variety, rather than unity, may prevail, and that human affairs may turn out to be a truly Hobbesian state of nature.

I have been trying to answer Professor Kelsen on the ground of "facts" to which he is devoted, and it is not, I hope, improper to summon as a final basis for optimism the fact of his own language. At the close of "What Is Justice" he affirms his belief that democracy, with its commitment to freedom and tolerance, must run the risk involved in applying its standard of free expression even to its enemies. "We have a right to reject autocracy and to be proud of our democratic form of government" only as we do this; he says "it is the essence and honor of democracy to run such risk, and if democracy could not stand such risk, it would not be worthy of being defended." (P. 23). I have been arguing that in the "right," the "pride," the "honor," the "worth" of which he speaks, Professor Kelsen refers to more than his own private preferences, that he employs the language of a common morality in which men who respond to principles stand in some sense on the same footing. Certainly such morality is not all there is to the situation, any more than it is all there is to law. Certainly such morality, like the law, always is in need of development and clarification. But with it both the coercions of law and the fumblings of diplomacy offer some prospect of serving human freedom. Without it they can be only ingenious devices by which some men exploit others.

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The Presidency in the Courts. By Glendon A. Schubert, Jr. Minneapolis, Minn.: University of Minnesota Press, 1957. Pp. xi, 366. $5.50.

"The tools," Napoleon insisted, "belong to the man who can use them." Professor Schubert's thesis appears to be that as far as the courts are concerned not only do the powers of the presidency belong to the presidents who wish to use them and who can use them, but more significantly the courts generally will support presidents in the exercise of even the broadest of executive powers upon their claim that they are constitutionally theirs.

To present but a few examples, the courts will not question the exercise of presidential powers in connection with such activities as the disposition of troops, the declaration of martial law, the establishment of military courts, the proclamation of a national emergency, the recognition of foreign powers, the conclusion of executive agreements, the regulation of aliens, and the control of personnel and property within the executive branch. Nor will the courts review "executive discretion" or "intervene in presidential decisions of political questions"; they will not "compel him to act" nor force him to "divulge official information that he chooses to withhold." (Pp. 347–54.)

Wars "hot" and "cold," quests for loyalty and security, crisis measures against depressions at home and unfavorable commercial relationships abroad —all of these factors contributed to an increased expansion of executive powers, or, as Professor Schubert likes to call them, "the President's implied powers," the power "to act affirmatively in the public interest." (Pp. 353.) Professor Schubert notes only two recent post-depression instances in which presidential orders encountered a judicial veto, *Cole v. Young*[1] and *Youngstown Sheet & Tube Co. v. Sawyer*.[2] He does not consider that the latter case in any substantial way constitutes an exception to his thesis that "in every major constitutional crisis between the executive and the judiciary, the President has emerged the victor" (p. 4), inasmuch as the central issue in that particular conflict appeared to him to be one not between the Court and the President but between the Congress and the President. In this interpretation Professor Schubert leans heavily on Justice Jackson's concurring opinion, which, in vigorously denying the concept of inherent presidential powers, acknowledged the right of Congress to pass broad enabling legislation for the President to meet emergencies but warned Congress that only it can "prevent power from slipping through its fingers. . . . I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems."[3]

Nor is the judicial veto in *Cole v. Young* very significant, because in that case the Court declined an opportunity to deal with the constitutionality of the presidential security program. Instead, the Court decided the case on the much narrower ground of statutory definition and the procedural adequacy of the petitioner's discharge.

In a generally laudatory review former President Harry S. Truman seemed to feel that Professor Schubert's findings "suggest very strongly that, if the Presidency should ever fall into the hands of a man (or men) without morals and scruples, the Supreme Court would not prove an effective obstacle to the plans and designs that such a man might have. . . . I am not sure that this has to be so; we have had (and have) men on our highest court with moral courage enough to make their voices heard when the nation's basic freedoms are at stake. . . ."[4] What Professor Schubert's evidence suggests to this reviewer, however, is not so much a doctrine of judicial self-restraint vis à vis the presidency, but rather, as Professor Pritchett once termed it, a definition of presidential powers "by the political rather than the judicial process."[5]

Professor Schubert adds to the distinct value of the book by drawing his findings from state-court and lower federal-court cases as well as from Su-

[1] 351 U.S. 536 (1956). [2] 343 U.S. 579 (1952).

[3] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (1952).

[4] 1 Midwest J. of Pol. Sci. 93 (1957).

[5] Rankin (ed.), The Presidency in Transition 92 (1949).

preme Court cases. His most lucid and able discussion of the judicial antecedents and circumstances surrounds such notable cases as *Yakus v. United States*[6] (pp. 269–71), *Bailey v. Richardson*[7] (pp. 21–33), *Myers v. United States*[8] (pp. 19–21), *United States v. Curtiss-Wright Export Corp.*[9] (pp. 107–18), *United States ex. rel. Knauff v. Shaughnessy*[10] (pp. 122–30), *United States v. Bush & Co.*[11] (pp. 156–63), and *Silesian-American Corp. v. Clark*[12] (pp. 225–34). It is not difficult to marvel at the chasm between the implicit judgments contained in the majority opinions of these cases when they are contrasted with the proposition expressed by Chief Justice Hughes in *Home Building & Loan Ass'n v. Blaisdell* that "[e]mergency does not create power."[13] Emergencies, even under our constitutional system, do seem to create powers—powers which by the very requirements of crisis could not be lodged anywhere else but in the presidency. Thus the Hamiltonian concept of the presidency, conceived in an era and for conditions quite different from ours, was gradually worked into our constitutional fabric by presidents like Jackson, Lincoln, Theodore Roosevelt, Wilson, and Franklin D. Roosevelt, with the assistance of congressional grant and judicial acquiescence. This constitutional development, in essence, represents to a not inconsiderable extent a frank judicial acknowledgement of the inappropriateness of courts serving as the locus for settling issues primarily political. Professor Schubert concurs with the wisdom of this type of judicial self-restraint. While wishing to destroy the myth that the courts could or should resolve broad questions of executive policy or rule-making, he does, however, enter a caveat to the effect that the doctrine of judicial self-restraint should not entail a judicial abnegation or lack of concern for questions of procedural due process of law. What the courts should do (citing *Peters v. Hobby*[14] as an illustration) is "to return to their historic role in Anglo-Saxon politics of enforcing, for citizen and official alike, the requirements of existing law." (P. 348.)

This book makes a real contribution to that body of political and legal literature which views the analytical distinction between legal restraints and powers, on the one hand, and political restraints and powers, on the other hand, as a necessary prerequisite for the development of a more realistic theory of a democratically responsible presidency. To claim that the courts cannot keep the President under control is not to deny either the need or the possibility that he may yet be kept within the confines of the Constitution. What this argument stresses is that the ultimately effective control upon the President must be political, since his office is political—the most political and

[6] 321 U.S. 414 (1944).
[7] 341 U.S. 918 (1951).
[8] 272 U.S. 52 (1926).
[9] 299 U.S. 304 (1936).
[10] 338 U.S. 537 (1950).
[11] 310 U.S. 371 (1940).
[12] 332 U.S. 469 (1947).
[13] 290 U.S. 398, 425 (1934).
[14] 349 U.S. 331 (1955).

only truly national office in the land. The President (*sub Deo et Populi*)—whether a mere voice of Congress or Steward of the People—must give his final account to the electorate and, to be sure, to the judgment of history.

"I do not think," Oliver W. Holmes, Jr., maintained, "that the United States would come to an end if we lost our power to declare an Act of Congress void."[15] Forty years later the United States had proved itself thoroughly able to meet the challenge of a world depression and a total war without requiring the type of "judicial review" symbolized best by the substantive due process of law tests of a Justice Peckham.[16] Nor has judicial self-restraint been practiced by the Supreme Court with reference to Congress alone, but, as Professor Schubert points out rather succinctly, the courts have in practice similarly failed to exercise any effective check upon the presidency. This is what causes Professor Schubert to insist, this reviewer believes rightly, that "the cause of constitutional democracy may be better served by discarding myths which inhibit the creation of alternative and more realistic approaches to the problem of executive responsibility." (P. 4.)

A consideration of such alternatives, although necessarily beyond the ken of this book, is made even more important by the challenges of the significantly broadened and continued political demand for presidential leadership and initiative in socio-economic and foreign affairs. Professor Schubert's closely reasoned and scholarly work not only destroys constitutional myths that must be destroyed but substantiates well his genuine concern lest a blind reliance upon an unrealistic "judicial big brother" will prevent the necessary focus and attention on making presidential accountability more clear and distinct.

In a series of lectures given a number of years ago, Professor E. S. Corwin, similarly concerned for individual liberties at a time of greatly expanded governmental and presidential power, maintained that such freedoms can only be safeguarded "in such constitutional arrangements . . . [that not only promise] that necessary things be done in time, but that the judgment that they are necessary be as widely representative as possible."[17] Professor Schubert's book, without detracting in any way from the proper role of the judiciary, leaves similarly little doubt that it is the President rather than the courts to whom demands for accountability must be addressed, and that constitutionally it is the presidency and the Congress from where the basic patterns of overall public policy must necessarily emerge.

G. Theodore Mitau*

[15] "Law and the Court," Speech to the Harvard Law School Association, New York, February 15, 1913.

[16] Lochner v. New York, 198 U.S. 45 (1905).

[17] Corwin, Total War and the Constitution 181 (1947).

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