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Corruption of Blood: The End of a Rules-Based World Order

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Abstract

In its foreign policy, the US purports to found its actions on a "rules-based order". What exactly comprises a rules-based world order is a matter of debate, but it must be founded on rules, which have certain properties. These properties arise from both the logic of rules and are to be found in legal decisions which consider the exercise of executive discretion. President Obama's foreign policy executive orders in regard to Crimea "the Executive Orders" could not be described as being founded on a rules-based order and are profoundly at odds with classic US jurisprudence. However, modern US jurisprudence is itself in retreat from its constitutional high ground, despite formally acknowledging principles which underlie earlier decisions.

Keywords

Rules-Based Order, Attainder, Executive Discretion, President Obama's Foreign Policy Executive Orders, The Ukraine, Crimea, Russia

1. Introduction

Rules nominate a set of prohibited behaviors, for which penalties attach. Nomination entails publication, providing that the rule is known or at least knowable. The requirement of publication is founded on rules being a guide to behavior, penalty deriving from knowing transgression or at least reckless indifference. From this stems the Law's abhorrence of retrospectivity, as rules cannot guide behavior if imposed post facto. Another central feature of rules is that like cases are treated alike, as a rule is a constant, during its term. A process that is applied unevenly is not a rule. At best there is a set of rules, provided it is clear which set applies to whom. Similarly, there must be one standard, rulers of different lengths cannot comprise one rule. Penalty must follow from breach as rules cannot be a guide to behavior if they are applied without fault. It follows that rules can only

impose personal liability. This essay does not exhaustively discuss what rules are, but sets out those central features that any fair rules-based order must exhibit, as follows:

1) The rule is known or at least knowable, rules cannot operate retrospectivity;
2) Rules must have internal consistency;
3) Like cases are treated alike, one standard applies to all;
4) Penalty derives from knowing transgression or at least reckless indifference;
5) Personal, not collective liability.

This essay interprets core US Supreme Court decisions on presidential powers in terms of primary rules. It then looks at the way the Executive Orders directly contradict primary rules and so is the antithesis of a rules-based order. Also considered is the retrograde tendency in the modern Supreme Court, away from upholding primary rules, as found in and derived from the US Constitution. This, despite never having overruled earlier cases, which strongly upheld primary rules and did not overrule cases.

2. Ex Parte Merryman (1861)[1]

Ex parte Merryman (1861) is an American Civil War opinion by chief justice "CJ" Taney condemning President Abraham Lincoln's suspension of habeas corpus. The focus in Merryman and the focus in cases involving presidential discretion has been the US Constitution's apportionment of powers, between the Executive and the Legislature. This essay does not address the US constitutional balance as such and interprets these cases in terms of primary rules. In Ex parte Merryman CJ Taney held:

> The president not only claims the right to suspend the writ of habeas corpus himself, at his discretion, but to delegate that discretionary power to a military officer, and to leave it to him to determine whether he will or will not obey judicial process that may be served upon him.

Here CJ Taney is referencing the hated "Writs of Assistance" which played such a large part in triggering the American Revolution. In James Otis's February 1761 speech to the Superior Court of Massachusetts, in opposition to the Writs, the first ill he raised was the general delegation of the writs, as follows:

> In the first place, the writ is universal, being directed "to all and singular justices, sheriffs, constables, and all other officers and subjects"; so that, in short, it is directed to every subject in the King's dominions. Everyone with this writ may be a tyrant; if this commission be legal, a tyrant in a legal manner…

The issue that is addressed here is that while it may be that such powers can be carefully weighed by a President, once it is delegated it becomes of much wider application. Delegated, the power rests in many lesser minds and can become a vehicle for vindictiveness and vendetta, as Otis examples in his speech.

[1] 17 F. Cas. 144, 9 Am. Law Reg. 524; 24 Law Rep. 78; 3 West. Law Month. 461 (1861).

The dynamic is such that even in cases of such abuse, the Administration will tend defend its application, to preserve its authority. This is a process argument, which goes to the real world effect of executive power.

This issue also arose in Taney CJ's referencing of English precedent, noting Blackstone (1 Bl. Comm. 136) to the effect that only parliament could suspend the writ of habeas corpus, where he stated:

> If the president of the United States may suspend the writ, then the constitution of the United States has conferred upon him more regal and absolute power over the liberty of the citizen, than the people of England have thought it safe to entrust to the crown; a power which the queen of England cannot exercise at this day, and which could not have been lawfully exercised by the sovereign even in the reign of Charles I.

In referencing Charles I, Taney CJ is comparing President Abraham with the most potent symbol of arbitrariness among the American revolutionaries and the English Civil War, in which divine right was pitched against constitutionalism. CJ Taney also pointed to a fundamental aspect of rules, that they must be proclaimed and set about with procedural formality as follows:

> No official notice has been given to the courts of justice, or to the public, by proclamation or otherwise, that the president claimed this power, and had exercised it in the manner stated in the return.

Legal precedent is a form of rules and CJ Taney relied on the precedential conduct of President Jefferson, who on the occasion of the Aaron Burr conspiracy, rather than acting executively, advocated to Congress for the suspension of a habeas corpus writ. The chief justice addressed the constitutional provisions, which reserved power to suspend habeas corpus to Congress and continued on, to enumerate the limitations on executive power, set out in the Constitution and the overriding application of due process, as guaranteed by the Fifth Amendment, together with the fair trial rights set out in the Sixth Amendment, both first order US constitutional rules. The chief justice then considered exigency stating:

> The government of the United States is one of delegated and limited powers; it derives its existence and authority altogether from the constitution, and neither of its branches, executive, legislative or judicial, can exercise any of the powers of government beyond those specified and granted; for the tenth article of the amendments to the constitution, in express terms, provides that the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people.

Here CJ Taney's opinion was that the US Constitution was the only source of Executive power and that there was no inherent presidential power. This approach demands that all legal exercises of executive power by an American

president are delimited by rules.

3. Korematsu v. United States (1944)[2]

In 1942 President Roosevelt issued Executive Order 9066, placing Japanese Americans into concentration camps during World War II. This Order entailed two conflicting sanctions laid on Japanese Americans, that they stay within their locality and that they report to detention centers. Korematsu was charged with refusing to leave his home. The U.S. Supreme Court upheld this order by a majority. The mainstay of the majority opinion in Korematsu was precedent and the Supreme Court's recent decision in Hirabayashi v. United States (1943)[3], which held that the imposition of a night time curfew of US citizens of Japanese descent was permissible. Of Hirabayashi, in his dissent in Korematsu, Justice Jackson said:

> We yielded, and the Chief Justice guarded the opinion as carefully as language will do…
> However, in spite of our limiting words we did validate a discrimination on the basis of ancestry for mild and temporary deprivation of liberty. Now the principle of racial discrimination is pushed from support of mild measures to very harsh ones, and from temporary deprivations to indeterminate ones. And the precedent which it is said requires us to do so is Hirabayashi.[4]

Justice Jackson continued:

> Now, if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable. Even if all of one's antecedents had been convicted of treason, the Constitution forbids its penalties to be visited upon him, for it provides that "no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.[5]

Similarly, Justice Murphy (1981) stated:

> To 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. Moreover, this inference, which is at the very heart of the evacuation orders, has been used in support of the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies which this nation is now pledged to destroy.[6]

Both Justice Roberts and Murphy qualified the broad discretion necessary for military decisions, Justice Murphey finding that: "No pronouncement of the commanding officer can, in my view, preclude judicial inquiry and determina-

[2]323 U.S. 214 (1944).
[3]320 U.S. 81 (1943).
[4]Op cit 247.
[5]453 U.S. 654 (1981).
[6]Op cit 240.

tion whether an emergency ever existed and whether, if so, it remained, at the date of the restraint out of which the litigation arose.[7] Justice Roberts set out a "chronologic recitation of events" which demonstrated that the rules put in place were nothing more than a "disingenuous attempt to camouflage the compulsion which was to be applied"[8]. Justice Murphy subjected the "Final Report" of Lt. Gen J L DeWitt, the commanding officer charged with internment, to a close and wilting analysis, highlighting reference to "an enemy race"[9] and showing it lacked "reliable evidence to ground its assumptions".[10] Murphy J also noted that while the Order was founded on exigency, this did not accord with the application of the Order, saying that: "Leisure and deliberation seem to have been more of the essence than speed"[11].

Justice Jackson, had been both United States Solicitor General and Attorney General, as well as chief United States prosecutor at the Nuremberg trials. Having seen the functioning of the executive, from the inside, he warned of the difficulty the Court had in second-guessing military assessments stating:

> In the very nature of things, military decisions are not susceptible of intelligent judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved. Information in support of an order could not be disclosed to courts without danger that it would reach the enemy. Neither can courts act on communications made in confidence. Hence courts can never have any real alternative to accepting the mere declaration of the authority that issued the order that it was reasonably necessary from a military viewpoint.[12]

Justice Jackson then stated that because the Court could not properly assess the reasonableness of an exercise of military authority, it should not enter into this arena, as it had done in Hirabayashi. It was Justice Jackson's opinion that it was the Court's validation of military orders, which was more dangerous than the orders themselves, as follows:

> A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image.[13] …But even if they were permissible military procedures, I deny that it follows that they are constitutional.[14]

Finally Jackson J warned: "If the people ever let command of the war power

[7] Ibid 231.
[8] Ibid 236 Note 5.
[9] Ibid 236.
[10] Ibid.
[11] Ibid 241.
[12] Ibid 245.
[13] Ibid 246.
[14] Ibid.

fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint".[15]

Applying the dissenting judges' opinions to the indicia of rules adopted here, President Truman's Executive Order fails to conform with a rules-based order as follows:

1) The Order was retrospective and so not a rule. Although exigency may necessitate executive orders, Jackson J's opinion was that the gravest error was to imbue them with the imprimatur of constitutionality, as that made an isolated incident into a precedent;

2) Effectively, the Order required Japanese Americans to both stay in their locality and report to detention centers, as discussed by Roberts J, and so was internally inconsistent;

3) The Order failed to treat like cases alike, Murphy J pointing to the different treatment accorded to Japanese Americans, as opposed to Italian or German Americans;

4) Penalty did not derive from knowing transgression or reckless indifference, but sprang purely from race;

5) The Order imposed collective liability.

4. Youngstown Sheet & Tube Co. v. Sawyer (1952)[16]

President Truman invoked emergency powers during the Korean Civil War to seize private US steel mills shut down by a strike, on the basis that the steel was needed for the war effort and to prevent a "national catastrophe"[17]. The difficulty with this proposition was that although the US was doing the heavy lifting for South Korea, it was not technically at war, being just part of the UN peacekeeping force. Most importantly the Soviet Union, China and the US had quickly arrived at and adhered to informal parameters to contain the conflict, which meant that the US was never under threat of radical escalation. The Administration relied on the President's military power as Commander in Chief of the Armed Forces and theater of war cases, arguing, inter alia, that as Article II of the Constitution stated that the executive Power shall be vested in a President of the United States of America, this provided "a grant of all the executive powers of which the Government is capable"[18], as commented on by Justice Jackson.

The U.S. Supreme Court struck down the Order, the majority principally relying on the constitutional separation of powers and Congress having expressly decided against seizures in cases of emergency. Giving the majority opinion Justice Black held that:

> When the Taft Hartley Act was under consideration in 1947, Congress rejected an amendment which would have authorized such governmental

[15]Op cit 248.

[16]343 U.S. 579 (1952).

[17]Ibid 582.

[18]Ibid 640.

seizures in cases of emergency.[19]

The "generative" factors identified by Justice Jackson in Korematsu featured in Frankfurter, J's concurrence, as follows:

> The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority…[20]

Justice Douglas concurring, held that "the theory of checks and balances expounded by Mr. Justice Black [tied in with] condemnation provision in the Fifth Amendment"[21]. Justice Jackson also made this point stating:

> The third clause in which the Solicitor General finds seizure powers is that "he shall take Care that the Laws be faithfully executed..."[22] That authority must be matched against words of the Fifth Amendment that "No person shall be...deprived of life, liberty or property, without due process of law. 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. These signify about all there is of the principle that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules.[23]

Justice Jackson concurring, agreed with the majority, that to override express congressional provision, the presidential power sought was one that sought unlimited executive power, as follows:

> The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image.

Justice Jackson next addressed the Government's reliance on the Constitution's bestowal of the rank of the Commander in Chief of the Army and Navy on the President, stating:

> But no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture.[24] …

In response to the claim of necessity and the alleged lacuna in the Constitution to provide for this, Jackson J, speaking of the Founding Fathers, stated:

> They knew what emergencies were, knew the pressures they engender for

[19]Ibid 586

[20]Ibid 594.

[21]Ibid 632.

[22]Ibid 594.

[23]Ibid 646.

[24]Ibid 642.

> authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies.[25] …

Jackson J went on to discuss that whereas both in France and Britain, emergency powers were subject to parliamentary authority the Weimar Constitution allowed the President to assume emergency powers, stating:

> This proved a temptation to every government, whatever its shade of opinion, and in 13 years suspension of rights was invoked on more than 250 occasions. Finally, Hitler persuaded President Von Hindenberg to suspend all such rights, and they were never restored.[26]

Jackson J then grounded this approach on conflict of interest, as follows:

> Emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them. That is the safeguard that would be nullified by our adoption of the "inherent powers" formula.[27]

Jackson J concluded his concurrence by stating that law must control power, as follows:

> The essence of our free Government is "leave to live by no man's leave, underneath the law"—to be governed by those impersonal forces which we call law.[28] …
> With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.[29]

The opinions of the majority in Youngtown do not neatly fit the indicia for rules adopted here, as they rejected the Executive Order on the basis that the Executive Order fundamentally clashed with the rules-based order set out in and derived from the US Constitution. Recalling CJ Taney's opinion, that the President had only those powers expressly provided in the Constitution, the majority was clearly very concerned the President sought "a grant of all the executive powers of which the Government is capable". Beneath the majorities reliance on Congress having determined the issue, both Black CJ and Douglas J referred to the Constitutional system of checks and balances, Douglas J also referring to the conflict with the 5th Amendment. Frankfurter and Jackson JJ both discussed executive power's tendency to expand and the rationales for constraint by law.

5. Bills of Attainder

As discussed below, President Obama's Executive Orders bear many of the fea-

[25] Ibid 650.
[26] Ibid 651.
[27] Ibid 653.
[28] Ibid 654.
[29] Ibid 655.

tures of bills of attainder. Article 1 S9 of the US Constitution provides: "No State shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts." Technically, a bill of attainder is a proscription and imposes the death penalty, as opposed to a "bill of pain and penalty", which imposes a penalty less than death. However, in Fletcher v. Peck (1810)[30] the US Supreme Court insisted that Art 1 S9 encompasses both, holding that, "a Bill of Attainder may affect the life of an individual, or may confiscate his property, or may do both." In Drehman v. Stifle (1869)[31] the US Supreme Court held that the "term 'bill of attainder' in the National Constitution is generical, and embraces bills of both classes." In Cummings v. Missouri (1867)[32], the US Supreme Court stated that: "A bill of attainder is a legislative act which inflicts punishment without a judicial trial." Clearly a bill is produced by a legislature, but it is a legislature acting at the behest of an executive, as the following passage from Cummings v Missouri shows:

> "Bills of this sort," says Mr. Justice Story, "have been most usually passed in England in times of rebellion, or gross subserviency to the crown, or of violent political excitements; periods, in which all nations are most liable (as well the free as the enslaved) to forget their duties, and to trample upon the rights and liberties of others." (Citation omitted)

6. Modern US Jurisprudence

In Trump v Hawaii (2018)[33] Sotomayor J put Korematsu into issue. The majority found that Korematsu had no relevance, but Korematsu has long been criticized and the Supreme Court took the opportunity to formally overrule it. This left the minority opinions in Korematsu good law. These opinions were akin to the majority opinions in Youngtown, which has never been overruled. However in Dames & Moore v. Regan (1981)[34], the Supreme Court had heard a case involving executive orders by both Presidents Carter and Regan. Despite the context being the Iran Hostage crisis, which shortly after morphed into Contra-Gate, the Court in Dames & Moore assiduously avoided any of Jackson J's warnings in Youngtown. The only nod to Jackson J's Youngtown opinion was reference to his tripartite division of Congressional stance vis a vis presidential discretion, which Rehnquist CJ described as "analytically useful"[35] when Jackson himself described it as "somewhat oversimplified"[36] and it is statutory interpretation 101. That did not stop Rehnquist's ruling being lauded by David F. Forte, who in his "The Foreign Affairs Power: The Dames & (and) Moore Case (1982)"[37] extolls Rehnquist CJ's use of Jackson J tripartite division, but ignored Jackson J's truly

[30] 10 U.S. (6 Cranch) 87 (1810).
[31] 75 U.S. 8 Wall. 595 595 (1869).
[32] 71 US 277 - Supreme Court 1867.
[33] 878 F. 3d 662. (2018).
[34] 453 U.S. 654, 669 (1981).
[35] Ibid 833.
[36] Op cit 635.
[37] Cleveland State Law Review Volume 31 Issue 1 Article 1982.

trenchant observations.

In regard to bills of attainder, historically Art1 S9 was broadly interpreted and was described as a "bulwark against tyranny," in United States v. Brown (1965)[38]. However, in Global Relief Foundation Inc v O'Neill (2002)[39], a US appeals court held that Art1 S9 only applied to legislation and was inapplicable to presidential decree. This approach ignored executive overreach and that in making domestic law; the presidential decree was purporting to legislate. It also ignored Jackson J's 1952 observations in Youngstown which warned that the rise of the party system rendered the distinction between legislature and executive moot, as follows:

> Moreover, rise of the party system has made a significant extraconstitutional supplement to real executive power. No appraisal of his necessities is realistic which overlooks that he heads a political system as well as a legal system. Party loyalties and interests, sometimes more binding than law, extend his effective control into branches of government other than his own and he often may win as a political leader, what he cannot command under the Constitution.[40]

7. President Obama's Foreign Policy Executive Orders – Purported Basis in Legislation

Previous US presidential invocations of national emergency war powers were at times that the US was at war or under direct attack. No doubt President Bush's 9/11 executive orders, together with the Patriot Act, enormously extended executive power in the US. These have never been relinquished by the Administration, as follows:

> Because the terrorist threat continues, the national emergency declared on September 14, 2001, and the powers and authorities adopted to deal with that emergency must continue in effect beyond September 14, 2021. Therefore, I am continuing in effect for an additional year the national emergency that was declared on September 14, 2001, with respect to the terrorist threat. This notice shall be published in the Federal Register and transmitted to the Congress. J.R. BIDEN, JR.

That being said, President Obama's orders were a radical departure from precedent. The US had not suffered an attack, still less was it at war. Two issues are examined here:

1) The extent to which these orders maintained a climate of purported national emergency;

2) The extent to which these orders and their successors demonstrates that the radical changes to the nature of American government warned of by Jackson J in Youngtown have come to pass.

[38]381 U.S. 437 (1965).

[39]207 F Supp 2d 779 (ND Ill 2002).

[40]Op cit 654.

In 2014 President Obama, promulgated the Executive Orders namely **EO 13660 of 6 March 2014**. **EO 13661 of 16 March 2014**, **EO 13662 of 20 March 2014** and **EO 13685 of 19 December 2014**. These Orders were founded on the following statutory provisions:

> International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 *et seq.*) (NEA), section 212(f) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1182(f)), and section 301 of title 3, United States Code,

Section 301 of title 3, United States Code is the general provision which empowers a president to delegate "any function which is vested in the President by law" and provides no lawful authorisation for the Orders. Section 212(f) of the Immigration and Nationality Act of 1952 provides an executive power to deem "classes of aliens" to be "ineligible for visas or admission". This provision provides for broad executive powers as to who might enter the US and prima facie provides a legal basis to deny entry to the US to the persons nominated pursuant to the Orders. However, this was not the thrust of the Orders, which was to freeze assets.

The specific section of the NEA referred to in the Orders is 50 U.S.C. 1601 which provides for the termination of declared emergencies and provides for a default 2-year period for use of emergency powers, a criterion which has not been complied with. It is unclear why the Order refers to s1601 when it is s1621 which provides for the "Declaration of national emergency by President". The reference in the Order extends "*et seq*" and so relies on subsequent s1621 of the NEA which provides:

> (a) With respect to Acts of Congress authorizing the exercise during the period of a national emergency, of any special or extraordinary power, the President is authorized to declare such national emergency.

As held by Chase CJ in Calder v. Bull (1798)[41]: "All the powers delegated by the people of the United States to the Federal Government are defined, and NO CONSTRUCTIVE powers can be exercised by it…". Clearly any declaration of a national emergency is not simply rhetorical and the purpose of such a declaration is to allow for presidential recourse to "special or extraordinary power". Section 1621 provides that the President is authorized to declare such national emergency <u>only</u> "with respect to Acts of Congress authorizing the exercise during the period of a national emergency". As section 1621 refers to there being "a national emergency" prior to a president's declaration of "such emergency", it must be that whether or not a national emergency exists is a question for Congress. Section 1621 provides that Congress must first authorise a president's use of "special or extraordinary power" prior to a presidential declaration of a national emergency. Such an interpretation accords with any declaration of war being within the legislative and not executive domain. Congress never having

[41]3 U.S. 386 (1798).

considered either whether there was a "national emergency" or authorizing "special or extraordinary power", the Orders were prima facie unconstitutional. Section 1621 creates two ambits of authority:

> (a) The exercise of "special or extraordinary powers" which Acts of Congress have authorized a president to use during the period of a national emergency.
> (b) The exercise of normal presidential powers during the period of a national emergency.

President Obama had no authority under (a), Congress never having found there to be a national emergency nor authorizing President Obama "special or extraordinary powers", in response to the Crimean situation. He had no authority under (b) as the gross violations of fundamental law by President Obama, as discussed below, could not be described as an exercise of normal presidential powers.

The overarching provision the NEA falls under is TITLE 50—WAR AND NATIONAL DEFENSE, An interpretation of the term "national emergency", consistent with Title 50, requires such an emergency to be a military emergency engaging defense of the nation. Such an interpretation is consistent with the litigation, Korematsu arising during WWII and Youngtown during the Korean War. In Dames & Moore, the invasion of the US embassy in the Iranian hostage crisis was by international law an invasion of US soil. President Bush's declaration of a national emergency over 9/11 was founded on the claim of a, "continuing and immediate threat of further attacks on the United States", even if this was evidence free.

Section 1702(C) of Title 50 sets out presidential authorities in general and provides for freezing of assets, as follows:

> …when the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals, confiscate any property, subject to the jurisdiction of the United States, of any foreign person, foreign organization, or foreign country that he determines has planned, authorized, aided, or engaged in such hostilities or attacks against the United States;

As the United States was not engaged in armed hostilities nor had been attacked by a foreign country or foreign nationals in the Crimean situation there was no national emergency and President Obama's asset seizures were unlawful. There remains necessity, but the necessity invoked by Lincoln was civil war and the inability of Congress to even gather. Nothing remotely like this order of necessity arose as a consequence of the Crimean situation.

The last legislative provision relied on by the Orders, the IEEPA, expanded the application of the NEA by providing for declarations of national emergencies arising from threats to the "national security, foreign policy, or economy of the United States." However, while the source of threats was expanded, Section 1701

IEEPA required that any such threat must be "unusual and extraordinary". Taken at its worst the amalgamation of Crimea into the Russian Federation was an act of annexation. There is no evidence of any bloodshed. In 2011 President Obama had waged war against Libya, destroying its capital, killing its leader among tens of thousands of Libyans and tearing the country in two. President Bush waged major wars against Afghanistan and Iraq. The only way the Russian action could be said to be "unusual and extraordinary" is if a double standard is applied. But one rule for the US and another for Russia is the law of the jungle, not a rules-based order.

Crucially, the IEEPA retained the threshold that any purported threat must rise to the level of a "national emergency". This takes us back to s1621 NEA and the lack of Congressional authorisation. The basis for S1621 "special or extraordinary powers", being exercised directly by the executive can only be necessity, where there is a national emergency that is so urgent that the deliberative process of Congress is too slow to address the situation. While this essay maintains that there was never a national emergency, the succession of orders President Obama promulgated could not meet this threshold, as it could not be said that Congress was unable to address events over the period of the orders, from March to December 2014.

In as much as President Obama's Orders were akin to the form of legalized piracy known as "Letters of Marque and Reprisal", he usurped Congress' power grant Letters of Marque and Reprisal. Article I, Section 8, Clause 11 of the U.S. Constitution provides: [The Congress shall have Power...] to declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.

8. President Obama's Orders in Detail

The first of the Orders, **EO 13660 of 6 March 2014**, proclaimed that amalgamation of Crimea into the Russian Federation constituted "an unusual and extraordinary threat to the national security and foreign policy of the United States". This formulation utilised the IEEPA phrase, "unusual and extraordinary threat", and asserted two of the permissible sources of threat, foreign policy and national security, declaring that purported threat amounted to a "national emergency".

The Order blocked "Property of Certain Persons Contributing to the Situation in Ukraine" by providing, at s1(a), that the property was "all property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person (including any foreign branch)". The Order did not name anyone, but s1(a) provided that the Order applied to "any person determined by the Secretary of the Treasury, in consultation with the Secretary of State" to be "responsible for or complicit in, or to have engaged in, directly or indirectly, in conduct set out at s1(a)(i) which broadly related to the re-integration of Crimea with Russia. The Order defined "person" as an individual or "entity",

the latter being defined as "a partnership, association, trust, joint venture, corporation, group, subgroup, or other organization". At the Order's broadest, s1(iv) provided that it applied to those the Administration deemed: "to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, any activity described in subsection (a)(i) or (a)(ii) of this section or any person whose property and interests in property are blocked pursuant to this order".

The catchment of this section is demonstrated by the October 2022 arrest of British businessman Graham Bonham-Carter on U.S. charges of conspiring to violate sanctions placed on Russian Oleg Deripaska. The US prosecutor is seeking to extradite Bonham Carter, for allegedly making payments for U.S. properties owned by Deripaska and trying to move the aluminum magnate's artwork in the United States overseas. To use the language in Cummings v. Missouri, the decision to charge Bonham-Carter was an executive "act which inflicts punishment without a judicial trial." This was a complete denial of due process and a replication of the "administrative means" the Soviet regime used to carry out its reign of terror.

The Order provided that any property of a sanctioned person or entity was "blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in" and applied "notwithstanding any contract entered into or any license or permit granted prior to the effective date of this order." By "impairing the obligation of contracts" 'this was in direct contravention of Art 1 s9, in spirit if not law. By these broad terms the Order inflicted financial punishment not only on those Russians singled out by the Administration, but on any others who had the misfortune to be engaged in financial dealing with them at the time. This was retrospective punishment, by which President Obama's Orders contravened the most fundamental principle of a rules-based order and one constantly restated by the US Courts.

The second Order, **EO 13661 of 16 March 2014**, "Blocking Property of Additional Persons Contributing to the Situation in Ukraine" vastly expanded the orders, as it broadened the scope of sanctions from involvement in the re-unification of Crimea to association to include any "official of the Government of the Russian Federation", redundantly naming 7 senior officials. It also sanctioned "persons determined by the Secretary of the Treasury, in consultation with the Secretary of State…to operate in the arms or related materiel sector in the Russian Federation". Casting the net as far as the "related materiel sector" entailed collective punishment.

Executive Order 13662 of March 20, 2014 sanctioned "such sectors of the Russian Federation economy as may be determined by the Secretary of the Treasury, in consultation with the Secretary of State, such as financial services, energy, metals and mining, engineering, and defense and related materiel." This Order broadened the scope of collective punishment.

EO 13685 of 19 December 2014 prohibited new investment in Crimea by a

United States person, wherever located, import and export of any “goods, services, or technology” between Crimea and the United States, by a United States person, wherever located and any “approval, financing, facilitation, or guarantee” by a United States person, wherever located, of a transaction by a foreign person where the transaction by that foreign person would be prohibited by this section if performed by a United States person or within the United States. This Order further broadened the scope of collective punishment.

The Orders even prohibited the operation of s203(b)(2) IEEPA (donations, by persons subject to the jurisdiction of the United States, of articles, such as food, clothing, and medicine, intended to be used to relieve human suffering, President Obama stating that relief of human suffering would “seriously impair my ability to deal with the national emergency declared in this order”.

Penalties for breach of such orders are set out at s1705. Section 1705 allows for a civil fine of $250,000 or double the amount at issue. Criminal penalty may be a fine not more than $1,000,000, “or if a natural person, may be imprisoned for not more than 20 years, or both.”

9. Conclusion

President Obama’s Orders were contrary to any rules-based order as they:

1) Operated retrospectively by punishing preexisting contractual arrangements. In regard to US persons it breached the US Constitutional prohibition on bills of attainder. The Orders were not validated by exigency, as the situation in Crimea did not give rise to a US national emergency;

2) Did not set one standard which applied to all, as at worst Russia’s actions did not compare with those of the US in Afghanistan, Iraq, Libya or Syria;

3) Imposed penalty on US contractors with sanctioned Russians, without fault;

4) Imposed collective liability.

In Youngtown Jackson J discussed a fundamental change in the nature of American society, speaking of:

> Vast accretions of federal power, eroded from that reserved by the States, have magnified the scope of presidential activity. Subtle shifts take place in the centers of real power that do not show on the face of the Constitution.[42]

Looking back, Jackson J concluded that the Founding Fathers understood the dangers of unbridled power, as follows:

> They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies.[43]

But looking forward Jackson J was not optimistic and wrote:

[42]Op cit 653.

[43]Ibid 650.

> No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role.[44]
>
> Of the US Constitution and the rule of law Jackson J wrote: "Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up."[45]

Sadly, the Court failed to make a stand, as shown by Dames & Moore v. Regan and Global Relief Foundation. Neither did Congress. To prevent President Trump from altering President Obama's Executive Orders, Congress passed the Countering America's Adversaries through Sanctions Act 2017 which legislated Obama's Executive Orders and passed the House 419-3 and the Senate 98-2, a veto roof majority. The collapse of the separation of powers within the US, as regards to foreign policy, has resulted in unbridled executive discretion and the law of the jungle being touted as a rules-based order. In Liversedge v Anderson (1942)[46] the House of Lords considered the scope of the Home Secretary's discretion in time of war and whether or not it was confined by reasonableness criteria, expressly inserted into the relevant legislation. Lord Atkin was the sole dissenter. The most controversial aspect of his opinion was his allusion to Lewis Carroll's *Through the Looking Glass*[47] as follows:

"*When I use a word*," *Humpty Dumpty said in rather a scornful tone*, "*it means just what I choose it to mean, neither more nor less.*" "*The question is*," *said Alice*, "*whether you can make words mean so many different things.*" "*The question is*," *said Humpty Dumpty*, "*which is to be master—that's all.*"[48]

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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