

PRESIDENTIAL UNILATERAL ACTIONS: CONSTITUTIONAL AND POLITICAL CHECKS

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*Throughout history, presidents have invoked a broad array of powers. Some are legitimate and well grounded; others exceed constitutional boundaries and have met defeat in Congress, the courts, and the public. Still others originate from historical errors by the Supreme Court, particularly in the field of external affairs. The powers analyzed in this article begin with these: enumerated, implied, inherent, prerogative, ministerial, and discretionary. Presidential instruments of power include executive orders and proclamations. The erroneous “sole organ” doctrine, first appearing in the Curtiss-Wright case of 1936, was at issue in the Jerusalem passport case of *Zivotofsky v. Kerry*. The scope of unilateral executive authority is being tested in initiatives by the Obama administration in the field of immigration policy.*

Presidential power is drawn from provisions expressly stated in the Constitution and authorities that can be reasonably drawn from those provisions (“implied” powers). Other sources include statutory grants from Congress, judicial decisions, national emergencies (real and contrived), and attempts by presidents to claim powers said to be “inherent” in the office. At times, presidents invoke a “prerogative” they claim allows them to act independently. In 2014, the Obama administration interpreted “prosecutorial discretion” broadly to permit substantial changes in immigration policy. These vague terms, used by government officials, federal courts, and scholars, need to be carefully defined, understood, and limited.

ENUMERATED AND IMPLIED POWERS

A number of presidential powers are enumerated in Articles I and II of the Constitution. The veto power is subject to a legislative override by the two chambers of Congress. The power to nominate and make treaties requires Senate support. The president has the power to fill up vacancies that may happen during the recess

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of the Senate. These powers, although expressly stated in the Constitution, have prompted many disputes between the two elected branches and required guidance by the courts.

In *McCulloch v. Maryland* (1819), Chief Justice John Marshall announced “This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted.”¹ His language is quite misleading. Government in the United States has never been limited to enumerated powers. If that were true, federal courts would not possess the power of judicial review. It is not enumerated in the Constitution. From 1789 to the present time, all three branches have exercised a range of *implied* powers that can be reasonably drawn from express powers.

Marshall’s description about the power of the federal government is surprising. The Framers understood that government requires a mix of enumerated and implied powers. As early as 1789, Congress engaged in a broad debate about the president’s need to have an implied power to remove the heads of the three executive departments: foreign affairs, war, and treasury. Similarly, Congress from the start understood that in order to carry out its enumerated power to pass legislation it needed the implied power to investigate and seek documents from the executive branch.

In Federalist No. 44, James Madison explained why government needs more than enumerated powers: “No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included” (Wright 2002, 322). During the First Congress, he argued successfully against an effort to limit the national government to power expressly delegated. The Articles of Confederation, which became effective in 1781, protected states by providing that they would retain all powers except those “expressly delegated” to the national government (Jensen 1963, 263).

During debate on the Bill of Rights in 1789, a member of the House proposed that the Tenth Amendment include the words “expressly delegated.” The constitutional language would read: “The powers not expressly delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Madison opposed using the word “expressly,” explaining that it was impossible to delineate the functions and duties of the national government with such precision. No one could limit a government to the exercise of express or enumerated powers, for there “must necessarily be admitted powers by implication, unless the Constitution descended to recount every minutiae.”² Madison prevailed in having the word “expressly” deleted.

Another insight about implied powers emerged in the First Congress. From May 19 through June 24, 1789, lawmakers debated whether the president possessed authority to remove certain executive officials. The Constitution makes no mention of that presidential power. Key to the legislative debate is the president’s express duty under Article II to “take Care that the Laws be faithfully executed.” If the head

of an executive department failed to carry out the functions of his office, could the president remove him and find a more reliable substitute? With Madison leading the debate, both chambers of Congress concluded that the President had an implied power to remove department heads (Fisher 2014, 57–62).

Recognition of an implied presidential power to remove department heads did not include the power to remove *all* subordinate executive officials. When Madison analyzed the duties of the comptroller in the Treasury Department, he said it was necessary “to consider the nature of this office” and concluded its properties were not “purely of an Executive nature.” It seemed to him “they partake of a judiciary quality as well as Executive; perhaps the latter obtains to the greatest degree.” Because of the mixed nature of the office, “there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the Executive branch of the Government.”³ The Comptroller was responsible for settling legal disputes about public accounts. After hearing contending sides, he would make a decision that would be final and conclusive. Presidents and their assistants had no authority to interfere with those judgments. Interestingly, the president remained in control over a department head but not over subordinate officers. This point is developed in detail in the section on ministerial and discretionary powers.

Federal courts regularly acknowledge the existence of implied powers.⁴ Nonetheless, the Supreme Court continues to promote the erroneous doctrine of enumerated powers. In 1995, in striking down a congressional statute intended to regulate guns in schoolyards, the Court announced: “We start with first principles. The Constitution creates a Federal Government of enumerated powers.”⁵ That is not a first principle. No government can operate solely on the basis of enumerated powers. Two years later, the Court again stated “Under our Constitution, the Federal Government is one of enumerated powers.”⁶ No. The federal government is one of enumerated *and implied* powers. In upholding the Affordable Care Act in 2012, Chief Justice Roberts stated “If no enumerated power authorizes Congress to pass a certain law, that Law may not be enacted. . . .”⁷ The power of Congress has never been restricted in that manner. All three branches have a number of implied powers, provided they can be reasonably drawn from enumerated powers.

INHERENT POWERS

In their writings, scholars frequently refer to “inherent” presidential power when the more accurate word is *implied*. For example, in a study on treaties and international agreements, Oona Hathaway claimed that the president “has the power to make international agreements entirely on his own inherent constitutional authority. Yet that power is not unlimited” (Hathaway 2009, 210). She explained that the limits are found in the U.S. Constitution, “which is the source of both the President’s unilateral international lawmaking authority and the limits thereon” (*ibid.*, 210–11). Thus, the president’s authority is a mix of express and implied powers, not inherent.

Presidents invoke the latter as a source of authority that is not subject to checks by the other branches.

Some scholars treat implied powers and inherent powers as the same (Calabresi and Yoo 2008, 20, 430). They are fundamentally different. Implied powers are reasonably drawn from express powers and therefore are directly linked to the Constitution. Inherent powers, by definition, are not drawn from express powers. As the word suggests, these powers “inhere” in a person or an office. Inherent has been defined in this manner: “An authority possessed without its being derived from another. . . . [P]owers over and beyond those explicitly granted in the Constitution or reasonably to be implied from express grants” (Black’s Law Dictionary 1979, 703). Inherent is clearly set apart from express and implied powers.

Presidents Truman, Nixon, and Bush II claimed the right to exercise inherent powers. On each occasion they were rebuffed by Congress, the Supreme Court, or both. On April 8, 1952, Truman issued Executive Order 10340, authorizing and directing the secretary of commerce to take possession of steel companies needed to support the prosecution of the Korean War.⁸ In district court, Holmes Baldrige of the Justice Department defended the steel seizure as “a legal taking under the inherent executive powers of the President.”⁹ He agreed with District Judge David Pine that Truman did not depend on any statutory authority. Advising Judge Pine that courts had no authority to interfere with Truman’s action, he identified only two possible checks on this presidential action: “One is the ballot box and the other is impeachment.”¹⁰

Judge Pine struck down Truman’s action in seizing the steel mills, finding no express or implied constitutional authority. In doing so, he repudiated any reliance on “inherent power,” treating Baldrige’s definition of presidential power as “a form of government alien to our Constitutional government of limited powers.”¹¹ Acknowledging that his ruling might precipitate heavy costs, such as a contemplated strike by labor unions, Pine stated that such a consequence “would be less injurious to the public than the injury which would flow from a timorous judicial recognition that there is some basis for this claim to unlimited and unrestrained Executive power. . . .”¹²

During oral argument before the Supreme Court, Solicitor General Philip Perlman did not rely a single time on the constitutional doctrine promoted by Baldrige: “inherent presidential power” (Kurland and Casper 1952, 877–995). After oral argument, Truman told reporters about his power to seize the steel mills: “Nobody can take it away from the President, because it is inherent in the Constitution of the United States.”¹³ By a 6 to 3 vote, the Supreme Court invalidated Truman’s executive order.¹⁴ All six justices in the majority rejected the claim of inherent presidential power.

On two occasions, President Richard Nixon invoked inherent presidential power. In investigating the Watergate affair, Congress learned that Nixon had ordered the National Security Agency to illegally monitor American citizens with warrantless domestic surveillance. The agency entered into agreements with U.S.

companies, including Western Union and RCA Global, to have them turn over private telegrams to NSA for its analysis (Bamford 2002, 431–39). In 1971, a district court rejected the claim of a broad “inherent” presidential power to conduct domestic surveillance without a warrant.¹⁵

The Sixth Circuit affirmed, as did a unanimous Supreme Court.¹⁶ The Foreign Intelligence Surveillance Act (FISA) of 1978 replaced the theory of inherent presidential power with a judicial check by a newly created Foreign Intelligence Surveillance Court (FISC). These statutory procedures represented the “exclusive means” for conducting domestic surveillance.¹⁷

On a second occasion, Nixon invoked an inherent power to refuse to spend (impound) appropriated funds. From the days of George Washington forward, presidents were not required to spend every dollar that Congress provided. If the statutory purpose could be satisfied by spending less than the full amount, no one objected.¹⁸ In 1949, House Appropriations Chairman George Mahon remarked that reasonable economies in government were acceptable, but “economy is one thing, and the abandonment of a policy and program of the Congress another thing.”¹⁹

Nixon stepped over that line on January 31, 1973, when he announced that the “constitutional right for the President of the United States to impound funds—and that is not to spend money, when the spending of money would mean either increasing prices or increasing taxes for all the people—that right is absolutely clear.”²⁰ He claimed the constitutional right to cut programs in half and eliminate them altogether. His actions prompted approximately 80 lawsuits, with the administration losing almost all of them (Fisher 1975, 175–201). Only one case reached the Supreme Court and the administration also lost that one.²¹ The Impoundment Control Act of 1974 placed substantial limits on the president’s ability to impound funds.²²

President George W. Bush invoked inherent power on November 13, 2001, by issuing a military order to create military tribunals to try individuals who provided assistance to the terrorist attacks of 9/11.²³ Military tribunals had not been used since World War II, but the administration relied on a Supreme Court decision in 1942, *Ex parte Quirin*, as an “apt precedent” to support Bush’s order (Barr and McBride 2001, B7). In this decision, involving eight German saboteurs, the Supreme Court agreed to take the case before there had been any lower court rulings. In upholding the military tribunal, the Court released a short opinion that contained no legal reasoning, promising to provide a “full opinion” as soon as possible. About a week later, six of the eight men were electrocuted. It took the Court three months to release the full opinion. In *Hamdi v. Rumsfeld* (2004), Justice Scalia, joined by Justice Stevens, properly referred to *Quirin* as “not this Court’s finest hour.”²⁴

The claim of inherent presidential power to create military tribunals was expressly rejected by the Supreme Court in *Hamdan v. Rumsfeld* (2006). It held that Bush’s military order violated both the Uniform Code of Military Justice (UCMJ) and the Geneva Conventions. Congress had enacted the UCMJ and it was the president’s constitutional duty to comply with it. No inherent authority allowed

the president to circumvent a policy that Congress established under its Article I powers.²⁵

THE EXECUTIVE PREROGATIVE

Inherent power is occasionally referred to as a prerogative power, but the two terms have different meanings. By claiming inherent power, the president seeks authority to act independently without any checks from the other branches. In contrast, prerogative supports presidential initiative with the understanding that Congress will have to act later to approve or modify what the president did. If the initiative lacks legislative support, the president is at risk of being impeached and removed from office. By invoking the prerogative, the president recognizes he is not acting under the law and requires congressional support.

In 1690, John Locke defined prerogative as the power of the executive “to act according to discretion for the public good, without the prescription of the law and sometimes even against it” (Locke 1690, sec. 160). William Blackstone, writing in 1765, described the king’s prerogative as “those rights and capacities which the king enjoys alone” (Blackstone 1765, 232). Under his theory, the prerogative and inherent power were the same. On occasion, various American presidents have exceeded express and implied powers to unilaterally announce national policy, but in doing so they admit the need for legislative support, either by statute, by treaty, or by both.

For example, President Thomas Jefferson received \$10 million in appropriations from Congress to purchase New Orleans and Florida from France. He later learned that Napoleon Bonaparte, facing war with Great Britain, was willing to sell all of the Louisiana territory for \$15 million. In proceeding with the negotiations, Jefferson knew he needed additional appropriations from Congress and the Senate’s agreement to the treaty. He received both (DeConde 1976; Sprague 1974). President Abraham Lincoln exercised extraordinary powers after the Civil War began in April 1861, including suspension of the writ of habeas corpus. However, he never claimed he possessed authority—either through the prerogative or inherent power—to justify his actions. Instead, he told Congress on July 4, 1861, that he “believed that nothing has been done beyond the constitutional competency of Congress” (Richardson 1961, 7: 3225). With those words, he publicly admitted he had exercised not only his Article II powers, but the Article I powers of Congress as well. For that reason, he needed Congress to authorize what he had done, which Congress proceeded to do by statute.²⁶

In 2011, President Barack Obama in a signing statement objected to a bill that defunded certain “czar” positions that were not confirmed by the Senate (Sollenberger and Rozell 2012, 170–72). He spoke of the president’s “well-established authority to supervise and oversee the executive branch” and the president’s “prerogative to obtain advice that will assist him in carrying out his

constitutional responsibilities.”²⁷ He misused the word prerogative. No doubt, the president has authority to supervise the executive branch and obtain advice, but he has no authority to create and fund White House positions. That authority belongs to Congress, which can increase and decrease the number of White House officials and increase or decrease their salaries.²⁸ His signing statement claimed that the statutory restrictions “violate the separation of powers by undermining the president’s ability to exercise his constitutional responsibilities and take care that the laws be faithfully executed.” The statute did not violate separation of powers. Congress acted pursuant to its constitutional authority to decide how many aides are available to a president and how much they shall be paid. The only advice a president is entitled to, without limit, is from the private sector.

MINISTERIAL AND DISCRETIONARY POWERS

In their book, *The Unitary Executive*, Steven Calabresi and Christopher Yoo claim that all presidents, from George Washington forward, insisted that the Constitution “gives them the power to remove and direct subordinates as to law execution” (Calabresi and Yoo, 2008, 418). That has not been the record. As explained in the first section, Congress decided in 1789 that the comptroller in the Treasury Department needed to function independently of the president in order to discharge “judicial” duties. That precedent has been followed to cover other types of adjudicatory work done by federal agencies, including decisions by administrative law judges and executive officials who decide various claims and benefits.

In *Marbury v. Madison* (1803), Chief Justice Marshall drew an important distinction for officials in the executive branch. He recognized that the heads of executive departments function as political agents of the president and are subject to removal. Yet they and their subordinates also receive legal duties assigned to them by Congress. Focusing on the secretary of state, Marshall said the office exercised two types of duties: ministerial and discretionary. The first duty is to the nation and the law. By statutory command, Congress may direct executive officials to carry out certain activities. When a secretary of state performs “as an officer of the United States,” he or she is “bound to obey the laws.”²⁹ In that capacity, the secretary acts “under the authority of law, and not by the instructions of the president. It is a ministerial act which the law enjoins on a particular officer for a particular purpose.”³⁰

On some occasions, a department head carries out the president’s will. At other times, the official (and subordinates) are required by statutory policy to carry out certain ministerial acts. Marshall underscored this latter duty: “But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to

the laws for his conduct; and cannot, at his discretion sport away the vested rights of others.”³¹

The distinction between ministerial/legal and discretionary/political has been recognized many times by attorneys general and federal courts. In 1823, Attorney General William Wirt advised President James Monroe about the extent of his control over agency accounting officers. Statutory policy regarding the settlement of public accounts required auditors in the Treasury Department to receive and examine accounts and certify them to the comptrollers, who would then reach a judgment about them. Although the Constitution directs the president to “take Care that the Laws be faithfully executed,” he is not expected to actually carry out each law. That would impose an impractical burden, even in the early decades of the national government and certainly in contemporary times. If officers under a president fail to carry out their duties, Wirt said it was the president’s duty to see that they are “displaced, prosecuted, or impeached.”³² It “could never have been the intention of the constitution, in assigning this general power to the President to take care that the laws be executed, that he should in person execute the laws himself.” Fulfilling that assignment would be “an impossibility.”³³

In subsequent years, Wirt frequently instructed Monroe that he should not be involved in the settlement of accounts.³⁴ Presidential interference “in any form would, in my opinion, be illegal.”³⁵ Two more Wirt opinions in 1825 underscored that constitutional principle.³⁶ In 1831, Attorney General Roger Taney advised President Andrew Jackson that a dispute within the Treasury Department about a government contractor had to be left to Congress. No appeal could be submitted to the president: “The power to give relief resides in Congress; and to them, in my opinion, the application must be made.”³⁷ Subsequent presidents received the same kind of advice.

In lawsuits, federal courts gained their own understanding of ministerial and discretionary duties. A major case is *Kendall v. United States* (1838), involving a private contract entered into with William T. Barry, postmaster general of the United States. In 1835, Barry resigned and Amos Kendall took his place. Congress passed legislation the next year directing the solicitor of the Treasury Department to settle and adjust the claims brought by the contractors.³⁸ The solicitor awarded the contractors \$161,563.89. Kendall set the amount at \$122,101.46.³⁹ The contractors appealed to President Andrew Jackson, asking him to award the full amount. He advised them to go to Congress, which would be “the best expounder of the intent and meaning of their own law.”⁴⁰

In response, Attorney General Benjamin Butler told the Supreme Court that when Congress passes legislation it belongs to the president “to take care that this law be faithfully executed.”⁴¹ The Court rejected his constitutional argument, pointing out that the vesting of the executive power in the president did not mean “that every officer in every branch of that department is under the exclusive direction of the President.” It would be “an alarming doctrine, that congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant

to any rights secured and protected by the constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to direction of the President. And this is emphatically the case, where the duty enjoined is of a mere ministerial character.”⁴²

These cases were generally directed at the heads of executive departments. They can also be aimed at the president. Federal courts invoked the ministerial-discretionary principle during the Nixon administration to force the release of impounded funds. Lawsuits can also specifically target the president. In 1974, an appellate court held that President Nixon violated the law by refusing to carry out a statute on federal pay. It was his obligation to either submit to Congress a pay plan recommended by the salary commission or offer an alternative. He did neither. He was required, said the court, to do one or the other. There was no constitutional authority to ignore the law.⁴³

Beginning in 1979, Congress directed the attorney general to issue a report to both houses in any case in which the administration refrained from enforcing a statutory provision because the Justice Department had determined that “such provision of law is not constitutional.” The department must also report to Congress when it decides to “contest, or will refrain from defending, any provision” of statutory law in any judicial or administrative proceedings because of constitutional objections.⁴⁴ President Obama and Attorney General Eric Holder complied with this statute in 2011 by reporting to Congress that the administration could no longer defend the Defense of Marriage Act (DOMA).⁴⁵

EXECUTIVE ORDERS AND PROCLAMATIONS

Although “making laws” is generally associated with Congress, studies have analyzed the “ordinance making” and “decree making” authority of presidents. These executive instruments can be used to implement statutory policy, but at times they are purely presidential initiatives (Carey and Shugart 1998; Hart 1925). In acting unilaterally, presidents have faced a mix of challenges, including invalidation by federal courts, regular challenges by Congress, and opposition from the general public.

The first foray into unilateral presidential lawmaking occurred in 1793 when President Washington released a proclamation warning Americans to avoid taking sides in the war between England and France. He directed law officers to prosecute all persons who violated his neutrality proclamation. To prevail, the administration needed the consent and support of jurors. However, when Gideon Henfield was prosecuted for violating Washington’s policy, jurors announced they would refuse to convict anyone simply based on a presidential proclamation. The creation of criminal law, they insisted, required a statute passed by Congress. With no statute in hand, the administration ceased trying to prosecute (Wharton 1849, 84–85, 88). At that point, Washington turned to Congress for support, informing lawmakers

that it rested with “the wisdom of Congress to correct, improve, or enforce” the policy his proclamation has set forth.⁴⁶ The Neutrality Act, passed the next year, gave the administration the legal authority it needed to prosecute violators.⁴⁷

Lincoln’s Emancipation Proclamation is often cited as a successful presidential initiative in lawmaking. What is ignored is that Congress had acted much earlier. Lincoln’s proclamation passed through three stages: the July 22, 1862, draft presented to the Cabinet, the revised proclamation of September 22, 1862, and the final official version publicly released on January 1, 1863 (Holzer 2012, 34–35, 88, 129). Long before that process was complete, Congress had already passed two confiscation acts of August 6, 1861, and July 17, 1862, establishing national policy to seize all property (including slaves) of southern states that had taken up arms against the Union.⁴⁸ On March 13, 1862, it prohibited military and naval officers from returning fugitive slaves to their masters.⁴⁹ On April 10, 1862, it declared that the United States should cooperate with states willing to gradually abolish slavery by offering financial aid to compensate them.⁵⁰ On April 16, 1862, it abolished slavery in the District of Columbia.⁵¹ Congress acted long before Lincoln.

Unilateral action by executive order and proclamation can be damaging to presidents, private citizens, and the nation. During his first 15 months in office, President Franklin D. Roosevelt signed 674 executive orders in an effort to stimulate the economy. In its first year, the National Recovery Administration (NRA) approved hundreds of codes and released 2,998 administrative orders and approved or modified the codes. Almost 6,000 NRA press releases, some having legislative effect, were issued during this period.⁵² With such volume, government officials were often unaware of their own regulations. In one case, the government learned that it had brought an indictment and taken an appeal to the Supreme Court without realizing that the portion of the regulation authorizing the proceeding had been eliminated by an executive order.⁵³

In 1935, the Supreme Court struck down a section of the NRA statute because it failed to establish a “criterion to govern the President’s course.” The Court noted that Congress “has declared no policy, has established no standard, has laid down no rule.”⁵⁴ A decision later that year invalidated the rest of the NRA.⁵⁵ Those decisions struck down the executive orders that Roosevelt had issued to implement the NRA. In 1935, the House Judiciary Committee spoke of the “utter chaos” regarding the publication and distribution of administrative rules and pronouncements.⁵⁶ As a result, Congress required that a *Federal Register* be created to publish all presidential and agency documents having the effect of law.⁵⁷

In 1942, President Roosevelt issued Executive Order 9066, requiring the transfer of more than 110,000 Japanese Americans (two-thirds of them natural-born U.S. citizens) from their homes to detention centers. He acted in part on “the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy.”⁵⁸ With no evidence of disloyalty or subversive activity, and

without the procedural safeguards of a hearing, these individuals were imprisoned solely because of their ancestry and race.

On February 20, 1976, President Gerald Ford issued a proclamation publicly apologizing for the treatment of Japanese Americans, referring to it as the “uprooting of loyal Americans.”⁵⁹ He asked the country “to affirm with me this American Promise—that we have learned from the tragedy of that long-ago experience forever to treasure liberty and justice for each individual American, and resolve that this kind of action shall never again be repeated.”⁶⁰ A commission established by Congress released its report in 1982, stating that Roosevelt’s executive order “was not justified by military necessity” and that the policies that flowed from it—curfew and detention—“were not driven by analysis of military conditions.” The factors that shaped those decisions were “race prejudice, war hysteria and a failure of political leadership.”⁶¹

Another damaging executive order was issued by President Truman in 1947, requiring a loyalty investigation of every employee in the federal executive branch.⁶² Employees had no opportunity to confront and cross-examine secret accusers. Truman’s order did not include a clear and understandable definition of either loyalty or subversion. Safeguards supposedly protected employees “from unfounded accusations of disloyalty,” but his order permitted federal agencies to rely on secret informants whose identities and credibility could be withheld from the accused (Bontecou 1953).

Turning to contemporary examples, in his second day in office on January 22, 2009, President Barack Obama issued Executive Order 13492 to close the detention camp at Guantánamo Bay “as soon as practicable, and no later than 1 year from the date of this order.”⁶³ His advisers should have told him the obvious: closure would require about \$100 million dollars to build an adequate facility in the United States to house the detainees, requiring an appropriation from Congress. In short, instead of trying to “settle” the matter with an executive order, the two branches had to work jointly. Obama’s executive order was the type of unilateral action that backfired repeatedly on President George W. Bush (Fisher 2015, 148–165).

Another claim of independent presidential power appeared in Obama’s State of the Union address on January 28, 2014. In identifying his priorities, he said that some will “require Congressional action” but “America does not stand still—and neither will I. So wherever and whenever I can take steps without legislation to expand opportunity for more American families, that’s what I’m going to do.”⁶⁴ He pledged that in the coming weeks he would issue “an Executive Order requiring Federal contractors to pay their federally funded employees a fair wage of at least \$10.10 an hour—because if you cook our troops’ meals or wash their dishes, you shouldn’t have to live in poverty.”⁶⁵ He gave the impression that he could act unilaterally through his own authority to settle this matter. Attorney General Eric Holder supported that position in testifying before the Senate Judiciary Committee shortly after Obama’s address. As to Obama’s authority to raise the minimum wage

of federal contractors, he testified: “I think that there’s a constitutional basis for it. And given what the president’s responsibility is in running the executive branch, I think that there is an inherent power there for him to act in the way that he has” (Gramlich 2014, 3).

In fact, it was well known that Congress has passed legislation providing presidents some authority over federal contractors (Scalia and Mondl 2014, A17). Obama would therefore be acting not on the basis of independent executive power but on statutory authority. That reality became clear a month later, on February 12, when he issued his executive order. The first paragraph identifies authority under the Federal Property and Administrative Services Act, codified at 40 U.S.C. 101.⁶⁶ Section 1 of the order raised the hourly minimum wage paid by federal contractors to \$10.10. Where would that money come from? The answer should be obvious: from Congress. Section 7 concedes that point: “This order shall be implemented consistent with applicable law and subject to the availability of appropriations.”

THE SOLE-ORGAN DOCTRINE

In the *Curtiss-Wright* case in 1936, the Supreme Court upheld a congressional statute that delegated to the president authority to impose an arms embargo in a region in South America.⁶⁷ At no time in the litigation did any party, including the Justice Department, claim any independent or inherent power for the president. The issue was solely one of legislative power and the extent to which Congress could delegate its power to the president. In imposing the embargo, President Franklin D. Roosevelt relied entirely on statutory authority. His proclamation prohibiting the sale of arms and munitions to countries engaged in armed conflict in the Chaco began: “NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, acting under and by virtue of the authority conferred in me by the said joint resolution of Congress. . . .”⁶⁸

After upholding the delegation, Justice George Sutherland began adding extraneous material (*dicta*) that described presidential power in broad fashion. He wrote “It is important to bear in mind that we are here dealing not alone with an authority vested in the president by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the president as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.”⁶⁹ It should be obvious in reading Articles I and II of the Constitution that it does not confer “plenary and exclusive” authority to the president in external affairs.

It is not unusual for a court to reach a holding on the core issue before it proceeds to add extraneous matter. What is remarkable about *Curtiss-Wright* is that the Court’s *dicta* is plainly erroneous, has magnified presidential power, and

weakened the system of checks and balances from 1936 to the present time. Over the decades the error remained uncorrected, despite scholars from 1936 forward highlighting Sutherland's error. Simply reading Section 8 of Article I of the Constitution underscores how much of external affairs is expressly assigned to Congress. Congress has the power to lay and collect duties; provide for the common defense; to regulate commerce with foreign nations; to define and punish piracies and felonies committed on the high seas and offenses against the Law of Nations; to declare war; to make rules concerning captures on land and water; to raise and support armies; to provide and maintain a Navy; to make rules for the land and naval forces, and other provisions. Article II empowers the president to make treaties but only with the advice and consent of two-thirds of the Senate. The president shall appoint ambassadors, by and with the advice and consent of the Senate. No one reading the text of the Constitution could conclude that it gives the president plenary and exclusive power over external affairs.

Justice Sutherland attempted to reinforce his argument by claiming that the president is the "sole organ" of the federal government in the field of international relations. The word "sole" could mean plenary and exclusive, but what is meant by "organ"? Does it mean the president's power to *communicate* to other nations about U.S. policy? Sutherland seems to indicate that when he wrote: "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation."⁷⁰ If that were the meaning, it would simply say that the two elected branches make foreign power jointly and the president then communicates that policy to other countries.

However, Sutherland pressed further by citing a speech that John Marshall gave on March 7, 1800, when he served in the House of Representatives: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."⁷¹ The reference to Marshall is powerful because the next year he would be Chief Justice of the Supreme Court and serve in that capacity until 1835. But what did Marshall mean by "sole organ"? Surely he could read the text of the Constitution to see that it did not confer all of external affairs to the president.

There is only way to understand what Marshall meant by the sole-organ doctrine: carefully read his entire speech, which apparently Sutherland did not do, nor did the other justices who joined his opinion. One must first understand the *political context* of the speech, something Sutherland failed to do. In 1800, Thomas Jefferson campaigned for president against John Adams, who sought reelection. Jeffersonians in the House urged that Adams be either impeached or censured for turning over to Great Britain an individual charged with murder. Because the case was already pending in an American court in South Carolina, some lawmakers wanted to sanction Adams for encroaching upon the judiciary and violating the doctrine of separation of powers. A House resolution described the decision to turn the accused over to the British as "a dangerous interference of the Executive

with Judicial decisions.”⁷² According to the resolution, the decision to release the individual to the British “exposes the administration to suspicion and reproach.”⁷³ Those elementary facts are not found in Sutherland’s opinion in *Curtiss-Wright*.

Lawmakers in 1800 disagreed about the nationality of the person released to the British. The House resolution began with these words: “it appears to this House that a person, calling himself Jonathan Robbins, and claiming to be a citizen of the United States,” was held on a British ship and committed to trial in the United States “for the alleged crime of piracy and murder, committed on the high seas, on board the British frigate *Hermione*.”⁷⁴ It “appears”? Someone “claiming” to be a U.S. citizen? Was Robbins an American or British? He said he was from Danbury, Connecticut, but citizens living in that community certified they had never known an inhabitant of the town “by the name of Jonathan or Nathan Robbins, and that there has not been nor now is any family known by the name of Robbins within the limits of said town.”⁷⁵ Secretary of State Timothy Pickering concluded that Robbins used an assumed name and was actually Thomas Nash, a native Irishman.⁷⁶ U.S. District Judge Thomas Bee, asked to turn the prisoner over to the British, agreed that the individual was Thomas Nash.⁷⁷

This issue is fundamental. Had the Adams administration sent an American citizen to the British for trial, the Jeffersonians would have had good cause to attack Adams. But they proceeded on an assumption rather than on evidence. Not a word about this dispute appears in Sutherland’s decision. The deficiency here is of great consequence. Only by understanding the misconception by Jeffersonians can we understand why Marshall took the floor to give his speech.

Marshall proceeded to methodically shred the call for impeachment or censure. The Jay Treaty with England contained an extradition provision in Article 27, providing that each country deliver up to each other “all persons” charged with murder or forgery.⁷⁸ President Adams was not making foreign policy unilaterally or claiming some kind of plenary and exclusive power over foreign affairs. He was not the “sole organ” in formulating the treaty. He was the sole organ in *implementing* it. Adams acted to fulfill his express power in Article II, Section 3, to “take Care that the Laws be faithfully executed.” Under Article VI of the Constitution, all treaties “shall be the supreme Law of the Land.”

The purpose of Marshall’s speech is clear and unambiguous, but Sutherland did not explore it. His erroneous sole-organ doctrine greatly influenced constitutional law from 1936 to the present time, with the Justice Department and other executive agencies regularly relying on his error to promote presidential power in external affairs. The Supreme Court and lower courts depended on Sutherland’s erroneous doctrine to magnify presidential power.

The matter is once again in the courts because on July 23, 2013, the DC Circuit held that congressional legislation in 2002 “impermissibly infringes” on the president’s power to recognize foreign governments.⁷⁹ On five occasions, the DC Circuit relied on the erroneous sole-organ doctrine in *Curtiss-Wright*. It admitted it

was relying on judicial dicta rather than a holding, but concluded that dicta by the Supreme Court generally must be treated as authoritative, especially if the Court reiterates the dicta. The Court has done that over the decades. However, no matter how often the Court repeats an error, it remains an error and should not be used to justify presidential actions. Even with repetition, errors do not emerge as truth. The Court in the case of *Zivotofsky v. Kerry* had an opportunity—and a duty—to admit that Justice Sutherland made an error in 1936 with the sole-organ doctrine and it should no longer be relied on by federal courts and the executive branch to define presidential power. In an amicus brief filed with the Supreme Court on July 17, 2014, U explained in detail why the sole-organ doctrine was erroneous and asked the Court to correct it (available at <http://www.loufisher.org/docs/pip/zivotofsky.pdf>). Finally, with its June 8, 2015 decision in *Zivotofsky* the Court jettisoned the sole-organ doctrine.

PROSECUTORIAL DISCRETION AND IMMIGRATION POLICY

As another claim of independent executive power, consider President Obama's initiative in the field of immigration policy. From 2010 to November 2014, he publicly stated that he lacked personal authority to resolve the problem of undocumented aliens. On October 25, 2010, he gave this answer to those who urged him to act: "I am president, I am not a king. I can't do these things just by myself. We have a system of government that requires the Congress to work with the Executive Branch to make it happen. I'm committed to making it happen, but I've got to have some partners to do it." There was a "limit to the discretion that I can show because I am obliged to execute the law. That's what the Executive Branch means. I can't just make the laws up by myself."⁸⁰

On March 28, 2011, reacting to calls for presidential leadership, he explained: "With respect to the notion that I can just suspend deportations through executive order, that's just not the case, because there are laws on the books that Congress has passed." Any effort to "simply through executive order ignore those congressional mandates would not conform with my appropriate role as President."⁸¹ In June 2012, however, the Obama administration unilaterally granted deferred action for undocumented aliens who arrived in the United States as children (childhood arrivals, or DACA), allowing eligible individuals who did not present a risk to national security or public safety to request temporary relief from deportation proceedings and apply for work authorization. Having extended protection to the "Dreamers," he stated on February 14, 2013, that he was not "the emperor" and he had "kind of stretched our administrative flexibility as much as we can."⁸² Speaking on August 6, 2014, he stated that his preference "in all these instances is to work with Congress, because not only can Congress do more, but it's going to be longer-lasting."⁸³

Nevertheless, following the November 2014 elections, President Obama issued a major address to the nation on November 20, setting forth a comprehensive

immigration policy to cover about four to five million undocumented aliens. Referred to as DAPA, he focused on this category: “if you’ve been in America for more than five years; if you have children who are American citizens or legal residents; if you register, pass a criminal background check, and you’re willing to pay your fair share of taxes—you’ll be able to apply to stay in this country temporarily without fear of deportation. You can come out of the shadows and get right with the law.”⁸⁴

On February 16, 2015, U.S. District Judge Andrew Hanen wrote a 123-page opinion holding against the November 20 initiative by the Obama administration. Litigants in the case, he said, agreed that President Obama in his official capacity did not directly institute any program at issue in the case. Although Obama made his address to the nation on November 20, “there are no executive orders or other presidential proclamations or communiqué that exist regarding DAPA.” The sole focus of the lawsuit consisted of memoranda issued by Secretary of Homeland Security Jeh Johnson.⁸⁵ Judge Hanen held that Texas had established standing to bring the case because of injuries it would suffer, such as the cost of issuing driver’s licenses to deferred action recipients.

Texas and other plaintiff states complained that implementation of DAPA violated the Administrative Procedure Act (APA) by issuing a “substantive” or “legislative” rule without the notice-and-comment procedure required by the APA. The administration argued that DAPA is exempt from APA requirements. To Judge Hanen, DAPA constituted final agency action because the Department of Homeland Security was in the process of obtaining facilities, assigning officers, and hiring contract employees to process DAPA applications. The administration expected to accept those applications in mid-to-late May 2015.⁸⁶ As to the substantive effects of DAPA, Judge Hanen referred to a statement by President Obama on November 25, 2014, while speaking on immigration in Chicago: “I just took an action to change the law.”⁸⁷ Pursuant to this analysis, Judge Hanen granted the request by Texas and plaintiff states for a preliminary injunction and held that the administration had “clearly legislated a substantive rule without complying with the procedural requirements under the Administrative Procedure Act.”⁸⁸

The administration appealed to the Fifth Circuit, asking that the preliminary injunction be reversed. In its brief, the Justice Department described the November 20 initiative as a “guidance” and insisted that states lack standing to challenge federal authority over immigration. The administration argued that Texas chose to pay part of the expense of driver’s licenses instead of placing the full cost on aliens. Therefore, any costs to Texas are “voluntarily assumed” and cannot be attributed to the federal government. Those points will be closely analyzed by the Fifth Circuit.

The government’s brief claims a scope of independent executive authority that cannot be curbed by the judiciary. While it is true that federal courts defer in substantial part to immigration decisions by the executive branch, these cases are litigated on a routine basis with courts frequently placing limits on what an administration may do. It is an extreme and untenable position for the Justice Department to claim in its brief that the November 20 policy is “a quintessential

exercise of prosecutorial discretion, an executive function that is not subject to judicial review.”⁸⁹ In other parts of the brief, the Justice Department backs away from that unsupportable claim by citing a Supreme Court opinion in 1977 that the power to expel or exclude aliens is a fundamental power exercised by the elected branches “largely immune from judicial control.”⁹⁰

Throughout the brief, the Justice Department describes DAPA in terms that differ dramatically from public statements by President Obama. In his speech to the nation on November 20, he made a firm pledge to undocumented aliens. If they resided in America for more than five years, have children who are American citizens or legal residents, register, pass a background check and show a willingness to pay taxes, “you can come out of the shadows and get right with the law.” Aliens who applied would be eligible for benefits that would last for three years without fear of deportation.

The government’s brief presents an entirely different picture. Deferred action “does not give an alien any legal right to remain in this country.”⁹¹ The Department of Homeland Security (DHS) may revoke the deferred status and remove aliens “at any time.”⁹² The deferred policy of November 20 “confers no substantive rights,” lacks “the force and effect of law,” and “does not bind DHS.”⁹³ Under this interpretation, why would an alien be willing to come out of the shadows and face those risks?

Other parts of the brief state that the November 20 policy “does not establish norms” for an alien’s future conduct and provides “no rights or obligations.”⁹⁴ Instead, it is simply a public statement of how DHS intends to exercise its discretionary powers. Elsewhere in the brief, however, the Justice Department explains that after aliens receive a Social Security number, they “may correct wage records to add prior covered employment within approximately three years of the year in which the wages were earned.”⁹⁵ Certainly that is a substantial benefit and a norm.

Why these contradictory statements? Contrary to the position taken by Judge Hanen, the Justice Department argues that the November 20 policy is not subject to notice and comment under the APA unless it has “a direct, coercive impact on regulated parties by establishing binding norms for their future conduct.”⁹⁶ By treating the November 20 initiative as a mere “guidance,” the administration may attempt to defend its decision not to follow the APA notice-and-comment procedure.

The brief insists that the Immigration and Naturalization Act vests the administration “with exclusive authority” to establish national immigration enforcement policies and priorities, barring any judicial role in this case.⁹⁷ How could Congress, by statute, wholly shift to the secretary of homeland security the authority to establish national immigration policy? Such a move would not constitute delegation but rather abdication. One need only read Title 8 of the U.S. Code to see the extent to which Congress uses statutory policy to set and define immigration policy.

To the Justice Department, Judge Hanen’s injunction “obstructs a core Executive prerogative” and “offends basic separation-of-powers principles, impinging on Executive functions in the complex and sensitive field of immigration

enforcement.”⁹⁸ In fact, the administration’s claim of independent executive power offends the American system of checks and balances. John Locke championed the prerogative as an executive action that is against the law but for the public good. That theory of presidential power describes what many consider the underlying justification and motivation behind the November 20 initiative. In sanctioning the general framework of what became the guidance, the Office of Legal Counsel warned: “the Executive cannot, under the guise of exercising enforcement discretion, attempt to effectively rewrite the laws to match its policy preferences.”⁹⁹

On April 7, Judge Hanen denied the administration’s request to allow the November 20 policy to proceed. His injunction remained in place (Shear 2015a, A14). On April 17, the Fifth Circuit held a rare two and a half hour oral argument to hear the administration’s appeal. Often federal appellate courts decide cases solely on written briefs submitted by the contending parties (Nakamura 2015, A9; Shear 2015b, A12). On May 26, 2015, the Fifth Circuit decided that the injunction would stand (Preston 2015, A10).

CONCLUSION

In a recent study on the presidency, William Howell remarks: “So great are the public’s expectations of the president, in fact, that most Americans see their entire government in the presidency” (Howell 2013, 5). There is much truth in that observation. The public, led by the media, follows the White House closely and presidents respond by remaining in the news with frequent news conferences and public statements. What is lacking in this preoccupation is an appreciation of the gap between presidential rhetoric and political accomplishments. An example is the executive order that President Obama signed on his second full day in office, promising to close Guantánamo within a year. Wholly missing from his promise was an understanding that reaching that goal required joint action by both branches and sound political judgments by the administration. Public fixation on the president is likely to encourage thoughtless executive initiatives at great cost to the nation and its constitutional system.

In Federalist No. 4, John Jay explained the dangers of relying on single executives to decide national policy, especially in external affairs. He said it was “too true, however disgraceful it may be to human nature, that nations in general will make war whenever they have a prospect of getting anything by it; nay, absolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans.” On the basis of those objectives, single executives engaged in wars “not sanctified by justice or the voice and interests of his people” (Wright 2002, 101). These military operations regularly led to great loss of life and national fortune.

It can be argued that Jay and the Framers thought in terms of the eighteenth century and could not foresee conditions in the twentieth and twenty-first centuries. However, the Framers studied human nature and the record of single executives unilaterally deciding national policy. Has human nature changed? What we have witnessed from World War II to the present time confirms the Framers' fear of letting one person make military commitments. Harry Truman was the first president to take the country to war without first coming to Congress for either a declaration of war or statutory authority. In doing so, he violated the UN Participation Act of 1945 that specifically required presidents to obtain the approval of Congress before using U.S. troops in a UN war.¹⁰⁰ In violating that statute, which remains in the U.S. Code, Truman argued unconstitutionally that a president may circumvent Congress and receive "authority" from an outside body. Congress adopted the UN Participation Act precisely to prohibit such action.

Consider the damage to the nation, its constitutional process, and to Truman personally for embarking unilaterally on war against North Korea. He decided to send troops north, having been advised that the Chinese would not intervene. They did, in great numbers, leading to a stalemate that resulted in a major loss of life to Americans, South Koreans, North Koreans, and Chinese. For the United States, the war was a stalemate, with no hope of military victory. Truman paid a political price for this war, as did his party. It should have been a lesson to future presidents to avoid the precedent he set.

Yet presidential initiatives, even when unconstitutional, can invite violations by subsequent presidents. That is what happened during the eight years of Bill Clinton, who took military action around the globe without ever coming to Congress a single time for authority. Instead, he sought resolutions from the UN Security Council regarding Haiti and Bosnia. When he could not receive UN support for military action in Kosovo, he went to NATO allies for "authority." Through these unilateral actions, he argued that Congress as an authorizing body for war could be replaced either by the Security Council or by NATO allies. No constitutional argument can be advanced to justify that procedure (Fisher 2013, 174–200).

Even when presidents act with statutory support, as Lyndon Johnson did with the August 1964 Gulf of Tonkin Resolution, receiving unanimous support in the House and only two votes against him in the Senate, presidential initiatives can be costly. In the following spring, he escalated the war in Vietnam, eventually sending more than 500,000 troops to Southeast Asia, leading to the deaths of 58,000 U.S. soldiers with no hope of military victory. Johnson did that after ensuring Congress and American voters that in responding to attacks by North Vietnam in the Tonkin Gulf the United States "intends no rashness, and seeks no wider war."¹⁰¹ President George W. Bush came to Congress in October 2002, requesting and receiving authority to use military force against Iraq. His administration offered six claims that Saddam Hussein possessed weapons of mass destruction, assertions that were highly suspect in 2002 and found to be without any basis within a year (Fisher 2013, 209–232). The Framers understood that single executives will make grievous mistakes.

In 2011, President Obama circumvented Congress by going to the Security Council for a resolution to use military force in Libya. The resolution permitted military action for the single purpose of protecting civilians in Libya. The United States and its allies were not supposed to work jointly with rebel forces, but they began to do that. Moreover, mission creep began to add regime change, with the goal of removing Qaddafi from power. The result of this unilateral presidential action was to create a broken state in Libya and a breeding ground for terrorism from 2011 to the present time (Fisher 2013, 238–247).

In authorizing this use of military force, Obama announced that the operation would last “days, not weeks” (Bromwich 2011, 8). The point of this unwise specificity might have been to reassure Congress and the American public that his military initiative, regardless of legal and constitutional questions, would last a short time and be of little concern. Military operations, however, continued from one month to the next. As a campaigner in 2006, Obama had warned about presidential deceit. He said the “biggest problem we have in our politics . . . is to lie about the choices that have to be made. And to obfuscate and to fudge” (Rogak 2007, 143). That pattern emerged in Libya. The prediction of days, not weeks, underscored that Obama and his advisers did not understand the risks and uncertainties of military action.

By early June 2011, U.S. military involvement in Libya exceeded the 60-day clock of the War Powers Resolution (WPR). Under the terms of that statute, the president engaged in military operations exceeding 60 days must begin to withdraw troops and complete that process within the next 30 days. In response to a House resolution passed by a strong bipartisan vote of 268 to 145, the Obama administration submitted a report on June 15 stating that the military operations underway in Libya “are distinct from the kinds of ‘hostilities’ contemplated” by the WPR.¹⁰² The report reasoned that “hostilities” did not exist because no U.S. ground troops were involved, there were no U.S. casualties or serious threat of such casualties, and no significant chance of the conflict escalating. Following that legal analysis, the United States could conduct military operations against another country by bombing at 30,000 feet, launching Tomahawk missiles from ships, and using armed drones, without amounting to “hostilities.”

Obama requested a legal judgment from the Office of Legal Counsel that no “hostilities” existed. OLC declined to provide such a memo. Jeh Johnson, General Counsel in the Defense Department, also refused Obama’s request. He found it impossible to deny the existence of hostilities in the midst of Tomahawk missiles, armed drones, and NATO aircraft bombings. Eventually, Obama received statements from White House Counsel Robert Bauer and State Department Legal Adviser Harold Koh that no hostilities existed in Libya (Savage 2011, A1). Anyone familiar with the scope of military operations in Libya could not take their analysis as credible.

When presidents and their advisers do not talk straight, it comes at a price. Credibility and public trust are lost. Drew Westin, writing for the *New York Times*

on August 7, 2011, expressed difficulty in understanding what President Obama was saying on Libya and other matters: “Like most Americans, at this point, I have no idea what Barack Obama—and by extension the party he leads—believes on virtually any issue.” He noted Obama’s pattern of “presenting inconsistent positions with no apparent recognition of their incoherence.” Westen wondered why Obama seemed “so compelled to take both sides of every issue, encouraging voters to project whatever they want on him, and hoping they won’t realize which hand is holding the rabbit” (Westin 2011, 7).

NOTES

1. 17 U.S. (4 Wheat.) 316, 404 (1819).
2. 1 Annals of Cong. 761 (August 18, 1789).
3. *Ibid.*, 611-12 (June 27, 1789).
4. *Inland Waterways Corp. v. Young*, 309 U.S. 517, 525 (1940); *United States v. Midwest Oil Co.*, 236 U.S. 459, 475 (1915); *Anderson v. Dunn*, 6 Wheat. (19 U.S.) 204, 225 (1821).
5. *United States v. Lopez*, 514 U.S. 549, 552 (1995).
6. *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997).
7. *National Federation of Independent Business v. Sebelius* (2012).
8. 17 Fed. Reg. 3139, 3142 (1952).
9. “The Steel Seizure Case,” H. Doc. No. 534 (Part 1), 82d Cong., 2d Sess. 253 (1952). This document contains proceedings in district court and the DC Circuit.
10. *Ibid.*, 371.
11. *Youngstown Sheet & Tube Co. v. Sawyer*, 103 F. Supp. 569, 576 (D.D.C. 1952).
12. *Ibid.*, 577.
13. *Public Papers of the Presidents, 1952–53*, 363.
14. *Youngstown [Sheet & Tube] Co. v. Sawyer*, 343 U.S. 579 (1952).
15. *United States v. Sinclair*, 321 F. Supp. 1074, 1077 (E.D. Mich. 1971).
16. *United States v. United States Dist. Ct. for E.D. of Mich.*, 444 F.2d 651, 658 (6th Cir. 1971); *United States v. United States District Court*, 407 U.S. 297 (1972).
17. 92 Stat. 1788, 1797, sec. 201(f) (1978).
18. 21 Op. Att’y Gen. 414, 415 (1896).
19. 95 Cong. Rec. 14922 (1949).
20. *Public Papers of the Presidents, 1973*, 62.
21. *Train v. City of New York*, 420 U.S. 35 (1975).
22. 88 Stat. 297, 332-39 (1974).
23. 66 Fed. Reg. 57833 (2001).
24. 542 U.S. 507, 569 (2004).
25. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).
26. 12 Stat. 326 (1861).
27. Statement by President Obama on April 15, 2011, in signing H.R. 1473; <http://www.whitehouse.gov/the-press-office/2011/04/14/statement-president-hr-1473>.
28. 3 U.S.C. § 105; 92 Stat. 2445 (1978).
29. *Marbury v. Madison*, 5 U.S. (1 Cr.) 137, 157 (1803).
30. *Ibid.*
31. *Ibid.*, 165-66.
32. 1 Op. Att’y Gen. 624, 625 (1823).
33. *Ibid.*
34. 1 Op. Att’y Gen. 636 (1824).
35. 1 Op. Att’y Gen. 678, 680 (1824).
36. 1 Op. Att’y Gen. 705, 706 (1825).
37. 2 Op. Att’y Gen. 480, 482 (1831).

38. *Kendall v. United States*, 12 Pet. (37 U.S.) 524, 528 (1838).
39. *Ibid.*, 530.
40. *Ibid.*, 531.
41. *Ibid.*, 600.
42. *Ibid.*, 610.
43. *National Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974).
44. 98 Stat. 1040, 1049-50 (1979), revised by 116 Stat. 1771, sec. 202 (2002); 28 U.S.C. § 530D.
45. U.S. Department of Justice, Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act, February 23, 2011; <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.
46. *Annals of Cong.*, 3d Cong., 1-2 Sess. (1793), 11.
47. 1 Stat. 381-88 (1794).
48. 12 Stat. 319 (1861); 12 Stat. 589 (1862). See Siddall 2005.
49. 12 Stat. 354 (1862).
50. *Id.* at 617 (1862).
51. *Id.* at 376 (1862).
52. 59 A.B.A. Rep. 553-54 (1934).
53. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 412-13 (1935). For the discovery that an executive order had deleted penalties, see Irons 1982, 70-71.
54. *Panama Refining Co. v. Ryan*, 293 U.S. at 430.
55. *Schechter Corp. v. United States*, 295 U.S. 495 (1935).
56. H. Rept. No. 280, 74th Cong., 1st Sess. (1935), 1-2.
57. 49 Stat. 500 (1935).
58. 7 Fed. Reg. 1407 (1942).
59. Proclamation 4417, 42 Fed. Reg. 7741 (1976).
60. *Ibid.*
61. Commission on Wartime Relocation and Internment of Civilians. *Personal Justice Denied* (1982), 18.
62. Executive Order 9835, 12 Fed. Reg. 1935 (1947).
63. 74 Fed. Reg. 4897, 4898, sec. 3 (2009).
64. 160 Cong. Rec. S522 (daily ed. January 28, 2014).
65. *Ibid.*, S524.
66. Executive Order—Minimum Wage for Contractors, February 12, 2014; <http://www.whitehouse.gov/the-press-office/2014/02/12/executive-order-minimum-wage-contractors>.
67. *United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936).
68. 48 Stat. 1745 (1934).
69. *United States v. Curtiss-Wright*, 299 U.S. at 319-20.
70. *Ibid.*, 319.
71. *Ibid.*
72. 10 *Annals of Cong.* 533 (1800).
73. *Ibid.*
74. *Ibid.*, 532.
75. *Ibid.*, 517.
76. *Ibid.*, 515.
77. *Ibid.*
78. 8 Stat. 129 (1794).
79. *Zivotofsky v. Secretary of State*, 725 F.3d 197, 220 (D.C. Cir. 2013).
80. 161 Cong. Rec. H967 (daily ed. February 11, 2015), placed in the record by Rep. Hill of Arkansas.
81. *Ibid.*
82. *Ibid.*, H968.
83. *Ibid.*
84. "Remarks by the President in Address to the Nation on Immigration," November 20, 2014; <http://www.whitehouse.gov/issues/immigration/immigration-action>, 3.
85. *State of Texas v. United States of America*, Civil No. B-14-254 (D. Texas), February 16, 2015, 4-6.
86. *Ibid.*, 117.
87. *Ibid.*, 107.
88. *Ibid.*, 123.

89. Brief for the Justice Department, *State of Texas v. United States*, No. 15-40238, Fifth Circuit, March 30, 2015, 1.
90. *Ibid.*, 21; *Fiallo v. Bell*, 430 U.S. 787, 792 (1977).
91. *Ibid.*, 3.
92. *Ibid.*, 3–4.
93. *Ibid.*, 12, 17.
94. *Ibid.*, 41.
95. *Ibid.*, 49.
96. *Ibid.*, 40.
97. *Ibid.*, 35.
98. *Ibid.*, 52.
99. Office of Legal Counsel, “The Department of Homeland Security’s Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others,” November 19, 2014, 6.
100. 59 Stat. 621, sec. 6 (1945).
101. *Public Papers of the Presidents*, 1963–64, II, 931.
102. “United States Activities in Libya,” report submitted by the Obama administration to Congress, *New York Times*, June 15, 2011, at 25; <http://www.nytimes.com/interactive/2011/06/16/us/politics/20110615.POWERS.DO.html?ref=politics>.

REFERENCES

- Bamford, James. 2002. *Body of Secrets: Anatomy of the Ultra-Secret National Security Agency*. New York, NY: Anchor Books.
- Barr, William P., and Andrew G. McBride. 2001. “Military Justice for al Qaeda.” *Washington Post*, November 18.
- Black’s Law Dictionary*. 1979. 5th ed. St. Paul, MN: West Publishing Co.
- Blackstone, William. 1765. *Commentaries on the Laws of England*. Oxford, UK: Clarendon Press edition.
- Bontecou, Eleanor. 1953. *The Federal Loyalty-Security Program*. Ithaca, NY: Cornell University Press.
- Bromwich, David. 2011. “Obama: His Words & His Deeds.” *New York Review of Books*, July 14.
- Calabresi, Steven G., and Christopher S. Yoo. 2008. *The Unitary Executive: Presidential Power from Washington to Bush*. New Haven, CT: Yale University Press.
- Carey, John M., and Matthew Soberg Shugart, eds. 1998. *Executive Decree Authority*. Cambridge, UK: Cambridge University Press.
- DeConde, Alexander. 1976. *This Affair of Louisiana*. New York, NY: Scribner.
- Fisher, Louis. 1975. *Presidential Spending Power*. Princeton, NJ: Princeton University Press.
- . 2013. *Presidential War Power*. Lawrence, KN: University Press of Kansas (3rd ed.).
- . 2014. *Constitutional Conflicts between Congress and the President*. Lawrence, KS: University Press of Kansas (sixth edition).
- . 2015. “Closing Guantanamo: A Presidential Commitment Unfulfilled.” *Congress and Civil-Military Relations*, Colton C. Campbell and David P. Auersworth, Eds. Washington, DC: Georgetown University Press.
- Gramlich, John. 2014. “Holder Sees Basis for Executive Actions.” *Roll Call*, January 30.
- Hart, James. [1925] 1970. *The Ordinance-Making Powers of the President of the United States*. New York, NY: Da Capo Press.
- Hathaway, Oona. 2009. “Presidential Power over International Law: Restoring the Balance,” *Yale Law Journal*, vol. 119.
- Holzer, Harold. 2012. *Emancipating Lincoln: The Proclamation in Text, Context, and Memory*. Cambridge, MA: Harvard University Press.

- Howell, William G. 2013. *Thinking About the Presidency: The Primacy of Power*. Princeton, NJ: Princeton University Press.
- Irons, Peter H. 1982. *The New Deal Lawyers*. Princeton, NJ: Princeton University Press.
- Jensen, Merrill. 1963. *The Articles of Confederation*. Madison, WI: The University of Wisconsin Press.
- Kurland, Philip B., and Gerhard Casper, eds. 1952. *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law*. Washington, DC: University Publications of America, volume 48.
- Locke, John. 1690. *Two Treatises of Civil Government*. London, England: J. M. Dent & Sons (1962 edition).
- Nakamura, David. 2015. "Appeals Court Hears Pitch to Unfreeze Executive Actions on Immigration," *Washington Post*, April 18.
- Preston, Julia. 2015. "Federal Panel Lets Injunction Against Immigration Actions Stand," *New York Times*, May 27.
- Richardson, James D., ed. 1916. *A Compilation of the Messages and Papers of the Presidents*. New York, NY: Bureau of National Literature. 20 volumes.
- Rogak, Lisa. 2007. *Barack Obama in His Own Words*. New York, NY: PublicAffairs.
- Savage, Charlie. 2011. "2 Top Lawyers Lose Argument on War Power," *New York Times*, June 18.
- Scalia, Eugene, and Rachel Mondl. 2014. "The Conflict in Obama's Wage Hike," *Washington Post*, February 21.
- Shear, Michael D. 2015a. "Judge Refuses to Let Obama's Executive Actions on Immigration Proceed," *New York Times*, April 9.
- . 2015b. "Appeals Panel Weighs Obama Immigration Actions," *New York Times*, April 18.
- Siddall, Silvana R. 2005. *From Property to Person: Slavery and the Confiscation Acts, 1861–1862*. Baton Rouge, LA: Louisiana State University Press.
- Sollenberger, Mitchel A., and Mark J. Rozell. 2012. *The President's Czars: Undermining Congress and the Constitution*. Lawrence, KS: University of Kansas Press.
- Sprague, Marshall. 1974. *So Vast So Beautiful a Land: Louisiana and the Purchase*. Boston, MA: Little, Brown.
- Westin, Drew. 2011. "What Happened to Obama?," *New York Times*, Sunday Review, August 7.
- Wharton, Francis. 1849. *State Trials of the United States During the Administrations of Washington and Adams*. Philadelphia, PA: Carey and Hart.
- Wright, Benjamin F., ed. 2002. *The Federalist*. New York, NY: Metro Books.