

Managing Conflicts Between Congressional and Inherent Presidential Powers: The “Coordinacy” Thesis

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The President of the United States has many constitutionally granted powers that authorize him to act without prior congressional action. For example, he has power as “Commander-in-Chief”² to collect foreign intelligence as part of his duty to ensure the safety of Americans.³ To provide another, the “receive Ambassadors” Clause⁴ grants presidential power to either settle American citizens’ claims against foreign governments or to elect *not* to pursue such claims for fear that doing so would create friction with other countries.⁵

Congress’ legislative powers overlap considerably⁶ with the President’s inherent, constitutionally-granted powers. For instance, Congress relied on its power to make “Rules for the Government and Regulation of the land and naval Forces”⁷ when it enacted the Foreign Intelligence Surveillance Act (FISA), which specifies procedures to be followed in collecting foreign intelligence.⁸ And Congress relied on several other constitutional grants when it enacted the Foreign Sovereign Immunities Act (FSIA), which grants American citizens the right to sue foreign countries.⁹

Lawfully enacted legislation triggers the presidential duty to “take Care that the Laws be faithfully executed.”¹⁰ But there is no authority for the proposition that lawful legislation *displaces* inherent presidential powers. There accordingly is significant overlap between inherent presidential power and congressional power, and this gives rise to a difficult question: what (for example) if the President believes “tak[ing] Care” that FISA’s intelligence-gathering requirements are “faithfully executed”¹¹ would undermine his duty as Commander-in-Chief to keep American citizens safe? Similarly, what if the President thought that a private lawsuit against a foreign country authorized by the FSIA threatened to undermine U.S. relations with that country, thereby interfering with his duties under the “receive Ambassadors” clause and his other foreign relations powers?¹²

Both these queries present a “conflict of laws” question. Conflicts can arise when two governmental institutions have overlapping powers. Justice Jackson’s concurring opinion in the famed *Steel Seizure Case*¹³ is near-universally understood as having provided a simple principle for resolving

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² U.S. CONST. Art. II, §2, cl. 1.

³ See, e.g., *Totten v. United States*, 92 U.S. 105, 106 (1876). Indeed, the President has “engaged in warrantless electronic surveillance of communications in wartime . . . without any statutory authorization . . . since at least the Civil War.” David J. Barron and Martin S. Lederman, *The Commander in Chief at the Lowest Ebb – A Constitutional History*, 121 HARV. L. REV. 941, 1075 (2008).

⁴ U.S. CONST. Art. II, §2, cl. 3.

⁵ See Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1624-30 (2007).

⁶ Though not fully. Some of the President’s inherent powers cannot be modified by Congress. For instance, it is generally accepted that Congress could not assign the power to supervise the armed forces to someone other than the President. This paper focuses on the areas of overlap between congressional and inherent presidential powers.

⁷ U.S. CONST. Art. I, §8, cl. 14.

⁸ See 92 Stat. at 1797, codified at 18 U.S.C. § 2511.

⁹ See 28 U.S.C. §§1330, 1602 *et seq.*

¹⁰ U.S. CONST. Art. I, §2, cl. 3.

¹¹ U.S. CONST. Art. II, §2, cl. 3.

¹² Cf. *Federal Insur. Co. v. Kingdom of Saudi Arabia*, 2009 WL 1835181.

¹³ 343 U.S. 579 (1952) (Jackson, J., concurring).

conflicts between Congress and the President: where presidential and congressional powers overlap, Congress' acts (primarily via statute) categorically trump the President's preference to act otherwise.¹⁴

In previous work I have shown three things. First, there are many other contexts in American law where two (or more) governmental bodies have overlapping powers.¹⁵ For example: (1) states have overlapping regulatory authority (meaning that a given transaction or occurrence frequently can be regulated by more than one state), (2) the federal and state governments have overlapping regulatory authority, (3) the courts of two or more states frequently have overlapping adjudicatory authority to hear a given case, (4) state and federal courts frequently have overlapping adjudicatory authority, and (5) and federal judges and juries have significant overlapping fact-finding powers.¹⁶

Second, American law has developed six different types of "conflict-resolution" rules to manage the conflicts that can arise where multiple institutions have overlapping power.¹⁷ Jackson's rule and the Supremacy Clause are what might be called "categorical identity-based" resolution rules in which one institution categorically trumps the other. There also are "presumptive identity-based" rules in which one institution presumptively – but not categorically – trumps the other.¹⁸ Other rules resolve inter-institutional conflicts on the basis of wholly different criteria. Two resolve conflicts on the basis of timing: either the institution that acts first trumps (a "first-in-time" rule, as is found in the *res judicata* and *collateral estoppel* rules that manage inter-court conflicts) or, less frequently, the last-acting institution trumps (a "last-in-time" rule is used to resolve a subset of conflicts among courts). Another type, which may be called a "multi-factor" conflict-resolution rule, determines which institution trumps on the basis of multiple considerations; this type of rule is used to resolve inter-state conflicts-of-law. Finally, the law sometimes adopts what might be called a "No-sorting" rule that allows both institutions to act and relies on negotiation or coordination among the institutions to resolve the conflict; this is used in relation to potential conflicts between states' criminal law.¹⁹

Third, Justice Jackson's *Steel Seizure* concurrence failed to justify the categorical identity-based rule it adopted, instead treating the choice as self-evident.²⁰ This is troublesome because although the Constitution specifies one conflict-resolution rule vis-à-vis federal/state conflicts (the Supremacy Clause), the Constitution provides no rule for resolving inter-branch conflicts between Congress and the President. Awareness that there exists a multiplicity of possible conflict-resolution rules underscores the importance of justifying the one that is selected. Indeed, the absence of sufficient justification is all the more concerning when one recognizes that American law traditionally has made the choice among conflict-resolution rules on the basis of pragmatic, context-sensitive analysis,²¹ and that this sort of analysis simply has never been undertaken in the context of conflicts between Congress and inherent presidential powers.

This paper provisionally suggests that conflicts between congressional and inherent presidential powers may best be resolved on the basis of an identity-based rule under which Congress' decisions presumptively – but, *pace Youngstown*, not categorically -- trump. Adopting such a conflict-resolution

¹⁴Jackson's conflict-resolution rule is implicit in his so-called "Category 2" and "Category 3" situations: Category 2 finds presidential action unauthorized by Congress to nonetheless be lawful so long as the action falls under the President's inherent authority, and Category 3 finds Presidential action contrary to statute to be lawful only where Congress acted beyond its constitutional powers and presidential action falls under the President's inherent powers. Read together, Categories 2 and 3 together mean that where presidential and congressional authority overlap and Congress *has* acted, the President must follow Congress. In other words, Congress categorically trumps. For a more complete discussion, [see](#) Mark D. Rosen, Revisiting *Youngstown*: Against the View That Jackson's Concurrence Resolves the Relation Between Congress and the Commander-in-Chief, 54 U.C.L.A. LAW REV. 1703 (2007).

¹⁵ [See id.](#); [see also](#) Mark D. Rosen, *From Exclusivity to Concurrence*, 86 MINN. L. REV. xx (forthcoming 2010).

¹⁶ [See](#) Rosen, *From Exclusivity to Concurrence*, [supra](#) note 15.

¹⁷ [See](#) Rosen, *Youngstown*, [supra](#) note 14.

¹⁸ This is the conflict-sorting rule that applies to the common fact-finding powers that are held by judges and juries. [See](#) *Youngstown*, [supra](#) note 14, at 1718-20.

¹⁹ [See id.](#) at 1728-30.

²⁰ [See id.](#)

²¹ [See](#) Rosen, *Youngstown*, [supra](#) note 14, at 1742-45.

approach would give rise to a relationship between Congress and the President that I shall dub “Coordinacy.” (I’ll explain why shortly). There are three components to the argument in support of Coordinacy.

First, as a formal matter, the constitutional text creates the possibility of conflicts, does not determine how they are to be resolved, and does not preclude a presumptive identity-based rule. The President has the duty to “faithfully execute” laws enacted by Congress, but he also has continuing duties to serve as Commander-in-Chief and to receive Ambassadors. It is possible that the President could be subject to conflicting constitutional duties: his take care duty could conflict with his Commander-in-Chief duty to protect the Nation. No constitutional text instructs which presidential duty trumps. Nor does any constitutional text decide which institution, Congress or the President, trumps.

Second, a categorical identity-based rule should not be deemed to be settled on the basis of *stare decisis*. *Stare decisis* is most properly applicable when a decision has been preceded by thorough consideration, and Jackson’s concurrence reflexively assumes that Congress categorically trumps without giving consideration to any alternative conflict-resolution rules. Further, Jackson’s concurrence endorses the sort of context-sensitive, functionalist analysis this paper advocates. More than this, a strong argument can be made that the near-universally held view that the Jackson concurrence announces a rule that mechanically proclaims categorical congressional supremacy is actually a *misreading* of Jackson’s opinion.²² And the few post-*Youngstown* cases that have discussed the issue have taken a position that “is much more equivocal than is often acknowledged.”²³

Third, a presumptive identity-based conflict-resolution rule seems preferable on the basis of a comparative institutional analysis.²⁴ How inter-institutional conflicts are to be resolved has profound effects on the balance of power and the dynamics between the institutions and, for this reason, is a crucial component of institutional design. Institutional design is best undertaken by considering the range of options and choosing the best (*i.e.*, a comparative institutional analysis) rather than analyzing a single option in isolation. The relevant question under a comparative institutional analysis is not whether a particular institutional arrangement has some flaws or dangers – for all do – but which arrangement is least flawed or most promising from a pragmatic, functional perspective.²⁵

A comparative analysis reveals that a presumptive identity-based conflict rule yields a more balanced, middle-of-the-road institutional design than does its three competitors. To understand how, it first is necessary to identify the three alternatives. The first is (what ordinarily is taken to be) Justice Jackson’s *Youngstown* approach: a categorical identity-based rule which, in this context, might be dubbed “Categorical Congressional Supremacy.” The second alternative, which might be called “Presidential Supremacy,” frees the President to pursue the course he thinks best by insisting that Congress does not have legislative authority in respect of matters that fall under the President’s inherent powers.²⁶ In other words, Presidential Supremacists assume that constitutional allocations of a

²² See Rosen, *Youngstown*, [supra](#) note 14, at 1739-41. Jackson’s analysis was far more nuanced than a categorical identity-based rule calls for. For instance, the five pages he spends explaining why the Commander in Chief’s power did not extend to seizing domestic steel factories experiencing labor unrest were unnecessary under a categorical identity-based conflict rule since it was undisputed that Congress had the power to regulate vis-à-vis labor relations. In other words, since Congress had the power to regulate labor relations in the steel industry, Category 3 would have made it irrelevant as to whether the President *also* had authority to address the matter under his Commander-in-Chief powers. [See id.](#)

²³ David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb – Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 695 (2008).

²⁴ For an invaluable treatment of this methodology see NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994).

²⁵ The two criteria (“least flawed” or “most promising”) are not identical, of course. I shall not explicitly address here which of the two is preferable in this context.

²⁶ See, e.g., Richard A. Epstein, *Executive Power, the Commander in Chief, and the Militia Clause*, 34 HOFSTRA L. REV. 317, 321 (2005) (arguing that if a power “is given explicitly to the Congress[,] [it] cannot be given implicitly to the President, except on pain of contradiction”). Others in this camp include Michael Stokes Paulsen, [see](#) Michael Stokes Paulsen, *The Emancipation Proclamation and the Commander-in-Chief Power*, 40 GA. L. REV. 807, 828 (2006) (“The Commander-in-Chief power, where it applies, marks the boundaries of Congress’ general regulatory powers

given power are given to *either* the President *or* Congress, but not both.²⁷ The third alternative, what may be called the “Emergency Exception,” adopts Categorical Congressional Supremacy, but adds the momentous caveat that the President may act contrary to what Congress has instructed – and, indeed, to what the Constitution demands – in dire emergencies.²⁸

We can now proceed to comparative institutional analysis. Each alternative to a presumptive identity-based rule vests categorical supremacy in one institution: Jackson’s rule places it in Congress, whereas Presidential Supremacy and the “Emergency Exception” in the President. By contrast, the presumptive rule eschews “single-institution supremacy,” and instead gives rise to an institutional arrangement under which neither the President nor Congress has categorical trumping authority. I shall dub this power-sharing institutional design “Coordinacy.” In this sense, Coordinacy is a middle ground between Categorical Congressional Supremacy, Presidential Supremacy, and the Emergency Exception -- each of which adopts some form of single-institution supremacy.

Coordinacy can be justified on the basis of the Constitution’s text; as discussed above, the Constitution does not provide a trumping rule to resolve interbranch conflicts between Congress and inherent presidential powers. More important, however, are functional considerations. It is undesirable for either Congress or the President to have the clear-cut final word vis-à-vis matters that fall within both the President’s inherent powers and Congress’ regulatory authority for two related reasons: (1) both Congress and the President have institutional flaws that counsel against giving either categorical trumping power and (2) rejecting “single-institution supremacy” may lead to greater coordination among the two institutions that, in turn, will lead to better decision-making on account of their complementary institutional characteristics.

The Undesirability of Single-Institution Supremacy. It is undesirable for Congress to *per se* have the final word in relation to the President’s inherent powers (primarily national security and foreign relations) on account of (1) the President’s institutional advantages in these arenas and (2) the legislative process’s deficiencies. The President’s institutional advantages include the familiar list (unity, secrecy, vigor and accountability), as well as something that I call “presentism:” the fact that, as compared to the legislature’s role of projecting forward to create prospective rules, presidential decisions are more temporally proximate both to the situation and the consequences of acting. The legislative process’s deficiencies include the comparative sluggishness of a decision-making process that involves 535 persons versus only one, the well known weaknesses that plague multi-member decision-making bodies (such as the possibility of cycling, splitting the baby, and other failures of rational decision-making that have been elucidated in the public choice literature), and the inevitable imperfection of prospective rules on account of humans’ limited foresight.

But it also is undesirable for the President to have unchecked trumping power. Such concentrated power could lead to tyranny. Further, better policies frequently result when there are many decision-makers, rather than just one.

Inter-branch Dynamics. Coordinacy’s advantages are perhaps best seen by considering the inter-branch dynamics that it encourages. This first requires an understanding of how Coordinacy would operate. To begin, lawful legislation that imposes constraints on the President’s exercise of his inherent powers is presumptively (indeed, strongly presumptively) binding on the President on account of the

under Article I.”), and many of the Bush Administration lawyers, *see, e.g.*, Prepared Remarks for Attorney General Alberto R. Gonzales at the Georgetown University Law Center, January 24, 2006, available at http://www.usdoj.gov/ag/speeches/2006/ag_speech_0601241.html, at 4 (approvingly referring to the FISA Court of Review’s statement that “[w]e take for granted that the President does have that [inherent] authority” and “assuming that is so, FISA could not encroach on the President’s constitutional power”).

²⁷ For an extended critique of the assumption underwriting Presidential Supremacy that constitutional powers are necessarily granted to “exclusively” to a single institution rather than “concurrently” to two or more, *see* Rosen, *From Exclusivity to Concurrence*, *supra* note 15.

²⁸ *See, e.g.*, RICHARD POSNER, NOT A SUICIDE PACT 12 (2006); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L. J. 1011, 1096-1102 (2003). Not all Emergency Exception advocates operate within the assumptions of Congressional Supremacy. *See* Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257 (2004).

“take Care” Clause. The mere fact that a statute may “interfere with his preferred manner” of acting²⁹ is not a sufficient reason for his disregarding it. It is only when enforcing the statute risks *interfering* with the President’s ability to successfully discharge his inherent duties that a potential conflict arises between two (or more) presidential duties.³⁰ At that point, the President’s first constitutional *obligation* is to seek to eliminate the conflict by asking Congress to repeal or amend the law that he believes to be problematic. If Congress refuses, and (as far as the President is concerned) the constitutional conflict remains, Coordinacy suggests that the President is constitutionally entitled, *in the first instance*, to resolve the conflict as he or she sees fit. The resolution may include a decision to disregard legislation that has been duly enacted – not on the theory that the legislation is unconstitutional, but on the ground that the legislation need not be applied under present circumstances because, even after giving the heavy deference that is owed to Congress’ policy judgment expressed in statute,³¹ the President believes that applying the law would lead him to violate one (or more) duties that flow from his inherent powers.³² For where a constitutional conflict between two or more duties exists and endures, the only mechanism for resolving it is allowing one to trump the other.

Coordinacy does not dissolve into Presidential Supremacy. A crucial component of Coordinacy is that any presidential decision to disregard legislation must be publicized outside the executive branch; secretive disregard of lawfully enacted legislation would run too great a risk of the tyranny of unchecked executive aggrandizement. Coordinacy thus gives the President license to unilaterally disregard lawfully enacted legislation -- but only for a limited period of time. Coordinacy requires and demands that there soon be a day of reckoning where the President will have to publicly defend his decision to allow his Commander-in-Chief powers to trump his “take care” duties. I dub this Coordinacy’s “publicity requirement.”

There are three societal institutions before which the President ultimately would have to justify his decision: (1) Congress, by means of hearings and possible impeachment proceedings, (2) courts, and (3) the public. These checks are well suited to the task at hand. For one, the primary functional reason to give the President leeway to disregard legislation is concern that the legislative process is too imperfect to support an absolute rule of congressional supremacy, and Coordinacy provides the President some time to test his thesis and accumulate evidence that can support his judgment. The primary danger of giving the President such leeway is that it could open the door to executive tyranny, but a properly calibrated publicity requirement would eliminate this danger.³³ That is to say, although Coordinacy’s publicity requirement does not foreclose the possibility of some executive overreaching in the short run (meaning inappropriate executive disregard of legislation), Coordinacy’s check should be sufficient to obviate concerns of permanent executive tyranny.

It is absolutely, categorically, imperative that every presidential trump of Congress be publicized outside the halls of the Executive. The details of how and when such disclosures must be made cannot be addressed in this brief essay, but some broad points can be made. To begin, certain types of

²⁹ Barron & Lederman, [supra](#) note 23, at 697. Barron and Lederman’s outstanding 2-part article addresses a different question than what I examine here. They convincingly argue on grounds of originalism, precedent, and longstanding practice against Bush Administration arguments that fall under what this paper dubs “Presidential Supremacy,” that is, the theory that “operational or tactical matters are . . . within the exclusive, and preclusive, province of the Commander in Chief.” [Id.](#) at 696.

³⁰ Cf. Statement of Attorney General Edward Levi, Foreign Intelligence Surveillance Act: Hearing Before the Subcomm. On Courts, Civil Liberties, and the Administration of Justice of the H. Comm. On the Judiciary, 94th Cong. 92 (1976) (concluding that “when a statute prescribes a method of domestic action *adequate to the President’s duty to protect the national security*, the President is legally obliged to follow it.”) (emphasis supplied).

³¹ For a valuable discussion concerning the nature of deference, see Philip Soper, *The Ethics of Deference: Learning From Law’s Morals* (Cambridge: Cambridge University Press, 2002).

³² This can be conceptualized as the presidential analog of an “as-applied” rather than “facial” challenge to a statute: the statute is not generally unconstitutional, but is problematically deficient in certain applications.

³³ Publicity and the day of reckoning also work against the concern that Coordinacy may allow too many decisions to be made by a single individual; Congress’ duly enacted policies are the baseline assumed policies, and any presidential deviations must be well justified and carefully circumscribed.

presidential overrides, by their nature, would be public. Consider, for example, a presidential decision to order the dismissal of a lawsuit against a foreign country, otherwise authorized under the FSIA, on the theory that the case problematically aggravated this Nation's foreign relations. On the other hand, the publicity requirement would come into tension with the secrecy that so often is required for matters relating to national security.³⁴ Federal law already imposes significant disclosure requirements on the President, with the most sensitive information being limited to select members of Congress (the so-called "Gang of 8").³⁵ There are good reasons to conclude that these requirements are not sufficiently strict to ensure reporting to Congress, and it is a difficult question as to whether Coordinacy's publicity requirement would be satisfied by disclosures that, for a long period of time, would be limited to members of Congress. More than this, it is an open question as to whether *any* such disclosure requirements would have sufficient traction to guard against executive usurpation if Coordinacy were applied to matters of national security.

Coordinacy creates less of a risk of executive overreaching than may appear at first because it endorses only a limited scope of presidential trumping power. Coordinacy authorizes presidential overrides only in one potential situation of "constitutional conflict:" where the President's inherent powers are in tension (or so he believes) with legislation that has been enacted pursuant to Congress' constitutional grants of power. Coordinacy's resolution of this sort of conflict – what usefully can be labeled a "powers conflict" – has no bearing on a second type of potential conflict: those between inherent presidential power and constitutional *limitations* (for instance, due process, equal protection, and so forth) – what might be called a "power-limit conflict." Coordinacy accordingly is concerned with constitutional conflicts in relation to presidential actions that unquestionably could have been permissible had Congress legislated. In this regard, Coordinacy is far more moderate than the Emergency Exception, whose supporters do not place any *a priori* limits on what limitations the President may disregard.

Coordinacy's "publicity requirement" is an integral component of the incentive structure that encourages beneficial inter-branch cooperation. As mentioned above, the President's first *duty* is to petition Congress to amend law he deems to problematically interfere with his inherent powers. More than this, Coordinacy encourages the President to make a significant effort to get Congress to act, for legislation provides the President a safe harbor within which he can act, free of the fear of impeachment, judicial challenge, and being tarred by the public as a usurper. If Congress does not act, after all, the law on the books presumptively binds the President, subject only to there being adequate grounds for him to conclude that enforcing the law would come at the expense of his inherent powers and that he would be able to convincingly justify this conclusion before Congress, courts, and the public.

Next consider Congress' perspective. Coordinacy encourages the Congress to take the President's concerns seriously and to act expeditiously. If Congress does not act, it knows that the President *could* elect to act unilaterally. The more out of touch legislation is with contemporary needs, the more readily the President will be able to make a convincing case that disregarding legislation was appropriate. The President's potential unilateral powers can combat congressional lethargy that may otherwise result when different parties control the presidency and one or both houses of Congress, if there are upcoming elections that either distract Congress or temporarily raise their risk-aversion, or other reasons.

Coordinacy's incentives for interbranch cooperation is a good thing because, all things being equal, it is better that national security policy be jointly set by the President and Congress rather than by only one institution. Dual branch policy formulation is preferable over single branch policy formulation

³⁴ Though not always. For example, President Ford disregarded statutory funding limitations when he authorized the evacuation of non-Americans from South Vietnam in 1975. See Barron & Lederman, [supra](#) note 23 at 1072-74. This action was not kept secret, but in fact was widely publicized at the time. [Id.](#) at 1074 n. 541.

³⁵ See 50 U.S.C. §412b(c)(2).

because each branch has distinctive institutional perspectives and characteristics in respect both of their respective competencies to formulate policy and also in terms of their democratic representativeness (only the President represents the interests of the nation as a whole, for example). Furthermore, the joint exercise of power works against the concentration of power in a single locus, which is the danger of tyranny that concerned the Framers and properly concerns us.

If It Ain't Broke . . . Finally, one might ask: why revisit Justice Jackson's Categorical Congressional Supremacy approach now if the system currently in place is working just fine? For one, scholars ought not to complacently close their minds to potentially superior alternatives. Perhaps more importantly, though, the premise that Jackson's system of categorical congressional supremacy works fine deserves further scrutiny. On at least two occasions, modern Presidents have acted so as to flatly disregard statutory limitations on their inherent powers.³⁶ Several other Presidents (all post-World War II) have explicitly indicated (primarily in signing statements) that they viewed statutory provisions as unconstitutionally encroaching on their inherent powers, though it is not clear that they ultimately acted upon their views.³⁷ Perhaps most importantly, Presidents have regularly skirted the constraints imposed by Jackson's rule by relying on implausible interpretations of statutes to "authorize" the actions they desire.³⁸

I am neither defending nor indicting these presidential actions. The important point for present purposes is that modern presidential practice does not neatly fit into *Youngstown's* framework of Categorical Congressional Supremacy. These contemporary practices undermine any defense of Jackson's approach on the ground that the status quo is just fine, for they suggest that the formal legal doctrine does not accurately describe what in fact is happening. It surely is possible to conclude that the presidential practices indicated above all are unconstitutional, and that Categorical Congressional Supremacy ought to be strictly applied to constrain the President. Alternatively, the practices may suggest that Categorical Congressional Supremacy's tight constraints do not work well in a modern era in which the United States occupies the important role it does on the international stage. And the point of this paper is that the Constitution does not foreclose a recalibration of the relationship between Congress and inherent presidential powers. This paper's preliminary comparative institutional analysis aspires to be the first, but certainly not the last, words on what may be the preferable conflict-resolution rule to adopt vis-à-vis conflicts between congressional and inherent presidential powers.

³⁶ Both President Truman and President Ford explicitly disregarded statutory limitations on their Commander-in-Chief powers. See Barron & Lederman, [supra](#) note 23, at 1062-63 (Truman); [id.](#) at 1071-74 (Ford).

³⁷ All post-World War II Presidents, with the sole exception of Jimmy Carter, have done this. For a comprehensive discussion, see Barron & Lederman, [supra](#) note 23, at 1056-98.

³⁸ As counsel to President Roosevelt, Robert Jackson himself did this when he offered what sympathetically has been described as a "creative" and "imaginative" reading of the Espionage Act that permitted Roosevelt to exchange American Navy destroyers for British naval and air bases in the Atlantic. Barron & Lederman, [supra](#) note 23, at 1043-48. President Clinton likewise relied on a "controversial statutory interpretation" to permit the deployment of troops in Kosovo longer than the sixty-day limit laid down in the War Powers Resolution. [Id.](#) at 1090. President Reagan did the same in the context of the so-called Iran-Contra Affair. See [id.](#) at 1081-84. The Supreme Court itself arguably did the same in the *Dames & Moore* decision.