THE PRESIDENTIAL CONTROL ATTEMPTING TO CHANGE
THE “CHECKS AND BALANCES”
—FOCUSBING ON THE EXECUTIVE ORDERS—

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This article makes an analysis on the growth of the power of the President of the United States from the viewpoint of legal, in particular constitutional theories. The unilateral and increasing presidential power mainly relied upon the principles which authorize extra-constitutional actions when in emergencies and in the realm of foreign affairs. This paper, referring to one of the most historic orders, Executive Order 9066, illustrates how the unilateral exercise of executive power has been justified. Also, the comparative analysis between this and case over NSA suggests that the logic used during World War II is still alive, and it is even developed further. The conclusion of the paper makes some reflections on issues about introduction of “emergency provisions” through constitutional provisions.

I. INTRODUCTION

The new president, Donald Trump has issued many executive orders, some of which are highly controversial, including executive orders on travel ban or building the wall on the border between Mexico.¹ The media has been responding to the excessive

¹ The executive order on travel ban (Executive Order 13769) was issued on January 27, 2017. After the wide criticism from the people of different fields and legal challenges, the redrafted order followed on March 6, 2017. About the original one, see, “Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States,” The White House, accessed December 19, 2017, (https://www.whitehouse.gov/presidential-actions/executive-order-protecting-nation-for-eign-terrorist-entry-united-states/).
As to the order on building the wall between the United States and Mexico, see, “Executive Order: Border Security and Immigration Enforcement Improvements,” The White House, accessed December 19, 2017,
issue of orders in both of their quantity and quality, criticizing it as the abuse of
executive powers. For example, CNN news warned of the unusual pace of signing
executive orders.\(^2\) This article, referring to the examples of unilateral presidential
exercise of power, illustrates how his power expanded and what kind of rhetoric of legal
discussion supports this phenomenon.

To begin with, what is the executive order? The executive order is a directive to
the executive branch issued by the president.\(^3\) It was since the Federal Register Act in
1936 when the thorough documentation of Executive Orders officially began.\(^4\) The
content or frequency of presidential orders has varied in the history of the U.S.
Presidency.

Some stressed the “formal” weakness of the president. For instance, Richard
Neustadt concluded that, referring to three decisive orders by the presidents, they were
“a painful last resort, a forced response to the exhaustion of all other remedies \(\ldots\)^\(^5\)
Initially, it actually was the last resort to overcome the weakness of the position of the
president. As the president came to resort to executive orders, however, these practices
have come to play a greater role through making precedents of the expansion of
presidential power.\(^6\)

Also, the ambiguity of the Constitutional text provoked the heavy reliance on the

\(^2\) “Trump is on pace to sign more executive orders than any president in the last 50
\(^3\) Kenneth R. Mayer, With the Stroke of a Pen: Executive Orders and Presidential Order
\(^4\) “Executive Orders,” The American Presidency Project, accessed November 24, 2017,
\(^5\) Richard E. Neustadt, Presidential Power and the Modern Presidents (New York: Free
\(^6\) Mayer, With the Stroke of a Pen, 54-58.
practices by the presidents. The Article II of the Constitution, which is the source of executive authority and adds only a simple list of specific powers about what consists of the “executive power,” illustrates the sharp contrast especially in comparison with Article I, which deals with the legislative power, in two significant ways. First, the catalog of powers commissioned to Congress is both long and comprehensive. Second, one cannot see the explicit counterpart to “necessary and proper clause” of Article I. These provisions of the Constitution show the unwillingness of the Framers about awarding one person, the President, the ultimate power, as proved in the language of the Article I, Section 8, which gives Congress the power to declare war, as well as the power to raise and support armies. The war power is separated and shared by the both branches.

Although there is no clear evidence that the Framers intended to vest the President with exclusive power to deal with the emergencies in the international relations, the President gradually gained his predominance. This does not stem from the Constitutional structure, but results from the social and historical changes.

In Part II of this article, I will refer to one of the most influential executive orders in the American history, the Executive Order 9066, and Korematsu case, in which the Supreme Court decided over the constitutionality of the order. In this case, the majority opinion, which ruled that the order was constitutional, stressed “military necessity” to intern the Japanese-American, for the purpose of protecting the people from public danger under the war situation. As the later evidence illustrates, such necessity has not

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8 This section enlists the power of the Congress, such as the power to declare war, to raise and support armies, to provide and maintain navy, and so forth.

been proved yet.

Part III will illustrate that, in the context of the “war on terror”, the President, in *ACLU v. NSA* case, argued the legitimacy of warrantless massive wiretapping. The President attempted to justify anti-terrorism measures which he thought was necessary on the basis of the Commander-in-Chief Clause in the Constitution. Moreover, the claim by the government shifted from the civil rights issues to a new interpretation on separation and distribution of powers.

Part IV of this essay will make a comparative analysis and a comment on these two major cases of different times above. The similarities and differences between them would present the fact that the theory which approved the mass deprivation of civilian’s liberties still has influence in today’s context of fight against terrorism.

Finally, as a conclusion, I will briefly summarize my argument and make some comments on the recent dispute over constitutional provision of introducing “emergency provisions.”

II. THE GROWTH OF THE PRESIDENTIAL POWER

1. The Establishment of the Principle of Necessity and Foreign Affairs Law

Since the Constitution does not explicitly catalogue the presidential powers, his discretion often needs logics to defend its legality.

The “principle of necessity” has been employed to make normally unlawful actions lawful, as unanimously decided in *Moyer v. Peabody* case\(^\text{10}\). When the labor

\(^\text{10}\) 212 U.S. 78 (1909).
dispute, known as the Colorado Labor Wars, arouse in the mining industry in Colorado, the Governor Peabody, who was anti-union, called out the Colorado militia, which led to breaking the strikes and arrests of many. The Governor defended the imprisonment, which continued from the morning of March 30, 1904 to the afternoon of June 15. Justice Holmes supported its legality by proclaiming that the ordinary rights of individuals must yield to what the head of State deems the necessities of the moment in public danger and the executive decision substitutes the judicial one.  

Second, in the *United States v. Curtiss-Wright Export Corp.* case, the Court decided that the President must be vested a degree of discretion and freedom about the matter of negotiation and inquiry within the international field from statutory restriction. The case was raised after the Curtiss-Wright Export Corp. was indicted for violating the arms embargo, which Congress authorized the President to place on the countries which engaged in Chaco War. The court’s opinion by Justice Sutherland held that “in the vast external realm,” the President alone has the exclusive power as “the sole organ” of the federal government in the field of international relations.  

In these two cases, the principle of necessity and the principle of “foreign affairs” were great justifiers of the wide discretion of the President. While the authority of the President in international relations and the legitimacy to respond immediately to the national crises might be examined separately, the issues they cause in the discussion of constitutional democracy are quite similar, including the civil liberties issues, and the limitation and separation of power. These came to combine with each other over the constitutional case over the executive order by the President to respond to the “crises”

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11 212 U.S. 78 (1909) at 85.  
12 299 U.S. 304(1936).  
13 299 U.S. 304(1936) at 320.  
the Americans experienced during the World War II: the Pearl Harbor.

2. Application of the Principles to the Korematsu Case

These principles, the foreign affairs law and the principle of necessity, support and affect the legal case over the most infamous exercise of presidential power; Executive Order 9066.

After the Pearl Harbor on December 7, 1941, Emboldened with an active campaign of the military and civilian leaders to intern Japanese-Americans living in the West Coast\(^{15}\), President Franklin D. Roosevelt issued the Executive Order 9066, which authorized the military to exclude people (mainly Japanese ancestry) from designated areas and intern into the concentration camps. Under this order, approximately 120,000 individuals of Japanese ancestry, including both citizens and non-citizens, were forced to be shipped off to the relocation centers.\(^{16}\) Fred Korematsu, a Japanese-American citizen who was arrested for violating the exclusion order, appealed to the Court with the help from the American Civil Liberties Union (ACLU). The Supreme Court, in *Korematsu v. United States*, decided over the constitutionality of the internment.

In the majority opinion, Justice Black held the internment program as constitutional, siding with the government by following that, Korematsu was excluded, not because of hostility to his race, but because the military urgency. According to him, pressing public necessity may sometimes justify the existence of such restrictions, while racial antagonism never can. He noted that we cannot say in hindsight the actions were unjustified at that time, considering the situation of the attack by the Japanese Navy.

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\(^{16}\) About the Japanese Internment, see, Eugene V. Rostow, “The Japanese American Case—A Disaster,” 54 Yale L.J. 489 (1945).
Justice Black, who tried to write the opinion as limited a fashion as possible, clarified that the task of the court should be to determine the existence of the “pressing public necessity”. The concurring opinion by Justice Frankfurter also insisted that “the validity of action under the war power must be judged wholly in the context of war.”

Justice Roberts, Murphy, and Jackson dissented. The dissenting opinion by Justice Murphy criticized this justification for “questionable racial and sociological grounds” not ordinarily within the realm of expert military judgment, drawn from an unwarranted use of circumstantial evidence. Justice Jackson also expressly worried what the decision would mean in the future if the Court approved the actions based entirely on racial classification. He left famous words: “The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”

Gil Gott has pointed out that, not only Korematsu case deserves great attention because in it, the internment’s discriminatory nature and its deprivation of the basic rights became the major issues, but also because it is the new precedent which the foreign affairs was applied to. In the light of the external threat, such as the chaos of the international realm, the lawless action would be categorized as “necessary.” In Korematsu case, the exclusion of Japanese ancestry from the West Coast was considered a necessary order, at least in the time when the order was made, with a definite and close relationship to prevent espionage and sabotage, given the external threats including the “disloyalty” of Japanese-American citizens.

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18 Melvin I. Urofsky, Dissent and the Supreme Court, 250.
III. CONTEXT OF TODAY – “WAR ON TERROR”

1. Enactment of Anti-Terrorist Acts

We have overviewed the logics the Court used to justify the Japanese Internment. Interestingly, they reappear in the use of the executive power against terrorism in recent years.

After the terrorist attacks on the World Trade Center and Pentagon on September 11, the executive power expanded unprecedentedly. Through passing the Authorization of Use of Military Force (AUMF), Congress authorized the President to use “all necessary and appropriate force” against those nations, organizations, or persons, which he determine planned, authorized, committed, or aided the terrorist attacks. Also, Congress passed the Patriot Act, which authorized the federal government to significantly ease the requirements for the electronic surveillance of future terrorists. Furthermore, Congress revised the Foreign Intelligence Surveillance Act (FISA), which was originally enacted in 1978 after revelations of widespread spying during Nixon Administration on American citizens by federal law enforcement and intelligent agencies. After enacting the Patriot Act, the purpose of preventing terrorist attacks was added to the requirement of the electronic surveillance.

Despite these legislatures made it much easier to conduct surveillance program with approval by a court, the President ordered warrantless mass surveillance over the citizens in the United States through neglecting judicial authority, which was made public by the leak of the New York Times in 2005.

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20 Harvey Gee, “Habeas Corpus, Civil Liberties, and Indefinite Detention during Wartime: From Ex Parte Endo and the Japanese American Internment to the War on Terrorism and Beyond”, (47 The U. of Pac. L. Rev. 791, 2016), 807-812.
2. Inherent Power for warrantless wiretapping? – ACLU v. NSA Case

Among the most controversial cases over anti-terrorism measures by the executive power is ACLU v. NSA case. On December 16, 2005, the New York Times released the article by James Risen and Eric Lichtblau, reporting that President Bush secretly authorized the National Security Agency (NSA) to monitor the international telephone calls and international e-mail messages of hundreds, perhaps thousands, of people inside the United States in effort to track possible terrorist activities. The presidential authorization which enabled this was a secret presidential order signed in 2002, soon after the terrorist attacks of 9/11. The President Bush first criticized the source of the leak, but later admitted, and even claimed the legality of that action.

The ACLU claimed the unconstitutionality of the program under the First and Forth Amendments. In addition to these debates over human rights issues, in this case, also the checks and balances issue was brought into the court.

In the rationale, which grounds mass wiretapping by the Bush administration, we can find the explicit change, when comparing it with the similar early cases. Prior to NSA case, in the United States v. U.S.D.C. case of the Supreme Court, in which three suspects were arrested on a charge of undertaking the bombing of the CIA office, the issue was the lawfulness of the arrest because it was based on the evidence by the

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warrantless wiretapping. In this case, the Court held that, under the Art. II section 1 of the Constitution, the President of the United States has the fundamental duty, “to preserve, protect, and defend the Constitution of the United States.” In this duty, the implicit duty of the President is, to protect the government. In discharge of this duty, “the President…may find it necessary to obtain intelligence information on the plans of those who plot unlawful acts against the Government.” At the same time, the Court rejected the Government’s argument that the internal security matters are too subtle and not suitable for the judicial evaluation but rather held that these duties should be exercised under the separation of powers. While the Court derived the executive power for wiretapping to protect the constitutional government from the Oath Clause, it limits the power, from this clause, by the duty to avoid the infringement of the Amendments freedoms, in this case the Fourth Amendment.  

After the attack of 9/11, however, the argument by the President presented some changes as shown in NSA case. The President Bush, instead of the Presidential Oath Clause, found the legal basis to support his side in Commander-in-Chief Clause. After the government’s initial defense which claimed that the AUMF authorized the warrantless wiretapping failed in the way which it is not compatible with the language of other federal statutes, the government shifted to the claim of “inherent power” of

27 The Fourth Amendment provides that, “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”
28 The Section 2 of the Article II provides that, “[t]he President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States....”
30 David Cole, “Reviving the Nixon Doctrine: NSA Spying, the Commander-in-Chief,
the President to act without any legal basis.\footnote{31}{About the theory of “inherent power”, see Erwin Chemerinsky, “Controlling Inherent Presidential Power: Providing a Framework for Judicial Review,” 56 S. Cal. L. Rev. 863, 1983.}

However, the court also dismissed the government’s claim of the “inherent power”. The government appeared to argue, according to Article II of the Constitution, particularly the President as Commander in Chief of the Army and Navy, he had been granted the inherent power to violate not only the laws of Congress but the Amendments. The Court, however, pointed out that the President as the Chief Executive itself has been created, with the power of the Constitution. “There are no hereditary Kings in America and no powers not created by the Constitution. So all ‘inherent powers’ must derive from that Constitution”, Justice Taylor proclaimed.\footnote{32}{493 F. 3d 644(2007) at 781.} Following this legal basis, the opinion noted that even in the time of emergencies, the President is Commander in Chief of only the military, not of all the people.

This case attracted attention from all around the globe, not just because of the controversy over the legality of the program, but by the government’s arguments on the checks and balances.\footnote{33}{David Cole, “Reviving the Nixon Doctrine,” 38.} As explained above, the legal basis of the government shifted from the Oath Clause to the Commander in Chief Clause. This means that, the sphere of the power on the military and anti-terrorist measures are approaching each other. That is, the scope of ”military power” has been growing, as was the Government’s argument in NSA case, through applying it to the prevention of conspiracy of domestic “terrorist attacks”, and with these attempts by the executive branch, the Presidential power has

\begin{itemize}
\item \footnote{34}{The attention this case attracted was considerable notwithstanding that this case was not finally brought to the Supreme Court, because of the High Court’s judgement about the lack of the standing.}
\end{itemize}
been expanding, stirring up the sense of crisis.

IV. COMPARATIVE ANALYSIS ON THE CASES

I have juxtaposed two major cases above; Korematsu case and ACLU v. NSA case. In the comparative analysis of these two, some similarities and differences between those two must be noticed.

These two cases are good examples in which the court reveals their unwillingness to decide on the political question, the executive decisions. In the former, even Justice Jackson, who did not agree the majority opinion, admitted that the state-interest was not reviewable. In the latter case, too, the High Court refused to decide on the issue because of lack of standing, which is the common method to avoid the political question.

In Korematsu case, by integrating the principle of necessity clause and foreign affairs law, the President exercised expansive power to intern Japanese ancestry, considering the emergencies after the Pearl Harbor as the international relations matter of war against Japan. In recent context —in “The Age of Terrorism” after 9/11— the expansion of the powers of the President can be observed, based on the Inherent Power of the President to protect the country.

As to the principle of necessity, which supports the presidential power to take extralegal actions in the emergencies, the supporters of this principle during the

35 “The political question” doctrine is a technique which the court often uses to show respect to other governmental branches and avoid deciding over highly political issues. Among these examples are the area about the military issues and foreign affairs issues. See, Shigenori Matsui, America Kenpou Nyumon (The Introduction of the Constitution of the United States) (Tokyo: Yuhikaku, 2012), 192-194.
emergencies have stressed that the Constitution is not a suicide pact, and therefore the President is entitled to take any measures necessary for national self-preservation. Professor Paulsen have proposed this principle as a meta-rule, which is required for preserving the constitutional government and should be given the priority at the expense of specific constitutional provisions. Moreover, he construes the first Section of Article II, the Presidential Oath Clause, as vesting a power of constitutional interpretive supremacy, and therefore a power to apply the principles of constitutional necessities in times of crises. As to the anti-terrorism attacks in the recent years, some advance their claim even further to the inherent power of the President to take the leadership of “war on terror”, as the Attorney General claimed in NSA case.

Some cast doubt, however, on these arguments which draw an analogy between the power to conduct war and to fight against terrorism. Those who criticize this position, firstly points out that, “terrorism” has no strict, established and historical definition even in the international law. Also, as a more substantial criticism, some pointed out that, while wars or some emergencies have more or less a clear end in general, there is no end in the fight against terrorism. Such easy analogy would lead the endless and constant exercise of extra-constitutional power by the executive branch.

Moreover, more radical criticism would question that, if we choose to compare

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37 The first Section of Article II provides as follows: “Before he enter on the execution of his office, he shall take the following oath or affirmation:—‘I do solemnly swear(or affirm) that I will faithfully executive the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States.’”
with our civil rights the interest such as “national preservation” as the administration claimed during the wartime or disturbances after the terrorist attack, every unlawful and even unconstitutional action would be justified without any substantial tests. To prevent the exercise of unlimited actions of the executive branch, the “proportionality”, which is supposed to be interwoven with the “necessity” test, should also be satisfied.

Apart from the justification of restricting the fundamental rights debate, as to the separation of powers issues, the President might possibly be the most appropriate position to respond at once in the extreme emergencies. We cannot foresee what kind of emergencies will come in the future. However, we must notice that the use of the unilateral power should be the last resort. At the same time, it is not “inherent” or “inviolable” realm of the President, but the other branches, the Congress and the Court, or either of them, would judge afterwards the action was truly “necessary.”

V. CONCLUSION – REFLECTION ON DISCUSSION IN JAPAN

We have overviewed the legal cases and theories which attempt to justify the overriding civil liberties guaranteed in the Constitution by the presidential orders in the times of World War II, as a case of emergencies, and in recent years, as anti-terrorism measures. In Korematsu case, the internment was authorized by a duty of the President to take a necessary measure to protect their country from the Japanese spies’ attacks. In the latter, the government even advocates that it is not only the duty but also the inherent power vested by the Commander-in-Chief Clause, to take any necessary measures to fight against terrorist attacks successfully, avoiding the fundamental rights
issues by bringing the debate on separation of powers.

The debates in the United States would give not a little suggestion on current legal and political dispute in Japan; the constitutional revision issues over the stipulation of “emergency provisions”. Even though both cases differ from each other in the way that, the one of the United States was about the legitimacy of the exercise of presidential power which is extraconstitutional, while the counterpart of Japan is about the revision of the Constitution, they are sharing notable similarities in the heart of the issues.

As well as Article 9 of the Constitution of Japan, the administration has claimed and its proponents have supported the introduction of the so-called “emergency provisions”, which vest the government a great power to take measures which it thinks is necessary in “emergencies” it declares. This could be similar with the claim which justifies the expansion of the executive power in emergencies, as seen above in the cases about Korematsu or NSA. Rather, this could be more drastic change than the case of the United States in allowing a great discretion in advance with the text of the Constitution.

Every state will go through some unforeseeable emergencies as long as it exists; wars, disasters, or massive terrorist attacks. Preparing for any catastrophic situations, the proponents’ aim to grant executive branch a privilege to declare emergency and to act unlawfully would only end up maximizing the potential of governmental actions. If the urgent need forced the government to take extralegal measures, the “necessity” or “proportionality” of them should be left to the judgment of other branches.

Last year, 2017 marked the 75th anniversary of Japanese Internment authorized by the executive order signed by Franklin D. Roosevelt. The lessons of this historical event question the extraconstitutional orders with “the stroke of a pen.”
References


