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Emergency in the Constitutional Law of the United States

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In the following report I shall concentrate on the law as pronounced by the United States Supreme Court, which has, within the sphere of judicial competence, the last say on the interpretation of the Constitution. The volume of significant litigation on the subject which stops below the Supreme Court has been relatively light, and the constitutional law declared by the lower courts has played a less significant role than is the case in many other issues. Indeed, as we shall see, the Supreme Court itself has had less to say on the topic than might be hoped for. I shall try to indicate the main lines of scholarly debate, which is vast in quantity, if not always in insight; but it must be said that in constitutional law as a whole, and in this area in particular, the influence of scholarly opinion on the behavior of governments and courts has been less than may be observed in other fields of American law.

I. IN GENERAL

A. Text of the Constitution

Neither the term "emergency" nor any cognate of comparable generality appears in the text of the United States Constitution. Nonetheless, there is no doubt that the Framers considered the question of how to deal with emergencies, or "exigencies"[1], and believed that they had fashioned a document which would permit the government to do so effectively. Evidence of this thinking in the document itself can be seen in two forms: (i) allocation of authority over particular functions clearly relating to emergency situations, and (ii) express exceptions to general rules conditioned on the existence of such situations. The lists themselves, which may be thought rather modest in length for a 20th-century superpower, are instructive as to what was understood at that time to be involved.

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1. See I.B. below.

1. Powers Relating to Emergency Situations

Article I § 8 of the Constitution gives the Congress extensive powers relating to war and other military action, which might be listed in three categories for present purposes:

(a) to declare war;
(b) to raise and support armies, to provide and maintain a navy, and to make rules for the government and regulation of the land and naval forces; and
(c) to provide for calling forth the militia (generally a state responsibility) for three specified purposes: (i) to execute the laws of the Union, (ii) to suppress insurrections, and (iii) to repel invasions.

Article II, which vests the Executive Power in the President, also specifically makes her Commander in Chief of the army and navy, as well as of the militia when called into actual federal service (§ 2), and charges her, among other things, with taking care that the laws be faithfully executed (§ 3).

In addition to these allocations of responsibility to particular branches of the federal government, the Constitution contains one other empowering provision relating to similar circumstances, namely Article IV § 4, the so-called "guaranty clause", which calls on the federal government not only to guarantee to every state a republican form of government, but also to protect it against invasion and (when asked) domestic violence.[2]

2. Exceptions to General Rules, for Emergency Situations

There are three specific exceptions of this sort in the text, two relating to individual rights and the third relating to the powers of the states vis-a-vis the national government. First, the privilege of the writ of habeas corpus (permitting a person to obtain judicial review of the validity of his detention, in a proceeding independent of that, if any, in which the detention was ordered) cannot be suspended, "unless when in Cases of Rebellion or Invasion the public Safety may require it."[3] Second, no one may be charged with a capital or otherwise infamous crime without an indictment by a grand jury, "except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger."[4] Third, no state may engage in war, "unless actually invaded, or in

2. "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion, and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence."
3. Article I § 9, cl. 2.
4. Fifth Amendment, cl. 1.

such imminent Danger as will not admit of delay."[5] Finally, one other provision of similar, if less specifically military character may be mentioned: that which allows the President "on extraordinary Occasions" to convene one or both houses of Congress.[6]

Two things about these provisions are especially noteworthy in relation to our topic. One is that while the allocations of power are general, the exceptions are specific to particular limitations on government action, inviting the conclusion that the Framers intended no other exceptions to be recognized. The other is that — with the exception of the last one — they all have to do with force and violence: war, invasion, rebellion, insurrection, the use of the militia to enforce the laws. Despite the facts that "promot(ing) the general Welfare" and "secur(ing) the Blessings of Liberty" are listed along with "insur(ing) domestic Tranquility" and "provid(ing) for the common defense" in the Preamble, and that — as the most cursory reading of Article I § 8 reveals — creating a national government with power to regulate economic activity was an equally explicit concern of its dispositive provisions, nowhere in the document is to be found a recognition of economic or other non-military emergencies as situations for exceptional action. The obvious questions for interpretation, therefore, are: (i) whether war or other military emergency warrants any exceptions to the normal arrangements other than those expressly set forth, and (ii) whether non-military emergency warrants any exception at all.

B. Orthodox Doctrine in Military Emergencies: the "Perfect Constitution"[7]?

Alexander Hamilton, in the *Federalist*,[8] argued in support of adoption of the Constitution that it should provide the national government with all the power it needs to deal with any of the emergencies which confront any nation. With respect to the complex of powers relating to "common defense", he said:

> "These powers ought to exist without limitation, *because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them.*[9]

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5. Article I § 10 para. 3.

6. Article II § 3 cl. 2.

7. The quoted phrase is from C. Rossiter, *Constitutional Dictatorship* at 213 (1948) (hereafter cited as Rossiter, Dictatorship). See also *id.* at 212: "It is constitutional dogma that this document foresees any and every emergency, and that no departure from its solemn injunctions could possibly be necessary."

8. A. Hamilton, J. Madison, J. Jay, *The Federalist* (B. F. Wright ed., Harvard U. Press, 1961), hereinafter cited as Federalist.

9. Federalist No. 23 at pp. 199-200 (emphasis in original). To the same effect see Federalist No. 41 (Madison), at pp. 294-5. For further arguments by Hamilton in

Particularly revealing of Hamilton's thinking is the argument in No. 25 on the peacetime army. He cited the example of Pennsylvania, whose bill of rights disapproved of standing armies but which had maintained one in peacetime anyway, as teaching "how unequal parchment provisions are to a struggle with public necessity." He went on to drive home the point that restrictions on power in times of emergency are counterproductive:

> ". . .(N)ations pay little regard to rules and maxims calculated in their very nature to run counter to the necessities of society. Wise politicians will be cautious about fettering the government with restrictions that cannot be observed, because they know that every breach of the fundamental laws, though dictated by necessity, impairs that sacred reverence which ought to be maintained in the breast of rulers towards the constitution of a country, and forms a precedent for other breaches where the same plea of necessity does not exist at all, or is less urgent and palpable."[10]

Like the constitution itself, however, all of Hamilton's discussion of emergency deals with war and other physical threats to peace; except perhaps for the identification of commerce as a major source of war among republics,[11] there is no mention of emergency in the *Federalist*'s rather less extensive references to economic matters.[12]

When one turns these arguments into principles of interpretation, as courts and governments operating under the document must do once it has been adopted, at least two logically consistent but potentially divergent principles suggest themselves: (1) that the Constitution was intended to function in emergencies as well as in normal times, and therefore an emergency affords no excuse for deviating from its terms;[13] and (2) that because it must function in emergencies as well as in normal times, it should be interpreted broadly to provide the government with whatever power may be needed to meet the emergency that is actually presented.[14] To the extent that the two are inconsistent, it seems clear that Hamilton

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the same vein see No. 25, id. at 212-3 (peacetime army); No. 28, id. at 222 (use of force to enforce the laws); No. 36, id. at 264 (against prohibiting poll taxes).

10. Federalist No. 25, at 213.

11. Federalist No. 6, at 110-112.

12. The most important numbers on the latter subject are Nos. 11-13. Wright, in his introduction to the Harvard Press edition of The Federalist, notes the relative absence of discussion of the relationship of government to economic and social affairs, and the anomaly of such an omission by the committed mercantilist Hamilton in particular: see note 8 at 85-6.

13. This view has been labeled "absolutist" by Lobel, "Emergency Power and the Decline of Liberalism", 98 *Yale L. Rev.* 1385, 1387 (1989).

14. Lobel, id. at 1388, labels this the "relativist" position, and attributes it to Hamilton.

himself favored the latter.[15]

Both of these principles have been applied by the Supreme Court in different cases. The most cited example of the first is *Ex parte Milligan*,[16] decided after the Civil War, invalidating the criminal conviction of a civilian by military commission in a non-rebellious area as a violation of the rights to indictment and trial by jury. Justice Davis' majority opinion offers an impassioned rejection of extraconstitutional powers (albeit in *obiter dictum*![17]):

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority."[18]

Perhaps the most often-quoted assertion of the second was published in 1917 by Charles Evans Hughes, who was then between terms on the Court, asserting that the war power is "a power to wage war successfully", and that "we have a *fighting* constitution."[19]

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15. Jefferson, after his presidency, wrote a letter to the effect that in times of danger leaders were obligated to save the country even if it meant violating the law. Letter from Jefferson to Colvin, Sept. 20, 1810, in 11 *Works of Thomas Jefferson* 146, 148-49 (P. Ford ed. 1905). This has been characterized as a third, ge; di fr "liberal" alternative to the two interpretive positions just outlined, which posits a division of executive authority between "normal constitutional conduct" governed by law, and emergency action, in which "law must be replaced by discretion and politics". Lobel, note 13, at 1390. It is, to be sure, a theory of executive responsibility, and no doubt also a theory about the relationship of law to politics and everyday life. It is not, however, a distinct theory of constitutional interpretation, since in Jefferson's own formulation the executive so acting "does indeed risk himself on the justice of the controlling powers of the Constitution, and his station makes it his duty to incur that risk. . ." Loc. cit. at 149. Rather, it presupposes that the Constitution is interpreted according to one of the other two principles, and that the executive who violates the Constitution as so interpreted will have to answer for it. Hamilton's position, on the other hand, the "relativist", argues the unwisdom of so structuring a Constitution as to force a president to violate it, namely that it would do more harm to the respect for the law than would an adaptation of the law to fit anticipated emergency.

16. 71 U.S. (4 Wall.) 2 (1866).

17. The opinion had already clearly held that the trial by military commission was contrary to a valid statute.

18. 71 U.S. (4 Wall.) at 120-121.

19. Hughes, "War Powers and the Constitution", 42 Am. Bar Ass'n Rep. 232, 238 (1917).

Twenty years later, as Chief Justice, he paraphrased himself in a case which upheld State action providing temporary debtor relief in an economic emergency against the claim that it violated the so-called Contract Clause[20]:

> "While emergency does not create power, emergency may furnish the occasion for the exercise of power. . . . The constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions. Thus, the war power of the federal government is not created by the emergency of war, but it is a power given to meet that emergency. It is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme co-operative effort to preserve the nation."[21]

Indeed the Court had expressed this view of the war powers both before and after *Milligan* — as for example in *Martin v. Mott*[22], where Justice Story said that the powers to regulate and command the militia "must be so construed as to the modes of their exercise as not to defeat the great end in view,"[23] and in *Miller v. United States*,[24] where it was said of Congress's war powers:

> "Upon the exercise of these powers no restrictions are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted."[25]

C. *Reality: Deference During the Military Emergency, Lectures Afterwards?*

In what is still one of the best available political studies of the Supreme Court's handling of the President's military and quasi-military functions,[26] the political scientist Clinton Rossiter concluded that "(t)here do indeed seem to be two Constitutions — one for war, one for peace."[27] What he meant was not so much different rules for each condition, but different judicial voices. Writing in 1951, Rossiter described what he observed to be a consistent judicial pat-

20. Art. I § 10 para. 1: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ."
21. Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426 (1934).
22. 12 Wheat. 19 (1827).
23. Id. at 30.
24. 78 U.S. 268 (1871).
25. Id. at 305.
26. C. Rossiter, *The Supreme Court and the Commander in Chief* (expanded ed. Longaker 1976) (hereafter cited as Rossiter, Commander).
27. *Id.* at 129.

tern in each of our then three great wars (Civil War, World War I, World War II):

> "*Bello flagrante*, we may expect [decisions] . . . pointing to power. *Post bellum* we will hear about *limitations*. . ."[28]

Prime illustration of this behavior, in his view, was precisely *Ex parte Milligan*,[29] when juxtaposed with another decision arising out of the same Civil War practice of trying civilians by military commission for ordinary crimes in states which were not in rebellion: *Ex parte Vallandigham*.[30] In the latter case, decided in 1864 while the war was at its peak, the Court refused to hear a civilian's petition for direct review (by means of the writ of certiorari) of his conviction by the military tribunal, on the ground that it lacked appellate jurisdiction over such non-regular tribunals. In *Ex parte Milligan*, decided in 1866 after the war was over, the Court agreed to review such a decision under the writ of habeas corpus, and found it invalid. While a lawyer will be more impressed than a political scientist might be by the distinction between appeal and habeas corpus as remedies for unlawful detention,[31] Rossiter's assessment is supported by the opening paragraph of Justice Davis' discussion of the merits in *Milligan*:

> "During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. *Then*, considerations of safety were mingled with the exercise of power; and feelings and interests prevailed which are happily terminated. *Now* that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment."[32]

A second illustrative pair of cases for Rossiter was *Korematsu v. United States*,[33] which during the Second World War sustained the

28. Id. at 128.

29. See text accompanying note 16 above.

30. 68 U.S. (1 Wall.) 243 (1864).

31. The distinction is based on the scope of review, which in appeal (or other direct review) could include simple error, but in habeas corpus could include only the jurisdiction of the committing agency and its conformity to statutory limitations. See, e.g., Dyne v. Hoover, 61 U.S. (20 How.) 65 (1857); Smith v. Whitney, 116 U.S. 167 (1885); McClaughry v. Deming, 186 U.S. 49 (1902). The statutes governing courts martial now make this clear, 10 U.S.C. § 876 (1982). Moreover, in habeas corpus, review is undertaken in the lower courts, as a separate proceeding, and the Supreme Court's role is that of reviewing decisions of lower regular courts. Finally, the Constitution plainly makes the appellate jurisdiction of the Supreme Court subject to statutory regulation, Art. III § 2 para.2.

32. 71 U.S. (4 Wall.) at 109 (emphasis in original), quoted by Rossiter, Commander at 37-38.

33. 323 U.S. 214 (1944).

wholly preventive (and probably objectively unnecessary) internment of thousands of American citizens of Japanese ancestry, and *Duncan v. Kahanamoku*,[34] which after the war struck down the post-Pearl Harbor imposition of martial law in Hawaii, at least to the extent that it authorized substitution of military tribunals for civil ones when the latter were capable of functioning.[35]

Rossiter's point is that the Court has been a relatively ineffective reviewer of war-based governmental action, and that the more resounding assertions of constitutional limitation have been too late and too peripheral to do much practical good. The *effective* judicial reaction to emergency action, in his view, has been that which defers to power during its exercise.[36] In this he echoed the skepticism of Alexander Hamilton about the usefulness of law in the face of perceived necessity, and Justice Jackson's warning in dissent from *Korematsu* that courts cannot be relied upon for review or restraint of military judgments.[37]

D. Special Constitutional Rules for Non-Military Emergencies?

We have said that there is no indication either in the document

34. 327 U.S. 304 (1946), discussed by Rossiter, Commander at 57-59.

35. The majority opinion did not reach the constitutional issue, but rested wholly on interpretation of the Act of Congress establishing the territorial government of Hawaii and the specific provision thereof which authorized the declaration of martial law: it found no reason to interpret the Act as authorizing conduct "so obviously contrary to our political traditions", 327 U.S. at 317, as military trial — without judicial review — of civilians charged with crime. Justice Murphy's concurring opinion insisted that displacement of functional civilian courts was unconstitutional as well. In defense of Rossiter's assessment, it does appear that the Court gave the war a chance to end before deciding, see E. Corwin, *The President: Office and Powers* 289-90 (5th ed. by Bland, Hindson & Peltason) (hereafter cited as Corwin, President).

36. Rossiter, Commander at 127-8: "Whatever limits the Court has set upon the employment of the war powers have been largely theoretical, rarely practical. . . .Future Presidents are likely to pay about as much attention to these decisions as did Lincoln, Wilson, and Roosevelt; the first and third were long dead, Wilson but three days from the end of his term, when the great limiting decision of each one's particular war was announced by a stern-visaged Court."

37. "Of course the existence of a military power resting on force, so vagrant, so centralized, so necessarily heedless of the individual, is an inherent threat to liberty. But I would not lead people to rely on this Court for a review that seems to me wholly delusive. The military reasonableness of these orders can only be determined by military superiors. If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint. The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history." 323 U.S. at 248 (Jackson, J., dissenting). Jackson's basis for dissenting from the particular judgment, however, was that while the courts could not *restrain* an unreasonable exercise of military power, they could properly *refuse to implement* it through judicial action, specifically by refusing to impose a criminal sentence on a person who failed to obey the relocation order.

itself, or in the adoption literature supporting it, of an intention to provide exceptional rules for non-military emergencies — that is, to permit certain government action in emergency situations which would be impermissible in normal times. Rather, it appears to have been assumed that the power to regulate encompasses whatever power is needed to deal with emergencies. On the whole, the few Supreme Court decisions purporting to address the question have borne out this assumption. On the one hand, however, the Court's pronouncements on federal powers have not always clearly distinguished between military and non-military emergencies; and on the other, it has treated State action in non-military emergencies rather more liberally than it has treated federal action.

1. Federal Powers

For a time it appeared that the Court would recognize a general emergency power in the federal government, which would encompass economic and social as well as military emergencies. Two cases in particular offered tantalizing hints. In *Wilson v. New*[38] (1917), against a claim based on earlier cases that it constituted an impermissible impairment of "freedom of contract",[39] the Court held that Congress could properly impose an 8-hour day on the railroads in favor of their employees, solely to prevent a general strike called after labor-management negotiations failed. The majority clearly claimed to be applying an existing power, but emphasized the emergency involved; the dissents claimed that the majority was simply introducing an "emergency" exception to established limitations in violation of the principle of *Ex parte Milligan*.[40] The precise status of the claimed restrictions was then unclear,[41] and in any event there is reason to believe that the majority opinion was influenced by war powers thinking.[42] In *Highland v. Russell Car & Snow Plow*

38. 243 U.S. 332 (1917).

39. Lochner v. New York, 198 U.S. 45 (1905); Adair v. United States, 208 U.S. 161 (1908); Coppage v. Kansas, 236 U.S. 1 (1915), all finding the freedom of contract to be a protected "liberty" under the due process clause.

40. See note 16.

41. The Court did not firmly commit itself to excluding production from the scope of the commerce clause until the following year, Hammer v. Dagenhart, 247 U.S. 251 (1918), and, since applying the due process clause to regulations of the employment relationship, it had already not only allowed the states to impose maximum hours for women employees, Muller v. Oregon, 208 U.S. 412 (1908), but had also allowed Congress to prohibit transportation in interstate commerce of tainted food, Hipolite Egg Co. v. U.S., 220 U.S. 45 (1911) (sustaining the Pure Food and Drug Act), and of women for immoral purposes, Hoke v. U.S., 227 U.S. 45 (1913) (sustaining the Mann Act).

42. No mention is made in the majority opinion of the impending war, but it was later reported that Chief Justice White wrote it with the greater emergency in mind, as had the President and Congress in proposing and enacting the legislation. See

Co.[43] (1929) the Court sustained the wartime Lever Act authorizing the fixing of coal prices by the President, against a claim of freedom of contract. While the majority relied expressly on the war powers, it also used more general language:

> "It is also well established by the decisions of this court that such liberty is not absolute or universal and that Congress may regulate the making and performance of such contracts whenever reasonably necessary to effect any of the great purposes for which the national government was created. . . ."[44]

In 1935, however, in *A.L.A. Schechter Poultry Corp. v. U.S.*,[45] the Court emphatically rejected any purely peacetime emergency exception to what it then understood to be firm limitations on the federal power to regulate commerce, namely that purely local conduct is not included:

> ". . .(T)he argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power. . . . Such assertions of extraconstitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment. . . ."[46]

The government seems after this case to have given up arguing for peacetime emergency powers, standing (and losing) twice in the ensuing year on the normal scope of the commerce power[47] in support of major legislation designed to combat the depression. Within five more years after losing these battles, however, they had won the constitutional war. The Court itself abandoned essentially all of its limitations on the normal scope of the commerce clause,[48] as well as its claim that due process requires more than a rational basis for

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Belknap, "The New Deal and the Emergency Powers Doctrine", 62 Tex. L. Rev. 67, 80 (1983), with references.

43. 279 U.S. 253 (1929).

44. 279 U.S. at 261.

45. 295 U.S. 495 (1935).

46. 295 U.S. at 528-9.

47. U.S. v. Butler, 297 U.S. 1 (1936) (Agricultural Adjustment Act controls on agricultural production); Carter v. Carter Coal Co., 298 U.S. 238 (1936) (Bituminous Coal Conservation Act). For an account of the government's strategy see Belknap, note 42 at 93-98 (1983), with further references.

48. N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) ("commerce" does not exclude "production"); U.S. v. Darby, 312 U.S. 100 (1941) ("commerce among the several states" includes not only that local conduct which "directly affects" such commerce, but also that which indirectly but "substantially" affects it); Wickard v. Filburn, 317 U.S. 111 (1942) (the clause also encompasses local action, not otherwise "substantially" affecting interstate commerce, where the cumulative effect of multiple instances of such action would be substantial — in that case a single farmer growing wheat on his own farm for personal consumption, as affecting the national market for wheat crops).

economic regulation;[49] the quest for purely peacetime domestic emergency powers was thus deprived of most, if not all, of its *raison d' être*.[50]

2. State Powers

Already in the first half of the 19th century, when the Court was first giving a broad interpretation to the grant to Congress (then not much used) of the power to regulate interstate commerce, and had not yet given up the idea that the power was exclusive,[51] but still understood the range of purely local economic activity outside of that power and therefore subject to direct state regulation to be large, it also recognized a distinct residual[52] power in the states — called the "police power" — to regulate even economic activity for purposes of health, safety, and morals. This power existed alongside Congress's explicitly economic power and yielded normally not to the constitutional grant itself but only to a valid, inconsistent exercise of that federal power.[53]

In *Home Building & Loan Ass'n v. Blaisdell*[54] (1934) the Court confronted the police power claim offered in support of an explicitly economic regulation having the effect of altering the content of existing contracts, against objection based on the Contract Clause, an express limitation on state economic regulation. Specifically, loans secured by mortgages on real estate, which under the contracts could be foreclosed on default of loan payments, were altered by temporarily suspending the right of foreclosure while leaving all

49. West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

50. Belknap, note 42, argues that it was a mistake to abandon the emergency powers doctrine, because it would be useful in dealing with certain other limitations which the Court has more recently found applicable to Congressional action, see pp. 104f. More on these limitations — one of which has been adandoned already by the Court — below.

51. See Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 198-200 (1824).

52. That is, not derived from a specific constitutional *grant* of power to the states but *inherent in their sovereign function*, and recognized by the 10th Amendment to the Constitution as "reserved to the States. . ." to the extent not granted to the federal government. For early recognition that the states' regulatory powers, to the extent not specifically limited by the constitution, were indefinite, see Calder v. Bull, 3 U.S. (Dall.) 396 (1798).

53. See Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829) (dam across navigable stream to drain swamp); Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102 (1837) (requiring passenger data from ships coming into city's port). In the 20th century this "police power" was found to be subject to some limitations implicit in the interstate commerce clause — in particular, that it could not be so exercised as to regulate competition in interstate commerce as such, (Buck v. Kuykendall, 267 U.S. 307 (1925)), or to discriminate against interstate commerce in favor of local interests, (Baldwin v. Seelig, 294 U.S. 511 (1935); Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977)), or to impose undue burdens on the flow of interstate commerce (Southern Pacific Co. v. Arizona, 349 U.S. 472 (1945); Raymond Motor Transportation Co. v. Rice, 434 U.S. 429 (1980)).

54. See text at notes 20 and 21.

other obligations — including that of paying interest — intact. The state based its statute on the existence of an emergency (the Depression) and its police power, and the Court — reviewing the entire range of contract clause cases[55] — sustained the statute on the same grounds. In subsequent decisions, even those in which statutes were struck down under the contract clause, the continued vitality of the *Blaisdell* formula for the emergency situation is always assumed.[56]

E. Judicial Definitions

In general, the Court has been extremely deferential to the relevant political authority's determination that a war, invasion, insurrection, rebellion, or emergency exists for constitutional purposes. It held, for example, that it was proper for Congress, in its statute providing for calling forth the militia to enforce the laws, suppress insurrections, and repel invasions, to vest exclusive authority in the president to determine when any of those needs has arisen, and to provide for trial by court-martial of any militiaman disobeying the president's order to mobilize.[57] In recognizing a general power of a state government to declare martial law when necessary to put down an insurrection, as well as the president's power to call up the militia to aid the state on request, the Court treated both decisions as essentially political in nature, not subject to judicial second-guessing.[58] In determining the propriety of seizing ships which had been trading in Confederate ports contrary to a presidentially declared blockade, as prizes of war, the Court held that the President's proclamation was itself conclusive evidence of the existence of a state of war justifying exercise of the rights of war.[59] In recognizing a State's power to impair the obligation of contract in time of emer-

55. In particular the Court relied on decisions which sustained state rent control regulations designed to prevent landlords from evicting their tenants during a declared public emergency in the availability of housing just after the war, and thereby rejected the contract clause claim, Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921); Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922). See also Block v. Hirsch, 256 U.S. 135 (1921), involving the District of Columbia (governed by Acts of Congress).

56. E.g., Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) (imposition of additional payments into private pension plan, invalid); United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) (diversion of revenues from public utility to purposes expressly forbidden by agreement with private investors, invalid).

57. Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827).

58. Luther v. Borden, 48 U.S. (7 How.) 1 (1847). "The State itself must determine what degree of force the crisis demands. And if the government of Rhode Island deemed the armed opposition so formidable, and so ramified throughout the State, as to require the use of its military force and the declaration of martial law, we see no ground upon which this court can question its authority." Id. at 45.

59. "Whether the President . . . in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him*, and this Court must be governed by the decisions and acts of the polit-

gency, it indicated that the State's declaration of emergency would be given effect unless it were a "subterfuge" without adequate basis.[60]

Occasionally, however, the Court has imposed some limiting definitions on the government. It held in *Ex parte Milligan*[61] that the power of martial law — at least for the federal government — was limited to actual, as distinguished from threatened invasion, such that the courts are closed and the civil administration disabled; the absence of any claim that such was the case was treated as conclusive, without the Court having to decide whether to put the government to its proof in support of such a claim.[62] In *Chastleton Corp. v. Sinclair*[63] it was held that a housing emergency resulting from the First World War, sufficient to support the imposition of rent controls, no longer existed in 1923 despite Congress's having renewed the law in 1922 for a period of 2 years;[64] although it did not have occasion to question Congress' finding of continued emergency at the time of renewal, it did indicate a willingness to correct "an obvious mistake" in making such a finding if one had been made.[65] When a governor declared martial law to enforce oil production quotas, claiming that the producers were "in a state of insurrection against the State" and threatening violence, the Court held the declaration invalid absent evidence of "actual uprising", "riots or mobs", "actual violence or attempt at violence", or "interference with the civil authorities or the courts" — the general language of the governor's declaration being treated as insufficient for that purpose.[66] And the Court held in *Reid v. Covert*,[67] in denying the jurisdiction of

ical department of the Government to which this power was entrusted. . . ." *The Prize Cases*, 67 U.S. (2 Black.) 635, 670 (1863) (emphasis in original).

60. Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 444 (1934).

61. See note 16.

62. See also, to the same effect, Duncan v. Kahanamoku, note 34.

63. 264 U.S. 543 (1923).

64. "A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed." 264 U.S. at 547-8. The case was remanded for a determination of whether the emergency existed at the time the administrative order reducing rents was made (1922), assuming that it did exist at the time of Congress' extension of the law.

65. Id. at 547.

66. Sterling v. Constantin, 287 U.S. 378 (1932). In Moyer v. Peabody, 212 U.S. 78 (1909), often cited for the non-reviewability of declarations of martial law, the Court through Justice Holmes had appeared to recognize a possible good-faith standard: "Such arrests [under martial law] are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power. So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief. . . ." Id. at 84-85.

67. 354 U.S. 1 (1957).

military tribunals over charges of on-base murder against wives of servicemen abroad, that neither the power of Congress to regulate the "land and naval Forces" (Art. I § 8 cl. 14), nor the Fifth Amendment's exception to the right to grand jury indictment in capital crimes arising in the armed forces, extends to such civilian dependents in peacetime.[68]

II. EFFECTS OF EMERGENCY ON RULES OF COMPETENCE

A. Executive vs. Legislative Branches of Federal Government

1. Independent Presidential Power

Throughout our constitutional history, strong presidents have claimed not only that the Constitution provides ample authority to deal with emergencies as well as normal times, but that the executive is the preeminent holder of such authority.[69] In its more extreme form, the so-called "stewardship theory", the claim denies to Congress any non-enumerated power to control executive action.[70] Most often the argument has been that this preeminence is inherent in the executive power, of which the enumerations in Art. II (commander-in-chief, appointment, pardon, faithful execution of the laws) are only particular manifestations. The Supreme Court's responses to these claims have been mostly non-committal, although it has accepted the idea that the grant of executive power has some content beyond the specific enumerations.[71] One reason for this judicial reticence, no doubt, is that in our great emergencies Congress has usually granted the executive unusual authority in advance or has ratified his emergency action afterward.

In particular, what it has said about the power of the President to act where Congress was understood to have been silent has been ambiguous at best. In 1863, in *The Prize Cases*[72], it affirmed the power of the President to wage a defensive war against rebellious states (specifically, the imposition of a blockade) without a Congressional declaration of war; indeed it suggested that Congress had no authority to declare war against states;[73] but the President's authority to use force to suppress insurrection derived from an Act of Con-

68. See also Kinsella v. Singleton, 361 U.S. 234 (1960)(noncapital offenses by dependents). The same rule applies to offenses by civilian employees of the armed forces, Grisham v. Hagan, 361 U.S. 278 (1960); McElroy v. Guagliardo, 361 U.S. 281 (1960).

69. See, for an admirable overview, Corwin, President ch. 1.

70. See Corwin, President at 174-5.

71. Myers v. United States, 272 U.S. 52, 118 (1926), in support of an exclusive presidential power to remove appointed officers, inferred from the appointment power. See L. Tribe, *American Constitutional Law at 210-1 (2d ed. 1988).*

72. 67 U.S. (2 Black.) 635 (1863).

73. Id. at 668.

gress. In 1871, after reciting the constitutional grants of power to Congress and the President, and holding that a statute suspending the prescription of private rights of action during the civil war was valid, the Court said:

> "The measures to be taken in carrying on war and to suppress insurrection, are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution."[74]

In 1890 it held that the President had the power, in the absence of Congressional prohibition, to assign a U.S. marshal (peace officer under the jurisdiction of the Attorney General) to protect a Supreme Court Justice against threatened violence, which officer had authority to kill the attacker.[75]

In the 1930's it affirmed one major, if somewhat vaguely defined, exclusive power of the President: that of "sole organ of the federal government in the field of international relations",[76] in the exercise of which he could not only determine whether or not to recognize the legitimacy of a foreign government, but could also enter into legally binding agreements with that government without going through the formal treaty-making process involving Senate advice and consent.[77] The Court found support for this unique role, however, not merely in the inherent content of the executive power but also in long-standing acquiescence and encouragement by Congress.[78]

In 1952 the Court did get more specific about the President's independent powers in the *Steel Seizure Cases*,[79] although even this can be seen as simply reaffirming several very early holdings sustaining Congress in direct conflict with the President.[80] In the middle of the Korean conflict, after various procedures prescribed under

74. Stewart v. Kahn, 78 U.S. (11 Wall.) 493, 506 (1870).

75. Cunningham v. Neagle, 135 U.S. 1 (1890).

76. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

77. United States v. Belmont, 301 U.S. 324 (1937), specifically involving the assignment from government to government of claims to property, to which private persons also claimed title.

78. See the extended review of congressional delegations to presidents in foreign affairs matters in Curtiss-Wright, note 76, at 322-328.

79. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). For an account of the political background and significance see Longaker, in Rossiter, Commander at xviii-xxiii.

80. E.g., Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804) (statute had identified ships subject to seizure, interpreted as precluding seizure of others, non-authorized seizure ordered by the President therefore unlawful); The Appollon, 22 U.S. (9 Wheat.) 362 (1824) (seizure inconsistent with international law, and not supported by statute, therefore unlawful); Mitchell v. Harmony, 54 U.S. (13 How.) 128 (1851) (in action against military commander for wrongful seizure, where seizure sought to be justified by military necessity, jury question as to whether proof of necessity was suf-

statute had failed to produce a settlement of wage disputes in the steel industry, President Truman ordered the Secretary of Commerce to seize the affected steel mills and operate them for the United States, in order to prevent a threatened strike which might affect military production. In a highly unusual expedited procedure, the Court held his action invalid. In the majority opinion, Justice Black characterized the action as a taking of property, an inherently legislative act which the executive could not undertake without Congressional authorization, even in an emergency. At least four of the six Justices making up the majority, however, rested their decisions specifically on the finding that Congress had implicitly forbidden the President to use this seizure remedy for labor disputes, because in the course of adopting a comprehensive regulation of the subject called the Taft-Hartley Act of 1947, Congress had considered and rejected a provision for such remedy.[81] The most frequently cited opinion in the case, however, has been that of Justice Jackson, who posited a scale of presidential power in relation to Congress: at its fullest when acting under Congressional authorization, still substantial when relying on independent powers absent Congressional authority, and "at its lowest ebb" when acting contrary to the will of Congress.[82]

With respect to the claimed emergency powers of the President, the majority rejected them in the particular case. While Justice Black did not consider the possibility of an emergency sufficient to allow the present conduct, Justices Clark and Burton thought that war closer to home might be sufficient.[83] Once again, however, Justice Jackson is the most quotable:

> "The appeal, however, that we declare the existence of inherent powers *ex necessitate* to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted. They knew what emergen-

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ficient). And of course the famous Milligan case itself, note 16, sustained a statutory limitation on the President.

81. E.g., Justice Burton, concurring: "The controlling fact here is that Congress, within its constitutionally delegated power, has prescribed for the President specific procedures, exclusive of seizure, for his use in meeting the present type of emergency. Congress has reserved to itself the right to determine where and when to authorize the seizure of property in meeting such an emergency. Under these circumstances, the President's order of April 8 invaded the jurisdiction of Congress." 343 U.S. at 660.

82. 343 U.S. at 634f.

83. E.g., Burton, J., 343 U.S. at 659: "The present situation is not comparable to that of an imminent invasion or threatened attack. We do not face the issue of what might be the President's constitutional power to meet such catastrophic situations. Nor is it claimed that the current seizure is in the nature of a military command addressed by the President, as Commander-in-Chief, to a mobilized nation waging, or imminently threatened with, total war."

> cies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies. Aside from suspension of the privilege of habeas corpus in time of rebellion or invasion, when the public safety may require it, they made no express provision for exercise of extraordinary authority because of a crisis. I do not think we rightfully may so amend their work. . . ."[84]

2. Congressional Delegation of Power to the President

By far the most important basis for what everyone has perceived as a massive shift of law-making authority to the Executive from the Legislative branch in this century, however, has been legislative delegation, beginning at least with the First World War (though earlier delegations resting explicitly on the use of military power had been quite extensive) and continuing to the present time, designed expressly to allow the President to deal effectively with emergencies, whether involving international or domestic violence on the one hand or economic crises on the other. The most important delegations in WWI — all requested by President Wilson — were (i) the Espionage Act of 1917[85], along with the Sedition Law of 1918[86], defining as crimes not only obstruction of recruitment, but also the utterance of disloyal or abusive language about the government, and authorizing the closing of the mails and other censorship; (ii) the Lever Act of 1917[87], authorizing wholesale regulation of the economy for war purposes; and (iii) the Trading with the Enemy Act of 1917,[88] authorizing censorship of international communications as well as regulation of all economic transactions with hostile countries.[89] Only one of these laws was successfully challenged as an improper delegation of legislative authority to the President, and that only in one detail: the Lever Act's provision prohibiting the willful making of "any unjust or unreasonable rate or charge in handling or dealing with any necessaries" was struck down on due process grounds, as too vague to fix a standard for criminal liability or to in-

84. 343 U.S. at 649-50 (Jackson, J., concurring).
85. 40 Stat. 217.
86. 40 Stat. 553.
87. 40 Stat. 276.
88. 40 Stat. 411.
89. After it was used by Roosevelt as the basis for his initial actions in 1933 to combat the depression — in particular the declaring of a bank holiday — Congress then reenacted the TEA, amended so as to authorize a wide variety of actions "during time of war or during any other period of national emergency declared by the President", Emergency Banking Act, 48 Stat. 1 (1933). For an account see Rossiter, Dictatorship at pp. 257-8.

form accused persons of the nature of the accusations.[90]

At a time of maximum policy conflict between "nine old men" and an emergency-driven government, the Court hit the high point of anti-delegation doctrine in the mid-1930's, striking down major delegations of the Depression Congress to President Roosevelt. *Panama Refining Co. v. Ryan*[91] and *A.L.A. Schechter Poultry Corp. v. U.S.*[92] invalidated the National Recovery Act of 1933, which authorized the President to (i) prohibit interstate transportation of petroleum products produced in excess of limitations imposed by state law, and (ii) to develop, with the aid of affected industries, binding "Codes of Fair Competition". *Carter v. Carter Coal Co.*[93] struck down similar provisions of a statute regulating coal production. Congress had failed, in the Court's view, to give sufficiently precise guidance to the President or to private persons to whom it delegated authority, in the form of basic policy determinations and careful parameters of decision.

In the same year, however, in what is now one of the leading delegation cases, it sustained a Joint Resolution of Congress delegating to the President the power to determine whether or not an embargo against arms sales to the adversaries in a South American war would be in the national interest — this time emphasizing the independent powers of the President in the conduct of foreign affairs as supporting the particular delegation.[94] Congress appears to have learned how to do the job, and subsequent decisions have almost eliminated the anti-delegation doctrine from the lexicon.[95]

Most recently, the Court has addressed itself to processes whereby Congress has sought to control the exercise of delegated authority after the delegation is made, and has demonstrated much greater concern for separation of powers than the earlier delegation decisions would have suggested. In *Immigration and Naturalization Service v. Chadha*[96], the issue was the validity of the so-called "legislative veto", Congress's favorite device (used in more than 200 statutes) for post-delegation control: the executive or administrative agency would be required to report its action to Congress, which

90. U.S. v. Cohen Grocery Co., 255 U.S. 81 (1921).
91. 293 U.S. 388 (1935).
92. 295 U.S. 495 (1935).
93. 298 U.S. 238 (1936).
94. United States v. Curtiss-Wright Export Corporation, 299 U.S. 304 (1936).
95. E.g., Currin v. Wallace, 306 U.S. 1 (1939), in which it was held permissible to assign to a vote of persons affected the decision of whether to implement a regulation otherwise sufficiently well defined. For a brief but useful overview of the delegation process in non-emergency situations, and its very accomodating treatment by the courts, see L. Fisher, *Constitutional Conflicts Between Congress and the President* 100-111 (1985). As Tribe, note 71 at 362-369, makes clear, most of the action now comes in interpreting the delegating statutes.
96. 462 U.S. 919 (1983).

could override it or prevent its taking effect by a resolution of one or both houses. In the case of an executive order suspending deportation proceedings in certain cases, pursuant to a statute providing for override of such a suspension by resolution of a single house, the Court held that the override resolution was a legislative act, which could only be accomplished by the constitutionally prescribed[97] procedure of passage by both houses followed by presentment to the President for approval or veto. This procedure, said the Court, applies to any act "having the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch. . ."[98] In *Bowsher v. Synar*[99] a somewhat less familiar device, that of assigning partial responsibility for delegated action to an official representing the Congress itself, was held invalid on the ground that the action in question — determining when certain statutorily defined budget deficit reduction targets had not been met, and identifying the automatic budget cuts called for by the statute in such case — was inherently executive in nature, and therefore not delegable to an official who is not fully a part of the executive branch.

These decisions in turn cast a shadow on Congress' efforts, after a period of massive delegations to meet perceived emergencies, to reassert control over the legislative process in such matters. The current wave, which dates from the 1970's and is largely but not exclusively traceable to the Vietnam War and the consequences of the Watergate scandal, features three major statutes. *First*, the War Powers Resolution of 1973[100] tries to control the use of armed forces abroad by limiting the President's power to introduce them into hostilities to three situations: (a) declaration of war, (b) specific statutory authorization, and (c) national emergency created by attack on the U.S. or its armed forces.[101] *Second*, the National Emergencies Act of 1976[102] attempts to set automatic termination dates for many existing delegations of power to the President triggered by declarations of national emergency.[103] *Third*, the International Emergency Economic Powers Act of 1977,[104] after another provision amended the Trading With the Enemy Act of 1917 to make it applicable only to declared wars,[105] granted new emergency economic powers to

97. Art. I § 7.
98. 462 U.S. at p. 952.
99. 478 U.S. 714 (1986).
100. 50 U.S.C. §§ 1541 et seq. (1982). For a brief but helpful political account see L. Fisher, note 95, at 307-18.
101. Id. § 1541(c).
102. 50 U.S.C. §§ 1601 et seq. (1982).
103. A Senate report in 1973 identified 470 statutes authorizing the exercise of emergency powers by the President, all activated by just 4 declarations of emergency. See L. Fisher, note 95, at 300-1.
104. 50 U.S.C. §§ 1701 et seq. (1982).
105. 50 U.S.C. app. § 5(b) (1982).

meet "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States", and required a Presidential declaration of national emergency to trigger them.[106] Each of these statutes contained a legislative veto provision almost certainly invalidated by *Chadha*[107], with the result that Congressional action to constrain the President under them will require full-scale legislation, including a two-thirds vote of each house to override a presidential veto. To the extent that each — but especially the War Powers Resolution — also purports to impose substantive limitations on Presidential emergency power, it is objected to as an unconstitutional encroachment on exclusive executive power.[108] Each is also said by scholars to be ineffective to impose real controls over Presidential initiative, either because the President often ignores the prescribed limitations and procedures, or because the Congress more often fails to exploit the opportunities to intervene.[109]

The Supreme Court has not addressed these constitutional questions directly, but has tended in recent decisions to read Congressional delegations in the international relations area broadly and thereby, if anything, has supported advocates of primary executive authority.[110] In this respect the trend may be at least to modify the

106. 50 U.S.C. § 1701(a).

107. See note 96.

108. For articulation of this view see, e.g., Rostow, "Great Cases Make Bad Law", 50 *Tex. L. Rev.* 833 (1972), and "Once More Into the Breach: The War Powers Resolution Revisited", 21 *Val. U. L. Rev.* 1 (1986).

109. On the War Powers Resolution see, e.g., Ely, "Suppose Congress Wanted A War Powers Resolution That Worked", 88 *Col. L. Rev.* 1379 (1988); Van Alstyne, "In a Republic and Under a Constitution Such as Ours, It Is for Congress to Say How the Armed Forces Shall be Used", 43 *U. Miami L. Rev.* 47 (1988); Goldstein, "The Failure of Constitutional Controls Over War Powers in the Nuclear Age: The Argument for a Constitutional Amendment", 40 *Stan. L. Rev.* 1543 (1988); Carter, "The Constitutionality of the War Powers Resolution", 70 *Va. L. Rev.* 101 (1984); Allison, "Making War: The President and Congress", 40 *Law & Contemp. Prob.* 86 (1976); Sofaer, "The Presidency, War, and Foreign Affairs: Practice Under the Framers", 40 *Law & Contemp. Prob.* 12 (1976).

On the International Economic Emergency Powers Act see, e.g., Note, "The President's National Emergency Economic Powers After Regan v. Wald: An Unchecked Proliferation of Authority", 12 *Syr. J. Int. L. & Com.* 125 (1985); Note, "The International Emergency Economic Powers Act: A Congressional Attempt to Control Presidential Emergency Power", 96 *Harv. L. Rev.* 1102 (1983).

110. E.g., Dames & Moore v. Regan, 453 U.S. 654 (1981), interpreting the International Emergency Economic Powers Act, in conjunction with long-standing practice in the claims settlement field, as authorizing the President to suspend private claims against Iran arising out of the 1979 revolution until they have been disposed of by a special international tribunal. For a comprehensive review of this decision, its background and consequences, see Note, "The Executive Claims Settlement Power: Constitutional Authority and Foreign Affairs Applications", 85 *Col. L. Rev.* 155 (1985).

See also Regan v. Wald, 468 U.S. 222 (1984), interpreting the IEEPA as leaving in effect presidential regulations adopted under previous statutes to prohibit private transactions with Cuba, including those related to travel to that country. For a critical assessment see, e.g., Note, "The President's International Emergency Economic

approach taken in the *Steel Seizure Case* of interpreting a failure to enact authority as equivalent to a prohibition thereof.[111]

B. Federal-State Relations

The leading decision on the non-existence of a general federal emergency power, *A.L.A. Schechter Poultry Corp. v. U.S.*,[112] specifically applied a norm of limitation on federal power vis-a-vis the states, in the form of a definition of the maximum reach of a regulatory power. As we have seen, the eventual result was a series of decisions dramatically extending the reach of the regulatory power, without any accompanying qualification that an emergency is required to utilize it. Since the war power is one over which the federal government has a monopoly under the constitution,[113] the expansive reading given to the war powers by the Court (of which we shall speak in more detail shortly) necessarily has the effect of reducing state power in military emergencies. In the sense that wars are by definition emergencies, then, it can be said that the constitution recognizes exceptional federal power in such situations.

It is in this context that we encounter one of the few provisions in the constitution which purport to impose affirmative duties on the government: the so-called Guaranty Clause, which includes not only the guaranty of a republican form of government but also protection against invasion or domestic violence.[114] In his discussion of the clause in the *Federalist*,[115] James Madison made it clear that it entailed duties both for the states and for the national government: on the one hand the states are obligated to maintain a republic form,[116] and on the other the federal government is obligated both to enforce that obligation[117] and to protect states against invasion (which can come from another state as well as from outside)[118] or domestic violence. Nonetheless the duties in question have been

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Power After Regan v. Wald: An Unchecked Proliferation of Authority", 12 *Syr. J. Int'l L. & Com.* 125 (1985).

111. For a critique on this point see L. Tribe, note 71, at 239-244.

112. See note 45.

113. See text at note 5. For a review of decisions, see Cowin, President at 201-3.

114. Text set forth in note 2.

115. Note 8, No. 43, pp. 311-314.

116. "As long . . . as the existing republican forms are continued by the States, they are guaranteed by the federal Constitution. Whenever the States may choose to substitute other republican forms, they have a right to do so, and to claim the federal guaranty for the latter. The only restriction imposed on them is, that they shall not exchange republican for anti-republican Constitutions. . ." Id. at 312.

117. "In a confederacy based on republican principles. . . [the members have a] right to insist that the forms of government under which the compact was entered into should be substantially maintained. But a right implies a remedy; and where else could the remedy be deposited, than where it is deposited by the Constitution?" Id. at 311-312.

118. Id. at 312.

political and moral, without significant judicial intervention. Unlike other power-granting provisions of the Constitution, this one is not addressed to a particular branch of government. Congress provided for the use of the militia in carrying out the duty to protect against invasion or domestic violence, in conjunction with its militia power specified in Art. I § 8, as early as 1792;[119] but whereas the constitutional language is mandatory, the statute and its successors to the present have been permissive in form.[120] While the only Supreme Court decisions on the subject involved challenges to actual exercise of this authority, which were either rejected as essentially non-justiciable[121] or avoided on procedural grounds[122], there is no reason to suppose that the Court would be less deferent to a President who declined to honor a state's request for assistance.

Another provision of the current statutes governing "insurrection", this time addressing such as would result in deprivation of constitutional rights, appears to use more mandatory language in its delegation to the President — "shall" rather than "may" — but is ultimately permissive in effect: "shall take such measures as he considers necessary to suppress. . ."[123] A final provision is clearly mandatory — if the President decides to use military forces to suppress insurrection, he must first give a proclamation to the insurgents to disperse[124] — but has never been enforced despite frequent violation.[125]

The Guaranty Clause contains one procedural protection against undue federal interference: the requirement that intervention to protect against domestic violence follow a request of assistance from the State. Congress translated this into a request requirement when

119. Act of May 2, 1792, § 1, 1 Stat. 264.

120. 10 U.S.C. § 331 (1980): "Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection."

121. Luther v. Borden, note 58, where the President had not actually called up the militia in response to the governor's request, but had recognized the latter as the legitimate chief executive and made preparations to call the militia if needed; Georgia v. Stanton, 73 U.S. (7 Wall.) 50 (1868) (involving a challenge to the constitutionality of the Reconstruction Acts of 1867-9).

122. E.g., Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1867); Texas v. White, 74 U.S. (7 Wall.) 700 (1869), both dealing with the post-Civil War Reconstruction Acts designed to impose acceptable governments on the defeated Confederate States, which Acts were explicitly founded on the Guaranty Clause. For an account see Kurland, "The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials", 62 *So. Cal. L. Rev.* 367, 435-445 (1989).

123. 10 U.S.C. § 333 (1982).

124. 10 U.S.C. § 334 (1982).

125. For accounts see Longaker, note 26, at 196-208; Note, "Honored in the Breech: Presidential Authority to Execute the Laws with Military Force", 83 *Yale L. J.* 130 (1973).

the President proposes to use armed forces or the militia to help a state suppress an insurrection against the state's authority.[126] This does not apply, however, where the intervention is to enforce federal law as such, including those constitutional provisions designed to protect the citizen against state action, such as denial of equal protection of the laws, which may be violated by a state's inability to enforce its own laws.[127] Thus when a strike against a railroad car company turned violent in Illinois, and the liberal governor expressly asked the pro-business President not to intervene, the President did so anyway on the pretext that the strike was affecting interstate commerce;[128] the Supreme Court upheld the intervention without mentioning the governor's objections, but the result would clearly have been supported anyway by the present statutes.[129]

III. EFFECTS OF EMERGENCY ON INDIVIDUAL RIGHTS

A. War Powers and Martial Law

1. Scope of National War Powers

We have noted that two constitutional provisions establishing or recognizing quite concrete individual rights — the privilege of the writ of habeas corpus and the right to indictment by a grand jury before being tried for a capital or other infamous crime — also contain explicit exceptions for what may be broadly classified as military emergencies. There are other provisions of comparable concreteness which contain no such exceptions, such as the right of the accused in criminal prosecutions to trial by jury — by clear implication, in a regular court staffed by judges enjoying the protections of life tenure and freedom from salary diminution[130] — in the district where the crime was committed.[131] One might have inferred from this that the Framers intended that the right to jury trial apply even in times of war or invasion or insurrection, but the Court has treated the rights to indictment and jury trial as a unit. In doing so, they have recognized a general exception for military emergency, but have insisted that the conditions of the express exceptions be met.

a. Suspension of the Writ of Habeas Corpus

The principal dispute specific to this provision has been over where the power of suspension resides. The clause itself is located

126. 10 U.S.C. § 331 (1982).
127. 10 U.S.C. § 333 (1982).
128. See Rossiter, Commander at 40-41.
129. In re Debs, 158 U.S. 564 (1895).
130. Art. III § 1.
131. Art. III § 2 cl. 3; Amendment VI, cl. 2.

in the Article on the legislative branch, and the judicial decisions have reasoned (i) that the President lacks the power to suspend the writ without Congressional authorization,[132] and (ii) that where Congress authorizes a limited suspension, the President is bound by those limitations.[133] Nonetheless, in the one period of extended use of the suspension, President Lincoln acted initially without Congressional authorization, pursuant to a claim of "public necessity", and waited nearly three months after calling out the militia against the attacking Confederacy before convening Congress to request ratification of his actions.[134] Indeed in this respect Congress did not grant him full authority until two years later[135] to do what he was doing from the beginning; and, as we have seen, the Supreme Court's disapproval of his flouting the will of Congress did not come until after the Civil War was over.[136]

b. Martial Law

In the early stages of the Civil War, President Lincoln also proclaimed the applicability of martial law generally — including trial and punishment by military commissions and courts-martial — to all persons within the U.S. "guilty of any disloyal practice affording aid and comfort to rebels against the authority of the United States".[137] In fact it appears that by far the most common practice was to arrest and detain such persons without any trial at all, eventually releasing them after they no longer posed a threat.[138] In any event, as we have seen, the Supreme Court, once it got around to addressing the issue, emphatically denied the legitimacy of such proceeding, with or without Congressional authorization, insisting that the federal government may impose martial law only in case of actual invasion, and may displace the courts for non-military crimes only if they are unable to function.[139] This conclusion, at least, seems commanded by the Fifth Amendment exception to the requirement of a grand jury indictment for "infamous" crime, which applies only to "cases arising in the land or naval forces, or in the Militia, when in actual service. . ."

132. Ex parte Merryman, 17 Fed. Cas. 145, No. 9,487 (Circuit Court 1861), decided by Chief Justice Taney sitting as circuit judge in first instance.

133. Ex parte Milligan, note 16; Duncan v. Kahanamoku, note 34.

134. For an account see Rossiter, Dictatorship at 225-230.

135. Act of March 3, 1863, 12 Stat. 755.

136. Ex parte Milligan, note 16.

137. Vi J. Richardson, *Messages and Papers of the Presidents* 98 (1897), as quoted in Rossiter, Dictatorship 235 (1948).

138. For an account with further references see Rossiter, Dictatorship 235-39, esp. 236: "Arrest without trial, detention without trial, release without punishment — this was the program by which civil liberty was restricted during the Civil War."

139. Ex parte Milligan, note 16; Duncan v. Kahanamoku, note 34.

c. War Powers Generally

Aside from the martial law cases, the dominant tone of judicial interpretations of the war power has been accommodating, even when dealing with their impact on individual rights. While a complete review of war power decisions would exceed the bounds of this paper, it seems appropriate to mention a few salient examples.

In preparation for war or other military action, it is permissible to impose military law on a member of the militia who fails to answer a call to service,[140] and indeed to impose an obligation of military service without the right to buy one's release.[141]

In the conduct of war, it is permissible to seize any property involved in commerce with the enemy, regardless of the nationality of the owner,[142] as well as to deny direct review by the ordinary courts of the judgments of military tribunals — this as a matter of the "common law of war", which may be applied to rebellions as well as to war with foreign sovereigns.[143] With respect to the statutorily authorized confiscation of property belonging to rebels during the Civil War, the Court held in *Miller v. United States*[144] that the procedural protections of the 5th and 6th Amendments (indictment by grand jury, due process, just compensation for taking, trial by jury) do not apply where no crime is defined or personal punishment imposed:

> "[I]f the statutes were not enacted under the municipal power of Congress to legislate for the punishment of crimes against the sovereignty of the United States, if, on the contrary, they are an exercise of the war powers of the government, it is clear they are not affected by the restrictions imposed by the fifth and sixth amendments."[145]

Already prior to World War II it was held permissible to regulate prices of strategically important products;[146] the far more comprehensive price control and rationing system of World War II, including the establishment of a separate court with exclusive competence over decisions of the responsible administrative agency[147] and a system of non-penal sanctions,[148] also met with unsurprising judicial approval.

By far the most controversial decisions of the Court concerning the war power, however, remain those concerning Japanese-Ameri-

140. Martin v. Mott, note 57.
141. Arver v. United States, 245 U.S. 366 (1918).
142. The Prize Cases, 67 U.S. (2 Black.) 635, esp. 667-8 (1863).
143. Ex parte Vallandigham, note 30.
144. Note 24.
145. 78 U.S. at 304-5.
146. Highland v. Russell Car & Snow Plow Co., note 43.
147. Yakus v. U.S., 321 U.S. 414 (1944).
148. L.P. Steuart & Bro. v. Bowles, 322 U.S. 398 (1945).

cans in World War II: In *Hirabayashi v. United States*[149] it unanimously upheld the imposition of a curfew applicable only to persons of Japanese ancestry; and in *Korematsu v. United States*[150] it upheld, over dissents containing bitter charges of racism, a massive relocation of such persons from their West Coast homes.[151]

In dealing with the consequences of war, it is permissible for Congress to suspend the operation of state statutes of limitation or prescription for the period of the conflict, and to do so retroactively;[152] it may prohibit production and sale of alcoholic beverages, in order to conserve manpower and promote efficiency during demobilization, as well as to conserve grain supplies;[153] it may establish[154] or continue[155] rent control regulations after the end of hostilities in order to combat the housing shortage produced by post-demobilization demand. The Court has been careful in these decisions, however, to avoid giving the government a post-war *carte blanche*:

> "We recognize the force of the argument that the effects of war under modern conditions may be felt in the economy for years and years, and that if the war power can be used in days of peace to treat all the wounds which war inflicts on our society, it may not only swallow up all other powers of Congress but largely obliterate the Ninth and the Tenth Amendments as well. There are no such implications in today's decision. We deal here with the consequences of a housing deficit greatly intensified during the period of hostilities by the war effort."[156]

2. States' Power to Declare Martial Law

In the earliest of the Court's relatively few pronouncements on the subject,[157] it sustained the action of state militiamen in breaking into and searching the plaintiff's house, in order to arrest him as a leader of armed insurgents in a battle over the legitimacy of the existing state government. The majority opinion confirmed the power of martial law in the strongest of terms:

> ". . .[U]nquestionably, a State may use its military power to put down an armed insurrection, too strong to be controlled

149. 320 U.S. 81 (1943).
150. 323 U.S. 214 (1944).
151. For an account written in 1951 which reflects the controversy at the time, see Rossiter, Commander at 48-54, with references.
152. Stewart v. Kahn, 78 U.S. (11 Wall.) 493 (1871).
153. Hamilton v. Kentucky Distilleries, 251 U.S. 146 (1919).
154. Block v. Hirsch, 256 U.S. 135 (1921).
155. Woods v. Cloyd W. Miller Co., 333 U.S. 138 (1948).
156. Woods v. Cloyd W. Miller Co., 333 U.S. at 143-4.
157. Luther v. Borden, note 65.

> by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the States of this Union as to any other government."[158]

Nonetheless the Court recognized justiciable limits on the power:

> "No more force, however, can be used than is necessary to accomplish the object. And if the power is exercised for the purposes of oppression, or any injury willfully done to person or property, the party by whom, or by whose order, it is committed would undoubtedly be answerable."[159]

In *Moyer v. Peabody*[160] similar claims against a governor and national guard officers for excessive detention without charge were rejected on the ground that martial law had been declared and the good faith of the defendants had not been challenged. Only when a declaration of martial law was found to have been without foundation in any serious threat of violence uncontrollable by civil authority, and indeed a particular exercise of military power was stimulated by the initiation of proceedings in federal court to challenge the governor's actions, did the Court invalidate the declaration.[161]

B. The Qualified Character of Individual Rights Protections

Having seen that even the most explicit and concrete rights of criminal defendants are qualified by the war powers, we should not be too surprised to find the Court treating essentially all individual rights protections in our constitution as qualified or conditional rather than absolute, whenever the language of the provision is sufficiently general to admit of interpretation. We have already noted that the protection for creditors provided by the Contract Clause is subject to exception explicitly tied to emergency.[162] An essentially similar analysis, but not tied to emergency as such, can be found in the Court's interpretation of the great sources of contemporary individual rights doctrine: the Free Speech clause of the First Amendment, the Due Process clauses of the Fifth and 14th Amendments, and the Equal Protection clause of the 14th Amendment. The judicial watchword, even for the most privileged of such rights, is "strict [or rigid] scrutiny", which means that government encroachment is not per se impermissible, but may be justified by a showing of neces-

158. 48 U.S. (7 How.) at 45.
159. Id. at 46.
160. Note 73.
161. Sterling v. Constantin, note 71.
162. Text accompanying notes 54-56.

sity for the protection of a compelling state interest. For others, and sometimes even for these, other, less demanding "tests" have been applied: "intermediate scrutiny", "balancing", "rational basis"; most often there has been significant disagreement among the Justices as to what test is appropriate. All involve some weighing of the government's interest against the individual's right in the particular case.

The debate over this method of analysis, which has ushered in a dramatic expansion of the individual rights enforceable against government, has centered on the legitimacy of unelected courts exercising control over the democratically responsive branches; the various "scrutinies" are attacked and defended as talismans of civil rights activism and liberalism. From the peculiar perspective of emergency powers, however, the analysis clearly implies the legitimacy of the claim of necessity. Brief reference to the most important decisions will illustrate the limited point that I wish to make here, which is that conditions which may be characterized as an "emergency" are likely to support significant restrictions on individual liberty, and that this flexibility is not considered as a suspension of or exception to the individual right but as part of its very definition. In this connection it is appropriate to begin precisely with the infamous *Korematsu* decision.

1. Equal Protection of the Laws

The opinion of Justice Black in *Korematsu* opens with language which has dominated analysis under the Equal Protection clause ever since:

> "It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can."[163]

The majority then proceeded to find just that pressing necessity — now viewed with almost universal skepticism — in the war with Japan. This new formulation of general principle is usually attributed — although the *Korematsu* opinions did not cite it — to a footnote in the majority opinion of a 1938 decision having to do with purely economic rights,[164] which was intended to suggest a rationale for judicial enforcement of certain individual rights (especially those of the Bill of Rights and the Fourteenth Amendment) by modifying

163. 323 U.S. at 216.
164. United States v. Carolene Products, 304 U.S. 144, 152n.4 (1938).

the presumption of validity usually applicable to a statute.[165] Eventually the strict scrutiny formula would enable the Court to invalidate all racial segregation in schools[166] and other public facilities, prohibitions against interracial marriage,[167] and poll taxes,[168] as well as to motivate Congress to pass sweeping civil rights legislation. It also invalidated the imposition of rigid quotas in academic admissions,[169] as well as a city's set-aside of a fixed percentage of its public works contracts for minority business,[170] even when designed to alleviate the effects of racial discrimination practiced by the society as a whole. On the other hand, in the only other type of case in which racial classifications have survived "strict scrutiny", the Court found a compelling interest to support racial classifications by courts (specifically, the assignment of pupils to schools on the basis of race), in the need to provide an effective remedy for past unlawful discrimination.[171]

2. Freedom of Speech and Expression

The Supreme Court's decisions on the First Amendment's freedom of speech — another right for which "the footnote" suggested preferred status — have been dominated by variants on the notion, articulated by Justice Holmes in two cases arising out of World War I,[172] that speech which presents a "clear and present danger" of "substantive evils that [government] has a right to prevent" may be sanctioned without abridging the freedom of speech.[173] In sustaining a conviction for circulating letters advocating draft resistance, Holmes said:

> "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."[174]

Holmes thought that circulating a general polemic against capitalist

165. For an overview of the vast literature on "the footnote" see, e.g., Ackerman, "Beyond Carolene Products", 98 *Harv. L. Rev.* 713 (1985), and the excellent summary by W. Wiecek, *Liberty Under Law* ch. 7 (1988). For an entire theory of judicial review founded in large part on the footnote, see J. Ely, *Democracy and Distrust* (1980).

166. Brown v. Board of Education, 347 U.S. 483 (1954).

167. Loving v. Virginia, 388 U.S. 1 (1967).

168. Harper v. Virginia, 383 U.S. 663 (1966).

169. Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

170. City of Richmond v. J.A. Croson Co., — U.S. —, 57 U.S.L.W. 4132 (1989).

171. Swann v. Charlotte-Mecklenburg School District, 402 U.S. 1 (1971).

172. Schenck v. United States, 249 U.S. 47 (1919); Abrams v. United States, 250 U.S. 616 (1919).

173. 249 U.S. at 52.

174. Ibid.

states interfering with the Russian revolution, on the other hand, presented no such danger; but a majority of the Court disagreed.[175] In the "Cold War" following World War II, the Court applied this test to a charge of advocating the necessity of overthrowing the Government by force and violence as a member of the Communist Party, and found the danger in the existence of "a group ready to make the attempt".[176] Eventually, in a somewhat less fearful time, the Court translated this into what may be taken as the current test for advocacy of unlawful action, that it may not be sanctioned "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[177]

The contemporary era of "national security" and global ideological competition has also given rise to a number of cases involving dissemination of information considered to be secret or sensitive. In *New York Times Co. v. United States*[178] the Court held that a generalized claim of national security was insufficient justification for enjoining the publication of a government document, already in the hands of the press, reviewing the history of the Vietnam War. In *United States v. Nixon*[179], on the other hand, the Court indicated in dictum that protection of "military, diplomatic or sensitive national security secrets"[180] would be a sufficient ground for the executive's refusing a demand for disclosure of information relevant to a criminal trial — although the general claim of presidential confidentiality made in the actual case was not.

The situation of former intelligence officers is less favorable for a claim of freedom of speech in disclosing information about their former jobs. In *Snepp v. U.S.*[181] a contract signed by a CIA agent as a condition of employment, which required him to submit all writings about the agency for prepublication review even after his employment terminated, was enforced against him by imposing punitive damages and a constructive trust on his earnings from an unscreened book. The Court dismissed the First Amendment claim by saying that even in the absence of an express agreement the Agency would have been justified in imposing such restrictions:

> "The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence

175. Abrams, note 172.
176. Dennis v. United States, 341 U.S. 494, 510 (1951).
177. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
178. 403 U.S. 713 (1971).
179. 418 U.S. 683 (1974).
180. Id. at 706.
181. 444 U.S. 507 (1980).

service."[182]

In *Haig v. Agee*[183] the Court sustained, on a similar rationale, revocation of the passport of a former CIA agent who had disclosed and planned further disclosures of the identity of agents abroad during speaking tours in various countries, against a claim of the right to international travel — a right which was in any event of questionable status.

3. Freedom from Unreasonable Searches and Seizures

The national security era has also produced controversy over the use of electronic surveillance by the government. After the Court had held that a warrant was required for such surveillance in ordinary crime situations,[184] Congress enacted implementing legislation[185] which expressly left national security surveillance unregulated. In a case involving surveillance of a wholly domestic group suspected of violent attacks on CIA property, the Court held that the warrant requirement of the Fourth Amendment also applies to internal security surveillance.[186] In doing so, the Court emphasized the involvement of freedom of expression in such cases:

> "National security cases . . . often reflect a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech. . . . Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute when the Government attempts to act under so vague a concept as the power to protect 'domestic security'."[187]

Following this decision, Congress and the President agreed on a special statutory framework for such cases, which created a Foreign Intelligence Surveillance Court consisting of seven judges appointed by the Chief Justice, one of whom must approve any such surveillance before it is undertaken.[188] It has been reported, to the obvious satisfaction of the Attorney General, that in the first ten years of its existence the special court has handled over 4000 requests for ap-

182. 444 U.S. at 509n.3.
183. 453 U.S. 280 (1981).
184. Katz v. United States, 389 U.S. 347 (1967).
185. Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510f. (1970).
186. United States v. U.S. District Court, 407 U.S. 297 (1972).
187. Id. at 313-4.
188. Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801f. (1982).

proval, and has not denied a single one.[189]

IV. CONCLUSION

The orthodox theory that the U.S. Constitution provides the government with all the powers it needs to deal with any emergency has been adhered to quite faithfully by the Supreme Court. While the document itself provides for wartime exceptions to certain specific limitations on government action, most of the flexibility has been supplied by a principle of interpretation which has been consistently applied (if not always acknowledged): when measuring assertions of governmental power against purported constitutional limitations, the importance of the government's purpose will be taken into account to the extent the constitutional language permits, and greater deference will be given to the government's judgment in times of military emergency. Tension arises, of course, when the Court undertakes its own evaluation of the emergency; but on the whole it has done so in the calm after the storm has passed. It is difficult, if not impossible, to identify an instance in which judicial intervention has prevented effective emergency action.

189. See Cinquegrana, "The Walls (and Wires) Have Ears: The Background and First Ten Years of the Foreign Intelligence Surveillance Act of 1978", 137 *U. Pa. L. Rev.* 793, 814-5 (1989).