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CONTROLLING INHERENT PRESIDENTIAL POWER: PROVIDING A FRAMEWORK FOR JUDICIAL REVIEW

ERWIN CHEMERINSKY*

In the past decade, the Supreme Court repeatedly has been asked to define the scope of the President's inherent powers. Did President Carter have the authority to freeze all Iranian assets in the United States?[1] Could the President unilaterally rescind the United States' treaty with Taiwan?[2] May the President impound funds allocated and appropriated by Congress?[3] What authority, if any, does the President have to keep information secret and to refuse requests for information

* Assistant Professor, DePaul University College of Law. B.S. 1975, Northwestern University; J.D. 1978, Harvard University. I want to thank Michael Abernathy and Bernie Murray for their excellent research assistance. I also wish to thank Jeffrey Shaman, Stephen Siegel, Marcy Strauss, and David Zarefsky for their helpful comments on an earlier draft of this Article.

1. Dames & Moore v. Regan, 453 U.S. 654 (1981).

2. Goldwater v. Carter, 444 U.S. 996 (1979) (mem.).

3. Train v. City of New York, 420 U.S. 35 (1975). The Court in *Train* invalidated the President's impoundment on statutory grounds and did not reach the constitutional issue. Many lower court cases, however, have held that the President lacks inherent constitutional authority to impound funds. *See, e.g.*, Louisiana *ex rel.* Guste v. Brinegar, 388 F. Supp. 1319, 1325 (D.D.C. 1975) (rejecting the argument that the vesting of executive power in the President authorizes refusal to fund congressionally approved programs); Sioux Valley Empire Elec. Ass'n, Inc. v. Butz, 367 F. Supp. 686, 698 (D.S.D. 1973) (President does not have the power to impound congressionally appropriated funds to promote sound fiscal policy), *aff'd*, 504 F.2d 168 (8th Cir. 1974); National Council of Community Mental Health Centers, Inc. v. Weinberger, 361 F. Supp. 897, 901 (D.D.C. 1973) (while President may have the power to limit expenditures to accommodate total money available, "he does not have complete discretion to pick and choose between programs when some are made mandatory by conscious, deliberate congressional action"); Local 2677, Am. Fed'n of Gov't Employees v. Phillips, 358 F. Supp. 60, 75 (D.D.C. 1973) (President may not effectively legislate the termination of congressionally funded programs by impounding the appropriated funds; the Constitution vests all legislative powers in Congress).

from Congress and the courts?[4] Is it lawful for the President to conduct warrantless wiretaps of domestic organizations to protect national security?[5] In these and numerous other cases,[6] the basic question has been the same: When may the President act without express constitutional or statutory authority?[7]

Although in each of these controversies the fundamental issue is identical, the Court has failed to use a consistent approach in dealing with the issue of inherent executive power. In some cases, the Court focused solely on whether Congress had disapproved the President's conduct.[8] In other instances, the Court inquired only as to whether there was explicit statutory or constitutional authority for the Presi-

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4. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 713 (1974) (enforcement of judicial subpoena for Presidential tapes and documents). *Cf.* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 370 F. Supp. 521, 522-23 (D.D.C.) (request of congressional committee for Presidential tapes and documents dismissed for failure to establish pressing need for the materials and because of possible prejudicial publicity from the materials in pending criminal prosecutions), *aff'd*, 498 F.2d 725 (D.C. Cir. 1974).

5. United States v. United States Dist. Court, 407 U.S. 297, 321 (1972) (President lacks the authority to conduct warrantless surveillances to protect national security).

6. In the past decade, there have been a great many lower court cases involving inherent executive power that never reached the Supreme Court. *See, e.g.*, Narenji v. Civiletti, 617 F.2d 745 (D.C. Cir. 1979) (authority of the Executive to issue regulation requiring all Iranians in the United States to provide information as to residence and maintenance of their nonimmigrant status upheld), *cert. denied*, 446 U.S. 957 (1980); Independent Meat Packers v. Butz, 526 F.2d 228 (8th Cir. 1975) (executive order requiring assessment of inflationary impact of regulations has the force of law), *cert. denied*, 424 U.S. 966 (1976); Consumers Union of United States, Inc. v. Kissinger, 506 F.2d 136 (D.C. Cir. 1974) (President has inherent authority to enter into agreements with foreign steel producers to limit their steel shipments to the United States, although he cannot impose quotas or tariffs without Congressional approval), *cert. denied*, 421 U.S. 1004 (1975); AFL-CIO v. Kahn, 472 F. Supp. 88 (D.D.C.) (President's authority to impose wage-price guidelines on government contractors denied), *rev'd*, 618 F.2d 784 (D.C. Cir.), *cert. denied*, 443 U.S. 915 (1979); Yoshida Int'l, Inc. v. United States, 378 F. Supp. 1155 (Cust. Ct. 1974) (President lacks authority to impose 10% surcharge on most articles imported into the United States), *rev'd*, 526 F.2d 560 (C.C.P.A. 1975). *See also* United States v. Brand Jewelers, Inc., 318 F. Supp. 1293 (S.D.N.Y. 1970) (upholding authority of Executive to seek injunctions and other civil remedies without statutory authority); *but see* United States v. Solomon, 419 F. Supp. 358, 371-72 (D. Md. 1976) (dismissing suit brought by Executive to enjoin certain practices and policies of mental health administrators for failure to justify independent action), *aff'd*, 563 F.2d 1121 (4th Cir. 1977). These cases are illustrative, but by no means exhaustive; there are literally dozens of others.

7. This, of course, is not an issue that has just emerged in the last decade. The question of when the President may act without express constitutional or statutory authority has arisen since the earliest days of the nation. *See, e.g.*, Hurtgen, *The Case for Presidential Prerogative*, 7 U. TOL. L. REV. 59, 65-73 (1975) (discussing the use of inherent emergency powers by past presidents); Note, *The National Emergency Dilemma: Balancing the Executive's Crisis Powers with the Need for Accountability*, 52 S. CAL. L. REV. 1453, 1481-87 (1979) (arguing that inherent emergency powers for the President do exist).

8. *See, e.g.*, Goldwater v. Carter, 444 U.S. 996, 997-98 (1975) (mem.) (Powell, J., concurring) (since Congress had not officially rejected the President's claim of inherent authority to rescind the treaty with Taiwan, the issue was not ripe for judicial review).

dent's actions.[9] In still other situations, the Court looked to whether the President's behavior usurped the prerogatives of other branches of government.[10] And in some decisions, the Court even upheld broad, extraconstitutional Presidential powers.[11] In sum, the Court has resolved challenges to presidential actions "on an ad hoc basis, without resort to any fundamental principle. . . ."[12]

The Court's lack of consistency in dealing with claims of inherent executive authority creates many problems. First, lower courts are given no guidance as how to handle challenges to Presidential actions. Since most suits that attempt to have a President's act declared unconstitutional never reach the Supreme Court,[13] it is crucial that federal district and appellate courts have a framework for deciding these cases. The Supreme Court's lack of consistency in the few cases that it does hear is mirrored in the decisions of the lower federal courts; different decisions use markedly different approaches to resolve similar issues.[14]

Second, the Court's failure to articulate a standard for when the President may act without express constitutional or statutory authority has significantly lessened the judicial checks and controls on the Chief Executive. The Court's inconsistency has left the President with no guidance as to when he may act or even what will determine whether his actions will be upheld or declared unconstitutional. As a result, the President may take almost any action under the guise of "inherent" authority.[15] The Court thus has contributed significantly to the ever

9. *See, e.g.*, Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952) (President's power must come from either the Constitution or an act of Congress).

10. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 707, 712 (1974) (legitimate needs of judicial process and the courts may outweigh Presidential privilege).

11. *See, e.g.*, United States v. Curtiss-Wright Corp., 299 U.S. 304, 318-19 (1936) (President's powers over international affairs not found in grants of the Constitution, but in the law of nations).

12. Winterton, *The Concept of Extraconstitutional Executive Power in Domestic Affairs*, 7 HASTINGS CONST. L.Q. 1, 20 (1979) (footnote omitted).

13. The Supreme Court has consistently refused to hear cases involving challenges to Presidential authority in recent years. *See supra* note 6.

14. *Compare, e.g.*, American Medical Ass'n. v. Matthews, 429 F. Supp. 1179, 1214 (N.D. Ill. 1977) (Council on Wage and Price Stability Act—COWPSA—does not authorize President to require federal agencies to report to him or to the Council) *with* AFL-CIO v. Kahn, 618 F.2d 784, 795 (D.C. Cir.), (while the COWPSA explicitly denied the President the power to impose mandatory economic controls, this power was derived from another statute) *cert. denied*, 443 U.S. 915 (1979).

15. *Cf.* Bessette & Tulis, *The Constitution, Politics, and the Presidency*, THE PRESIDENCY IN THE CONSTITUTIONAL ORDER 3, 10 (J. Bessette & J. Tulis, eds. 1981) ("What is often overlooked,

increasing accumulation of power in the White House.[16]

Finally, the Court's ad hoc approach has led to decisions that focus on short term policy outcomes and ignore more important long term institutional considerations.[17] The Constitution is based on the assumption that the *process* of decisionmaking is crucial to prevent tyranny and to insure the best results over time.[18] Without a clear standard for dealing with Presidential power, however, the "tendency is strong to emphasize transient results upon policies . . . and lose sight of enduring consequences upon the balanced power structure of our Republic."[19]

It is my goal in this Article to describe a framework for judicial review of inherent Presidential power. As used herein, "inherent Presidential power" refers to "a general class of powers which are neither expressly stated in the Constitution nor specifically delegated by Congress."[20] That is, when both the Constitution and Congress are silent, when may the President act?[21] This is the question posed in literally dozens of cases, yet it is one that the Court has never answered.

Section I of this Article describes the Court's different approaches to the issue of inherent executive power. It is my contention that the varying approaches used by the Justices reflect fundamental, unarticulated differences in the proper role for judicial review of Presidential

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however, is that the necessity to find some constitutional grounds for questionable political acts may itself influence the selection or character of the actions.").

16. Fleishman & Aufses, *Law and Orders: The Problem of Presidential Legislation*, 40 LAW & CONTEMP. PROBS., Summer 1976, at 1, 36 ("Even before Watergate, many commentators had detected a dramatic rise in presidential power."); Miller, *An Inquiry into the Relevance of the Intentions of the Founding Fathers, With Special Emphasis Upon the Doctrine of Separation of Powers*, 27 ARK. L. REV. 583, 591 (1973) ("No serious observer disputes the rise of presidential government, however much he may decry it and illustrate its potential for danger.").

17. *Cf.* Kurland, *The Impotence of Reticence*, 1968 DUKE L. J. 619, 624 (recognizing the Court's failure to consider the institutional rather than the personal elements involved in the shift of control over foreign relations to the executive).

18. Thurow, *Presidential Discretion in Foreign Affairs*, 7 VAND. J. TRANSNAT'L L. 71, 75 (1973) (The separation of powers requires "that governmental functions be divided *on principle*, and not according to the prudential considerations of the moment.") (emphasis in original).

19. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

20. L. FISHER, PRESIDENT AND CONGRESS 32 (1972).

21. For the purposes of this Article, the Constitution will be regarded as silent if there is no explicit provision dealing with the subject matter at issue. For example, the Constitution is silent about such issues as executive privilege, impoundment of funds, removal of executive officials, and rescission of treaties. The scope of an express constitutional provision raises a different question—one of interpretation of an existing constitutional provision rather than resolution of an issue that the constitution does not address.

power. I will attempt to identify the underlying frameworks for review of Presidential conduct used in the various cases. Section II analyzes these frameworks, with the goal of identifying the best approach for achieving both efficient government and accountable uses of power. Finally, section III describes the proper role of the courts in reviewing these disputes and controlling Presidential power.

Most literature on the Presidency is concerned "with powers rather than limitations."[22] Yet, the experiences of Viet Nam and Watergate make it imperative that a framework be devised for limiting the scope of the President's implied powers, while still preserving the necessary powers of the office. This Article is certainly only a beginning. But it is a beginning of an inquiry of crucial and lasting importance. As Professor William Goldsmith observed:

> The problem is not simply a theoretical one, or a question emerging out of the complexities of a single event or a particular presidential action or inaction . . . . It is a question which goes to the heart of our political process. If the President lacks adequate power to discharge his constitutional responsibilities, or if he possesses more power than he needs, in fact so much that he represents a challenge not only to the doctrine of separation of powers but to the most effective operation of the American political system, then this is the kind of problem that needs, indeed demands, careful examination and analysis. An imbalance of power at the center can easily make the entire political system dysfunctional, or even worse, authoritarian and dangerous.[23]

I. THE COURT'S APPROACHES TO INHERENT PRESIDENTIAL POWER

Article II of the Constitution begins, "The executive Power shall be vested in a President of the United States of America."[24] From the earliest days of this country, there has been a debate over whether this language was intended to vest the President with inherent powers not enumerated in article II. Some commentators, beginning with Alexander Hamilton, have argued that the difference in the wording of articles I and II reveals the Framers' intention to create inherent Presidential power.[25] Article I initially states that, "All legislative Powers herein

22. Schlesinger, *Forward* to 1 W. GOLDSMITH, THE GROWTH OF PRESIDENTIAL POWER: A DOCUMENTED HISTORY, at xvii (1974).

23. 1 W. GOLDSMITH, *supra* note 22, at 4.

24. U.S. CONST. art. II, § 1, cl. 1.

25. Alexander Hamilton, The First Letter of *Pacificus* (June 29, 1793), *reprinted in* 1 W.

granted shall be vested in a Congress of the United States."[26] Since article II does not limit the President to powers "herein granted," it is argued that he is permitted to exercise authority not specifically delineated in the Constitution.[27]

Others, beginning with James Madison, have disputed this interpretation of article II,[28] contending that the initial language of article II was "simply to settle the question of whether the Executive branch should be plural or singular and to give the Executive a title."[29] According to this position, the President has no powers that are not enumerated in article II and, indeed, such unenumerated authority would be inconsistent with a Constitution creating a government of limited authority.[30]

After two hundred years of scholarly and judicial debate, it is clear that the "dispute over whether the particular wording of the vesting clause in article II was designed to add powers not specifically enumerated is textually unresolvable."[31] Since the "true" meaning of article II can never be known, it is therefore useless to argue over whether inherent power was intended by the Framers. Furthermore, even if it is ad-

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GOLDSMITH, *supra* note 22, at 398, 401 [hereinafter cited as Hamilton Letter]. Hamilton had occasion to express this position while he was Secretary of the Treasury under George Washington. The question at stake was whether President Washington could issue a Neutrality Proclamation, declaring that the United States would remain impartial toward countries involved in a war in Europe. Hamilton, writing under the pseudonym "Pacificus," argued that article II does not limit the President to the powers enumerated therein. James Madison, on the other hand, writing under the pseudonym "Helvidius," argued that the President is limited to the authority contained explicitly in article II. James Madison, The First Letter of Helvidius (Aug.-Sept. 1793), *reprinted in* 1 W. GOLDSMITH, *supra* note 22, at 405 [hereinafter cited as Madison Letter]. For a discussion of this debate, see L. FISHER, *supra* note 20, at 32-33.

26. U.S. CONST. art. I, § 1.

27. "The general doctrine of our Constitution . . . is, that the executive power of the nation is vested in the President; subject only to the exceptions and qualifications which are expressed in the instrument." Hamilton Letter, *supra* note 25, at 401. *See also* Matthews, *The Constitutional Power of the President to Conclude International Agreements*, 64 YALE L.J. 345, 349-50 (1964) ("[S]ince the famous debate between Pacificus and Helvidius it has been generally accepted that the opening sentence of Article II conferring upon the President the 'executive power' is not declaratory merely but makes an affirmative grant of power.").

28. Madison Letter, *supra* note 25, at 405. *See* L. FISHER, *supra* note 20, at 33.

29. Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 COLUM. L. REV. 53, 53 (1953).

30. Berger, *The President's Unilateral Termination of the Taiwan Treaty*, 75 NW. U. L. REV. 577, 587 (1980).

31. Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 43 U. CHI. L. REV. 463, 488 (1976). *See also* Frohmayer, *The Separation of Powers: An Essay on the Vitality of a Constitutional Idea*, 52 OR. L. REV. 211, 218-19 (1973) (it is fruitless to seek a full understanding of the separation of powers doctrine from the text of the Constitution).

mitted that the President possesses some inherent power, there is still a need to decide the circumstances under which the President can use this authority. Thus, the Court is forced to look past the text and history of the Constitution in deciding when the President may act without statutory or constitutional authority.

A. JUSTICE JACKSON'S ANALYSIS: A FALSE START

Virtually every case dealing with the President's authority begins by reciting Justice Jackson's analysis of Presidential power in *Youngstown Sheet and Tube Co. v. Sawyer*.[32] This opinion has been termed the "definitive account" of the proper approach to judicial review of executive conduct.[33] Yet, a careful examination of Justice Jackson's analysis reveals that it is of no use in deciding cases involving claims of *inherent* Presidential power.

In his concurring opinion, Justice Jackson identifies three types of Presidential actions. First, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[34] Under such circumstances the President's acts are presumptively valid.[35] Second, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."[36] Justice Jackson stated that in this area, "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."[37] Finally, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . . ."[38] Such Presidential actions will be sustained only if they are in an area where Congress cannot lawfully act.[39]

Justice Jackson's first and third categories arise in situations where

32. 343 U.S. 579, 634 (1952) (Jackson, J., concurring). A LEXIS search reveals fifty-four different cases that quote Justice Jackson's analysis.

33. Fleishman & Aufses, *supra* note 16, at 19.

34. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

35. *Id.* at 637.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 637-38.

Congress has acted.[40] Only the second category, the so-called "twilight zone of authority," involves instances in which there is no express constitutional or statutory authority.

Justice Jackson, however, provides almost no guidance as to how these cases should be decided. He states that the outcome depends on the "imperatives of events,"[41] but never explains what this phrase means, or what criteria should be used in evaluating Presidential claims of inherent authority.[42] Thus, Justice Jackson's analysis is of no help in deciding cases involving inherent powers such as executive privilege, impoundment, rescission of treaties, executive agreements, removals of executive officials from office, and the like.[43]

B. THE COURT'S TREATMENT OF INHERENT PRESIDENTIAL POWER: THE UNDERLYING FRAMEWORKS

Although courts repeatedly quote Justice Jackson's *Youngstown* concurrence, they must develop other criteria for evaluating when the President may act without constitutional or statutory authority. The Supreme Court, however, has never provided any principles for deciding these controversies. The Court's holdings not only present different answers, they even ask different questions. These differences reflect fundamental, unarticulated disagreement over the proper method for judicial review of inherent executive power. I suggest that the Court has used four different frameworks in its review. These frameworks represent four distinct points on a continuum of possible interpretations of inherent Presidential power. The continuum ranges from denying the existence of these inherent powers at one extreme, to allowing unchecked discretionary use of the powers at the other. While the Court has not adopted either of these extremes, its four approaches progress from the more restrictive to the less restrictive ends of this spectrum.

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40. It is conceivable that the President could rely on inherent authority to resist a congressional action. Usually, however, the issue in such a case would be whether Congress had the authority to enact the disputed law rather than the scope of the President's power. As used in this Article, inherent power refers to Presidential actions taken in circumstances in which neither the Constitution nor Congress has validated the exercise of that power.

41. 343 U.S. at 637 (Jackson, J., concurring).

42. Justice Jackson finds the *Youngstown* case to fit into his third category: when Congress has disapproved the President's conduct. *Id.* at 639-40.

43. A. MILLER, PRESIDENTIAL POWER IN A NUTSHELL 33 (1977) ("Jackson's delineation of executive power fails to discuss the concept of 'implied' or 'inherent' powers.").

1. *No Inherent Presidential Power*

One approach sometimes used by the Court is to deny the existence of any inherent Presidential power: the Court declares that the President may act only pursuant to express or clearly implied constitutional or statutory authority. For example, in *Youngstown Sheet and Tube Co. v. Sawyer*, Justice Black, writing for the majority, stated that "[t]he President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."[44] Justice Black concluded that President Truman's order to seize control of the steel mills was unconstitutional because "[t]here is no statute that expressly authorizes the President to take possession of property as he did here," and "it is not claimed that express constitutional language grants this power to the President."[45]

This approach is premised on the belief that inherent authority is inconsistent with a written Constitution establishing a government of limited powers.[46] According to this argument, the Constitution was intended to define specifically the President's power, eliminating all remnants of "royal prerogatives."[47] As William Howard Taft, former President and Supreme Court Chief Justice, declared:

> The true view of the Executive function is . . . that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied or included within such express grant as proper and necessary to its exercise. Such specific grant must be either in the Federal Constitution or in an act of Congress passed in pursuance thereof. There is no undefined resid-

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44. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952).

45. *Id.* at 585, 587. Justice Black's approach has been criticized. *See, e.g.*, Corwin, *supra* note 29, at 64 (Black's majority opinion in *Youngstown*, "while purporting to stem from the principle of separation of powers, is a purely arbitrary construct created out of hand for the purpose of disposing of this particular case, and is altogether devoid of historical verification."); Kauper, *The Steel Seizure Cases: Congress, the President, and the Supreme Court*, 51 MICH. L. REV. 141, 180-81 (1952) (Black's attempt to distinguish between legislative and executive power fails to recognize that the two may overlap in certain areas).

46. *See, e.g.*, Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1, 27, 32-33 (1972) (allowing inherent executive powers ignores the Framer's clear intent to form a government of limited powers); Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467, 497 (1946) ("[T]he inherent powers doctrine . . . was contrary to the spirit of a written constitution . . . . [A]s long as we live under such a document there appears little room for a theory of 'inherent' powers.").

47. Berger, *supra* note 46, at 32-33 ("[T]he Founders jealously insisted on a Federal government of enumerated, strictly limited powers . . . . They purposely cut all roots to the royal prerogative . . . . A supra-constitutional 'residuum' of powers not granted expressly or by necessary implication was not only furthest from their thoughts, . . . but avowal of such a 'residuum' would have affrighted them and barred adoption of the Constitution.") (footnotes omitted).

> uum of power which he can exercise because it seems to him to be in the public interest . . . .[48]

Thus, under the first framework, the Court's role is simply to interpret the language of the Constitution or an existing statute to determine the legality of the President's actions.[49] If there is no constitutional or statutory authority for the President's action, the action is unconstitutional.[50]

2. *Interstitial Executive Power*

In other cases, the Court, using an entirely different approach, has held that the President may act without express constitutional or statutory authority so long as the prerogatives of another branch of government are not usurped. Unlike the "no inherent Presidential power" framework, this approach recognizes a zone of inherent executive power. The President's inherent authority extends until he infringes upon the powers of Congress or the courts. If the President usurps legislative or judicial prerogatives, the Court will rule the action unconstitutional.

For example, in *United States v. Nixon*,[51] the issue before the Supreme Court was whether the President had an executive privilege that would permit him to refuse to disclose certain tape recordings and documents relating to his conversations with aides and advisors.[52] Executive privilege presents a paradigmatic example of inherent Presidential power. No statute sanctioned Presidential secrecy and "[n]owhere in the Constitution . . . is there any explicit reference to a privilege of confidentiality."[53]

The Supreme Court did not hold that the President has no right to an executive privilege because the Constitution and Congress are silent on the issue. To the contrary, the Court concluded that there is a "pre-

48. W. TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 139-40 (1916).

49. This mode of constitutional decisionmaking is often termed "interpretivism." *See* J. ELY, DEMOCRACY AND DISTRUST 1 (1980) (interpretivism is the idea that judges should be limited to applying the text or its clear implications in interpreting the Constitution). This method of analysis characterized Justice Black's view of the Court's role. *See, e.g.*, H. BLACK, A CONSTITUTIONAL FAITH, 33-34 (1969) (the protections afforded by the Due Process Clause are limited to those explicitly mentioned in the Constitution).

50. *See, e.g.*, Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, 40 LAW & CONTEMP. PROBS., Spring 1976, at 102, 118 ("[T]he absence of affirmative action by Congress may defeat an assertion of ancillary executive . . . powers that cannot be defended as having been expressly provided in article II . . . .").

51. 418 U.S. 683 (1973).

52. *Id.* at 686.

53. *Id.* at 711.

sumptive privilege for Presidential communications."[54] However, the Court held that in this instance, President Nixon could not claim executive privilege because secrecy would "gravely impair the basic function of the courts."[55] Allowing the President to resist compliance with a "subpoena essential to enforcement of criminal statutes . . . would upset the constitutional balance of a 'workable government' and gravely impair the role of the courts under Art. III."[56] In denying Nixon's claim, the Court implicitly held that the President may claim an inherent executive privilege until, as in this case, he infringes upon the functions of another branch of government.

Using this approach, an analysis of a separation of powers problem requires consideration of the constitutional relationship of the various branches of government. Each branch may act until it usurps another's power. Thus, in *Nixon v. Administrator of General Services*,[57] the Court, considering whether Congress could require review and preservation of Presidential papers, stated:

> [I]n determining whether the [Presidential Recordings and Materials Preservation] Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions.[58]

This approach is premised on the belief that there is a need for the President to exercise powers not specifically enumerated in the Constitution or not expressly granted by Congress. For example, the Constitution makes no mention of a Presidential power to recognize foreign governments or to remove Presidential appointees from office,[59] nor has Congress ever granted such powers in a statute. Yet it is conceded that the President does have these powers.[60] Inherent powers such as these are not objectionable so long as they do not disrupt the "balance of powers" among the branches; that is, action is allowed so long as one branch does not infringe on the authority of another. As James Madison stated in *The Federalist No. 47*, separation of powers "goes no

54. *Id.* at 708. ("The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.").

55. *Id.* at 712.

56. *Id.* at 707.

57. 433 U.S. 425 (1977).

58. *Id.* at 443.

59. An exception is the power of impeachment of "all civil officers of the United States" for treason, bribery, or other "high crimes or misdemeanors." U.S. CONST. art. II, § 4.

60. *See infra* cases cited at notes 146 (recognition of foreign governments) and 147 (removal of Presidential appointees).

farther than to prohibit any one of the entire departments from exercising the powers of another department."[61] Thus, using the interstitial executive power approach, in every case involving a challenge to inherent Presidential powers, the Court must ask whether the President has usurped the authority of the legislature or judiciary. If so, the action will be declared unconstitutional; otherwise, it will be permitted.

3. *Legislative Accountability*

In still other cases, the Court has implicitly adopted a framework whereby the President may take any action not expressly prohibited by the Constitution or statute. Under this approach, the President may exercise inherent power until Congress acts to limit him. As with framework one, the Court asks whether there is a constitutional or statutory provision on point. Under the first framework, if both the Constitution and Congress are silent, the President's action is unconstitutional. By contrast, under the third, the President's initiative will be permitted if there is no constitutional or statutory authority to the contrary. The Court will either explicitly uphold the President's conduct,[62] or refuse to rule by declaring the matter nonjusticiable until Congress acts.[63] In both cases, the effect is the same: the President may take any action not explicitly forbidden by the Constitution or a statute. It is immaterial that the President's conduct may usurp the powers of another branch of government.

For example, in *Goldwater v. Carter*,[64] the Supreme Court was asked to decide whether the President could unilaterally rescind a treaty without the advice and consent of the Senate. The Constitution is silent about the proper procedure for rescission of treaties. In theory, unilateral rescission by the President usurps the Senate's power to participate in the formulation of the United States' foreign policy obligations.[65] The Court, however, neither invalidated President Carter's rescission of the Taiwan treaty, nor questioned whether the President

61. THE FEDERALIST No. 47, at 304 (J. Madison) (C. Rossiter ed. 1961).

62. *See, e.g.* United States v. Midwest Oil Co., 236 U.S. 459, 472-73 (1915) (If the terms of the Constitution do not clearly uphold a practice of the President that has gone unchallenged for many years, the Court will uphold the validity of the act "on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice.").

63. *See, e.g.*, Goldwater v. Carter, 444 U.S. 996, 997-98 (1979) (mem.) (Powell, J., concurring) ("If the Congress chooses not to confront the President, it is not [the Supreme Court's] task to do so.").

64. 444 U.S. 996 (1979).

65. *See* Goldwater v. Carter, 617 F.2d 697, 716, 717 (D.C. Cir.) (MacKinnon, J., dissenting in part and concurring in part), *vacated*, 444 U.S. 996 (1979) (mem.).

infringed on the Senate's powers. Rather, the Court, in a fragmented decision, refused to rule on the merits of the President's conduct until Congress took action. Thus, given congressional inaction, the effect was to uphold the President's rescission of the Taiwan treaty. Justice Powell, in a concurring opinion, stated:

> [A] dispute between Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority. . . . The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse.[66]

By this view, the President may act until Congress legislates to the contrary.

One of the earliest separation of powers cases, *Little v. Barreme*,[67] used this approach. In *Little*, the Supreme Court upheld an award of damages against a ship captain who, following a specific order of the President, seized a ship coming to the United States from France. The Court stated that while the President might have the inherent authority to order seizure of ships, Congress, by the Nonintercourse Act, had expressly limited the President's authority by "prescrib[ing] . . . the manner in which [the] law shall be carried into execution."[68] The President's inherent power, therefore, existed until Congress acted.

This third framework is premised on the belief that "separation of powers is entirely a political matter. The power that ought to be in one branch or another is simply the power that a branch is able to take and maintain."[69] The system of checks and balances remains intact because "there is every reason to believe that Congress will be heard from if it is not content with what the President has done."[70] Congressional inaction is presumed to constitute acquiescence in the President's conduct.[71] Since the "President's authority includes the power to take all measures not prohibited by the Constitution or a statute . . . ,"[72] the

66. 444 U.S. at 997 (Powell, J., concurring).

67. 6 U.S. (2 Cranch) 170 (1804).

68. *Id.* at 177-78.

69. Thurow, *supra* note 18, at 74.

70. J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 325 (1980).

71. In United States v. Midwest Oil Co., 236 U.S. 459, 472, 474 (1915), the Court affirmed a Presidential action on the ground that congressional inaction represented acquiescence in the President's conduct. Fleishman and Aufses note that the decision presumes on the side of Presidential initiative by requiring specific prohibition against, rather than specific authorization for, executive action. Fleishman & Aufses, *supra* note 16, at 17.

72. B. SCHWARTZ, CONSTITUTIONAL LAW: A TEXTBOOK 47 (1972).

issue in every challenge to a President's inherent power is whether the Constitution or Congress forbids the President's action.[73]

4. *Broad Inherent Authority*

Finally, in some cases, the Court has upheld substantial inherent Presidential authority, restricted only by the text of the Constitution. If the Constitution is silent, the President may act unimpeded by Congress or the judiciary.

This approach was followed by the Court in *United States v. Curtiss-Wright Export Corp.*[74] This case involved a congressional authorization permitting the President to restrict arms sales to two warring Latin American nations. The issue was whether Congress had impermissibly delegated its legislative powers to the President. Justice Sutherland, writing for the Court, initially noted that the requirement that the government act pursuant to enumerated powers only applies in the area of domestic policy:

> The two classes of powers [domestic and foreign] are different, both in respect of their origin and their nature. The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution . . . is categorically true only in respect of our internal affairs.[75]

Justice Sutherland argued that power to conduct foreign policy does not stem from the Constitution, but instead is intrinsic to nationality.[76] Furthermore, the Court held that the President possesses broad inherent authority, which Congress cannot limit. This power is not derived from the Constitution, but rather is inherent in the office:

> [Congressional] participation in the exercise of the power [over external affairs] is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation . . . .
>
> It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of leg-

73. Often it is unclear whether or not Congress has acted to restrict the President. For example, in the *Youngstown* case, the Justices disagreed as to whether Congress' failure to enact statutory authorization for Presidential seizure of industries constituted a congressional action restricting the President. *Compare* Justice Frankfurter's concurring opinion, 343 U.S. at 598, 600-02 (arguing that Congress' silence restricted the President), *with* Justice Vinson's dissenting opinion, *id.* at 667-710 (arguing that Congress' silence did not restrict the President).

74. 299 U.S. 304 (1936).

75. *Id.* at 315-16.

76. *Id.* at 318.

> islative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other government power, must be exercised in subordination to the applicable provisions of the Constitution.[77]

In other words, this approach advocates that the President may take any action in foreign affairs so long as he does not violate the express limitations of the Constitution.

The *Curtiss-Wright* doctrine of extra-constitutional powers has been followed in other cases in the area of foreign affairs.[78] For example, the Court has relied on Justice Sutherland's analysis in *Curtiss-Wright* to uphold the President's inherent authority to enter into executive agreements with foreign nations,[79] and to freeze the assets of a foreign government.[80]

This approach has not been limited to the area of foreign affairs, however. In *In re Neagle*,[81] the Court held that the President had inherent authority to assign a United States Marshal as a personal bodyguard for Supreme Court Justice Stephen Field. The Court held that the absence of an authorizing congressional statute was irrelevant, and affirmed broad inherent Presidential power to see that the laws are faithfully executed.[82] Similarly, in *In re Debs*,[83] the Court upheld President Cleveland's authority to use troops and to seek an injunction without statutory authority to end the Pullman Strike.

Not surprisingly, many Presidents have invoked this approach and claimed that they were restricted only by the text of the Constitution. President Truman declared that: "[T]he power of the President should be used in the interest of the people, and in order to do that the President must use whatever power the Constitution does not expressly deny

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77. *Id.* at 319-20.

78. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 25-26 (1972). *See also* L. FISHER, *supra* note 20, at 207 (The tradition of "foreign policy [being] set aside as a Presidential preserve . . . owes much to the *Curtiss-Wright* decision . . . .").

79. *See, e.g.*, United States v. Pink, 315 U.S. 203, 229-30 (1942) (applying Sutherland's analysis to executive recognition of the Soviet government and acceptance of the Litvinov agreement); United States v. Belmont, 301 U.S. 324, 330-32 (1937) (President has the power to enter into an international compact with the Soviet Government without the participation of the Senate).

80. Dames & Moore v. Regan, 453 U.S. 654, 661 (1981).

81. 135 U.S. 1 (1890).

82. *Id.* at 64.

83. 158 U.S. 564 (1895).

him."[84] Similarly, President Nixon claimed inherent, unchecked, authority both to impound funds[85] and to determine the scope of executive privilege.[86] Nixon claimed that neither Congress nor the courts could limit these inherent prerogatives.

This view draws support from Alexander Hamilton's declaration that the "general doctrine of our Constitution . . . is that the executive power of the nation is vested in the President; subject only to the exceptions and qualifications which are expressed in the instrument."[87] The claim of broad inherent authority is based on a belief that it is not only the President's "right but his duty to do anything that the needs of the Nation demand."[88] In summary, under this approach, the only relevant question is whether the Constitution expressly forbids the President's action. Absent an explicit constitutional prohibition, the President's conduct is constitutional.

C. The Importance of Articulating and Choosing a Framework for Review of Inherent Presidential Power

The Supreme Court's inconsistency in dealing with inherent Presidential power reflects unarticulated differences among the Justices in the appropriate method of judicial review of executive authority. The Court's failure to explicitly identify its underlying approach to review of Presidential power, and the absence of any discussion about the merits of alternative approaches, has led to confused, inconsistent deci-

84. *Quoted in* M. CUNLIFFE, AMERICAN PRESIDENTS AND THE PRESIDENCY 343 (2d rev. ed. 1976). In fact, at the district court hearing in the *Youngstown* case, Truman's Justice Department asserted virtually unlimited executive authority. In one exchange, Judge Pine asked Assistant Attorney General Baldridge: "So . . . [the Constitution] limited the powers of the Congress and . . . of the judiciary, but it did not limit the powers of the Executive. Is that what you say?" Baldridge replied: "That is the way we read Article II of the Constitution." *Quoted in* J. SMITH & C. COTTER, POWERS OF THE PRESIDENT DURING CRISES 135 (1960). The district court rejected the government's contention. *See* Sawyer v. United States Steel Co., 103 F. Supp. 569, 572-74 (D.D.C.), *aff'd*, 197 F.2d 582 (D.C. Cir.), *aff'd sub nom.* Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952).

85. WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 109-10 (1973) (claiming that the "constitutional right" for the President to impound funds is "absolutely clear"). *But see* Note, *Impoundment of Funds*, 86 HARV. L. REV. 1505, 1513-16 (1973) (inherent executive authority to impound does violence to the established balance of power).

86. Reply Brief for Respondent at 2-3, United States v. Nixon, 418 U.S. 683 (1974) ("[I]t is for the Chief Executive, not for the judicial branch, to decide when the public interest permits disclosure of Presidential discussions."). *See also* A. BRECKENRIDGE, THE EXECUTIVE PRIVILEGE 14 (1974) (discussing Nixon's claim that *Curtiss-Wright* justifies executive secrecy).

87. Hamilton Letter, *supra* note 25, at 401.

88. A. TOURTELLOT, THE PRESIDENTS ON THE PRESIDENCY 55-56 (1964) (quoting Theodore Roosevelt).

sions. This, in turn, has led to inconsistent decisions in the lower federal courts, as different judges use different frameworks of review. Thus, there is a need to determine which frameworks, if any, are most appropriate for review and which are unacceptable.

The framework adopted is all-important because this choice determines both the nature of the inquiry and the result. If the first framework is used, the issue to be determined is whether constitutional or statutory authority exists for the President's conduct. If the second framework is adopted, the issue becomes whether the President's action usurps the power of the legislature or judiciary. In the third framework, the inquiry is whether the Constitution or a congressional action forbids the President's behavior. Using the final framework, the only question is whether the Constitution forbids the President's conduct. As one moves from the first framework to the last, the presumption of the legality of the challenged Presidential action shifts from strongly negative to strongly positive. The choice of a framework, therefore, can, to a great extent, determine the outcome.

The importance of the choice of a framework in determining the outcome of a case can be illustrated by an examination of the impoundment controversy. Impoundment is an Executive's refusal to spend appropriated funds. It is a practice that dates back to 1803, when President Jefferson refused to spend money that Congress had allocated for gunboats.[89] President Nixon, however, used impoundment on an unprecedented basis. He impounded twenty percent of the controllable federal sector budget, including funds for many major social programs.[90] Numerous lawsuits were filed challenging various impoundments.[91] Since there is no statute authorizing impoundment, the

89. Levinson & Mills, *Impoundment: A Search for Legal Principles*, 26 U. FLA. L. REV. 191, 191 (1974).

90. W. MONDALE, THE ACCOUNTABILITY OF POWER 109-10 (1975) (These programs included "food stamps, rural water and waste disposal grants, Rural Electrification Administration loans . . . sewage treatment funds, . . . highway construction monies, Farmers' Home Administration disaster loan funds, HUD contract authority, manpower training programs, Indian Health Service funds, Indian education funds, library resource money, [and] veterans' costs-of-education grants.").

91. *See, e.g.*, Train v. City of New York, 420 U.S. 35 (1975) (impoundment of sewage treatment funds); Louisiana *ex rel.* Guste v. Brinegar, 388 F. Supp. 1319 (D.D.C. 1975) (impoundment of highway funds); Sioux Valley Empire Elec. Ass'n. Inc. v. Butz, 367 F. Supp. 686 (D.S.D. 1973) (impoundment of funds for rural electric loans), *aff'd*, 504 F.2d 168 (8th Cir. 1974); Pennsylvania v. Lynn, 362 F. Supp. 1363 (D.D.C. 1973) (impoundment of funds for low-income housing programs); Local 2677, Am. Fed'n of Gov't Employees v. Phillips, 358 F. Supp. 60 (D.D.C. 1973) (impoundment of funds for Community Action Agency program of the Office of Economic Opportunity).

constitutionality of the practice depends on how the President's inherent power is construed. This, in turn, depends entirely on the framework chosen. For example, if the first framework is used, impoundment is unconstitutional because it is not authorized by an explicit constitutional or statutory provision.[92] If the second framework were to be applied, impoundment most likely would be unconstitutional because it usurps Congress' legislative power in several ways. First, "impoundment in effect repeals a law."[93] In addition, it infringes not only on Congress' authority to decide all expenditures, but also on Congress' ability to override Presidential vetoes, since "an impoundment order represents a veto which Congress cannot override."[94] Using the third framework, impoundment was constitutional until Congress restricted it by enacting the Budget and Impoundment Control Act of 1974.[95] Until this statute was put into effect, the absence of constitutional or statutory authority meant that impoundments were permissible. Finally, following the fourth framework, the President possesses an inherent authority to impound funds, and since the Constitution is silent, Congress cannot limit this authority.[96] Using this approach, the Impoundment Control Act would be an unconstitutional restriction on the President's powers.

The impoundment example illustrates the importance of focusing on the underlying frameworks of review of inherent Presidential authority, and of having an open and thorough debate about the appropriate format for judicial review of executive actions. Accordingly, section II of this Article attempts to analyze the comparative desirability of the various frameworks.

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92. *See, e.g.*, Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 613 (1838) (President's obligation to see that the laws are faithfully executed does not imply the power to forbid their execution); Sioux Empire Elec. Ass'n., Inc. v. Butz, 367 F. Supp. 686, 697-98 (D.S.D. 1973) (grant of executive power does not include the power to nullify congressional action).

93. Mikva & Hertz, *Impoundment of Funds—The Courts, The Congress, and The President: A Constitutional Triangle*, 69 NW. U. L. REV. 335, 376 (1974).

94. Mikva & Hertz, *supra* note 93, at 382, 389. *See also* Levinson & Mills, *supra* note 89, at 193-94 (The veto issue is "one of the strongest constitutional arguments against impoundment . . . .").

95. 31 U.S.C. §§ 1301-1353 (1974).

96. It was President Nixon's position that "an appropriation . . . is merely a ceiling upon expenditure or obligation and leaves the Executive free to spend all, some, or none of the funds provided." Abascal & Kramer, *Presidential Impoundment Part II: Judicial and Legislative Responses*, 63 GEO. L.J. 149, 149 (1974).

II. ANALYZING THE APPROACHES TO INHERENT PRESIDENTIAL POWER

A. THE FALSE DICHOTOMY BETWEEN FLEXIBILITY AND ACCOUNTABILITY

Since the Constitutional Convention, there has been an unresolved debate over whether the Constitution's separation of powers[97] was intended to maximize efficiency in government or accountability in the use of power.[98] Should the framework for judicial review of Presidential conduct emphasize checking and controlling the Chief Executive's actions, even if this limits the government's ability to respond quickly to crises? Or, alternatively, should the approach to judicial review emphasize government flexibility, providing the President all the power he needs to deal with emergencies?

Many Justices and commentators find an unequivocal choice of accountability over efficiency in the Constitution's history. They point to the fact that the Constitutional Convention rejected five times a proposal to allow Congress to choose the President, even though this plan would tend to minimize disagreements between the branches and maximize efficiency.[99] Justice Brandeis observed:

> The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.[100]

The proponents of this theory assert that efficiency was sacrificed to accountability because the "unhappy memories of royal prerogative, fear of tyranny, and distrust of any one man, kept the Framers from giving the President too much [power]."[101] Justice Frankfurter explicitly recognizes the loss of flexibility:

> A scheme of government like ours no doubt at times feels the lack of power to act with complete, all-embracing, swiftly moving authority. No doubt a government with distributed authority . . . labors under

97. Richard Neustadt correctly points out that the phrase "separation of powers" is a misnomer because the Constitution creates "a government of separated institutions sharing power." R. NEUSTADT, PRESIDENTIAL POWER 33 (1960). As used here, "separation of powers" refers generally to the division of authority among the three branches of government.

98. Miller, *supra* note 16, at 589.

99. W. BINKLEY, PRESIDENT AND CONGRESS 21 (3d ed. 1962); H. FINER, THE PRESIDENCY: CRISIS AND REGENERATION 38 (1960).

100. Meyers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

101. L. HENKIN, *supra* note 78, at 33.

> restrictions from which other governments are free. It has not been our tradition to envy such governments. In any event our government was designed to have such restrictions. The price was deemed not too high in view of the safeguards which these restrictions afford.[102]

However, other Justices and commentators believe that efficiency, rather than accountability, was the fundamental objective in drafting the Constitution, and a strong, separate Executive was viewed as a necessary means for achieving the efficiency goal.[103] According to this interpretation, the need for a flexible government led the Constitutional Convention to draft the President's power in open ended terms, thus promoting efficiency over accountability.[104] In fact, according to this view, "efficiency was stressed as a principal reason for establishing an executive independent of the legislature by, among others, John Adams, Thomas Jefferson, John Jay, and James Wilson."[105] Alexander Hamilton expressed the need for a strong, active Executive:

> There is an idea, which is not without its advocates, that a vigorous executive is inconsistent with the genius of republican government. . . . Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property . . . ; to the security of liberty . . . .
>
> A feeble executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be in practice, a bad government.[106]

Adherents of this view believe that the need for swiftness in dealing with crises caused the Framers to reject strict limits on executive authority, choosing flexibility over control of power. As Chief Justice Vinson explained, "the Presidency was deliberately fashioned as an office of power and independence."[107]

Thus, these arguments suggest that there is a need to choose either

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102. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 613 (1952) (Frankfurter, J., concurring).

103. *See, e.g.*, L. FISHER, *supra* note 20, at 253-70, 332-34; Fisher, *The Efficiency Side of Separation of Powers*, 5 J. AM. STUD. 113 *passim* (1971).

104. *See, e.g.*, Miller, *supra* note 16, at 587 (criticizing the separation of powers doctrine as at best a "half truth").

105. *Id.* at 588.

106. THE FEDERALIST No. 70, at 423 (A. Hamilton) (C. Rossiter ed. 1961).

107. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 682 (Vinson, C.J., dissenting).

accountability or efficiency as the primary goal of the Constitution. Certainly there is ample authority to justify selecting either. But these discussions have failed to consider whether a choice is really necessary at all. Shouldn't the structure of government permit *both* flexibility, allowing the Constitution to be adapted to new situations, *and* accountability, insuring a check on all uses of power? In other words, the debate described above has created a false dichotomy between efficiency and control of power. The appropriate framework for judicial review of Presidential conduct should be the one that furthers both objectives.[108]

B. Achieving Both Accountability and Flexibility: The Failure of Frameworks One and Four

1. *The Failure of Interpretivism*

The first framework described above allows the President to exercise only those powers expressed or clearly implied in the Constitution or a federal statute. This framework corresponds to the theory of judicial review known as "interpretivism." Interpretivism represents the view that "judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution."[109] The first framework maximizes the accountability and control of Presidential actions because it clearly defines his powers and limits him to taking only those actions explicitly authorized or clearly implied by the Framers of the Constitution. It is, however, too inflexible to be a workable standard of review of Presidential actions.

The first problem with framework one is that there are many important powers not mentioned anywhere in the Constitution. For example, the Constitution does not provide any process for removing Presidential appointees or other federal officers from office.[110] Similarly, the Constitution does not specify how foreign governments are to be recognized.[111] However, both of these powers are conceded to be

108. Miller, *supra* note 16, at 601 ("separation of powers necessitates both efficiency and accountability").

109. J. Ely, *supra* note 49, at 1.

110. *See* A. Miller, *supra* note 43, at 45-46 (Constitution says nothing about Presidential power to remove federal officers).

111. *See* E. Corwin, The President: Office and Powers 184-93 (4th ed. 1957) (discussing the fight over recognition power between Congress and the President); *Id.* at 171 (the Constitution makes no definite allocation of powers to determine foreign relations); L. Henkin, *supra* note 78, at 16 (the Constitution fails to explicitly delegate important powers with respect to foreign relations).

legitimate Presidential powers.[112] An interpretivist using framework one would conclude that, in the absence of a federal statute granting the President these powers, the President may not remove appointees or recognize foreign governments because such authority is not contained in, or clearly implied by, article II. However, to pursue this line of reasoning is to deny the existence of the removal and recognition powers to any branch of government because they cannot be derived from articles I or III either. In other words, since the powers are not contained in the Constitution, to an interpretivist they cannot exist. The degree of inflexibility embodied in the interpretivist approach could virtually paralyze the government.

This inflexibility cannot be avoided by looking to the intent of the Framers to provide guidance where the Constitution is silent. First, it is difficult to determine what the Framers intended. As Justice Jackson eloquently observed: "Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh."[113] Moreover, even if the Framers' intent somehow could be identified, it is of limited usefulness in solving modern problems because of the vastly different social context in which the Constitution was created. As Professors McDougal and Lans noted over a quarter of a century ago:

> [I]t is utterly fantastic to suppose that a document framed 150 years ago "to start a governmental experiment for an agricultural, sectional, seaboard folk of some three millions" could be interpreted today . . . in terms of the "true meaning" of its original Framers for the purpose of controlling the "government of a nation, a hundred and thirty millions strong, whose population and advanced industrial civilization have spread across a continent."[114]

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112. *See infra* cases cited at notes 146 (recognition of foreign governments) and 147 (removal of Presidential appointees).

113. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 634 (Jackson, J., concurring). *See also* Shaman, *The Constitution, the Supreme Court, and Creativity*, 9 HASTINGS CONST. L.Q. 257, 267 (1982) ("[T]here are considerable difficulties in discerning what in fact the Framers intended. The *Journal of the Constitutional Convention*, which is the primary record of the Framers' intent, is neither complete nor entirely accurate. The notes for the *Journal* were carelessly kept and have been shown to contain several mistakes.") (footnotes omitted).

114. McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181, 214-15 (1945) (quoting in part from Lewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 3 (1934)). For further discussion of problems involved in relying on Framers' intent in contemporary adjudication, see J. ELY, *supra* note 49, at 11-41; Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661, 683 (1960); Shaman, *supra* note 113, at 266-72. *But see* R. BERGER, EXECU-

Thus, the Constitution "must be understood as an Eighteenth-Century sketch of a government hoped for, not as a blueprint of the Government that is."[115] The first framework, which treats the Constitution as an all-inclusive blueprint, is too restrictive to be workable.

In fact, there is every indication that the Framers drafted the Constitution intending for future generations to define its meaning.[116] The Framers most likely realized that no document could possibly list all powers that a government would ever need.[117] Thus, those committed to interpretivism are obligated to abandon it. Interpretivism requires adherence to the Framers' intent, and here the Framers intended that the Constitution not be a self-contained, all-inclusive document. As such, framework one is both practically and theoretically unsound.

2. *The Inappropriateness of Absolute Authority*

Framework four provides that the President may take any action not specifically prohibited by the Constitution. Thus, if the Constitution is silent on an exercise of power, the President's use of that power is lawful and cannot be limited by Congress. This framework certainly is the most flexible, for the President possesses the greatest freedom from restraints. This flexibility, however, is gained at the expense of accountability, for this approach removes a great deal of executive action from congressional or judicial supervision.[118] The balance of powers struck in the Constitution is premised on the assumption that such unaccountable exercises of power are dangerous because they "strike at the very heart of democracy."[119] Because of the lack of accountability provided

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TIVE PRIVILEGE 88-92 (1974) (criticizing theories of constitutional interpretation that seek to go beyond Framers' intent in general, and the theory of McDougal and Lans in particular).

115. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 653 (Jackson, J., concurring). Of course, when the Framers did express a clear intent and the intended rule is still consistent with current societal needs, courts may adopt that rule as binding.

116. J. ELY, *supra* note 49, at 13. *See also* Miller, *supra* note 16, at 584 ("[Constitutions] are open-ended, always being updated to meet the exigencies of succeeding generations.).

117. *See* 1 W. GOLDSMITH, *supra* note 22, at 1-2 (Framers probably realized that no formal constitution would be able to describe an executive office that would be adequate for the future as the country grew and changed).

118. Winterton, *supra* note 12, at 28.

119. *Id.* at 44. *See also* Ledewitz, *The Uncertain Power of the President to Execute the Laws*, 46 TENN. L. REV. 757, 769-70 (1979) (such inherent executive power is incompatible with the very purpose of a limiting Constitution); Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467, 497 (1946) (an inherent powers doctrine is contrary to the spirit of a written constitution). As Thomas Jefferson stated almost two hundred years ago: "To take a single step beyond the boundaries . . . specifically drawn . . . is to take possession of a boundless field of power, no longer susceptible of any definition." Opinion on the constitutionality of the Bill for Establishing a National Bank, quoted in G. GUNTHER, CONSTITUTIONAL LAW

by the fourth framework, it is unacceptable as a means of defining the scope of inherent Presidential power in a constitutional democracy such as ours.

The unacceptability of framework four is further demonstrated by the fact that the development of this framework has no constitutional basis. As explained above, this framework is most clearly expressed in Justice Sutherland's opinion in the *Curtiss-Wright* case.[120] Sutherland contended that the President's powers in foreign policy are not derived from the Constitution, but rather are inherent in the office. Commentators are in almost universal agreement, however, that "Sutherland uncovered no constitutional ground for upholding a broad, inherent, and independent power in foreign relations."[121] In fact, Justice Sutherland's view of inherent Presidential power is inconsistent with the text, history, and philosophy of the Constitution.[122] If Sutherland's view were correct, there would have been no reason for the Constitution to enumerate any powers in the area of foreign affairs; all powers would exist automatically as part of national sovereignty. The detailing of authority for conducting foreign policy rebuts the assumption that executive authority in this area is inherent in the office.

Furthermore, although Justice Sutherland bases his conclusion on historical evidence,[123] a review of the Constitution's origins reveals no basis for the inherent power theory. To create such a broad executive power runs counter to the manifest intention of the Framers to create a federal government of limited and enumerated powers. This power is also inconsistent with the clear desire of the Framers to condition Presidential action in the field of foreign relations on congressional participation.[124] As Professor Lofgren notes, the "history on which [*Curtiss-*

95 (10th ed. 1980). Although Jefferson was speaking of the powers of Congress, his concerns are relevant to the expansion of power of any branch of government.

120. *See supra* text accompanying notes 74-77.

121. Lofgren, United States v. Curtiss-Wright Export Corporation: *A Historical Reassessment*, 83 YALE L.J. 1, 30 (1973).

122. *See* Berger, *supra* note 46, at 32-33 (Founders did not intend to create an Executive with the powers granted by Justice Sutherland); Levitan, *supra* note 119, at 493-94 (Sutherland's theory is the furthest departure from the concept of the United States as a constitutionally limited democracy, and is an erroneous constitutional interpretation.); Patterson, *In re the* United States v. Curtiss-Wright Corporation, 22 TEX. L. REV. 286, 297 (1944) (Sutherland's theory is unconstitutional.); Quarles, *The Federal Government: As to Foreign Affairs Are Its Powers Inherent as Distinguished from Delegated?*, 32 GEO. L.J. 375 *passim* (1944) (the Constitution does not support the notion of inherent Presidential powers).

123. 299 U.S. at 316-22.

124. Berger, *supra* note 46, at 27.

Wright] rests is 'shockingly inaccurate.' "[125] Justice Sutherland's theory is therefore philosophically inconsistent with the concept of a constitutionally limited government.[126] His opinion has been termed "more a flight of fancy than an exercise either in logic or historical research,"[127] and a "grandiose conception [that] never had any warrant in the Constitution, . . . wrong in theory and unworkable in practice."[128] The Court, however, has continued to rely on Justice Sutherland's analysis in many cases involving inherent Presidential power.[129] Despite this reliance, it is clear that the theory is an inappropriate grant of inherent, uncontrollable power to the President. Framework four is therefore unjustified, even in times of emergency,[130] because it does not sufficiently insure Presidential accountability.

C. Who Should Keep the President Accountable?: The Choice Between Congress and the Courts

The need to achieve *both* flexibility and accountability compels a rejection of frameworks one and four. This leaves a choice between the second framework, in which the President may act unless he usurps the constitutional prerogative of another branch of government, and the third framework, which allows the President to act unless forbidden by the Constitution or Congress. In the area of inherent powers where the Constitution does not prohibit the President's conduct, the difference between frameworks two and three is in who has the primary responsi-

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125. Lofgren, *supra* note 121, at 32 (footnote omitted).

126. Berger, *supra* note 30, at 591-92 (the inherent power theory would circumvent the Framers' intent to create a limited central government); Levitan, *supra* note 119, at 497 ("The Sutherland doctrine . . . makes shambles out of the very idea of a constitutionally limited government. It destroys even the symbol.").

127. A. Miller, *supra* note 43, at 131 (citing Lofgren, *supra* note 121).

128. *Transmittal of Executive Agreements: Hearings on S. 596 Before the Senate Comm. on Foreign Relations*, 92d Cong., 1st Sess. 26 (1971) (statement of Alexander Bickel).

129. *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654, 661 (1981); Goldwater v. Carter, 444 U.S. 996, 1003-05 (1979) (mem.) (Rehnquist, J., concurring) (citing *Curtiss-Wright* to support dismissal of complaint over President's termination of Taiwan treaty). *See also* R. Berger, *supra* note 114, at 100-01 ("*Curtiss-Wright* has become the foundation of subsequent decisions and has all too frequently been cited for an omnipresent presidential power over foreign relations.").

130. *See, e.g.*, Jones v. Seward, 40 Barb. 563, 570-71 (N.Y. App. Div. 1863) ("If [the Framers] intended that a dictatorship should exist under any emergency, they would not leave it to the Chief Executive to assume it when he may, in his discretion, declare necessity required it . . . . That the President can of his own accord assume dictatorial power, under any pretext, is an extravagant assumption."); *Ex Parte* Milligan, 71 U.S. (4 Wall.) 2, 120-21 (1866) ("The Constitution of the United States is a law for rulers and people, equally in war and in peace . . . . 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 . . . .").

bility for checking the President. Under framework two, it is the courts' role to limit the Chief Executive by invalidating any Presidential action that infringes on the functions of the legislature or the judiciary.[131] By contrast, under framework three, Congress has the primary role in restricting the President; the courts are not to rule until Congress first acts to limit Presidential authority. Thus, the key issue in analyzing inherent Presidential power is whether Congress or the courts should have the primary responsibility for controlling the President.

Under framework three, Presidential actions are constitutional unless prohibited by the Constitution or a federal statute. Therefore, as long as the President does not violate the few specific prohibitions contained in the Constitution, he may take any action that Congress has not forbidden. Thus, there will be a tremendous increase in Presidential power if Congress fails to act. Congressional inaction legitimizes Presidential initiatives.

This approach rests on a number of assumptions. First, it assumes that congressional silence constitutes tacit approval of the President's actions.[132] Because Congress has the power to limit the President's conduct, it is assumed that its failure to do so represents implicit consent to the Executive's actions.[133] This assumption is unjustified, however, because failure to object does not necessarily mean that Congress approves of the action.[134] Professor Gewirtz offers many reasons why Congress may not act, even though a majority of its members disagree with the President:

> [W]hen Congress is faced with an executive policy that is in place and functioning, Congress often acquiesces in the executive's action for reasons which have nothing to do with the majority's preferences on the policy issues involved. . . . In such a situation, Congress may not want to be viewed as disruptive; or Congresspersons may not want to embarass the President; or Congress may want to score polit-

131. Of course, under framework two, Congress also can limit the President by enacting a law and removing the issue from the zone of inherent powers.

132. In Goldwater v. Carter, 444 U.S. 996 (1979) (mem.). Justice Powell, in a concurring opinion, proclaimed that "[i]f the Congress chooses not to confront the President, it is not our task to do so." *Id.* at 997. *See also* Note, *Executive Action*, Goldwater v. Carter, *and the Allocation of the Treaty Termination Power*, 15 GA. L. REV. 176, 181 n.37 (1980) ("Powell seemingly viewed legislative inaction as acquiescence.").

133. *Cf.* J. CHOPER, *supra* note 70, at 325 ("Courts in statutory interpretations often accept the executive department's view of legislative intent and thus force Congress to expressly disagree with such an interpretation.").

134. Fleishman & Aufses, *supra* note 16, at 17-18.

> ical points by attacking the executive's action rather than accepting political responsibility for some action itself; or Congresspersons may be busy running for reelection or tending to constituents' individual problems; or Congress may be lazy and prefer another recess . . . .[135]

In addition, framework three rests on the assumption that Congress can and will act to check the constitutionality of every action taken by the President. If Congress fails to act, then Presidential power will be uncontrolled and unaccountable. In fact, it is often questionable whether Congress can effectively act to limit the President. If Congress wishes to restrict the Executive, it must enact a law. However, the President has the authority to veto the bill before it becomes law. Thus, in order to check the President, Congress must be able to muster a two-thirds majority, substantially lessening the likelihood that Congress can act.[136]

Finally, even if congressional silence can be taken as implicit consent to the President's conduct, the third framework assumes that this consent should increase the President's powers. That is, framework three sanctions an almost total transfer of legislative power to the executive, so long as Congress does not object. Repeated congressional inaction would result in a tremendous shift of power to the White House.[137] Such a growth in executive authority would threaten the entire system of checks and balances. As Justice Frankfurter noted: "The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority."[138]

An example of how Presidential power is increased through congressional inaction is the Court's repeated statement that "a systematic, unbroken executive practice, long pursued to the knowledge of Congress and never before questioned . . . making as it were such exercise of power part of the structure of our government, may be treated as a

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135. Gewirtz, *The Courts, Congress, and Executive Policy-Making: Notes on Three Doctrines*, 40 LAW & CONTEMP. PROBS., Summer 1976, at 46, 79 (footnotes omitted).

136. Brief for the Constitutional Lawyers Committee on Undeclared War as Amicus Curiae at 76, Massachusetts v. Laird, 400 U.S. 866 (1970); Kauper, *supra* note 45, at 181.

137. There is no doubt that such a shift in power already has occurred. W. MONDALE, *supra* note 90, at 106 ("A potent combination of Presidential action and congressional inaction had shifted the balance of power, . . . undercutting much of Congress' role as restraint against the arbitrary exercise of Presidential power.").

138. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 594 (Frankfurter, J., concurring).

gloss on 'executive Power' vested in the President by § 1 of Art. II."[139] Under this view, "usurpation of power, if repeated often enough, accomplishes an amendment of the Constitution and a transfer of power."[140] This approach, characteristic of framework three's total reliance on congressional control of the Executive, unjustifiably assumes that unconstitutional practices become legitimate by the passage of time and effects a massive, unwarranted shift of power to the President.[141]

Moreover, history has shown that Congress generally is unwilling to restrain the President.[142] "[C]ongressional review of executive policy-making is sporadic, and the executive frequently makes policy without Congress' either taking responsibility for it or repudiating it. The result is a system sharply skewed towards executive policy-making."[143] Thus, framework three is based on assumptions and practicalities that make it an insufficient guarantor of Presidential accountability.

By contrast, framework two insures both accountability and flexibility. Under the second framework, the President may act unless he usurps the prerogatives of another branch of government. Thus, the courts have the duty to invalidate a Presidential action that infringes on the legislature or the judiciary. Of course, under this framework, Congress also retains the power to limit the President's authority.

More specifically, framework two insures sufficient accountability because it prevents Presidential power from increasing as a result of congressional inaction. The President may exercise only those powers that are consistent with the functions of the legislature and the judici-

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139. *Id.* at 610-11. *See also* Dames & Moore v. Regan, 453 U.S. at 680-82 (Congressional inaction in the face of the continuing exercise of claim settlement authority by the President results in implicit approval of the procedure.); Haig v. Agee, 453 U.S. 280, 293-300 (1981) (long-standing Executive practice allowing the revocation of passports for national security reasons inferably adopted by Congress in the enactment of a new Passport Act that did not repudiate this practice); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 321-29 (1936) (tracing Congressional delegations of power to the Executive in foreign relations, with this history implying approval of broad inherent Presidential powers in this area).

140. Berger, *supra* note 46, at 49-50.

141. Casper, *supra* note 31, at 479.

142. Miller, *supra* note 16, at 600 ("The problem about Congress is simply this: Not only does it not govern, *it does not want to govern*.") (emphasis in original).

143. Gewirtz, *supra* note 135, at 79. *See also* A. MILLER, *supra* note 43, at 29-30. ("At the present time, despite some surface indications to the contrary following the resignation of President Nixon, Congress truly is the sapless branch of government. It is like a great beached whale, still alive and still mindlessly flipping its tail to and fro, but with little motive or innovative power of its own.").

ary. Accountability for Presidential actions is assured because the courts can review all claims that the President has usurped congressional or judicial powers.[144] As such, the second framework would stem "the flow of policy-making power away from Congress."[145]

Furthermore, framework two leaves the President with the flexibility necessary for an efficient government. Using this framework, the President has inherent authority that is limited only when the powers of another branch are infringed. Therefore, in areas where the Constitution is incomplete, the President possesses powers not enumerated in article II, such as the ability to recognize foreign governments[146] or to remove Presidential appointees.[147] The President also has the authority to act in emergencies, but not in a way that would violate the concept of separation of powers.[148]

Accordingly, in every case involving a challenge to inherent Presidential authority, the Court should inquire whether the President's action infringes on legislative or judicial powers.[149] It does not matter whether the issue involves domestic or foreign policy,[150] for in each area it is essential both that accountability be preserved and that the President not be allowed to usurp congressional or judicial powers.[151]

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144. *See* C. BLACK, THE PEOPLE AND THE COURTS 213 (1960) ("The crucial thing . . . is that the measures of government are actually submitted—in earnest and not in play—to a tribunal representing the nation but detached from the political departments.").

145. Gewirtz, *supra* note 135, at 46.

146. *See, e.g.*, Wilson v. Show, 204 U.S. 24, 32 (1907) (recognition of Panama by President); United States *ex rel.* D'Equiva v. Uhl, 137 F.2d 903, 906 (2d Cir. 1943); (recognition of Austria as a part of Germany by President); Bank of China v. Wells Fargo Bank, 104 F. Supp. 59, 66 (N.D. Cal. 1952) (recognition of Nationalist China by President).

147. *See, e.g.*, Myers v. United States, 272 U.S. 52, 164-65 (1926) (President has the power to remove the Postmaster General without the advice and consent of the Senate).

148. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 632 (1952) (Douglas, J., concurring) (President has emergency powers to recommend law, not to make it).

149. For a discussion of the criteria courts should use in making this determination, see *infra* text accompanying notes 209-35.

150. Justice Sutherland's assertion that foreign and domestic policy are inherently different in United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315 (1936), has no historical or legal support. Lofgren, *supra* note 121, at 30-31. *See supra* text accompanying notes 120-28. Moreover, the assumption that the President needs more powers in the foreign policy area than in other areas has been convincingly refuted. *See* Kurland, *supra* note 17, at 622-23.

151. For example, given the enormous human and economic consequences of armed conflicts, it is essential that the safeguards built into our democratic process be protected, so that neither the President nor Congress usurps the other's role in entering a war. *See, e.g.*, T. EAGLETON, WAR AND PRESIDENTIAL POWER vii (1974) ("The terrible presidential miscalculations on Vietnam . . . argue convincingly for a return to fundamental constitutional principles."); A. SOAFER, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER: THE ORIGINS 378 (1976) (discussing initiation of military action by early 19th century Presidents without express congressional approval); Ratner, *The Coordinated Warmaking Power—Legislative, Executive, and Judicial Roles*, 44 S. CAL.

Framework two would have the judiciary review the President's actions to insure that they do not infringe on the prerogatives of Congress or the courts.[152] As such, this approach is based upon the belief that it *should* be the role of the federal courts to become involved in such disputes. This judicial activism might be opposed by those who prefer a more limited role for the federal courts.[153]

It could be argued that judicial review of Presidential behavior risks the courts' credibility and effectiveness. The premise for this argument is that the federal courts should avoid, to the greatest extent possible, involvement in controversial areas.[154] Commentators such as Alexander Bickel and Felix Frankfurter have contended that the courts must preserve their institutional credibility by avoiding decisions that will draw the ire of other branches of government.[155] They argue that due to the courts' limited power to implement their decisions, the courts must depend upon voluntary compliance by the legislature and the Executive.[156] The amount of compliance that the courts can expect

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L. REV. 461, 488 (1971) (discussing the "accommodation of presidential and congressional warmaking power"); Reveley, *Presidential War-Making: Constitutional Prerogative or Usurpation*, 55 VA. L. REV. 1243, 1300 (1969) (Congress should regain its voice in President's decision to initiate military action); Van Alstyne, *Congress, the President, and the Power to Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1, 13 (1972) (explicit congressional approval of President's decision to use military action necessary in absence of limited exceptions); Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771, 1775 (1968) (check of executive power to declare war necessary to control the economic, physical, moral, and legal consequences); Comment, *The President, the Congress and the Power to Declare War*, 16 U. KAN. L. REV. 82, 92-94 (1967) (proposing legislation to maintain both congressional power to declare war and Presidential power to resist sudden attack with military force).

152. Of course, this assumes that such cases would be brought to court and that they would meet the justiciability requirements of article III. For an analysis of why these requirements would not pose an obstacle to judicial review of Presidential actions, *see infra* text accompanying notes 170-208.

153. *See, e.g.*, J. CHOPER, *supra* note 70, at 260-379 (arguing for judicial restraint in reviewing separation of powers issues).

154. *See, e.g.*, A. BICKEL, THE LEAST DANGEROUS BRANCH (1962) (discussing ways for the Court to properly limit its involvement in the adjudication of policy) [hereinafter cited as A. BICKEL, BRANCH]; A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 94 (1970) (Court's credibility is at stake when it intervenes too much) [hereinafter cited as A. BICKEL, PROGRESS]. *But see* Gunther, *The Subtle Vices of the Passive Virtues*, 64 COLUM. L. REV. 1 *passim* (1964) (responding to Bickel's theory of a passive judiciary).

155. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 284-89 (1962) (Frankfurter, J., dissenting) (the Court should not decide issues committed to other political institutions); A. BICKEL, PROGRESS, *supra* note 154, at 94. *But see* Barron, *The Ambiguity of Judicial Review: A Response to Professor Bickel*, 1970 DUKE L.J. 591, 598-99 (the Court does have a "political role" and a "political task" in adjudication).

156. This notion can be traced back to Alexander Hamilton's concern regarding impeachment. He "doubted whether [the Supreme Court] would possess the degree of credit and authority which might, on certain occasions, be indispensable towards reconciling the people to a decision

depends on the courts' credibility in the eyes of those whose behavior the courts seek to regulate. Accordingly, the courts must preserve their legitimacy by avoiding involvements in controversies that will risk the courts' political capital.[157]

It might be argued that judicial review of Presidential behavior is just such a waste of the courts' institutional credibility. Arguably, this is an area in which the courts' involvement is unnecessary, because there is another check on the President; Congress can legislate to limit the Executive. By contrast, however, it can be argued that only the federal courts can adequately protect the individual liberties guaranteed by the Constitution.[158] Therefore, some commentators have proposed a modified form of judicial restraint, in which the Supreme Court should reserve its activism and credibility for protecting personal constitutional rights and should eschew involvement in disputes involving the separation of powers.[159]

This argument for judicial restraint is based on a number of untenable assumptions. First, the argument assumes that review of executive conduct is a discretionary rather than a constitutionally mandated duty of the federal courts. Yet, for almost two hundred years it has been accepted that judicial review of the Executive is an obligation for the federal courts, whose "province and duty" it is "to say what the law is."[160] Since *Marbury v. Madison*, it has been recognized that the judiciary should determine "where authority lies as between the democratic forces in our scheme of government."[161]

Second, the modified judicial restraint approach assumes that it is

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that should happen to clash with an accusation brought by their immediate representatives." THE FEDERALIST No. 65, at 398 (A. Hamilton) (C. Rossiter ed. 1961).

157. *See* A. BICKEL, PROGRESS, *supra* note 154, at 94-95 ("[T]here is a natural quantitative limit to the number of major, principled interventions the Court can permit itself. . . . A Court unmindful of this limit will find that more and more of its pronouncements are unfulfilled promises, which will ultimately discredit and denude the function of constitutional adjudication."); J. CHOPER, *supra* note 70, at 139-40 ("[T]he Court's public prestige and institutional capital [are] exhaustible.").

158. *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) ("[p]rejudice against discrete and insular minorities . . . may call for a . . . more searching judicial inquiry."); J. CHOPER, *supra* note 70, at 60-84 (the Court is institutionally ideal for undertaking review of constitutional cases); R. DWORKIN, TAKING RIGHTS SERIOUSLY 142-43 (1977) (the judiciary is an especially proper forum for cases involving constitutional rights, since these rights are against the "state" or the "majority").

159. *See, e.g.*, J. CHOPER, *supra* note 70, at chs. 3 & 5.

160. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

161. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 597 (1952) (Frankfurter, J., concurring). *See also* R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 9 (1949) (conflict of power questions are for the judiciary to resolve).

possible to distinguish the protection of individual liberties from the control of Presidential abuses of power. In fact, these abuses often threaten the personal rights protected by the Constitution. The Framers created separation of powers in the Constitution precisely because they thought that the accumulation of power in the Executive would lead to tyranny.[162] As Dorsen and Shattuck note: "[A]ll unlimited power is inherently dangerous, and it is the salutary function of the courts to circumscribe the boundaries of the executive and legislative powers so that neither branch is exalted at the expense of the other."[163] Controlling Presidential power is necessary to safeguard individual liberties, and it is the role of the courts to protect these rights. Thus, there is no justification for judicial restraint in review of the Executive.

Third, the argument for judicial restraint assumes that the legislature can and will act to adequately check the President. If, however, the legislature fails at this task, then without judicial review there is no limit on the President's accumulation of power. For all of the reasons explained in the second section of this Article, the legislature may be inadequate to this task.[164] Therefore, if there is to be any check, it must come from an active judiciary.

Finally, advocates of judicial inaction assume that a court's highest mission should be to preserve its institutional credibility. Yet, the basis for this assumption never has been adequately explained. Is there a fear that if the courts review the Executive, the President will begin disregarding judicial decisions? If so, what evidence is there that judicial activism in this area will undermine the courts' credibility? In fact, judicial review of inherent Presidential power might *enhance* credibility.[165] Although judicial review often is criticized as being "countermajoritarian,"[166] the courts actually perform a "promajoritarian"

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162. The classic explanation of separation of powers as a way to prevent tyranny is found in James Madison's observation: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." THE FEDERALIST No. 47, *supra* note 61, at 301 (J. Madison).

163. Dorsen & Shattuck, *Executive Privilege, the Congress and the Courts*, 35 OHIO ST. L.J. 1, 40 (1974). *But see* J. CHOPER, *supra* note 70, at 263 (These decisions should "be remitted to the interplay of the national political process.").

164. *See supra* text accompanying notes 132-43.

165. For example, the credibility of the federal judiciary was enhanced by the courts' role in the Watergate investigations. Frankel, Book Review, 43 U. CHI. L. REV. 874, 874 (1976).

166. *E.g.*, A. BICKEL, BRANCH, *supra* note 154, at 16-23. *See also* J. ELY, *supra* note 49, at 103 (Although values are determined by the majority, they are adjudicated by "appointed judges," who are "comparative outsiders in our governmental system.").

function when they act to control unconstitutional Presidential acts.[167] The courts, by preserving congressional powers, help to insure rule by the majority. Furthermore, "far from bespeaking a sensitive regard for a coordinate branch . . . judicial abdication in such cases contributes to the erosion of the formal structural guarantees which the Constitution codified."[168] Judicial review of the Presidency is at least as likely to enhance as it is to diminish the credibility of the courts.

Even if one were to accept the notion that the courts might occasionally anger the other branches, this does not require the courts to avoid involvement in such areas. As Professor Tribe argues, "the highest mission of the Supreme Court . . . is not to conserve judicial credibility, but in the Constitution's own phrase, 'to form a more perfect union . . . .' "[169]

Thus, the best way to maximize both accountability and flexibility is to permit the President to act when the Constitution and Congress are silent, unless the President's actions usurp legislative or judicial power. The final section of this Article discusses how this selected framework would operate in practice.

III. CREATING A FRAMEWORK FOR JUDICIAL REVIEW OF INHERENT PRESIDENTIAL POWER

If, as argued above, it is the courts' role to prevent the President from infringing upon the powers of Congress or the judiciary, two practical considerations must be addressed. First, does the judicial power of article III permit the federal courts to perform this function? Second, in deciding specific cases, what factors should the courts use to determine whether the President has usurped legislative or judicial powers?

A. INSURING JUDICIAL REVIEW: JUSTICIABILITY

The preliminary consideration with respect to the courts' power to review executive acts is whether challenges to Presidential power are justiciable. Two justiciability principles, the political question doctrine and the standing doctrine, pose potential obstacles to judicial review.[170] On close examination, however, it is clear that neither should preclude judicial review of inherent Presidential power.

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167. Tigar, *Judicial Power, the "Political Question Doctrine," and Foreign Relations*, 17 U.C.L.A. L. REV. 1135, 1142 (1970).

168. *Id.* at 1179.

169. L. TRIBE, AMERICAN CONSTITUTIONAL LAW iv (1978).

170. Casper, *supra* note 31, at 467. Ripeness, another potential justiciability barrier, is considered *infra* note 180.

1. *The political question doctrine*

The political question doctrine is invoked by the courts to avoid ruling on a matter when the resolution of that matter is committed to the discretion of another branch of government.[171] The doctrine has its origins in Justice Marshall's opinion in *Marbury v. Madison*:

> By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience . . . . [A]nd whatever opinion may be entertained of the manner in which executive discretion may be used, there still exists, and can exist, no power to control that discretion. The subjects are political . . . . [B]eing entrusted to the executive, the decision of the executive is conclusive . . . . Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.[172]

Some commentators, most notably Professor Jesse Choper, suggest that the courts should treat all challenges to inherent executive power as political questions.[173] Professor Choper contends that the courts should declare that litigation contesting the constitutionality of Presidential actions is nonjusticiable:

> The federal judiciary should not decide constitutional questions concerning the respective powers of Congress and the President vis-a-vis one another; rather, the ultimate constitutional issues of whether executive action (or inaction) violates the prerogatives of Congress . . .

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171. L. TRIBE, *supra* note 169, at 71-73. The classic definition of the political question doctrine is found in Baker v. Carr, 369 U.S. 186, 217 (1961):

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

See also Firmaye, *The War Powers and the Political Question Doctrine*, 49 U. COLO. L. REV. 65, 68-78 (1977) (tracing the development of the political question doctrine in the caselaw).

172. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165-66, 170 (1803). Some commentators trace the political question doctrine back to 15th century England. *See, e.g.*, Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338, 338 (1924) (citing a case filed by the Duke of York seeking a declaration that he was the rightful heir to the throne that the court refused to hear because it "perteyned to the Lordes of the Kyngs blode.").

173. *See* J. CHOPER, *supra* note 70, at 263, 298.

> should be held to be nonjusticiable, their final resolution to be remitted to the interplay of the national political process.[174]

This doctrine was followed by the Supreme Court in *Goldwater v. Carter*,[175] in which the Court refused to rule on the constitutionality of President Carter's rescission of the Taiwan treaty. Justice Rehnquist, writing for the plurality, concluded that the case presented "a nonjusticiable political dispute that should be left for resolution by the Executive and Legislative branches of the government."[176] Similarly, most cases challenging the constitutionality of the Viet Nam War were dismissed on political question grounds.[177] By invoking the political question doctrine, the Court never reaches the merits of the challenge to the President's action and so cannot analyze whether the President has usurped legislative or judicial power. Framework two is thus impossible to follow if courts deem all litigation involving the constitutionality of inherent Presidential authority to be a political question, and thus nonjusticiable.

This use of the political question doctrine, however, is undesirable, incorrect as a matter of legal principle, and an unjustified restriction of the Court's constitutional role. The Court's refusal to consider challenges to executive power is an implicit decision in favor of broad inherent Presidential authority. Professor Choper would have the Court

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174. *Id.* at 263.

175. 444 U.S. 996 (1979) (mem.).

176. *Id.* at 1003.

177. *See, e.g.*, Holtzman v. Schlesinger, 484 F.2d 1307, 1309 (3d Cir.), *cert. denied*, 416 U.S. 936 (1973); De Costa v. Laird, 471 F.2d 1146, 1147 (2d Cir. 1973); Sarnoff v. Connally, 457 F.2d 809, 810 (9th Cir. 1972); Orlando v. Laird, 443 F.2d 1039, 1043 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971); Simmons v. United States, 406 F.2d 456, 460 (5th Cir.), *cert. denied*, 395 U.S. 982 (1969); United States v. Conston, 373 F. Supp. 1119, 1120 (E.D. Wisc. 1974); Drinan v. Nixon, 364 F. Supp. 854, 856 (D. Mass. 1973); Atlee v. Laird, 347 F. Supp. 689, 707-08 (E.D. Pa. 1972), *aff'd, without opinion sub nom.* Atlee v. Richardson, 411 U.S. 911 (1973); Massachusetts v. Laird, 327 F. Supp. 378, 381 (D. Mass.), *aff'd on other grounds*, 451 F.2d 26, 34 (1st Cir. 1971); United States v. Sisson, 294 F. Supp. 511, 515 (D. Mass. 1968); Velvel v. Johnson, 287 F. Supp. 846, 849 (D. Kan. 1968), *aff'd sub nom.* Velvel v. Nixon, 415 F.2d 236, 239 (10th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970). *See also* A. D'AMATO & R. O'NEILL, THE JUDICIARY AND VIETNAM 51-58 (1972) (description of cases illustrating the sharp division in lower federal courts as to whether challenges to Vietnam labor policy posed political questions); Henken, *Vietnam in the Courts of the United States: "Political Questions"*, 63 AM. J. INT'L L. 284, 284-89 (1969) (Supreme Court has never satisfactorily explained why courts should abstain from considering challenges to foreign relations policy); Schwartz & McCormack, *The Justiciabilitly of Legal Objections to the American Military Effort in Vietnam*, 46 TEX. L. REV. 1033, 1046-53 (1968) (judicial abstention in the Vietnam War cases was an unjustified application of the political question doctrine); Sugarman, *Judicial Decisions Concerning the Constitutionality of United States Military Activity in Indo-China: A Bibliography of Court Decision*, 13 COLUM. J. TRANSNAT'L L. 470, 470-76 (1974) (servicemen should have been granted standing to challenge Congressional authority to authorize the Vietnam War).

become involved only when a congressional act results in an impasse between the Executive and the legislature.[178] Thus, until Congress acts to limit the President, "the Court should simply accept the presidential assertion of constitutional authority and carry on his mandate accordingly."[179] This approach is the very definition of framework three, with the political question doctrine simply being the label used to explain why the Court will not rule until Congress has acted.[180] As explained above,[181] this framework will lead to a tremendous increase in the power of the Chief Executive and to an impermissible lack of control and accountability.

Second, it is a misinterpretation of the political question doctrine to view it as precluding courts from deciding whether the President has usurped another branch's powers. The political question doctrine, as set forth in *Marbury v. Madison*, provides that courts should not review an official's performance of duties in which he or she has discretion.[182] Thus, the threshold question must be whether the official has the power to act, and if so, whether the act is discretionary or mandated by some external authority. If the act is discretionary, the official's conduct is an unreviewable political question; if not, the court must review the challenged action. The question of whether the official is exercising lawful discretion is not a political question. As the Court declared in *Baker v. Carr*:

> Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, *and is a responsibility* of this Court as ultimate interpreter of the Constitution.[183]

Accordingly, a two-stage analysis must be undertaken. First, a court must ask what kind of power the President is exercising; it may be an exercise of constitutionally granted discretion, an implied power, or not a Presidential power at all. Once this initial determination is made,

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178. J. CHOPER, *supra* note 70, at 298.

179. *Id.* at 320.

180. Likewise, if the Court declares that a controversy over inherent executive power is not ripe until Congress acts, as it did in Goldwater v. Carter, 444 U.S. 996, 997 (1979) (mem.) (Powell, J., concurring), the Court is following framework three and using "ripeness" as the label to explain why the Court will not rule until Congress has acted.

181. *See supra* text accompanying notes 131-43. *See also* Tigar, *supra* note 167, at 1148-49 (refusal to rule encourages increasing executive use of political powers).

182. 5 U.S. at 165-66.

183. 369 U.S. at 211 (emphasis added).

the political question issue arises; the court may refuse to review the action on political question grounds only if the action falls into the first classification. Thus, the political question doctrine simply precludes review of the exercise of discretionary power; it does not prevent a court from determining whether the Executive's conduct is an unconstitutional usurpation of judicial or legislative power.[184] As such, the Court's invocation of the political question doctrine in *Goldwater v. Carter* was based on a misinterpretation of the doctrine.

Finally, requiring the courts to abstain from deciding all challenges to executive power until Congress acts is an unjustified limit on the judiciary's constitutional role. It is the courts' responsibility to interpret the Constitution.[185] Accordingly, a court, when a case is properly before it, must decide whether the President's conduct is lawful.[186] A court abdicates its duty when it declares that any suit to restrain inherent Presidential authority presents a political question. In fact, the Supreme Court repeatedly has "decided disputes between Congress and the President under its general power to hold the other two departments within the ambit of the Constitution."[187]

Nor should the courts declare that a case is nonjusticiable solely

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184. Justice Brennan advanced this argument in his dissent in *Goldwater v. Carter*:

> But the doctrine does not pertain when a court is faced with the *antecedent* question whether a particular branch has been constitutionally designated as the repository of political decisionmaking power. . . . The issue of decision-making authority must be resolved as a matter of constitutional law, not political discretion; accordingly it falls within the competence of the courts.

Goldwater v. Carter, 444 U.S. 996, 1007 (1979) (mem.) (Brennan, J., dissenting) (emphasis in original) (citation omitted). *See also* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7-9 (1959); Henkin, *Is There a Political Question Doctrine?*, 85 YALE L.J. 597, 606 (1976); Note, *Whether the President May Terminate a Mutual Defense Treaty Without Congressional Approval*, 29 DRAKE L. REV. 659, 669-70 (1979-1980) (in *Goldwater*, the Court abdicated its duty to resolve constitutional disputes between the Executive and Legislative branches).

185. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

186. United States v. Nixon, 418 U.S. 683, 703-04 (1973); Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 596 (1952) (Frankfurter, J., concurring).

187. Younger, *Congressional Investigations and Executive Secrecy: A Study in Separation of Powers*, 20 U. PITT. L. REV. 755, 777 n.100 (1959). *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 135-37 (1975) (congressional appointment of members of Federal Election Commission violates Appointments Clause of the Constitution, which vests power to nominate "officers of the United States" in the President); United States v. Nixon, 418 U.S. 683, 692-97 (1974) (a dispute between an appointee of the Attorney General and the President is a justiciable controversy); Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 587-89 (1952) (President had no authority to order the Secretary of Commerce to seize and operate steel mills); Myers v. United States, 272 U.S. 52, 117 (1926) (Congress may not by statute divest the President of the power to remove an officer in the executive branch which the President was initially authorized to appoint).

because it involves foreign policy.[188] While the actual conduct of foreign affairs is committed to the political branches of government, it nonetheless is the courts' role to decide if the President is exercising a constitutional power in that area. In fact, this is a role that the courts have often fulfilled.[189] Requiring the judiciary to dismiss challenges to executive authority as political questions is inconsistent with the courts' role in the constitutional structure.

For all of these reasons, federal courts may review challenges to inherent Presidential power. The inquiry as to whether the President is unconstitutionally usurping legislative or judicial power is never a political question.

2. *Standing*

The political question doctrine is not constitutionally required; its application is entirely prudential. In contrast, the principle of standing is based on the Constitution's restriction of the jurisdiction of the federal courts to "cases and controversies."[190] This constitutional mandate has been interpreted to require that a party seeking to invoke a federal court's jurisdiction must allege "a personal stake in the outcome of a controversy."[191] The question of whether a particular plaintiff has a sufficient stake in the outcome of a controversy is termed "standing." The purpose of the doctrine is to insure that cases are presented to the

188. It has long been suggested that foreign policy issues present political questions. *See, e.g.*, Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) (the nature of executive decisions as to foreign policy is political, not judicial); Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918) (the conduct of foreign relations is committed to the political departments, and the propriety of what may be done in foreign affairs is not subject to judicial inquiry); Weston, *Political Questions*, 38 HARV. L. REV. 296, 315-16 (1925) (quoting *Oetjen*, 246 U.S. at 302).

189. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 542 (1966). *See, e.g.*, United States v. Pink, 315 U.S. 203, 229 (1942) (confirming President's power to determine public policy of the United States with respect to Russian nationalization decrees); United States v. Belmont, 301 U.S. 324, 330 (1936) (Court confirmed President's power to recognize, and assume diplomatic relations with, the Soviet Union); Missouri v. Holland, 252 U.S. 416, 433 (1920) (Court confirmed Congress' power to enter into a treaty with Great Britain regulating the hunting of migratory birds).

190. U.S. CONST. art. III, § 2. For a thorough treatment of standing, see P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 64-241 (2d ed. 1973). *See also* Brilmayer, *The Jurisdiction of Article III: Perspectives on the Case or Controversy Requirement*, 93 HARV. L. REV. 297 *passim* (1979) (examination of the case or controversy requirement of the standing doctrine). For a discussion of the federal standing issue in the context of taxpayer class actions, see Chemerinsky, *Fraud and Corruption Against the Government: A Proposed Statute to Establish a Taxpayer Remedy*, 72 J. OF CRIM. L. & CRIMINOLOGY 1482, 1500-05 (1981).

191. Baker v. Carr, 369 U.S. 196, 204 (1962).

courts by the proper parties.[192]

Specifically, the Supreme Court has held that the "cases and controversies" requirement of article III requires a plaintiff to demonstrate " 'a distinct and palpable injury to himself' that is likely to be redressed if the relief is granted."[193] Additionally, policy considerations have led the Court to adopt other prudential, nonconstitutional standing barriers. These include refusal to hear cases involving "third party standing" or presenting "generalized grievances." In a third party standing situation, the plaintiff does not allege an injury to him or herself, but rather seeks to protect others not before the court.[194] The bar on "generalized grievances" requires that "a litigant normally must assert an injury that is peculiar to himself or a group of which he is a part, rather than one 'shared in substantially equal measure by all or a large class of citizens.' "[195]

If no one has standing to challenge a Presidential action, there can be no court review. The effect of restrictive standing doctrines would be to make framework two, judicial review of executive action allegedly usurping Congress or the courts, impossible. There is, however, no reason to believe that standing will be a barrier to judicial scrutiny

192. Homburger, *Private Suits in the Public Interest of the United States of America*, 23 BUFFALO L. REV. 343, 388 (1976).

193. Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979) (quoting Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38 (1976)). Thus, there are two constitutional standing requirements: "Injury in fact" and "redressability"—requiring that a favorable decision will redress the injury suffered. As to injury in fact, see United States v. SCRAP, 412 U.S. 669, 686 (1973) (injury in fact is not limited to economic damage but includes damage to aesthetic and environmental well-being as well); Sierra Club v. Morton, 405 U.S. 727, 735 (1972) (party alleging injury to environmental well-being must be among the users of the injured area); Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 613 (1973) (trifling injuries often suffice for standing when a matter of principle is at stake, such as a small injury to a taxpayer who brings a class action). As to redressability, see Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. at 38 (to satisfy the standing requirement, plaintiff must show an injury to himself that is likely to be redressed by a favorable decision); Warth v. Seldin, 422 U.S. 490, 499 (1975) (judicial power exists only to redress or to protect against injury).

194. *See, e.g.*, Barrows v. Jackson, 346 U.S. 249, 255 (1953) (ordinarily, a plaintiff cannot sue to protect the rights of a third party); Tileston v. Ullman, 318 U.S. 44, 46 (1943) (physician lacked standing to challenge a statute prohibiting the use of contraceptives for the alleged injury was to his patients, not himself); Sedler, *Standing to Assert Constitutional* Jus Tertii *in the Supreme Court*, 71 YALE L.J. 599, 608 (1962) (examination of factors considered by the Court in cases of third party standing); Note, *Standing to Assert Constitutional* Jus Tertii, 88 HARV. L. REV. 423, 426 (1974) (third party claims allowed where the difficulty of the third party asserting its rights and equal protection considerations urge standing for the *jus tertii* claimant).

195. Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99-100 (1979) (quoting Warth v. Seldin, 422 U.S. at 499).

of inherent Presidential power. There are two potential classes of plaintiffs who would have standing to sue.

First, private citizens, hurt by specific executive actions, would have standing. For example, in the cases challenging the legality of Presidential impoundment, parties denied appropriated funds were accorded standing.[196] The deprivation of funds was an "injury in fact" that would be "redressed" by a court's declaration that the President's conduct was unconstitutional. Similarly, courts have recognized that plaintiffs have standing to challenge the constitutionality of executive orders that allegedly overstep Presidential authority.[197] A Presidential usurpation of legislative or judicial powers will tend to injure identifiable individuals or businesses, who will then have standing to obtain judicial review of the executive action.

Second, members of a coordinate branch of government should be accorded standing to challenge Presidential infringement of their branch's powers. Specifically, members of Congress should be allowed to sue based on a claim that the President has infringed legislative prerogatives.[198] Allowing such suits would ensure the effectiveness of framework two because legislators would have standing to challenge any Presidential action that allegedly usurps Congress' powers.

This approach, however, requires a modification of the standing afforded members of Congress. Currently, a member of Congress has standing only if "the alleged dimunition in congressional influence . . . amount[s] to a disenfranchisement, a complete nullification or with-

196. *See* Louisiana *ex rel.* Guiste v. Brinegar, 388 F. Supp. 1319, 1322 (D.D.C. 1975) (impoundment case justiciable because dispute can be readily settled by an exercise of judicial power); Sioux Valley Empire Elec. Ass'n, Inc. v. Butz, 367 F. Supp. 686, 689 (D.S.D. 1973) (rural utility cooperative has standing to sue the Secretary of Agriculture for termination of a loan program because of impoundment), *aff'd*, 504 F.2d 168 (8th Cir. 1974); Local 2677, Am. Fed'n of Gov't Employees v. Phillips, 358 F. Supp. 60, 67-68 (D.D.C. 1973) (employees of Office of Economic Opportunity have standing to sue Director for termination of program because of impoundment).

197. Independent Meat Packers v. Butz, 526 F.2d 228, 231 (D.C. Cir.) (business association has standing to challenge Department of Agriculture revisions of meat grading standards), *cert. denied*, 424 U.S. 966 (1975); Farkas v. Texas Instruments, Inc., 375 F.2d 629, 631-35 (5th Cir. 1967) (employee has standing to sue employer for violation of executive antidiscrimination order); *See, e.g.*, AFL-CIO v. Kahn, 472 F. Supp. 88, 90 (D.D.C.) (labor union has standing to challenge Presidential wage and price controls), *rev'd on other grounds*, 618 F.2d 784 (D.C. Cir.), *cert. denied*, 443 U.S. 915 (1979).

198. Members of the judiciary are also able to sue if the President usurps the court's prerogatives. *See, e.g.*, United States v. Will, 449 U.S. 200, 218 (1980) (Congressional rollback of judicial salaries held to violate the Constitution's Compensation Clause). The discussion in the text focuses on congressional standing simply because infringement of legislative powers is much more likely to occur. The same principle, however, should be applied to the judiciary.

drawal of a voting opportunity."[199] In other words, so long as Congress has the power to conduct a vote on the issue, a member has no standing to challenge the Executive's action. As a result, major Presidential infringements of legislative power are unreviewable merely because Congress, in theory, could vote on the result of the action. For example, in *Edwards v. Carter*,[200] sixty members of the House of Representatives sued to challenge President Carter's submission of the Panama Canal Zone treaties only to the Senate. They contended that the President violated the requirement contained in article IV, section 3 of the Constitution, that "Congress shall have Power to dispose of the . . . Territory or other property belonging to the United States."[201] Although there was a clear allegation that the House of Representatives' powers were usurped, the court ruled that the plaintiffs lacked standing.[202] The Representatives were not allowed to sue because they still had the ability to vote (although it is unclear what the Representatives could have voted on, since the whole point of the suit was that they were denied the chance to participate), and because they could not show a total "nullification of their official influence upon the legislative process."[203] Similarly, in *Holtzman v. Schlesinger*,[204] a member of the House of Representatives challenged the bombing of Cambodia by the United States, alleging that the President's unilateral military action usurped Congress' powers. Nonetheless, the court held the suit nonjusticiable on the grounds that the plaintiff lacked standing.[205]

The courts should expand congressional standing to permit any member to sue based on an allegation that the President has usurped legislative powers. Such a suit fulfills all of the constitutional and prudential standing requirements: the plaintiff is alleging an injury to Congress' powers and authority, which constitutes an "injury in fact," and the injury would be redressed if the President's action were ruled unconstitutional. Although technically the plaintiff is asserting an injury to a third party (Congress), such suits fit within two exceptions permitting third party standing. The first is when there is a sufficiently

199. Goldwater v. Carter, 617 F.2d 697, 702 (D.C. Cir.), *vacated and remanded on other grounds*, 444 U.S. 996 (1979) (mem.); Harrington v. Bush, 553 F.2d 190, 213 (1977).

200. 445 F. Supp. 1279 (D.D.C.), *aff'd on other grounds*, 580 F.2d 1055 (D.C. Cir. 1978).

201. 445 F. Supp. at 1281, citing U.S. CONST. art. IV, cl. 2.

202. 445 F. Supp. at 1284, 1286.

203. *Id.* at 1286.

204. 484 F.2d 1307 (2d Cir. 1973).

205. *Id.* at 1315. The court found that the plaintiff lacked standing because the Representatives' ineffectiveness was due to the contrary votes of her colleagues, not the actions of the executive branch.

close relationship between the plaintiff and the injured party.[206] The second exception allows a litigant to raise claims of third parties if no one else can adequately protect the rights of that third party.[207] Members of Congress are not only in the best position to determine that Presidential actions impinge on the rights of Congress, but also they are often the only plaintiffs likely to come forward. Finally, there is no generalized grievance, since the plaintiff is alleging a harm to a specific institution of which he is a member.

This expanded congressional standing would not unjustifiably expand the role of the courts. It already has been established that it is the courts' duty to insure that the President does not usurp legislative or judicial powers.[208] Permitting members of Congress to have standing in such instances simply serves to assure that the courts will be able to fulfill this duty.

B. Criteria for Judicial Review: Identifying Presidential Violations of Separation of Powers

Following the framework advocated in this Article, the President may act without statutory or constitutional authority so long as he does not usurp the powers of another branch of government. Therefore, it is the court's task, once a case is before it, to determine whether the President's conduct infringes upon legislative or judicial power. The concepts of "infringement" and "usurpation," however, are vague. There is a need to define the specific criteria that the court should look to in deciding whether a Presidential action is lawful or whether it constitutes an impermissible violation of the separation of powers. There are three interrelated factors that a court should consider in cases involving inherent Presidential power. These may be termed "constitutional effects," "functional effects," and "accountability effects."

1. *Constitutional Effects*

The first factor that a court should consider in a challenge to an assertion of inherent Presidential power is whether the President is exercising a power that is constitutionally committed to another branch of

206. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 481 (1965) (doctor has standing to raise the constitutional rights of married people with whom he had a professional relationship); NAACP v. Alabama, 357 U.S. 449, 458-59 (1958) (association has standing to assert the constitutional rights of its members).

207. *See, e.g.*, Barrows v. Jackson, 346 U.S. 249, 255-58 (1952) (petitioners sued respondents, who were caucasian, for breaching covenant prohibiting sale of their house to blacks; respondents allowed to raise the civil rights of potential black purchasers in defense).

208. *See supra* text accompanying notes 144-69.

government. In other words, when the Constitution and federal statutes are silent about the Executive's authority, and thus do not explicitly prohibit the President's action, the question is whether the President is using a power delegated to the legislature or the judiciary. Two examples, one in which there is such a delegation and one in which there is not, illustrate this criterion.

First, consider the President's use of executive agreements to formulate the United States' foreign policy commitments. Executive agreements are pacts between the United States and foreign governments that are put into effect unilaterally by the President, without the advice and consent of the Senate.[209] The Constitution is silent about the President's power to enter into executive agreements,[210] and no federal statutes grant this power. The use of these agreements is thus a classic case of inherent Presidential power because of the lack of constitutional or statutory authorization or prohibition. The Constitution does, however, provide that the President "has the Power by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur."[211] The Senate is thus given the explicit constitutional authority to participate in the implementation of all treaties. Executive agreements are recognized as having the same legal effect as treaties.[212] By concluding these agreements without the consent of the Senate, therefore, the President is nullifying that body's constitutional role, by "circumvent[ing] the use of the Senate's veto

209. There is a voluminous body of literature discussing the constitutional legitimacy of executive agreements. *See, e.g.*, Matthews, *supra* note 27, at 351 (analysis of independent Presidential power to make agreements); McDougal & Lans, *supra* note 114, *passim* (examination of treaties and executive agreements in the context of national policy); Wright, *The United States and International Agreements*, 38 AM. J. INT'L L. 341, 355 (1944) (supporting the legal and political authority of the President to make international agreements). In addition, there have been many congressional hearings on the subject. *See Congressional Review of International Agreements: Hearings Before the Subcomm. on International Security and Scientific Affairs of the House Comm. on International Relations*, 94th Cong., 2d Sess. (1976); *Congressional Oversight of Executive Agreements: Hearings Before the Subcomm. on Separation of Powers of the Senate Judiciary Comm.*, 94th Cong., 1st Sess. (1975).

Statistical studies indicate that there is an increasing tendency on the part of the President to use executive agreements rather than treaties. *See* Rovine, *Separation of Powers and International Executive Agreements*, 52 IND. L.J. 397, 398 (1977) (over one hundred executive agreements are put into effect for every five treaties ratified by the Senate).

210. Matthews, *supra* note 27, at 351.

211. U.S. CONST. art. II, § 2.

212. Pritchett, *The President's Constitutional Position*, in THE PRESIDENCY REAPPRAISED 23 (R. Tugwell & T. Cronin eds. 1977). Although many executive agreements are of a "routine technical nature, without political significance," Rovine, *supra* note 209, at 409, there are many examples of important agreements that were not submitted to Congress. *Id.* at 399.

power over treaties."[213] Permitting the President to rely on executive agreements rather than on treaties "emasculate[s] the senatorial check on executive discretion that the framers so carefully embodied in the Constitution."[214] Therefore, the "constitutional effects" criterion would indicate that Presidential authority to implement executive agreements usurps the power expressly delegated to another branch of government.[215]

By contrast, Presidential recognition of foreign governments does not displace a congressional power.[216] The Constitution does not delineate which branch of the government has the authority to recognize foreign nations. Unlike the treaty power, there is no mention of a role for the Senate in the process of recognition. The President's recognition of foreign governments does not implicate the Senate's role to participate in the implementation of treaties in the same way as does the use of executive agreements, for recognition is more of a diplomatic exercise. As such, the "constitutional effects" criterion would sanction the inherent Presidential power to recognize foreign governments.[217]

2. *Functional Effects*

Another factor that a court should consider is whether the effect of the President's action is to prevent another branch from performing its functions. Does the executive conduct prevent performance of legislative or judicial tasks? Even though the President may not directly take over another branch's constitutional responsibility, his actions may still undermine the separation of powers by significantly interfering with Congress or the courts.

Unlike the constitutional effects criterion discussed above, the courts have used a form of the functional effects approach in their analysis; two such instances illustrate its application. First, in cases involv-

213. J. DAVIS & D. RINGQUIST, THE PRESIDENT AND CONGRESS 75 (1975).

214. L. TRIBE, *supra* note 169, at 171.

215. The Supreme Court, however, has repeatedly upheld the President's use of executive agreements. *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654, 682 (1981) (executive agreement entered into in negotiations with foreign country enforceable over claims of American citizens); United States v. Pink, 315 U.S. 203, 229 (1942) (executive agreement with the Soviet Union held superior to the law of the state of New York); United States v. Belmont, 301 U.S. 324, 330 (1937) (executive agreement settling all claims with the Soviet Union upheld although it was made without the advice and consent of the Senate).

216. For a discussion of the importance of the recognition power, see H. FINER, *supra* note 99, at 91.

217. In fact, the Court has stated that the recognition of, and the withdrawal of recognition from, foreign regimes is exclusively a function of the Executive. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964).

ing executive privilege, the Court has examined the functional effects of secrecy. Executive privilege is an example of a Presidential power contained in neither statutes nor the Constitution.[218] The privilege does not violate the constitutional effects criterion discussed above because Congress does not have a constitutional right to all information from executive communications. In *United States v. Nixon*, the Court recognized "a presumptive privilege for Presidential communications,"[219] but adopted a functional approach to hold that the privilege was inapplicable where it would "conflict with the functions of the courts under Art. III."[220] The Court concluded that allowing the President to refuse to disclose evidence needed for a criminal trial would "gravely impair the basic function of the courts."[221]

The Court has used a similar functional approach in considering the President's power to remove Presidential appointees from office. Although the Constitution describes the process for appointments,[222] it is silent on the removal power.[223] Therefore, when the President removes an official, he is not displacing a constitutionally granted congressional power because no such authority is specified in the Constitution. Thus, according to the constitutional effects criterion, inherent Presidential removal power is permissible.

The Court, however, has adopted a functional test for determining when the President may remove an appointee without the consent of the Senate. In *Myers v. United States*, the Supreme Court upheld the President's removal of a postmaster.[224] The Court spoke of a broad, inherent Presidential removal power. This removal power was subsequently limited by the Court by its decision in *Humphrey's Executor v. United States*.[225] In *Humphrey's Executor*, the Court ruled that the President could not remove a member of the Federal Trade Commis-

218. Van Alstyne, *supra* note 50, at 107-08. For general discussions of executive privilege, see R. BERGER, *supra* note 114; Berger, *Executive Privilege v. Congressional Inquiry*, 12 U.C.L.A. L. REV. 1044 (1965); Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383 (1974); Dorsen & Shattuck, *supra* note 163.

219. United States v. Nixon, 418 U.S. 683, 708 (1974).

220. *Id.* at 707.

221. *Id.* at 712.

222. U.S. CONST. art. II, § 2.

223. For a discussion of the scope of the President's removal power, see Corwin, *Tenure of Office and the Removal Power under the Constitution*, 27 COLUM. L. REV. 353 *passim* (1927); Donovan & Irvine, *The President's Power to Remove Members of Administrative Agencies*, 21 CORNELL L.Q. 215 *passim* (1936); Grundstein, *Presidential Power, Administration and Administrative Law*, 18 GEO. WASH. L. REV. 285 *passim* (1950).

224. 272 U.S. 52, 176 (1926).

225. 295 U.S. 602 (1935).

sion because the Commission was an independent regulatory agency and not a purely executive office such as was involved in *Myers*.[226] Thus, in *"Humphrey's Executor*, the Court pursued a more functional approach: the character of the office rather than the locus of the appointment determined where the power of removal reposed."[227]

In *Weiner v. United States*, the Court, considering the President's authority to remove a member of the War Claims Commission, reaffirmed this functional approach to the removal power.[228] The Court held that in deciding whether the President had removal power it considered "the difference in functions between those who are part of the Executive establishment and those whose tasks require absolute freedom from Executive interference."[229] If the removed individual performed a legislative rather than an executive task, his removal by the President impinges upon the function of the legislature. This limitation on Presidential authority is nowhere specified in the Constitution. Rather, the definition of the scope of the President's removal power reflects functional considerations.

3. *Accountability Effects*

Finally, the court should inquire whether the effect of the challenged Presidential action is to prevent sufficient review or control of the President by another branch of government. It has long been recognized that concurrence among the branches of government in enacting legislation checks the abuse of governmental power.[230] The courts should carefully scrutinize all Presidential acts that have the effect of insulating the President from accountability.

Presidential authority to rescind treaties illustrates the application of this criterion. Although the Constitution specifies the procedure for ratifying treaties, it does not mention how they may be rescinded. Unilateral rescission by the President does not displace the Senate's constitutional role because no such role is provided for in the Constitution. Similarly, Presidential rescission does not interfere with the Senate's functions because that body takes no actions concerning abrogation of treaties. However, if the President can unilaterally rescind a treaty, he has the power to change America's foreign policy commitment without accounting to, or being subjected to, the checks of another branch of

226. *Id.* at 626-28.
227. L. TRIBE, *supra* note 169, at 188.
228. 357 U.S. 349, 353 (1958).
229. *Id.*
230. Fleishman & Aufses, *supra* note 16, at 39.

government. There is no way, short of impeachment, that Congress can limit the President's action. As the Court of Appeals explained in *Goldwater v. Carter* in holding that Petitioners had standing to challenge the President's termination of a treaty:

> The crucial fact is that . . . there is no conceivable senatorial action that could likely prevent termination of the Treaty. A congressional resolution or statute might at most have persuasive effect with the President; it could not block termination if he persisted in his . . . interpretation of the Constitution giving him unilateral power to terminate. That appellee Senators have no power to enact a remedy is especially clear in light of the nature of their constitutional claim. They claim the right to block termination with only one-third plus one of their colleagues. There is no way that such a minority can even force a resolution to the floor, let alone pass it. To pretend that effective remedies are open to appellees is to ignore that . . . even if they could muster a majority, any legislative action they might take under the present circumstances could well be futile.[231]

Because unilateral rescission would be an unaccountable form of inherent Presidential power, judicial review is essential. To insure the existence of a check on the President, the Court should require some form of congressional consent to rescissions.[232]

Thus, in considering whether the President's actions impermissibly usurp legislative or judicial power, the courts should consider three factors: whether the President is exercising a power constitutionally committed to another branch of government; whether the effect of the executive conduct is to prevent performance of legislative or judicial tasks; and whether the effect of the President's action is to prevent adequate review or control by another branch of government. It is important to emphasize that each of these criteria should be applied to each instance of challenged inherent Presidential authority.

It is possible that none of the criteria will be violated. This would indicate that the President has inherent power in that area. For example, the President's power to recognize foreign governments does not usurp a congressional constitutional duty, and it does not infringe Congress' functions or deny accountability because the Senate has the opportunity to participate prior to the creation of any commitments

231. 617 F.2d 697, 703 (footnote omitted), *vacated and remanded on other grounds*, 444 U.S. 996 (1979) (mem.).

232. Majority approval by Congress could be required for rescission of a treaty. *See* Goldwater v. Carter, 617 F.2d 697, 739 (MacKinnon, J., dissenting), *vacated on other grounds*, 444 U.S. 996 (1979) (mem.).

pursuant to the recognition.[233] Thus, the President has the inherent power to recognize foreign governments.

If, however, any one of the criteria is violated, then the President has exceeded his lawful powers because he has usurped legislative or judicial power. It is possible that in some instances all three criteria would be violated by a single Presidential action claimed to be justified by an inherent Presidential power. For example, Presidential impoundment of funds displaces Congress' constitutional duty to determine expenditures of funds. Furthermore, it interferes with Congress' legislative function of enacting programs to solve particular problems, because impoundment, in effect, eliminates the program.[234] Finally, impoundment is an unaccountable Presidential power because it "represents a veto which Congress cannot override."[235]

Of course, these criteria will not provide a clear answer in all challenges to Presidential power, but no list of guidelines for judicial decisionmaking ever will. As demonstrated by the recognition and impoundment powers examples above, however, these criteria can help to clarify the issues involved in cases of inherent Presidential power and to focus the attention of different courts on the same issues, so that a uniform and workable doctrine may develop.

CONCLUSION

> With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law.[236]

It has been my goal to argue that the courts have done an inadequate job of controlling the exercise of inherent Presidential power. The Supreme Court's ad hoc, unprincipled approach to this power, and the confused responses of the lower courts as they attempt to follow the Supreme Court's cases, have contributed greatly to the development of an "Imperial Presidency."[237]

There is, however, one advantage to the Court's failure to clearly articulate a method for analyzing inherent Presidential power. The Court can write on an almost blank slate; no clear principles need to be overruled. In fact, there is some case law support for virtually every

233. *See supra* text accompanying notes 216-17, 231-32.
234. Mikva & Hertz, *supra* note 93, at 376.
235. *Id.* at 382.
236. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 655 (1952).
237. The term is drawn from A. SCHLESINGER, THE IMPERIAL PRESIDENCY (1974).

conceivable approach. Undoubtedly, the judiciary will have repeated opportunities to create a consistent framework for judicial review of Presidential actions that will insure control of inherent executive power, while allowing the President the flexibility necessary to carry out his job. This Article is an attempt to outline such a framework.