egated powers doctrine.[31] The holding in *Kent v. Dulles*[32] that delegation to the Executive of discretion in the issuance of passports must be measured by the usual standards applied in domestic delegations appeared to circumscribe Justice Sutherland's more expansive view, but the subsequent limitation of that decision, though formally reasoned within its analytical framework, coupled with language addressed to the President's authority in foreign affairs, leaves clouded the vitality of that decision.[33] The case nonetheless remains with *Myers v. United States* the source and support of those contending for broad inherent executive powers.[34]

The Youngstown Case.—The only modern case that has extensively considered the "inherent" powers of the President or the issue of what executive powers are vested by the first section of Article II[35]

---

[31] *E.g.*, *Ex parte* Quirin, 317 U.S. 1, 25 (1942) (Chief Justice Stone); Reid v. Covert, 354 U.S. 1, 5–6 (1957) (plurality opinion, per Justice Black).

[32] 357 U.S. 116, 129 (1958).

[33] Haig v. Agee, 453 U.S. 280 (1981). For the reliance on *Curtiss-Wright*, *see* id. at 291, 293–94 & n.24, 307–08. *But see* Dames & Moore v. Regan, 453 U.S. 654, 659–62 (1981), qualified by id. at 678. *Compare* Webster v. Doe, 486 U.S. 592 (1988) (construing National Security Act as not precluding judicial review of constitutional challenges to CIA Director's dismissal of employee, over dissent relying in part on *Curtiss-Wright* as interpretive force counseling denial of judicial review), *with* Department of the Navy v. Egan, 484 U.S. 518 (1988) (denying Merit Systems Protection Board authority to review the substance of an underlying security-clearance determination in reviewing an adverse action and noticing favorably President's inherent power to protect information without any explicit legislative grant). In Loving v. United States, 517 U.S. 748 (1996), the Court recurred to the original setting of *Curtiss-Wright*, a delegation to the President without standards. Congress, the Court found, had delegated to the President authority to structure the death penalty provisions of military law so as to bring the procedures, relating to aggravating and mitigating factors, into line with constitutional requirements, but Congress had provided no standards to guide the presidential exercise of the authority. Standards were not required, held the Court, because his role as Commander-in-Chief gave him responsibility to superintend the military establishment and Congress and the President had interlinked authorities with respect to the military. Where the entity exercising the delegated authority itself possesses independent authority over the subject matter, the familiar limitations on delegation do not apply. Id. at 771–74.

[34] That the opinion "remains authoritative doctrine" is stated in L. Henkin, Foreign Affairs and the Constitution 25–26 (1972). It is used as an interpretive precedent in American Law Institute, Restatement (Third) of the Law, The Foreign Relations Law of the United States see, *e.g.*, §§ 1, 204, 339 (1987). The Restatement is circumspect, however, about the reach of the opinion in controversies between presidential and congressional powers.

[35] The issue is implicit in several of the opinions of the Justices in New York Times Co. v. United States, 403 U.S. 713 (1971). *See* id. at 727, 728–30 (Justice Stewart concurring), 752, 756–59 (Justice Harlan dissenting). Assertions of inherent power to sustain presidential action were made in Dames & Moore v. Regan, 453 U.S. 654 (1981), but the Court studiously avoided these arguments in favor of a somewhat facile statutory analysis. Separation-of-powers analysis informed the Court's decisions in United States v. Nixon, 418 U.S. 683 (1974), Nixon v. Administrator of General Services, 433 U.S. 425 (1977),Nixon v. Fitzgerald, 457 U.S. 731 (1982), and Harlow v. Fitzgerald, 457 U.S. 800 (1982). Although perhaps somewhat latitudinarian in some respect of the President's powers, the analysis looks away from inherent