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In re Neagle:

A case study in executive prerogative

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There is a constitutional debate, nearly as old as the nation itself, over the question of what the President has the authority to do. Is he authorized to act where the law is silent? Can he act in the absence of Congressional statute or express constitutional authorization? Over the past two centuries, justices, Presidents, and constitutional scholars have articulated arguments on both sides of this issue. One important Supreme Court statement on the issue, however, often goes unnoticed. The decision of the Court in *In re Neagle* deserves more credit and more space on the pages of the history books than it often receives. The case is described in a few textbooks and scholarly essays, but more often than not, it is mentioned in a footnote here or there. Yet, here was a decision where the Court, for the first time, gave an explicit answer to the prerogative question. And the answer Justice Miller gave when he wrote for the Court was succinct and clear. Even where Neagle seems to rehash age-old arguments, there is significance in the redundancy. The fact that this constitutional debate is as old as our nation itself, and that the arguments have been applied to so many situations over the centuries, is a testament to the importance of the issue. The opinions of the Court – both majority and dissenting – are significant in their place in the larger prerogative debate. To see *Neagle’s* place in the debate, we must understand the theory of executive prerogative, the historical debate surrounding this theory, the circumstances the led to the decision in *Neagle*, and *Neagle’s* relationship to other explanations of prerogative. Upon analysis, the decision of the Court in *Neagle*, as well as the dissenting opinion written by Justice Lucius Lamar, find their place in the prerogative debate to be significant in their succinct, repeated and articulate explanations of both sides of the ongoing and unresolved constitutional debate over executive prerogative. These opinions can help guide today’s student of politics through this complex debate. In a democratic society, where all Americans are encouraged to participate in their government, it is not only the peoples’ right, but
also their responsibility to be informed. The debate over presidential claims of inherent power is one about which the public should be aware, and *Neagle* is a way to introduce not only students of politics, but the American population at large to this aspect of constitutional study.

**Defining Executive Prerogative**

In order to understand the Court’s decision in *Neagle*, as well as the ways in which the opinion has been used, one must consider the meaning of executive prerogative. Broadly defined, executive prerogative is the right of the President, and at times even his duty, to act where the law is silent. On occasion, executive prerogative has been taken to mean that the President can act contrary to the Constitution when a situation demands it. Though these simple definitions do not do justice to the complexity and nuance of this constitutional debate, when one considers the ways in which scholars have defined prerogative and its synonyms, it is evident that all the authors are discussing the same essential idea (Epstein and Walker, 2007, p. 207).

Prerogative was not a new or distinctly American concept. When Edward Corwin uses the term *prerogative*, he hearkens back to the definitions of John Locke, who states that there are some things for which the law simply cannot provide. These must be left up to the discretion of the executive, “to be ordered by him as the public good and advantage shall require” (qtd. in Corwin, 1984, p. 7). For Corwin, executive prerogative allows for the President to act where the law is silent and, sometimes, even contrary to the law, but always for the “public good.” “This power,” says Locke, “whilst employed for the benefit of the community and suitably to the trust and ends of the government [is never] questioned” (qtd. in Corwin, 1984, p. 8).

Louis Fisher refers to implied or inherent powers, but he notes that there are various other ways of referring to powers of the President that are not expressly stated, such as incidental or inferred power, and he notes that all the different terms essentially mean the same thing. “They
parade under assorted names,” he says, “[but] [w]hatever the name, the result is identical: the conferral of a power that is neither expressly stated in the Constitution, nor specifically granted by Congress” (2007, p. 13). For Lee Epstein and Thomas Walker, executive prerogative is understood as a general grant of power to the President. He has all the powers specifically enumerated in Article II, and any other executive function that is required of him to “run the nation” (2007, p. 207). The authors distinguish this method of interpretation from what they refer to as the mere designation view of presidential power, which asserts that when the executive power is vested in the President, his responsibilities are limited to those specifically listed in the Constitution. Epstein and Walker note that these are more old-fashioned terms, and that more modern scholars use different terms, like the stewardship theory, prerogative powers, or inherent powers (Epstein and Walker, 2007, p. 207). Supporting these authors’ assertions, Kenneth Mayer uses the term implied powers. These are the powers of the President that are not explicitly granted to him by the Constitution or by law, but that he possesses nonetheless. For Mayer, implied powers are rooted in the enumerated powers given the President in the Constitution (2001, pp. 42 – 43). Both Daniel Farber and Henry Monaghan look at prerogative as the protective powers of the President (Farber, 2003, p. 133; Monaghan, 1993, p. 74). Monaghan finds protective power in Neagle, as well as a related case, In re Debs, which was decided five years later (1993, p. 74). These cases will be discussed in more detail in the analysis of Neagle, which follows. Former President William Howard Taft, in his book Our Chief Magistrate and His Powers, defines a specific outline for executive power, a view most closely related to Epstein and Walker’s mere designation (Taft, 1916, p. 140). Unlike Theodore Roosevelt, Taft did not accept that the President could do something so long as it was not prohibited, but admitted the President could infer powers from the enumerated powers he is...
given by the Constitution (Nelson, 2008, p. 127). Louis Koenig’s discussion of prerogative highlights the tension between Lockean prerogative and Taft’s understanding. While Locke asserted that this power was on “reserve” for the President’s use when the public good required it (Koenig, 1986, p. 11), Taft argued that the notion of some “residuum” of power from which the President could draw is erroneous (Taft, 1916, p. 140). Each definition of prerogative is nuanced, but the different terms – implied powers, general grant theory, stewardship, trustee of the people, and inherent powers – essentially refer to the same concept: the idea that the President has the power to act where the law and the Constitution are silent. The majority opinion in Neagle serves as a great example of the pro-prerogative argument, while the Neagle dissent well explains the opposition to prerogative. These opinions are especially helpful because they connect to other similar arguments that came before and after the Neagle decision.

**History of the Prerogative Debate**

By the time the Supreme Court handed down its decision in Neagle in the year 1890, nearly a century had passed since Washington’s Proclamation of Neutrality in the war between France and Great Britain first raised the issue and resulted in a war of words between Pacificus and Helvidius, the pseudonyms used by Alexander Hamilton and James Madison, respectively. Hamilton wrote from the broad general grant view of presidential power and defended Washington’s actions. He argued that the power to proclaim neutrality was executive in nature and that the President’s power was only restricted by the specific limitations in the Constitution (Nelson, 2008, p. 55). Madison, writing from a position more akin to Epstein and Walker’s *mere designation* view, believed that the President’s actions constituted lawmaking – a power that rested solely with the Legislature. Madison believed that the powers Washington was executing and Hamilton was defending were the stuff of royal prerogative (Nelson, 2008 pp. 58 – 59).
In the 1860s, much more dire circumstances threatened the government and the nation itself. At that time, President Lincoln drew upon a broad understanding of executive power and his constitutional roles of Chief Executive and Commander in Chief, as well as his oath of office, to justify the actions he took in the absence of Congressional or clear constitutional authorization. He defended his actions in three ways. First, Lincoln argued that the President had executive power to do most of these things. Additionally, he held that he had done nothing “beyond the constitutional competency of Congress” (qtd. in Farber, 2003, p. 118). Finally, Lincoln believed the survival of the Union was more important than a strict adherence to the letter of the Constitution. As he wrote in a letter to his friend Albert Hodges, “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” (qtd. in Nelson, 2008, p. 98). In the end, Lincoln did not do anything that Congress could not do; his actions could be traced, somehow, to the Constitution (Farber, 2003, p. 118).

Not long after these wartime actions, reaffirming the legitimacy of Lincoln’s actions, the Court in 1890 handed down the decision upon which we focus here. Justice Samuel Miller wrote for the majority in *Neagle* (Farber, 2003, p. 135). One of his defenses of the broad general grant of power to the President was that a legitimate government requires provisions to protect its personnel. In the *Neagle* case, it was Justice Stephen Field who needed protecting, and Miller asserted that the power to protect is executive in nature. Miller argued for a broad understanding of executive power for the sake of securing safety in the nation, but he was not without opposition. Justice Lucius Lamar wrote a convincing dissent, insisting that lawmaking power of
any kind, including the sorts of powers exercised by President Benjamin Harrison, belonged with
the legislature (135 U.S., 1890, pp. 1 – 99).

Although the *Neagle* decision was the Court’s first definitive answer to the prerogative
question, it by no means ended the debate. Five years later, a case was handed down with similar
enough arguments to *Neagle* that the two are often discussed together in textbooks and scholarly
literature. *In re Debs* considered the President’s ability to protect public property – in the form of
the U.S. mail. President Grover Cleveland took action in absence of Congressional statute or
explicit constitutional authorization, and as in *Neagle*, the Court validated his actions (158 U.S.,
1895, p. 564). However, the Court’s affirmation of executive prerogative is not universal. The
decision in *Youngstown Sheet & Tube Co. v. Sawyer* was handed down in 1952. In this decision,
the Court rejected President Truman’s legal claim that he had the authority to seize the steel mills
during the Korean War in order to keep them in operation (343 U.S., 1952 p. 579). It is important
to note here that there are limits to presidential power of this sort, particularly in the realm of
domestic affairs, and where Congress has explicitly or implicitly prohibited presidential action.
While there are claims of inherent power in both realms, the President is generally given more
leeway in the realm of foreign affairs (Shafritz and Weinberg, 2006, p. 323).

The Court is not the only institution that has had to wrestle with this issue. Some of our
country’s most prominent Presidents have articulated the arguments of Justices Miller and Lamar.
President and future Chief Justice William Howard Taft held to the stricter view, which was
articulated by Madison and Lamar, and wrote that the power of the President must be rooted
directly and unmistakably in a Congressional statute, or in the Constitution. In contrast,
Theodore Roosevelt developed a theory of executive stewardship, in which the President has the
authority to take certain actions that benefit the public interest so long as these were not
prohibited by the Constitution or Congressional statute. As Milkis and Nelson note, Roosevelt asserted that this inherent power of the President can and should be enacted in the day-to-day business of government and extended presidential authority not only during situations of emergency (like those Lincoln encountered) but also during peacetime (2008, p. 211).

The debate over executive prerogative continues to the modern era. Most often, Presidents use their inherent power claims to justify actions in realms of foreign affairs and national defense. This was especially evident during the presidency of George W. Bush, who used his understanding of inherent executive power to justify such actions as detaining suspected enemy combatants, establishing military tribunals, and even curtailing civil liberties (Epstein and Walker, 2007, pp. 320 – 321).

The importance of executive prerogative as an ongoing constitutional debate cannot be overstated. Neagle is a case study in the two sides of the debate. To understand Neagle and the arguments for and against this type of inherent/implied/protective/prerogative power, it is helpful to understand the story behind the case. When Miller wrote his opinion, this is where he began, so it is only fitting that we begin here as well. ¹

The Facts of the Neagle Case

The story behind the case is a fascinating drama, whose leading men are Stephen Field and David Terry. Their story has been chronicled dozens of times by historians, but two

¹ Some scholars choose to pay the facts of the Neagle case little to no attention, claiming that what might make for a good movie script, is not relevant to a discussion of Constitutional theory. This author disagrees. In a democracy like ours, it should be with pride that we consider the American experience as intrinsically tied to the development of political theory. A government of the people can and must be shaped by the experiences of those people, particularly people whose lives are the stuff of American folklore. In conjunction with this case analysis and examination of Presidential prerogative, I have composed an audio dramatization of the facts of the Neagle case entitled Once Upon a Train in the West. This project was borne out of a desire to bring the executive prerogative issue to a greater audience. I choose to use the fascinating Western drama of truly colorful American characters to engage my readers, and listeners, in a discussion of their government.
relatively recent retellings of the tale stand out. Historian Robert Kroninger catalogued this rivalry in the Supreme Court Historical Society Yearbook article *The Justice and the Lady*. The yearbook article is cited in Epstein and Walker’s textbook because it is perhaps the quintessential source for understanding the interactions between Field and Terry prior to Terry’s death. Kroninger eloquently wove together the stories of what he calls “two brilliant but irascible men of the West” (Kroninger, 1977, p. 6). Another leading source of information on Stephen Field comes from his biography by Paul Kens (1997). Terry and Field were the leading institutional actors in the historical drama that resulted in the landmark case, so their mutual history is essential to our understanding of the facts of the case. Field occupied a unique position in the *In re Neagle* story; He was a justice of the Supreme Court at the time that the case came to the Bench, and while he was not a direct party to the case itself, events that occurred because of him are the facts of the case. As for David Terry, he was a judge in the state of California. This is what connected him to Field, who had worked extensively as a lawyer and judge in that state. The two men had a deep-seated rivalry that had professional, political, and personal roots. It was a rivalry that ultimately led to a dramatic encounter in a rail station restaurant in Lathrop, California, an encounter that resulted in Terry’s death (Kens, 1997, pp. 275 – 283).

The two men met professionally when Field was elected to the state Supreme Court and was sworn in by Terry, then Chief Justice. Hostility between them began when they found themselves on two sides of a dispute regarding David Broderick, United States Senator from California. Field was indebted to Broderick, who had defended him in a saloon ambush. Because of an underlying animosity between Terry and Broderick, the former resigned as California’s Chief Justice, and challenged the latter to a duel. Avenging his honor, Terry shot and killed Senator Broderick on the morning of September 13, 1859. As a result of Terry’s
resignation, Field was made Chief Justice of California, and when a spot opened on the US Supreme Court, Field was President Abraham Lincoln’s choice to fill the vacancy, and the tension between them deepened. The rivalry became even more intense with Terry’s successful attempt to block Field’s run for the Presidency, and during the debate over the transcontinental railroad, about which Field and Terry held opposing positions. Living much of their lives on opposite sides of the Civil War conflict, New England-born Field and Terry the Southerner had an undeniable fundamental antagonism (Kroninger, 1997, pp. 6 – 7). However, the greatest factor of all was the way in which Field would rule when he was riding circuit in California in 1888.

In 1880, Sarah Hill was just twenty-seven years old, but already had a reputation for scandal. That year, she began a relationship with William Sharon, a man who was thirty-three years her senior. Well respected in the San Francisco community, Sharon was a former Senator from Nevada, and a wealthy silver speculator. About a year after their relationship began, Sharon ended things. But the lady would not go without a fight. Heading to the courthouse with a marriage certificate in hand, she set out to reclaim her dignity and claim a share of the old Senator’s millions. So began a legal battle between the lady and the Senator. A state court had granted Hill a divorce, but a federal court had ruled that her marriage license was a fake. During the divorce trials, Sarah Althea’s story met the story of the rivalry of Field and Terry, because David Terry came to be Hill’s lawyer. By 1885, William Sharon had died, and Sarah Althea Hill married David Terry. Sharon’s sons continued the legal battle against Hill and, as fate would have it, it was Justice Stephen Field who sat as circuit judge when Sharon’s sons brought a motion to the court to make the federal determination final. When Field ruled against the Terrys, the courtroom erupted. Hill, bursting with anger, screamed at Field that he had been bribed by
the Sharons (Kens, 1997, pp. 275 – 283). When marshals attempted to escort her from the courtroom, Terry lunged at and struck one of them. A man named David Neagle, who was a witness and bystander to the whole ordeal, wrenched a knife from Terry’s hand. Both Mr. and Mrs. Terry were sent to prison, though his sentence was longer than hers, lasting for six months. During that time, he was visited frequently by his wife, but spent much of his time growing in anger at his old nemesis Field. Both David and Sarah Terry threatened Field’s life after his ruling in the divorce suit (Kroninger, 1977, pp. 7 – 8). Stories differ as to what was actually said. Mr. Terry may have said that he planned to “horsewhip and then kill Field if the justice ever returned to California” (Epstein and Walker, 2007, p. 209). Mrs. Terry reportedly said that she could have killed “the old villain” right in the courtroom, but that sad was not ready to do so yet (Kens, 1997, p. 280). In any event, the threats found their way to Washington, and Attorney General William Miller, by the authority of President Benjamin Harrison, made the decision to assign a bodyguard to Justice Field during his next visit to the state of California. Federal government officials in that state gave the job to David Neagle, partly because of his heroic defense of the man during the outburst in the Alameda County courtroom (Kroninger, 1977, p. 9).

The years-old rivalry between the two men reached its peak in a dining room at a railway station where Neagle killed Terry, the event that was the basis for the Neagle case itself. Field, accompanied by Mr. Neagle, was riding a train between Los Angeles and San Francisco, two stops on his circuit. The Terrys boarded the train sometime after Field did, but the two did not directly interact until the breakfast stop in the town of Lathrop on August 13th, 1889. Accounts differ, but what is certain is that Terry approached Field, and they came to blows. Field and Neagle claimed that it appeared that Terry was reaching for a gun or knife when Neagle, a
talented marksman, reached for his own pistol and shot Terry, first in the chest and then in the head. Sarah Althea ran to her dead husband’s body, accusing Neagle of murder. At the next station stop, Neagle was escorted from the train and detained. Charges were initially filed against Field as well, but these were eventually dropped. When Neagle was arrested and charged with murder, a federal court granted a writ of habeas corpus, ordering his release from California state authorities. Habeas corpus would require that an explanation be given for Neagle’s arrest, and, if he were being held in a state prison for an action he took in pursuit of a federal law, he should be released. The state of California appealed, and the issue came before the Supreme Court (Kroninger, 1977, pp. 9 – 11).

The case came to the Supreme Court in 1890. Justice Field himself was, of course, on the bench at the time, but he recused himself from the decision, hearing none of the arguments and taking no part in the decision. The justices needed to decide if the President, Benjamin Harrison, had the right to appoint, by executive order through the Attorney General, a bodyguard to protect Justice Field. The majority ruled that the President’s action was valid. In a six-to-two decision, the Court ruled in favor of a general grant of Presidential power, freeing Neagle and laying the foundation for new understandings of what the President can do constitutionally (Kroninger, 1977, pp. 9 – 13).

**Neagle: The Decision of the Court**

Justice Miller wrote for the majority and was joined by Justices Blatchford, Bradley, Brewer, Gray, and Harlan. As stated above, Miller wrote, among other things, in favor of a broad understanding of executive power. After his retelling of the facts of the case, Miller made several pronouncements about presidential power as it relates to the case-at-hand. Miller

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2 The Court’s decision covers more aspects of the case than the question of presidential power, but history has shown that the executive implications are the most salient (135 U.S. 1, 1890).
maintained that Field is due protection in his role as a circuit court judge, that the President is the logical source of that protection, that the President has the responsibility to keep peace in the nation, and that there is a constitutional basis for this presidential authority.

The President’s protective power

Miller began by declaring that Field’s role as a justice extended beyond sitting on the bench and hearing and deciding cases. In traveling between circuit court sessions, Field was “engaged in the discharge of his duties as Circuit Justice of the Ninth Circuit, and was entitled to all the protection under those circumstances which the law could give him” (135 U.S., 1890, p. 58). Miller explained that “in order to enable him to perform this duty, Mr. Justice Field had to travel each year from Washington City, near the Atlantic coast, to San Francisco, on the Pacific coast. In doing this, he was as much in the discharge of a duty imposed upon him by law as he was while sitting in court and trying causes. There are many duties which the judge performs outside of the courtroom where he sits to pronounce judgment or to preside over a trial” (135 U.S., 1890, p. 55). According to Miller, the Court did not need to cite a specific statute giving Neagle, or any bodyguard, a specific responsibility, because this authorization grew out of Field’s duty as a judge and the protection due him as a result of that duty. “This duty is as much an obligation imposed by the law as if it had said in words ‘the Justices of the Supreme Court shall go from Washington City to the place where their terms are held every year’” (135 U.S., 1890, p. 56). Miller equated the duty of the justice, in his role as a circuit court judge, with a law. No one would disagree that a judge is entitled to protection in the courtroom, but Miller argued that while he is traveling about, he still deserved this protection. Justices perform their duties whenever and wherever convenient. Therefore, wherever they are, they fall under the protection that is due to them as justices. This protection is due all personnel of the Federal government.
Neagle, then, as Field’s bodyguard, was authorized by that position to act in order to protect the justice. Miller wrote that Neagle was acting in accordance with his duty when he defended Field by shooting Terry. “[I]n taking the life of Terry, under the circumstances, he [Neagle] was acting under the authority of the law of the United States, and was justified in so doing; and that he is not liable to answer in the courts of California on account of his part in that transaction. (135 U.S., 1890, p. 76).

This duty of an officer may seem, at first, to be unrelated to presidential power. After all, Field was a judicial official, not an executive one. But note the way in which Miller used Field’s duties as a justice and a judge of the circuit court to explain the protection that an officer of the law is due. “It would be a great reproach to the system of government of the United States…if there is to be found within the domain of its powers no means of protecting the judges, in the conscientious and faithful discharge of their duties, from the malice and hatred of those upon whom their judgments may operate unfavorably” (135 U.S., 1890, p. 59). Justice Miller established the fact that justices require governmentally sanctioned protection. The United States government is not so ineffectual as to leave its high officers “defenseless and unprotected” (135 U.S., 1890, p. 59). In a previous section, we explained that one manifestation of executive prerogative, as scholars understand it, is the President’s power to protect. Henry Monaghan wrote about this piece of the theory in his aptly titled journal article, “The Protective Power of the Presidency.” Monaghan wrote that “inherent in the concept of the American Chief Executive is the power (and perhaps the duty) to use force as necessary to enforce federal law when a breakdown in the normal civil process has occurred, and not only to defend the United States against sudden attack, but also to “protect” the government’s personnel, property, and instrumentalities” (1993, p. 66). This, then, is where the role of the officer relates to the power of
the President and fits within the larger prerogative debate. The *Neagle* decision made a case for the President’s power to protect of personnel of the government. After describing why Field was due protection not only in the courtroom but also while traveling, Miller asserted that the protection of a Supreme Court Justice is a special responsibility of the President. This responsibility did not fall to the courts, because it was not within their jurisdiction to execute the laws. Nor was the protection legislative in nature, because Congress “can only protect the judicial officers by the enactment of laws for that purpose” (135 U.S., 1890, p. 63). In other words, while Congress could authorize the protection, the President remains the appropriate entity to carry out the protection. Since Congress had enacted no such statute, the Court concludes that this responsibility belongs to the executive. So Miller concluded that it falls to the President, through the use of the U.S. Marshall system, to carry out judicial orders (135 U.S., 1890, p. 63). “We cannot doubt the power of the President to take measures for the protection of a judge of one of the courts of the United States who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death; and we think it clear that where this protection is to be afforded through the civil power, the department of justice is the proper one to set in motion the necessary means of protection” (135 U.S., 1890, p. 67). Protection of judicial officials, Miller claimed, is a function executive in nature. No other branch could authorize protection like the executive through the department of justice.

Daniel Farber recognized this protective power and explained how *Neagle* and a subsequent case, *in re Debs*, compliment each other in the way they defend the President’s power to protect (2003, p. 134). For Farber, *Debs* and *Neagle* are undeniably related. Both involved the government’s obligation to protect, either governmental personnel or governmental property, and in each case, the Court determined that the protective power belongs to the
President (2003, pp. 134-135). Corwin noted this connection as well, stating that *Debs* was decided “along closely parallel lines to *Neagle* (1984, p. 172). In *Neagle*, the President acted to protect the life of a Supreme Court justice who was in danger. In *Debs*, the President acted to protect the government’s property in the form of the U.S. mail.

The situation surrounding the *Debs* case should be explained. Federal troops were sent to the city of Chicago by President Grover Cleveland in 1894 to put down the strike of the Pullman railroad workers. The labor strike had turned violent and threatened the public peace. As it relates to prerogative, it is important to note that Cleveland’s actions were not authorized by any act of Congress. This is essentially the same situation we saw in *Neagle*, as Harrison’s actions were not supported by any specific statute either. Railroad worker Eugene Debs was among those cited for contempt in the riots, but he protested his detention on the claim that the President had usurped power from Congress, having not obtained specific statutory authorization (Epstein and Walker, 2007, p. 213). The Governor of Illinois, John Altgeld, requested that the troops be withdrawn, but Cleveland argued that his actions protected public property (Milton, 1965, p. 168). According to Cleveland, the striking railroad workers were halting the movement of the U.S. mail. Counsel for the President used the *Neagle* case, decided just a few years prior, as support for the President’s actions. “Every government, intrusted [sic] by the very terms of its being with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter” (158 U.S., 1895, p. 584). The actions of President Cleveland were necessary to protect public property – the mail – and Debs was not released.
Farber’s understanding of the *Debs* decision, as it relates both to the decision of the Court in *Neagle* and the protective power of the President, is that the case “re-emphasized” this power “with much broader national significance” (2003, p. 134). While the *Neagle* case dealt with violence against one man (Field), the *Debs* case dealt with violence on a much larger scale. It might be going a bit too far to say that *Neagle* set a precedent for *Debs*, but *Neagle* and *Debs* together demonstrate what “no one would now deny” – that the national government had the authority to protect its officials, as in *Neagle*, and its property, as in *Debs* (Monaghan, 1993, pp. 61-62). In both of these cases, the Court lodged this protective power in the President.

The protective powers defended in *Neagle* and *Debs* were similar to the powers exercised by President Lincoln during the civil war. Lincoln took several actions that were not among his constitutionally granted powers. These included: increasing the size of the army and navy; blockading of Southern ports; suspending of the writ of habeas corpus; instructing to the treasury to purchase military supplies; and barring treasonable correspondence (Nelson, 2008, pp. 96-97). Farber notes that Lincoln rooted these wartime actions in part in his role as Chief Executive as well as his oath of office. In a time of war, the President can do things not specifically enumerated, if the needs of the nation demanded it. Lincoln went so far act contrary to the law in a few of his actions, such as asking the treasury to appropriate funds (Farber, 2003, pp. 115, 128). Recall, however, his justification for this in his letter to his friend Albert Hodges and his use of the life/limb analogy (Nelson, 2008, p. 98). Farber connected Lincoln’s reasoning to Miller’s in *Neagle*. Justice Miller cited precedent when he noted that the United States “must execute its powers, or it is no government (135 U.S., 1890, p. 61). “Justice Miller’s majority opinion emphasized the inherent power of the government to protect itself and execute its laws” (Farber p. 133-134). Lincoln’s prerogative was not only acting where the law was silent, but
acting contrary to the law when the situation demands it. Some of his actions may have not have been strictly executive, Lincoln admitted, but at most, some of what he did was what Congress and the President could do together. Lincoln covered all his bases – he rooted his power in executive functions, then in what the President or Congress could do, then finally defended the belief that, at times, a limb must be sacrificed to save a life. Farber’s real point is that what Miller said in *Neagle* is retroactively upholding Lincoln’s actions. In light of what the Court said in *Neagle*, that Court likely would have upheld Lincoln’s actions as well (2003, p. 137-138).³

In addition to justifying the actions Lincoln took as President, Miller’s opinion was in keeping with the central argument of Hamilton’s Pacificus letters. In defending Washington’s actions, Hamilton asserted that the power to preserve the peace is executive in nature, and that all executive power belongs to the President. According to Hamilton, the President’s executive power is so broad that he is only restricted by the exceptions explicitly noted in the Constitution. Hamilton believed that the issue of the Proclamation of Neutrality was an executive act. The noted exceptions to presidential authority in that context were the Senate’s participation in the appointment of officers and making treaties, and the Legislature’s authority to declare war. Wrote Hamilton, “With these exceptions the Executive Power of the Union is completely lodged in the President” (Nelson, 2008, p. 55). According to Hamilton, the Constitution gives the President executive power, and lists some specific powers, but this is not meant to take away from the general grant. Miller argued alongside Hamilton in *Neagle*, asserting that protection of officers is executive in nature and therefore belongs to the President. Hamilton and Miller both noted concluded that the power they were considering was executive in nature, and therefore it is something the President can do even without explicit authorization.

³ Congress retroactively validated Lincoln’s wartime actions (Nelson, p. 97-98).
Until this point in his argument, Miller had asserted that a justice requires protection in accordance with his duty not only while sitting in the courtroom, but also on his travels between courtrooms. He claimed that this protective power was executive in nature, and was a special responsibility of the President. In his opinion, Miller went on to claim that the President has another responsibility – keeping the peace.

A “peace” of the United States: The emergency power connection

Some scholars lump the Neagle decision into a discussion of emergency powers. The term emergency powers, as opposed to war powers, is used here because Neagle was not decided in the context of a war. War powers, like those Lincoln exercised when he suspended the writ of habeas corpus during the Civil War, are a subset of emergency powers. An emergency can simply be when the general peace of the nation is threatened. Miller referred to this general peace of the nation in the Neagle opinion. “[T]here is a peace in the United States,” he said, and “a man assaulting a judge of the United States while in the discharge of his duties violates that peace” (135 U.S., 1980, p. 69). At first glance, Neagle may not seem to be a situation of dire emergency (certainly not in comparison to the examples of Lincoln’s civil war actions, or even the labor violence involved in Debs.) However, here we can consider the words of that great political theorist John Locke. He did not consider emergency powers to be “limited to wartime, or even situations of ‘great urgency’” (qtd. in Corwin, 1984, p. 169). “The President is authorized to enact such powers if the public good might be advanced by their use” (qtd. in Corwin, 1984, pp. 169 – 170). In his discussion of the case, Edward Corwin acknowledged the momentous significance of the Court’s opinion in Neagle. He noted, “The most important relevant utterance of the Court is to be found in the opinion of Justice Miller delivered in 1890 in the case of In re Neagle” (1984, p. 170). When Neagle killed Terry in pursuance of his duty, he
was acting on the behalf of the President in keeping the peace of the United States and maintaining the public good that was threatened when the life of a Supreme Court justice was threatened (135 U.S., 1890, p. 72).

When Miller justified Neagle’s actions, he noted the similarity between the bodyguard’s responsibility and the role a local sheriff might play in keeping the peace. Deputy Marshal Neagle had power rooted in the Federal government to take on a role usually held by local law enforcement. Paraphrasing Miller, George Fort Milton wrote, “Wherefore a Federal marshal has as much right to protect this Federal peace as a State sheriff had to protect that of his state.” (1965, p. 169 - 170). This argument was similar to the one made in the Debs case, where the violence in Chicago, which had halted the movement of the mail, affected the nation in its entirety. Milton cited President Cleveland’s understanding of the office. Cleveland considered himself the “direct representative of the people,” who ought to be concerned with justice for all individuals (Milton, 1965, p. 157). Cleveland’s actions, like President Harrison’s, were not explicitly sanctioned by Congressional statute, but arose out of what they believed to be their authority to keep the peace of the nation (Milton, 1965, p. 168; Corwin, p. 172).

This understanding of the President’s role in preserving the general peace in the United States was captured by Hamilton in his Pacificus letters. Specifically, he declared that, while it is the Legislature’s constitutional right to make war, it is the right of the executive to preserve the peace until war is declared. Hamilton held that part of the Executive responsibility is to “preserve the nation to the blessings of peace” (qtd. in Nelson, 2008, p. 55). Some might counter that Hamilton’s specific argument had to do with maintaining peace between nations, not maintaining the domestic peace. But there is no reason to believe that Hamilton would have been opposed to the use of presidential power in domestic affairs in order to maintain the peace. One need only
think back to the Whiskey rebellion, and the encouragement that Hamilton gave to Washington in putting down that domestic uprising (Milkis and Nelson, 2008, p. 83).

Miller’s constitutional basis

Neither of these logical arguments for executive prerogative – the President’s protective power or his duty to protect the peace – would be so substantial without Miller’s constitutional justification in Neagle. Miller rooted this presidential authority in the Take Care Clause. Article II charges the President with the enumerated power to “take care that the laws are faithfully executed.” Miller went on to apply this duty not only to specific statutes, but to “rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution” (135 U.S., 1890, p. 64). In the majority opinion, Miller essentially redefined what the law truly is: “[I]n the view we take of the Constitution of the United States, any obligation fairly and properly inferable from that instrument, or any duty of the marshal to be derived from the general scope of his duties under the laws of the United States, is a 'law,' within the meaning of this phrase” (135 U.S., 1890, p. 59). His duties extend beyond mere acts of Congress (Epstein and Walker, 2007, p. 213).

In the majority opinion, Justice Miller rested heavily on the Take Care Clause of Article II, and, in effect, expanded executive power by declaring that clause to refer to more than expressly granted powers that the President is given in Article II, Sections 2 and 3. The clause reads that the President “shall take care that the laws be faithfully executed” (Mayer, 2001, p. 40). Like Miller’s defense of Neagle’s actions, Roosevelt rested his stewardship theory on the Take Care Clause (Kernell et. al., 2009, p. 331). President Theodore Roosevelt also took the

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4 Mayer is of the opinion that this is not only a grant of power to the president, but a limit on him as well, since under this clause, he is required to carry out statutes passed by Congress whether or not he gave said statutes his support (Mayer, 2001, p. 40).
Miller side of the argument and developed his theory of executive stewardship. The theory asserts that the Constitution’s grant of executive power dictates that the President can and must do that which is in the best interest of the people no matter what it may be, so long as it is not expressly forbidden by the Constitution or the laws of Congress. This stewardship theory has been adapted for use by most modern Presidents. In Roosevelt’s autobiography, he explained that the President can do “anything that the needs of the Nation demanded unless such an action was forbidden by the Constitution or by laws” (qtd. in Nelson, 2008, p. 128). Scholars like Louis Koenig have connected Roosevelt’s theory to the Miller’s opinion in Neagle. He wrote the Roosevelt’s “wide-open doctrine is encouraged by [Neagle]” (Koenig, 1986, p.76).

Though Miller found his constitutional defense in the Take Care Clause, it is not the only clause in which proponents of executive prerogative root the power. Miller did not refer to the Vesting Clause of Article II in his Neagle opinion, it, too, is a worthy defense of prerogative, and Hamilton cites it in his Pacificus letters. As Hamilton noted as Pacificus, sometimes it is not the words that are included but the words that are not included that guide interpretation of the Constitution. When the Framers drafted the Constitution at the Convention in 1787, the committee of style was charged with putting the final “literary polish” on the document. It is suspected by some, including Charles Thach, that Gouverneur Morris of the committee of style added the words “herein granted” to Article I so that it would read, “All legislative power herein granted shall be vested in a Congress” [emphasis added]. The words of Article II state that “the executive power shall be vested in a President of the United States of America.” Scholars like Thach believe that Morris purposely left Article II alone anticipating that it would be heavily scrutinized. Therefore, Morris added to words “herein granted” Article I to distinguish it from Article II (Thach, 1969, p. 122). Hamilton picked up on the difference in the language and
emphasized it in his Pacificus letters: “The different mode of expression employed in the Constitution in regard to the two powers the Legislative and the Executive serves to confirm this inference. In the article which grants the legislative powers of the Governt, the expressions are – ‘All Legislative powers herein granted shall be vested in a Congress of the U[nited] States;’ in that which grants the Executive Power the expressions are, as already quoted ‘The Executive Power shall be vested in a President of the U[nited] States of America’ [sic]” (qtd. in Nelson, 2008, p. 54). In other words, there is a difference between Hamilton and Miller. Whereas Miller primarily rests on the Take Care Clause, Hamilton rests his argument on the Vesting Clause.

**Neagle: Lamar’s Dissent**

Miller’s explanations of presidential power can seem, to the casual observer, to be the be-all end-all of the argument, especially when accompanied by the arguments of such prominent figures as Hamilton, Roosevelt, and Lincoln. Mayer went so far as to say that the decision in *Neagle* resolved the question of implied powers altogether (2001, p. 237). It was the first time that the Court had made a definitive statement regarding this question of presidential prerogative in domestic affairs. Mayer suggested that the President has always had the authority to take action independent of Congressional statute. According to him, Miller’s majority opinion “validated the President’s authority to take independent action in executing the law, even when that action has not been expressly authorized by statute” (Mayer, 2001, p. 43). But did *Neagle* definitively answer the question of implied powers of the President? Miller had a worthy opponent in the debate in his fellow justice, Lucius Lamar. As convincing as Miller’s opinion of the Court is, history has proved that it was not enough to end the debate. Even at the time of the decision, the Court was not unanimous. Justice Lamar’s dissent articulated worthy opposition to Miller’s opinion.
Officers are not above the law

According to Lamar, Neagle had no official duty during the events in Lathrop. He had the right, as any bystander would, to interfere in the skirmish. But that interference was not official in its nature, and therefore Neagle was answerable to all of the laws of the state of California. (135 U.S., 1890, p. 80). “[I]t is indispensable to observe carefully the distinction between the individual man, Neagle, and the same person in his official capacity as a deputy marshal of the United States, and also the individual man whose life he defended and the same person in his official capacity of a circuit justice [sic] of the United States” (135 U.S., 1890, p. 79). The dissent argued that Field, who was not sitting on the bench and trying cases at the time of the incident, was not above his arrest, and neither was Neagle. Lamar cited previous precedent and said, “No officer or employe [sic] of the United States is placed by his position, or the services he is called to perform, above responsibility to the legal tribunals of the country, and to the ordinary processes for his arrest and detention, when accused of felony, in the forms prescribed by the Constitution and laws” (135 U.S., 1890, p. 79). This is an important part of Lamar’s argument because it rebutted Miller’s assertion of protective powers. However, there are not many direct connections that can be made between this portion of his argument and the arguments of others who have challenged the theory of executive prerogative. With regard to other sections of Lamar’s arguments, such connections can be made.

Lack of constitutional or congressional statute

After establishing that protection was not due to these officers any more than if they did not hold their positions, Lamar went on to dispute Miller’s claim that Neagle was in custody for pursuing a law of the United States. (Recall that this is what would justify his release on the basis of habeas corpus.) Lamar noted that both the government, in its defense of Neagle, and Miller,
in the majority opinion, recognized that there was no specific statute authorizing Neagle’s protection of Field. He called the Court’s attention “to the formal and deliberate admission that it is not pretended that there is any single specific statute making it, in so many words, Neagle’s duty to protect the justice” (135 U.S., 1890, p. 80).

William Howard Taft, who wrote at the time of and in opposition to Theodore Roosevelt, also desired that all presidential action find its root in specific statute or in the Constitution. He asserted that the President’s powers must be “fairly and reasonably traced to some specific grant of power or *justly implied* and included within such express grant as proper and necessary to its exercise…Such specific grant must be either in the federal Constitution or in an act of Congress passed in pursuance thereof” [emphasis added] (Taft, 1916, p. 140). So, while Taft did not challenge the idea of implied power altogether, he did reject the idea that there is some “undefined residuum of power” from which the President can draw (Taft, 1916, p. 140). Neither Taft nor Lamar denied the existence of implied power. As Lamar explained, “[P]owers may be found not only in the express authorities conferred by the Constitution, but also in necessary and proper implications” (135 U.S., 1890, p. 82). Taft is somewhat distinct from Lamar because his view of these implied powers leaves much more room interpretation. Lamar, while acknowledging that even the President can infer power from the Constitution, gave more implied power to the Legislature. Referring to the Necessary and Proper Clause, Lamar said, “This clause is that which contains the germ of all the implication of powers under the Constitution. It is that which has built up the Congress of the United States into the most august and imposing legislative assembly in the world, and which has secured vigor to the practical operations of the government, and at the same time tended largely to preserve the equilibrium of its various powers among its coordinate departments, as partitioned by that instrument” (135 U.S., 1890, p.
Therefore, Justice Lamar rejected Miller’s interpretation of the Take Care Clause and stated that “[implied] powers must be exercised not only by the organs, but also in conformity with the modes, prescribed by the Constitution itself” (135 U.S., 1890, p. 82). The trouble with Neagle’s exercise of implied, or prerogative, powers, according to Lamar, was that he was not exercising power in conformity with these prescribed modes.

**Congress as sole lawmaker**

The modes prescribed by the Constitution, according to Lamar, indicated that Congress, and Congress alone, is the lawmaking authority. As stated in the previous section, Lamar did not deny that power can be implied from the Constitution. But protective power, he asserts, rests solely with the legislature: “[T]he manifest answer is that the protection needed and to be given must proceed not from the President, but primarily from Congress. Again, while it is the President's duty to take care that the laws be faithfully executed, it is not his duty to make laws or a law of the United States. The laws he is to see executed are manifestly those contained in the Constitution and those enacted by Congress, whose duty it is to make all laws necessary and proper for carrying into execution the powers of those tribunals” (135 U.S., 1890, p. 83). Lamar claimed that the President may only infer power insofar as he is inferring it from Congressional statute. According to Lamar, the integrity of the Constitution rests upon this distinction. “It would seem plain, therefore, that if the Constitution means anything, and if these judicial utterances, extending, as they do, over a period of 80 years, and embracing a variety of interests, mean anything, they mean that the power to provide and prescribe the laws necessary to effectuate the governmental and official powers of the United States and its officers is vested in Congress” (135 U.S., 1890, p. 89).
In making the above arguments, Lamar occupied some of the same ground as James Madison, who also found no express statute for Washington’s actions, and made that clear when writing as Helvidius. The Pacificus Helvidius argument and the argument between Miller and Lamar are similar in that both debate the nature of the power being performed. Hamilton and Miller argue that the power is executive, while Madison and Lamar argued that the power is legislative. Madison believed that in issuing the Proclamation of Neutrality, Washington was acting within the legislative sphere. He admitted that “to see that the laws be faithfully executed is the essence of executive power” (Nelson, 2008, p. 59), but argued that executing the laws has no relation to the making of treaties or the making of war, and, according to Madison, that is what President Washington’s actions amounted to. “[T]he conclusive circumstance is, that treaties, when formed according to the constitutional mode, are confessedly to have force and operation of laws, and are to be a rule for the courts in controversies between man and man, as much as any other laws” (qtd. in Nelson, 2008, p. 58). Madison admits that the powers that Washington executed may not have been purely legislative, but they were more legislative than they were anything else, and the President had therefore overstepped his bounds (Nelson, p. 57 – 58). Lamar believed that President Harrison had overstepped his bounds as well by assigning a bodyguard when no statute existed that allowed him to do so. Lamar passionately declared that the President had no authority the lawmaking realm. “The Constitution itself, the treaties, and the laws made in pursuance of the Constitution [are m]ade by whom? By Congress, manifestly” (135 U.S., 1890, p. 91).

The arguments of Lamar and Madison are also similar in their understandings of the nature of prerogative itself. Madison considered the expansive prerogative defended by Hamilton to be entirely outside of the governmental structure of the United States. He even
smacked Washington with the insult of comparing his actions to a monarch, saying that the only source of authority that Washington might legitimately claim was of the stuff of “royal prerogative” (Nelson, 2008, p. 59). Madison essentially accused Hamilton of reading features of the British monarchy into the Constitution (Milkis and Nelson, 2008, p. 81). Therefore, asserted Madison, the President had no authority to act in any way that did not directly stem from enumerated authority. “All his acts, therefore, properly executive, must presuppose the existence of the laws to be executed” (qtd, in Nelson, 2008, p. 57). Lamar had the same issue with prerogative. He made a similar, although more subtle, accusation of monarchical tendencies of the government’s defense in *Neagle*: “The common law never existed in our federal system. The legislative power possessed by the United States must be found either exercised in the Constitution as fundamental law or by some body or person to whom it was delegated by the Constitution” (135 U.S., 1890, p. 91). According to Lamar, the government’s assertion that the President is obliged to protect the judges was erroneous: “[T]here is no such implication…for the simple but all-sufficient reason that, by the Constitution itself, the whole of those functions is committed to Congress. Since, then, the Constitution did not, by its own direct provisions, regulate this matter, but committed it to the hands of Congress, with full powers in the premises, it is only by the enactment of some law of Congress that the appellee can show that he is in custody ‘in violation of the Constitution’” (135 U.S., 1890, p. 92).

**Subsequent Restraints on Presidential Power**

Despite the fact that the Court in *Neagle* ruled in favor of presidential power, executive power has been constrained by subsequent judicial decisions. Epstein and Walker refer to one such constraint as the Congressional limit. The authors acknowledge that the President is subject to limitation when he acts against either the express or implied will of Congress. This limitation
is well exemplified by the 1952 Court decision in *Youngstown Sheet & Tube Co. v. Sawyer.* (2007, p. 213).

In 1951, a labor dispute in the steel industry led President Harry Truman to order his secretary of commerce to seize the steel mills and prevent a threatened strike. Truman believed that, with the nation at war with Korea, it was vital to keep the mills in operation in order to produce weapons and supplies for the military effort. Such interference in a labor dispute went against the implied will of Congress because a statute called the Taft-Hartley Act provided the President with other means of solving such disputes. The act authorized the President to “impose an eighty-day cooling-off period as a way to postpone any strike that seriously threatened the public interest (Epstein and Walker, 2007, p. 312).

In the *Youngstown* case, the mill owners argued that the President’s executive order, which authorized the mills’ seizure, amounted to lawmakership. Truman claimed that his powers as Chief Executive and Commander in Chief were enough to authorize the seizure, but a majority of justices disagreed (Epstein and Walker, pp. 312–313). “[T]he President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker,” wrote Justice Hugo Black for the majority (343 U.S., 1952, p. 587). President Truman relied on similar justification to the government’s position in *Neagle.* He maintained that his inherent power as Chief Executive was enough to authorize his seizure of the steel mills (Epstein and Walker, 2007, p. 312). Black asserted that the role of Chief Executive is an aggregate of other designated powers.\(^5\) Though the President is charged with executing the laws, he is not a lawmaker. Like Lamar, he noted that, though the executive power is vested in the President, the legislative power is still granted to Congress, and the President’s execution of his executive authority cannot infringe upon that legislative authority. As for the Commander in Chief argument, Black countered that

\(^5\) Note the way this fits inside Epstein and Walker’s *mere designation* conception of Presidential power.
the steel mills are not a part of the “theater of war” (Epstein and Walker, 2007, p. 313-314). This was Justice Black’s essential train of thought in his opinion for the court. He asserted that the President’s power “must stem either from an act of Congress or from the Constitution itself” (Epstein and Walker, 2007, p. 313). This is what Epstein and Walker describe as the mere designation approach. Monaghan examined Youngstown as an affirmation of this approach as well. He wrote, “except perhaps when acting pursuant to some ‘specific’ constitutional power, the President has no inherent power to invade private rights” (Monaghan, 1993, p. 10). For Black, since Truman could cite no express statute authorizing his actions, such a law could not be fairly implied (343 U.S., 1952, p. 585). Lamar did not think that such implication could be made in the Neagle case either. He stressed that no law had been passed that authorized President Harrison to assign Justice Field a bodyguard.

However, Youngstown is unique and in some ways consistent with the majority opinion in Neagle. Six of the justices in Youngstown agreed that Truman’s actions, which went against the implied will of Congress, were outside the scope of his authority. However, a majority of the justices also held that the executive does have some implied power. A concurring opinion by Justice Robert Jackson articulates this middle ground view (Epstein and Walker, 2007, pp. 314 – 317). Pika and Maltese note the significance of Jackson’s opinion, which actually set additional precedent in favor of Presidential power (2006, p. 285). Jackson defined three zones in which the President can act. He can act (quite legally) in pursuance of a law passed by Congress. He can act (perhaps illegally) in opposition to the express or implied will of Congress. Or he can act within a third zone of power that Jackson called the “zone of twilight.” He wrote, “When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may
have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence [sic] may sometimes, at least, as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables, rather than on abstract theories of law” (343 U.S., 1952, p. 637-638). Therefore, although the Court as a whole rejected Truman’s specific action as an overreach of presidential power, the concurring opinion “set a precedent that actually expanded presidential power through the Court’s recognition of inherent power” (Pika and Maltese, 2006, p. 285). The authors went on to connect the Court’s decision in *Youngstown* with the decision of the Court in *U.S. v. Nixon*. Both of these cases denied the President the authority to take specific action, but at the same time acknowledged inherent power. “As with *Youngstown*, the Court [in *U.S. v. Nixon*] ruled against a specific exercise of presidential power while at the same time expanding the general scope of presidential power (Pika and Maltese, 2006, p. 285).

In a discussion that considers legitimate uses of executive power, the Nixon presidency must be mentioned. Nixon made sweeping statements about executive authority in his interviews with journalist David Frost, calling the President “sovereign” and stating that “’by definition,’ presidential approval…meant that the ensuing conduct [of Watergate] was not illegal” (Monaghan, 1993, pp. 7 – 8). The Watergate scandal offers perhaps the most piquant example of an abuse of presidential power in today’s collective memory. Richard Nixon claimed “executive privilege” in refusing to give up the subpoenaed White House tapes (Pika and Maltese, p. 285). While the Court did not accept his argument, the majority opinion admits, “[c]ertain powers and privileges flow from the nature of enumerated powers; the protection of
the confidentiality of Presidential communications has similar constitutional underpinnings” (qtd. in Epstein and Walker, p.242).

**Prerogative in the Modern Era**

Considering Richard Nixon brings us into the modern era, where issues of presidential prerogative still arise in foreign and domestic policy decisions. (Admittedly, though, these policies are more often issues of foreign affairs, where the President has more leeway already.) Most times when the Court has ruled in these cases, they have chosen not to answer the prerogative question. Monaghan noted that modern Presidents have used the theory of *Neagle* to defend the use of presidential force in foreign affairs. The author recognized President Jimmy Carter’s use of *Neagle* in this way (1993, p. 71). During the Iran hostage crisis, Carter seized Iranian assets to gain leverage. In the Supreme Court case that followed, the majority ruled that Congress had implied sufficient authorization for Carter’s actions. Therefore, the Court chose not to answer the question of whether Carter would have had prerogative to act in this way without this implied Congressional mandate (Epstein and Walker, 2007, pp. 318 – 320). Modern Presidents have also invoked their prerogative in domestic issues. Though it was not as controversial as the actions of other Presidents, Ronald Reagan acted without statutory authority when he issued executive orders requiring executive agencies to submit their regulations to the Office of Management and Budget (Calabresi and Yoo, 2008, pp. 380-381).

The actions of President George W. Bush are perhaps the most pertinent when studying executive prerogative in the modern era. President Bush took some actions without Congressional authorization that were not very controversial. Other actions he took without Congressional authorization were quite controversial, so much so that Bush sought this authorization after the fact. Bush’s actions were sometimes defended by the unitary executive
theory. This relatively new theory is defined by Calabresi and Yoo as the understanding that the Constitution vests not some, but all of the executive authority in one, and only one, individual – the President. Most often, and most coherently, this theory is connected to the President’s power to remove officers within the executive branch. The idea of inherent power as explained in *Neagle*, is a piece, but not the whole, of the unitary executive. As Calabresi and Yoo explain in their book on the subject, “We also think that the president possesses a narrow implied, inherent power to protect the instrumentalities of government, even in the absence of specific statutory authorization” (2008, p. 430). The authors go on to cite *Neagle* as perhaps the best example of this type of presidential power. According to the logic of Calabresi and Yoo, Bush might stand as the staunchest defender of presidential prerogative in the modern era. “The fact that Bush may have pushed an unduly vigorous view of presidential power that expanded far beyond the logical boundaries of the unitary executive implicitly confirms his determination to defend the prerogatives of the executive branch (Calabresi and Yoo, 2008, p. 415).

Looking specifically to the actions Bush took, we can see evidence of this “vigorous view.” Some of Bush’s actions based on his prerogative were less controversial – like his establishment of the Office of Homeland Security. (Milkis and Nelson, 2008, p.433). Other actions elicited much more criticism. Bush’s signing statements, for example, were his way to keep the legislature from encroaching upon his prerogative. Signing statements are qualifications that the President attaches to a bill when he signs it into law. He refused to allow Congress to tell him how to carry out his authority. Kernell et. al. note that “although Bush’s statements were not altogether unprecedented in raising constitutional issues, they arguably constitute the strongest effort by a president to unilaterally expand the power of the office” (2009, p. 316). Bush was also highly criticized for some of the actions he took after September 11th and as a part of the
War on Terrorism. The *New York Times* broke the story that Bush had authorized warrantless wiretaps by executive order. This allowed the National Security Agency to wiretap calls between the United States and foreign countries if one of the parties was suspected of terrorist activity (Pika and Maltese, 2008, p. 461). Bush received Congressional authorization for this surveillance through the Patriot Act (signed by Bush in 2001), which authorized wiretaps on telephone conversations of suspected terrorists (Epstein and Walker, 2007, pp. 320-312). Resting on his Commander in Chief power, the President established military commissions to try enemy combatants. Those accused of being or harboring combatants would therefore be deprived of right “normally afforded accused persons” (Epstein and Walker, 2007, p. 322). These detainments and military commissions were also highly criticized, and the Supreme Court was called upon to rule on Bush’s actions.

The Court did determine the legality of Bush’s actions, but did not answer the question of prerogative. In the case of *Hamdi v. Rumsfeld*, the government asserted two things: first, that Hamdi (who was a U.S. citizen captured in Afghanistan) was an enemy combatant, and, “as such…could be held indefinitely without formal charges” (qtd. in Epstein and Walker, p. 322). This authority was based in the Authorization for Use of Military Force (AUMF), passed just after the September 11th attacks (Epstein and Walker, 2007, p. 322). However, the government also asserted that “no explicit congressional authorization [was] required” to justify Bush’s actions “because the Executive possesses plenary authority to detain…” (qtd. in Epstein and Walker, 2007, p. 323). When the Court ruled in *Hamdi v. Rumsfeld* they accepted the AUMF defense, but chose not to rule on whether the President had authority enough without it. A subsequent case, *Hamdan v. Rumsfeld*, decided the legality of the detainment and trial of Salim Ahmed Hamdan, a Yemini national accused of conspiring with Osama bin Ladin (Epstein and
Walker, 2007 pp. 329-330). The government argued that, without Congressional authorization, Bush had the power to establish military tribunals (Milkis and Nelson, 2008, p.433). In a complex holding, the court ruled again not on the President’s prerogative power, but regarding the statutory claims. The Court ruled that while statutes like the Detainee Treatment Act and the Uniform Code of Military Justice gave the President sufficient authority to establish tribunals, the kind of trial to which Hamdan had been subjected went against sections of the UCMJ and the Geneva Conventions (Epstein and Walker, 2007, pp. 332 – 333). After Hamdan, Bush received the authority he had acted without when Congress passed the Military Commissions Act (Epstein and Walker, 2007, p. 335).

As even the Bush presidency is still being studied and analyzed, the influence of Barack Obama’s presidency on this issue is yet to be determined. However, the fact that the debate is not over is undeniable, and Neagle’s place in the debate is equally undeniable. The written opinions of Miller and Lamar serve as a guide into the rest of the arguments surrounding this constitutional issue.

How understanding Neagle can help us understand the debate

What falls within the bounds of legitimate presidential authority is a question that affects policy decisions – foreign and domestic – frequently. In a democratic society, where all Americans are encouraged to participate in their government, it is not only the peoples’ right, but also their responsibility to be informed. Though it “parade[s] under assorted names,” executive prerogative is essentially the President’s right to act where the law is silent - his authority to act without express grant from the Constitution or Congress (Fisher, 2007, p. 13). However, this power is disputed, and great political minds have come down on both sides of the issue. The opinions of Miller and Lamar can serve to guide a student of politics through this debate. Miller,
arguing alongside the likes of Hamilton and Roosevelt, found a constitutional basis for the President’s prerogative power. Lamar, like Madison and Taft, did not support this broad grant of power to the President. In subsequent cases, the Court has ruled both in favor of and against prerogative power. In re Debs defended President Cleveland’s expansive use of his power, but the Youngstown decision ruled that President Truman had overstepped his bounds. More recent Presidents, like Carter and Reagan, have cited their inherent executive power when defending actions in both foreign and domestic affairs. The Presidency of George W. Bush offers us several case studies in executive prerogative. The debate over prerogative has not met its conclusion, and it likely never will, which makes an understanding of the debate all the more vital. The Neagle opinions can guide this understanding, and perhaps even show us with whom we should side.

When reading the facts of the case, it is easy to see Field as the hero and Terry as the villain of the story. Similarly, when Neagle is mentioned in the world of academics, Miller’s opinion is highlighted while Lamar’s dissent is hardly cited. Nevertheless, Lamar’s opinion was well constructed, and his arguments deserve a second look, particularly since he is in such good company. Madison and Taft are well respected for their arguments, and Lamar should be included in their ranks. Considering the ways in which presidential power has been expanded over the last several decades, it is hard not to imagine that the outcome would have been much different had more of his colleagues sided with Lamar. Certainly, Miller’s argument makes sense in context. Any government worth its salt should be able to protect itself in the persons of its judicial officials. Certainly, it should be implied that the President has authority to keep the peace. Certainly, the President’s authority to “take care” should extend beyond the enumerated powers of the Constitution. The problem with Miller’s opinion is that the sweeping statements he
makes about presidential power do not offer any limit on the executive. Where should we draw the line?

Lamar provides part of the answer. Powers enumerated in the Constitution “must be exercised not only by the organs, but also in conformity with the modes, prescribed by the Constitution itself” (135 U.S., 1890, p. 82). The three branches of our government should not be allowed to step on one another’s toes. The Court and Congress should fight more vigorously to maintain the balance of power between the branches. After all, it is this tension among the branches that distinguishes our democracy. Where Lamar’s answer is insufficient, we look to Taft, who walks a more stable middle ground between Miller and Lamar: “The true view of the executive functions is, as I conceive it, that the president can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise [emphasis added] (Taft, 1916, pp. 140-141). Implications of power that fit Taft’s strict criteria should be rare, but presidential actions by such power are not. This speaks volumes about the power the President holds today, and encourages the student of politics to carefully scrutinize presidential action. When taking sides in this debate, though, we should consider the words with which Justice Jackson opened his concurring opinion in Youngstown. “A century and a half of partisan debate and scholarly speculation yields no net result, but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other. And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way (343 U.S., 1952, pp. 634 - 635).”

*Neagle* is a case that will draw in the student of politics – and especially those who are *not* – with its colorful characters and almost unbelievable plot. Once the reader is engrossed in
the story, an interest in the theory of executive prerogative will be inescapable. Consider the ways in which the arguments of Miller and Lamar can be connected to the arguments of the other great voices in this debate. Consider the more recent circumstances that have brought this debate to the forefront once again. *In re Neagle* and its story should be more than a footnote in books about presidential power and constitutional law. The case is a landmark; it should be treated as such.
Works Cited


*In re Neagle*. 135 U.S. 1 (1890).


*Youngstown Sheet and Tube Co. v. Sawyer.* 343 U.S. 579 (1952)