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THE POWERS OF THE PRESIDENT*

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I. INTRODUCTION

In his theory of the republic, Plato conceived of the leader of a community as a wise philosopher-king, dedicating himself to the pursuit of the good of the community and the common interest.¹ The American Revolution² set itself against

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¹ PLATO, *THE REPUBLIC*, bk. V, at 153 (Allan Bloom trans., 2nd ed. 1991).

² BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); ROBERT MIDDLEKAUFF, *THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763-1789* (1985); GORDON S. WOOD, *THE*

this idea of one benign, all-powerful monarch on the assumption that human beings cannot be seen as completely altruistic, committed to the well-being and the flourishing of others. In particular, they saw clearly that men—and I assume women as well—are no angels³ and therefore governmental powers had to be, by necessity, divided so that the excessive ambition of one could be held in check by the ambition of others.⁴ Thus the construct of separating powers, both vertically⁵ and horizontally,⁶ and the particularly American principle of having nobody serve in two branches at the same time, i.e. the personal separation of powers—an idea unfamiliar to other modern democracies such as the United

RADICALISM OF THE AMERICAN REVOLUTION (1992). The ideals of its democratic revolution have become a model for the world. GORDON S. WOOD, *THE AMERICAN REVOLUTION: A HISTORY* (2002); R.R. PALMER, *THE AGE OF THE DEMOCRATIC REVOLUTION. VOL. I: THE CHALLENGE* (1959).

³ Cf. THE FEDERALIST NO. 51 (James Madison) (February 6, 1788), with its iconic language: “If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.” See also GOTTFRIED DIETZE, *THE FEDERALIST: A CLASSIC OF FEDERALISM AND FREE GOVERNMENT* (1960); DAVID F. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* (1984); *THE ENDURING FEDERALIST* (Charles A. Beard ed., 1948).

⁴ Madison, *supra* note 3, “Ambition must be made to counteract ambition.”

⁵ Siegfried Wiessner, *Federalism: An Architecture for Freedom*, 1 NEW EUROPE L. REV. 129 (1992-1993); A.E. Dick Howard, *The Values of Federalism*, 1 NEW EUROPE L. REV. 143 (1992-1993); Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749, 777 (1999). Roots of the idea can be found in JOHANNES ALTHUSIUS, *POLITICA* (1603) (Frederick S. Carney ed. & trans., 2013).

⁶ Charles-Louis de Secondat, baron de La Brède et de Montesquieu, in his 1748 book *DE L’ESPRIT DES LOIS* (translated 1750 into English as *The Spirit of the Laws*), urged that the political authority of the state be divided into separate and independent legislative, executive and judicial powers.

Kingdom where the Chief Executive, the Prime Minister, is also a member of Parliament.⁷

On the other hand, the Constitution appears to recognize the need for a strong community response to threats—thus the grant of apparently undivided executive power, novel from the Articles of Confederation.⁸ While Congress' power was enumerated in Article I, with whatever minor adjustments *McCulloch* and the necessary and proper clause wrought to it,⁹ the President was vested with "executive power" as declared in Article II.¹⁰ It is argued that therefore all executive action in the burgeoning welter of the modern administrative state derived ultimately from the President. The President also was accorded the original power of Commander-in-Chief,¹¹ and the power to appoint members of his or her branch and also the judiciary.¹² In order to acquit

⁷ The requirement, by constitutional convention, that the Prime Minister be elected by Parliament, reduces the danger of gridlock more likely to be experienced in a presidential system, where both the head of the executive branch and all the members of the legislative branch enjoy direct democratic legitimacy conferred by the people.

⁸ The Articles of Confederation of 1781 constituted a "firm league of friendship" amongst the thirteen seceding former British colonies (Article III). Their institutional focus was on the legislature of the "united states, in Congress assembled" (*e.g.*, Article IX), with the standing committee of this institution representing the closest analogue to an executive in the sense of a permanently sitting organ.

⁹ See *McCulloch v. Maryland*, 17 U.S. 316 (1819).

¹⁰ U.S. CONST. art. II, § 1, cl. 1: "The executive Power shall be vested in a President of the United States of America."

¹¹ U.S. CONST. art. II, § 2, cl. 1: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States. ..."

¹² U.S. CONST. art. II, § 2, cl. 2: "He ... shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the

themselves of what they saw as their responsibility to the nation, Presidents since Lincoln and Roosevelt have asserted the power to control their branch by issuing commands from the White House directing departments and administrative agencies to pursue certain policies. This original content of the theory of the “unitary executive,”¹³ advocated mainly at the end of the 20th and the beginning of the 21st century, was arguably expanded to include broad powers in the field of national security¹⁴ resting more on an emergency rationale, rather than the idea of the President’s accountability for all the acts of his or her branch.

Opponents of this idea of strong executive power, unbridled within the branch and far-reaching outside, were pointing to the Constitution’s grant of power to Congress to make all laws necessary to execute their legislative powers, including measures directed towards “departments.” The Congress created departments and agencies with discretion, isolated from direct orders by the President or other members of the Executive Branch. The motives were often respect for the subject-matter expertise of agency decision makers, who were in need of protection against overly political or partisan incursions (such as the Federal Reserve¹⁵), or required safeguards for their independence and impartiality to ensure the quality and fairness of quasi-judicial determinations (such

President alone, in the Courts of Law, or in the Heads of Departments.”

¹³ For a history of the idea from the beginnings of the Republic, see STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE. PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008). For a highly critical assessment, see JOHN P. MACKENZIE, *ABSOLUTE POWER: HOW THE UNITARY EXECUTIVE THEORY IS UNDERMINING THE CONSTITUTION* (2008).

¹⁴ See CALABRESI & YOO, *supra* note 13, at 18-19: “Most recently, the administration of George W. Bush has explicitly invoked the theory of the unitary executive as the basis for asserting sweeping implied emergency powers in waging the War on Terrorism.”

¹⁵ Federal Reserve Act, 12 U.S.C. § 341 (1913).

as asylum decisions rendered by an immigration judge¹⁶). As we will see, the Supreme Court respected these limits by allowing Congress to limit the President's originally unrestrained removal power to cause, at least in cases of certain officials exercising quasi-legislative or quasi-judicial power.

To properly delimit the scope of Presidential power, it would help to start with the structure, the architecture of the Constitution. The Executive Power is not the first one mentioned in this foundational document; in the sequence of the Constitution, it is listed after the powers of Congress, enumerated in Article I. That should tell us something. It reflects the judgment of the fathers of the Constitution that Congress is, or should be, pre-eminent in setting policy for the nation. The President has to "take care" that he or she implement the policy set by Congress; he or she has to faithfully execute it -- *nota bene* "faithfully."¹⁷ He or she is not allowed to depart from the text and policy of a congressional statute; that is the original idea. For these reasons, I usually start my Constitutional Law class in Miami with *McCulloch v. Maryland*,¹⁸ not, as most other teachers and casebooks do, with *Marbury v. Madison*¹⁹—the former dealing with the range of

¹⁶ "Immigration Judges are responsible for conducting Immigration Court proceedings and act independently in deciding matters before them. Immigration Judges are tasked with resolving cases in a manner that is timely, impartial, and consistent with the Immigration and Nationality Act, federal regulations, and precedent decisions of the Board of Immigration Appeals and federal appellate courts." IMMIGRATION COURT PRACTICE MANUAL, last revised June 10, 2013, ch. 1.2(a), at http://www.justice.gov/eoir/vll/OCIJPracManual/ocij_page1.htm (last visited November 24, 2013).

¹⁷ U.S. CONST. art. II, § 2, cl. 3: "[H]e shall take Care that the Laws be faithfully executed. ..." Even his oath of office includes this commitment: "I do solemnly swear (or affirm) that I will *faithfully execute* the Office of President of the United States." (U.S. CONST. art. II, § 1, cl. 8, emphasis added).

¹⁸ See *supra* note 9.

¹⁹ 5 U.S. 137 (1803).

express and implied powers of Congress, the latter with the authority of the Supreme Court.

Now, Congress often does not live up to the exalted role that the founding fathers foresaw for it. Part of the reason for it is that the Senate straight-jacketed itself with the requirement, not constitutionally mandated, of a super-majority of sixty (60) votes to close debate and proceed to a vote on the merits of a bill, if a so-called filibuster is signaled. At a time of a nearly ubiquitous use of that instrument,²⁰ a simple majority of fifty-one (51) is often no longer sufficient to have pieces of legislation approved by the Senate. The House of Representatives, on the other hand, still makes decisions by simple majority vote, so that institution should not have as much of a problem in reaching decisions and molding legislation. Since, however, every enactment has to be to the comma the same in both houses, federal legislation is hard to achieve, especially when government is divided by political party and ideology. In addition, the various branches of government are not hermetically sealed from each other. There

²⁰ See Citizens for Responsibility and Ethics in Washington, *Reforming a Broken Senate: Filibuster Reform*, <http://www.citizensforethics.org/policy/entry/filibuster-reform> (last visited November 21, 2013): "Some simple statistics highlight the present predicament. From roughly 1920 to 1970, filibusters averaged one a year. In stark contrast, in 2005-2006, there were an average of 34 cloture motions filed to end filibusters, and in the 2007-08 Congress there were 139 cloture motions filed, roughly 70 a year. So far in the session (2009-2010), 132 cloture motions have been filed." See also http://senate.gov/pagelayout/reference/cloture_motions/clotureCounts.htm (last visited November 21, 2013) for a year-by-year statistical chart tracking Senate cloture motions from 1917 to present; See also Janet Hook & Kristina Peterson, *Democrats Reign In Senate Filibusters*, WALL STREET J. (Nov. 21, 2013), <http://online.wsj.com/news/articles/SB1000142405270230460710579211881413579404> on a November 21, 2013 Senate rule change which effectively ends the use of filibusters for executive branch appointments and most judicial branch appointments. This so-called "nuclear option" will not affect filibusters of legislation or Supreme Court nominations.

are checks and balances between them. In the area of legislation, the President has a veto power. Once a law has been passed, though, he or she owes the duty to faithfully execute Congress' will. On the other hand, he or she has the original power of the Commander-in-Chief,²¹ the power to make treaties,²² and the power to appoint, with the advice and consent of the Senate, and also to remove, officers of the United States.²³

The *Federalist Papers* do not talk much about the general nature of how this executive power should be interpreted. Alexander Hamilton, however, made the comment that "energy in the Executive is the leading characteristic in the definition of good government."²⁴ One would hope that any person who exercises governmental power be energetic, particularly one holding an office within the Executive Branch. Theodore Roosevelt has staked out the position of broad executive power in his theory of the stewardship of the country by the President. He stated:

[T]he executive power is limited only by specific restrictions and prohibitions appearing in the Constitution, or imposed by the Congress under its Constitutional powers. My view was that every executive officer, and above all every officer in high position, was a steward of the people bound actively and affirmatively to do all he could for the people, and not to content himself with the negative merit of keeping his talents undamaged in a napkin. I declined to adopt the view that what was imperatively necessary for the Nation could not be done by

²¹ See *supra* note 11.

²² U.S. CONST. art. II, § 2, cl. 2: "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur..."

²³ See *supra* note 12.

²⁴ THE FEDERALIST No. 70 (Alexander Hamilton) (March 15, 1788).

the President unless he could find some specific authorization to do it.²⁵

His successor, and his own Secretary of War, William Howard Taft, is cited for the opposite position:

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. There is, he said, no undefined residuum of power which he can exercise because it seems to him to be in the public interest.²⁶

These are two conflicting positions, and they have led to controversies over certain exercises of Presidential powers. Ultimately, they rest on the seemingly eternal conflict between an interpretation of the Constitution that relies virtually exclusively on its text and original meaning²⁷ and the other reading which considers it a "living document."²⁸

²⁵ THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 388-89 (1913).

²⁶ WILLIAM H. TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 139-140 (1916).

²⁷ For early formulations of this position, see Maurice Merrill, *Constitutional Interpretation: The Obligation to Respect the Text*, in PERSPECTIVES OF LAW: ESSAYS FOR AUSTIN WAKEMAN SCOTT 260 (Roscoe Pound et al. eds. 1964); see also Justice Sutherland in *Home Bldg. & L. Ass'n v. Blaisdell*, 290 U.S. 398, 448-49, 453 (1934) (Sutherland, J., dissenting). Justice Black summarizes: "Our written Constitution means to me that where a power is not in terms granted or not necessary and proper to exercise a power granted, no such power exists in any branch of the government -- executive, legislative or judicial. Thus, it is language and history that are the crucial factors which influence me in interpreting the Constitution -- not reasonableness or desirability as determined by justices of the Supreme Court." HUGO BLACK, A CONSTITUTIONAL FAITH 8 (1968). For today's defense of the textualist position, see Justice ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997). See also the video *Scalia explains textualism*, available at

II. THE DUTY TO FAITHFULLY EXECUTE THE LAWS

Let us address first the duty to faithfully execute the laws. Under this rule, the President may not simply refuse to execute the law or a decision of a court interpreting it. May I offer one example. In *Worcester v. Georgia*,²⁹ the Supreme Court under Chief Justice John Marshall upheld the validity of a treaty between the United States and the Cherokee Nation, which gave the latter rights to self-government over their lands in the State of Georgia. Andrew Jackson, President at the time, supposedly said, "John Marshall has made his ruling, now let him enforce it."³⁰ Actually, Jackson had the military force to back him up, and, indeed, he failed to take any action to enforce the Supreme Court's decision in this case. What happened instead, in his Presidency, was the forced exodus of

<http://www.youtube.com/watch?v=FEKVXK61mew> (last visited November 24, 2013).

²⁸ The idea is generally attributed to Chief Justice John Marshall's statement in *McCulloch v. Maryland*: "We must never forget that it is a constitution we are expounding . . . intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." *See supra* note 9, at 407. Chief Justice Charles Evans Hughes amplified that the "power of 'judicial review' has given the Court a crucial responsibility in assuring individual rights, as well as in maintaining a 'living Constitution' whose broad provisions are continually applied to complicated new situations." Supreme Court of the United States, *The Court and Constitutional Interpretation, Charles Evans Hughes Cornerstone Address*, at <http://www.supremecourt.gov/about/constitutional.aspx> (last visited November 24, 2013). *See also* Karl Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1 (1934); and William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

²⁹ 31 U.S. 515 (1832).

³⁰ CALABRESI & YOO, *supra* note 13, at 450, referencing JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 516-18 (1996), who noted that Jackson "probably did not make that statement, at least not in that form," and that he "had no duty to enforce that particular judgment at that point."

Native Americans to Oklahoma, the tragic Trail of Tears³¹ – an area declared to be Indian territory forever, only to be turned over half a century later to new inhabitants of the later State of Oklahoma in the Land Run of 1889.³² President Obama went in a different policy direction when he, on December 16, 2010, declared the United States' support³³ for the 2007 U.N. Declaration on the Rights of Indigenous Peoples,³⁴ including rights to land and autonomy,³⁵ reversing the Bush administration's initial rejection of that declaration. Now there has not been an executive order or a Presidential directive, which would be binding and arguably within the President's executive power, that would force the administrative agencies, like the Bureau of Indian Affairs (BIA) or the Bureau of Land Management (BLM), to implement the Declaration. But I am

³¹ Based on the Indian Removal Act of 1830, the Trail of Tears of the "Five Civilized Tribes" with its countless deaths, trauma and misery represented the nadir of the United States policy to remove Indians from the Eastern seaboard. *See* GRANT FOREMAN, *INDIAN REMOVAL: THE EMIGRATION OF THE FIVE CIVILIZED TRIBES OF INDIANS* (1953); *see also* ANGIE DEBO, *AND STILL THE WATERS RUN* (1972).

³² *See* KENNY A. FRANKS & PAUL F. LAMBERT, *OKLAHOMA, THE LAND AND ITS PEOPLE* 17-30 (1994); *see also* STAN HOIG, *THE OKLAHOMA LAND RUSH OF 1889* (1989).

³³ For President Barack Obama's declaration of support, see <http://www.whitehouse.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference> (last visited November 24, 2013).

³⁴ United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res.61/295, Annex, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), available at http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

³⁵ According to the International Law Association's Resolution No. 5/2012 of August 30, 2012, the Declaration reflects customary international law rights of indigenous peoples to their cultural heritage, autonomy, and traditional lands. For its text, see <http://www.ila-hq.org/en/committees/index.cfm/cid/1024>; for background, see Siegfried Wiessner, *The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges*, 22 *EUR. J. INT'L L.* 121-140 (2011), available at <http://ejil.oxfordjournals.org/content/22/1/121.full.pdf+html> (last visited November 24, 2013).

told that, at least now, Indian leaders feel much more welcome in the corridors of power. Prior to the President's endorsement of the Declaration, Indian representatives may have been given a few minutes with a low-level employee of the BIA in Washington; now, I understand, they get one hour, courteously provided by the head of the agency. Things change.

President Lincoln provided another example of a somewhat controversial use of executive power, when he interpreted the Constitution contrary to the Supreme Court's decision in *Dred Scott v. Sandford*.³⁶ Technically speaking, he was questioning the rule of law, at least in its formal sense. Although the fugitive slave clause of the Constitution itself, as interpreted by the Court, might have violated natural law, or what we think is right and decent, positivist lawyers could see his attitude as disrespect for the ruling of the Supreme Court which had to be obeyed whether one liked it or not. Later, on the other side of history, Southern governors refused to comply with *Brown v. Board of Education*,³⁷ the command to desegregate. The Supreme Court did not take too kindly to that act of resistance. Arkansas' Governor, Orval Faubus, had referred to his oath of office where he swore to abide by the Constitution; he maintained he would just interpret the Constitution differently than the Supreme Court and remain with the "separate, but equal" doctrine, then overruled, of *Plessey v. Ferguson*.³⁸ The Supreme Court did not agree, reaffirming that it is its exclusive domain to say, with finality, what the Constitution means.³⁹ *Brown* was now the supreme law of the land, to be observed by any other agent of

³⁶ 60 U.S. 393 (1857).

³⁷ 347 U.S. 483 (1954).

³⁸ 163 U.S. 537 (1896).

³⁹ *Cooper v. Aaron*, 358 U.S. 1 (1958) (holding that the Arkansas Governor and Legislature were bound by the Supreme Court's interpretation of the U.S. Constitution after state officials had failed to properly implement the Court's holding in *Brown v. Board of Education*, 347 U.S. 483 (1954)).

Government.⁴⁰ *Marbury* had already held that it is “emphatically the province and duty of the judicial department to say what the law is.”⁴¹ The Supreme Court also reaffirmed against Congress its pre-eminence in interpreting the Constitution when it struck down the Religious Freedom Restoration Act, as applied to the states, in which Congress attempted to redefine the standard of review for the application of the Free Exercise Clause.⁴²

Controversy also surrounds a third issue of the exercise of presidential power, i.e. the increasing practice of the President to issue statements on the validity or interpretation of a law at the time of his signing it. Some of these “signing statements” had already been issued under President Clinton; they proliferated under President George W. Bush; and they continued under President Obama, though to a lesser degree; functionally, they may go back as far as President Monroe.⁴³ These statements do not only provide for an interpretation of the law as seen from the President’s perch; they also include declarations of the law that he just signed as unconstitutional.⁴⁴ Some of President Bush’s statements stood out as they “routinely asserted that he will not act contrary to the constitutional provisions that direct the president to

⁴⁰ *Id.* at 18.

⁴¹ *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

⁴² *City of Boerne v. Flores*, 521 U.S. 507 (1997).

⁴³ See The American Presidency Project, *Presidential Signing Statements*, <http://www.presidency.ucsb.edu/signingstatements.php> (last visited November 22, 2013) for general information about presidential signing statements as well as a detailed database on signing statements issued by various Presidents.

⁴⁴ See President Bush’s signing statement regarding H.R. 2068 made on August 23, 2002 found at <http://gpo.gov/fdsys/pkg/PPP-2002-book2/html/PPP-2002-book2-doc-pg1471.htm> (last visited November 22, 2013); see also Memorandum for the Heads of Executive Departments and Agencies from President Obama on Presidential Signing Statements (March 9, 2009) found at http://www.whitehouse.gov/the_press_office/Memorandum-on-Presidential-Signing-Statements (last visited November 22, 2013).

‘supervise the unitary executive branch.’”⁴⁵ A couple of times these statements merely reflected political differences because they go to the reach of the President’s war power or they introduce new reporting requirements to Congress, and so on. The President, in this case, just wants to maintain his position on an issue that has not yet been finally decided by the Supreme Court. In a second set of statements, President Bush has been clearly in the right. These include flagging a statute as unconstitutional when it includes provisions that provide a “legislative veto” held unconstitutional in *Immigration & Naturalization Service v. Chadha*⁴⁶ and its progeny.⁴⁷ That means that the executive implementation of a law cannot be made subject to the review, reconsideration and ultimate rejection by members of Congress, even individual committee chairs, or one house of Congress or both houses, and so on. That statutory reservation of power appears to plainly violate *I.N.S. v. Chadha* and established Supreme Court jurisprudence. As to the President, what would be the alternative to him? Could he veto that particular provision? This, again, would be unconstitutional as it would be equivalent to a line-item veto, declared unconstitutional in *Clinton v. The City of New York*.⁴⁸ So, if Congress decides to bundle everything on its legislative agenda into one statute, an omnibus bill, then the President has to either veto the entire legislation or let it pass in its entirety. In this regard, many of the states’ constitutions are probably much more preferable because they have allowed line-item vetoes.⁴⁹ They also often include a single-subject requirement, disallowing the bundling, in one piece of

⁴⁵ *Presidential Signing Statements*, *supra* note 43.

⁴⁶ 462 U.S. 919 (1983).

⁴⁷ See President Bush’s statement cited *supra* in note 44.

⁴⁸ 524 U.S. 417 (1998).

⁴⁹ See *Separation of Powers—Executive Veto Powers*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/about-state-legislatures/separation-of-powers-executive-veto-powers.aspx> (last visited November 22, 2013) noting that 44 states allow their executive the power of the line-item veto.

legislation, of all kinds of different issues (as in an “omnibus bill”).⁵⁰ In the absence of such a constitutional provision on the federal level, what is the President to do? An ABA Blue-Ribbon Task Force has stated that signing statements denying the constitutionality and enforceability of certain provisions of non-vetoed legislation are highly problematic in light of the Constitution’s separation of powers and the rule of law.⁵¹ The legislative intent could not be determined out of a mix between what the Congress intended and the President intended. The Congress, in Article I, is appointed to be the principal legislator; the President is encouraged to veto the law if he or she finds it unconstitutional or unwise. At this point, no single court has yet used signing statements as binding interpretations of a law, but the legality of administrative action based on them is a subject of controversy.⁵²

III. THE EXPRESS POWER OF THE PRESIDENT TO APPOINT AND REMOVE OFFICERS OF THE UNITED STATES

⁵⁰ See *Single Subject Rules*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/single-subject-rules.aspx> (last visited November 22, 2013) stating “41 states have constitutional provisions stipulating that bills may address only one subject, and several others have chamber rules for single-subject bills.”

⁵¹ Press Release, American Bar Association, Blue-Ribbon Task Force Finds Bush’s Signing Statements Undermine Separation of Powers (July 24, 2006), available at <http://archive.is/Z4V4y> (last visited November 24, 2013). See also Walter Dellinger, *The Legal Significance of Presidential Signing Statements*, Memorandum to Bernard N. Nussbaum, Counsel to the President, November 3, 1993, at <http://www.justice.gov/olc/signing.htm> (last visited November 24, 2013).

⁵² Nicholas J. Leddy, *Determining Due Deference: Examining When Courts Should Defer to Agency Use of Presidential Signing Statements*, 59 ADMIN. L. REV. 869 (2007).

Beyond the obligation to faithfully execute the laws, which translates into a power derived from Congress, the President has original powers. One of them is the power to nominate and remove officers of the United States.⁵³ The logic is that the President has to have the authority to choose the members of his branch and to entrust the job of faithfully executing the law to them.⁵⁴ If the President cannot trust them, he or she cannot perform his or her constitutional obligation; thus the argument for an unfettered power of removal under the theory of a unitary executive branch. At first, Congress approved allowing the President to remove, at will, the Secretaries of War, Foreign Affairs, and Treasury as seen fit by the President. Vice-President John Adams, in a famed decision of 1789, broke a 10 to 10 tie in the Senate in favor of the President's power to fire the Secretary of the Treasury.⁵⁵ Subsequently, in September 1833, Andrew Jackson fired two Treasury Secretaries to appoint one who would agree with him and his command to terminate the Second Bank of the United States.⁵⁶ That was a successful use of the claimed unfettered power. Later, President Nixon, fired attorney generals Elliot Richardson and William French Smith in sequence one Saturday night,⁵⁷ when they would not remove special prosecutor Archibald Cox, appointed to investigate the Watergate affair. This "Saturday Night Massacre" led to a

⁵³ U.S. CONST. art. II, § 2, cl. 2.

⁵⁴ U.S. CONST. art. II, § 3, cl. 5.

⁵⁵ JAMES HART, *THE AMERICAN PRESIDENCY IN ACTION: 1789*, at 217-18 (1948); CALABRESI & YOO, *supra* note 13, at 59, 445.

⁵⁶ CALABRESI & YOO, *supra* note 13, at 105 et seq. See generally Jonathan L. Entin, *The Removal Power and The Federal Deficit: Form, Substance, and Administrative Independence*, 75 KY. L.J. 699, 721-22 (1987).

⁵⁷ Carroll Kilpatrick, *Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit: President Abolishes Prosecutor's Office; FBI Seals Records*, WASHINGTON POST (Oct. 21, 1973), http://washingtonpost.com/politics/nixon-forces-firing-of-cox-richardson-ruckelshaus-quit-president-abolishers-prosecutors-office-fbi-seals-records/2012/06/04/gJQAFSR7IV_story.html (last visited November 22, 2013).

statute, the Ethics in Government Act, which we will address in a moment.

The Supreme Court addressed this claimed presidential removal power first in *Frank Myers v. United States*.⁵⁸ President Woodrow Wilson fired Frank Myers, a postmaster in Oregon despite the fact that he had a statutory four-year term, and his firing required Senate advice and consent. The Supreme Court in *Myers* decided that the President can fire any executive branch employee who performs only executive functions. That was the high point of the unitary executive theory. In *Humphrey's Executor v. U.S.*,⁵⁹ President Franklin D. Roosevelt fired the Senate-confirmed chairman of the Federal Trade Commission, William E. Humphrey -- not for inefficiency, neglect of duty, or malfeasance in office, as the act required, but because a rather business-oriented Mr. Humphrey would not go along with his views on the New Deal.⁶⁰ The Supreme Court declared this firing unconstitutional. Independent agencies with quasi-legislative and/or quasi-judicial functions can be created by Congress; and Congress can limit the Presidential removal power of officers performing these functions to cause.

The last pertinent case is *Morrison v. Olson*.⁶¹ Ted Olson was the Assistant Attorney General in charge of the Office of Legal Counsel who tangled with some House committees who investigated Superfund environmental clean-up law enforcement efforts and alleged his having committed criminal offenses in the process. He was investigated by Alexia Morrison, a so-called independent counsel, the

⁵⁸ 272 U.S. 52 (1926).

⁵⁹ 296 U.S. 602 (1935).

⁶⁰ CALABRESI & YOO, *supra* note 13, at 283-84. The Court affirmed *Humphrey's Executor* in the 1958 decision of *Wiener v. United States*, 357 U.S. 349, which involved the removal of a member of the War Claims Commission -- a body with judicial functions -- even though the Congress had not specified the legitimate grounds for removal.

⁶¹ 487 U.S. 654 (1988).

functional equivalent of a special prosecutor appointed by a special division of the courts and subject only to removal for cause. This unique form of appointment and removal was established through the Ethics in Government Act⁶² enacted in the wake of Watergate. Mr. Olson challenged the constitutionality of the independent counsel, stating that her appointment by the courts violated the principle of the separation of powers: instead of the courts, the President should have appointed her. The D.C. Circuit Court of Appeals, 2 to 1, ruled for Olson.⁶³ Judge Silverman confirmed the unitary executive branch idea. His position was that the power to appoint and remove persons from office must come from the same branch.⁶⁴ You cannot have some other branch come in and appoint a person with such core executive functions as a prosecutor has. The Supreme Court reversed in a 7 to 1 decision. Chief Justice Rehnquist stated for the Court that the federal courts can appoint inferior officers, as they qualified the independent counsel to be, and the Attorney General can still remove him, but only for good cause.⁶⁵ So removal restrictions were extended even to officers that do not perform legislative or judicial functions, but also core executive functions such as investigation and prosecution. The only limit is for Congress to tie the hands of the President regarding removal if it impedes the President's ability to perform his constitutional duty.⁶⁶ That is a very broad standard.

Thus, the pendulum swings back to Congress and the take-care clause;⁶⁷ meaning that Congress may construct an office in a way that dictates the terms of appointment and removal of officials holding such office. I would, however, think that there could, and should, be a more limiting

⁶² Ethics in Government Act of 1978, 5 U.S.C. §§ 101 *et seq.* (1978).

⁶³ *In re Sealed Case*, 838 F.2d 746 (D.C. Cir. 1988).

⁶⁴ *Id.* at 481-82.

⁶⁵ *Olson*, 487 U.S. at 690.

⁶⁶ *Id.* at 691.

⁶⁷ U.S. CONST. art. II, § 3, cl. 5.

interpretation of this opinion, restricting it to its rather unique facts. This was a situation in which the executive branch itself could possibly only be credibly investigated by someone who gets appointed from the outside and does not work under the full authority and supervision of the Attorney General. So there could and should be, for this particular conflict of interest, the case of an exception to *Myers*. It would make eminent sense to consider *Myers* to still be in force for all other executive employees.

IV. EXECUTIVE PRIVILEGE

Executive privilege is another area of asserted executive power which we do not find in the text of the Constitution itself. The case of *United States v. Nixon* was concerned with a subpoena of certain documents and tapes which the President claimed were privileged.⁶⁸ The President's counsel argued that the Constitution grants an absolute privilege of confidentiality for all presidential communications. On the other hand, it was asserted that it is the judicial department's role to say what the law is. The President claimed that communications between high government officials and advisors need to be protected, and that the executive branch needs to be kept independent, within its own sphere. For these reasons, the President should be immune from being subpoenaed in an ongoing criminal prosecution. The Supreme Court shot that argument down, holding that there is no absolute unqualified presidential privilege of immunity from judicial process.⁶⁹ It is not enough to state a broad and undifferentiated claim of a public interest in the confidentiality of presidential communications. The Court held what a President can claim as privileged are concretely identified military, diplomatic, or sensitive national

⁶⁸ See 418 U.S. 683 (1974).

⁶⁹ *Id.* at 706.

security secrets.⁷⁰ Furthermore, the Court stated that this type of information will be checked in chambers to verify that a claim of privilege is justified.⁷¹

V. WAR AND EMERGENCY POWERS

The last area of controversial exercises of power concerns executive authority in the case of war or other emergencies. At Lincoln Memorial University, it is appropriate to talk about the Civil War. During the war, Lincoln blockaded Southern ports after the secession of the states which formed the Confederacy.⁷² The suits challenging the proclamation of that blockade resulted in a decision by the United States Supreme Court, the *Prize Cases* of 1863, where, not surprisingly, Justice Grier for the Supreme Court stated that the President is the pre-eminent war-maker in his role as Commander-in-Chief, and that Congress has a very narrow veto power.⁷³ The only dissenter, Justice Nelson, saw Congress as the primary war-maker, since they had the power to declare war and to raise monies for the Armies and to fund it.⁷⁴ All the President had, in his view, was the power to repel sudden attacks.⁷⁵

The outcome of this case was a major victory for the President. This theory, however, came under heavy attack during the Vietnam War due to the high cost of error and misperceptions in international relations. This set the scene for great economic, physical, and emotional sacrifice for the

⁷⁰ *Id.* at 713.

⁷¹ *Id.* at 711.

⁷² For a concise historical account of Lincoln's blockade of the South, see *The Blockade of Confederate Ports, 1861-1865*, U.S. DEPARTMENT OF STATE OFFICE OF THE HISTORIAN, <http://www.history.state.gov/milestones/1861-1865/blockade> (last visited November 22, 2013).

⁷³ See 67 U.S. 635 (1862).

⁷⁴ *Id.* at 668.

⁷⁵ *Id.* at 691-92.

nation. As a result, the Congress determined that there need to be some deliberative process before the nation goes to war. To that end, in 1973, the War Powers Resolution was enacted.⁷⁶ Congress overruled a Presidential veto of this resolution, and it became the War Powers Act which required an end to an armed conflict if certain conditions were fulfilled.⁷⁷ All Presidents have rejected this resolution, and have not complied with all of its required procedures. The Court has not yet ruled on any attempts to clarify the reach of Congress' war powers.

In 1936, however, the Supreme Court in *United States v. Curtiss-Wright Export Co.* provided the Executive Branch with another strong victory in the field of foreign affairs.⁷⁸ This case concerned the sale of arms to Bolivia in violation of a Presidential proclamation that prohibited this transaction.⁷⁹ Justice Sutherland said that the President alone has the power to speak or listen as a representative of the nation in the international arena. He alone negotiates treaties; the Congress and the Senate cannot invade that territory. The President is the sole organ of the federal government in the field of international relations also in order to avoid embarrassment internationally. Congress' legislation must often accord the President broad discretion, one not admissible when dealing with domestic affairs. The President has more information, he

⁷⁶ The War Powers Resolution of 1973, 50 U.S.C. §§ 1541-1548 (1973).

⁷⁷ For an overview of the historical background and detailed requirements of the War Powers Resolution, see *War Powers*, THE LIBRARY OF CONGRESS, <http://www.loc.gov/law/help/war-powers.php> (last visited November 22, 2013).

⁷⁸ 299 U.S. 304 (1936).

⁷⁹ For the actual copy of the U.S. Senate report adopting a House Joint Resolution granting the President the power to impose an arms embargo against nations participating in the Chaco War, see http://congressional.proquest.com/congressional/result/pqpresultpage.gispdfhitspanel.pdflink/http%3A%2f%2fprod.cosmos.dc4.bowker-dmz.com%2fapp-bin%2fgisserialset%2f5%2f4%2f2%2fa%2f9770_srp1153_from_1_to_2.pdf/entitlementkeys=1234%7Capp-gis%7Cserialset%7C9770_s.rp.1153 (last visited November 22, 2013).

communicates secretly with other leaders and there is a longstanding tradition of broad delegation. What now about the constitutional text?

There are many foreign affairs powers allocated to Congress in the Constitution. For example, Congress may declare wars, raise armies, militias and navies, regulate commerce with foreign nations, and so on.⁸⁰ Still, the President is Commander-in-Chief of the Armed Forces and the President negotiates treaties, even though he or she needs them to be approved in the Senate by a two-thirds majority. In practice, this Presidential power has been ever more cabined by Congress by it becoming much more involved, particularly, in congressional-executive agreements, and in the Senate approval debate of treaties, where this body adds reservations, interpretations, and declarations of understanding.⁸¹

The case of *Youngstown Sheet & Tube Co. v. Sawyer*, decided in 1951, however, limits Presidential power in such important ways that it will forever be in all constitutional law textbooks.⁸² *Youngstown* involved a labor dispute in the steel industry where a strike was imminent. A few hours before the strike, President Truman issued Executive Order 10340, directing the Secretary of Commerce to take possession and

⁸⁰ U.S. CONST. art. I, § 8: "Congress shall have the power...To declare war...To raise and support Armies...To provide and maintain a Navy."

⁸¹ U.S. CONST. art. II, § 2, cl. 1-2: "The President shall be commander in chief of the Army and Navy of the United States...[and] He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur...". For details, see W. MICHAEL REISMAN, MAHNOUSH H. ARSANJANI, SIEGFRIED WIESSNER & GAYL S. WESTERMAN, *INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE* (2004), at 1286 *et seq.* (re congressional-executive agreements), and 1320 *et seq.* (re reservations). For an example, see the "declaration" in the Senate Report on the 1966 International Covenant on Civil and Political Rights that the rights under this covenant are "not self-executing." *Id.* at 1329.

⁸² 343 U.S. 579 (1952).

run most of the steel mills.⁸³ The President argued this strike would jeopardize national defense because of the on-going Korean War. The Secretary issued possessory orders. On April 30th the District Court enjoined the Secretary of Commerce from continuing the seizure and possession of the mills, and the Court of Appeals stayed the District Court's decision. Cert was granted immediately on May 3rd, argued on May 12th, and the decision announced on June 2nd. The Court affirmed the judgment of the District Court. The plurality opinion was written by Justice Black, but he was practically alone in stating that the President's power can only be derived from an act of Congress or from the Constitution itself.⁸⁴

The controlling law is difficult to discern. There is the opinion by Justice Frankfurter who advocated some theory of adverse possession of powers, which included a systematic, un-broken practice known to Congress and never before disapproved.⁸⁵ Justice Jackson, another eminent jurist on the Court, started with the axiom that, in order to have a workable government, the two branches have to work together. If Congress opposed some action of the President, the President cannot do it. If it is at least to be implied, from the facts, that Congress agrees with the President, he can go ahead with his planned action. If there is silence, whichever branch acts first can do so under the doctrine of concurrent authority.⁸⁶ In this case, Congress spoke first through the Taft-Hartley Act⁸⁷ in

⁸³ To view the complete text of President Truman's Executive Order, see The American Presidency Project, *Executive Order 10340 – Directing the Secretary of Commerce to Take Possession of and Operate the Plants and Facilities of Certain Steel Companies*, <http://www.presidency.ucsb.edu/ws/?pid=78454> (last visited November 22, 2013).

⁸⁴ 343 U.S. at 585.

⁸⁵ *Id.* at 610-11.

⁸⁶ *Id.* at 635 *et seq.*

⁸⁷ Labor Management Relations Act of 1947, 29 U.S.C. §§ 401-531 (1947).

which it expressly rejected Presidential involvement in labor strikes. Stated simply, Congress said the President should not have the power to interfere in domestic labor disputes. An often overlooked but interesting fact is that there were three dissenters, led by Chief Justice Vinson, who said essentially that the President can make law in the presence of a national emergency.⁸⁸ They were joined by two members of the majority, Justice Clark and Justice Burton, who were not disinclined to follow that line of reasoning, albeit in a much more restricted way. They formed what constitutes, in my view, the real holding of *Youngstown*. Justice Clark stated that the President has broad authority in times of grave and imperative national emergency.⁸⁹ The situation at hand, in his view, did not constitute such a compelling emergency at this time. Justice Burton agreed with this, finding that Congress had also specified procedures for this particular emergency, i.e. the Taft-Hartley Act, which excluded the measure of seizure. Therefore, despite Justices Jackson's and Frankfurter's opinions, the rule of *Youngstown* is that the President possesses special emergency powers in times of grave and imperative national threat.

The *Dames & Moore v. Regan* decision in 1981 elevated Justice Jackson's tripartite test to the test of the majority.⁹⁰ This case interpreted an executive agreement that suspended private claims against Iran in the wake of the Mullahs' takeover of Iran where American interests were harmed. This case arose from a deal negotiated by President Carter in Algiers the day before President Reagan took office. Under this agreement, the private claims that were pending in U.S. courts were to be suspended and then directed to arbitration

⁸⁸ *Youngstown*, 343 U.S. at 667 *et seq.*

⁸⁹ *Id.* at 662 ("In my view, the Constitution does grant to the President extensive authority in times of grave and imperative national emergency. In fact, to my thinking, such a grant may well be necessary to the very existence of the Constitution itself.").

⁹⁰ 453 U.S. 654 (1981).

in a newly-constituted Iran-U.S. claims tribunal. Many such claims are still pending. This suspension of claims and their subsequent arbitration was not one of the actions foreseen in the International Emergency Economic Powers Act⁹¹ which Congress had enacted in 1977. The Executive Branch could nullify private claims, but it could not suspend them. However, Congress' silence on the issue was looked upon by the Court as favoring Presidential power, and Congress did not really object to that kind of solution. The Court also referred to Justice Frankfurter's idea that international settlements have been entered into in a systematic, unbroken way never before challenged by Congress and thus allowed this agreement to stand.

Taken together, these decisions may confirm a presidential emergency power, but not an extra-constitutional one. This is not like Germany during the Weimar Republic in 1933 where President Hindenburg's emergency powers allowed him to abrogate democratic freedoms and pave the way for Hitler to become the sole, pernicious leader of the nation.⁹² It is also not the type of powers found under the 1853 Argentinian Constitution, which allowed many military dictatorships to live freely under the Constitution because they came into power under the pretext of responding to an emergency situation.⁹³ That kind of extra-constitutional emergency power has been effectively rejected in the United

⁹¹ 50 U.S.C. §§ 1701-1707 (1977).

⁹² See generally Neil MacCormick, *Jurisprudence, Democracy, and the Death of the Weimar Republic*, 77 TEX. L. REV. 1095 (1999). The operative provision was Article 48 of the Constitution of the Weimar Republic.

⁹³ Carlos Rosenkrantz, *Constitutional Emergencies in Argentina: The Romans (not the Judges) Have the Solution*, 89 TEX. L. REV. 1557, 1558 (2011) ("The 1853 constitution allowed congress, in case of internal commotion, and the senate, in case of foreign attack, to declare a state of siege and to suspend individual rights provided that the constitution or authorities created thereby were in danger. From 1854 until 2001, the state of siege was declared fifty-seven times.").

States. Justice Jackson, in *Youngstown*, noted that “emergency powers tend to kindle emergencies.”⁹⁴ The thought being, once one has that power written in the Constitution the powers that be tend to take advantage of it. The U.S. Constitution does not expressly confer such powers. There was no discussion regarding such powers in the Constitutional Convention either. This does not, however, exclude the fact that the need for such emergency powers exists. In fact, a Senate special committee established in 1972 found that, by then, Congress had enacted 470 statutes that grant the President emergency powers.⁹⁵ I already mentioned the International Emergency Economic Powers Act, but there is also the National Emergency Act of 1976.⁹⁶ They can be broadly interpreted, as we have seen in *Dames & Moore*, but the question is: can they be interpreted against the will of Congress? Probably not. In any event, they are only to be exercised in the face of grave and imperative national emergencies.

There have been arguments that, especially in war time, there is no law, *inter arma silent leges*.⁹⁷ This is no longer true, since we have the Lieber Code in the U.S.⁹⁸ and the 1949 Geneva Conventions and their Additional Protocols internationally. They define what is allowable in times of war. The U.N. Charter and international practice also define when war can be started.⁹⁹ There is an international crime of

⁹⁴ *Youngstown*, 343 U.S. at 650.

⁹⁵ CRS Report for Congress, National Emergency Powers, Harold C. Relyea Specialist in American National Government, Government Division, December 10, 1990, revised April 29, 1991, at <http://usa-the-republic.com/emergency%20powers/crs.html#/48>.

⁹⁶ National Emergency Act of 1976, 50 U.S.C. §§ 1601-1651 (1976).

⁹⁷ “In times of war, the law falls silent.” For detailed discussion, see ROZA PATI, DUE PROCESS AND INTERNATIONAL TERRORISM. AN INTERNATIONAL LEGAL ANALYSIS 14 *et seq.* (2009).

⁹⁸ See Jordan J. Paust, *Dr. Francis Lieber and the Lieber Code*, 95 AM. SOC’Y INT’L L. PROC. 112 (2001).

⁹⁹ U.N. Charter art. 39-51 (self-defense and authorization by the UN Security Council). There is also the apparent approval, under customary international law, of humanitarian intervention in cases

aggression that was just also defined for the International Criminal Court,¹⁰⁰ and our Supreme Court did in fact use Common Article III of the Geneva Conventions when it decided the *Hamdan* case.¹⁰¹ Only a month later, the Military Commissions Act turned this around by declaring that all the provisions of the Geneva Conventions are non-self-executing, and as a result cannot be used in U.S. courts.¹⁰² Beyond the concept of emergency powers, we have executive orders, and presidential directives. These have the full force of law, but they need to rest within the original powers of the President or within the confines of legislation set by Congress.¹⁰³

VI. APPRAISAL AND RECOMMENDATION

When we aim at determining the limits of executive powers, or any other legal issue within the structure of the Constitution, we ought to look at the problem from the perspective of the political opponent as well. That is, how would he or she use whatever power we ascribe to him or her? In particular, how could these powers be abused by a President of the other political persuasion? Second, the structure of decision-making should be seen in the context of achieving a public order of human dignity, for the function of

of massive violation of fundamental human rights. Myres S. McDougal & Siegfried Wiessner, *Law and Minimum World Public Order*, in MYRES S. MCDUGAL & FLORENTINO FELICIANO, *THE INTERNATIONAL LAW OF WAR* xix, lii (1994).

¹⁰⁰ The international crime of aggression was defined in Kampala, Uganda on June 11, 2010. Coalition for the International Criminal Court, *The Crime of Aggression*, at <http://www.iccnw.org/?mod=aggression> (last visited November 24, 2013).

¹⁰¹ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (holding that the use of military tribunals to try Guantánamo Bay detainees violated Common Article 3 of the 1949 Geneva Conventions).

¹⁰² The Military Commissions Act of 2006, 10 U.S.C. §§ 948-949 (2006).

¹⁰³ John Contrubis, *Executive Orders and Proclamations*, CRS Report for Congress #95-722A, March 9, 1999, at 1-2.

all law is to serve human beings and not the other way around. We have to appraise the outcome, in terms of its consequences on human beings, of whatever constitutional structuring we have now and what we aim to have. Does it maximize access by all to all the things humans desire, humans want out of life? Does it pave the road for access to the processes of shaping and sharing of all the things humans strive to achieve in this great republic: power, wealth, affection, rectitude, enlightenment, skills, well-being, and respect?¹⁰⁴

In the area of the vertical separation of powers, commonly known as federalism, we see that its structure in our nation has for quite some time allowed for the exclusion of some people from the political process. But today, especially since President Lincoln issued the Emancipation Proclamation, we can say, with good reason, that federalism is an “architecture for freedom”:¹⁰⁵ its structuring allows decision-making on the lowest possible level – close to maximum quality access to power for all. Combined with the principle of subsidiarity, it empowers individuals. The question then is: is this also true for the principle of the horizontal separation of powers, i.e. the personal walls dividing the various branches of government? A similar yardstick should be applied here: do the legal consequences drawn from it fulfill the needs and

¹⁰⁴ Professor Myres McDougal has provided a most useful methodology to analyze a problem in this context and to resolve it. It is outlined, in great detail, in his lecture *The Application of Constitutive Prescriptions: An Addendum to Justice Cardozo*, 1 CARDOZO L. REV. 135 (1979). His approach to law in general is problem- and policy-oriented, and was developed in close collaboration with policy scientist Harold D. Lasswell. Cf. Lasswell & McDougal’s two-volume treatise, HAROLD D. LASSWELL & MYRES S. MCDUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY (1992). See also W. Michael Reisman, Siegfried Wiessner & Andrew R. Willard, *The New Haven School: A Brief Introduction*, 32 YALE J. INT’L L. 575-582 (2007).

¹⁰⁵ Wiessner, *Federalism*, *supra* note 5.

meet the aspirations of humans which the Constitution and all laws under it are supposed to serve? The powers of the President in this context do have to face the same scrutiny as any other decision making body under our venerable Constitution.

Does our constitutional system properly balance the interests of security and liberty? As a lawyer, you will be party to important decisions – in the courtroom, in legislatures, as advisor to, or even member of, the government. You should, as a law student, see yourself as one of the future leaders of the nation, as trustee of the community. You know that the law of yesterday is not necessarily the law of tomorrow. I recommend that you take a close look at yesterday's laws, responses to the social problem they try to cure, and attempt to improve them in the interest of all. While teaching practical legal skills is important, legal education has a broader calling. As public servant, you ought to try to understand and shape the law¹⁰⁶ -- convince others that different arrangements might better achieve the goals of the flourishing of all. As to the President, we would not want to see him as a philosopher-king, but it helps for him or her to have a good philosophy.

¹⁰⁶ Siegfried Wiessner, *The New Haven School of Jurisprudence: A Universal Toolkit for Understanding and Shaping the Law*, 18 ASIA PACIFIC L. REV. 45-61 (2010).