ARTICLES

Is the President Bound by the Supreme Law of the Land?—Foreign Affairs and National Security Reexamined

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Introduction

This article is concerned with whether or not the President and other members of the executive branch are bound by the United States Constitution and other laws comprising the supreme law of the land[1] when "foreign affairs" or "national security" interests are involved. This general issue also involves more specific concerns about governmental attempts to control both access to and content of public information. For example, if the President could act without regard to the supreme law of the land, then, functionally at least, his control of access to and the content of information in a courtroom, a newspaper office, a television or radio station, a publishing house, a library, a classroom, or even the governmental "foggy-bottom" could be furthered by numerous strategies.[2] New and dangerous meanings of "na-

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1. Under article VI, clause 2 of the United States Constitution, the supreme law of the land includes "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States . . . ." U.S. CONST. art. VI, cl. 2.

2. These strategies might include arresting and holding incommunicado all political dissenters and social nonconformists, closing newspapers or other forms of communication, punishing those who disclose unfavorable information, misusing classified governmental information, or imposing martial law. What would have happened, in fact, if President Nixon, through White House Chief of Staff H.R. Haldeman or General Alexander Haig, had asked high-level Pentagon officials to cooperate with a declaration of martial law to control dissent and allow his continuation in power? One hopes the Pentagon officials would have refused.

tional security," "executive privilege," or "political question" might be conditioned by an unrestrained executive power. Indeed, if the precept that all are bound to comply with the law is not recognized as the preemptory norm conditioning the meaning of each of these phrases, then it is likely that the legal niceties and the nuances of judicial choice concerning public access to information will be trampled by an advancing, all-powerful executive immunity. In such a circumstance, it would be possible for many of the writers and readers of this law review to be jailed or assassinated if the Executive thought that the printed word was, as it is often considered abroad, threatening to the retention of power. In the end, if amorphous phrases such as "national security" are used to justify various anticonstitutional and antidemocratic evils, then important freedoms of speech and press, including the public's right of access to and dissemination of information, will become meaningless.[3]

In another article,[4] I sought to document related dangers posed to the human and constitutional rights of Americans by similar trends occurring in our society and, more alarmingly, in numerous other societies throughout the world. In that article, disturbing aspects of dicta in some United States cases and the unacceptable claims of Richard Nixon were discussed: (1) that "the President is like a 'sovereign' and can ignore constitutional prohibitions and federal law in order to protect national 'security,' "[5] and (2) that, when applying or interpreting law, so-called "governmental interests" can outweigh public interests

3. In a provocative article, Professor Arthur Miller has suggested that we have nearly arrived at such a level of governmental dictatorship with a far too frequent acceptance of a "doctrine" of *raison d'état* and a functional "Constitution of Control." Miller, *Reason of State and the Emergent Constitution of Control*, 64 MINN. L. REV. 585, 585 (1980) [hereinafter cited as Miller, *Reason of State*]. Elsewhere, he has warned that "crisis government" will soon be normal as "increasingly despotic governments" develop globally and the United States becomes more authoritarian in order to protect "interests of the state." Miller, *Constitutional Law: Crisis Government Becomes the Norm*, 39 OHIO ST. L.J. 736, 737, 739-41, 749-50 (1978). He also quotes Senators Church and Mathias for the proposition that, in the United States, "emergency government has become the norm." *Id.* at 737. *See also* A. MILLER, PRESIDENTIAL POWER IN A NUTSHELL 200, 205-14, 225-27 (1977) [hereinafter cited as A. MILLER]. For evidence of global trends of emergency decrees often instituted in the name of "national security" and "interests of the state," see Paust, *International Law and Control of the Media: Terror, Repression and the Alternatives*, 53 IND. L.J. 621 (1978) [hereinafter cited as Paust, *International Law*], and note 7 *infra*. For evidence of domestic trends involving government agency attempts to suppress political dissent, see F. DONNER, THE AGE OF SURVEILLANCE: THE AIMS AND METHODS OF AMERICA'S POLITICAL INTELLIGENCE SYSTEM (1980).

4. Paust, *International Law*, *supra* note 3.

5. *Id.* at 622. *See also* A. MILLER, *supra* note 3, at 225-27; Dorsen & Shattuck, *Executive Privilege, the Congress and the Courts*, 35 OHIO ST. L.J. 1, 8-9 (1974) (presidential brief in *United States v. Nixon* arguing that Nixon was not subject to criminal law); note 110 *infra*.

and obviate democratic freedoms.[6] What I did not predict, despite an awareness of the deprivations of human and constitutional rights suffered increasingly by most of our global neighbors,[7] is that certain government attorneys, not long after the resignation of Richard Nixon, would vigorously reassert these and related claims with apparent sincerity. More importantly, I did not realize how easily certain federal judges would accept quite similar, if partially hidden, claims when "foreign affairs" or foreign persons were somehow involved. So quickly and so easily have democratic values and human rights been seriously threatened.

A recent four-four split among the members of the United States Supreme Court in *Kissinger v. Halperin*,[8] although generally reaffirming our constitutional values, creates additional concern as to whether or not a few justices might be dangerously close to considering a Nixonian view of both the presidency and the role of the judiciary in a democratic process.[9] In the following pages, an effort is made to iden-

6. Paust, *International Law*, *supra* note 3, at 655. In the past, there had been case language supportive of President Nixon's second claim. *See, e.g.*, cases cited in Miller, *Reason of State*, *supra* note 3, at 607; Paust, *International Law*, *supra* note 3, at 664 n.282.

7. *See generally* Paust, *International Law*, *supra* note 3, at 621-22, 632-33. These trends abroad continue, quite often at an increased rate. *See* N.Y. Times, Dec. 14, 1981, at A1, cols. 5 & 6 (Poland's martial law crackdown); N.Y. Times, Sept. 7, 1981, at A3, col. 5 (Egyptian arrests of more than 1,500 persons, as well as measures against newspapers, journalists, lawyers, professors, religious leaders, and others in the name of national "security"); *Marchenko, a Dissident, Goes on Trial in Soviet*, N.Y. Times, Sept. 3, 1981, at A5, col. 4; *Philippines Expels Priest on Charge of Subversion*, N.Y. Times, Aug. 31, 1981, at A7, col. 2; Hanson, *A Korean In Prison*, N.Y. Times, Aug. 3, 1981, at A15, col. 1; Sarachik, *As Soviet Dissidents Continue to Suffer*, N.Y. Times, Aug. 3, 1981, at A14, col. 6; *South Africa Bans Head of Journalists' Group*, N.Y. Times, Aug. 1, 1981, at A5, col. 2; *Crackdown Under Way in South Africa*, N.Y. Times, June 23, 1981, at A3, col. 1; N.Y. Times, June 21, 1981, at A9, col. 1 (series of South African actions against journalists, union organizers, and students); *New Crackdown in Chile Greets Appeals for Changes*, N.Y. Times, July 10, 1980, at A2, col. 3; *15 Czechoslovak Dissidents Reported Seized in Prague*, N.Y. Times, June 3, 1980, at A5, col. 2; *30,000 Defying Warning, Protest Martial Law in South Korean City*, N.Y. Times, May 25, 1980, at A1, col. 3; *Editor of Banned Magazine In Taiwan Gets 5 Years*, N.Y. Times, May 16, 1980, at A8, col. 4; *Rights Group Says Soviet Has Detained 400 Dissidents*, N.Y. Times, Apr. 30, 1980, at A6, col. 2; R. Falk, A World Order Perspective on Authoritarian Tendencies, Working Paper No. 10 (1980) (World Order Models Project). The list of rights violations in foreign countries could continue at length, but concerning matters closer to home, the following should be added: "Editors from the United States, South Africa and Britain said Tuesday their governments and courts are frustrating the public's right to know in the name of national security. On the second day of the annual conference of the International Press Institute, the editors said that Western governments increasingly are suppressing news, formulating lies and 'colonizing the public.'" Hous. Post, May 7, 1980, at 12, col. 3.

8. 452 U.S. 713 (1981) (4-4 decision; Rehnquist, J., not participating; per curiam; mem.), *aff'g*, 606 F.2d 1192 (D.C. Cir. 1979), *reh'g denied*, 453 U.S. 938 (1981).

9. The effect of the four-four split is automatically to affirm the lower court ruling in Halperin v. Kissinger, 606 F.2d 1192 (D.C. Cir. 1979), but note that Nixon v. Fitzgerald, No.

tify and consider the general problem posed by recent claims of executive immunity from law, the legal policies at stake, and the predominant trends in judicial decisions. A final section addresses more specific questions raised with regard to a particular executive function: the operation of our intelligence system.

I. The Problem: Recent Executive Claims to Immunity from Law

Some of the trends during the past few years have been alarming. One hears more frequently of bills being drafted to allow the FBI and the CIA to violate civil liberties. These proposed bills even include attempts to shield government agents from prosecution for breaking the law if they "were following orders,"[10] a defense denied even to soldiers

79-1738 (D.C. Cir. June 24, 1982), *cert. granted*, 452 U.S. 959 (1981), may raise similar issues. Justice Rehnquist did not participate in the *Halperin* vote but should be available to participate in *Fitzgerald*, and Justice Stewart, who did participate, has retired. Nevertheless, Justice Rehnquist has already gone "on record" in opposition to a Nixonian-type claim that the President is not bound by law. While serving in his former position as Assistant Attorney General, he was quoted as saying that "the execution of any law is . . . an executive function, and it seems an anomalous proposition that because the Executive branch is bound to execute the laws, it is free to decline to execute them." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 195-96 (1978). *See also* Campaign Clean Water, Inc. v. Train, 489 F.2d 492, 498 (4th Cir. 1973), *vacated and remanded*, 420 U.S. 136 (1975). For a related point concerning a recent opinion by Justice Rehnquist, see text accompanying note 134 *infra*.

10. *See, e.g., Tactics previously labeled abuses OK'd in GOP draft of FBI charter*, Hous. Post, June 22, 1980, at 21A, col. 3. Retired Major General Lawrence Williams has written in a related vein: "It can be expected that Executive privilege . . . may, . . . as an inherent Constitutional power, allow the President to *override laws* [such as the Freedom of Information Act] requiring the divulging of general classes of information." Williams, *Presidential Protection of Intelligence Information*, 2 A.B.A. STANDING COMM. ON L. & NAT'L SECURITY, INTELLIGENCE REP. no. 5, at 4 (May 1980) (emphasis added). In a 97-page report for the Reagan Administration, the Heritage Foundation recommended that new legislative measures exempt intelligence agencies from certain laws and even repeal the "criminal standard . . . now applied to [counterintelligence] surveillance operations." 2 A.B.A. STANDING COMM. ON L. & NAT'L SECURITY, INTELLIGENCE REP. no. 12, at 2-3 (Dec. 1980). During House hearings on a proposed CIA charter, Representative Robert McClory (R-Ill.) even opposed prohibitions of assassination by CIA agents. 2 A.B.A. STANDING COMM. ON L. & NAT'L SECURITY, INTELLIGENCE REP. no. 4, at 2 (Apr. 1980).

At an A.B.A. Conference on Intelligence Legislation, held at the University of Chicago Law School June 27-28, 1980, FBI Director William Webster indicated that such measures are neither sought nor necessary. 2 A.B.A. STANDING COMM. ON L. & NAT'L SECURITY, INTELLIGENCE REP. no. 7, at 6 (July 1980). Director Webster also stated that Executive Order No. 12036, 3 C.F.R. 125 (1979), *reprinted in* 50 U.S.C. § 401, at 696-712 (1980), requires that FBI activities "must be conducted in a manner that preserves and respects established concepts of privacy and civil liberties," that the FBI has "found these controls entirely workable," and that he is confident that both national security and civil liberty can be served in the future. 2 A.B.A. STANDING COMM. ON L. & NAT'L SECURITY, INTELLIGENCE REP. no. 7, at 6 (July 1980). In a speech before the Senate Select Committee on Intelligence; William Casey (now Director of the CIA) similarly declared, "I will cooperate fully in facili-

acting in the heat of battle during a time of grave national emergency.[11] More serious than such pernicious nonsense, however, are claims made openly by government attorneys that the Executive, in certain contexts, should not be bound by the Constitution or other elements of supreme federal law. Although it is difficult to believe that such claims could be made by attorneys working for a constitutional and democratic government, pledged as they are to uphold the United States Constitution, these claims clearly have been made in at least three cases.

The first such attempt occurred in 1979. *United States v. Tiede*[12] was a criminal proceeding, the result of the diversion of a Polish airliner by two East Germans from its scheduled landing in East Berlin to a landing in West Berlin. The United States prosecutors argued before Federal District Judge Herbert Stern, sitting in a specially convened

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tating the oversight through which Congress can ensure that the intelligence community operates within the limits of the law. This will provide the American people with additional assurance that U.S. intelligence will fully respect their civil liberties . . . ." 3 A.B.A. STANDING COMM. ON L. & NAT'L SECURITY, INTELLIGENCE REP. no. 2, at 3 (Feb. 1981).

Professors Antonin Scalia and James Q. Wilson expressed similar views at a 1980 meeting of the *Consortium for the Study of Intelligence, Counterintelligence: Requirements for the 1980's*, 2 A.B.A. STANDING COMM. ON L. & NAT'L SECURITY, INTELLIGENCE REP. no 6, at 3 (June 1980). On June 3, 1980, the Senate approved S. 2284, the Intelligence Oversight Act of 1980. *Id.* at 4. Under § 501(a)(3) of the bill, the Director of the CIA and heads of all other governmental entities "involved in intelligence activities" must report "any illegal intelligence activity . . . and any corrective action that has been taken or is planned" to two Select Committees of the Senate and House, presumably for the purpose of stopping "any illegal intelligence activity." S. 2284, 96th Cong., 2d Sess. § 3 (1980). Indeed, in view of the cases noted at note 24 *infra*, which demonstrate that the President and all other governmental officials are bound by the law, such a presumption would appear to be the only one that is constitutionally permissible and is only strengthened by the recognition that our entire intelligence system is designed not to preserve a government as such, but to preserve a constitutional government and a free and democratic society. *See also* Remarks of Leonard Theberge, Chairman of the ABA International Law Section, and John Shattuck, Director of the ACLU's Washington Legislative Office, in ABA STANDING COMM. ON LAW AND NATIONAL SECURITY, LAW, INTELLIGENCE AND NATIONAL SECURITY WORKSHOP 5, 58 (1979) (Shattuck quoting A. BARTH, THE LOYALTY OF FREE MEN (1951)) [hereinafter cited as LAW, INTELLIGENCE AND NATIONAL SECURITY WORKSHOP]; notes 123 & 126-27 *infra*. President Reagan's recent executive order, Exec. Order No. 12356, 45 Fed. Reg. 14,874 (1982), on national security information affirms these latter expectations. It declares: "In no case shall information be classified in order to conceal violations of law . . . ." N.Y. Times, April 3, 1982, at 9, col. 3.

11. *See, e.g.*, U.S. DEP'T OF ARMY, FIELD MANUAL FM 27-10, THE LAW OF LAND WARFARE ¶ 509, at 182-83 (1956); Principle IV, Principles of the Nuremberg Charter and Judgment, U.N. GAOR Supp. (No. 12) at 12, U.N. Doc. A/1316 (1950); THE MILITARY IN AMERICAN SOCIETY 6-48, 6-66, 6-68 to 6-69; 6-74 to 6-96 (D. Zillman, A. Blaustein, E. Sherman, *et al.*, eds. 1978).

12. Crim. Case No. 78-001A (U.S. Ct. for Berlin Mar. 14, 1979), *reprinted in* 19 I.L.M. [International Legal Materials] 179 (1980). This case is ably reviewed in Gordon, *American Courts, International Law and "Political Questions" Which Touch Foreign Relations*, 14 INT'L LAW. 297 (1980).

United States court in Berlin,[13] that both the proceedings and other governmental actions did not have to comply with the United States Constitution.[14] The prosecution reasoned that because Berlin is a territory, governed as the result of military conquest, the court served only as an instrument of foreign policy, unable to protect rights that were not provided by the Secretary of State. The prosecution also argued that, in the court's words, "everything which concerns the conduct of [the government's occupation of a foreign territory] is a 'political question' not subject to court review."[15] Despite such claims, Judge Stern refused to deviate from legal and constitutional requirements, admonishing counsel for the government, "[E]verything American public officials do [at home or abroad] is governed by, measured against, and must be authorized by the United States Constitution."[16] As Judge Stern aptly noted:

> [T]here has never been a time when United States authorities exercised governmental powers in any geographical area—whether at war or in times of peace—without regard for their own Constitution. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). Nor has there ever been a case in which constitutional officers, such as the Secretary of State, have exercised the powers of their office without constitutional limitations.[17]

Judge Stern further upheld the predominant trend and expectation that judicial attention to law must not be lessened merely because of the involvement of an executive power to conduct foreign relations. As far as the court was concerned, the existence of "foreign affairs" implications and separate executive powers, even in an international crisis, could never be raised to bar jurisdiction or to justify judicial inattention to the constitutionality, or permissibility under other federal law, of United States executive actions at home or abroad. Quite properly, the court noted that although laws might not directly regulate executive discretion concerning the conduct of otherwise permissible governmen-

13. The court was established in 1955, during the occupation of Berlin by the Western allies. The *Tiede* case was the first time the court had convened. Gordon, *supra* note 12, at 316-17 nn.88 & 90.

14. 19 I.L.M. at 188, 191-92, setting forth the exchange during trial between Judge Stern and United States Attorney Surena. At issue was the right to a trial by jury and the more general right to due process. Nevertheless, the court recognized the broad implications of the prosecution's claim with respect to other constitutional protections, including the First Amendment. *See id.* at 191.

15. *Id.* at 188.

16. *Id.* at 192. During the trial, the judge also noted that it was not only unthinkable that conduct of government officials that thwarted due process standards would be permissible, but also that such conduct was ever contemplated. *See* Gordon, *supra* note 12, at 326.

17. 19 I.L.M. at 190.

tal operations, the Executive, in choosing among permissible options, must not violate the law. More specifically, the court recognized that "the talismanic incantation of the word 'occupation' cannot foreclose judicial inquiry into the nature and circumstances of the occupation, or the personal rights of two defendants which are at stake."[18]

Judge Stern's recognitions concerning the scope of executive and judicial powers have not always been shared by all federal judges. Indeed, the seemingly talismanic incantation of words like "crisis," "political," or "embarrassment," and phrases such as "national security," "governmental interests," "foreign affairs," "the conduct of our international relations," or "interacting interests of the United States and foreign nations" appears to have been reason enough for certain other federal judges to abdicate their judicial power and responsibility to identify, articulate, and apply constitutional or other supreme federal laws, even in the face of important allegations that such laws had been violated.

For example, quite recently, in *Rappenecker v. United States*, Federal District Court Judge Schwarzer, finding nonjusticiable the claims by former crewmen of the privately owned *S.S. Mayaguez* against the United States Government for personal injuries suffered as a result of United States military operations in response to the seizure of the vessel by Cambodian gunboats, wrote, "The textual commitment to the President as commander in chief of authority for military decisions entails that his decisions may be implemented without judicial scrutiny."[19]

18. *Id.* at 193. On a related point, see Sterling v. Constantin, 287 U.S. 378, 400-01 (1932); Brown v. United States, 12 U.S. (8 Cranch) 110, 128-29, 147, 149, 153 (1815) (Marshall, C.J.) (Story, J., dissenting). *See also* United States v. Robel, 389 U.S. 258, 263-64 (1967) ("the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of. . . power which can be brought within its ambit. 'Even the war power does not remove constitutional limitations safeguarding essential liberties.'" (citing *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 120-121 (1866), and quoting from Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426 (1934)). The *Robel* language is quoted in Rostker v. Goldberg, 453 U.S. 57, 89 (1981) (Marshall, J., dissenting) (citing, among others, United States v. Cohen Grocery Co., 255 U.S. 81, 88-89 (1921) (war context or war power does not obviate protections under the Fifth or Sixth Amendments); Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146, 156 (1919)).

19. Rappenecker v. United States, 509 F. Supp. 1024, 1030 (N.D. Cal. 1980) (citing Durand v. Holland, 8 F. Cas. 111 (C.C.S.D.N.Y. 1860) (No. 4,168)). For contrary decisions, see cases cited in note 24 *infra*.

Curiously, the court seemed to ignore the point that a mere textual description of a power is certainly not the same as a "textual commitment" of such a power solely to another branch. *See* Goldwater v. Carter, 444 U.S. 996, 999 (1979) (Powell, J., concurring) (not only is there no explicit conferral of presidential power, but "the text of the Constitution does not unquestionably commit the power . . . to the President alone"); Powell v. McCormack, 395 U.S. 486, 519-23, 547-48 (1969); J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 109-10 (1978).

What seemed to impress the court was the indisputable but ever-present fact that "policy decisions" and a "basic policy judgment" were involved[20] and thus, perforce (we are led to believe), a nonjusticiable "political question" existed.[21] Curiously, the court concluded that claims arising out of the conduct of military operations "fall within the class of claims arising out of determinations entrusted to the executive branch and not subject to review by the courts, and are therefore nonjusticiable."[22]

What Judge Schwarzer seemed to ignore, however, is that although numerous "determinations" are "entrusted" to the Executive, a fundamental expectation has predominated elsewhere under our constitutional system that the Executive, in carrying out its own powers and responsibilities, is bound by the Constitution and other supreme federal law.[23] Unlike Judge Stern in the *Tiede* decision, Judge Schwarzer appears to have been unaware of numerous cases that affirm that the Executive has, indeed, no power or authority to act except in accordance with the Constitution and the supreme law of the land. More specifically, it has long been held that during the conduct of "mil-

20. *Rappenecker*, 509 F. Supp. at 1027.

21. *Id.* at 1026, 1028. *Cf. id.* at 1028 ("[n]ot every question involving the exercise of these powers is necessarily nonjusticiable"). *See also id.* at 1029-30.

22. *Id.* at 1030. *See also id.* at 1028-29.

23. *See generally* cases cited in note 24 *infra*; authorities cited in note 89 *infra*. Judge Schwarzer also hinged his decision upon further conclusions reached while supposedly following "the reasoning of the Court in Baker v. Carr." 509 F. Supp. at 1029. For example, he noted that "[t]he responsibility for dealing with foreign nations . . . is clearly committed to the President." *Id.* This fact, however, would not support a conclusion that in exercising such a responsibility the President could violate the law. Additionally, as Professor Gordon points out, "the power to conduct foreign relations is not mentioned, as such, anywhere in the text of the Constitution, . . . nor is it specifically allocated to one or another branch of the federal government." Gordon, *supra* note 12, at 299. This fact would seem to be important to one relying on language in Baker v. Carr, 369 U.S. 186 (1962), that requires "a textually demonstrable commitment of the issue to a coordinate political department." *Id.* at 217. *See also* note 19 *supra*.

Judge Schwarzer also stated that there were "no judicially discoverable and manageable standards for resolving the present issue." 509 F. Supp. at 1029. Nevertheless, if, as alleged by plaintiffs, international law were violated during the exercise of such a presidential responsibility, the law provides such standards and, moreover, international law "must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly represented for their determination." The Paquete Habana, 175 U.S. 677, 700 (1900). *See also* Hilton v. Guyot, 159 U.S. 113, 116 (1895); Fernandez v. Wilkinson, 505 F. Supp. 787, 798 (D. Kan. 1980), *aff'd sub nom.* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981). On this point and its relation to the so-called "political question" doctrine, see Paust, *The Concept of Norm: Toward a Better Understanding of Content, Authority and Constitutional Choice*, 53 TEMPLE L.Q. 226, 253-57 (1980) [hereinafter cited as Paust, *The Concept of Norm*]; Paust, *Letter*, 18 VA. J. INT'L L. 601 (1978) [hereinafter cited as Paust, *Letter*]; notes 89 & 148 *infra*.

itary operations," the President of the United States is not only bound by international law, which is part of the supreme law of the land under article VI, clause 2 of the Constitution, but is also subject to the court's jurisdiction and thus to judicial review in order to remedy any legal improprieties.[24]

24. *See* The Paquete Habana, 175 U.S. 677 (1900) (voiding an executive seizure of an enemy vessel in time of war); Brown v. United States, 12 U.S. (8 Cranch) 110, 128-29, 145, 147, 149, 153 (1815); The Flying Fish, 6 U.S. (2 Cranch) 170, 178-79 (1804); Seery v. United States, 127 F. Supp. 601 (Ct. Cl. 1955). *See also* United States v. Robel, 389 U.S. 258, 263-64 (1967); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (presidential order reversed because President is bound by the Constitution in time of war); Duncan v. Kahanamoku, 327 U.S. 304 (1946) (presidential order during war declaring martial law in Hawaii voided as illegal); Sterling v. Constantin, 287 U.S. 378, 400-01 (1932); United States v. Pacific R.R., 120 U.S. 227, 233 (1887); Coleman v. Tennessee, 97 U.S. 509, 517 (1878); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 120-21 (1866); Zweibon v. Mitchell, 516 F.2d 594, 626-27 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); *Ex parte* Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487) (presidential authorization during time of war to suspend writ of habeas corpus voided); United States v. Smith, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342) ("the law is paramount," and President, in exercising the war power, cannot "authorize a person to do what the law forbids"); 11 Op. Att'y Gen. 297, 300 (1865) (Constitution does not permit the Executive to abrogate international laws or authorize their infraction); text accompanying notes 89, 131-32, 137-38 & 141-44 *infra*.

In United States v. Smith, 27 F. Cas. 1192 (C.C.D.N.Y. 1806) (No. 16,342), the court held that although no action was "voided" as such, a presidential order to do certain acts that were illegal under both domestic and international law could not be allowed as a defense in the case of criminal prosecution. *Id.* at 1229-30. Similarly, a presidential or superior military officer's order "to do an illegal act . . . can afford no justification" for an unlawful taking of property abroad in time of war. Mitchell v. Harmony, 54 U.S. (13 How.) 115, 137 (1852). Further, claims of "necessity" in time of war will be second-guessed by the judiciary. *Id.* at 133-34. *See also* cases cited in notes 142-44 & 153 *infra*. In another case, although the Court found no violation of international law, the plaintiff argued that a United States officer was "limited by the Constitution and by the rules of international law in his dealing with private rights" during a time of military occupation. *See* O'Reilly de Camara v. Brooke, 209 U.S. 45, 48 (1908) (plaintiff's argument appears at 52 L.Ed. 676, 676, citing several cases and texts). Executive actions in time of peace have also been regulated when violations of international law were at issue. *See, e.g.*, Cook v. United States, 288 U.S. 102, 120-21 (1933) (jurisdiction voided where U.S. government seized vessel in violation of treaty that had "imposed a territorial limitation upon [U.S. government's] own authority"); United States v. Toscanino, 500 F.2d 267, 276-79 (2d Cir.), *reh'g denied*, 504 F.2d 1380 (2d Cir. 1974); Fernandez v. Wilkinson, 505 F. Supp. 787, 795-800 (D. Kan. 1980), *aff'd sub nom.* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1388-90 (10th Cir. 1981); note 137 *infra*.

Dicta in some lower court opinions are clearly out-of-line with identifiable trends at the Supreme Court level, both before and after the above-cited cases. For example, the district court opinion in United States v. Berrigan, 283 F. Supp. 336 (D. Md. 1968), *aff'd sub nom.* United States v. Eberhardt, 417 F.2d 1009 (4th Cir. 1969), *cert. denied*, 397 U.S. 907 (1970), incorrectly stated that "[c]ourts have usually decided the constitutional questions concerning international agreements, . . . but the corresponding question of international law has been treated as a 'political question.' . . . Whether the actions by the executive . . . in utilizing our armed forces are in accord with international law is a question which necessarily must be left to the elected representatives of the people and not to the judiciary." 283 F. Supp. at 342 (citations omitted). *See also* United States v. Sisson, 294 F. Supp. 511, 515 (D. Mass. 1968); United States v. Sisson, 294 F. Supp. 515, 517-18 (D. Mass. 1968). *But see* United

Elsewhere in Judge Schwarzer's opinion are statements that are also out-of-line with the case law.[25] For example, his opinion states that "[i]t has long been settled that the underlying . . . legal determinations on the basis of which the President conducts the foreign relations of the United States are not subject to judicial scrutiny."[26] This is simply not true. No court has held before that "legal determinations" made by the Executive, forming the basis of executive actions at home or abroad, are beyond the purview of our courts. Both legal and nonlegal determinations have been ruled on by the judiciary when the law has been violated.[27] The cases Judge Schwarzer cited for this proposition actually dealt with matters that are traditionally left to executive discretion—matters that concern little more than whether or not an Executive's recognition of a foreign government or the extent of its territorial claims presents a nonjusticiable question.[28] As such, they are unrelated to the general question of whether or not the President is bound by law, and it is difficult, if not impossible, with even the most unrestrained judicial logic, to assume from these cases that presidential "legal determinations" are *per se* outside the jurisdiction of United States courts.

As Professor Gordon recognized in a study of recent cases raising claims of "political" questions, other cases have also contained simi-

States v. Sisson, 297 F. Supp. 902, 912 (D. Mass. 1969) (court "assumes without deciding" that the United States Government did not intervene illegally in Vietnam and was not "using unlawful methods in Vietnam"). What these lower courts ignored were predominant trends in decision noted above. In *The Paquete Habana*, for example, the Supreme Court actually voided an executive action involving use of our armed forces in time of war precisely because it was violative of international law. Several other Supreme Court cases belie the validity of overly broad statements made in the *Berrigan* opinion. Perhaps the Court may have seen a distinction between a decision to engage in armed conflict and the application of law to specific acts occurring during a conflict, but international law applies to both.

25. These statements are addressed more thoroughly in text accompanying notes 126-60 *infra*.

26. Rappenecker v. United States, 509 F. Supp. at 1028.

27. *See, e.g.*, cases cited in note 24 *supra* and note 89 *infra*. It is also worth noting that in a case involving a denial of a permit to construct an off-shore drilling platform, the Court of Claims allowed plaintiffs to obtain executive papers where these "might well lead to the discovery . . . [that] the President or someone on his White House staff turned [the] application down and did so for impermissible, extraneous, political, or other reasons which they think, if shown, would make their case." Sun Oil Co. v. United States, 514 F.2d 1020, 1025 (Ct. Cl. 1975) (per curiam).

28. The main cases cited in Rappenecker v. United States, 509 F. Supp. at 1028, were Doe v. Braden, 57 U.S. (16 How.) 635, 656-57 (1854), and Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415, 419-20 (1839). A related case, not cited in *Rappenecker*, is Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo, 577 F.2d 1196 (5th Cir. 1978), *cert. denied*, 442 U.S. 928 (1979). This case has been criticized extensively by Professor Gordon, largely on the ground that matters of international law were also involved and should not have been ignored by the court. Gordon, *supra* note 12, at 303-04, 307-10.

larly disturbing language. Among these is an absurd statement in a Fifth Circuit opinion, *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo*,[29] that "[i]n their external relations, sovereigns are bound by no law."[30] Later in the same opinion, the same judge made an equally egregious remark: "Should the president ever officially act on a political issue, we would be constitutionally bound to accept his act."[31] What this latter statement necessarily, but incorrectly, assumes is that when a president acts politically in a general sense, *i.e.*, "on a political issue," he may act in any way whatsoever and thus in violation of the Constitution or other supreme federal law. Richard Nixon undoubtedly would have welcomed such an excuse, but, as the Supreme Court emphatically has held, such a broad exclusion of judicial power and presidential duty remains constitutionally unacceptable.[32]

Professor Gordon's study also contains an important reply to counsel for the government on the subject of the abdication of judicial power when important matters of "foreign affairs" or "national interest" are involved. When counsel continued to stress these considerations before Judge Stern, the judge replied:

> When was it that Judges were supposed to worry about that in deciding what the law is? When was it permissible under the oath you took as an attorney, and a member of the Bar, for Judges to care about that in construing the rights of human beings? And when did it become permissible for lawyers in a courtroom or a litigant to tell the Judge that the piece of litigation is so important to the litigant that the Judge is ordered to find a certain way? What system of justice are you referring to? What jurisprudence were you trained in that you should make such references? What court do you know of in the whole American [legal system] that functions this way? What Judge would do it for you?
>
> . . . That's a vile thing for a Judge to listen to. He can't be a Judge if he listens to that.

29. 577 F.2d 1196 (5th Cir. 1978), *cert. denied,* 442 U.S. 928 (1979).

30. 577 F.2d at 1204-05, *quoted in* Gordon, *supra* note 12, at 303. It is also possible that Judge Morgan, the author of the *Occidental* opinion, confused sovereignty, held by the people of the United States, with the executive branch, a misconception explored in more detail below. *See* notes 59, 109-12 & 114-15 *infra*. *See also* note 5 *supra*.

31. 577 F.2d at 1205 n.16.

32. *See* United States v. Nixon, 418 U.S. 683 (1974). On Nixon's putative justifications, see also Paust, *International Law*, *supra* note 3, at 622; Paust, *Human Rights and the Ninth Amendment: A New Form of Guarantee*, 60 CORNELL L. REV. 231, 240-43 (1975) [hereinafter cited as Paust, *Human Rights*]. The Court also has recognized that the mere fact that important political issues are involved and important political consequences might follow from a decision of the Court, the case or controversy before the Court does not thereby involve a nonjusticiable political question. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 217 (1962); J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 19, at 100.

> Human beings can be adjudged guilty if it is important enough to the state, guilty or not, as long as it is important enough to the state or to the allies of the state or to the community of the world. When can it become permissible for Judges to consider that?[33]

What Judge Stern could not foresee was that in *Narenji v. Civiletti*,[34] several judges for the Court of Appeals for the District of Columbia would base their holding in the Iranian deportation case on similar matters of executive concern. Despite documented claims that constitutional and human rights were being violated by the executive branch during its attempt to deport Iranian students, and the acceptance of *amicus* briefs on the need for the judicial branch to enforce international law even against an unwilling executive, the majority opinions neglected these issues. They did, however, incorporate several of the touchstone phrases complained of by Judge Stern. The majority opinion, for example, speaks of "foreign affairs," a "crisis," and "foreign policy,"[35] as if such matters obviate the need for inquiry into whether or not the President has violated the United States Constitution and international law. Judge Robb, writing for the majority in *Narenji*, declined jurisdiction, reasoning: "[I]t is not the business of courts to pass judgment on the decisions of the President in the field of foreign policy."[36] Elsewhere, he noted, "The present controversy in-

33. Record, vol. 2, at 86-88, Dostal v. Benedict, Civ. Case No. 79-1 (U.S. Court for Berlin 1979), *quoted in* Gordon, *supra* note 12, at 328.

34. 617 F.2d 745 (D.C. Cir. 1979), *reh'g denied*, 446 U.S. 957 (1980). *Narenji* involved the constitutionality of a regulation requiring students who were natives or citizens of Iran to provide information as to their residences and maintenances of nonimmigration status in preparation for a major effort to deport Iranians.

35. 617 F.2d at 747-49.

36. *Id.* at 748. Judge Robb also declared that when the lower court found the executive action to be unconstitutionally discriminatory, "the District Court undertook to evaluate the policy reasons upon which the regulation is based. . . . In doing this the court went beyond an acceptable judicial role." *Id.* Since the circuit court also looked at several "policy reasons" in order to support its choice, it must not be impermissible *per se* to evaluate policy reasons. One must assume that what Judge Robb really meant was that if a court uses policy reasons to deny the validity of an executive decision, it is not engaged in an "acceptable" judicial role, but if it uses policy reasons to justify an executive decision, then the court is engaged in an "acceptable" role. Contrary to such an assumption, the Supreme Court has engaged in a second-guessing both of legal and nonlegal determinations made by the Executive, even in times of war or other national "crisis" or emergency, when law has been violated. *See* note 24 *supra*; notes 89 & 131-56 and accompanying text *infra*. When such an allegation has been made, the Court has proceeded to make a determination on the specific issue(s) raised. For this reason, Judge Robb's proffered formula for deference to the Executive (*i.e.*, if only the executive actions "are not wholly irrational they must be sustained," 617 F.2d at 747) must be opposed whenever law has been violated. Otherwise, courts would entertain the most ludicrous of arguments about the whole irrationality versus partial irrationality of any illegalities perpetrated by the President. For the jurisprudential point, see

volving Iranian students in the United States lies in the field of our country's foreign affairs and implicates matters over which the President has direct constitutional authority."[37] What Judge Robb seems incorrectly to have assumed, as did the Fifth Circuit opinion in *Occidental of Umm al Qaywayn, Inc.*,[38] is that whenever a president has general constitutional authority to act and "foreign affairs" are involved, the president may act in any way whatsoever and thus in violation of law. Numerous cases stand in opposition to such an assumption, most importantly in this instance, *The Paquete Habana*.[39]

Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 819 (1935), generally condemning the so-called rational basis test as a mental institution test that also is far too myopic when compared with one that takes into account all aspects of law and all relevant legal policies at stake.

37. 617 F.2d at 748.

38. *See* text accompanying notes 30-32 *supra*. A similar notion was advanced by the United States Attorney in the *Tiede* case. *See* text accompanying note 15 *supra*.

39. 175 U.S. 677 (1900). *See generally* cases cited in notes 23-24 *supra*; notes 136 & 141 *infra*; authorities cited in note 89 *infra*. In *The Paquete Habana*, the President clearly had direct constitutional authority to act in time of war, but his specific actions in furtherance of that otherwise appropriate mandate were found to be violative of the law of the land and were therefore voided.

Most importantly, the United States Government has recently recognized, in a suit involving foreign officials, that lawsuits involving breaches of international human rights law may properly be brought before our courts. In its *amicus curiae* memorandum before the Second Circuit Court of Appeal, the government declared, "Because foreign officials are among the prospective defendants in suits alleging violations of fundamental human rights, such suits unquestionably implicate foreign policy considerations. But not every case or controversy which touches foreign relations lies beyond judicial cognizance. Like many other areas affecting international relations, the protection of fundamental human rights is not committed exclusively to the political branches of government . . . .

"The courts are properly confined to determining whether an individual has suffered a denial of rights guaranteed him as an individual by customary international law . . . . [In such a case,] there is little danger that judicial enforcement will impair our foreign policy efforts. To the contrary, a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights. As we have shown . . . , official torture is both clearly defined and universally condemned. Therefore, private enforcement is entirely appropriate." Memorandum for the United States as Amicus Curiae at 22-23, Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980), *reprinted in* 19 I.L.M. 585 (1980) (citations omitted). Compare the above approach to "political" versus "legal" questions with Paust, *Letter*, *supra* note 23. If international law has been violated, the "political" question, sovereign immunity, and the act of state doctrines should present no real difficulty for claimants against foreign governments or foreign government officials. *See, e.g.*, Letelier v. Republic of Chile, 502 F. Supp. 259 (D.D.C. 1980) (awarding damages partially based on international law); Letelier v. Republic of Chile, 488 F. Supp. 665, 673 (D.D.C. 1980) (upholding subject matter jurisdiction over foreign government for civil liability if that government ordered an assassination that took place in the United States); Paust, *The Mexican Oil Spill: Jurisdiction, Immunity, and Acts of State*, 2 HOUS. J. INT'L L. 239, 252-53 (1979) [hereinafter cited as Paust, *The Mexican Oil Spill*]; Paust, *Letter*, *supra* note 23, at 601-08. Even as a matter of reciprocity, our govern-

Judge Robb also seemed impressed by an affidavit from the Attorney General stating that his regulation was issued "as an element of the language of diplomacy . . . in response to actions by foreign countries. The action implemented by these regulations is therefore a fundamental element of the President's efforts to resolve the Iranian crisis."[40] As Judge MacKinnon added in concurrence, "in the situation with which we are here dealing, the President's power is at its zenith—right up to the brink of war."[41] What these judges did not address, however, is the fact that the Supreme Court and other federal courts have often stressed that, even in time of war, when executive powers are admittedly at their highest, the President is bound by international and United States constitutional law.[42] A crisis circumstance, even war, does not obviate judicial power and responsibility.

In opposition to the denial of a rehearing *en banc*, Chief Judge Wright and Judges Spottswood, Robinson, Wald, and Mikva noted problems posed by "selective law enforcement"[43] involving, really, a form of unlawful collective punishment,[44] discrimination,[45] and retalia-

ment and officials should clearly have been subject to such claims by the Iranian litigants in the *Narenji* case. *See also* note 47 *infra*.

40. Narenji v. Civiletti, 617 F.2d at 747 (quoting an affidavit from the Attorney General). Judge Robb continued, "Thus the present controversy . . . lies in the field of our country's foreign affairs . . . ." *Id.* at 748. An appropriate response is "So what?" *See also* note 39 *supra*; text accompanying note 42 *infra*.

41. 617 F.2d at 753 (MacKinnon, J., concurring). Judge MacKinnon would have allowed the President to go even further, regardless of international law. For Judge MacKinnon, the "international crisis and confrontation in Iran" meant that even innocent human beings, because of their nationality, "create a clear and present danger" and, thus, can be "located . . . so that the Government may immediately take proper security measures." *Id.* at 752. This he argued even in the face of federal decisions that now recognize that governmental actions taken against aliens that are motivated by a retaliatory purpose or that discriminate against nationals of a particular country are patently violative of international law despite coercion engaged in by their home country and by such government. *See* notes 45-46 *infra*. Judge MacKinnon even admitted that, in this case, "[t]he disparity in treatment . . . is based upon the fact that the Government of their home country has committed [unlawful acts]." 617 F.2d at 749 (MacKinnon, J., concurring). *See also id.* at 751; *id.* at 747 (admission of the Attorney General in this regard). Because the right of free speech by certain Iranians was at stake, Judge MacKinnon's proffered remedy also has grave implications for the continued viability of an "unchilled" First Amendment.

42. *See* cases cited in note 24 *supra*; notes 138-51 *infra*; authorities cited in note 89 *infra*.

43. 617 F.2d at 754 (joint statement of Wright, C.J., Spottswood, Robinson, Wald, and Mikva, JJ., in support of rehearing *en banc*).

44. Functionally, Iranians, and no others, were singled out and punished as a responsive measure, in effect because of the conduct of other persons who were acting outside of our borders. Both human rights law and United States case law recognize that collective punishment, that is, the punishment of persons not for what they have done as individuals, but for the acts of others, is impermissible. In Communist Party v. United States, 384 F.2d 957 (D.C. Cir. 1967), for example, the court found that governmental schemes premised on action that "in essence comprehends the collective punishment of [individual] persons" must

be condemned under the Fifth Amendment. *Id.* at 967. The prohibition in human rights law is evidenced in many related prohibitions, *see, e.g.*, 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 33, 6 U.S.T. 3516, 75 U.N.T.S. 287 (1955) (prohibition against collective punishment in time of armed conflict); 1969 American Convention on Human Rights, Protocol No. 4, art. 4 (prohibition against "collective expulsion of aliens"). *See also* Convention No. IV, Respecting Laws and Customs of War on Land, Oct. 18, 1907, Annex, art. 50, 36 Stat. 2277, 2307, T.S. No. 539 (declared customary international law at Nuremberg). 1 Trials Major War Crimes 253-54 (1947) (no collective penalties); United States v. List, *reprinted in* 11 Trials of War Criminals 757, 1248-53, 1270 (1950).

Of no less import is the fact that any form of collective punishment would violate the right of individuals to human dignity, Universal Declaration of Human Rights, art. 1, G.A. Res. 217, U.N. Doc. A/810 (1948), would necessarily deprive individuals of their right to be treated as individuals and be recognized "as a person before the law," *id.* at art. 6, would necessarily violate the right of the individual to be "presumed innocent," *id.* at art. 11, would subject the individual to "inhuman or degrading treatment or punishment," *id.* at art. 5, and would most likely involve a prohibited "arbitrary arrest, detention or exile," *id.* at art. 9.

Clearly an affirmation of individual worth and dignity—precepts that are also recognized in the preamble to the United Nations Charter—requires that individuals be punished only for what they, as individuals, have done. As Justice Murphy rightly warned in another context, "[t]o infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for deprivation of rights . . . [and] to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow." Korematsu v. United States, 323 U.S. 214, 240 (1944) (Murphy, J., dissenting).

As our courts have declared repeatedly, guilt must be personal; collective guilt is alien to our jurisprudence and to American values. *See, e.g.*, Schware v. Board of Bar Examiners, 353 U.S. 232, 246 (1957); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 178 (1951) (Douglas, J., concurring); Bridges v. Wixon, 326 U.S. 135 (1945); Schneiderman v. United States, 320 U.S. 118, 154 (1943); Doe v. Plyler, 458 F. Supp. 569, 582 (E.D. Tex. 1978) (recognizing the common constitutional expectation that disabilities, burdens, or penalties imposed must be related to personal guilt or individual responsibility) (citing Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 175 (1972); St. Ann v. Palisi, 495 F.2d 423, 425 (5th Cir. 1974)), *aff'd*, Plyler v. Doe, 50 U.S.L.W. 4650 (U.S. 1982) (No. 80-1538). What is also clear is the fact that these prohibitions apply to federal deportation measures that are violative of the principle of personal guilt, and thus promote an impermissible "guilt by association." *See, e.g.*, Bridges v. Wixon, 326 U.S. 135, 163 (1945) (Murphy, J., concurring).

45. Discrimination on the basis of "national or ethnic origin" has been recognized by the International Court of Justice as "a denial of fundamental human rights [and] is a flagrant violation of the purposes and principles of the Charter" of the United Nations. Advisory Opinion of the International Court of Justice, 1971 I.C.J. 16, 57. The government of the United States clearly agrees with this proposition. *See* Memorial of the United States before the International Court of Justice at 71, in Concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran), 1980 I.C.J. 1. Furthermore, several United States laws prohibit governmental participation in conduct involving discrimination on the basis of "national origin." *See, e.g.*, 22 U.S.C. § 2755 (1976) (the Arms Export Control Act); 22 U.S.C. § 2661(a) (1976) (the 1977 Foreign Relations Authorization Act); 22 U.S.C. § 2426 (1976) (the International Development and Food Assistance Act of 1975), 22 U.S.C. § 2314(g) (1976) (the Foreign Assistance Act); 42 U.S.C. §§ 2000a, 2000a-1, 2000d (1976) (the 1964 Civil Rights Act). *See also* Note, Narenji v. Civiletti: *Expediency Triumphes Over Aliens' Constitutional Rights*, 14 LOY. L.A.L. REV. (1981); Note, *Aliens—Constitutionality of*

tory purpose.[46] At the conclusion of their opinion, they issued a trenchant warning that, unfortunately, still has gone unheeded by some. "These cases do . . . raise a grave constitutional issue. When the rule of law is being compromised by expediency in many places in the world, it is crucial for our courts to make certain that the United States does not retaliate in kind."[47]

Before the United States Supreme Court, during an attempted appeal, United States Attorneys McCree, Daniel, Kopp, Steinmeyer, and Singer openly argued against such a notion: "The Constitution does not forbid the President . . . to violate international law, and the courts will give effect to acts within the constitutional powers of the political branches without regard to international law."[48] Although case law belies the validity of such an argument, government attorneys openly argued once again that, in certain circumstances, the President of the United States should not be bound by the Constitution or other supreme federal law.

Discrimination Based on National Origin—Narenji v. Civiletti, 21 HARV. INT'L L.J. 467, 482-87 (1980) [hereinafter cited as Note, *Aliens*].

46. Federal cases recognize that governmental actions taken against aliens that are "motivated by a retaliatory purpose" or that discriminate against nationals of a particular country are patently violative of international law and will not be enforced, upheld, or recognized in this country. *See, e.g.*, Banco Nacional de Cuba v. Farr, 383 F.2d 166, 170, 183-85 (2d Cir. 1967), *cert. denied,* 390 U.S. 956 (1968); Banco Nacional de Cuba v. Farr, 307 F.2d 845, 861, 864-68 (1962); Banco Nacional de Cuba v. First Nat'l City Bank, 270 F. Supp. 1004, 1010 (S.D.N.Y. 1967). *See also* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 402-03 (1964) (recognizing the State Department position on the violations of international law, as printed at 43 DEP'T ST. BULL. 171 (Aug. 1, 1960)). With regard to the Court's "balance" test, it should be noted that since the Executive cannot lawfully violate international law, there can be no legitimate federal interest (compelling or otherwise) in retaliatory violations of international law or in the collective punishment of persons in violation of fundamental human rights and more general norms of international law. *See also* Gordon & Lichtenstein, *Trends: The Decision to Block Iranian Assets—Reexamined*, 16 INT'L LAW. 161, 164-65 (1982); Note, *Aliens*, *supra* note 45, at 487-90, 492-94.

47. Narenji v. Civiletti, 617 F.2d at 755 (joint statement of Wright, C.J., Spottswood, Robinson, Wald, and Mikva, JJ., in support of rehearing *en banc*). Other judges have taken similar stands in protecting Iranians in this country. *See, e.g.*, *Judge Not Wrathful, Clears Iranian Student*, L.A. Times, July 25, 1980, at 11, col. 1 (Municipal Court Judge Harris, explaining, "No consideration can or should be given to the fact that this defendant is of a nationality notorious to the American public"); *Judge Clears 105 Iranians Seized at Rally*, L.A. Times, July 19, 1980, at 1, col. 2 (Municipal Court Judge Boags writing, "As an American citizen, I am outraged at our people being held hostage in Iran and, frankly, there was a tendency to say turnabout is fair play. But, while that may seem like justice out in the streets, it has no place in a court of law"). For similar juristic views, see notes 44-46 *supra*.

48. Respondents Brief in Opposition at 18, Confederation of Iranian Students v. Civiletti, 617 F.2d 745 (1979), *cert. denied*, 446 U.S. 957 (1980) (quoting L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 222 (1972)).

It is noteworthy that in the more disturbing "foreign affairs" and international law cases disclosed above, one professorial work is often used by those judges and attorneys who would support the claim that the President should not be bound by international law. That work, cited without question or attention to the actual trends in the case law as noted in Part II of this article, is the book, *Foreign Affairs and the Constitution*, prepared by Professor Louis Henkin.[49] The language quoted in the government's brief before the Supreme Court in the Iranian deportation case and noted above is, in fact, Professor Henkin's.[50]

Since Professor Henkin's work has been cited to support this misconception regarding presidential power, his statements are worthy of our attention, even though Professor Henkin would himself admit that "[t]here are no clear Supreme Court holdings, or even explicit dicta, upholding the power of the President to act contrary to international law."[51] Such a realization does not restrain him, however, from making remarks like those quoted above[52]—remarks that rest ultimately upon mere belief, and thus a personal preference,[53] and that are supported only by a misreading of dicta by Chief Justice Marshall in *Brown v. United States*,[54] a misreading copied by government attorneys

49. L. HENKIN, *supra* note 48. Professor Henkin's work was also cited similarly in Rappenecker v. United States, 509 F. Supp. at 1029.

50. *See* note 48 *supra*.

51. L. HENKIN, *supra* note 48, at 460 n.61.

52. *See, e.g.*, *id.* at 165 n.† (President can break or terminate treaties); *id.* at 170-71 (President can breach a treaty); *id.* at 188, 222, 460-61 (President can act regardless of treaty obligations). *But see id.* at 55 ("[the President] shall enforce the law of the United States (including international law and obligations . . .)"). As a member of a panel of the American Society of International Law on The Constitution and the Conduct of Foreign Policy, Professor Henkin apparently approved a recommendation that "we should do our utmost to have the two branches act together *within* a framework of *law*, especially on the vital issues of war and peace." Recommendation No. 5 concerning The Power to Wage War (emphasis added), *reprinted in* THE CONSTITUTION AND THE CONDUCT OF FOREIGN POLICY xiv, 4 (F. Wilcox & R. Frank eds. 1976).

53. *See* L. HENKIN, *supra* note 48, at 460 n.61: "There are no clear Supreme Court holdings, or even explicit dicta, . . . but the principle is, I believe, the same."

54. 12 U.S. (8 Cranch) 110, 153 (1815). The only other possible footnoted "support" for such a dangerous allegation lies in an even more irrelevant quotation from another Supreme Court opinion: " 'This court is not a censor of the morals of the other departments of the government.' " L. HENKIN, *supra* note 48, at 419 n.139 (quoting The Chinese Exclusion Case, 130 U.S. 581, 602-03 (1889)). The "morals" of another department are not directly relevant, and the quoted language is irrelevant to whether or not the President is bound by law. *See also* Paust, *The Seizure and Recovery of the Mayaguez*, 85 YALE L.J. 774, 803-04 n.131 (1976) (power to terminate does not imply power to breach law while it remains law); Paust, *Does Your Police Force Use Illegal Weapons? A Configurative Approach to Decision Integrating International and Domestic Law*, 18 HARV. INT'L L.J. 19, 43-4 (1977) (President bound by law while it is law, despite power to terminate treaties).

in their brief before the Supreme Court.[55]

Chief Justice Marshall's statement is innocuous enough if properly understood. All that he actually declared was that "usage is a guide which the sovereign follows or abandons at his will."[56] What seems curiously to have escaped attention is the significant fact that mere "usage" is not the equivalent of law and that "usage" has a definite meaning for international lawyers.[57] Moreover, the word "law" was not used by Chief Justice Marshall in this sentence, although it was utilized nearby to affirm just the opposite of Professor Henkin's belief, to wit: that the President "can pursue only the law as it is written," as opposed to his unilateral preference, and that he is restrained to such acts as are allowed by the laws.[58] Professor Henkin also seems to fall into error by equating the President with "the sovereign."[59]

Also worth mentioning in this section on disturbing claims to immunity from law are a series of developments occurring with regard to bilateral prisoner exchange agreements between the United States and several foreign countries.[60] These are relevant because, although the

55. *See* note 48 and accompanying text *supra*.

56. 12 U.S. (8 Cranch) at 128.

57. *See, e.g.*, Mauran v. Smith, 8 R.I. 192, 222-23, 5 Am. Rep. 564, 571-72 (1865) ("usage and practice of war" does not mean the "rules and articles of war" or, by implication, the law of war); 1 L. OPPENHEIM, INTERNATIONAL LAW 26 (8th ed. 1955); UNITED STATES DEP'T OF ARMY PAMPHLET 27-161-1, INTERNATIONAL LAW 9 n.45 (1964) (distinguishing customary law from mere usage and adding that usage is habitual conduct engaged in "without any conviction of its legally obligatory nature and as a result of mere comity"). *See also* United States *ex rel.* E & R Constr. Co. v. Guy H. James Constr. Co., 390 F. Supp. 1193, 1209 (M.D. Tenn. 1972); Power v. Bowdle, 3 N.D. 107, 123-24, 54 N.W. 404, 410 (1893); American Lead Pencil Co. v. Nashville, C. & St. L. Ry., 124 Tenn. 57, 64, 134 S.W. 613, 615 (1911). An early opinion of Attorney General Randolph also demonstrated the then current expectation that "until . . . usages shall have grown into principles, and are incorporated into the law of nations," they remain mere usages. 1 Op. Att'y Gen. 32, 37-38 (1793).

58. Brown v. United States, 12 U.S. (8 Cranch) at 128-29.

59. *See* L. HENKIN, *supra* note 48, at 22-27, 83-84, 168, 460. *Compare* text accompanying notes 5 & 30 *supra*, *with* notes 109-15 and accompanying text *infra*. In our country, sovereignty and authority exist with the people. *See* notes 110-11 *infra*. For this and other reasons set forth below, any attribution of "sovereign" powers that some foreign government might possess to our President would be misplaced. Our entire government is one of delegated powers. It has no power except that granted by the Constitution. *See* text accompanying notes 62-64 & 109-15 *infra*.

60. *See, e.g.*, Abramovsky, *A Critical Evaluation of the American Transfer of Penal Sanctions Policy*, 1980 WIS. L. REV. 25 (1980); Abramovsky & Eagle, *A Critical Evaluation of the Mexican-American Transfer of Penal Sanctions Treaty*, 64 IOWA L. REV. 275 (1979); Bassiouni, *Perspectives on the Transfer of Prisoners Between the United States and Mexico and the United States and Canada*, 11 VAND. J. TRANSNAT'L L. 249 (1978); Paust, *The Unconstitutional Detention of Mexican and Canadian Prisoners by the United States Government*, 12 VAND. J. TRANSNAT'L L. 67 (1979) [hereinafter cited as Paust, *The Unconstitutional Detention*]; Robbins, *A Constitutional Analysis of the Prohibition Against Collateral Attack in the Mexican-American Prisoner Exchange Treaty*, 26 U.C.L.A. L. REV. 1 (1978); Vagts, *A Reply*

United States Government has no constitutional power to incarcerate individuals who are prosecuted for violating a domestic law not authorized by Congress in a tribunal that has not been authorized by Congress or the Constitution and that utilizes unconstitutional procedures, the United States Government has participated in such an incarceration of American citizens by implementing prisoner transfer agreements.[61] Thus, the government seeks to act, by implementing international agreements, free from the restraints of the United States Constitution.

Since the power and authority of the government "have no other source [and the government] can only act in accordance with all the limitations imposed by the Constitution, ... [it having] no power except that granted by the Constitution";[62] since "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution";[63] since no federal power exists to so incarcerate Americans;[64] and since the government is participating still in such an incarceration of American citizens; these developments amount to an impermissible claim by the executive branch, approved by Congress,[65] that it be allowed to act as if it were immune from the Constitution of the United States. As explained in other writings, federal courts should uphold the

to "A Critical Evaluation of the Mexican-American Transfer of Penal Sanctions Treaty", 64 IOWA L. REV. 325 (1979); Letter to the Editor from E. Freeman, N.Y. Times, May 20, 1980, at A18, col. 4. Most of these sources address questions of rights, waivers, and consent, but do not adequately address a more fundamental question of whether or not any federal power exists to incarcerate Americans who have violated neither United States' nor international laws.

61. *See, e.g.*, Paust, *The Unconstitutional Detention*, *supra* note 60, at 67-69, 71-72; Paust, *The Unconstitutional Detention of Prisoners by the United States Under Exchange of Prisoner Treaties*, in INTERNATIONAL ASPECTS OF CRIMINAL LAW: ENFORCING UNITED STATES LAW IN THE WORLD COMMUNITY 204 (R. Lillich ed. 1981) [hereinafter cited as Paust, *The Unconstitutional Detention of Prisoners*].

62. Reid v. Covert, 354 U.S. 1, 6, 12 (1957). *See also* Balzac v. Porto Rico, 258 U.S. 298, 312-13 (1922); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 120-21 (1866); Bauer v. Acheson, 106 F. Supp. 445, 449, 451-52 (D.D.C. 1952); United States v. Tiede, Crim. Case No. 78-001A (U.S. Ct. for Berlin Mar. 14, 1979), *reprinted in* 19 I.L.M. 179 (1979), *quoted in* text accompanying notes 16-17 *supra*; notes 110-15 and accompanying text *infra*.

63. Reid v. Covert, 354 U.S. at 16.

64. *See* articles cited in note 61 *supra*. *See also* 1 Op. Att'y Gen. 509, 521 (1821) (no presidential power to arrest anyone except for violation of our laws or possibly to extradite); 1 Op. Att'y Gen. 406, 408 (1820) (relevant British expectation that government can "inflict no punishment upon any [person] . . . unless warranted by the law of the land").

65. There has been congressional implementing legislation. *See* 18 U.S.C. § 3244 (Supp. II 1978). Nevertheless, Congress cannot obtain powers that do not exist through a treaty and its own acts any more than the President. *See* notes 62-63 and accompanying text *supra*.

Constitution in the face of such a subversive threat to law and void attempted exercises of power not delegated by the Constitution.[66] Similar threats occur and should be similarly voided where the government knowingly involves itself in foreign state illegalities by subsequently incarcerating the victims of such illegalities, especially if human rights deprivations have occurred.[67]

Perhaps equally or even more disturbing in view of Richard Nixon's claim that "governmental interests" should be considered to outweigh public interests and democratic freedoms,[68] is the language from Chief Justice Burger's opinion in *Haig v. Agee*.[69] In providing the Secretary of State with broad discretion to deny travel abroad under an American passport to citizens whom the Secretary believes pose a threat to national security, the Chief Justice expressly recognized that even an "exclusive power of the President . . . in the field of international relations" is a power that "must be exercised in subordination to the applicable provisions of the Constitution."[70] Nevertheless, he declared that "freedom to travel abroad with a . . . passport . . . is subordinate to national security and foreign policy considerations . . . [or] to reasonable governmental regulation."[71] The Chief Justice added: "[N]o governmental interest is more compelling than the security of the Nation . . . . Protection of the foreign policy of the United States is a governmental interest of great importance . . . [and m]easures to protect the secrecy of our Government's foreign intelligence operations plainly serve these interests."[72]

Although his opinion is unclear on this point, presumably the existence of compelling or important "governmental interests" and measures needed to "serve these interests" were primary factors leading to his conclusion that the constitutional freedom being considered should be "subordinate to national security and foreign policy consid-

66. *See* Reid v. Covert, 354 U.S. 1, 6, 12 (1957); Toledo, P. & W.R.R. v. Stover, 60 F. Supp. 587, 593 (S.D. Ill. 1945); articles cited in note 61 *supra*. *See also Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 119 (1866). Several other cases suggest the same sort of remedy. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); The Paquete Habana, 175 U.S. 677 (1900); Halperin v. Kissinger, 606 F.2d 1192, 1211-13 (D.C. Cir. 1979), *aff'd in part*, 452 U.S. 713 (1981) (4-4 decision; Rehnquist, J., not participating). *See also* United States v. Toscanino, 500 F.2d 267, 280 (2d Cir. 1974).

67. *See* articles cited in note 61 *supra*.

68. *See* United States v. Nixon, 418 U.S. 683, 706 (1974); Paust, *Human Rights*, *supra* note 32, at 243 n.35.

69. 453 U.S. 280 (1981).

70. *Id.* at 289 n.17 (quoting United States v. Curtiss-Wright Export Co., 299 U.S. 304, 320 (1936)).

71. 453 U.S. at 306.

72. *Id.* at 307.

erations."[73] The Chief Justice may have reaffirmed the long-recognized expectation that the President cannot violate the Constitution in the name of "national security" or "foreign policy considerations," but that reaffirmance may make little difference if previously recognized constitutional freedoms are interpreted away or depleted in order to serve those same executive "considerations" or to assure that "governmental interests" in "national security and foreign policy" will always prevail. The point is all the more disturbing in view of the fact that the government will often have "interests" or "considerations" at stake when national security or foreign policy is somehow involved.

Moreover, in light of Richard Nixon's claims that the President can ignore the supreme law of the land in order to protect the national security and that "governmental interests" can outweigh public interests, the danger inherent in what appears to be an approach to constitutional choice that favors "national security and foreign policy considerations"[74] seems potentially to be even more threatening to our constitutional process when these "considerations" are couched, not in terms of democratic values and the public interest, but in terms of a potentially antagonistic and more limited standard termed "governmental interest."[75] If governmental interests are to outweigh public interests and democratic values (either through an open balance or through a failure to address effects upon public interests and democratic values at stake while "balancing" merely governmental interests as such), then the Chief Justice, at least, seems to have accepted one of

73. *See* text accompanying note 71 *supra*.

74. *See also National Security—a Legal Shift*, L.A. Times, July 12, 1981, at 1, col. 1 (quoting Professor Gerald Gunther on the point that when confronted with these interests, the Court "brushes off the civil liberties questions quite summarily"). Actually, the Chief Justice may have acted like any other "activist" or "value-oriented" judge while interpreting the content of "rights," and may simply prefer "national security" values over "civil liberties" values in an *Agee*-type context. In this sense, to paraphrase Justice Brennan's dissent, "[t]he reach . . . is potentially staggering." 453 U.S. 319 n.9 (Brennan, J., dissenting). The *Agee* decision may thwart First Amendment policies at stake and reach "other citizens who may merely disagree with Government foreign policy and express their views." *Id.* On this jurisprudential point, see Parham v. J.R., 442 U.S. 584, 608 (1979) ("[w]hat process is constitutionally due cannot be divorced from the nature of the ultimate decision that is being made"). Chief Justice Burger's result-oriented approach is "potentially" even more "staggering" when one realizes that although he claims to rely in the *Agee* case on Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952), he seems to use things "important" to the government and "national security" as factors that outweigh "rights" that are potentially at stake—despite the rejection by six of the justices deciding *Youngstown* of these very factors as overriding. *See* note 144 *infra*.

75. See also Paust, *Human Rights*, *supra* note 32, at 243; note 6 *supra*; text accompanying notes 182-83 *infra*, on the point that the human rights test is not a compelling "governmental interest" test, but a higher standard based on necessity, public interests, and the fundamental conditioning phrase "democratic society."

Richard Nixon's earlier claims. In any event, an end run (*e.g.*, an interpretive approach that makes the "rights" to be interpreted "subordinate to national security and foreign policy") would seem to be just as dangerous as a frontal assault (*e.g.*, a claim that the Executive can disregard law when "national security and foreign policy" are to be served). In view of the general legal policies at stake and predominant trends in the case law, both attempts at derogation should be condemned.

II. Legal Policies at Stake

Of the general legal policies at stake in considering the extent of executive power, one fairly specific constitutional provision stands out. Article II, section 3 of the federal Constitution charges the President to "take Care that the Laws be faithfully executed." Also of import is the constitutionally prescribed oath of office that the President must take. It demands that the President "to the best of. . . [his] Ability, preserve, protect and defend the Constitution of the United States."[76] As commentators generally affirm, these provisions create a constitutional "duty to see that the laws are enforced"[77] and that the Constitution is preserved and protected.[78] Early opinions of United States attorneys general also affirm "the constitutional duty of the President to take care that the laws be faithfully executed,"[79] and therefore also to "take care that [lower federal officials] execute their duties faithfully and honestly."[80]

What follows necessarily from these recognized duties are the accepted conclusions that the President must obey the law,[81] including

76. U.S. CONST. art. II, § 1, cl. 8.

77. E. CORWIN, UNDERSTANDING THE CONSTITUTION 82 (4th ed. 1967). *See also* M. FORKOSCH, CONSTITUTIONAL LAW 144 (2d ed. 1969); A. MILLER, *supra* note 3, at 105-06; J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 19, at 214; B. SCHWARTZ, CONSTITUTIONAL LAW 178-79 (2d ed. 1979); L. TRIBE, *supra* note 9, at 187, 191-92; text accompanying notes 102-05 *infra*.

78. *See, e.g.*, B. SCHWARTZ, *supra* note 77, at 178; J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 19, at 4-5; L. TRIBE, *supra* note 9, at 201; text accompanying notes 103 & 107 *infra*.

79. 4 Op. Att'y Gen. 515, 516 (1846). For similar recognitions, see 5 Op. Att'y Gen. 630, 635, 656 (1852); 5 Op. Att'y Gen. 287, 288 (1851); 2 Op. Att'y Gen. 507, 508 (1832); 1 Op. Att'y Gen. 624, 625 (1823); 1 Op. Att'y Gen. 566, 570-71 (1822).

80. 4 Op. Att'y Gen. 515, 516 (1846); 1 Op. Att'y Gen. 624, 625 (1823).

81. *See, e.g.*, A. MILLER, *supra* note 3, at 105-06, 109-10; B. SCHWARTZ, *supra* note 77, at 178-79; Karst & Horowitz, *Presidential Prerogative and Judicial Review*, 22 U.C.L.A. L. REV. 47, 53 (1974) ("deeply held popular sentiment that not even a President is above the law"); *id.* at 67 (in United States v. Nixon, 418 U.S. 683 (1974), most important thing the Court did was reaffirm that Executive is "under the law" and his "claim of discretionary power" is subject "to the limits of the law"); Winterton, *The Concept of Extra-Constitutional Executive Power in Domestic Affairs*, 7 HASTINGS CONST. L.Q. 1, 35 (1979). *See also* 11 Op.

the Constitution,[82] and thus must respect the constitutional rights of others.[83] A related expectation, although less widely recognized, is that the President can be prosecuted for violations of the law.[84] Alexander Hamilton stressed this numerous times in the *Federalist Papers*. After impeachment, for example, the President would "be liable to prosecution and punishment in the ordinary course of law,"[85] "would be amenable to personal punishment and disgrace,"[86] and would be subject "to the forfeiture of life and estate by subsequent prosecution in the common course of law."[87] More recently, a court has ruled that the

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Att'y Gen. 297, 300 (1865) (Constitution does not permit President to abrogate international law or authorize violations thereof); 1 Op. Att'y Gen. 566, 570-71 (1822) (President bound by treaties and also by the general or customary law of nations); W. WINTHROP, MILITARY LAW AND PRECEDENTS 16, 32 (2d ed. 1920); Dean, *Is the President's Power Exclusive?*, 55 ALB. L.J. 376, 378-79 (1897); Goldberg, *The Constitutional Limitations on the President's Powers*, 22 AM. U.L. REV. 667, 671, 673, 675, 683 (1973); Karst & Horowitz, *supra*, at 54 (idea from Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), that political discretion ends where the law imposes a duty—thus, there can be no executive discretion to violate the law); *id.* at 64 ("presidential discretion must give way . . . to the demands of the law"); Mishkin, *Great Cases and Soft Law: A Comment on* United States v. Nixon, 24 U.C.L.A. L. REV. 76, 80, 86, 90 (1974) (President's subjection to law was the great public issue in United States v. Nixon, 418 U.S. 683 (1974)); Wormuth, *The Nixon Theory of the War Power: A Critique*, 60 CALIF. L. REV. 623, 625-26, 628, 634, 641-42 (President bound by international law), 644, 652 (President bound by Constitution), 664-65 (1972); Berger, *Mr. Nixon's Refusal of Subpoenas: "A Confrontation with the Nation,"* N.Y. Times, July 8, 1974, at 29, col. 1; Letter to Editor from L. Tribe, N.Y. Times, June 11, 1974, at A40, col. 5. *See also* A. MILLER, *supra* note 3, at 105-06, 109-10; L. TRIBE, *supra* note 9, at 16 (Supp. 1979) (Supreme Court reaffirmed the principle that federal executive officials are not above the law in Butz v. Economou, 438 U.S. 478 (1978)); text accompanying notes 102-05 *infra*. *But see* A. MILLER, *supra* note 3, at 117-18, 213-14.

82. *See, e.g.*, A. MILLER, *supra* note 3, at 106; J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 19, at 8; B. SCHWARTZ, *supra* note 77, at 178-79, 183; Goldberg, *supra* note 81; Wormuth, *supra* note 81, at 652; Berger, *supra* note 81; text accompanying notes 103 & 107 *infra*. *See also* 1 Op. Att'y Gen. 229, 230 (1818); L. TRIBE, *supra* note 9, at 164-67, 169-71.

83. *See, e.g.*, B. SCHWARTZ, *supra* note 77, at 178, 183; L. TRIBE, *supra* note 9, at 167, 201; Remarks of John Shattuck, in LAW, INTELLIGENCE AND NATIONAL SECURITY WORKSHOP, *supra* note 10, at 57; Remarks of Professor Robert Bork, *id.* at 59, 64, 69-70 (but adding that a second question is, of course, whether or not one has a constitutional right); cases cited in note 88 *infra*; text accompanying note 103 *infra*. *See also* 1 Op. Att'y Gen. 229, 229-30 (1818).

84. *See, e.g.*, L. TRIBE, *supra* note 9, at 201. *Cf.* L. LUSKY, BY WHAT RIGHT? 316-17 (2d ed. 1978) (President should be prosecuted "for official malfeasance"); L. TRIBE, *supra* note 9, at 201. *See also* G. GUNTHER, CONSTITUTIONAL LAW 457 (9th ed. 1975) (citing a Justice Dep't memo); Berger, *The Incarnation of Executive Privilege*, 22 U.C.L.A. L. REV. 4, 19 (1974) (President can be arrested). *But see* J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 418-19 (1833) (President not subject to arrest "while he is in the discharge of the duties of his office").

85. THE FEDERALIST No. 69 (A. Hamilton). *See also id.* No. 83 (offenses against the government for which the persons who commit them may be indicted and punished).

86. THE FEDERALIST No. 83 (A. Hamilton). *See also id.* No. 70.

87. THE FEDERALIST No. 77 (A. Hamilton).

President can be held personally liable for money damages arising out of a presidentially directed violation of an individual's constitutional rights, even where such a violation was ordered in the name of "national security."[88]

It is evident from this and other cases that, even in the face of claims involving national security, war, or foreign affairs, the President's activities can be restricted either by the judiciary or by Congress.[89] Other recognized remedies have, in fact, included the voiding of a presidential act;[90] normal remedies of criminal defendants;[91] the

88. Halperin v. Kissinger, 606 F.2d 1192, 1207-13 (D.C. Cir. 1979), *aff'd in part*, 452 U.S. 713 (1981). *See* L. TRIBE, *supra* note 9, at 187, 191-92 (citing Halperin v. Kissinger, 424 F. Supp. 838, 843, 845 (D.D.C. 1976)). *See also* Butz v. Economou, 438 U.S. 478 (1978). In *Butz*, Justice White declared, "The extension of absolute immunity from damages liability to all federal executive officials would seriously erode the protection provided by basic constitutional guarantees . . . [and with regard to higher ranked officials], the greater power of such officials affords a greater potential for a regime of lawless conduct. Extensive Government operations offer opportunities for unconstitutional action on a massive scale. In situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees." 438 U.S. at 505-06. Importantly, Justice White's language did not exclude the liability of a president; furthermore, he added: " 'Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law . . . .' " *Id.* (quoting United States v. Lee, 106 U.S. 196, 220 (1882)). *See* text accompanying note 132 *infra*. Other cases also have recognized that federal officials who are responsible for enforcing the law can be held personally liable for damages when they wilfully fail to implement the law. *See* National Black Police Ass'n v. Velde, 631 F.2d 784, 787 (D.C. Cir. 1980). *See also* note 110 *infra*.

89. *See* Dean, *supra* note 81, at 378 (the proximity of the receipt of ambassadors clause to the "take care that the laws are faithfully executed" clause clearly demonstrates "that in his foreign relations activities [the President] was still subject to the law"); Dorsen & Shattuck, *supra* note 5, at 13-20, 24-26; Goldberg, *supra* note 81; Shattuck, *supra* note 83; Wormuth, *supra* note 81. *See also* L. TRIBE, *supra* note 9, at 164-67, 169-71 ("[F]oreign policy choices and their implementation . . . are fully constrained by the Constitution's protections for individuals in article I, § 9, and the Bill of Rights"). *Cf.* A. MILLER, *supra* note 3, at 223-28. *See also* United States v. Nixon, 418 U.S. 683 (1974); Halperin v. Kissinger, 606 F.2d 1192, 1201 n.59 (D.C. Cir. 1979), *aff'd in part*, 452 U.S. 713 (1981); J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 19, at 4-5, 8; B. SCHWARTZ, *supra* note 77, at 180 ("A court order . . . is a 'law' to whose faithful execution the President is exhorted to attend"); cases cited in note 24 *supra* & note 151 *infra*.

On the congressional power to compel certain types of testimony from "all federal officials," including the President's National Security Adviser, where otherwise there is a congressional "right to know," see Franck, *The Constitutional and Legal Position of the National Security Adviser and Deputy Adviser*, 74 AM. J. INT'L L. 634, 637-39 (1980). Professor Franck adds correctly that even the President has no "blanket immunity" from testifying before Congress on national security matters, although "executive privilege may shield an official from answering some . . . questions." *Id.* at 638.

90. *See, e.g.*, cases cited in notes 24 & 66 *supra*.

91. *See, e.g.*, United States v. District Court, 407 U.S. 297 (1972); Reid v. Covert, 354 U.S. 1 (1957); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 119 (1866); United States v. Burr, 25 F. Cas. 30, 31-5, 37-8 (D. Va. 1807) (No. 14, 692). With regard to lower level federal officials, see also United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974).

ordering of "ministerial," as opposed to "discretionary," acts[92] when more prohibitive remedies and money damages do not suffice; and the subpoena power.[93] Whatever remedy is effective may vary with the circumstances, but it is important to recall language in *Marbury v. Madison*[94] that intimates that whenever presidential violations of the law have a sufficient impact upon an individual, the protection of the individual's right to an effective remedy is also at stake.[95]

Regarding the more specific question of secrecy concerning foreign affairs or national security, one scholar has also suggested that the First Amendment be interpreted to allow "the disclosure of plans that could reasonably be believed to violate national or international law,"[96] thus

92. *See, e.g.*, Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1866) (President cannot be enjoined from carrying into effect an Act of Congress); Halperin v. Kissinger, 606 F.2d 1192, 1211 (D.C. Cir. 1979), *aff'd in part*, 452 U.S. 713 (1981); United States v. Smith, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16, 342) (President cannot "dispense with" execution of an Act of Congress); G. GUNTHER, *supra* note 84, at 456, 458 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), and Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838)). *See also* A. MILLER, *supra* note 3, at 107, 109, 121 (citing Myers v. United States, 272 U.S. 52 (1926); National Treasury Employees Union v. Nixon, 492 F.2d 587 (D.C. Cir. 1974)); J. NOVAK, R. ROTUNDA & J. YOUNG, *supra* note 19, at 4-5, 8; Karst & Horowitz, *supra* note 81, at 50 (ministerial versus political discretionary duties); *id.* at 54 (political discretion ends where law imposes a duty (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165-66 (1803))); Karst & Horowitz, *supra* note 81, at 64 (discretion must give way to demands of law); *id.* at 67 (subjecting presidential "discretionary power to the limits of law").

93. *See, e.g.*, United States v. Nixon, 418 U.S. 683 (1974); Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973); United States v. Burr, 25 F. Cas. 30 (D. Va. 1807) (No. 14,692d); G. GUNTHER, *supra* note 84, at 466-67; Berger, *supra* note 84, at 6 n.15, 19; Karst & Horowitz, *supra* note 81, at 48-49, 67 (President not beyond the reach of the courts).

94. 5 U.S. (1 Cranch) 137 (1803).

95. *Id.* at 162-63, 166. *See also* Halperin v. Kissinger, 606 F.2d 1192, 1212 (D.C. Cir. 1979), *aff'd in part*, 452 U.S. 713 (1981); text accompanying notes 130-31 *infra*. On the legal requirement to provide an effective judicial remedy for a violation of human rights, see Paust, *The Unconstitutional Detention, supra* note 60, at 70 n.13. *See also* Paust, Book Review, 56 N.Y.U. L. REV. 227, 243 n.79 (1981) [hereinafter Paust, Book Review], and cases cited therein.

96. Futterman, *Controlling Secrecy in Foreign Affairs*, in THE CONSTITUTION AND THE CONDUCT OF FOREIGN POLICY, *supra* note 52, at 41. *See also id.* at 16 (*United States v. Reynolds* and *United States v. Nixon* do not bar court inspection of national security information "in an appropriate case"); *id.* at 48-50 (compelled disclosure categories). On this last point, see L. TRIBE, *supra* note 9, at 212. Futterman also argues, "The public would seem entitled to know whether the CIA uses kidnapping or torture, or intercepts vast numbers of telephone messages abroad." Futterman, *supra*, at 49. On the illegality of kidnapping and torture by federal agents acting abroad, see United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974).

For support of the general notion that disclosure should occur when law must be served, see Berger, *supra* note 84, at 17 (early English history); *id.* at 27 (the Nixon affair); Karst & Horowitz, *supra* note 81, at 64-65 (demands of law override presidential discretion); *id.* at 67 (subjecting presidential "discretionary power to the limits of law"). *See also* L. TRIBE, *supra* note 9, at 208 (privilege overcome by showing of relevancy to pending criminal trial); Henkin, *Executive Privilege: Mr. Nixon Loses but the Presidency Largely Prevails*, 22

subjecting the President to possible politico-legal controls with regard to plans to engage in future illegal activity. Such controls include the "ultimate remedy" of impeachment[97] and, of course, the voting power of individuals and their congressional representatives.

U.C.L.A. L. REV. 40, 41-42 (1974) (the privilege will defer at least to the needs of criminal justice and give way in every case to the public interest in law enforcement generally); Karst & Horowitz, *supra* note 81, at 54 (discretion ends where law imposes a duty). *Cf.* Dorsen & Shattuck, *supra* note 5, at 11, 32-33 (President cannot shield criminal wrongdoing or withhold information concerning criminal conduct (citing Gravel v. United States, 408 U.S. 606, 629 (1973); United States v. Brewster, 408 U.S. 501, 526 (1973))); Freund, *Foreword: On Presidential Privilege*, 88 HARV. L. REV. 13, 21 (1974) ("the privilege would not extend to communications in furtherance of a course of criminal conduct"); Henkin, *supra*, at 44-45 (not told how to weigh national security interests—thus, national security interests not an automatic bar to disclosure of information); Ratner, *Executive Privilege, Self Incrimination, and the Separation of Powers Illusion*, 22 U.C.L.A. L. REV. 92, 103-04, 115 (1974) (suggesting that "a constitutional purpose to inhibit abuse of executive power" overrides an executive privilege "when executive wrongdoing [or unlawful activity] is the object of inquiry," because "evidence of such abuse is likely to be focused in executive communications;" " '[p]ersonal involvement' of the President obviously thwarts objective execution of laws"); *id.* at 104 (unless impairment of national security is claimed, no weighing of interests at stake should be made—thus, presumably national security interests should not be an automatic bar, but should be weighed); Van Alstyne, *A Political and Constitutional Review of* United States v. Nixon, 22 U.C.L.A. L. REV. 116, 127 (1974) (compulsory process regarding presidential criminality); *id.* at 133 (court might safeguard judicial power from abuse even by the President). *See also* Freund, *supra*, at 30-31.

This problem (*i.e.*, disclosure of presidential illegalities) was probably of concern to the Court in *United States v. Nixon*. *See* Dorsen & Shattuck, *supra* note 5, at 9 (Nixon brief); Mishkin, *supra* note 81, at 76-78, 84 (any crimes and charges against any person). *See also* L. TRIBE, *supra* note 9, at 209.

Once prosecution has actually begun, however, matters contained in "investigatory files compiled for law enforcement purposes" might be held to be exempt from public disclosure under the Freedom of Information Act, 5 U.S.C. § 552 b(7) (1976). *See* Aspin v. Department of Defense, 491 F.2d 24, 30 (D.C. Cir. 1973). Nevertheless, this exemption must not be abused in an attempt to cover up illegalities and avoid actual prosecution. The statutory exemption relates only to files compiled "for law *enforcement* purposes" and must be squared with overriding constitutional policies and interests at stake. But see *id.* with regard to completed investigations. The decision in the *Aspin* case was changed partly by subsequent amendment to the Freedom of Information Act. *See* Rubin, *A Wholesome Discretion*, 20 N.Y.L.F. 569, 596-97 (1975).

There is language from one federal district court opinion that seems to stand in sole opposition to the many authorities noted above. See Lesar v. Department of Justice, 455 F. Supp. 921, 924 (D.D.C. 1978), in which the court, responding to a claim that information should "be disclosed and denied the protection of [5 U.S.C. § 552 b(7)(C)] because the surveillance conducted by the FBI was illegal and therefore not law enforcement," concluded: "Illegality or legality does not determine the applicability of this exemption." Absolutely no reasoning or cases supported the conclusion, and in view of the authorities noted above and the overriding constitutional policies at stake, such a conclusion is not constitutionally justifiable.

97. *See, e.g.*, J. BARRON & C. DIENES, CONSTITUTIONAL LAW: PRINCIPLES AND POLICY 381 (1975); L. TRIBE, *supra* note 9, at 215; Dean, *supra* note 81, at 379. *But cf.* A. MILLER, *supra* note 3, at 291-306. On impeachment, see E. BARRETT & W. COHEN, CONSTITUTIONAL LAW 461-63 (6th ed. 1981).

Although disclosure of secret improprieties of a related sort was not based on the First Amendment as such, the concurrent thrust of the Congressional Committee's *Articles of Impeachment* and the Court's opinion in *United States v. Nixon*[98] was certainly toward a forced disclosure of prior planning that could reasonably be believed to violate national law. There are also several other general policies at stake in such a case. As the Court recognized:

> The allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would [first] cut deeply into the guarantee of due process of law and [second] gravely impair the basic function of the courts . . . [third] [w]ithout access to specific facts a criminal prosecution may be totally frustrated.[99]

Since many of these policies are equally at stake when the President violates the law and is subject to prosecution, presidential plans to engage in conduct that would be violative of national or international law should be disclosed.[100]

Also of import when a President seeks to violate a law are threats to our constitutional government, the public trust held by the President, and the democratic society in which we are all participants. These threats were most notably articulated in President Nixon's *Articles of Impeachment*.[101] The House Judiciary Committee declared that Nixon had violated his constitutional oath and his constitutional duty to take care that the laws be faithfully executed by preventing, obstructing, and impeding criminal investigations;[102] by repeatedly engaging in conduct violating the constitutional rights of citizens;[103] by failing to act when close subordinates were being investigated;[104] by knowingly misusing

98. 418 U.S. 683 (1974).

99. United States v. Nixon, 418 U.S. 683, 712-13 (1974). *See also id.* at 708-09. With regard to the first and second policies noted in the text, see United States v. Burr, 25 F. Cas. 30 (D. Va. 1807) (No. 14, 692d).

100. *See also* authorities cited in note 96 *supra*; President Reagan's executive order, Exec. Order No. 12356, 45 Fed. Reg. 14,874 (1982), the Heritage Foundation's recommended legislation, 2 A.B.A. STANDING COMM. ON L. & NAT'L SECURITY, INTELLIGENCE REP., at 2-3 (Dec. 1980).

101. HOUSE JUDICIARY COMM. ARTICLES OF IMPEACHMENT OF RICHARD NIXON, I-III, H.R. DOC. No. 93-1305, 93d Cong., 2d Sess. (1974), *reprinted in* N.Y. Times, Aug. 4, 1974, at E2 [hereinafter cited as ARTICLES OF IMPEACHMENT]; G. GUNTHER, *supra* note 69, at 452-55.

102. ARTICLES OF IMPEACHMENT, *supra* note 101, at art. I. An early opinion of the Attorney General had already recognized that the Constitution requires the President to see that lower federal officials "do their duty faithfully; and on their failure, to cause them to be displaced, prosecuted, or impeached, according to the nature of the case." 1 Op. Att'y Gen. 624, 625 (1823). *See also* note 108 *infra*.

103. ARTICLES OF IMPEACHMENT, *supra* note 101, at art. II, preamble, §§ 1-3.

104. *Id.* at art. II, § 4.

executive power in disregard of the rule of law;[105] and by wilfully disobeying subpoenas.[106] The Committee found such violations to be "subversive of constitutional government," "contrary to his trust as President," prejudicial to "the cause of law and justice," and "manifestly injurious to the people of the United States."[107]

At another time, the American people denounced the King of England as a tyrant who was "unfit to be the ruler of a free People" because, among other things, he obstructed the administration of justice, invaded "the rights of the people," protected violators of the criminal law from punishment, and deprived people "in many cases, of the benefits of Trial by Jury."[108] With these improprieties in mind, the Framers of the Declaration of Independence expressly declared that governments are constituted "to secure" the inalienable Rights of Man, that "governments derive their just powers from the consent of the governed," and that "it is the right of the people to alter or abolish" any form of government that "becomes destructive of those ends."[109] What the Framers recognized was that sovereignty[110] and authority[111] exist

105. *Id.* at art. II, § 5.

106. *Id.* at art. III.

107. *Id.* at arts. I-III.

108. The Declaration of Independence (U.S. 1776). *See also* Declaration of the Causes and Necessity of Taking Up Arms (1775). The specific improprieties listed are quite similar to those listed by the House Judiciary Committee almost 200 years later. Compare the above with text accompanying notes 102-05 *supra*. For a related point about the "evils" of unlimited power described in the Declaration of Independence and their relevance to the impropriety of Executive claims to exclusive or unlimited power, see Dames & Moore v. Regan, 453 U.S. 654, 662 (1981) (opinion of Rehnquist, J.,) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. at 641 (Jackson, J., concurring)).

109. The Declaration of Independence (U.S. 1776). See also relevant language from early state constitutions in Kurland, *Government by Judiciary*, 2 U. ARK. LITTLE ROCK L.J. 307, 311-12 (1979); Paust, *Human Rights, supra* note 32, at 241 & n.30, 243-44 & nn.36-37; Paust, *International Law, supra* note 3, at 622. *See generally* United States v. Lee, 106 U.S. 196, 208-09, 219-21 (1882); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 454, 460-63 (1793).

110. *See, e.g.*, Paust, *International Law, supra* note 3, at 622, and cases cited therein; Paust, *The Concept of Norm, supra* note 23, at 275 n.199. *See also* United States v. Richardson, 418 U.S. 166, 201 (1974) (Douglas, J., dissenting); *Ex parte* Curtis, 106 U.S. 371, 372 (1882) (government "is one of delegated powers only, and . . . its authority is defined and limited by the Constitution"); United States v. Lee, 106 U.S. 196, 208-09, 219-21 (1882); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 454, 460-63 (1793); Halperin v. Kissinger, 606 F.2d 1192, 1213 (D.C. Cir. 1979), *aff'd in part*, 452 U.S. 713 (1981); Nixon v. Sirica, 487 F.2d 700, 711 (D.C. Cir. 1973).

The concept of a sovereign government is repugnant to those who share democratic values. As Woodrow Wilson recognized, "There was never any sovereign government in America." W. WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 146 (1908). *See also* Dean, *supra* note 81, at 378. For evidence of a contrary view—one which is clearly incorrect in light of the cases and other evidences of traditional expectation noted herein—see Baldwin, *Absolute Power, an American Institution*, 7 YALE L.J. 1, 5 (1897) ("a King who . . . rules in his own right"). What is curious is the fact that the concept of

with the people, that the "authority of the people" is "the only author-

"sovereign immunity" ever arose to grant, in effect, an immunity from private suit for certain official wrongs. *See also* Feres v. United States, 340 U.S. 135, 139 (1950); Borchard, *Governmental Responsibility in Tort, VI* 36 YALE L.J. 1, 17 (1926); James, *Tort Liability of Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610, 611-15 (1955).

Since the government is not sovereign, how can it rightly benefit from the concept of sovereign immunity? We have recently begun to abandon the concept, but it lingers in certain circumstances. For example, the sovereign immunity of the federal government announced by Chief Justice Marshall in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411-12 (1821), was first eroded by statutory consent to be sued and then by case decision. On statutory consent, see, *e.g.*, the Federal Torts Claims Act, 28 U.S.C. §§ 2671-2680 (1976); the Suits in Admiralty Act, 46 U.S.C. § 741 (1976). The Federal Torts Claims Act, however, contains a number of exceptions, *see, e.g.*, 28 U.S.C. §§ 2680(a), (h), (j) (1976). *See generally*, W. PROSSER, HANDBOOK ON THE LAW OF TORTS 970-75 (4th ed. 1971). For relevant case decisions, see Butz v. Economou, 438 U.S. 478 (1978); Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). *See also* Wilkes v. Dinsman, 48 U.S. (7 How.) 89, 123 (1849); Jaffee v. United States, 663 F.2d 1226 (3d Cir. 1981) (Jaffee III), *vacating* 48 U.S.L.W. 2586 (3d Cir. 1980) (Jaffee II) (slip. op.); Jaffee v. United States, 592 F.2d 712 (3d Cir.), *cert. denied*, 411 U.S. 961 (1979) (Jaffee I); cases cited in notes 88 & 95 *supra*, notes 130-31 *infra*; Comment, *Immunity of Federal Executive Officials to Damage Suits for Constitutional Violations*, 19 HOUS. L. REV. 299 (1982).

In other related developments, the Eleventh Amendment has been interpreted so as to find a waiver of immunity in certain state actions, when the state wilfully engages in federally regulated activities and Congress, expressly, or by clear implication, intends to abrogate the state's immunity. *Compare* Parden v. Terminal R.R. Co., 377 U.S. 184 (1964), *and* Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959), *with* Edelman v. Jordan, 415 U.S. 651, 672-74 (1974). *See also* E. BARRETT & W. COHEN, *supra* note 97, at 77-79. Private suits against the state are also permitted where Congress has acted pursuant to § 5 of the Fourteenth Amendment and has allowed them. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 449-52 (1976). *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 19, at 48-53; L. TRIBE, *supra* note 9, at 129-47. For evidence of a related cutback in state immunity, now termed a "qualified" immunity, see Procunier v. Navarette, 434 U.S. 555 (1978); O'Connor v. Donaldson, 422 U.S. 563 (1975); Wood v. Strickland, 420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232, 247 (1974). With regard to cutbacks to a "qualified" immunity for state judges, prosecutors, and sheriffs, see Pierson v. Ray, 386 U.S. 547, 557 (1967) (sheriff); Beard v. Udall, 648 F.2d 1264 (9th Cir. 1981) (judges, prosecutors, and sheriffs); Rankin v. Howard, 633 F.2d 844 (9th Cir. 1980), *cert. denied*, 101 S. Ct. 2020 (1981) (judge); Hampton v. Hanrahan, 600 F.2d 600 (7th Cir. 1979), *rev'd on other grounds*, 446 U.S. 754 (1980) (prosecutor); Forsyth v. Kleindienst, 599 F.2d 1203 (3d Cir. 1979) (prosecutor); Jacobson v. Rose, 592 F.2d 515, 524 (9th Cir. 1978), *cert. denied*, 442 U.S. 930 (1979) (prosecutor); Briggs v. Goodwin, 569 F.2d 10 (D.C. Cir. 1977), *cert. denied*, 437 U.S. 904 (1978) (prosecutor); Gregory v. Thompson, 500 F.2d 59, 63 (9th Cir. 1974) (judge); *see also* Stump v. Sparkman, 435 U.S. 349 (1978) (judge); Imbler v. Pachtman, 424 U.S. 409, 430-31 (1976) (prosecutor); Rosenberg, Stump v. Sparkman: *The Doctrine of Judicial Impunity*, 64 VA. L. REV. 833 (1978).

For a description of the trends, see Jaffee v. United States 592 F.2d 712 (3d. Cir. 1979) (Jaffee I). Similar cutbacks have occurred with regard to so-called municipal immunity. *See, e.g.*, Owen v. City of Independence, 445 U.S. 622 (1980); Monell v. Department of Social Services, 436 U.S. 658 (1978); *see also* Garner v. Memphis Police Dep't., 600 F.2d 53 (6th Cir. 1979). The latter cutbacks have also occurred through state court and legislative action, *see, e.g.*, W. PROSSER, *supra*, at 984-87. Trends that were out-of-line with those noted above concerned immunity granted from liability under 42 U.S.C. § 1983 to private individuals whose alleged conduct included that of judicial coparticipants, who could then, at least, claim immunity for themselves. *See, e.g.*, Kurz v. Michigan, 548 F.2d 172 (6th Cir.

ity on which government has a right to exist in any country,"[112] and that all persons (including the President) are bound by the law.[113] Thus, it is evident that when the President of the United States violates the law, he violates not only his constitutional oath and duty, but also the expectations of the Framers—still generally shared—about authority, delegated powers, and democratic government.[114] When the Presi-

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1977); Hazo v. Geltz, 537 F.2d 747 (3d Cir. 1976). This view was not unanimous among the circuits. *See* Sparks v. Duval County Ranch Co., 604 F.2d 976 (5th Cir. 1979), *cert. granted sub nom.* Dennis v. Sparks, 445 U.S. 942 (1980); Kermit Constr. Corp. v. Banco Credito y Ahorro Ponceno, 547 F.2d 1, 3 (1st Cir. 1976). The Supreme Court finally resolved the issue by denying immunity to private coconspirators. *See* Dennis v. Sparks, 449 U.S. 24, 27-32 (1980). For a useful discussion of derivative immunity, see Note, *The Abrogation of Derivative Immunity*, 17 HOUS. L. REV. 399 (1980).

On the broader question of immunity, I believe Justice Frankfurter correctly asserted that whatever the ancient basis for a choice of immunity, "it undoubtedly runs counter to modern democratic notions of the moral responsibility of the State." Great N. Life Ins. Co. v. Read, 322 U.S. 47, 59 (1944) (Frankfurter, J., dissenting). *See also Ex parte* Young, 209 U.S. 123, 150-60 (1908); Nippon Hodo Co. v. United States, 285 F.2d 766, 769 (Ct. Cl. 1961). Also of importance is the fact that the United States now denies foreign governments any "sovereign immunity" in our courts for violations of international law. *See, e.g.*, Letelier v. Republic of Chile, 488 F. Supp. 665, 673 (D.D.C. 1980); Paust, *The Mexican Oil Spill*, *supra* note 39. The United States has also recognized that foreign heads of state are not entitled to immunity in our courts for violations of foreign law. *See, e.g.*, Jimenez v. Aristeguieta, 311 F.2d 547 (5th Cir. 1962), *cert. denied*, 373 U.S. 914 (1963); *see also* Nippon Hodo Co. v. United States, 285 F.2d 766, 769 (Ct. Cl. 1961). It seems only a matter of time before any lingering immunity will cease to restrain a full implementation of law.

111. *See* Ware v. Hylton, 3 U.S. (3 Dall.) 199, 237 (1796) ("It is the declared will of the people of the United States . . . and their will alone is to decide . . . ."); note 110 *supra*; Paust, *Human Rights, supra* note 32, at 241-44, 252. *See also* Ware v. Hylton, 3 U.S. (3 Dall.) at 236.

112. *See* Paust, *Human Rights, supra* note 32, at 242 (quoting Thomas Paine). *See also* cases cited in note 62 *supra*.

113. Paust, *Human Rights, supra* note 32, at 241-44. See the early opinions of the Attorneys General cited in note 79 *supra*, and the early judicial decisions cited in note 24 *supra*.

114. *See generally* Paust, *Human Rights, supra* note 32; Paust, *The Concept of Norm, supra* note 23; cases cited in note 62 *supra*. *See also* THE FEDERALIST No. 78, (A. Hamilton) ("[e]very act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void"); Karst & Horowitz, *supra* note 81, at 47, 53-54, 64 (generally shared expectation that "government under law" is required, and thus the presidential power is limited by and not "above the law"); cases cited in notes 24 & 62 *supra*.

Early opinions of the Attorneys General also affirm the expectation of the Founders that the "President possesses no powers but those which he derives from the constitution and laws of the United States." 1 Op. Att'y Gen. 406-07 (1820). *See* 1 Op. Att'y Gen. 566, 570-71 (1822); 1 Op. Att'y Gen. 509, 521 (1821); 1 Op. Att'y Gen. 229, 230 (1818); 1 Op. Att'y Gen. 213, 214 (1818). Thus, the President possesses no inherent or "emergency" powers beyond those delegated by supreme federal law. *See also* 2 Op. Att'y Gen. 452 (1831); 2 Op. Att'y Gen. 263 (1829); J. BARRON & C. DIENES, CONSTITUTIONAL LAW: PRINCIPLES AND POLICY 270 (2d ed. 1982), (citing Winterton, *The Concept of Extra-Constitutional Executive Power in Domestic Affairs*, 7 HASTINGS CONST. L.Q. 1 (1979)); notes 137-44 and accompanying text *infra*. As stated also with regard to the powers of the Attorney General, "in a government purely of laws, no officer should be permitted to stretch his authority and carry the

dent violates the law, he acts without authority, beyond his constitutionally prescribed powers, and, quite likely, in a way destructive of democratic values.[115] As the House Judiciary Committee found, such violations are "subversive of constitutional government."[116]

In view of the above discussion, it is relatively easy to support what some might term an "exception" to a claimed executive privilege to withhold information when the President (or a subordinate) has engaged (or is likely to engage) in any violation of the Constitution or other supreme federal law.[117] Actually, this stems not from an exception to a "privilege," but from a limitation upon all forms of executive power. Indeed, the limitation stems from the constitutional fact that when a President violates the supreme law of the land, he acts without authority and beyond his constituted powers. Because of this, clearly one area in which the public must have an effective right to know, is where violations of the law are involved. This is true whether that right, born in revolution and a significant affirmation of democratic values, is thought to be based on necessary penumbral guarantees of the First Amendment or, more generally, on the nature of constitutional authority and constituted powers as mirrored partly in the preamble to the Constitution, in article II duties, in article VI, clause 2, and in the history and significance of the Ninth and Tenth Amendments.[118]

As the Founders must surely have understood, governmental secrecy about illegality thwarts both constitutional authority and democratic values.[119] In the *Federalist Papers*, for example, Hamilton recognized that "the censure attendant on bad measures" deprives the public

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influence of his office beyond the circle which the positive law of the land has drawn around him. This . . . is republican orthodoxy . . . ." 1 Op. Att'y Gen. 492, 493 (1821). *See also* 1 Op. Att'y Gen. 211, 211-12 (1818); text accompanying notes 132-44 *infra*.

115. *See generally* Paust, *Human Rights, supra* note 32.

116. *See* ARTICLES OF IMPEACHMENT, *supra* note 101.

117. *See, e.g.*, note 96 *supra*; text accompanying note 100 *supra*.

118. On that latter basis, see generally THE FEDERALIST Nos. 70, 77 (A. Hamilton); Paust, *Human Rights, supra* note 32; Paust, *The Concept of Norm, supra* note 23; cases cited in note 62 *supra*.

119. Thomas Paine, for example, was an ardent patriot of the public's "right to know," declaring more specifically "There is no place for mystery. . . . In the representative system, the reason for everything must publicly appear. Every man is a proprietor in government, and considers it a necessary part of his business to understand." T. PAINE, THE RIGHTS OF MAN pt. II, ch. III, at 179 (1961). *See also* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 587 (1976) (Brennan, J., concurring); New York Times Co. v. United States, 403 U.S. 713, 719, 724 (1971) (Black & Douglas, JJ., concurring).

> of the two greatest securities they can have for the faithful exercise of any delegated power, first, the restraints of public opinion, . . . and, secondly, the opportunity of discovering with facility and clearness the misconduct of the persons they trust, in order either to their removal from office, or to their actual punishment in cases which admit of it.[120]

Hamilton was not adverse to secrecy,[121] but he recognized that secrecy for the purpose of covering up "bad measures," "misconduct," and illegalities would obviously be detrimental to democratic values and to our constitutional principles of delegated authority and powers. As he explained, such "abuse[s] of the executive authority" are threats to "public security,"[122] and thus to national security as properly conceived.[123]

Furthermore, the Founders certainly were opposed, in Hamilton's words, to "the practice of arbitrary imprisonments, [which] have been, in all ages, the favorite and most formidable instruments of tyranny."[124] What was even more alarming was the practice of secret confinement,[125] a practice to be remedied by *habeas corpus* and clearly not denied by restrictive interpretations of the First and Fifth Amendments that rest on executive claims of "national security."

III. Predominant Trends in Judicial Decision

In the 1950's, Justice Jackson warned, "Security is like liberty in that many are the crimes committed in its name."[126] He did not mean, of course, that such a practice is legally proper; he meant to condemn

120. THE FEDERALIST No. 70 (A. Hamilton).

121. *Id.* No. 75 (secrecy regarding treaty negotiations).

122. *Id.* No. 77.

123. Justice Black would remind that secrecy at the expense of representative government provides no real security. New York Times Co. v. United States, 403 U.S. 713, 719 (1971) (Black, J., concurring). *See also* United States v. Robel, 389 U.S. 258, 264 (1967); De Jonge v. Oregon, 299 U.S. 353, 365 (1937) (opinion of Hughes, C.J.); Halperin v. Kissinger, 606 F.2d 1192, 1201 (D.C. Cir. 1979), *aff'd in part*, 452 U.S. 713 (1981). In *New York Times Co.*, Justice Douglas added: "Secrecy in government is fundamentally anti-democratic." New York Times Co. v. United States, 403 U.S. 713, 724 (1971) (Douglas, J., concurring).

124. THE FEDERALIST No. 84 (A. Hamilton). Hamilton is, unfortunately, still correct today. *See, e.g.*, Paust, *International Law, supra* note 3, at 631-62; *see also* M. MCDOUGAL, H. LASSWELL & L. CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 690-712 (1980).

125. *See* THE FEDERALIST No. 84 (A. Hamilton) (quoting Blackstone).

126. United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 551 (1950) (Jackson, J., dissenting) ("In the name of security the police state justifies its arbitrary oppressions on evidence that is secret, because security might be prejudiced if it were brought to light in hearings.") Justice Jackson was, unfortunately, correct. *See* materials cited in note 124 *supra*. For judicial recognition of the inherent vagueness of, and, thus, the dangers posed by, a "security" concept, see United States v. United States District Court, 407 U.S. 297, 320 (1972); Zweibon v. Mitchell, 516 F.2d 594, 653-54 (D.C. Cir. 1975), *cert. denied*, 453 U.S. 928 (1981).

criminal activity engaged in under a claim of "security." A year later, he wrote that in order to preserve a "free government . . . the Executive [must] be under the law."[127] He added that the power delegated to the President to execute law "must be matched against words of the Fifth Amendment . . . . One gives a governmental authority that reaches so far as there is law, the other gives a private right that authority shall go no farther."[128] Even before Justice Jackson's warning, predominant trends in judicial decision had either confirmed or conditioned related expectations about authority, delegated powers, and the requirement that all persons, even the President, must obey the supreme law of the land.

Perhaps the most articulate of these judicial expressions was made in *United States v. Lee*,[129] in which the Supreme Court emphatically stated that merely because one "asserts authority from the executive branch" and "the President has ordered" a particular outcome of events, the judiciary cannot deny a remedy to private litigants who were harmed by the executive action.[130] Further, it was of no consequence, when constitutional rights were at stake, that the federal actors were "military officers, acting under the orders of the President," during the Civil War and in supposed compliance with an act of Congress.[131] As the Court declared more generally:

127. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 655 (1952) (Jackson, J., concurring). Professor Berger adds that in 1791, Justice Wilson of the Supreme Court stated "[T]he most powerful magistrates should be amenable to the law . . . . No one should be secure while he violates the Constitution and the laws." *See* Berger, *supra* note 81.

128. *Youngstown*, 343 U.S. at 646. In *Youngstown*, even the government attorneys argued that executive powers are "derived from the Constitution and they are limited, of course, by the provisions of the Constitution." L. FISHER, PRESIDENT AND CONGRESS, POWER AND POLICY 40 (1972).

129. 106 U.S. 196 (1882).

130. *Id.* at 219-21. *See also* Butz v. Economou, 438 U.S. 478, 485 (1978); Wilkes v. Dinsman, 48 U.S. (7 How.) 89, 123 (1849); Jaffee v. United States, 592 F.2d 712 (3d Cir.), *cert. denied*, 441 U.S. 961 (1979) (Jaffee I); Cruikshank v. United States, 431 F. Supp. 1355, 1359 (D. Hawaii 1977); United States v. Smith, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342).

131. 106 U.S. at 219-21. Several other cases either have refused to enforce unconstitutional or unlawful presidential orders or have voided actions taken under such orders. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (presidential order reversed); The Paquete Habana, 175 U.S. 677, 700-02 (1900) (voiding an executive seizure of an enemy vessel in time of war); The Flying Fish, 6 U.S. (2 Cranch) 170 (1804) (presidential orders to military officers in time of war cannot "legalize" illegal actions taken abroad); cases cited in notes 24 *supra* & 139 *infra*. As those cases demonstrate, it does not matter whether the actions taken or to be taken occur here or abroad, in time of war or of relative peace. *See also* Reid v. Covert, 354 U.S. 1 (1957); United States v. Tiede, Crim. Case No. 78-001A (U.S. Ct. for Berlin Mar. 14, 1979), *reprinted in* 19 I.L.M. 179 (1980); Balzac v. Porto Rico, 258 U.S. 298, 312-13 (1922); The Prize Cases, 67 U.S. (2 Black) 635, 668 (1862) (President "is bound to take care that the laws be faithfully executed," including laws of

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.
>
> It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.[132]

The President's power may have been near its zenith in time of war, and even supported by an act of Congress, but both the Executive and Congress are bound by the Constitution. As the Court explained in *United States v. Lee*, law limits the exercise of delegated authority; there is no authority to violate the law. As the Court declared seventy-five years later, the United States is "entirely a creature of the Constitution . . . . Its power and authority have no other source. It can only act [at home or abroad] in accordance with all the limitations imposed by the Constitution . . . . [It] has no power except that granted by the Constitution . . . ."[133] It was certainly not determinative, nor seemingly relevant, that foreign affairs, military interests, the concurrence of Congress (through legislation) with the Executive, and even a treaty were involved, for, as the Court explained, "[N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."[134]

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war); Wilkes v. Dinsman, 48 U.S. (7 How.) 89, 123 (1849); Jaffee v. United States, 592 F.2d 712 (3d Cir. 1979), *cert. denied*, 441 U.S. 961 (1979) (Jaffee I).

132. 106 U.S. at 220. See also Butz v. Economou, 438 U.S. 478 (1978), in which the Court stated, "Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law." *Id.* at 506 (citing United States v. Lee, 106 U.S. at 220).

The district court in Cruikshank v. United States, 431 F. Supp. 1355, 1359 (D. Hawaii 1977), added, "If this country has learned nothing else in the past decade, it has learned that no man, nor any man acting on behalf of our government, is above the law." *See also* Halperin v. Kissinger, 606 F.2d 1192, 1213 (D.C. Cir. 1979), *aff'd in part*, 452 U.S. 713 (1981) (citing United States v. Lee, 106 U.S. at 220; United States v. Smith, 27 F. Cas. 1192 (C.C.D.N.Y. 1806) (No. 16, 432)); note 114 *supra*.

133. *See* Reid v. Covert, 354 U.S. 1, 5-6, 12 (1957). *See also* Balzac v. Porto Rico, 258 U.S. 298, 312-13 (1922); Dostal v. Haig, 652 F.2d 173, 176 (D.C. Cir. 1981); Seery v. United States, 127 F. Supp. 601 (Ct. Cl. 1955); Turney v. United States, 115 F. Supp. 457, 464 (Ct. Cl. 1953) (Fifth Amendment applies abroad to taking of property by military in war area); United States v. Tiede, Crim. Case No. 78-001A (U.S. Ct. for Berlin Mar. 14, 1979), *reprinted in* 19 I.L.M. 179 (1980); notes 109-10 & 114 *supra*. As these cases demonstrate, this is true whether or not the government acts at home or abroad.

134. Reid v. Covert, 354 U.S. at 16. The quoted language constitutes "[t]he definitive pronouncement on this constitutional question." *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 19, at 184 (citing several other cases).

Even the opinion in *United States v. Curtiss-Wright Export Corp.*,[135] which is cited incorrectly by some for the broad proposition that executive power in the area of foreign affairs must prevail even against law, actually recognized and reaffirmed the fundamental constitutional precept that "every . . . governmental power, must be exercised in subordination to the applicable provisions of the Constitution."[136] The Supreme Court has often stressed that even in time of war, when executive powers are greatest, the President is bound by the United States Constitution and by international law.[137] Similarly, lower federal courts have recognized during a wartime context that:

> The executive department of our government cannot exceed the powers granted to it by the Constitution and the Congress, and if it does exercise a power not granted to it, or attempts to exercise a power in a manner not authorized by statutory enactment, such executive act is of no legal effect.[138]

Clearly, the same approach applies whether the Executive seeks to act illegally in time of war or because of some putative "foreign affairs" or

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135. 299 U.S. 304 (1936).

136. *Id.* at 320 (a case which involved congressionally delegated power despite overly broad dicta about the executive branch). This language was recently cited with approval in Dames & Moore v. Regan, 453 U.S. 654, 661 (1981) (opinion of Rehnquist, J.). *See also id.* at 691 (Powell, J., concurring in part and dissenting in part) ("The extraordinary powers of the President and Congress . . . cannot . . . displace the Just Compensation Clause of the Constitution.") Importantly, the majority opinion in *Dames & Moore* stressed that the President's actions in settling claims against Iran did not even attempt "to divest the federal courts of jurisdiction" in violation of article III of the Constitution. *See id.* at 685. A similar recognition made only three days earlier was just as emphatic on this point. *See* Haig v. Agee, 453 U.S. 280, 289 n.17 (1981) (Burger, C.J., opinion) (quoting United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-20 (1936)) (even an "exclusive power of the President . . . in the field of international relations [is] 'a power . . . which . . . of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.' ") *See also* Bauer v. Acheson, 106 F. Supp. 445, 449, 451-52 (1952); J. NOWAK, R. ROTUNDA, J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 33 (Supp. 1982).

137. *See, e.g.*, cases cited in note 24 *supra*. In a nonwar context, it was also early recognized that the President has a duty to enforce and to obey "not merely the constitution, statutes, and treaties of the United States, but those general laws of nations," all of which are part of the supreme law of this country. 1 Op. Att'y Gen. 566, 570-71 (1822).

138. Toledo, P. & W. R.R. v. Stover, 60 F. Supp. 587, 593 (S.D. Ill. 1945). *See also* Wilkes v. Dinsman, 48 U.S. (7 How.) 89, 123 (1849) ("while the chief agent of the government . . . is to be protected under mere errors of judgment in the discharge of his duties, yet he is not to be shielded from responsibility if he acts out of his authority or jurisdiction"); Brown v. United States, 12 U.S. (8 Cranch) 110, 147, 153 (1814) (Story, J., dissenting); United States v. Smith, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342) ("The President of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids"); authorities cited in note 89 *supra*.

"national security" need that does not reach the level of a wartime crisis circumstance.[139] As the Circuit Court for the District of Columbia added in *Zweibon v. Mitchell*:[140] "A plethora of other cases have similarly recognized constitutional limits on the President's powers as commander-in-chief or as the nation's spokesman in the arena of foreign affairs. The Supreme Court has indicated that 'even the war power does not remove constitutional limitations safeguarding essential liberties.' "[141] Thus, the exercise of war or foreign affairs powers not only must be within the limits of the law, but also must not take exception to law in the name of "necessity" or under some theory that claims the end justifies the means.[142] To this sort of claim, the Supreme Court gave an apt reply in *Ex parte Milligan*:[143]

> Time has proven the discernment of our ancestors. . . . Those great and good men foresaw that troublous times would arise,

139. *See* United States v. United States District Court, 407 U.S. 297 (1972); Halperin v. Kissinger, 606 F.2d 1192, 1201 (D.C. Cir. 1979), *aff'd in part*, 452 U.S. 713 (1981); United States v. Ehrlichman, 376 F. Supp. 29, 33 (D.D.C. 1974); cases cited in notes 24, 127-28, 132 *supra*; authorities cited in note 89 *supra*. *See also* United States v. Butler, 297 U.S. 1, 78-79 (1936) (Stone, J., dissenting) (unconstitutional exercise of power by the executive and legislative branches is subject to judicial restraint); United States v. Toscanino, 500 F.2d 267, 276-79 (2d Cir.), *reh'g denied*, 504 F.2d 1380 (2d Cir. 1974) (citing Shapiro v. Ferrandina, 478 F.2d 894, 906 n.10 (2d Cir. 1973) (courts should see "that the Executive lives up to our international obligations")); United States v. Butenko, 494 F.2d 593, 603 (maj.), 611 (Seitz, C.J., concurring and dissenting), 631 (Gibbons, J., dissenting) (3d Cir.), *cert. denied sub nom.* Ivanov v. United States, 419 U.S. 881 (1974); Marschalk Co. v. Iran Nat'l Airlines, 518 F. Supp. 69, 86, 91-92 (S.D.N.Y.), *rev'd on other grounds*, 657 F.2d 3 (2d Cir. 1981);

Here, it should also be noted that the circuit court in *Halperin v. Kissinger* came dangerously close to suggesting that when a "national security" crisis poses an "immediate and grave peril to the nation," the judiciary might recognize "whatever special powers the Executive may hold in national security situations." 606 F.2d at 1201. Such a statement, however, begs the question of "whatever special powers the Executive may hold"—a question answered in several previous cases to the effect that the President cannot lawfully exercise a power that does not exist under the Constitution and, moreover, cannot exercise any power, in any circumstance, so as to violate the supreme law of the land. *See, e.g.*, cases cited in notes 132-38 *supra* & notes 141-45 *infra*. *See also* L. TRIBE, *supra* note 9, at 164-67, 169-71; Paust, *The Unconstitutional Detention, supra* note 60; Paust, *The Unconstitutional Detention of Prisoners, supra* note 61. It is also important that *Halperin v. Kissinger* never suggested that the President can violate the supreme law of the land, but reaffirmed instead that the President is not immune from judicial process and must obey the law. *See* 606 F.2d at 1211, 1213.

140. 516 F.2d 594 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

141. 516 F.2d at 626-27 (citing Home Bldg. & Loan Ass'n. v. Blaisdell, 290 U.S. 398, 426 (1934)). *Home Building & Loan* was quoted similarly in United States v. Robel, 389 U.S. 258, 264 (1967), and in Rostker v. Goldberg, 453 U.S. 57 (1981).

142. See generally cases cited in notes 24 & 62 *supra* and note 144 *infra*, especially Reid v. Covert, 354 U.S. 1 (1957); Sterling v. Constantin, 287 U.S. 378 (1932); Brown v. United States, 12 U.S. (8 Cranch) 110 (1815). See also Judge Stern's admonition concerning matters of "interest" or "importance" to the state, at text accompanying note 33 *supra*.

143. 71 U.S. (4 Wall.) 2 (1866).

> when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law . . . . The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. *No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government*. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence . . . .[144]

144. *Id.* at 120-21 (emphasis added). In Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 649-50 (1952), Justice Jackson pointed out in his concurring opinion that the Founders omitted presidential "powers *ex necessitate* to meet an emergency" and that they knew how emergency powers "afford a ready pretext for usurpation." *See also id.* at 646 (under his "military role" the President cannot take action "without support of law, to seize persons or property because they are important"). In *Youngstown Sheet & Tube*, despite executive claims of a "grave emergency," "national emergency," "threats against our national security," jeopardy and peril to our "national defense," danger to national well-being and safety, and the necessity of a presidential action to avoid a "national catastrophe," *see id.* at 582-84, 589-90, Justices Black, Frankfurter, Douglas, Burton, and Clark agreed with Justice Jackson (for various reasons) that the President has no inherent power outside of the Constitution to meet such alleged needs, especially in the face of congressional powers to deal with such emergencies. *See id.* at 587-89 (Black, J.), *id.* at 597, 602-04, 610, 614 (Frankfurter, J.); *id.* at 629, 633 (Douglas, J.); *id.* at 655, 659-60 (Burton, J.); *id.* at 660-62 (Clark, J.). Neither did the dissent argue that the President could violate the law in any such circumstance. *Id.* at 691 (Vinson, J., dissenting) (quoting an older government brief about exercising power "in ways short of making laws or disobeying them"). *See also* Yoshida Int'l, Inc. v. United States, 378 F. Supp. 1155, 1175 (Cust. Ct. 1974), *rev'd*, 526 F.2d 560, 578-83 (C.C.P.A. 1975); Massachusetts v. Simon, No. 75-1281 (D.C. Cir. Aug. 1975), *reprinted in part in* H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 124, 125 (2d ed. 1976) ("Neither the term 'national security' nor 'emergency' is a talisman . . . which should, *ipso facto*, suspend the normal checks and balances on each branch of Government. Our laws were not established merely to be followed only when times are tranquil"). Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 589 (Black, J., opinion) ("in both good times and bad"); notes 18 & 141 *supra*. The court in *Simon* also observed that the President is limited by the Constitution and the law. *See* H. STEINER & D. VAGTS, *supra*, at 125-26.

On the pernicious ends and means theory, see Olmstead v. United States, 277 U.S. 438 (1928) (Brandeis, J., dissenting). "To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face." *Id.* at 485. Of a related interest, but slightly different, is McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 424 (1819).

It is also worth noting that the excuse of claimed necessity for violations of international law was expressly repudiated at Nuremberg. *See, e.g.*, United States v. List, *reprinted in* 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 757, 1255 (1950); Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 MIL. L.

The Court also declared expressly that "the President . . . is controlled by law, and has his appropriate sphere of duty, which is to execute . . . the laws,"[145] adding, "By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers . . . ."[146]

Whether one is concerned with human rights, other constitutionally protected rights, or more ordinary federal law, it is beyond doubt that whatever discretion the President may have concerning the implementation of law while exercising his duty faithfully to execute the law, the President can never lawfully violate the law.[147] Although several cases address the point that law limits any discretion the President might otherwise have and that violations of the law are precisely those aspects of circumstance that justify and demand judicial attention,[148]

REV. 99, 159-61 (1972) [hereinafter cited as Paust, *My Lai and Vietnam*], and authorities cited therein.

145. 71 U.S. (4 Wall.) at 121.

146. *Id.* at 119. On the need for the judiciary to protect human rights, see Paust, *International Law, supra* note 3; Paust, *Human Rights, supra* note 32; Paust, Book Review, *supra* note 95.

147. *See* Myers v. United States, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting); Kendall v. United States, 37 U.S. (12 Pet.) 524, 613 (1838); Nixon v. Sirica, 487 F.2d 700, 711 (D.C. Cir. 1973); Nixon v. Sampson, 389 F. Supp. 107, 136 (D.D.C.), *stay granted*, 513 F.2d 430, 431 (D.C. Cir. 1975). *See also* United States v. Guy W. Capps, Inc., 204 F.2d 655, 659 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955) (citing Myers v. United States, 272 U.S. 52, 177 (1926) (duty not to go beyond the laws)); Cruikshank v. United States, 431 F. Supp. 1355, 1359 (D. Hawaii 1977) ("The Government should not have the 'discretion' to commit illegal acts . . . In this area, there should be no policy option. . . .[and] there is no exception to this rule for the acts of the CIA"); Bauer v. Acheson, 106 F. Supp. 445, 451 (D.D.C. 1952) ("[T]he executive department's discretion, although in a political matter, must be exercised with regard to the constitutional rights of the citizens, who are the ultimate source of all governmental authority"); *id.* at 452 (executive power does not include "any absolute discretion which may encroach on the individual's constitutional rights," nor does Congress have "power to confer such absolute discretion"); cases cited in note 24 *supra*; authorities cited in notes 81-83 & 89 *supra*; notes 93-108 *supra*. It should be noted that Justice Holmes' dissent in *Myers v. United States* was also quoted approvingly by Justice Frankfurter in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952).

148. *See* note 147 *supra*; Paust, *Letter*, *supra* note 23, and cases cited therein; Paust, *The Concept of Norm, supra* note 23; text accompanying note 153 *infra*. *See also* text accompanying notes 15-18 *supra*; note 39 *supra*. Of course, "law" provides judicially discoverable and manageable standards, and its application by the judiciary involves not only the judiciary's "traditional role" but should not properly embarrass either the Executive or Congress, or both. *See, e.g.*, Goldwater v. Carter, 444 U.S. 996, 997 (1979) (Powell, J. concurring); *id.* at 1007 (Brennan, J., dissenting); Powell v. McCormack, 395 U.S. 486, 548-49 (1969); Baker v. Carr, 369 U.S. 186, 226 (1962). *See also* Gilligan v. Morgan, 413 U.S. 1, 11-12 (1973) (Burger, C.J., opinion); Laird v. Tatum, 408 U.S. 1, 15-16 (1972) (Burger, C.J., opinion); cases cited at notes 18 & 24 *supra*; text accompanying note 153 *infra*. Although Justice Rehnquist's concurring opinion in *Goldwater* contains potentially overly broad dicta, such dicta is distinguishable. Justice Rehnquist referred merely to "the conduct of our country's foreign relations" as such and not necessarily to international law (as opposed to policy

two cases are worth highlighting with regard to the limits of military discretion. In *Brown v. United States*,[149] both the majority and dissent agreed that, in the majority's words, while exercising presidential discretion the Executive "can pursue only the law as it is written."[150] The dissent added: "He has a discretion vested in him, as to the manner and extent; but he cannot lawfully transcend the rules of warfare established among civilized nations. He cannot lawfully exercise powers, or authorize proceedings, which the civilized world repudiates and disclaims."[151] A related executive power of a state governor was considered in *Sterling v. Constantin*.[152] In that case, the Court declared:

> It does not follow from the fact that the Executive has this range of discretion, deemed to be a necessary incident of his power to suppress disorder, that every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat. The contrary is well established. *What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions*. . . . There is no ground for the conclusion that military orders in the case of insurrection have any higher sanction or confer any greater immunity.[153]

In addition to rejecting claims of executive immunity from law because of important interests,[154] ends and means,[155] or necessity,[156] the Court has rejected the claim that the Executive cannot be bound by his own regulations (*i.e.*, that which he has the power to create and to ter-

judgments and foreign relations generally) or violations of supreme federal law by the Executive. *See* Goldwater v. Carter, 444 U.S. at 1002 (Rehnquist, J., concurring).

149. 12 U.S. (8 Cranch) 110 (1814).

150. *Id.* at 128-29 (Marshall, C.J., opinion).

151. *Id.* at 153 (Story, J., dissenting). *See also id.* at 145, 147, 149 (where no legislative limit, President is still governed by the law of nations); cases cited in notes 24 & 144 *supra*. For similar reasons, a foreign government has no "discretion" to violate international law and, if it does, it is not entitled to any immunity before our courts. *See* Letelier v. Republic of Chile, 502 F. Supp. 259 (D.D.C. 1980); Letelier v. Republic of Chile, 488 F. Supp. 665, 673 (D.D.C. 1980); Paust, *The Mexican Oil Spill, supra* note 39; Paust, Book Review, *supra* note 95, at 242 n.78.

152. 287 U.S. 378 (1932).

153. *Id.* at 400-01 (emphasis added). *See also* notes 15-16, 18, 130-32 & 142-44 and accompanying text *supra*. With regard to the fact of judicial review of military actions taken under circumstances of claimed "necessity" during war, see United States v. Russell, 80 U.S. (13 Wall.) 623, 627-28 (1871); Mitchell v. Harmony, 54 U.S. (13 How.) 115, 134-35 (1851); cases cited in note 24 *supra*.

154. *See* text accompanying note 33 *supra*; note 144 *supra*.

155. *See* note 142 *supra*.

156. *See* notes 142, 144 & 153 *supra*.

minate).[157] This latter claim was expressly rejected in *United States v. Nixon*, the Court noting that "[s]o long as [a] regulation is extant it has the force of law . . . [and] [s]o long as [it] remains in force the Executive Branch is bound by it."[158] Other cases,[159] as well as earlier text writers on military law,[160] agree with that holding.

IV. Regulating the Intelligence Community

In light of the above discussion and case law, it is clear that the FBI and the CIA, whether acting at home or abroad, are bound, like the President, by the Constitution, and other supreme federal law.[161] For this reason, FBI or CIA charters adopted by Congress need no clause demonstrating that these entities are bound by all of the supreme federal law; that result is necessarily required as a matter of constitutional law. Nevertheless, a far more difficult problem was presented recently by Deputy Director of Central Intelligence Frank Carlucci. In a speech before an American Bar Association Conference on Intelligence Legislation, Director Carlucci explained that intelligence organizations like the CIA "must go forward with our task, often in disregard of foreign law."[162] As he explained, foreign law might simply forbid the collection of intelligence and the fact that a foreign agent has a contract with the CIA may itself "break the law of the agent's host country."[163] He added, "The problem . . . is . . . how we sanction this kind of activity within a carefully drawn legal framework. . . . [W]e

157. *See* cases cited in notes 158-60 *infra*. This sort of claim was also made by Professor Henkin, *supra* note 48, in an effort to justify presidential violations of international law. *See* note 54 *supra*. A similar claim, later rejected by the Supreme Court, was made by Professor Bickel. *See* Bickel, *Lawful Powers of the President*, N.Y. Times, June 3, 1974, at 30, col. 5.

158. 418 U.S. 683, at 695-96 (1974) (citing Vitarelli v. Seaton, 359 U.S. 535 (1959)); Service v. Dulles, 354 U.S. 363, 388 (1957); United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954).

159. *See* Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973); notes 158 *supra* & 160 *infra*. *See generally* L. TRIBE, *supra* note 9, at 192.

160. See W. WINTHROP, *supra* note 81, at 32, in which the author states, "[T]he President, as well as any other executive official, would be so far bound by general regulations framed by him that he could not justly except from their operation a particular case to which they applied" (citing Arthur v. United States, 16 Ct. Cl. 422 (1880); 10 Op. Att'y Gen. 11, 17 (1861)).

161. For cases involving those agencies, see United States v. United States District Court, 407 U.S. 297 (1972); Halperin v. Kissinger, 606 F.2d 1192 (D.C. Cir. 1979), *aff'd in part*, 452 U.S. 713 (1981); Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); Cruikshank v. United States, 431 F. Supp. 1355 (D. Hawaii 1977). *See also* notes 102 & 130-32 *supra*.

162. 2 A.B.A. STANDING COMM. ON L. & NAT'L SECURITY, INTELLIGENCE REP. no. 8, at 7 (Aug. 1980).

163. *Id.*

must always bear in mind that we are legalizing an activity that is inherently antagonistic to the interests of other countries in which that activity is going to be conducted."[164] Surely, Director Carlucci did not have in mind assassination and torture directed by the United States, which would violate not only United States law and foreign law, but international law as well.[165] What he seemed concerned with is whether or not the CIA should be free to violate foreign law as long as our Constitution, federal laws, and international law are not violated.

Because neither article VI, clause 2 of the Constitution nor the case law mention foreign law as such, this question is interesting. One approach might be to distinguish the types of foreign law involved. For example, CIA violations of foreign laws that are similar to United States laws might be prohibited. Thus, otherwise unregulated CIA activities abroad could be prohibited if those activities would have been prohibited had they occurred, for example, in a United States territory or against United States citizens. Another approach might be simply to ignore violations of foreign law that do not also involve a violation of international law, United States federal law, or the Constitution.

In a case involving solely a violation of foreign law, the same types of legal policy might not be at stake. Although legitimate needs for effective intelligence and national security do not outweigh the supreme law of the land, they might still outweigh foreign law or certain types of foreign law. Certainly, the government cannot act abroad except in accordance with the supreme law of the land,[166] but if the

164. *Id.*

165. *See* Letelier v. Republic of Chile, 502 F. Supp. 259 (D.D.C. 1980) (prohibition of assassination recognized in both national and international law); Letelier v. Republic of Chile, 488 F. Supp. 665, 673 (D.D.C. 1980); Kelly, *Assassination in War Time*, 30 MIL. L. REV. 101 (1965); Paust, *My Lai and Vietnam*, *supra* note 144, at 143-46; note 96 *supra*. Former Director of the CIA William Colby has stated that there should be an "absolute" prohibition against the assassination of foreign leaders (except in times of armed conflict) and a flat prohibition of torture. LAW, INTELLIGENCE AND NATIONAL SECURITY WORKSHOP, *supra* note 10, at 174. Earlier, there were recommendations of the United States Senate Select Intelligence Committee that the United States not engage in assassination under any circumstances and that a criminal law be enacted making certain forms of assassination a domestic criminal offense. *See* M. MCDOUGAL & W. REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 1023-26 (1981) (reproducing portions of the Committee's Report on Assassinations, S. DOC. No. 465, 94th Cong., 1st Sess. 5-7, 257-77 (1975)).

166. Note that the CIA is thereby restrained by international law, and relevant international law would apply regardless of the nationality of persons involved. Because some provisions of the federal Constitution may not apply to foreigners abroad, in a manner similar to Americans abroad and to both foreigners and Americans within the United States, some foreigners may not receive the same protections as Americans, yet some foreigners will. *See, e.g.*, Seery v. United States, 127 F. Supp. 601 (Ct. Cl. 1955) (occupied territory); United States v. Tiede, Crim. Case No. 78-001A (U.S. Ct. for Berlin Mar. 14, 1979), *reprinted*

government's public acts abroad violate only a foreign law, are the government and its agents acting within the scope of their public power entitled to immunity? Foreign government agents engaging in similar activities within the United States might add another variable to the inquiry.[167] Does this latter concern depend upon whether or not foreign agent activities violate our own laws?[168]

With regard to international law, if foreign law is violated on foreign territory (*i.e.*, the territory of the "host" state) at the direction of our government, international law might not necessarily be violated, depending on the nature of the activity (*e.g.*, the mere receipt of information within a country versus an active participation in its extraction

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in 19 I.L.M. 179 (1980) (occupied territory). *See also* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1386-89 (10th Cir. 1981); Dostal v. Haig, 652 F.2d 173, 176 (D.C. Cir. 1981).

167. Foreign agents suspected of illegal activities in this country, including espionage, have been held in detention. There are also practices of expelling such persons as *persona non grata*, "trading" them, or simply watching them. Concerning the latter, see the 1978 Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801-1811 (Supp. II 1978). With regard to *persona non grata* practice, see Vienna Convention on Consular Relations, Apr. 24, 1963, art. 23(1), 21 U.S.T. 77, T.I.A.S. No. 6820; Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 9(1), 23 U.S.T. 3227, T.I.A.S. No. 7502. It should also be noted that espionage is generally regarded under international law as a "political offense" for purposes of extradition. *See* Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226, 1237 (1962), *reprinted in* INTERNATIONAL LAW AND WORLD ORDER 487 (B. Weston, R. Falk & A. D'Amato eds. 1980).

A problem also exists with regard to the constitutionality of potentially vague language contained in our own espionage laws. Some language appears far too broad in the face of human rights law and related constitutional standards, since some provisions might be interpreted so as to prohibit what is merely a knowing receipt of public "information *relating to* the national defense which information the possessor has reason to believe *could* be used to . . . the advantage of any foreign nation." 18 U.S.C. §§ 793(d), 793(e) (1976) (emphasis added). Again, this might involve the mere receipt of public information and be interpreted so as to prohibit an activity deemed by this author to be generally permissible under human rights law when engaged in by the CIA in a reverse situation. *See* text accompanying notes 174-82 *infra*. Either the statutes involved should be amended or they should be restricted by judicial interpretation that implements human right standards as suggested below. For a more general discussion of this statute and other potentially broad restrictions on the free flow of information, see Rubin, *supra* note 96, at 577.

168. A former Chairman of the President's Foreign Intelligence Advisory Board, Leo Cherne, has stated, "The KGB invades our civil privacy . . . . Indeed, nothing the 'plumbers' ever contemplated was a fraction as extensive as the routine, daily violation by the Soviet Union of the communications of U.S. individuals, companies and institutions." LAW, INTELLIGENCE AND NATIONAL SECURITY WORKSHOP, *supra* note 10, at 9. On Soviet activities, see also 3 A.B.A. STANDING COMM. ON L. & NAT'L SECURITY, INTELLIGENCE REP. no. 6, at 5-6 (June 1981) (Czechoslovakian activities coordinated with KGB); Epstein, *The Spy War*, N.Y. Times, Sept. 28, 1980, § 6 (Magazine), at 34. With regard to "intelligence operations in the U.S., ranging from surveillance to assassination" conducted by Chile, Iran, the Philippines, South Korea, Taiwan, and Yugoslavia, see *Foreign Spooks*, Houston Post, Nov. 9, 1980, (Parade Magazine) at 17, col. 2; *Spies Among Us*, TIME, Aug. 10, 1981, at 19, col. 1 (Taiwan, Libya).

from foreign government files). Does it matter that the activity is itself arguably protected by international law—for example, as part of a process of a relatively free exchange of information across national borders?

International law does prohibit many types of active and intentional interference with the essentially domestic or internal affairs of another nation,[169] especially the undermining of a foreign self-determination process through strategies of military or economic coercion.[170] The extent of these prohibitions is complicated, however, by other competing interests that might internationalize a situation so that foreign "internal" affairs are no longer "essentially" domestic within the meaning of article 2(7) of the United Nations Charter.[171] Examples include international concern about human right deprivations engaged in by a foreign government against its own people[172] and the relatively recent recognition of a right of self-determination assistance.[173] It is certainly possible that intelligence agencies will participate in activities abroad that involve permissible efforts to further human rights and self-deter-

169. *See, e.g.*, U.N. CHARTER art. 2, paras. 4 & 7; Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States, G.A. Res. 2625, 13 U.N. GAOR Supp. (No. 18) at 337, U.N. Doc. A/8018 (1970).

170. *See, e.g.*, M. MCDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER (1961); J. MOORE, LAW AND THE INDO-CHINA WAR (1972); J. PAUST & A. BLAUSTEIN, THE ARAB OIL WEAPON 70-79, 84-96, 122-23, 137-39, 153-56 (1977) (with relevant U.N. documents reprinted at 310); Falk, *An Alternative to Covert Intervention*, 69 PROC., AM. SOC'Y INT'L L. 195 (1975); Remarks of A. Fatouros, *id.* at 193; Remarks of T. Franck, *id.* at 214-15; Remarks of A. Rubin, *id.* at 210; Paust & Blaustein, *War Crimes Jurisdiction and Due Process: The Bangladesh Experience*, 11 VAND. J. TRANSNAT'L L. 1, 18-19, 30-31 (1978) [hereinafter cited as Paust & Blaustein, *War Crimes*].

171. *See, e.g.*, McDougal & Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AM. J. INT'L L. 1 (1968); Paust & Blaustein, *War Crimes*, *supra* note 170, at 10-19.

172. *See, e.g.*, note 171 *supra*; R. LILLICH & F. NEWMAN, INTERNATIONAL HUMAN RIGHTS 5, 37, 67, 134, 865-66 (1979); M. MCDOUGAL, H. LASSWELL & L. CHEN, *supra* note 124, at 89-90, 185, 208-15, and authorities cited therein. *See also* United States Brief, Filartiga v. Peña-Irala, No. 79-6090 (2d Cir. 1980), *reprinted in* 19 I.L.M. 585 (May 1980), *reviewed in more detail in* Paust, Book Review, *supra* note 95; Paust, *Transnational Freedom of Speech: Legal Aspects of the Helsinki Final Act*, 45 LAW & CONTEMP. PROBS. 53 (1982) [hereinafter Paust, *Transnational Freedom of Speech*].

173. *See, e.g.*, Paust & Blaustein, *War Crimes*, *supra* note 170, at 11-12 n.39, 38; Paust, *Self-Determination: A Definitional Focus*, in SELF-DETERMINATION: NATIONAL, REGIONAL, AND GLOBAL DIMENSIONS 3, 7 (Y. Alexander & R. Friedlander eds. 1980). As the above sources indicate, this might well involve assistance to a people who seek relief from oppression by their present government. Self-determination assistance may even take the form of support for a democratic revolution, causing the overthrow of an oppressive foreign government by relatively peaceful or even violent means. Since such activity is permissible, even desirable, under international law, it should matter little that decrees of the prior dictatorship are thereby "violated." Obviously, the main concern is whether or not self-determination is promoted.

mination, whether or not such internationally permissible activities violate some foreign law. It must be assumed, therefore, that the mere fact of a violation of foreign law is not determinative since adequate inquiry must extend to consideration of all relevant legal policies, including international and United States domestic law.

In addition, commentators generally agree that the mere receipt of information from outside a nation's territorial jurisdiction, without more, is generally permissible.[174] What about the gathering of intelligence from within, or the dissemination of information, not to coerce, but to inform a foreign populace so that they might themselves participate even more effectively in the shaping of their political process? Is there something like a global First Amendment freedom—one that even CIA agents can enjoy? In another article, I have documented the fundamental human right to freedom of opinion and expression, which international law affirms as including the freedom "to seek, receive and impart information and ideas through any media and regardless of frontiers."[175] Although such law has been challenged,[176] United States and foreign intelligence agents who merely gather and disseminate

174. *See generally* N. LEECH, C. OLIVER & J. SWEENEY, THE INTERNATIONAL LEGAL SYSTEM 302-03 (1973) (difference between receipt and sending of information); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 33 (1965) (mere receipt of information abroad must be "recognized as a crime under the law of states that have reasonably developed legal systems"); HARVARD RESEARCH IN INTERNATIONAL LAW art. 7 (1935) (jurisdiction over security threatening conduct outside of state's territory, provided that such conduct is not a liberty guaranteed by the law of the place where it was engaged in; note that mere receipt of information may very well be a human right where engaged in); Almond, *International Monitoring Agency: The French Proposal*, 19 INT'L PRACTITIONER'S NOTEBOOK 22, 24 (Int'l L. Ass'n. July 1982); Remarks of R. Borosage, 69 PROC., AM. SOC'Y INT'L L. (1975) ("[s]ome 85% of our information comes either from open sources . . . or from technological means, such as satellites or sonars. These modes of collection are generally considered to be legal under international law"). *See also* Remarks of R. Borosage, *id.* at 192 (distinguishing between intelligence collection and covert action). *But see* J. SWEENEY, C. OLIVER & N. LEECH, THE INTERNATIONAL LEGAL SYSTEM 190-91, 285 (2d ed. 1981), and references cited therein; Paust, *The Seizure and Recovery of the Mayaguez*, *supra* note 54, at 785 n.58, 789-91 (additional facts of coastal state control measures in their own territorial sea or on the high seas and, thus, not clearly on another state's territory). With regard to "electronic intelligence," see also Epstein, *supra* note 168; Casey, *The State of Intelligence*, 3 A.B.A. STANDING COMM. ON L. & NAT'L SECURITY, INTELLIGENCE REP. no. 6, at 1 (June 1981). In our own domestic system, the mere gathering of intelligence information by lawful means, without a demonstrated harm or threat of harm, has been declared to be nonjusticiable and thus necessarily is constitutionally permissible. *See, e.g.*, Laird v. Tatum, 408 U.S. 1, 16 (1972) ("[T]here is nothing in our Nation's history or in this Court's decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities . . . would go unnoticed or unremedied").

175. Paust, *International Law*, *supra* note 3, at 625-31. *See also* Paust, *Transnational Freedom of Speech*, *supra* note 172.

176. *See* Paust, *International Law*, *supra* note 3, at 648-50.

public information "through any media and regardless of frontiers" would seem to be exercising an internationally protectable human right. They are engaged, to that extent, in an activity related to the public's "right to know" and are not thwarting another human right—the right to privacy.

Yet there are other complications. First, there is an exception to such a freedom: one conditioned by a strict test of necessity within democratic limits.[177] This exception, when properly implemented, allows the foreign government to limit the human rights of a foreign agent within its country.[178] In the reverse situation, in which the human rights of foreign agents who gather public information in this country are involved, the test is also usable, as is any other part of human rights law, by our federal courts;[179] it contains several limiting provisions that seek to accommodate important interests, including the "just requirements" and the "democratic society" phrase. Since the exception is strictly controlled and available only in a "democratic society,"[180] the human right "to seek, receive and impart information and ideas" should be available to United States agents in many countries under many circumstances, regardless of violations of foreign laws that seek to deny this human right and that do not comply with the test set forth in human rights instruments for a lawful exception to such a right. Again, the mere fact that a foreign law is violated should not determine legality under international law or under the supreme federal law of the United States. A second complication arises when intelligence agents seek and receive information that is not otherwise "public" in the "host" country. Then, at least, human rights norms might bend to a foreign country's interest in a right to privacy[181] and foreign espionage laws. The question arises, should the United States

177. *See id.* at 624, 626-29. Article 29, paragraph 2 of the 1948 Universal Declaration of Human Rights reads, "In the exercise of his rights and freedoms, everyone shall be subject to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society." Universal Declaration of Human Rights art. 29, para. 2 (1948).

178. This test, required by international law, seems compatible with the 1978 Foreign Intelligence Surveillance Act, *supra* note 167. *See also* Halperin v. Kissinger, 606 F.2d 1192, 1201 (D.C. Cir. 1979), *aff'd in part*, 452 U.S. 713 (1981).

179. *See, e.g.*, Paust, *International Law*, *supra* note 3, at 665-70; Paust, *Human Rights*, *supra* note 32, *passim*.

180. Paust, *International Law*, *supra* note 3, at 626-29.

181. Since there is a human right to privacy, the foreign law violation may also involve a violation of international law. In such a case, our intelligence agents should be restrained. On the human right to privacy, see Universal Declaration of Human Rights art. 12 (1948); M. MCDOUGAL, H. LASSWELL & L. CHEN, *supra* note 124, at 466, 548-49, 810, 816-17, 820-25, 840-56, and authorities cited therein. Concerning a related right to privacy in the United

government authorize violations of foreign laws that are not themselves overridden by international law, so long as the activity to be engaged in by government agents would not itself constitute a violation of international law or other supreme federal law?[182] Or, in such a circumstance, should we authorize nothing so precise, leaving the matter for executive decision and, realistically, leaving the agent who is caught to the foreign judicial system? The latter approach is the one presently operative, and for now there is no compelling need to change it where supreme federal law is not at stake.

Nonetheless, three important legal restraints on government intelligence agents operating here or abroad have been identified. American agents must not violate: (1) the Constitution, (2) international law, or (3) other supreme federal law. Also identified are three important rights or freedoms based on international law that government agents should be able to enjoy so long as they are not otherwise restricted by supreme federal law: (1) the general freedom to further human rights, (2) the general freedom to promote self-determination in accordance with international law, and (3) the general human right to seek, receive, and impart public information and ideas through any media and regardless of frontiers. These last three rights or freedoms should be available whether or not a foreign law is violated, unless international law recognizes the validity of a foreign law restraining a human right or freedom in accordance with the strict test of necessity within democratic limits. It has also been recognized that international law prohibits many forms of military or economic coercion, and that assassination, torture, or violations of basic human rights must not be allowed whether or not such conduct is compatible with foreign law. Yet, whether or not foreign laws can or should otherwise be violated is left for future consideration.

One final point involves judicial choice concerning limitations placed on the public's "right to know" sensitive and secret intelligence agency information. Although judicial tests are still being refined, greater attention should be paid to the "necessity within democratic

States, see Halperin v. Kissinger, 606 F.2d 1192, 1199-1200, 1210 (D.C. Cir. 1979), *aff'd in part*, 452 U.S. 713 (1981).

182. Note that a violation of a foreigner's (or American's) human right to privacy would be impermissible under article six, clause two of the Constitution, or through the process of indirect incorporation, as explained in Paust, *International Law*, *supra* note 3, at 666, 668-70, but there is an exception to the right of privacy if one can meet the strict test of necessity within democratic limits. *See also* M. MCDOUGAL, H. LASSWELL & L. CHEN, *supra* note 124, at 807 (citing Universal Declaration of Human Rights, article 29); *id.* at 810 (citing American Convention on Human Rights, arts. 30 & 32, and the European Convention on Human Rights, article 8(2)).

limits" test developed as a part of human rights law. As noted above, the human rights test accommodates several important interests while seeking to assure democratic values, and it is usable by the federal judiciary with or without further attempts at guidance through congressional legislation. Nevertheless, no matter what test is finally adopted, there should always be an overriding constitutional exception to governmental secrecy when supreme federal law has been or is likely to be violated.[183]

183. *See* notes 10, 96, 100 & 117-25 and accompanying text *supra*. An intriguing question also worth considering is whether or not foreign government illegalities committed in the United States and known by our government should be revealed publicly. Is there a public "right to know" about these also? For an interesting exchange between Dean Rusk and Richard Falk on this issue, see PROC., AM. SOC'Y INT'L L. 214 (1975) (Rusk disfavoring and Falk favoring disclosure). On balance, I tend to favor disclosure unless overriding national security interests can be demonstrated to a court. I would, therefore, favor a judicial opportunity to make a choice on such a question. On foreign government illegalities, see also note 168 *supra*.

On the preferable and ever-present need for judicial choice, see, *e.g.*, L. TRIBE, *supra* note 9, at 204-05, and cases cited therein; Cox, *Watergate and the Constitution of the United States*, 26 U. TORONTO L.J. 125, 132-33 (1976); Freund, *supra* note 96, at 33-4; Goldberg, *supra* note 81, at 712; Rubin, *supra* note 96, at 598 (Congress clearly intended that the judiciary "should have the final determination of what information should be withheld from public scrutiny on the grounds of national security"); *id.* at 600 (claims of executive privilege have always been subject to judicial review) (citing Berger, *Executive Privilege v. Congressional Inquiry*, 12 U.C.L.A. L. REV. 1044, 1288 (1965)). *Cf.* United States v. Nixon, 418 U.S. 683, 711 (1974) (suggesting a choice not to inspect in certain circumstances, *i.e.*, when the Executive can "satisfy the court" concerning a reasonable danger that *in camera* inspection will lead to exposure of the information—an outcome that would seem in fact to occur only rarely); Founding Church of Scientology v. Bell, 603 F.2d 945, 947-50 (D.C. Cir. 1979); Raven v. Panama Canal Co., 583 F.2d 169, 172 (5th Cir. 1978) (*in camera* inspection at the discretion of the court) (citing Weissman v. Central Intelligence Agency, 565 F.2d 692, 696 (D.C. Cir. 1977)), *cert. denied*, 440 U.S. 980 (1979); Maroscia v. Levi, 569 F.2d 1000, 1003 (7th Cir. 1977); Mead Data Central, Inc. v. United States Dep't of Air Force, 566 F.2d 242, 251 (D.C. Cir. 1977); Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1369 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975); Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974); Serbian E. Orthodox Diocese for United States & Canada v. Central Intelligence Agency, 458 F. Supp. 798 (D.D.C. 1978); Aspin v. United States Dep't of Defense, 453 F. Supp. 520 (D.C. Wis. 1978); Fonda v. Central Intelligence Agency, 434 F. Supp. 498 (D.D.C. 1977). These trends in decision seem generally compatible with dicta contained in the early case of United States v. Burr, 25 F. Cas. 30, 191 (D. Va. 1807) (No. 14, 692d). Even the majority in the *Snepp* decision spoke of "reasonable restrictions on employee activities" and of the fact that the CIA review procedure is itself "subject to judicial review." Snepp v. United States, 444 U.S. 507, 509 n.3, 513 n.8 (1980). *See also id.* at 526 (Stevens, J., dissenting).

It is also worth noting that the Freedom of Information Act, considered in some of the cases noted above, allows judicial *in camera* inspection of certain records or recordings as well as "such additional evidence as it deems necessary." 5 U.S.C. § 552b (h)(1) (1976). This applies to determinations about the propriety of executive classifications of matters sought "to be kept secret in the interests of national defense or foreign policy" in accordance with § 552b (c)(1), as recognized partly there ("in fact properly classified") and in subsection (h)(1) ("jurisdiction to enforce the requirements of subsections (b) through (f)").

Conclusion

In conclusion, it might be useful to recall the observation of a sagacious Englishman who, when confronted with the notion that the King can do no wrong, reminded "that the King not only is capable of doing wrong, but is more likely to do wrong than other men if he is given a chance."[184] Contrary to another old adage—that this is a government of laws and not of men—it seems wise to note that, realistically, we have a government of both. The trick is to make the second attentive to the first.

Choices will be made by real human beings, human beings who certainly can do wrong. Choices must be made about the content of law, and delegated authority does allow a measure of discretion, but one peremptory norm remains—all who exercise authority in the name of the people of the United States, all within the government, as all others living in our country, are bound by the supreme law of the land in their exercise of choice. For this reason, they may never lawfully violate such law.

If it were ever otherwise, then, functionally, as Judge Stern recognized implicitly in *United States v. Tiede*,[185] there would be no Constitution, no First Amendment. Recently, there have been claims made that the President and others can violate the supreme law of the land. Clearly, this and other disturbing notions of executive immunity from law and judicial inquiry must be opposed. Whatever the boundaries of discretion as such, the President must not step outside the law. Furthermore, this line between permissible discretion and law is one that must be drawn by the judiciary—a line that must forever hold against every attempted break and any claimed exception.

Postscript: the Reach of *Fitzgerald*

Justice White, writing in dissent, argued that the recent decision in *Nixon v. Fitzgerald*[186] "places the President above the law,"[187] adding: "It is a reversion to the old notion that the King can do no wrong."[188]

184. A. HERBERT, UNCOMMON LAW 292 (1935), *quoted in* Nippon Hodo Co. v. United States, 285 F.2d 766, 769 (Ct. Cl. 1961). *See also* Butz v. Economou, 438 U.S. 478, 506 (1978); Halperin v. Kissinger, 606 F.2d 1192, 1212 (D.C. Cir. 1979), *aff'd in part*, 452 U.S. 713 (1981) (citing Butz v. Economou, 438 U.S. 478 (1978)).

185. Crim. Case No. 78-001A (U.S. Ct. for Berlin Mar. 14, 1979), *reprinted in* 19 I.L.M. 179, 191 (1980).

186. 50 U.S.L.W. 4797 (U.S. June 24, 1982) (No. 79-1738). The decision in *Fitzgerald* was handed down after this article was in pageproofs.

187. *Id.* at 4806 (White, J., dissenting). *See also id.* at 4815 (Blackmun, J., dissenting).

188. *Id.* at 4806 (White, J., dissenting).

For Justice White, the *Fitzgerald* holding means that the President now:

> [M]ay, without liability, deliberately cause serious injury to any number of citizens even though he knows his conduct violates a statute or tramples on the constitutional rights of those who are injured . . . . He would be immune regardless of the damage he inflicts, regardless of how violative of the statute and of the Constitution he knew his conduct to be, and regardless of his purpose.[189]

Nevertheless, Justice White recognized that the majority opinion in *Fitzgerald* "is almost wholly a policy choice, . . . and . . . is ambiguous in its reach and import."[190] He also recognized, in contrast to his dire prediction about placing the President "above the law," that the *Fitzgerald* holding leaves the President subject to the impeachment sanction,[191] to criminal prosecution,[192] to suits seeking declaratory or injunctive relief,[193] and generally to judicial review and "judicial process."[194] Moreover, he added quite appropriately: "Regardless of the possibility of money damages against the President, then, the constitutionality of the President's actions or their legality under the applicable statutes can and will be subject to review."[195]

These latter recognitions are, in my opinion, closer to the mark. As Justice Powell observed while writing for the majority, the civil damages immunity decision "will not place the President 'above the law' . . . [but] merely precludes a particular private remedy for alleged misconduct."[196] Chief Justice Burger, concurring separately, seemed to agree, while adding:

> The dissents are wide of the mark to the extent that they imply that the Court today recognizes sweeping immunity for a President for all acts. The Court does no such thing. The immunity is limited to civil damage claims. Moreover, a President . . . [is]

189. *Id.* *See also id.* at 4807.

190. *Id.* at 4807. *See also id.* at 4813 ("ambiguity even with respect to the most fundamental point: How broad is the immunity granted the President?").

191. *See id.* at 4807 n.2, 4810. *See also id.* at 4804 (Powell, J., opinion).

192. *Id.* at 4810 (White, J., dissenting). *See also id.* at 4804 n.38 (Powell, J., opinion). On this point, see also text accompanying notes 84-87 *supra*.

193. 50 U.S.L.W. at 4810 (White, J., dissenting). On this point, see also text accompanying notes 90-93 *supra*.

194. 50 U.S.L.W. at 4810 (White, J., dissenting). *See also id.* at 4805 (Burger, C.J., concurring). On this point, see also text accompanying notes 90-93 *supra*.

195. 50 U.S.L.W. at 4810 (White, J., dissenting).

196. *Id.* at 4804 (Powell, J., opinion). See also *id.* at n.41, where Justice Powell adds that Justice White's fear of the Fitzgerald decision placing the President above the law is "wholly unjustified," that the President "remains accountable under law for his misdeeds in office," and that the case "involves only a damages remedy."

not immune for acts outside official duties.[197]

Thus, although the reach of *Fitzgerald* is partly ambiguous, and one can appreciate Justice White's concern about the impact of the decision on presidential obedience to supreme federal law, at least two points are made clear: (1) no member of the Court claims that the President can violate the law, and (2) no member of the Court claims that the President is immune from sanctions other than civil damage remedies. Also important is that every member of the Court would limit the cutback of civil damages relief at least to cases where the President was acting within the scope of his constitutional authority.[198] As the Chief Justice explicitly forewarned: "[A]bsolute immunity does not protect a President for acts *outside* the Constitutional function of a President"[199] or "outside official duties."[200]

For these reasons, *Fitzgerald* is "merely" a civil damages case,[201] and the impact of *Fitzgerald* will hinge on subsequent use of the "within the scope" concept—at least until a change occurs in the Court's membership[202] or, as some members of the Court seem to intimate, Congress expressly creates "a damages action against the President of the United States."[203] For purposes of this article the main question remaining is whether, contrary to some of the critical statements of Justice White, the majority of the justices recognize that when

197. *Id.* at 4804 (Burger, C.J., concurring). *See also id.* at 4805 n.4, 4806; Harlow v. Fitzgerald, 50 U.S.L.W. 4815, 4822 n.5 (U.S. June 24, 1982) (No. 80-945) (Burger, C.J., dissenting).

198. *See, e.g.*, Nixon v. Fitzgerald, 50 U.S.L.W. 4797, 4798, 4802 n.27-4804 (Powell, J., opinion), 4804-06 (Burger, C.J., concurring); Harlow v. Fitzgerald, 50 U.S.L.W. 4815, 4822 n.5 (Burger, C.J., dissenting); *cf. id.* at 4821 (Rehnquist, J., concurring) (would "reexamine our holding in *Butz v. Economou*").

199. Harlow v. Fitzgerald, 50 U.S.L.W. 4815, 4822 n.5 (Burger, C.J., dissenting) (emphasis in original).

200. Nixon v. Fitzgerald, 50 U.S.L.W. 4797, 4804 (Burger, C.J., concurring); *see also id.* at 4805 n.4, 4806 (acts must be "within the scope of Executive authority").

201. *See* Nixon v. Fitzgerald, 50 U.S.L.W. at 4802 n.27 (decided only that President is immune from civil damages liability for his official acts), 4804 ("merely precludes a particular private remedy") (Powell, J., opinion). *See also id.* at 4804, 4806 (Burger, C.J., concurring).

202. This is an obvious point for most, but it is underscored by Justice White's recognition that *Fitzgerald* "is almost wholly a policy choice," without adequate historical underpinning or express textual support. *See* 50 U.S.L.W. at 4807 (Justice White adding: "This is policy, not law, and in my view, very poor policy"). *See also id.* at 4810 ("no support in constitutional text or history, or in the explanations of the earliest commentators"); *cf. id.* at 4802 n.31 (Powell, J., opinion). Moreover, the notion of civil damages immunity has no proven support in patterns of generally shared legal expectation in the United States.

203. *See id.* at 4802 n.27 (Powell, J., opinion); *see also id.* at 4815 (Blackmun, J., dissenting). Chief Justice Burger clearly disagrees with any notion that Congress can create presidential civil damages liability. *See id.* at 4806 n.7. On the legislative cutbacks of immunity generally, see note 110 *supra*.

a President violates supreme federal law he does not function "within the scope of Executive authority,"[204] "official acts,"[205] "official duties,"[206] or "the Constitutional function of a President."[207] For reasons noted below, I believe that each member of the Court either assumes or affirms such a recognition.

Indeed, Chief Justice Burger, in response to Justice White, has implicitly declared that if a President knows, for example, that his conduct violates a statute, he is acting "*outside* the Constitutional function of a President" and civil damages immunity will not be allowed.[208] The Chief Justice also declared: "Far from placing a President above the law, the Court's holding places a President on essentially the same footing with judges and other officials whose absolute immunity we have recognized."[209] Since judges and other officials are not immune from actions based on knowing or reasonably foreseeable violations of law because such violations are not within the scope of judicial or other official functions,[210] Chief Justice Burger's statements are consistent. Moreover, the Chief Justice added that *Fitzgerald* does not preclude inquiry, "in a given case, . . . *whether* an official—even a President—

204. For use of this language, see *id.* at 4805-06 (Burger, C.J., concurring); *see also id.* at 4804 (Powell, J., opinion) (within his constitutional and statutory authority).

205. For use of this language, see *id.* at 4802 & n.27, 4803 (Powell, J., opinion), 4804 n.1, 4805 (Burger, C.J., concurring).

206. For use of this language, see *id.* at 4803 & n.32 (Powell, J., opinion), 4804, 4805 n.4 (Burger, C.J., concurring).

207. For use of this language, see Harlow v. Fitzgerald, 50 U.S.L.W. 4815, 4822 n.5 (Burger, C.J., dissenting).

208. *Id.* (emphasis in original). *See also* Nixon v. Fitzgerald, 50 U.S.L.W. at 4804-05 & n.3 (Burger, C.J., concurring) (does not prohibit sanctions against illegal acts since such are outside scope of duties).

209. Nixon v. Fitzgerald, 50 U.S.L.W. 4797, 4806 (Burger, C.J., concurring); *see also id.* at 4804.

210. *See, e.g., id.* at 4806, 4807 n.2 (White, J., dissenting) (unlawful activity "does not fall within the judicial, legislative, or prosecutorial functions to which absolute immunity attaches"); cases and materials cited in note 110 *supra* (especially Beard v. Udall, 648 F.2d 1264, 1267-70 (9th Cir. 1981)); Butz v. Economou, 438 U.S. 478, 489-91, 493-95, 498 (1978); Comment, *Immunity of Federal Executive Officials to Damage Suits for Constitutional Violations*, 19 HOUS. L. REV. 299, 305, 319 (1982) (unconstitutional acts are not authorized and not within the scope). *See also* Harlow v. Fitzgerald, 50 U.S.L.W. 4815, 4818 (Powell, J., opinion) (judges absolutely immune only when performing judicial function); United States v. Helstoski, 442 U.S. 477, 492 (1979) (no congressional immunity for illegal acts); O'Shea v. Littleton, 414 U.S. 488, 503 (1974) (judge and others not immune for illegal acts); Gravel v. United States, 408 U.S. 606, 627 (1972) (no official immunity for criminal conduct); United States v. Brewster, 408 U.S. 501, 516 (1972) (same); Larson v. Domestic & Foreign Corp., 337 U.S. 682, 698-99 (1949); United States v. Lee, 106 U.S. 196 (1882), *quoted in* text accompanying note 132 *supra*; Wilkes v. Dinsman, 48 U.S. (7 How.) 89 (1849), *quoted in* note 138 *supra*; Gregory v. Thompson, 500 F.2d 59, 63 (9th Cir. 1974) (no judicial immunity for act of assault in courtroom).

had acted within the scope of the official's constitutional and statutory duties," and that "absolute immunity does not extend beyond such actions."[211]

Whether or not the majority's characterization of the events was correct, Justice Powell consistently stressed that the plaintiff's claim in *Fitzgerald* actually rested on acts "well within" the scope of presidential authority.[212] Moreover, he added: "In defining the scope of an official's absolute privilege, this Court has recognized that the sphere of protected action must be related closely to the immunity's justifying purposes."[213] Since Justice Powell identified these as including primarily the need to avoid "the dangers of intrusion on the authority and functions of the Executive Branch,"[214] one can assume that Justice Powell would agree with the Chief Justice that illegal conduct outside the authority and the constitutional function of a president will not be protected.[215] Illegal conduct clearly is not "related closely to the immunity's justifying purposes," but is instead destructive of those purposes, the more general legal policies at stake,[216] and—as recognized earlier by the House Judiciary Committee—our form of constitutional government.[217] Further, as the above article demonstrates, when the President violates the supreme law of the land, he acts without authority and beyond his constitutionally prescribed powers.[218]

211. Nixon v. Fitzgerald, 50 U.S.L.W. 4797, 4805 n.4 (Burger, C.J., concurring) (emphasis in original). *See also id.* at 4804.

212. *Id.* at 4804 (Powell, J., opinion) (clearly within President's authority, "well within the outer perimeter of his authority"); *see also id.* at 4798 n.34 (actions within official capacity), 4802 (official acts), 4803 (within official duties). Justice Powell also noted the administrative finding below that Fitzgerald's allegation that he was fired in retaliation for his testimony before a congressional committee was not supported by "the evidence in the record." *See id.* at 4799. Justice White clearly disagreed, and his assumption that President Nixon had actually acted illegally in this instance seemed to form the basis for his assumption that the majority was approving immunity in the case of known illegal conduct. *See, e.g.*, *id.* at 4806 (White, J., dissenting); text accompanying notes 187-89 *supra*. *Cf.* 50 U.S.L.W. at 4812 (White, J., dissenting).

213. Nixon v. Fitzgerald, 50 U.S.L.W. at 4803.

214. *Id.*

215. *See* text accompanying note 208 *supra*.

216. *See, e.g.*, text accompanying notes 76-83, 101-18, 128-53 *supra*.

217. *See* text accompanying note 107 *supra*.

218. *See, e.g.*, text accompanying notes 76-83, 101-18, 128-53 *supra*. For this reason, a separation or balance of powers inquiry would be misplaced when the President violates supreme federal law, for the President has no power to violate the law. As the Chief Justice, who generally favors a separation of powers rationale, must have recognized, when the President violates the law he acts "outside the Constitutional function of a President." *See* text accompanying note 208 *supra*. Justice White would surely agree. *See* Nixon v. Fitzgerald, 50 U.S.L.W. at 4814 (White, J., dissenting).

The dissenting justices quite clearly agree with these points. Indeed, the whole thrust of their argument is that not only should the President be liable for civil damage remedies for illegal conduct engaged in outside the delegated authority of the President, but that he should also be liable for any actionable injuries caused by conduct occuring within the scope of his powers.[219] As Justice White seemed to summarize, "the President should have the same remedial obligations toward those whom he injures as any other federal officer."[220]

Justice White's statement, then, that the majority would allow the President "deliberately [to] cause serious injury to any number of citizens even though he knows his conduct violates a statute or tramples on the constitutional rights of those who are injured"[221] is misplaced and possibly an overreaction.[222] If the President knew that his conduct was violative of supreme federal law, he would be acting outside his constitutional authority, and, as the Chief Justice concurred, would not be entitled to immunity. Thus, however appropriate the concern of Justice White, the President is not "above the law" and cannot violate the supreme law of the land with impunity.

Yet, Justice White did make a more compelling point. As he declared more generally: "To the extent that the Court denies an otherwise appropriate remedy, it denies the victim the right to be made whole and, therefore, denies him 'the protection of the laws.' "[223] Thus, even when the President acts lawfully, he "should [still] have the same remedial obligations toward those whom he injures as any other federal officer."[224] What Justice White challenged therefore, at least in part, was the basis for a lingering concept of immunity in a democratic society that seeks to perpetuate not merely obedience to law but also " 'the

219. *See generally* Nixon v. Fitzgerald, 50 U.S.L.W. at 4806-15 (White, J., dissenting); *see also id.* at 4815 (Blackmun, J., dissenting).

220. *Id.* at 4811 (White, J., dissenting).

221. *Id.* at 4806. For similar statements, see *id.* at 4806-07.

222. Nowhere did the majority make these kind of statements. Further, they were expressly or impliedly repudiated. *See* text accompanying notes 196-97, 199-200, 204-18.

223. Nixon v. Fitzgerald, 50 U.S.L.W. at 4811 (White, J., dissenting).

224. *Id.* There is also more historical evidence in support of such an expectation. *See id.* at 4808-10. One might also have thought that cases like United States v. Lee, 106 U.S. 196 (1882), would have established that since the President cannot violate the law with "impunity" he might not be immune in cases where law has not been violated. Wilkes v. Dinsman, 48 U.S. (7 How.) 89, 123 (1849), a case not cited in *Fitzgerald* but one involving an action of trespass against a military commander for assault and battery, seems equally important: "[T]he chief agent of the government . . . is not to be shielded from responsibility if he acts out of his authority or jurisdiction, or inflicts private injury either from malice, cruelty, or any species of oppression, founded on considerations independent of public ends."

protection of the laws.' "[225] And although such a challenge has been partially set back by *Fitzgerald*, it will surely continue as long as a free people cherishes the human right of each person to an "effective remedy."[226]

225. *See also* note 110 *supra*. Using the words of the Chief Justice in another opinion, Justice White seemed to emphasize the policy justification for what he might term a better "policy choice" concerning civil damages immunity: " 'Accountability of each individual for individual conduct lies at the core of all law—indeed, of all organized societies. The trend to eliminate or modify sovereign immunity is not an unrelated development; we have moved away from "the king can do no wrong." This principle of individual accountability is fundamental . . . .' " Nixon v. Fitzgerald, 50 U.S.L.W. 4797, 4807 (White, J., dissenting) (quoting Complete Auto Transit, Inc. v. Reis, 451 U.S. 401, 429 (1981) (Burger, C.J., dissenting)). *See also* Nixon v. Fitzgerald, 50 U.S.L.W. at 4811 & n.26.

226. *See* Article 8 of the Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810, at 137 (1948): "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." On the general question of remedies, one should also recall the pronouncement of Chief Justice Marshall in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803): "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection . . . [Blackstone] says, 'it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded.' " For a similar point by the European Court of Human Rights, see Golder v. United Kingdom, Judgment of 21 Feb. 1975, Ser. A, vol. 18, paras. 34-35, *reprinted in* R. LILLICH & F. NEWMAN, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY 563, 570-71 (1979). On the use of human rights law in constitutional litigation, see, *e.g.*, Paust, Book Review, *supra* note 95, at 229-44; Paust, *Human Rights*, *supra* note 32; *Symposium on Human Rights*, 4 HOUS. J. INT'L L. no. 1 (1981).