

# Presidential Power, American Constitutionalism, and the Rule of Law

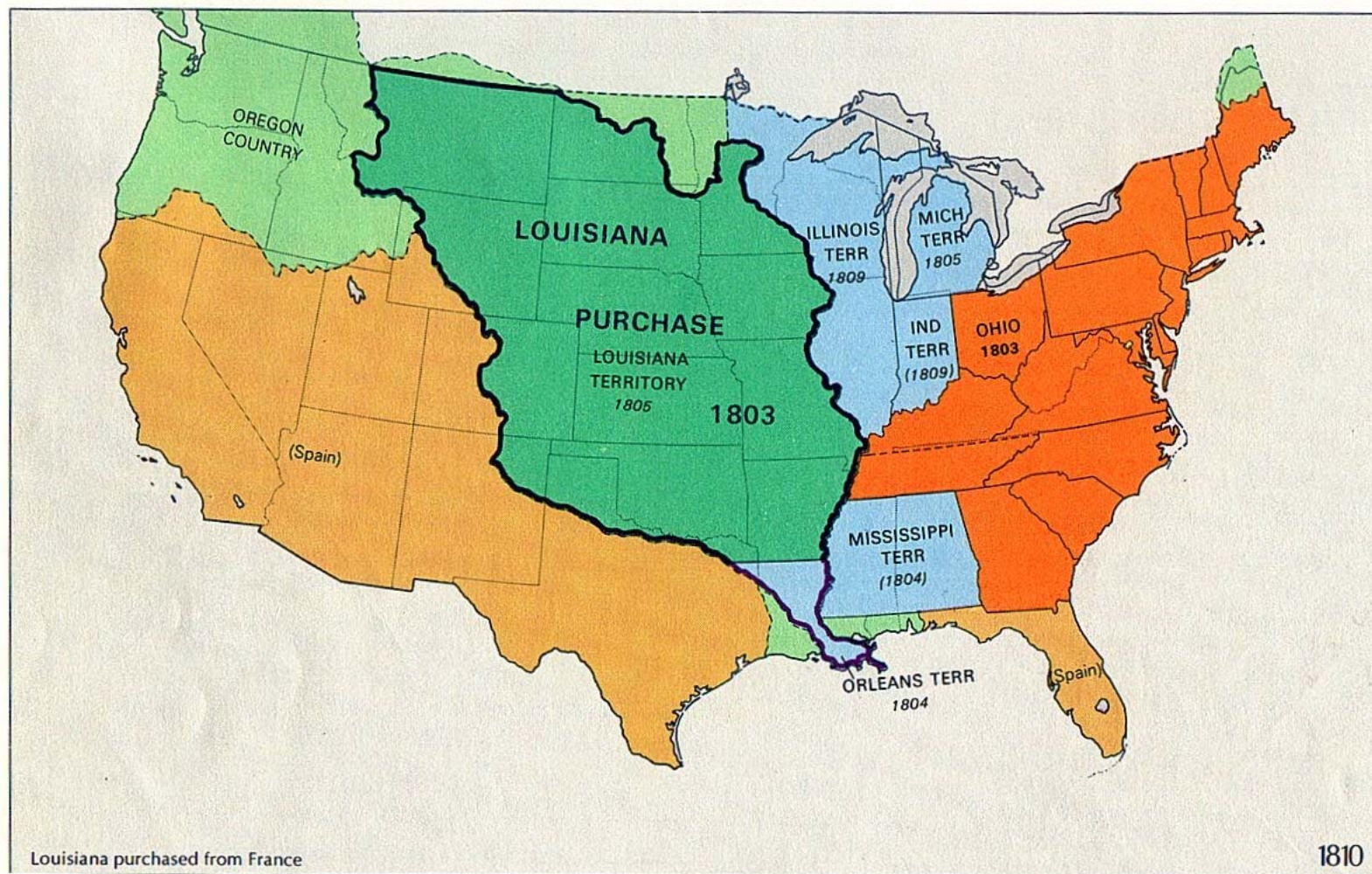
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February 24, 2012

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## Four Key Incidents

1. **The fall of 1803:** You have an opportunity to purchase the vast Louisiana Territory from France, opening up the navigation of the Mississippi River, removing the threat of European powers from the West, and immeasurably increasing the wealth of the nation.
2. **June of 1807:** Three miles off Norfolk, VA, the British frigate *Leopard* confronts the smaller U.S. warship *Chesapeake* and demands the surrender of four alleged British deserters. When the American commander refuses, the *Leopard* opens fire, killing three Americans and wounding 18. The British then remove the four alleged deserters. There is an enormous uproar in the United States and war with Britain seems imminent. Congress is not in session and there are insufficient funds available to properly prepare for war.
3. **April of 1861:** In the previous months seven southern states have passed ordinances or laws formally “seceding” from the Union. When the governor of South Carolina learns that the President has sent a relief mission with food and medicine to the federal fort in Charleston harbor, he orders his forces to bombard the fort. Serious fighting between North and South has now begun. Congress is not in session, the nation’s capital is surrounded by slave states, and there are few federal forces to protect Washington. Southern sympathizers in Maryland, determined to prevent the arrival of reinforcements from the mid-Atlantic and New England, riot in Baltimore when loyal troops try to transfer from one train line to another. Later they burn the railroad bridges.
4. **Summer of 1941:** War in Europe has been going on since September of 1939. After defeating Poland, Hitler’s armies conquer the low countries and then storm into Paris in June of 1940. Britain stands virtually alone against Hitler until Germany invades the Soviet Union in June of 1941. Throughout 1940 and 1941 American public opinion remains isolationist and Congress resists overt military support to Britain.

# Louisiana Purchase



## Thomas Jefferson (A)

### On the Louisiana Purchase and strict construction:

1. To political ally John Dickinson: “The general government has no powers but such as the [C]onstitution has given it; and it has not given it a power of holding foreign territory, and still less of incorporating it into the Union.”
2. To political ally and Republican Senator John Breckinridge (KY): “The Executive in seizing the fugitive occurrence which so much advances the good of their country, have done an act beyond the Constitution. The Legislature in casting behind them metaphysical subtleties, and risking themselves like faithful servants, must ratify to pay for it, and throw themselves on their country for doing for them unauthorized what we know they would have done for themselves had they been in a situation to do it.”
3. Letter to Wilson C. Nicholas, 1803, arguing against Nicholas’s position that the Constitution allows for the addition of new territory: “When an instrument admits two constructions, the one safe, the other dangerous, the one precise, the other indefinite, I prefer that which is safe & precise. I had rather ask an enlargement of power from the nation, where it is found necessary, than to assume it by a construction which would make our powers boundless. Our peculiar security is in possession of a written Constitution. Let us not make it a blank paper by construction.”

# Thomas Jefferson (B)

## Jefferson's response to the Leopard-Chesapeake incident

1. Issued a proclamation excluding British warships from American waters.
2. Ordered that any unspent funds appropriated for fortifications be used solely to fortify New York, Charleston, and New Orleans.
3. Ordered the purchase of 500 tons of saltpeter, 100 tons of sulphur, and timber to build 100 gunboats. (For these purchases Congress had not authorized or appropriated a single dollar.)

## Jefferson's defense of his actions:

1. Seventh Annual Message to Congress, October 27, 1807: "The moment our peace was threatened I deemed it indispensable to secure a greater provision of those articles of military stores with which our magazines were not sufficiently furnished. To have awaited a previous and special sanction by law would have lost occasions which might not be retrieved. I did not hesitate, therefore, to authorize engagements for such supplements to our existing stock as would render it adequate to the emergencies threatening us, and I trust that the Legislature, feeling the same anxiety for the safety of our country, so materially advanced by this precaution, will approve, when done, what they would have seen so important to be done if then assembled. Expenses, also unprovided for, arose out of the necessity of calling all our gun boats into actual service for the defense of our harbors; all of which accounts will be laid before you."

[U.S. Constitution, Article I, Sec. 9: "No Money shall be drawn from the Treasury, but in Consequence of Appropriation made by Law."]

2. Letter to John B. Colvin, 1810 (from retirement): "The question you propose, whether circumstances do not sometimes occur, which make it a duty in officers of high trust, to assume authorities beyond the law, is easy of solution in principle, but sometimes embarrassing in practice. A strict observance of the written laws is doubtless one of the high duties of a good citizen, but it is not *the highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means."

## John Locke, *Second Treatise*, Ch 14: “Of Prerogative”



(The portrait of John Locke that Thomas Jefferson hung at Monticello. Jefferson called Locke, Francis Bacon, and Isaac Newton “my trinity of the three greatest men the world had ever produced.”)

Sect. 159. Where the legislative and executive power are in distinct hands, (as they are in all moderated monarchies, and well-framed governments) there the good of the society requires, that several things should be left to the discretion of him that has the executive power: for the legislators not being able to foresee, and provide by laws, for all that may be useful to the community, the executor of the laws having the power in his hands, has by the common law of nature a right to make use of it for the good of the society, in many cases, where the municipal law has given no direction, till the legislative can conveniently be assembled to provide for it. Many things there are, which the law can by no means provide for; and those must necessarily be left to the discretion of him that has the executive power in his hands, to be ordered by him as the public good and advantage shall require: nay, it is fit that the laws themselves should in some cases give way to the executive power, or rather to this fundamental law of nature and government, viz. That as much as may be, all the members of the society are to be preserved: for since many accidents may happen, wherein a strict and rigid observation of the laws may do harm; (as not to pull down an innocent man's house to stop the fire, when the next to it is burning) and a man may come sometimes within the reach of the law, which makes no distinction of persons, by an action that may deserve reward and pardon; 'tis fit the ruler should have a power, in many cases, to mitigate the severity of the law, and pardon some offenders: for the end of government being the preservation of all, as much as may be, even the guilty are to be spared, where it can prove no prejudice to the innocent.

## Massachusetts Constitution of 1780

Art. XXX. In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws, and not of men.



# Lincoln's emergency actions at the beginning of the Civil War

Message to Congress in Special Session, July 4, 1861:

Recurring to the action of the Government, it may be stated that at first a call was made for 75,000 militia, and rapidly following this a proclamation was issued for closing the ports of the insurrectionary districts by proceedings in the nature of blockade. So far all was believed to be strictly legal. At this point the insurrectionists announced their purpose to enter upon the practice of privateering.

Other calls were made for volunteers to serve three years unless sooner discharged, and also for large additions to the Regular Army and Navy. These measures, whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity, trusting then, as now, that Congress would readily ratify them. It is believed that nothing has been done beyond the constitutional competency of Congress.

Soon after the first call for militia it was considered a duty to authorize the Commanding General in proper cases, according to his discretion, to suspend the privilege of the writ of *habeas corpus*, or, in other words, to arrest and detain without resort to the ordinary processes and forms of law such individuals as he might deem dangerous to the public safety. This authority has purposely been exercised but very sparingly. Nevertheless, the legality and propriety of what has been done under it are questioned, and the attention of the country has been called to the proposition that one who is sworn to "take care that the laws be faithfully executed" should not himself violate them. Of course some consideration was given to the questions of power and propriety before this matter was acted upon. The whole of the laws which were required to be faithfully executed were being resisted and failing of execution in nearly one-third of the States. Must they be allowed to finally fail of execution, even had it been perfectly clear that by the use of the means necessary to their execution some single law, made in such extreme tenderness of the citizen's liberty that practically it relieves more of the guilty than of the innocent, should to a very limited extent be violated? To state the question more directly, Are all the laws but one to go unexecuted, and the Government itself go to pieces lest that one be violated? Even in such a case, would not the official oath be broken if the Government should be overthrown when it was believed that disregarding the single law would tend to preserve it? But it was not believed that this question was presented. It was not believed that any law was violated. The provision of the Constitution that "the privilege of the writ of *habeas corpus* shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it" is equivalent to a provision -- is a provision -- that such privilege may be suspended when, in cases of rebellion or invasion, the public safety *does* require it. . . .



## Lincoln's ultimate defense of his actions

Letter to Albert G. Hodges, April 4, 1864:

I did understand . . . that my oath to preserve the constitution to the best of my ability, imposed upon me the duty of preserving, by every indispensable means, that government -- that nation -- of which that constitution was the organic law. Was it possible to lose the nation, and yet preserve the constitution? By general law life *and* limb must be protected; yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb. I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation.

# Publius on the Constitution and necessity

## *Federalist 23:*

The authorities essential to the common defense are these: to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support. These powers ought to exist without limitation, *because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them.* The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.

. . . [G]overnment ought to be clothed with all the powers requisite to complete execution of its trust. And unless it can be shown that the circumstances which may affect the public safety are reducible within certain determinate limits; unless the contrary of this position can be fairly and rationally disputed, it must be admitted, as a necessary consequence, that there can be no limitation of that authority which is to provide for the defense and protection of the community, in any matter essential to its efficacy that is, in any matter essential to the *formation, direction, or support* of the national forces.

## *Federalist 25:*

It was a fundamental maxim of the Lacedaemonian commonwealth, that the post of admiral should not be conferred twice on the same person. The Peloponnesian confederates, having suffered a severe defeat at sea from the Athenians, demanded Lysander, who had before served with success in that capacity, to command the combined fleets. The Lacedaemonians, to gratify their allies, and yet preserve the semblance of an adherence to their ancient institutions, had recourse to the flimsy subterfuge of investing Lysander with the real power of admiral, under the nominal title of vice-admiral. This instance is selected from among a multitude that might be cited to confirm the truth already advanced and illustrated by domestic examples; which is, that nations pay little regard to rules and maxims calculated in their very nature to run counter to the necessities of society. Wise politicians will be cautious about fettering the government with restrictions that cannot be observed, because they know that every breach of the fundamental laws, though dictated by necessity, impairs that sacred reverence which ought to be maintained in the breast of rulers towards the constitution of a country, and forms a precedent for other breaches where the same plea of necessity does not exist at all, or is less urgent and palpable.

# U.S. Constitution, Article II (selections)

## Section 1.

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, 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 execute 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."

## Section 2.

The 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; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

## Section 3.

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

## Section 4.

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

## **Franklin Roosevelt's actions in the 15 months prior to U.S. entry into WWII without explicit congressional authorization**

1. September, 1940: Transferred 50 “over-age” destroyers to Britain in exchange for land in British possessions for use as military bases.
2. April, 1941: Expanded the U.S. defense perimeter to Greenland, pledging to defend it against invasion.
3. May, 1941: Proclaimed an unlimited national emergency, closing all German and Italian consulates in the U.S.
4. June, 1941: Authorized U. S. naval forces to convoy shipping across the Atlantic as far as Iceland.
5. July, 1941: Sent troops to Iceland to prevent occupation by German forces.
6. September, 1941: Issued a “shoot on sight” order to U.S. naval forces in U.S. defensive waters against German and Italian vessels, initiating a *de facto* naval war between U.S. and German ships.

**Arthur Schlesinger Jr.'s criteria necessary to justify executive prerogative**  
(from the 1989 edition of *The Imperial Presidency*)

1. There must be a clear, present and broadly perceived danger to the life of the nation and to the ideals for which the nation stands.
2. The President must define and explain to Congress and the people the nature and urgency of the threat.
3. The understanding of the emergency, the judgment that the life of the nation is truly at stake, must be broadly shared by Congress and the people.
4. Time must be of the essence; existing statutory authorizations must be inadequate; and waiting for normal legislative action must constitute an unacceptable risk.
5. The danger must be one that can be met in no other way than by presidential initiative beyond the laws and the Constitution.
6. Secrecy must be strictly confined to the tactical requirements of the emergency. Every question of basic policy must be opened to national debate.
7. The President must report what he has done to Congress, which, along with the Supreme Court and ultimately the people, will serve as the judge of his action.
8. None of the presidential actions can be directed against the political process and rights.