

Washington and Lee Law Review

Member of the National and Southern Law Review Conferences

Volume XXXII

Fall 1975

Number 4

THE PRESIDENCY AND CONGRESS†

CHARLES L. BLACK, JR.*

In the summer of 1930, an Austin, Texas, family which was desperate as to how to deal with a nearly fifteen-year-old boy sent him to a place called then — and for all I know still called — Camp Dixie for Boys in Wiley, Georgia. From that camp toward the end of its season — a season mercifully long from my parents' point of view — there went out, for those who wanted it and whose parents would pay for it, an expedition called the Virginia trip. And so, nearly forty-five years ago, and only some sixty years after General Lee's death, I was in this Chapel, feeling all those feelings a Southern boy of those times must feel in such a spot. Later, I considered coming back here to college, but instead slid down the path of least resistance into what we called in Texas "The University." But I must, after all, have had a rendezvous, for here I am at last, and most pleased and honored to be here.

In another way, time has circled. My first chief in law, John W. Davis, still actively in charge when I worked for his firm, inaugurated this lecture series.

I am to talk to you on "The Presidency and Congress." I cannot believe that you expect anything wholly new from me, for so much has been said on this subject of late, by me and by very many others,¹ that anything really new must almost necessarily be foolish. But I will

†The John Randolph Tucker Lecture, delivered at Washington & Lee University, May 10, 1975.

*Henry R. Luce Professor of Jurisprudence, Yale Law School, Yale University, New Haven, Conn. B.A. (1935), M.A. (1938), University of Texas; L.L.B. (1943), Yale University.

¹I think here especially of my students, particularly those in my Constitutional Law Seminar, John Adney, Ed Geffner, David Martin, Robert Mintz, Chuck Patrizia, John Pottenger and Richard Zuckerman. In the quick interchanges of ideas in such a seminar, it is impossible to remember or sometimes even to ascertain origin. Of course, the responsibility is entirely my own.

try a somewhat different approach, a special kind of overview of our Constitution, coming to my topic rather indirectly.

I have a problem or puzzle I take up with my students in Constitutional Law. You might call it a sort of game. I hope it is an instructive game, though the thrust of its instructiveness must be toward insights rather than toward concrete inferences. What we do is try to identify the irreducible minimum of the American Constitution, and so, we hope, to see further into what modern grammarians might call its deep structure. We ask ourselves how much of our Constitution was and is indispensable to the formation and continuance of the government — how much of the Constitution is basically constitutive — and how much is either non-essential limitation or detail work.

Generally, to a fair degree of approximation, the answer is that what was indispensably necessary was Article I. With some changes in detail — changes mainly or entirely made necessary only by the fact that a few provisions in Article I refer forward to other articles — a complete, ongoing government, with all necessary organs, could have been formed, and could have functioned down to now, if the Constitution had ended at the end of Article I. On the other hand, out of the remaining six Articles, or any part or combinations thereof, or even any somewhat altered versions thereof, no government at all could have been formed.

Article VII may be discarded at once, as *functus officio* on the coming into force of the Constitution. Article V facilitates amendment, to be sure, but amendment, which now requires something near a full consensus, would in the nature of the case have been possible by unanimous consent of the States without any express provision; in any event, Congress has under its Article I powers — mainly commerce and taxation — accomplished much which might have seemed more naturally to be accomplished by amendment, and would undoubtedly in this way have accomplished even more if the amendment power had not existed. Consider the paradigm of *Katzenbach v. McClung*,² and the Civil Rights Act of 1964,³ where the Commerce Clause was used copiously to accomplish what it was feared the Fourteenth Amendment, which seemed to speak so much more naturally to the issues, could not accomplish. Since patents and copyrights are constitutionally based,⁴ one might have thought trademarks would also have to be constitutionally based, and would need to be given this basis by amendment, after the first Trade Mark

²379 U.S. 294 (1964).

³42 U.S.C. § 2000a *et seq.* (1970).

⁴U.S. CONST. art. I, § 8.

Cases.⁵ Not at all; the commerce clause, our constitutional equivalent of the untraversable allegation of breach of the King's peace, was available and availed.⁶ No constitutional amendment put narcotics under national control; the taxing power was enough.⁷ It seems quite clear that, as a mere matter of constitutional law, slavery could have been abolished by use of the commerce and taxing powers, and after the Civil War who would have said nay? I dare even speculate that, after that war, if Article I had been all we had, Congress, within the field of force of its naturalization power, might have made citizens of the freedmen, and, by the same token, of course could have granted them the privileges and immunities of citizenship, if, indeed, that were not thought to have been accomplished by the mere step of making them citizens. Reconstruction, moreover, might have taken a different form if the device had not been available of compelling assent to the three great post-Civil War Amendments. Here, however, I have no desire to force my argument. It may have been a good thing to have an Article V — but an entirely viable government could have lived without it. In some ways, it might have been a better government; we could not, for example, have put beyond legislative reach the provisions of the Twenty-fifth Amendment, the first and quite ridiculous result of which — and perhaps the only result for a hundred years — was that a President already deeply suspect, and rather obviously on his way out, got to appoint his own successor.

As to Articles IV and VI, we have to do here with miscellaneous provisions. I should think it fairly plain that the substance of the Full Faith and Credit Clause could and would have been enacted by Congress under its Article I powers, as an obviously desirable if not obviously necessary facilitation of "Commerce among the several States," as that phrase has been interpreted. The same would have been true, I think, of the Article IV interstate "privileges and immunities" clause. The extradition clause can scarcely have been necessary, as it is not enforced and has been judicially declared unenforceable; in any case, interstate compacts, validated by Article I, could and certainly would have taken care of the matter. The Fugitive Slave Clause, if you like that sort of thing, could, again, have been enacted by Congress, just as the Fugitive From Justice Act⁸ has been enacted, under the commerce power. The power of Congress to admit

⁵100 U.S. 82 (1879).

⁶United Drug Co. v. Theodore Rectanus Co., 248 U.S. 90, 98 (1918); Thaddeus Davids Co. v. Davids Mfg. Co., 233 U.S. 461 (1914).

⁷United States v. Doremus, 296 U.S. 86 (1919).

⁸18 U.S.C. § 1073 (1970).

new States would, against the background of the Northwest Ordinance, seem to be something to be taken for granted, as would the right to make treaties, and the proprietary clause would seem to be a mere spelling out of a power obviously implied by the mere existence of a national government; the ownership and management of property would, moreover, fall so clearly under the "implied" or "instrumental" powers doctrine of *McCulloch v. Maryland*⁹ as to need no structural justification and certainly no explicit statement.

Since we have never acted under the "republican Form of Government" clause, and since no State has ever shown any disposition to have anything but a republican form of government, that clause is presumably dispensable.

As to Article VI, Congress, as an incident to its Article I power to tax and spend for the general welfare, and to borrow money on the credit of the United States, plainly could have assumed the prior debts of the Confederation, for the clearing of the credit of the United States would rather obviously be a step facilitating further borrowing. The requirement of the oath of support of the Constitution could beyond question have been imposed by Congress on federal officers, but I should think that the imposing of such an oath on state officers as well, by Act of Congress, would have been a means clearly "proper" to the assurance of obedience to the laws passed under Article I. Congress could perhaps have required a "religious test" for office had any American Congress ever been disposed to do so; our only real "religious test," the rule that no Roman Catholic might be President, was imposed by what was guessed as to the wishes of the electorate, and was repealed by the electorate in 1960. This leaves the celebrated Supremacy Clause — but, without that clause, could there ever have been any doubt of the supremacy of national over state law? Is such supremacy not irresistibly implied in Article I, § 10, wherein the Constitution speaks as with authority over state law? Without any Supremacy Clause, would it not have been merely frivolous, for example, to contend that a state law could prevail over a congressional regulation of commerce? True, without the Supremacy Clause as worded, treaties might not have had with us, as they have not with the British, any independent force as municipal law — unless and until Congress, which under Article I is in charge both of foreign commerce and of war, subjects to which virtually all treaties are ancillary, might have given them that force — generally or one at a time. The position would not have been greatly different in theory to what it is now, for Congress can by simple statute deprive a treaty of

⁹17 U.S. (4 Wheat.) 316 (1819).

its municipal-law force,¹⁰ so that the difference, even in the absence of a general statute giving such force to self-executing treaties, would have been one between a condition precedent and a condition subsequent.

Now all this is propaedeutic, or brush-clearing, to the seriously constitutive parts of the Constitution as it stands — Articles I, II, and III. It will be useful, perhaps, to look at Article I in confrontation with each of the other two, and I will start with the third article.

That short article provides for a federal judiciary — or does it? Well it does it, if it does, in a most imperfect way. As to the lower federal courts, they are to be such as *Congress* may “ordain and establish;” the words “from Time to Time” are added, in a document not remarkable for its verbosity, as though to remind us that *Congress* is free not only to refrain from establishing a lower federal judiciary, but to change its mind about this matter, or about any of the details of this matter, “from Time to Time.” A “supreme Court” is to be sure, in some imperfect sense, established by the very force of the Article — but how infirm a foundation! *Congress* is to say — and did say — how many judges there were to be — and it has changed its mind on this “from Time to Time.” *Congress* is to say what the compensation of these judges shall be, and *Congress*, it was early and correctly assumed, is to say when and where the Court shall sit. The Senate — as we learn, if we steal a look at Article II — has to confirm each judge before he is commissioned. It was and is up to *Congress* to provide this Court with a meeting place, and with those officers without which no court can function.

Moreover, the all-important appellate jurisdiction of this “supreme Court” is to be exercised, within the enumerated case over which the judicial power extends, “with such Exceptions, and under such Regulations as the Congress shall make.”

Let me digress concerning this provision. I know that there are people who would see in it much less than it appears to say. It seems to me to say that Congress may make any exceptions it regards as wise to the appellate jurisdiction of the Court. For my part, I stand with Herbert Wechsler on this question,¹¹ and see no ground at all, none at all, for importing exceptions into this “exceptions” power. I would only add, very briefly, two arguments. First, the Court itself has been empowered by Congress, through the conferring of the discretionary certiorari jurisdiction, to make, from time to time, “exceptions” to its own jurisdiction, on any unstated prudential ground that

¹⁰The Chinese Exclusion Case, 130 U.S. 581 (1889).

¹¹Wechsler, *The Courts and the Constitution*, 65 Colum. L. R. 1001 (1965).

appeals to it, and *not* necessarily on grounds sounding in the legal merits; it has done this many times, not only because tendered issues were thought trivial, but in some cases quite obviously because it thought the time inopportune for decision on the merits of some clearly non-trivial issue. This control of jurisdiction, on grounds not sounding in law but merely in time-allocation or political prudence for the time being, is hardly a full-bodied judicial function. I find myself more comfortable with it when I think of it as the exercise by the Court of an "exceptions" power quite reasonably delegated to the Court by Congress. In any case, it does, without creating any clamor, exactly what those who would limit Congress' "exceptions" power say is forbidden — it denies, without so much as reason given, and with no reason in law necessary, review of some federal constitutional claims in the Supreme Court, and sometimes in any federal court. I do not understand how it could be right for the Court to be given by Congress this quite literally extra-legal power, while at the same time Congress, expressly given an "exceptions" power as to the Court's appellate jurisdiction, cannot exercise that power on classes of cases which, for prudential reasons, it thinks ought not to come to the Court.

Secondly, there is reason primarily of a political kind, but going to interpretation. Except for the original jurisdiction of the Supreme Court, every assumption of jurisdiction by every federal court since 1789 has been on the basis of an Act of Congress giving jurisdiction to that court. This, it seems to me, is the rock on which rests the legitimacy of the judicial work in a democracy. Of course such Acts have required and continually do require interpretation, but any interpretation objected to by Congress is known to be changeable by Congress. The integral sum of all this process is that the federal courts take jurisdiction because Congress tells them to, and do not take jurisdiction when Congress tells them not to — as best they can interpret the Congressional command, with Congress free to correct that interpretation. Now suppose Congress, in language of unmis-takeable clarity, forbade the Supreme Court to hear on appeal some identifiable class of cases, and suppose the Court, convinced by the arguments of the exceptions-to-"exceptions" school, took jurisdiction nevertheless, holding the exceptive act unconstitutional. And suppose Congress in its turn disagreed, reading the Constitution, as I would read it, to give it full power to make such "exceptions" as it thinks prudent to the Court's appellate jurisdiction. Why should Congress accept the Court's view? Why should any officer of government accept the Court's view? The Congressional view would be that the Court had acted without jurisdiction, in the face of the constitu-

tional language, and without pretense of following Congress' directions, and that a judgment thus outside the Court's jurisdiction was a mere nullity. I fear (and I choose the word carefully) that I would have to agree. An interpretation producing this impasse is not acceptable.

I think, finally — and this is not so much a legal as a tactical argument — that those people are very badly mistaken who think they *strengthen* the position of the Court by arguing that its jurisdiction is outside congressional control. The root objection to the Court's power of constitutional review is that it is undemocratic — an objection not subject to facile dismissal on grounds only of what was intended in Philadelphia in 1787. It seems to me that the most effective answer to this objection is and always has been that the Court could have been and still can be curbed by Congress, in many ways, and not only under the "Exceptions and Regulations" power, and that Congress, with this power to curb, has not only refrained almost entirely from using it, but has in several crucial Acts accepted this judicial function. I am not sure that I could defend, as consistent with the postulates of democracy, a system which really did put nine men, with life tenure, in an absolutely invulnerable position of final power. I am very sure that the designation of such a government as one of "checks and balances" would be quite absurd.

I read Article III, then, as laying the basis for a federal judiciary, but for a federal judiciary very largely subject, as to jurisdiction and procedure, to Congress' authority. But even if you do not wholly agree with this, I think you will, on reflection, agree that Article III, on the basis of established constitutional doctrine, was quite unnecessary to the creation of a federal judiciary. For if *McCulloch v. Maryland*¹² is right, and Congress is empowered to create and use such *means* as are needful for the carrying into effect of its legislation, and if Congress has choice among all arguably reasonable and not expressly prohibited means, then nothing could be clearer than that Congress might have set up pretty much the sort of judiciary we actually have, and would almost certainly have done so. Congress would not, of course, have been *obligated* to give the judges life tenure, but neither is the British Parliament so obligated. The Parliament has done so, and stuck to it; I think it probable that Congress would have done the same.

One could view Article III, then, not as a *necessary* basis for the creation of a federal judiciary, but rather as a set of definite but not

¹²17 U.S. (4 Wheat.) 316 (1819).

absolutely essential limitations on Congress' control over the nature and empowerment of that judiciary, and as a *moral* bolstering of the position of the judges. And I think it interesting that, even to people who, like me, think those limitations to be rather sparse, and who think Congress has wide power over the federal judiciary, the *practical* reasons for its moderating its own use of that power would have been just the same if the power to create the judiciary had flowed directly from Article I. Herbert Wechsler, again, has enumerated them, and I cannot do better than to quote from him:

To begin with, government cannot be run without the use of courts for the enforcement of coercive sanctions and within large areas it will be thought that federal tribunals are essential to administer federal law. Within that area, the opportunity for litigating constitutional defenses is built in and cannot be foreclosed. The same necessity for federal tribunals will be felt in many situations that do not involve proceedings for enforcement; it has led Congress in recent years to expand remedial jurisdiction by such measures as the Federal Declaratory Judgment Act, the Tucker Act, the Administrative Procedure Act and others I could name. The withdrawal of such jurisdiction would impinge adversely on so many varied interests that its durability can be assumed. Beyond this, if the jurisdiction of the Supreme Court alone is withdrawn in a given field, as happened in *McCardle*, issues are left to final resolution in the lower courts, which may, of course, reach contrary results in different sections of the country. If, in addition, all federal jurisdiction is withdrawn, the resolution is perforce left to the courts of fifty states, with even greater probability of contrariety in their decisions. How long would you expect such inconsistency in the interpretation of the law of the United States to be regarded as a tolerable situation? . . .

These are the reasons why congressional control of jurisdiction has so rarely been exerted as a method of expressing dissidence to constitutional decisions, even when such dissidence has won the sympathy of Congress . . . The federal system needs federal courts and the judicial institution needs an organ of supreme authority.¹³

If this last sentence is true — and I see no possible doubt of its

¹³Wechsler, *supra* note 11, at 1006-07.

truth — then we can be reasonably sure that any Congress constituted by a lone-standing Article I would of necessity have created a federal judiciary much like the one we have.

Now let us try this sort of thinking on Article II, in which we are primarily interested today. First, let us examine Article II critically, to see what foundation it gives to the independent powers of the Presidency. (Here I have to repeat myself to some extent, hoping new hearers and readers will be reached; Article II remains the same Article II, however many times one examines it.)

The fact is (freshly surprising, perhaps, to those who have not recently read Article II) that, as far as the text takes us, the President has very little power of his own. His treaty-making power is in the hands of the Senate. He has a power of appointment, but this power is not only in the hands of the Senate but also is a power to appoint people to fill such offices as Congress may create, paid and otherwise materially supported as Congress chooses. He is commander-in-chief of the armed forces, but Congress is empowered to raise these and to provide for their maintenance, and to make regulations for their governance. Underlying all these limitations is the financial one — the so-called “Presidency” has firm constitutional claim only to an undiminished salary for the President; all else is at the discretion of Congress, and is freshly at hazard in every new general appropriations act.

True, we have never come quite to rest on the question of the existence of a general “executive” power, but it is at least reasonable to hold that such power is at best interstitial and ancillary to the policy-forming powers of Congress. If Congress held such a view in good faith, then it might in good faith use any of the ample and quite irresistible means at its disposal to see to it that the general “executive power” was employed only in these interstitial and ancillary ways — and it could of course, narrow the interstices at will.

I would conclude, therefore, that what Article II sets up is an “executive” branch very largely under congressional control, *whenever Congress generates the initiative and will to control it*. If I am right in this, then the Article II situation is parallel to the Article III situation, and also resembles it in that Congress, had the Constitution ended at the end of Article I, might and probably would have chosen to establish, as a generally available means to the attainment of its legislative ends, an “executive” much like the Presidency we know.

Here again I think we have something like corroboration from actual history. For the modern Presidency, as it actually exists, is

very largely a creation of Congress. The modern powers of the Presidency are derived in principal part from delegations by Congress to the President. The President's assumption of powers not expressly so delegated might, moreover, easily be nullified by Congress. Article II created a one-man executive, and provided the manner of his choosing — but Congress has the continuing power to make and unmake the empowerment of the office. On both these scores, it seems to me that Congress is led to the delegation I have mentioned by a fatality visible in its effects even without insight into its causes. As a museum-piece example, take the War Powers Resolution.¹⁴ Presented as a *limitation* on presidential power, this Resolution can hardly be read as other than a very nearly explicit authorization of any presidential action whatever, with Congress exercising supervisory power later along, after the commitment has been made.

As I have briefly indicated already, it would seem that the historic fatality that has brought about, and continues to bring about, these abundant delegations, would have sufficed, even if the Constitution had ended at the end of Article I, to motivate the creation by Congress of an executive branch, and to delegate to it much the same powers it has delegated to the President. The Article of Confederation Congress was struggling with this problem, and moving toward a solution; a newly and more widely empowered Congress, under the present Article I, would almost certainly have solved it by creating an executive for the very purpose of carrying on government in a continuous manner. Having created such an executive, Congress would in all likelihood have delegated power to it much as it has to the President, because the reasons and motives for such delegation would have been just the same.

What are those reasons? I have pointed out elsewhere that the main general reason lies in the constitution of Congress itself, as spelled out by Article I. The short truth is that, while many institutional factors might lead a Congressman or a Senator to want to get along with his party leadership in the House or the Senate respectively the continuance of his political career rests altogether in the hands of his constituency, of which he cannot be deprived by anybody in Washington, and which (as experience has shown) cannot be much influenced by anybody in Washington. This iron law works on all Congressmen, regardless of the safety of their seats. The Congressman or Senator with a district or state safe for himself has little to fear from the congressional party leadership. On the other hand, the Congressman or Senator in a more marginal situation with respect to

¹⁴87 Stat. 555 (1973).

his constituency is so much the more motivated to please that constituency. This does not mean, of course, that any Congressman or Senator must or will himself act against his own conscience to bring about his own reelection. It does mean that in the fairly short run a match will be found between the views of a constituency and the conscience of its representative. And, much more important for the present purpose, it means that the power of effective discipline, absolutely necessary for leadership, is not and can never be lodged in the party leadership in either House, except perhaps by historical accident for very brief periods.

The paradox then arises that the organ beyond doubt authorized to form policy has a great and continuing difficulty in forming national policy adequately freed of local interests, or in organizing itself to form and pursue consistent policy at all. What is more natural than that such a body, knowing its own limitations, should repeatedly look to the President for leadership both in the formation and in the execution of policy?

So far I have not mentioned the one large and genuinely intrusive foreign body in an Article I which could have been a Constitution in itself. I refer, of course, to the veto. This is a vital intrusion because the veto, I think, makes entirely impossible any reliance on the continuing formation of independent congressional policy, since it makes it necessary that such policy command the support of stable two-thirds majorities in both Houses, as against a resolutely opposed President. Vetoes may be overridden by an angry Congress, on some particularly wanted legislation. But vetoes in overwhelming majority are not overridden, and as long as this institution exists it will greatly strengthen the power of the President over policy.

I have elsewhere suggested that it might be possible that Congress, for non-party institutional reasons, might develop a convention that vetoes invariably be overridden. This is not impossible, and no one can say whether, over the decades and centuries, it may not develop — particularly as those members who support the President's veto on the merits would only have to absent themselves from the overriding vote, and would not have to vote against their consciences. But I see no signs of the emergence of such a convention, and it seems likely that the merits of the individual occasion will continue to dominate in the foreseeable future.

While I am on the veto, I would like to make one somewhat subsidiary but I think very important point. Let me take you back to the question of the existence of a general "executive power." Without going into details, let me just say that I join the school of thought which would make the extent of such a power, or even its existence

in most cases, depend largely on the presence or absence of a Congressional determination covering the same policy ground. I take it that if one counts judges, instead of puzzling over the question why some judges who obviously did not believe in it joined the majority opinion, that is the general teaching of the *Youngstown Steel* case.¹⁵

Mr. Justice Jackson's opinion in that case¹⁶ makes the distinctions most clearly. He discerns an ever-narrowing ambit of "executive" power as one progresses from the case where Congress has authorized or supported the presidential action, through the case where Congress has not spoken, to the end-case of express congressional disapproval of the presidential action. This seems to me a sensible spectrum for its purpose. But it leaves unanswered one question: Suppose "Congress," in the narrow sense of "House and Senate," disapproves of some Presidential action, and expresses its disapproval unambiguously either in a Joint Resolution which is vetoed and not passed by override, or in a Concurrent Resolution which simply expresses congressional opinion, without having the force of law, and so is not submitted for veto.

What if anything does this do, in Justice Jackson's frame of reference, to the "executive power?" I think it arguable that independent executive power ought to be seen as greatly constricted under these circumstances. I think it too hasty a dismissal to say that this view violates Article I, Section 7, in that it gives force as law to a "resolution" of Congress not approved by the President. I own the question is a close one, but I believe that the view just mentioned confuses the issue. The final question, after all, is whether the *President's* independent exercise of "executive power" is to have the force of law. The affirmative argument usually has to be that Congress has formulated no policy for dealing with the presented subject matter. If the Senate and House actually *have* formulated and agreed on policy, even to the extent of disapproving a presidential step, then this seems to me, veto or no veto, necessarily to alter the *factual* and *political* background out of which the presidential power must emerge.

I think occasion might well arise when this could be tried. If it is, and if a justifiable case arises, I would hope that a court would hold that the fact of congressional disapproval, in the narrow sense I have mentioned, had great effect on the propriety of independent presidential action. If this is not to be so, then the President is in the (to me) paradoxical position of being able to claim the necessity of interstitial or emergency action because of congressional inaction, when he him-

¹⁵343 U.S. 579 (1952).

¹⁶*Id.* at 634.

self, by his veto, has produced this situation. But I must close this digression.

When I was lecturing in Asia recently, I offered as one topic — and it was often chosen — “The Location of Leadership in the American Polity.” By the time I had finished, the talk really had been about “The Non-Location of Leadership in the American Polity.” I told my Far Eastern audiences that they, as students of the Book of Changes, might be less surprised than would the minds of the West at the fading of a topic into its opposite. That is what I have really been talking about today. The American polity is so set up as *not* to generate leadership.

That is, I think, the real point of the game I described in the beginning. So strong is the position of Congress that we might easily have had a complete government if the Framers had stopped at the end of Article I. Yet Congress is so incapable, organically, of leadership that we can conjecture quite plausibly that something very like the presidency and the judiciary, built and empowered as we now know them, would have come into being anyway — brought into being by necessity, and created by a fully empowered Congress to fill the needs it could not itself hope to fill.

A government so structured must be, under all normal circumstances, leaderless. It must be a government of compromise, of conciliation, of continual redistribution and relocation of temporary power, a government of hundreds of new alignments for new problems and times. To my Far Eastern friends, this made the whole enterprise look rather hopeless. Yet, I urge you, as I did them, to consider that this Constitution has lasted a long time, and stood many strains. It is an experiment trying, amongst other things, whether constitutionally confirmed leadership is really necessary to political success. I hope it keeps on working, and I tremblingly believe that it will.

I hope nothing I have said will be interpreted as an assertion of the unimportance of Articles II and III. But I believe their importance rises, most paradoxically but truly, out of the fact that they were *not* necessary — that the bare logic of the government could have been much the same without them. For they embody thus the more clearly a *moral* foundation for the independent executive and judicial branches. That independence can exist, as it could have existed without these Articles, only through congressional deference. But these Articles make such deference a part of the unwritten American Constitution, the Constitution we have lived by. The deference to the judiciary suggested by Article III is currently not in danger — indeed the danger there is of an opposite character. But I believe a newly healthy American government will arise only when the deference to

the President suggested by Article II is resumed, perhaps re-formed — when we have, in other words, ceased from the foolish course of trying to create a legal and political regime for the Presidency which fits only an unworthy and deeply distrusted President.

As I finish, I have a sense of only having skimmed the surface — or rather, a very small part of the surface. There is much more I could say, and much more that is there that I cannot yet say clearly. Understanding of the dynamics of the American system does not come easily. I am pretty sure nobody has yet understood it through and through, and I doubt anybody ever will. I only hope my remarks today may lead you to think about it somewhat freshly.