.S. CONST. art. II, § 2, cl. 1.
\textsuperscript{253} See supra note 47 and accompanying text.
\textsuperscript{254} U.S. CONST. art. II, § 2, cl. 2.
\textsuperscript{255} Id. § 3.
\textsuperscript{256} Id. art. I, § 1. Cf. Corwin, supra note 182, at 57.
\textsuperscript{257} See supra note 12.
current Powers Theory allows for the flexibility necessary in foreign relations while still adhering to the confines of the Constitution. Unfortunately, there are no strict guidelines for the courts or executive advisers to follow; that is the nature of foreign affairs. Nonetheless, the common thread for all such decisions must be the Constitution.

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