



PRESIDENTIAL POWERS CASEBOOK

**PRESIDENTIAL POWER IN A
SEPARATION OF POWERS SYSTEM**

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Introduction: Constitutional Provisions Dealing with the Presidency

Article II

Section 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the term of four Years, and, together with the Vice-President chosen for the same term, be elected as follows:

Each State shall appoint in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

[The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates and the Votes shall then be counted. The Person having the greater Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representatives from each State having one Vote; a quorum for this Purpose shall consist of a Member or Members from two-thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.] [Changed by the Twelfth Amendment]

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No person except a natural born Citizen, or a Citizen of the United States at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any

Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States.

[In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the disability be removed, or a President shall be elected.] [Changed by the Twenty-Fifth Amendment]

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: - "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Services of the United States; he may require an Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices, and shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

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

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

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he

shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article I

Section 3, Parts 6,7

6: The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

7: Judgment in Cases of impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section 7, Part 3

Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

Amendment XII

Ratified June 15, 1804

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President and of the number of votes for each, which lists they shall sign and certify and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; - the President of the Senate shall, in the presence of the Senate and the House of Representatives, open all the certificates and the votes shall then be counted; - The person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of Electors appointed; and if no

person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. [And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.] [Superseded by Section 3 of the Twentieth Amendment] The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President, a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

Amendment XX

Ratified January 23, 1933

Section 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall appoint a different day.

Section 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Section 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the

Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Section 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

Amendment XXII

Ratified February 27, 1951

Section 1. No person shall be elected to the office of President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President, when this article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the Office of President or acting as President during the remainder of such term.

Amendment XXV

Ratified February 10, 1967

Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 2. Whenever there is a vacancy in the office of Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority of both Houses of Congress.

Section 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their

written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determine by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

The Federalist Papers On The Presidency In A Separation Of Powers System

FEDERALIST 10

MADISON

To the People of the State of New York:

AMONG the numerous advantages promised by a wellconstructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. The friend of popular governments never finds himself so much alarmed for their character and fate, as when he contemplates their propensity to this dangerous vice. He will not fail, therefore, to set a due value on any plan which, without violating the principles to which he is attached, provides a proper cure for it. The instability, injustice, and confusion introduced into the public councils, have, in truth, been the mortal diseases under which popular governments have everywhere perished; as they continue to be the favorite and fruitful topics from which the adversaries to liberty derive their most specious declamations. The valuable improvements made by the American constitutions on the popular models, both ancient and modern, cannot certainly be too much admired; but it would be an unwarrantable partiality, to contend that they have as effectually obviated the danger on this side, as was wished and expected. Complaints are everywhere heard from our most considerate and virtuous citizens, equally the friends of public and private faith, and of public and personal liberty, that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority. However anxiously we may wish that these complaints had no foundation, the evidence, of known facts will not permit us to deny that they are in some degree true. It will be found, indeed, on a candid review of our situation, that some of the distresses under which we labor have been erroneously charged on the operation of our governments; but it will be found, at the same time, that other causes will not alone account for many of our heaviest misfortunes; and, particularly, for that prevailing and increasing distrust of public engagements, and alarm for private rights, which are echoed from one end of the continent to the other. These must be chiefly, if not wholly, effects of the unsteadiness and injustice with which a factious spirit has tainted our public administrations.

By a faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.

There are two methods of curing the mischiefs of faction: the one, by removing its causes;

the other, by controlling its effects.

There are again two methods of removing the causes of faction: the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests.

It could never be more truly said than of the first remedy, that it was worse than the disease. Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.

The second expedient is as impracticable as the first would be unwise. As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves. The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors, ensues a division of the society into different interests and parties.

The latent causes of faction are thus sown in the nature of man; and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society. A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good. So strong is this propensity of mankind to fall into mutual animosities, that where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts. But the most common and durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of the government.

No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the

most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different classes of legislators but advocates and parties to the causes which they determine? Is a law proposed concerning private debts? It is a question to which the creditors are parties on one side and the debtors on the other. Justice ought to hold the balance between them. Yet the parties are, and must be, themselves the judges; and the most numerous party, or, in other words, the most powerful faction must be expected to prevail. Shall domestic manufactures be encouraged, and in what degree, by restrictions on foreign manufactures? are questions which would be differently decided by the landed and the manufacturing classes, and probably by neither with a sole regard to justice and the public good. The apportionment of taxes on the various descriptions of property is an act which seems to require the most exact impartiality; yet there is, perhaps, no legislative act in which greater opportunity and temptation are given to a predominant party to trample on the rules of justice. Every shilling with which they overburden the inferior number, is a shilling saved to their own pockets.

It is in vain to say that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm. Nor, in many cases, can such an adjustment be made at all without taking into view indirect and remote considerations, which will rarely prevail over the immediate interest which one party may find in disregarding the rights of another or the good of the whole.

The inference to which we are brought is, that the **CAUSES** of faction cannot be removed, and that relief is only to be sought in the means of controlling its **EFFECTS**.

If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution. When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed. Let me add that it is the great desideratum by which this form of government can be rescued from the opprobrium under which it has so long labored, and be recommended to the esteem and adoption of mankind.

By what means is this object attainable? Evidently by one of two only. Either the existence of the same passion or interest in a majority at the same time must be prevented, or the majority, having such coexistent passion or interest, must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression. If the impulse and the opportunity be suffered to coincide, we well know that neither moral nor religious motives can be relied on as an adequate control. They are not found to be such on the injustice and violence of individuals, and lose their efficacy in proportion to the number combined together, that is, in proportion as their efficacy becomes needful.

From this view of the subject it may be concluded that a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in

person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths. Theoretic politicians, who have patronized this species of government, have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions.

A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking. Let us examine the points in which it varies from pure democracy, and we shall comprehend both the nature of the cure and the efficacy which it must derive from the Union.

The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.

The effect of the first difference is, on the one hand, to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose. On the other hand, the effect may be inverted. Men of factious tempers, of local prejudices, or of sinister designs, may, by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests, of the people. The question resulting is, whether small or extensive republics are more favorable to the election of proper guardians of the public weal; and it is clearly decided in favor of the latter by two obvious considerations:

In the first place, it is to be remarked that, however small the republic may be, the representatives must be raised to a certain number, in order to guard against the cabals of a few; and that, however large it may be, they must be limited to a certain number, in order to guard against the confusion of a multitude. Hence, the number of representatives in the two cases not being in proportion to that of the two constituents, and being proportionally greater in the small republic, it follows that, if the proportion of fit characters be not less in the large than in the small republic, the former will present a greater option, and consequently a greater probability of a fit choice.

In the next place, as each representative will be chosen by a greater number of citizens in the large than in the small republic, it will be more difficult for unworthy candidates to practice with success the vicious arts by which elections are too often carried; and the suffrages of the people being more free, will be more likely to centre in men who possess the most attractive merit and

the most diffusive and established characters.

It must be confessed that in this, as in most other cases, there is a mean, on both sides of which inconveniences will be found to lie. By enlarging too much the number of electors, you render the representatives too little acquainted with all their local circumstances and lesser interests; as by reducing it too much, you render him unduly attached to these, and too little fit to comprehend and pursue great and national objects. The federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular to the State legislatures.

The other point of difference is, the greater number of citizens and extent of territory which may be brought within the compass of republican than of democratic government; and it is this circumstance principally which renders factious combinations less to be dreaded in the former than in the latter. The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other. Besides other impediments, it may be remarked that, where there is a consciousness of unjust or dishonorable purposes, communication is always checked by distrust in proportion to the number whose concurrence is necessary.

Hence, it clearly appears, that the same advantage which a republic has over a democracy, in controlling the effects of faction, is enjoyed by a large over a small republic,--is enjoyed by the Union over the States composing it. Does the advantage consist in the substitution of representatives whose enlightened views and virtuous sentiments render them superior to local prejudices and schemes of injustice? It will not be denied that the representation of the Union will be most likely to possess these requisite endowments. Does it consist in the greater security afforded by a greater variety of parties, against the event of any one party being able to outnumber and oppress the rest? In an equal degree does the increased variety of parties comprised within the Union, increase this security. Does it, in fine, consist in the greater obstacles opposed to the concert and accomplishment of the secret wishes of an unjust and interested majority? Here, again, the extent of the Union gives it the most palpable advantage.

The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States. A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source. A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it; in the same proportion as such a malady is more likely to taint a particular county or district, than an entire State.

In the extent and proper structure of the Union, therefore, we behold a republican remedy for the diseases most incident to republican government. And according to the degree of pleasure and pride we feel in being republicans, ought to be our zeal in cherishing the spirit and supporting the character of Federalists.

PUBLIUS.

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FEDERALIST 51

MADISON

To the People of the State of New York:

TO WHAT expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places. Without presuming to undertake a full development of this important idea, I will hazard a few general observations, which may perhaps place it in a clearer light, and enable us to form a more correct judgment of the principles and structure of the government planned by the convention.

In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others. Were this principle rigorously adhered to, it would require that all the appointments for the supreme executive, legislative, and judiciary magistracies should be drawn from the same fountain of authority, the people, through channels having no communication whatever with one another. Perhaps such a plan of constructing the several departments would be less difficult in practice than it may in contemplation appear. Some difficulties, however, and some additional expense would attend the execution of it. Some deviations, therefore, from the principle must be admitted. In the constitution of the judiciary department in particular, it might be inexpedient to insist rigorously on the principle: first, because peculiar qualifications being essential in the members, the primary consideration ought to be to select that mode of choice which best secures these qualifications; secondly, because the permanent tenure by which the appointments are held in that department, must soon destroy all sense of dependence on the authority conferring them.

It is equally evident, that the members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive

magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal. But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions. This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State. But it is not possible to give to each department an equal power of self-defense. In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit. It may even be necessary to guard against dangerous encroachments by still further precautions. As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified.

An absolute negative on the legislature appears, at first view, to be the natural defense with which the executive magistrate should be armed. But perhaps it would be neither altogether safe nor alone sufficient. On ordinary occasions it might not be exerted with the requisite firmness, and on extraordinary occasions it might be perfidiously abused. May not this defect of an absolute negative be supplied by some qualified connection between this weaker department and the weaker branch of the stronger department, by which the latter may be led to support the constitutional rights of the former, without being too much detached from the rights of its own department? If the principles on which these observations are founded be just, as I persuade myself they are, and they be applied as a criterion to the several State constitutions, and to the federal Constitution it will be found that if the latter does not perfectly correspond with them, the former are infinitely less able to bear such a test.

There are, moreover, two considerations particularly applicable to the federal system of America, which place that system in a very interesting point of view. First. In a single republic, all the power surrendered by the people is submitted to the administration of a single

government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself. Second. It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure.

There are but two methods of providing against this evil: the one by creating a will in the community independent of the majority that is, of the society itself; the other, by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable. The first method prevails in all governments possessing an hereditary or self-appointed authority. This, at best, is but a precarious security; because a power independent of the society may as well espouse the unjust views of the major, as the rightful interests of the minor party, and may possibly be turned against both parties. The second method will be exemplified in the federal republic of the United States. Whilst all authority in it will be derived from and dependent on the society, the society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority.

In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects; and this may be presumed to depend on the extent of country and number of people comprehended under the same government. This view of the subject must particularly recommend a proper federal system to all the sincere and considerate friends of republican government, since it shows that in exact proportion as the territory of the Union may be formed into more circumscribed Confederacies, or States oppressive combinations of a majority will be facilitated: the best security, under the republican forms, for the rights of every class of citizens, will be diminished: and consequently the stability and independence of some member of the government, the only other security, must be proportionately increased. Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit. In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger; and as, in the latter state, even the stronger individuals are prompted, by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves; so, in the former state, will the more powerful factions or parties be gradually induced, by a like motive, to wish for a government which will protect all parties, the weaker as well as the more powerful.

It can be little doubted that if the State of Rhode Island was separated from the Confederacy and left to itself, the insecurity of rights under the popular form of government within such narrow limits would be displayed by such reiterated oppressions of factious majorities that some

power altogether independent of the people would soon be called for by the voice of the very factions whose misrule had proved the necessity of it. In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good; whilst there being thus less danger to a minor from the will of a major party, there must be less pretext, also, to provide for the security of the former, by introducing into the government a will not dependent on the latter, or, in other words, a will independent of the society itself. It is no less certain than it is important, notwithstanding the contrary opinions which have been entertained, that the larger the society, provided it lie within a practical sphere, the more duly capable it will be of self-government. And happily for the REPUBLICAN CAUSE, the practicable sphere may be carried to a very great extent, by a judicious modification and mixture of the FEDERAL PRINCIPLE.

PUBLIUS.

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FEDERALIST 68
HAMILTON

To the People of the State of New York:

THE mode of appointment of the Chief Magistrate of the United States is almost the only part of the system, of any consequence, which has escaped without severe censure, or which has received the slightest mark of approbation from its opponents. The most plausible of these, who has appeared in print, has even deigned to admit that the election of the President is pretty well guarded.¹ I venture somewhat further, and hesitate not to affirm, that if the manner of it be not perfect, it is at least excellent. It unites in an eminent degree all the advantages, the union of which was to be wished for.

It was desirable that the sense of the people should operate in the choice of the person to whom so important a trust was to be confided. This end will be answered by committing the right of making it, not to any preestablished body, but to men chosen by the people for the special purpose, and at the particular conjuncture.

It was equally desirable, that the immediate election should be made by men most capable of analyzing the qualities adapted to the station, and acting under circumstances favorable to deliberation, and to a judicious combination of all the reasons and inducements which were proper to govern their choice. A small number of persons, selected by their fellow-citizens from the general mass, will be most likely to possess the information and discernment requisite to such complicated investigations.

It was also peculiarly desirable to afford as little opportunity as possible to tumult and disorder. This evil was not least to be dreaded in the election of a magistrate, who was to have so

important an agency in the administration of the government as the President of the United States. But the precautions which have been so happily concerted in the system under consideration, promise an effectual security against this mischief. The choice of SEVERAL, to form an intermediate body of electors, will be much less apt to convulse the community with any extraordinary or violent movements, than the choice of ONE who was himself to be the final object of the public wishes. And as the electors, chosen in each State, are to assemble and vote in the State in which they are chosen, this detached and divided situation will expose them much less to heats and ferments, which might be communicated from them to the people, than if they were all to be convened at one time, in one place.

Nothing was more to be desired than that every practicable obstacle should be opposed to cabal, intrigue, and corruption. These most deadly adversaries of republican government might naturally have been expected to make their approaches from more than one quarter, but chiefly from the desire in foreign powers to gain an improper ascendant in our councils. How could they better gratify this, than by raising a creature of their own to the chief magistracy of the Union? But the convention have guarded against all danger of this sort, with the most provident and judicious attention. They have not made the appointment of the President to depend on any preexisting bodies of men, who might be tampered with beforehand to prostitute their votes; but they have referred it in the first instance to an immediate act of the people of America, to be exerted in the choice of persons for the temporary and sole purpose of making the appointment. And they have excluded from eligibility to this trust, all those who from situation might be suspected of too great devotion to the President in office. No senator, representative, or other person holding a place of trust or profit under the United States, can be of the numbers of the electors. Thus without corrupting the body of the people, the immediate agents in the election will at least enter upon the task free from any sinister bias. Their transient existence, and their detached situation, already taken notice of, afford a satisfactory prospect of their continuing so, to the conclusion of it. The business of corruption, when it is to embrace so considerable a number of men, requires time as well as means. Nor would it be found easy suddenly to embark them, dispersed as they would be over thirteen States, in any combinations founded upon motives, which though they could not properly be denominated corrupt, might yet be of a nature to mislead them from their duty.

Another and no less important desideratum was, that the Executive should be independent for his continuance in office on all but the people themselves. He might otherwise be tempted to sacrifice his duty to his complaisance for those whose favor was necessary to the duration of his official consequence. This advantage will also be secured, by making his re-election to depend on a special body of representatives, deputed by the society for the single purpose of making the important choice.

All these advantages will happily combine in the plan devised by the convention; which is, that the people of each State shall choose a number of persons as electors, equal to the number of senators and representatives of such State in the national government, who shall assemble within the State, and vote for some fit person as President. Their votes, thus given, are to be transmitted to the seat of the national government, and the person who may happen to have a majority of the whole number of votes will be the President. But as a majority of the votes might not always happen to centre in one man, and as it might be unsafe to permit less than a majority to be

conclusive, it is provided that, in such a contingency, the House of Representatives shall select out of the candidates who shall have the five highest number of votes, the man who in their opinion may be best qualified for the office.

The process of election affords a moral certainty, that the office of President will never fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications. Talents for low intrigue, and the little arts of popularity, may alone suffice to elevate a man to the first honors in a single State; but it will require other talents, and a different kind of merit, to establish him in the esteem and confidence of the whole Union, or of so considerable a portion of it as would be necessary to make him a successful candidate for the distinguished office of President of the United States. It will not be too strong to say, that there will be a constant probability of seeing the station filled by characters pre-eminent for ability and virtue. And this will be thought no inconsiderable recommendation of the Constitution, by those who are able to estimate the share which the executive in every government must necessarily have in its good or ill administration. Though we cannot acquiesce in the political heresy of the poet who says: "For forms of government let fools contest That which is best administered is best," yet we may safely pronounce, that the true test of a good government is its aptitude and tendency to produce a good administration.

The Vice-President is to be chosen in the same manner with the President; with this difference, that the Senate is to do, in respect to the former, what is to be done by the House of Representatives, in respect to the latter.

The appointment of an extraordinary person, as Vice-President, has been objected to as superfluous, if not mischievous. It has been alleged, that it would have been preferable to have authorized the Senate to elect out of their own body an officer answering that description. But two considerations seem to justify the ideas of the convention in this respect. One is, that to secure at all times the possibility of a definite resolution of the body, it is necessary that the President should have only a casting vote. And to take the senator of any State from his seat as senator, to place him in that of President of the Senate, would be to exchange, in regard to the State from which he came, a constant for a contingent vote. The other consideration is, that as the Vice-President may occasionally become a substitute for the President, in the supreme executive magistracy, all the reasons which recommend the mode of election prescribed for the one, apply with great if not with equal force to the manner of appointing the other. It is remarkable that in this, as in most other instances, the objection which is made would lie against the constitution of this State. We have a Lieutenant-Governor, chosen by the people at large, who presides in the Senate, and is the constitutional substitute for the Governor, in casualties similar to those which would authorize the Vice-President to exercise the authorities and discharge the duties of the President.

PUBLIUS.

FEDERALIST 69

HAMILTON

To the People of the State of New York:

I PROCEED now to trace the real characters of the proposed Executive, as they are marked out in the plan of the convention. This will serve to place in a strong light the unfairness of the representations which have been made in regard to it.

The first thing which strikes our attention is, that the executive authority, with few exceptions, is to be vested in a single magistrate. This will scarcely, however, be considered as a point upon which any comparison can be grounded; for if, in this particular, there be a resemblance to the king of Great Britain, there is not less a resemblance to the Grand Seignior, to the khan of Tartary, to the Man of the Seven Mountains, or to the governor of New York.

That magistrate is to be elected for FOUR years; and is to be re-eligible as often as the people of the United States shall think him worthy of their confidence. In these circumstances there is a total dissimilitude between HIM and a king of Great Britain, who is an HEREDITARY monarch, possessing the crown as a patrimony descendible to his heirs forever; but there is a close analogy between HIM and a governor of New York, who is elected for THREE years, and is re-eligible without limitation or intermission. If we consider how much less time would be requisite for establishing a dangerous influence in a single State, than for establishing a like influence throughout the United States, we must conclude that a duration of FOUR years for the Chief Magistrate of the Union is a degree of permanency far less to be dreaded in that office, than a duration of THREE years for a corresponding office in a single State.

The President of the United States would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law. The person of the king of Great Britain is sacred and inviolable; there is no constitutional tribunal to which he is amenable; no punishment to which he can be subjected without involving the crisis of a national revolution. In this delicate and important circumstance of personal responsibility, the President of Confederated America would stand upon no better ground than a governor of New York, and upon worse ground than the governors of Maryland and Delaware.

The President of the United States is to have power to return a bill, which shall have passed the two branches of the legislature, for reconsideration; and the bill so returned is to become a law, if, upon that reconsideration, it be approved by two thirds of both houses. The king of Great Britain, on his part, has an absolute negative upon the acts of the two houses of Parliament. The disuse of that power for a considerable time past does not affect the reality of its existence; and is to be ascribed wholly to the crown's having found the means of substituting influence to authority, or the art of gaining a majority in one or the other of the two houses, to the necessity of

exerting a prerogative which could seldom be exerted without hazarding some degree of national agitation. The qualified negative of the President differs widely from this absolute negative of the British sovereign; and tallies exactly with the revisionary authority of the council of revision of this State, of which the governor is a constituent part. In this respect the power of the President would exceed that of the governor of New York, because the former would possess, singly, what the latter shares with the chancellor and judges; but it would be precisely the same with that of the governor of Massachusetts, whose constitution, as to this article, seems to have been the original from which the convention have copied.

The President is to be the "commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States. He is to have power to grant reprieves and pardons for offenses against the United States, EXCEPT IN CASES OF IMPEACHMENT; to recommend to the consideration of Congress such measures as he shall judge necessary and expedient; to convene, on extraordinary occasions, both houses of the legislature, or either of them, and, in case of disagreement between them WITH RESPECT TO THE TIME OF ADJOURNMENT, to adjourn them to such time as he shall think proper; to take care that the laws be faithfully executed; and to commission all officers of the United States." In most of these particulars, the power of the President will resemble equally that of the king of Great Britain and of the governor of New York. The most material points of difference are these:

First. The President will have only the occasional command of such part of the militia of the nation as by legislative provision may be called into the actual service of the Union. The king of Great Britain and the governor of New York have at all times the entire command of all the militia within their several jurisdictions. In this article, therefore, the power of the President would be inferior to that of either the monarch or the governor.

Secondly. The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the DECLARING of war and to the RAISING and REGULATING of fleets and armies, all which, by the Constitution under consideration, would appertain to the legislature.¹ The governor of New York, on the other hand, is by the constitution of the State vested only with the command of its militia and navy. But the constitutions of several of the States expressly declare their governors to be commanders-in-chief, as well of the army as navy; and it may well be a question, whether those of New Hampshire and Massachusetts, in particular, do not, in this instance, confer larger powers upon their respective governors, than could be claimed by a President of the United States.

Thirdly. The power of the President, in respect to pardons, would extend to all cases, EXCEPT THOSE OF IMPEACHMENT. The governor of New York may pardon in all cases, even in those of impeachment, except for treason and murder. Is not the power of the governor, in this article, on a calculation of political consequences, greater than that of the President? All conspiracies and plots against the government, which have not been matured into actual treason, may be screened from punishment of every kind, by the interposition of the prerogative of

pardoning. If a governor of New York, therefore, should be at the head of any such conspiracy, until the design had been ripened into actual hostility he could insure his accomplices and adherents an entire impunity. A President of the Union, on the other hand, though he may even pardon treason, when prosecuted in the ordinary course of law, could shelter no offender, in any degree, from the effects of impeachment and conviction. Would not the prospect of a total indemnity for all the preliminary steps be a greater temptation to undertake and persevere in an enterprise against the public liberty, than the mere prospect of an exemption from death and confiscation, if the final execution of the design, upon an actual appeal to arms, should miscarry? Would this last expectation have any influence at all, when the probability was computed, that the person who was to afford that exemption might himself be involved in the consequences of the measure, and might be incapacitated by his agency in it from affording the desired impunity? The better to judge of this matter, it will be necessary to recollect, that, by the proposed Constitution, the offense of treason is limited "to levying war upon the United States, and adhering to their enemies, giving them aid and comfort"; and that by the laws of New York it is confined within similar bounds.

Fourthly. The President can only adjourn the national legislature in the single case of disagreement about the time of adjournment. The British monarch may prorogue or even dissolve the Parliament. The governor of New York may also prorogue the legislature of this State for a limited time; a power which, in certain situations, may be employed to very important purposes.

The President is to have power, with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur. The king of Great Britain is the sole and absolute representative of the nation in all foreign transactions. He can of his own accord make treaties of peace, commerce, alliance, and of every other description. It has been insinuated, that his authority in this respect is not conclusive, and that his conventions with foreign powers are subject to the revision, and stand in need of the ratification, of Parliament. But I believe this doctrine was never heard of, until it was broached upon the present occasion. Every jurist² of that kingdom, and every other man acquainted with its Constitution, knows, as an established fact, that the prerogative of making treaties exists in the crown in its utmost plenitude; and that the compacts entered into by the royal authority have the most complete legal validity and perfection, independent of any other sanction. The Parliament, it is true, is sometimes seen employing itself in altering the existing laws to conform them to the stipulations in a new treaty; and this may have possibly given birth to the imagination, that its co-operation was necessary to the obligatory efficacy of the treaty. But this parliamentary interposition proceeds from a different cause: from the necessity of adjusting a most artificial and intricate system of revenue and commercial laws, to the changes made in them by the operation of the treaty; and of adapting new provisions and precautions to the new state of things, to keep the machine from running into disorder. In this respect, therefore, there is no comparison between the intended power of the President and the actual power of the British sovereign. The one can perform alone what the other can do only with the concurrence of a branch of the legislature. It must be admitted, that, in this instance, the power of the federal Executive would exceed that of any State Executive. But this arises naturally from the sovereign power which relates to treaties. If the Confederacy were to be dissolved, it would become a question, whether the Executives of the several States were not solely invested with that delicate and important prerogative.

The President is also to be authorized to receive ambassadors and other public ministers. This, though it has been a rich theme of declamation, is more a matter of dignity than of authority. It is a circumstance which will be without consequence in the administration of the government; and it was far more convenient that it should be arranged in this manner, than that there should be a necessity of convening the legislature, or one of its branches, upon every arrival of a foreign minister, though it were merely to take the place of a departed predecessor.

The President is to nominate, and, WITH THE ADVICE AND CONSENT OF THE SENATE, to appoint ambassadors and other public ministers, judges of the Supreme Court, and in general all officers of the United States established by law, and whose appointments are not otherwise provided for by the Constitution. The king of Great Britain is emphatically and truly styled the fountain of honor. He not only appoints to all offices, but can create offices. He can confer titles of nobility at pleasure; and has the disposal of an immense number of church preferments. There is evidently a great inferiority in the power of the President, in this particular, to that of the British king; nor is it equal to that of the governor of New York, if we are to interpret the meaning of the constitution of the State by the practice which has obtained under it. The power of appointment is with us lodged in a council, composed of the governor and four members of the Senate, chosen by the Assembly. The governor CLAIMS, and has frequently EXERCISED, the right of nomination, and is ENTITLED to a casting vote in the appointment. If he really has the right of nominating, his authority is in this respect equal to that of the President, and exceeds it in the article of the casting vote. In the national government, if the Senate should be divided, no appointment could be made; in the government of New York, if the council should be divided, the governor can turn the scale, and confirm his own nomination.³ If we compare the publicity which must necessarily attend the mode of appointment by the President and an entire branch of the national legislature, with the privacy in the mode of appointment by the governor of New York, closeted in a secret apartment with at most four, and frequently with only two persons; and if we at the same time consider how much more easy it must be to influence the small number of which a council of appointment consists, than the considerable number of which the national Senate would consist, we cannot hesitate to pronounce that the power of the chief magistrate of this State, in the disposition of offices, must, in practice, be greatly superior to that of the Chief Magistrate of the Union.

Hence it appears that, except as to the concurrent authority of the President in the article of treaties, it would be difficult to determine whether that magistrate would, in the aggregate, possess more or less power than the Governor of New York. And it appears yet more unequivocally, that there is no pretense for the parallel which has been attempted between him and the king of Great Britain. But to render the contrast in this respect still more striking, it may be of use to throw the principal circumstances of dissimilitude into a closer group.

The President of the United States would be an officer elected by the people for FOUR years; the king of Great Britain is a perpetual and HEREDITARY prince. The one would be amenable to personal punishment and disgrace; the person of the other is sacred and inviolable. The one would have a QUALIFIED negative upon the acts of the legislative body; the other has an ABSOLUTE negative. The one would have a right to command the military and naval forces of the nation; the other, in addition to this right, possesses that of DECLARING war, and of RAISING and REGULATING fleets and armies by his own authority. The one would have a

concurrent power with a branch of the legislature in the formation of treaties; the other is the SOLE POSSESSOR of the power of making treaties. The one would have a like concurrent authority in appointing to offices; the other is the sole author of all appointments. The one can confer no privileges whatever; the other can make denizens of aliens, noblemen of commoners; can erect corporations with all the rights incident to corporate bodies. The one can prescribe no rules concerning the commerce or currency of the nation; the other is in several respects the arbiter of commerce, and in this capacity can establish markets and fairs, can regulate weights and measures, can lay embargoes for a limited time, can coin money, can authorize or prohibit the circulation of foreign coin. The one has no particle of spiritual jurisdiction; the other is the supreme head and governor of the national church! What answer shall we give to those who would persuade us that things so unlike resemble each other? The same that ought to be given to those who tell us that a government, the whole power of which would be in the hands of the elective and periodical servants of the people, is an aristocracy, a monarchy, and a despotism.

PUBLIUS.

FEDERALIST 70

HAMILTON

To the People of the State of New York:

THERE is an idea, which is not without its advocates, that a vigorous Executive is inconsistent with the genius of republican government. The enlightened well-wishers to this species of government must at least hope that the supposition is destitute of foundation; since they can never admit its truth, without at the same time admitting the condemnation of their own principles. Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy. Every man the least conversant in Roman story, knows how often that republic was obliged to take refuge in the absolute power of a single man, under the formidable title of Dictator, as well against the intrigues of ambitious individuals who aspired to the tyranny, and the seditions of whole classes of the community whose conduct threatened the existence of all government, as against the invasions of external enemies who menaced the conquest and destruction of Rome.

There can be no need, however, to multiply arguments or examples on this head. A feeble Executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government.

Taking it for granted, therefore, that all men of sense will agree in the necessity of an energetic Executive, it will only remain to inquire, what are the ingredients which constitute this energy? How far can they be combined with those other ingredients which constitute safety in the republican sense? And how far does this combination characterize the plan which has been reported by the convention?

The ingredients which constitute energy in the Executive are, first, unity; secondly, duration; thirdly, an adequate provision for its support; fourthly, competent powers.

The ingredients which constitute safety in the republican sense are, first, a due dependence on the people, secondly, a due responsibility.

Those politicians and statesmen who have been the most celebrated for the soundness of their principles and for the justice of their views, have declared in favor of a single Executive and a numerous legislature. They have with great propriety, considered energy as the most necessary qualification of the former, and have regarded this as most applicable to power in a single hand, while they have, with equal propriety, considered the latter as best adapted to deliberation and wisdom, and best calculated to conciliate the confidence of the people and to secure their privileges and interests.

That unity is conducive to energy will not be disputed. Decision, activity, secrecy, and despatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.

This unity may be destroyed in two ways: either by vesting the power in two or more magistrates of equal dignity and authority; or by vesting it ostensibly in one man, subject, in whole or in part, to the control and co-operation of others, in the capacity of counsellors to him. Of the first, the two Consuls of Rome may serve as an example; of the last, we shall find examples in the constitutions of several of the States. New York and New Jersey, if I recollect right, are the only States which have intrusted the executive authority wholly to single men.¹ Both these methods of destroying the unity of the Executive have their partisans; but the votaries of an executive council are the most numerous. They are both liable, if not to equal, to similar objections, and may in most lights be examined in conjunction.

The experience of other nations will afford little instruction on this head. As far, however, as it teaches any thing, it teaches us not to be enamoured of plurality in the Executive. We have seen that the Achaeans, on an experiment of two Praetors, were induced to abolish one. The Roman history records many instances of mischiefs to the republic from the dissensions between the Consuls, and between the military Tribunes, who were at times substituted for the Consuls. But it gives us no specimens of any peculiar advantages derived to the state from the circumstance of the plurality of those magistrates. That the dissensions between them were not more frequent or more fatal, is a matter of astonishment, until we advert to the singular position in which the republic was almost continually placed, and to the prudent policy pointed out by the circumstances of the state, and pursued by the Consuls, of making a division of the government between them. The patricians engaged in a perpetual struggle with the plebeians for the

preservation of their ancient authorities and dignities; the Consuls, who were generally chosen out of the former body, were commonly united by the personal interest they had in the defense of the privileges of their order. In addition to this motive of union, after the arms of the republic had considerably expanded the bounds of its empire, it became an established custom with the Consuls to divide the administration between themselves by lot one of them remaining at Rome to govern the city and its environs, the other taking the command in the more distant provinces. This expedient must, no doubt, have had great influence in preventing those collisions and rivalships which might otherwise have embroiled the peace of the republic.

But quitting the dim light of historical research, attaching ourselves purely to the dictates of reason and good sense, we shall discover much greater cause to reject than to approve the idea of plurality in the Executive, under any modification whatever.

Wherever two or more persons are engaged in any common enterprise or pursuit, there is always danger of difference of opinion. If it be a public trust or office, in which they are clothed with equal dignity and authority, there is peculiar danger of personal emulation and even animosity. From either, and especially from all these causes, the most bitter dissensions are apt to spring. Whenever these happen, they lessen the respectability, weaken the authority, and distract the plans and operation of those whom they divide. If they should unfortunately assail the supreme executive magistracy of a country, consisting of a plurality of persons, they might impede or frustrate the most important measures of the government, in the most critical emergencies of the state. And what is still worse, they might split the community into the most violent and irreconcilable factions, adhering differently to the different individuals who composed the magistracy.

Men often oppose a thing, merely because they have had no agency in planning it, or because it may have been planned by those whom they dislike. But if they have been consulted, and have happened to disapprove, opposition then becomes, in their estimation, an indispensable duty of self-love. They seem to think themselves bound in honor, and by all the motives of personal infallibility, to defeat the success of what has been resolved upon contrary to their sentiments. Men of upright, benevolent tempers have too many opportunities of remarking, with horror, to what desperate lengths this disposition is sometimes carried, and how often the great interests of society are sacrificed to the vanity, to the conceit, and to the obstinacy of individuals, who have credit enough to make their passions and their caprices interesting to mankind. Perhaps the question now before the public may, in its consequences, afford melancholy proofs of the effects of this despicable frailty, or rather detestable vice, in the human character.

Upon the principles of a free government, inconveniences from the source just mentioned must necessarily be submitted to in the formation of the legislature; but it is unnecessary, and therefore unwise, to introduce them into the constitution of the Executive. It is here too that they may be most pernicious. In the legislature, promptitude of decision is oftener an evil than a benefit. The differences of opinion, and the jarrings of parties in that department of the government, though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection, and serve to check excesses in the majority. When a resolution too is once taken, the opposition must be at an end. That resolution is a law, and resistance to it punishable. But no favorable circumstances palliate or atone for the disadvantages of dissension in the

executive department. Here, they are pure and unmixed. There is no point at which they cease to operate. They serve to embarrass and weaken the execution of the plan or measure to which they relate, from the first step to the final conclusion of it. They constantly counteract those qualities in the Executive which are the most necessary ingredients in its composition, vigor and expedition, and this without any counterbalancing good. In the conduct of war, in which the energy of the Executive is the bulwark of the national security, every thing would be to be apprehended from its plurality.

It must be confessed that these observations apply with principal weight to the first case supposed that is, to a plurality of magistrates of equal dignity and authority a scheme, the advocates for which are not likely to form a numerous sect; but they apply, though not with equal, yet with considerable weight to the project of a council, whose concurrence is made constitutionally necessary to the operations of the ostensible Executive. An artful cabal in that council would be able to distract and to enervate the whole system of administration. If no such cabal should exist, the mere diversity of views and opinions would alone be sufficient to tincture the exercise of the executive authority with a spirit of habitual feebleness and dilatoriness.

But one of the weightiest objections to a plurality in the Executive, and which lies as much against the last as the first plan, is, that it tends to conceal faults and destroy responsibility. Responsibility is of two kinds to censure and to punishment. The first is the more important of the two, especially in an elective office. Man, in public trust, will much oftener act in such a manner as to render him unworthy of being any longer trusted, than in such a manner as to make him obnoxious to legal punishment. But the multiplication of the Executive adds to the difficulty of detection in either case. It often becomes impossible, amidst mutual accusations, to determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures, ought really to fall. It is shifted from one to another with so much dexterity, and under such plausible appearances, that the public opinion is left in suspense about the real author. The circumstances which may have led to any national miscarriage or misfortune are sometimes so complicated that, where there are a number of actors who may have had different degrees and kinds of agency, though we may clearly see upon the whole that there has been mismanagement, yet it may be impracticable to pronounce to whose account the evil which may have been incurred is truly chargeable. "I was overruled by my council. The council were so divided in their opinions that it was impossible to obtain any better resolution on the point." These and similar pretexts are constantly at hand, whether true or false. And who is there that will either take the trouble or incur the odium, of a strict scrutiny into the secret springs of the transaction? Should there be found a citizen zealous enough to undertake the unpromising task, if there happen to be collusion between the parties concerned, how easy it is to clothe the circumstances with so much ambiguity, as to render it uncertain what was the precise conduct of any of those parties?

In the single instance in which the governor of this State is coupled with a council that is, in the appointment to offices, we have seen the mischiefs of it in the view now under consideration. Scandalous appointments to important offices have been made. Some cases, indeed, have been so flagrant that ALL PARTIES have agreed in the impropriety of the thing. When inquiry has been made, the blame has been laid by the governor on the members of the council, who, on their part, have charged it upon his nomination; while the people remain altogether at a loss to determine,

by whose influence their interests have been committed to hands so unqualified and so manifestly improper. In tenderness to individuals, I forbear to descend to particulars.

It is evident from these considerations, that the plurality of the Executive tends to deprive the people of the two greatest securities they can have for the faithful exercise of any delegated power, first, the restraints of public opinion, which lose their efficacy, as well on account of the division of the censure attendant on bad measures among a number, as on account of the uncertainty on whom it ought to fall; and, secondly, the opportunity of discovering with facility and clearness the misconduct of the persons they trust, in order either to their removal from office or to their actual punishment in cases which admit of it.

In England, the king is a perpetual magistrate; and it is a maxim which has obtained for the sake of the public peace, that he is unaccountable for his administration, and his person sacred. Nothing, therefore, can be wiser in that kingdom, than to annex to the king a constitutional council, who may be responsible to the nation for the advice they give. Without this, there would be no responsibility whatever in the executive department an idea inadmissible in a free government. But even there the king is not bound by the resolutions of his council, though they are answerable for the advice they give. He is the absolute master of his own conduct in the exercise of his office, and may observe or disregard the counsel given to him at his sole discretion.

But in a republic, where every magistrate ought to be personally responsible for his behavior in office the reason which in the British Constitution dictates the propriety of a council, not only ceases to apply, but turns against the institution. In the monarchy of Great Britain, it furnishes a substitute for the prohibited responsibility of the chief magistrate, which serves in some degree as a hostage to the national justice for his good behavior. In the American republic, it would serve to destroy, or would greatly diminish, the intended and necessary responsibility of the Chief Magistrate himself.

The idea of a council to the Executive, which has so generally obtained in the State constitutions, has been derived from that maxim of republican jealousy which considers power as safer in the hands of a number of men than of a single man. If the maxim should be admitted to be applicable to the case, I should contend that the advantage on that side would not counterbalance the numerous disadvantages on the opposite side. But I do not think the rule at all applicable to the executive power. I clearly concur in opinion, in this particular, with a writer whom the celebrated Junius pronounces to be "deep, solid, and ingenious," that "the executive power is more easily confined when it is ONE";² that it is far more safe there should be a single object for the jealousy and watchfulness of the people; and, in a word, that all multiplication of the Executive is rather dangerous than friendly to liberty.

A little consideration will satisfy us, that the species of security sought for in the multiplication of the Executive, is nattainable. Numbers must be so great as to render combination difficult, or they are rather a source of danger than of security. The united credit and influence of several individuals must be more formidable to liberty, than the credit and influence of either of them separately. When power, therefore, is placed in the hands of so small a number of men, as to admit of their interests and views being easily combined in a common enterprise,

by an artful leader, it becomes more liable to abuse, and more dangerous when abused, than if it be lodged in the hands of one man; who, from the very circumstance of his being alone, will be more narrowly watched and more readily suspected, and who cannot unite so great a mass of influence as when he is associated with others. The Decemvirs of Rome, whose name denotes their number,³ were more to be dreaded in their usurpation than any ONE of them would have been. No person would think of proposing an Executive much more numerous than that body; from six to a dozen have been suggested for the number of the council. The extreme of these numbers, is not too great for an easy combination; and from such a combination America would have more to fear, than from the ambition of any single individual. A council to a magistrate, who is himself responsible for what he does, are generally nothing better than a clog upon his good intentions, are often the instruments and accomplices of his bad and are almost always a cloak to his faults.

I forbear to dwell upon the subject of expense; though it be evident that if the council should be numerous enough to answer the principal end aimed at by the institution, the salaries of the members, who must be drawn from their homes to reside at the seat of government, would form an item in the catalogue of public expenditures too serious to be incurred for an object of equivocal utility. I will only add that, prior to the appearance of the Constitution, I rarely met with an intelligent man from any of the States, who did not admit, as the result of experience, that the UNITY of the executive of this State was one of the best of the distinguishing features of our constitution.

PUBLIUS.

CHAPTER I:

Early War Powers of the President

Ex Parte Merryman (1861)

As the case comes before me [Chief Justice Roger Taney], therefore, I understand that the President not only claims the right to suspend the writ of Habeas Corpus himself, at his discretion, but to delegate that discretionary power to a military officer, and to leave it to him to determine whether he will or will not obey Judicial process that may be served upon him.

No official notice has been given to the courts of justice, or to the public, by proclamation or otherwise, that the President claimed this power, and had exercised it in the manner stated in the return. And I certainly listened to it with some surprise. For I had supposed it to be one of those points of constitutional law upon which there was no difference of opinion, and that it was admitted on all hands that the privilege of the writ could not be suspended, except by act of Congress. . . .

And the only power therefore which the President possesses, where the “life, liberty, or property” of a private citizen is concerned, is the power and duty prescribed in the 3rd section of the 2nd Article, which requires “That he Shall take care that the laws be faithfully executed.” He is not authorized to execute them himself or through agents or officers civil or military appointed by himself, but he is to take care that they be faithfully carried into Execution as they are expounded and adjudged of by the Coordinate Branch of the Government to which that duty is assigned by the Constitution. It is thus made his duty to come in aid of the judicial authority, if it shall be resisted by a force too strong to be overcome without the assistance of the Executive arm. But in Exercising this power he acts in subordination to judicial authority, assisting it to Execute its process & enforce its judgments.

But the documents before me show that the military authority, in this case has gone far beyond the mere suspension of the privilege of the writ of Habeas Corpus. It has, by force of arms, thrust aside the judicial authorities and officers to whom the Constitution has confided the power and duty of interpreting and administering the laws, and substituted a military government in its place, to be administered and executed by military officers. And if a military officer, or any other person, had reason to believe that the prisoner had committed any offence against the laws of the United States, it was his duty to give information of the fact, and the evidence to support it, to the District Attorney; and it would then have become the duty of that officer to bring the matter before the District Judge or Commissioner, and if there was sufficient legal evidence to justify his arrest, the Judge or Commissioner would have issued his warrant to the Marshal, to arrest him; and upon the hearing of the case, would have held him to bail, or committed him for trial, according to the character of the offense, as it appeared in the testimony, or would have discharged him immediately, if there was not sufficient evidence to support the accusation. There was no danger of any obstruction, or resistance to the action of the civil authorities, and therefore

no reason whatever for the interposition of the military. And yet under these circumstances a military officer, stationed in Pennsylvania, without giving any information to the District Attorney, and without any application to the judicial authorities, assumes to himself the judicial power, in the District of Maryland, undertakes to decide what constitutes the crime of Treason, or rebellion, what evidence (if, indeed, he required any) is sufficient to support the accusation, and justify the commitment, and commits the party, without a hearing even before himself, to close custody in a strongly garrisoned Fort, to be there held, it would seem, during the pleasure of those who committed him.

The [Fourth Amendment to the] Constitution provides, as I have before said, that “no person shall be deprived of life, liberty, or property, without due process of law.” It declares that “the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

It provides that the party accused shall be entitled to a speedy trial in a court of justice.

And these great and fundamental laws, which Congress itself could not suspend, have been disregarded and suspended, like the writ of Habeas Corpus, by a military order, supported by force of arms. Such is the case now before me, and I can only say, that if the authority which the Constitution has confided to the Judiciary Department and Judicial officers, may thus, upon any pretext or under any circumstances be usurped by the military power at its discretion, the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty, and property at the will and pleasure of the Army officer, in whose Military District he may happen to be found.

In such a case my duty was too plain to be mistaken. I have exercised all the power which the Constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome. It is possible, that the officer, who has incurred this grave responsibility, may have misunderstood his instructions, and exceeded the authority intended to be given him. I shall, therefore, order all the proceedings in this case, with my opinion, to be filed, and recorded in the Circuit Court of the United States for the District of Maryland, and direct the clerk to transmit a copy, under seal, to the President of the United States. It will then remain for that high officer, in fulfilment of his constitutional obligation to “take care that the laws be faithfully executed,” to determine what measures he will take to cause the civil process of the United States to be respected, and enforced.

Ex Parte McCardle (1869)

The first question necessarily is that of jurisdiction, for if the act of March, 1868, takes away the jurisdiction defined by the act of February, 1867, it is useless, if not improper, to enter into any discussion of other questions.

It is quite true, as was argued by the counsel for the petitioner, that the appellate jurisdiction of this court is not derived from acts of Congress. It is, strictly speaking, conferred by the Constitution. But it is conferred "with such exceptions and under such regulations as Congress shall make."

It is unnecessary to consider whether, if Congress had made no exceptions and no regulations, this court might not have exercised general appellate jurisdiction under rules prescribed by itself. For among the earliest acts of the first Congress, at its first session, was the act of September 24th, 1789 [The Judiciary Act of 1789], to establish the judicial courts of the United States. That act provided for the organization of this court, and prescribed regulations for the exercise of its jurisdiction.

The source of that jurisdiction, and the limitations of it by the Constitution and by statute, have been on several occasions subjects of consideration here. In the case of *Durousseau v. The United States* particularly, the whole matter was carefully examined, and the court held that, while "the appellate powers of this court are not given by the judicial act, but are given by the Constitution," they are, nevertheless, "limited and regulated by that act, and by such other acts as have been passed on the subject." The court said further that the judicial act was an exercise of the power given by the Constitution to Congress "of making exceptions to the appellate jurisdiction of the Supreme Court." "They have described affirmatively," said the court, "its jurisdiction, and this affirmative description has been understood to imply a negation of the exercise of such appellate power as is not comprehended within it."

The principle that the affirmation of appellate jurisdiction implies the negation of all such jurisdiction not affirmed having been thus established, it was an almost necessary consequence that acts of Congress, providing for the exercise of jurisdiction, should come to be spoken of as acts granting jurisdiction, and not as acts making exceptions to the constitutional grant of it.

The exception to appellate jurisdiction in the case before us, however, is not an inference from the affirmation of other appellate jurisdiction. It is made in terms. The provision of the act of 1867 affirming the appellate jurisdiction of this court in cases of habeas corpus is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception.

We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution, and the power to make exceptions to the appellate jurisdiction of this court is given by express words.

What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction, the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and, when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon

principle.

Several cases were cited by the counsel for the petitioner in support of the position that jurisdiction of this case is not affected by the repealing act. But none of them, in our judgment, affords any support to it. They are all cases of the exercise of judicial power by the legislature, or of legislative interference with courts in the exercising of continuing jurisdiction.

On the other hand, the general rule, supported by the best elementary writers, is that, "when an act of the legislature is repealed, it must be considered, except as to transactions past and closed, as if it never existed." And the effect of repealing acts upon suits under acts repealed has been determined by the adjudications of this court. The subject was fully considered in *Norris v. Crecker*, and more recently in *Insurance Company v. Ritchie*. In both of these cases, it was held that no judgment could be rendered in a suit after the repeal of the act under which it was brought and prosecuted.

It is quite clear, therefore, that this court cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal, and judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer.

Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of habeas corpus, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.

IN RE NEAGLE

135 U.S. 1 (1890)

Opinion

MILLER, J., Opinion of the Court

MR. JUSTICE MILLER, after stating the case as above, delivered the opinion of the court.

The history of the incidents which led to the tragic event of the killing of Terry by the prisoner Neagle had its origin in a suit brought by William Sharon of Nevada, in the Circuit Court of the United States for the District of California, against Sarah Althea Hill, alleged to be a citizen of California, for the purpose of obtaining a decree adjudging a certain instrument in writing, possessed and exhibited by her, purporting to be a declaration of marriage between them, under the code of California, to be a forgery, and to have it set aside and annulled. This suit, which was commenced October 3, 1883, was finally heard before Judge Sawyer, the Circuit Judge for that circuit, and Judge Deady, United States District Judge for Oregon, who had been duly appointed

to assist in holding the Circuit Court for the District of California. The hearing was on September 29, 1885, and on the 15th of January, 1886, a decree was rendered granting the prayer of the bill. In that decree, it was declared that the instrument purporting to be a declaration of marriage, set out and described in the bill of complaint, was not signed or executed at any time by William Sharon, the complainant; that it is not [p43] genuine; that it is false, counterfeited, fabricated, forged, and fraudulent, and, as such, is utterly null and void. And it is further ordered and decreed that the respondent, Sarah Althea Hill, deliver up and deposit with the clerk of the court said instrument, to be endorsed "cancelled," and that the clerk write across it "cancelled" and sign his name and affix his seal thereto. . . .

This case was argued in the Circuit Court before Field, Circuit Justice, Sawyer, Circuit Judge, and Sabin, District Judge. While the matter was held under advisement, Judge Sawyer, on returning from Los Angeles, in the Southern District of California, where he had been holding court, found himself on the train as it left Fresno, which is understood to [p44] have been the residence of Terry and wife, in a car in which he noticed that Mr. and Mrs. Terry were in a section behind him, on the same side. On this trip from Fresno to San Francisco, Mrs. Terry grossly insulted Judge Sawyer, and had her husband change seats so as to sit directly in front of the Judge, while she passed him with insolent remarks, and pulled his hair with a vicious jerk, and then, in an excited manner, taking her seat by her husband's side, said: "I will give him a taste of what he will get by and by. Let him render this decision if he dares," -- the decision being the one already mentioned, then under advisement. Terry then made some remark about too many witnesses being in the car, adding that "The best thing to do with him would be to take him out into the bay and drown him." These incidents were witnessed by two gentlemen who knew all the parties, and whose testimony is found in the record before us.

This was August 14, 1888. On the 3d of September, the court rendered its decision granting the prayer of the bill of revivor in the name of Frederick W. Sharon and against Sarah Althea Terry and her husband, David S. Terry. The opinion was delivered by Mr. Justice Field, and, during its delivery, a scene of great violence occurred in the courtroom. It appears that, shortly before the court opened on that day, both the defendants in the case came into the courtroom and took seats within the bar at the table next the clerk's desk, and almost immediately in front of the judges. Besides Mr. Justice Field, there were present on the bench Judge Sawyer and Judge Sabin of the District Court of the United States for the District of Nevada. The defendants had denied the jurisdiction of the court originally to render the decree sought to be revived, and the opinion of the court necessarily discussed this question without reaching the merits of the controversy. When allusion was made to this question, Mrs. Terry rose from her seat and, addressing the justice who was delivering the opinion, asked in an excited manner whether he was going to order her to give up the marriage contract to be cancelled. Mr. Justice Field said: "Be seated, madam." She repeated the question, and was again told to be seated. She then said, [p45] in a very excited and violent manner, that Justice Field had been bought, and wanted to know the price he had sold himself for; that he had got Newland's money for it, and everybody knew that he had got it, or words to that effect. Mr. Justice Field then directed the marshal to remove her from the courtroom. She asserted that she would not go from the room, and that no one could take her from it.

Marshal Franks proceeded to carry out the order of the court by attempting to compel her to leave, when Terry, her husband, rose from his seat under great excitement, exclaiming that no man living should touch his wife, and struck the marshal a blow in his face so violent as to knock out a tooth. He then unbuttoned his coat, thrust his hand under his vest, apparently for the purpose of drawing a bowie knife, when he was seized by persons present and forced down on his back. In the meantime, Mrs. Terry was removed from the courtroom by the marshal, and Terry was allowed to rise and was accompanied by officers to the door leading to the marshal's office. As he was about leaving the room, or immediately after being out of it, he succeeded in drawing a bowie knife, when his arms were seized by a deputy marshal and others present to prevent him from using it, and they were able to wrench it from him only after a severe struggle. The most prominent person engaged in wresting the knife from Terry was Neagle, the prisoner now in court.

For this conduct, both Terry and his wife were sentenced by the court to imprisonment for contempt, Mrs. Terry for one month and Terry for six months, and these sentences were immediately carried into effect. Both the judgment of the court on the petition for the revival of the decree in the case of Sharon against Hill and the judgment of the Circuit Court imprisoning Terry and wife for contempt have been brought to this court for review, and in both cases the judgments have been affirmed. The report of the cases may be found in *Ex parte Terry*, 128 U.S. 289, and *Terry v. Sharon*, 131 U.S. 40.

Terry and Mrs. Terry were separately indicted by the grand jury of the Circuit Court of the United States during the same term for their part in these transactions, and the cases were [p46] pending in said court at the time of Terry's death. It also appears that Mrs. Terry, during her part of this altercation in the courtroom, was making efforts to open a small satchel which she had with her, but, through her excitement, she failed. This satchel, which was taken from her, was found to have in it a revolving pistol.

From that time until his death, the denunciations by Terry and his wife of Mr. Justice Field were open, frequent, and of the most vindictive and malevolent character. While being transported from San Francisco to Alameda, where they were imprisoned, Mrs. Terry repeated a number of times that she would kill both Judge Field and Judge Sawyer. Terry, who was present, said nothing to restrain her, but added that he was not through with Judge Field yet; and, while in jail at Alameda, Terry said that, after he got out of jail, he would horsewhip Judge Field, and that he did not believe he would ever return to California, but this earth was not large enough to keep him from finding Judge Field and horsewhipping him; and, in reply to a remark that this would be a dangerous thing to do, and that Judge Field would resent it, he said: "if Judge Field resents it, I will kill him." And while in jail, Mrs. Terry exhibited to a witness Terry's knife, at which he laughed, and said, "Yes, I always carry that," and made a remark about judges and marshals, that "they were all a lot of cowardly curs," and he would "see some of them in their graves yet." Mrs. Terry also said that she expected to kill Judge Field some day. . . .

The result of . . . correspondence [threatening Justice Field] was that Marshal Franks appointed Mr. Neagle a deputy marshal for the Northern District of California, and gave him special instructions to attend upon Judge Field both in court and while going from one court to another, and protect him from any assault that might be attempted upon him by Terry and wife.

Accordingly, when Judge Field went from San Francisco to Los Angeles to hold the Circuit Court of the United States at that place, Mr. Neagle accompanied him, remained with him for the few days that he was engaged in the business of that court, and returned with him to San Francisco.

It appears from the uncontradicted evidence in the case that, while the sleeping car, in which were Justice Field and Mr. Neagle, stopped a moment in the early morning at Fresno, Terry and wife got on the train. The fact that they were on the train became known to Neagle, and he held a conversation with the conductor as to what peace officers could be found at Lathrop, where the train stopped for breakfast, and the conductor was requested to telegraph to the proper officers of that place to have a constable or some peace officer on the ground when the train should arrive, anticipating that there might be violence attempted by Terry upon Judge Field. It is sufficient to say that this resulted in no available aid to assist in keeping the peace. When the train arrived, Neagle informed Judge Field of the presence of Terry on the train, and advised him to remain and take his breakfast in the car. This the Judge refused to do, and he and Neagle got out of the car and went into the dining room, and took seats beside each other in the place assigned them by the person in charge of the breakfast room, and very shortly after this, Terry and wife came into the room, and Mrs. Terry, recognizing Judge Field, turned and left in great haste, while Terry passed beyond where Judge Field and Neagle were and took his seat at another table. It was afterwards ascertained that Mrs. Terry went to the car and took from it a satchel in which was a revolver. Before she returned to the eating room, Terry arose from his seat and, passing around the table in such a way as brought him behind Judge Field, who did not see him or notice him, came [p53] up where he was sitting with his feet under the table, and struck him a blow on the side of his face, which was repeated on the other side. He also had his arm drawn back and his fist doubled up, apparently to strike a third blow, when Neagle, who had been observing him all this time, arose from his seat with his revolver in his hand, and in a very loud voice shouted out: "Stop! stop! I am an officer!" Upon this, Terry turned his attention to Neagle, and, as Neagle testifies, seemed to recognize him, and immediately turned his hand to thrust it in his bosom, as Neagle felt sure, with the purpose of drawing a bowie knife. At this instant, Neagle fired two shots from his revolver into the body of Terry, who immediately sank down and died in a few minutes.

Mrs. Terry entered the room with the satchel in her hand just after Terry sank to the floor. She rushed up to the place where he was, threw herself upon his body, made loud exclamations and moans, and commenced inviting the spectators to avenge her wrong upon Field and Neagle. She appeared to be carried away by passion, and in a very earnest manner charged that Field and Neagle had murdered her husband intentionally, and shortly afterwards she appealed to the persons present to examine the body of Terry to see that he had no weapons. This she did once or twice. The satchel which she had, being taken from her, was found to contain a revolver.

These are the material circumstances produced in evidence before the Circuit Court on the hearing, of this habeas corpus case. It is but a short sketch of a history which is given in over five hundred pages in the record, but we think it is sufficient to enable us to apply the law of the case to the question before us. Without a more minute discussion of this testimony, it produces upon us the conviction of a settled purpose on the part of Terry and his wife, amounting to a conspiracy, to murder Justice Field. And we are quite sure that, if Neagle had been merely a

brother or a friend of Judge Field, traveling with him, and aware of all the previous relations of Terry to the Judge -- as he was -- of his bitter animosity, his declared purpose to have revenge even to the point [p54] of killing him, he would have been justified in what he did in defence of Mr. Justice Field's life, and possibly of his own.

But such a justification would be a proper subject for consideration on a trial of the case for murder in the courts of the State of California, and there exists no authority in the courts of the United States to discharge the prisoner while held in custody by the State authorities for this offence unless there be found in aid of the defence of the prisoner some element of power and authority asserted under the government of the United States.

This element is said to be found in the facts that Mr. Justice Field, when attacked, was in the immediate discharge of his duty as judge of the Circuit Courts of the United States within California; that the assault upon him grew out of the animosity of Terry and wife, arising out of the previous discharge of his duty as circuit justice in the case for which they were committed for contempt of court, and that the deputy marshal of the United States, who killed Terry in defence of Field's life, was charged with a duty under the law of the United States to protect Field from the violence which Terry was inflicting, and which was intended to lead to Field's death.

To the inquiry whether this proposition is sustained by law and the facts which we have recited we now address ourselves.

Mr. Justice Field was a member of the Supreme Court of the United States, and had been a member of that court for over a quarter of a century, during which he had become venerable for his age and for his long and valuable service in that court. The business of the Supreme Court has become so exacting that for many years past, the justices of it have been compelled to remain for the larger part of the year in Washington City, from whatever part of the country they may have been appointed. The term for each year, including the necessary travel and preparations to attend at its beginning, has generally lasted from eight to nine months.

But the justices of this court have imposed upon them other duties, the most important of which arise out of the fact that they are also judges of the Circuit Courts of the United States. [p55] Of these circuits there are nine, to each one of which a justice of the Supreme Court is allotted, under section 606 of the Revised Statutes, the provision of which is as follows:

The chief justice and associate justices of the Supreme Court shall be allotted among the circuits by an order of the court, and a new allotment shall be made whenever it becomes necessary or convenient by reason of the alteration of any circuit, or of the new appointment of a chief justice or associate justice, or otherwise.

Section 610 declares that it

shall be the duty of the chief justice, and of each justice of the Supreme Court, to attend at least one term of the Circuit Court, in each district of the circuit to which he is allotted during every period of two years.

Although this enactment does not require in terms that the justices shall go to their circuits more than once in two years, the effect of it is to compel most of them to do this, because there are so many districts in many of the circuits that it is impossible for the circuit justice to reach them all in one year, and the result of this is that he goes to some of them in one year, and to others in the next year, thus requiring an attendance in the circuit every year.

The justices of the Supreme Court have been members of the Circuit Courts of the United States ever since the organization of the government, and their attendance on the circuit and appearance at the places where the courts are held has always been thought to be a matter of importance. 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. The statutes of the United States, and the established practice of the courts, require that the judge perform a very large share of his judicial labors at what is called "chambers." This chamber work is as important as necessary, as much a discharge of his official duty as that performed [p56] in the courthouse. Important cases are often argued before the judge at any place convenient to the parties concerned, and a decision of the judge is arrived at by investigations made in his own room, wherever he may be, and it is idle to say that this is not as much the performance of judicial duty as the filing of the judgment with the clerk and the announcement of the result in open court.

So it is impossible for a justice of the Supreme Court of the United States, who is compelled by the obligations of duty to be so much in Washington City, to discharge his duties of attendance on the Circuit Courts as prescribed by section 610 without traveling in the usual and most convenient modes of doing it to the place where the court is to be held. 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."

Justice Field had not only left Washington and traveled the three thousand miles or more which were necessary to reach his circuit, but he had entered upon the duties of that circuit, had held the court at San Francisco for some time; and, taking a short leave of that court, had gone down to Los Angeles, another place where a court was to be held, and sat as a judge there for several days, hearing cases and rendering decisions. It was in the necessary act of returning from Los Angeles to San Francisco, by the usual mode of travel between the two places, where his court was still in session, and where he was required to be, that he was assaulted by Terry in the manner which we have already described.

The occurrence which we are called upon to consider was of so extraordinary a character that it is not to be expected that many cases can be found to cite as authority upon the subject.

In the case of *United States v. The Schooner Little Charles*, 1 Brock. 380, 382, a question arose before Chief Justice Marshall, holding the Circuit Court of the United States for Virginia, as to the validity of an order made by the District Judge at his chambers, and not in court. The act of Congress authorized stated terms of the District Court, and gave the judge [p57] power to hold

special courts at his discretion, either at the place appointed by the law or such other place in the district as the nature of the business and his discretion should direct. He says:

It does not seem to be a violent construction of such an act to consider the judge as constituting a court whenever he proceeds on judicial business;

and cites the practice of the courts in support of that view of the subject.

In the case of *United States v. Gleason*, 1 Wool.C.C. 128, 132, the prisoner was indicted for the murder of two enrolling officers who were charged with the duty of arresting deserters, or those who had been drafted into the service and had failed to attend. These men, it was said, had visited the region of country where they were murdered, and, having failed of accomplishing their purpose of arresting the deserters, were on their return to their home when they were killed, and the court was asked to instruct the jury that, under these circumstances, they were not engaged in the duty of arresting the deserters named. "It is claimed by the counsel for the defendant," says the report,

that, if the parties killed had been so engaged, and had come to that neighborhood with the purpose of arresting the supposed deserters, but at the moment of the assault had abandoned the purpose of making the arrests at that time, and were returning to headquarters at Grinnell with a view to making other arrangements for arrest at another time, they were not so engaged as to bring the case within the law.

But the court held that this was not a sound construction of the statute, and

that, if the parties killed had come into that neighborhood with intent to arrest the deserters named, and had been employed by the proper officer for that service, and were in the proper prosecution of that purpose, returning to Grinnell with a view to making other arrangements to discharge this duty, they were still engaged in arresting the deserters within the meaning of the statute. It is not necessary,

said the court,

that the party killed should be engaged in the immediate act of arrest, but it is sufficient if he be employed in and about that business when assaulted. The purpose of the law is to protect the life of the person so employed, and this protection continues so [p58] long as he is engaged in a service necessary and proper to that employment.

We have no doubt that Mr. Justice Field, when attacked by Terry, 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.

It is urged, however, that there exists no statute authorizing any such protection as that which Neagle was instructed to give Judge Field in the present case, and indeed no protection whatever against a vindictive or malicious assault growing out of the faithful discharge of his official duties, and that the language of section 753 of the Revised Statutes, that the party seeking the

benefit of the writ of habeas corpus must in this connection show that he is "in custody for an act done or omitted in pursuance of a law of the United States," makes it necessary that, upon this occasion, it should be shown that the act for which Neagle is imprisoned as done by virtue of an act of Congress. It is not supposed that any special act of Congress exists which authorizes the marshals or deputy marshals of the United States in express terms to accompany the judges of the Supreme Court through their circuits, and act as a bodyguard to them, to defend them against malicious assaults against their persons. But we are of opinion that this view of the statute is an unwarranted restriction of the meaning of a law designed to extend in a liberal manner the benefit of the writ of habeas corpus to persons imprisoned for the performance of their duty. And we are satisfied that, if it was the duty of Neagle, under the circumstances, a duty which could only arise under the laws of the United States, to defend Mr. Justice Field from a murderous attack upon him, he brings himself within the meaning of the section we have recited. This view of the subject is confirmed by the alternative provision, that he must be in custody

for an act done or omitted in pursuance of a law of the United States or of an order, process, or decree of a court or judge thereof, or is in custody in violation of the Constitution or of a law or treaty of the United States. [p59]

In the view we take of the Constitution of the United States, any obligation fairly and properly inferrible 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. It would be a great reproach to the system of government of the United States, declared to be within its sphere sovereign and supreme, 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.

It has in modern times become apparent that the physical health of the community is more efficiently promoted by hygienic and preventive means than by the skill which is applied to the cure of disease after it has become fully developed. So also the law, which is intended to prevent crime, in its general spread among the community, by regulations, police organization, and otherwise, which are adapted for the protection of the lives and property of citizens, for the dispersion of mobs, for the arrest of thieves and assassins, for the watch which is kept over the community, as well as over this class of people, is more efficient than punishment of crimes after they have been committed.

If a person in the situation of Judge Field could have no other guarantee of his personal safety, while engaged in the conscientious discharge of a disagreeable duty, than the fact that, if he was murdered, his murderer would be subject to the laws of a State, and by those laws could be punished, the security would be very insufficient. The plan which Terry and wife had in mind of insulting him and assaulting him and drawing him into a defensive physical contest, in the course of which they would slay him, shows the little value of such remedies. We do not believe that the government of the United States is thus inefficient, or that its Constitution and laws have left the high officers of the government so defenceless and unprotected.

The views expressed by this court through Mr. Justice [p60] Bradley, in *Ex parte Siebold*, 100 U.S. 371, 394, are very pertinent to this subject, and express our views with great force. That was

a case of a writ of habeas corpus, where Siebold had been indicted in the Circuit Court of the United States for the District of Maryland for an offence committed against the election laws during an election at which members of Congress and officers of the State of Maryland were elected. He was convicted, and sentenced to fine and imprisonment, and filed his petition in this court for a writ of habeas corpus to be relieved on the ground that the court which had convicted him was without jurisdiction. The foundation of this allegation was that the Congress of the United States had no right to prescribe laws for the conduct of the election in question, or for enforcing the laws of the State of Maryland by the courts of the United States. In the course of the discussion of the relative powers of the federal and state courts on this subject, it is said:

Somewhat akin to the argument which has been considered is the objection that the deputy marshals authorized by the act of Congress to be created and to attend the elections are authorized to keep the peace, and that this is a duty which belongs to the state authorities alone. It is argued that the preservation of peace and good order in society is not within the powers confided to the government of the United States, but belongs exclusively to the States. Here again we are met with the theory that the government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that government. We hold it to be an incontrovertible principle that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent. This power to enforce its laws and to execute its functions in all places does not derogate from the power of the State to execute its laws at the same time and in the same [p61] places. The one does not exclude the other, except where both cannot be executed at the same time. In that case, the words of the Constitution itself show which is to yield. "This Constitution, and all laws which shall be made in pursuance thereof, . . . shall be the supreme law of the land." . . . Without the concurrent sovereignty referred to, the national government would be nothing but an advisory government. Its executive power would be absolutely nullified. Why do we have marshals at all if they cannot physically lay their hands on persons and things in the performance of their proper duties? What functions can they perform if they cannot use force? In executing the processes of the courts, must they call on the nearest constable for protection? must they rely on him to use the requisite compulsion, and to keep the peace, whilst they are soliciting and entreating the parties and bystanders to allow the law to take its course? This is the necessary consequence of the positions that are assumed. If we indulge in such impracticable views as these, and keep on refining and re-refining, we shall drive the national government out of the United States, and relegate it to the District of Columbia, or perhaps to some foreign soil. We shall bring it back to a condition of greater helplessness than that of the old confederation. . . . It must execute its powers, or it is no government. It must execute them on the land as well as on the sea, on things as well as on persons. And, to do this, it must necessarily have power to command obedience, preserve order, and keep the peace, and no person or power in this land has the right to resist or question its authority so long as it keeps within the bounds of its jurisdiction.

At the same term of the court, in the case of *Tennessee v. Davis*, 100 U.S. 257, 262, where the same questions in regard to the relative powers of the federal and state courts were concerned, in regard to criminal offences, the court expressed its views through Mr. Justice Strong, quoting from the case of *Martin v. Hunter*, 1 Wheat. 363, the following language: "The general

government must cease to exist whenever it loses the power of protecting itself in the exercise of its Constitutional [p62] powers," and then proceeding:

It can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a state court, for an alleged offence against the law of the State, yet warranted by the federal authority they possess, and if the general government is powerless to interfere at once for their protection -- if their protection must be left to the action of the state court -- the operations of the general government may at any time be arrested at the will of one of its members. The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws. It may deny the authority conferred by those laws. The state court may administer not only the laws of the State, but equally federal law, in such a manner as to paralyze the operations of the government. And even if, after trial and final judgment in the state court, the case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged federal power arrested. We do not think such an element of weakness is to be found in the Constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the States and the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends, it is supreme. No state government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it for a moment the cognizance of any subject which that instrument has committed to it.

To cite all the cases in which this principle of the supremacy of the government of the United States, in the exercise of all the powers conferred upon it by the Constitution, is maintained would be an endless task. We have selected these as being the most forcible expressions of the views of the court having a direct reference to the nature of the case before us.

Where, then, are we to look for the protection which we [p63] have shown Judge Field was entitled to when engaged in the discharge of his official duties? Not to the courts of the United States, because, as has been more than once said in this court, in the division of the powers of government between the three great departments, executive, legislative and judicial, the judicial is the weakest for the purposes of self-protection and for the enforcement of the powers which it exercises. The ministerial officers through whom its commands must be executed are marshals of the United States, and belong emphatically to the executive department of the government. They are appointed by the President, with the advice and consent of the Senate. They are removable from office at his pleasure. They are subjected by act of Congress to the supervision and control of the Department of Justice, in the hands of one of the cabinet officers of the President, and their compensation is provided by acts of Congress. The same may be said of the district attorneys of the United States, who prosecute and defend the claims of the government in the courts.

The legislative branch of the government can only protect the judicial officers by the enactment of laws for that purpose, and the argument we are now combating assumes that no such law has been passed by Congress.

If we turn to the executive department of the government, we find a very different condition of affairs. The Constitution, section 3, Article 2, declares that the President "shall take care that the laws be faithfully executed," and he is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and, by and with the advice and consent of the Senate, to appoint the most important of them and to fill vacancies. He is declared to be commander-in-chief of the army and navy of the United States. The duties which are thus imposed upon him he is further enabled to perform by the recognition in the Constitution, and the creation by acts of Congress, of executive departments, which have varied in number from four or five to seven or eight, the heads of which are familiarly called cabinet ministers. These aid him in the performance of the [p64] great duties of his office, and represent him in a thousand acts to which it can hardly be supposed his personal attention is called, and thus he is enabled to fulfill the duty of his great department, expressed in the phrase that "he shall take care that the laws be faithfully executed."

Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms*, or does it include the 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?

One of the most remarkable episodes in the history of our foreign relations, and which has become an attractive historical incident, is the case of Martin Koszta, a native of Hungary, who, though not fully a naturalized citizen of the United States, had in due form of law made his declaration of intention to become a citizen. While in Smyrna, he was seized by command of the Austrian consul general at that place, and carried on board the Hussar, an Austrian vessel, where he was held in close confinement. Captain Ingraham, in command of the American sloop of war St. Louis, arriving in port at that critical period, and ascertaining that Koszta had with him his naturalization papers, demanded his surrender to him, and was compelled to train his guns upon the Austrian vessel before his demands were complied with. It was, however, to prevent bloodshed, agreed that Koszta should be placed in the hands of the French consul subject to the result of diplomatic negotiations between Austria and the United States. The celebrated correspondence between Mr. Marcy, Secretary of State, and Chevalier Hulsemann, the Austrian minister at Washington, which arose out of this affair and resulted in the release and restoration to liberty of Koszta, attracted a great deal of public attention, and the position assumed by Mr. Marcy met the approval of the country and of Congress, who voted a gold medal to Captain Ingraham for his conduct in the affair. Upon what act of Congress then existing can anyone lay his finger in support of the action of our government in this matter? [p65]

So, if the President or the Postmaster General is advised that the mails of the United States, possibly carrying treasure, are liable to be robbed and the mail carriers assaulted and murdered in any particular region of country, who can doubt the authority of the President or of one of the executive departments under him to make an order for the protection of the mail and of the persons and lives of its carriers, by doing exactly what was done in the case of Mr. Justice Field, namely, providing a sufficient guard, whether it be by soldiers of the army or by marshals of the United States, with a *posse comitatus* properly armed and equipped, to secure the safe performance of the duty of carrying the mail wherever it may be intended to go?

The United States is the owner of millions of acres of valuable public land, and has been the owner of much more which it has sold. Some of these lands owe a large part of their value to the forests which grow upon them. These forests are liable to depredations by people living in the neighborhood, known as timber thieves, who make a living by cutting and selling such timber, and who are trespassers. But until quite recently, even if there be one now, there was no statute authorizing any preventive measures for the protection of this valuable public property. Has the President no authority to place guards upon the public territory to protect its timber? No authority to seize the timber when cut and found upon the ground? Has he no power to take any measures to protect this vast domain? Fortunately we find this question answered by this court in the case of *Wells v. Nickles*, 104 U.S. 444. That was a case in which a class of men appointed by local land officers, under instructions from the Secretary of the Interior, having found a large quantity of this timber cut down from the forests of the United States and lying where it was cut, seized it. The question of the title to this property coming in controversy between Wells and Nickles, it became essential to inquire into the authority of these timber agents of the government thus to seize the timber cut by trespassers on its lands. The court said:

The effort we have made to ascertain and fix the authority of these timber agents by any [p66] positive provision of law has been unsuccessful.

But the court, notwithstanding there was no special statute for it, held that the Department of the Interior, acting under the idea of protecting from depredation timber on the lands of the government, had gradually come to assert the right to seize what is cut and taken away from them wherever it can be traced, and in aid of this, the registers and receivers of the Land Office had, by instructions from the Secretary of the Interior, been constituted agents of the United States for these purposes, with power to appoint special agents under themselves. And the court upheld the authority of the Secretary of the Interior to make these rules and regulations for the protection of the public lands.

One of the cases in this court in which this question was presented in the most imposing form is that of *United States v. San Jacinto Tin Company*, 125 U.S. 273, 279, 280. In that case, a suit was brought in the name of the United States, by order of the Attorney General, to set aside a patent which had been issued for a large body of valuable land on the ground that it was obtained from the government by fraud and deceit practised upon its officers. A preliminary question was raised by counsel for defendant, which was earnestly insisted upon, as to the right of the Attorney General or any other officer of the government to institute such a suit in the absence of any act of Congress authorizing it. It was conceded that there was no express authority given to the Attorney General to institute that particular suit or any suit of that class. The question was one of very great interest, and was very ably argued both in the court below and in this court. The response of this Court to that suggestion conceded that, in the acts of Congress establishing the Department of Justice and defining the duties of the Attorney General, there was no such express authority, and it was said that there was also no express authority to him to bring suits against debtors of the government upon bonds, or to begin criminal prosecutions, or to institute criminal proceedings in any of the cases in which the United States was plaintiff, yet he was invested with the general superintendence of all such suits. It was further said: [p67]

If the United States, in any particular case, has a just cause for calling upon the judiciary of the country, in any of its Courts, for relief by setting aside or annulling any of its contracts, its obligations, or its most solemn instruments, the question of the appeal to the judicial tribunals of the country must primarily be decided by the Attorney General of the United States. That such a power should exist somewhere, and that the United States should not be more helpless in relieving itself of frauds, impostures, and deceptions than the private individual is hardly open to argument. . . . There must, then, be an officer or officers of the government to determine when the United States shall sue, to decide for what it shall sue, and to be responsible that such suits shall be brought in appropriate cases. The attorneys of the United States in every judicial district are officers of this character, and they are by statute under the immediate supervision and control of the Attorney General. How, then, can it be argued that, if the United States has been deceived, entrapped, or defrauded into the making, under the forms of law, of an instrument which injuriously affects its rights of property, or other rights, it cannot bring a suit to avoid the effect of such instrument, thus fraudulently obtained, without a special act of Congress in each case, or without some special authority applicable to this class of cases?

The same question was raised in the earlier case of *United States v. Hughes*, 11 How. 552, and decided the same way.

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. The correspondence already recited in this opinion between the marshal of the Northern District of California and the Attorney General, and the district attorney of the United States for that district, although prescribing no very specific mode of affording this [p68] protection by the Attorney General, is sufficient, we think, to warrant the marshal in taking the steps which he did take, in making the provisions which he did make, for the protection and defence of Mr. Justice Field.

But there is positive law investing the marshals and their deputies with powers which not only justify what Marshal Neagle did in this matter, but which imposed it upon him as a duty. In chapter fourteen of the Revised Statutes of the United States, which is devoted to the appointment and duties of the district attorneys, marshals, and clerks of the courts of the United States, section 78 declares:

The marshals and their deputies shall have, in each State, the same powers, in executing the laws of the United States, as the sheriffs and their deputies in such State may have, by law, in executing the laws thereof.

If, therefore, a sheriff of the State of California was authorized to do in regard to the laws of California what Neagle did, that is, if he was authorized to keep the peace, to protect a judge from assault and murder, then Neagle was authorized to do the same thing in reference to the laws of the United States.

Section 4176 of the Political Code of California reads as follows:

The sheriff must:

First. Preserve the peace.

Second. Arrest and take before the nearest magistrate for examination all persons who attempt to commit or have committed a public offence.

Third. Prevent and suppress all affrays, breaches of the peace, riots and insurrections, which may come to his knowledge. . . .

And the Penal Code of California declares (section 19) that homicide is justifiable when committed by any person "when resisting any attempt to murder any person or to commit a felony or to do some great bodily injury upon any person;" or

when committed in defence of habitation, property or person against one who manifestly intends or endeavors by violence or surprise to commit a felony. [p69]

That there is a peace of the United States, that a man assaulting a judge of the United States while in the discharge of his duties violates that peace, that, in such case, the marshal of the United States stands in the same relation to the peace of the United States which the sheriff of the county does to the peace of the State of California, are questions too clear to need argument to prove them. That it would be the duty of a sheriff, if one had been present at this assault by Terry upon Judge Field, to prevent this breach of the peace, to prevent this assault, to prevent the murder which was contemplated by it, cannot be doubted. And if, in performing this duty, it became necessary for the protection of Judge Field, or of himself, to kill Terry, in a case where, like this, it was evidently a question of the choice of who should be killed, the assailant and violator of the law and disturber of the peace or the unoffending man who was in his power, there can be no question of the authority of the sheriff to have killed Terry. So the marshal of the United States, charged with the duty of protecting and guarding the judge of the United States court against this special assault upon his person and his life, being present at the critical moment, when prompt action was necessary, found it to be his duty, a duty which he had no liberty to refuse to perform, to take the steps which resulted in Terry's death. This duty was imposed on him by the section of the Revised Statutes which we have recited, in connection with the powers conferred by the State of California upon its peace officers, which become, by this statute, in proper cases, transferred as duties to the marshals of the United States.

But all these questions being conceded, it is urged against the relief sought by this writ of habeas corpus that the question of the guilt of the prisoner of the crime of murder is a question to be determined by the laws of California and to be decided by its courts, and that there exists no power in the government of the United States to take away the prisoner from the custody of the proper authorities of the State of California and carry him before a judge of the court of the United States, and release him without a trial by jury according [p70] to the laws of the State of California. That the statute of the United States authorizes and directs such a proceeding and such a judgment in a case where the offence charged against the prisoner consists in an act done in pursuance of a law of the United States and by virtue of its authority, and where the

imprisonment of the party is in violation of the Constitution and laws of the United States, is clear by its express language.

The enactments now found in the Revised Statutes of the United States on the subject of the writ of habeas corpus are the result of a long course of legislation forced upon Congress by the attempt of the States of the Union to exercise the power of imprisonment over officers and other persons asserting rights under the federal government or foreign governments, which the States denied. The original act of Congress on the subject of the writ of habeas corpus, by its 14th section, authorized the judges and the courts of the United States, in the case of prisoners in jail or in custody under or by color of the authority of the United States, or committed for trial before some court of the same, or when necessary to be brought into court to testify, to issue the writ, and the judge or court before whom they were brought was directed to make inquiry into the cause of commitment. 1 Stat. 81, c. 20, § 14. This did not present the question, or, at least, it gave rise to no question which came before the courts, as to releasing by this writ parties held in custody under the laws of the States. But when, during the controversy growing out of the nullification laws of South Carolina, officers of the United States were arrested and imprisoned for the performance of their duties in collecting the revenue of the United States in that State, and held by the state authorities, it became necessary for the Congress of the United States to take some action for their relief. Accordingly, the act of Congress of March 2, 1833, 4 Stat. 634, c. 7, § , among other remedies for such condition of affairs, provided, by its the section, that the federal judges should grant writs of habeas corpus in all cases of a prisoner in jail or confinement, where he should be committed or confined on or by any authority or law, for any act [p71] done, or omitted to be done, in pursuance of a law of the United States, or any order, process or decree of any judge or court thereof.

The next extension of the circumstances on which a writ of habeas corpus might issue by the federal judges arose out of the celebrated *McLeod Case*, Case, in which McLeod, charged with murder in a state court of New York, had pleaded that he was a British subject, and that what he had done was under and by the authority of his government, and should be a matter of international adjustment, and that he was not subject to be tried by a court of New York under the laws of that State. The federal government acknowledged the force of this reasoning, and undertook to obtain from the government of the State of New York the release of the prisoner, but failed. He was, however, tried and acquitted, and afterwards released by the State of New York. This led to an extension of the powers of the federal judges under the writ of habeas corpus by the act of August 29, 1842, Stat. 39, c. 27, entitled "In act to provide further remedial justice in the courts of the United States." It conferred upon them the power to issue a writ of habeas corpus in all cases where the prisoner claimed that the act for which he was held in custody was done under the sanction of any foreign power, and where the validity and effect of this plea depended upon the law of nations. In advocating the bill, which afterwards became a law, on this subject, Senator Berrien, who introduced it into the Senate, observed:

The object was to allow a foreigner, prosecuted in one of the States of the Union for an offence committed in that State, but which he pleads has been committed under authority of his own sovereign or the authority of the law of nations, to be brought up on that issue before the only competent judicial power to decide upon matters invoked in foreign relations or the law of nations. The plea must show that it has reference to the laws or treaties of the United States or

the law of nations, and, showing this, the writ of habeas corpus is awarded to try that issue. If it shall appear that the accused has a bar on the plea alleged, it is right and proper that he should not be delayed in prison awaiting the [p72] proceedings of the state jurisdiction on the preliminary issue of his plea at bar. If satisfied of the existence in fact and validity in law of the bar, the federal jurisdiction will have the power of administering prompt relief.

No more forcible statement of the principle on which the law of the case now before us stands can be made.

The next extension of the powers of the court under the writ of habeas corpus was the act of February 5, 1867, 14 Stat. 38, c. 28, and this contains the broad ground of the present Revised Statutes, under which the relief is sought in the case before us, and includes all cases of restraint of liberty in violation of the Constitution or a law or treaty of the United States, and declares that

the said court or judge shall proceed in a summary way to determine the facts of the case by hearing testimony and the arguments of the parties interested, and if it shall appear that the petitioner is deprived of his or her liberty in contravention of the Constitution or laws of the United States, he or she shall forthwith be discharged and set at liberty.

It would seem as if the argument might close here. If the duty of the United States to protect its officers from violence, even to death, in discharge of the duties which its laws impose upon them, be established, and Congress has made the writ of habeas corpus one of the means by which this protection is made efficient, and if the facts of this case show that the prisoner was acting both under the authority of law and the directions of his superior officers of the Department of Justice, we can see no reason why this writ should not be made to serve its purpose in the present case.

We have already cited such decisions of this court as are most important and directly in point, and there is a series of cases decided by the Circuit and District Courts to the same purport. Several of these arose out of proceedings under the fugitive slave law, in which the marshal of the United States, while engaged in apprehending the fugitive slave with a view to returning him to his master in another State, was arrested by the authorities of the State. In many of these cases, they made application to the judges of the United States for relief [p73] by the writ of habeas corpus which give rise to several very interesting decisions on this subject.

In *Ex parte Jenkins*, 2 Wall. 521, 529, the marshal, who had been engaged, while executing a warrant, in arresting a fugitive, in a bloody encounter, was himself arrested under a warrant of a justice of the peace for assault with intent to kill, which makes the case very analogous to the one now under consideration. He presented to the Circuit Court of the United States for the Eastern District of Pennsylvania a petition for a writ of habeas corpus, which was heard before Mr. Justice Grier, who held that, under the act of 1833, already referred to, the marshal was entitled to his discharge, because what he had done was in pursuance of and by the authority conferred upon him by the act of Congress concerning the rendition of fugitive slaves. He said:

The authority conferred on the judges of the United States by this act of Congress gives them all the power that any other court could exercise under the writ of habeas corpus or gives them none

at all. If under such a writ they may not discharge their officer when imprisoned "by any authority" for an act done in pursuance of a law of the United States, it would be impossible to discover for what useful purpose the act was passed.

It was passed when a certain state of this Union had threatened to nullify acts of Congress, and to treat those as criminals who should attempt to execute them; and it was intended as a remedy against such state legislation.

This same matter was up again when the fugitive slave, Thomas, had the marshal arrested in a civil suit for an alleged assault and battery. He was carried before Judge Kane on another writ of habeas corpus, and again released. 2 Wall. 531. A third time the marshal, being indicted, was arrested on a bench warrant issued by the state court, and again brought before the circuit court of the United States by a writ of habeas corpus, and discharged. Some remarks of Judge Kane on this occasion are very pertinent to the objections raised in the present case. He said (2 Wall. 543:)

It has been urged that my order, if it shall withdraw the relators from the prosecution pending against them, [in the [p74] state court,] will, in effect, prevent their trial by jury at all, since there is no act of Congress under which they can be indicted for an abuse of process. It will not be an anomaly, however, if the action of this court shall interfere with the trial of these prisoners by a jury. Our Constitutions secure that mode of trial as a right to the accused; but they nowhere recognize it as a right of the government, either state or federal, still less of an individual prosecutor. The action of a jury is overruled constantly by the granting of new trials after conviction. It is arrested by the entering of *nolle prosequis* while the case is at bar. It is made ineffectual at any time by the discharge on habeas corpus. . . . And there is no harm in this. No one imagines that, because a man is accused, he must therefore, of course, be tried. Public prosecutions are not devised for the purpose of indemnifying the wrongs of individuals, still less of retaliating them.

Many other decisions by the Circuit and District Courts to the same purport are to be found, among them the following: *Ex parte Robinson*, 6 McLean 355, 4 Amer.Law Register 617; *Roberts v. Jailor of Fayette Co.*, 2 U.S. 265; *In re Ramsey*, 2 Flippin 451; *In re Neill*, 8 Blatchford 156; *Ex parte Bridges*, 2 Woods 428; *Ex parte Royall*, 117 U.S. 241.

Similar language was used by Mr. Choate in the Senate of the United States upon the passage of the act of 1842. He said:

If you have the power to interpose after judgment, you have the power to do so before. If you can reverse a judgment, you can anticipate its rendition. If, within the Constitution, your judicial power extends to these cases or these controversies, whether you take hold of the case or controversy at one stage or another is totally immaterial. The single question submitted to the national tribunal, the question whether, under the statute adopting the law of nations, the prisoner is entitled to the exemption or immunity he claims, may as well be extracted from the entire case, and presented and decided in those tribunals before any judgment in the state court, as for it to be revised afterwards on a writ of error. Either way, they pass on no other question. Either [p75]

way, they do not administer the criminal law of a state. In the one case as much as in the other, and no more, do they interfere with state judicial power.

The same answer is given in the present case. To the objection, made in argument, that the prisoner is discharged by this writ from the power of the state court to try him for the whole offense, the reply is that if the prisoner is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as marshal of the United States, and if, in doing that act, he did no more than what was necessary and proper for him to do, he *cannot* be guilty of a crime under the law of the state of California. When these things are shown, it is established that he is innocent of any crime against the laws of the state, or of any other authority whatever. There is no occasion for any further trial in the state court, or in any court. The Circuit court of the United States was as competent to ascertain these facts as any other tribunal, and it was not at all necessary that a jury should be impaneled to render a verdict on them. It is the exercise of a power common under all systems of criminal jurisprudence. There must always be a preliminary examination by a committing magistrate, or some similar authority, as to whether there is an offense to be submitted to a jury, and, if this is submitted in the first instance to a grand jury, that is still not the right of trial by jury which is insisted on in the present argument.

We have thus given, in this case, a most attentive consideration to all the questions of law and fact which we have thought to be properly involved in it. We have felt it to be our duty to examine into the facts with a completeness justified by the importance of the case, as well as from the duty imposed upon us by the statute, which we think requires of us to place ourselves, as far as possible, in the place of the circuit court, and to examine the testimony and the arguments in it, and to dispose of the party as law and justice require. The result at which we have arrived upon this examination is that, in the protection of the person and the life of Mr. Justice Field while in the discharge of his official duties, [p76] Neagle was authorized to resist the attack of Terry upon him; that Neagle was correct in the belief that, without prompt action on his part, the assault of Terry upon the judge would have ended in the death of the latter; that, such being his well founded belief, he was justified in taking the life of Terry as the only means of preventing the death of the man who was intended to be his victim; that, in taking the life of Terry, under the circumstances, he 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.

We therefore affirm the judgment of the circuit court authorizing his discharge from the custody of the sheriff of San Joaquin county.

FIELD, J., did not sit at the hearing of this case, and took no part in its decision.

IN RE NEAGLE

135 U.S. 1 (1890)

Opinion

MILLER, J., Opinion of the Court

MR. JUSTICE MILLER, after stating the case as above, delivered the opinion of the court.

The history of the incidents which led to the tragic event of the killing of Terry by the prisoner Neagle had its origin in a suit brought by William Sharon of Nevada, in the Circuit Court of the United States for the District of California, against Sarah Althea Hill, alleged to be a citizen of California, for the purpose of obtaining a decree adjudging a certain instrument in writing, possessed and exhibited by her, purporting to be a declaration of marriage between them, under the code of California, to be a forgery, and to have it set aside and annulled. This suit, which was commenced October 3, 1883, was finally heard before Judge Sawyer, the Circuit Judge for that circuit, and Judge Deady, United States District Judge for Oregon, who had been duly appointed to assist in holding the Circuit Court for the District of California. The hearing was on September 29, 1885, and on the 15th of January, 1886, a decree was rendered granting the prayer of the bill. In that decree, it was declared that the instrument purporting to be a declaration of marriage, set out and described in the bill of complaint, was not signed or executed at any time by William Sharon, the complainant; that it is not [p43] genuine; that it is false, counterfeited, fabricated, forged, and fraudulent, and, as such, is utterly null and void. And it is further ordered and decreed that the respondent, Sarah Althea Hill, deliver up and deposit with the clerk of the court said instrument, to be endorsed "cancelled," and that the clerk write across it "cancelled" and sign his name and affix his seal thereto. . . .

This case was argued in the Circuit Court before Field, Circuit Justice, Sawyer, Circuit Judge, and Sabin, District Judge. While the matter was held under advisement, Judge Sawyer, on returning from Los Angeles, in the Southern District of California, where he had been holding court, found himself on the train as it left Fresno, which is understood to [p44] have been the residence of Terry and wife, in a car in which he noticed that Mr. and Mrs. Terry were in a section behind him, on the same side. On this trip from Fresno to San Francisco, Mrs. Terry grossly insulted Judge Sawyer, and had her husband change seats so as to sit directly in front of the Judge, while she passed him with insolent remarks, and pulled his hair with a vicious jerk, and then, in an excited manner, taking her seat by her husband's side, said: "I will give him a taste of what he will get by and by. Let him render this decision if he dares," -- the decision being the one already mentioned, then under advisement. Terry then made some remark about too many witnesses being in the car, adding that "The best thing to do with him would be to take him out into the bay and drown him." These incidents were witnessed by two gentlemen who knew all the parties, and whose testimony is found in the record before us.

This was August 14, 1888. On the 3d of September, the court rendered its decision granting the prayer of the bill of revivor in the name of Frederick W. Sharon and against Sarah Althea Terry and her husband, David S. Terry. The opinion was delivered by Mr. Justice Field, and, during its delivery, a scene of great violence occurred in the courtroom. It appears that, shortly before the court opened on that day, both the defendants in the case came into the courtroom and took seats within the bar at the table next the clerk's desk, and almost immediately in front of the judges. Besides Mr. Justice Field, there were present on the bench Judge Sawyer and Judge Sabin of the District Court of the United States for the District of Nevada. The defendants had denied the jurisdiction of the court originally to render the decree sought to be revived, and the opinion of the court necessarily discussed this question without reaching the merits of the controversy. When allusion was made to this question, Mrs. Terry rose from her seat and, addressing the justice who was delivering the opinion, asked in an excited manner whether he was going to order her to give up the marriage contract to be cancelled. Mr. Justice Field said: "Be seated, madam." She repeated the question, and was again told to be seated. She then said, [p45] in a very excited and violent manner, that Justice Field had been bought, and wanted to know the price he had sold himself for; that he had got Newland's money for it, and everybody knew that he had got it, or words to that effect. Mr. Justice Field then directed the marshal to remove her from the courtroom. She asserted that she would not go from the room, and that no one could take her from it.

Marshal Franks proceeded to carry out the order of the court by attempting to compel her to leave, when Terry, her husband, rose from his seat under great excitement, exclaiming that no man living should touch his wife, and struck the marshal a blow in his face so violent as to knock out a tooth. He then unbuttoned his coat, thrust his hand under his vest, apparently for the purpose of drawing a bowie knife, when he was seized by persons present and forced down on his back. In the meantime, Mrs. Terry was removed from the courtroom by the marshal, and Terry was allowed to rise and was accompanied by officers to the door leading to the marshal's office. As he was about leaving the room, or immediately after being out of it, he succeeded in drawing a bowie knife, when his arms were seized by a deputy marshal and others present to prevent him from using it, and they were able to wrench it from him only after a severe struggle. The most prominent person engaged in wresting the knife from Terry was Neagle, the prisoner now in court.

For this conduct, both Terry and his wife were sentenced by the court to imprisonment for contempt, Mrs. Terry for one month and Terry for six months, and these sentences were immediately carried into effect. Both the judgment of the court on the petition for the revival of the decree in the case of Sharon against Hill and the judgment of the Circuit Court imprisoning Terry and wife for contempt have been brought to this court for review, and in both cases the judgments have been affirmed. The report of the cases may be found in *Ex parte Terry*, 128 U.S. 289, and *Terry v. Sharon*, 131 U.S. 40.

Terry and Mrs. Terry were separately indicted by the grand jury of the Circuit Court of the United States during the same term for their part in these transactions, and the cases were [p46] pending in said court at the time of Terry's death. It also appears that Mrs. Terry, during her part of this altercation in the courtroom, was making efforts to open a small satchel which she had

with her, but, through her excitement, she failed. This satchel, which was taken from her, was found to have in it a revolving pistol.

From that time until his death, the denunciations by Terry and his wife of Mr. Justice Field were open, frequent, and of the most vindictive and malevolent character. While being transported from San Francisco to Alameda, where they were imprisoned, Mrs. Terry repeated a number of times that she would kill both Judge Field and Judge Sawyer. Terry, who was present, said nothing to restrain her, but added that he was not through with Judge Field yet; and, while in jail at Alameda, Terry said that, after he got out of jail, he would horsewhip Judge Field, and that he did not believe he would ever return to California, but this earth was not large enough to keep him from finding Judge Field and horsewhipping him; and, in reply to a remark that this would be a dangerous thing to do, and that Judge Field would resent it, he said: "if Judge Field resents it, I will kill him." And while in jail, Mrs. Terry exhibited to a witness Terry's knife, at which he laughed, and said, "Yes, I always carry that," and made a remark about judges and marshals, that "they were all a lot of cowardly curs," and he would "see some of them in their graves yet." Mrs. Terry also said that she expected to kill Judge Field some day. . . .

The result of . . . correspondence [threatening Justice Field] was that Marshal Franks appointed Mr. Neagle a deputy marshal for the Northern District of California, and gave him special instructions to attend upon Judge Field both in court and while going from one court to another, and protect him from any assault that might be attempted upon him by Terry and wife. Accordingly, when Judge Field went from San Francisco to Los Angeles to hold the Circuit Court of the United States at that place, Mr. Neagle accompanied him, remained with him for the few days that he was engaged in the business of that court, and returned with him to San Francisco.

It appears from the uncontradicted evidence in the case that, while the sleeping car, in which were Justice Field and Mr. Neagle, stopped a moment in the early morning at Fresno, Terry and wife got on the train. The fact that they were on the train became known to Neagle, and he held a conversation with the conductor as to what peace officers could be found at Lathrop, where the train stopped for breakfast, and the conductor was requested to telegraph to the proper officers of that place to have a constable or some peace officer on the ground when the train should arrive, anticipating that there might be violence attempted by Terry upon Judge Field. It is sufficient to say that this resulted in no available aid to assist in keeping the peace. When the train arrived, Neagle informed Judge Field of the presence of Terry on the train, and advised him to remain and take his breakfast in the car. This the Judge refused to do, and he and Neagle got out of the car and went into the dining room, and took seats beside each other in the place assigned them by the person in charge of the breakfast room, and very shortly after this, Terry and wife came into the room, and Mrs. Terry, recognizing Judge Field, turned and left in great haste, while Terry passed beyond where Judge Field and Neagle were and took his seat at another table. It was afterwards ascertained that Mrs. Terry went to the car and took from it a satchel in which was a revolver. Before she returned to the eating room, Terry arose from his seat and, passing around the table in such a way as brought him behind Judge Field, who did not see him or notice him, came [p53] up where he was sitting with his feet under the table, and struck him a blow on the side of his face, which was repeated on the other side. He also had his arm drawn back and his fist doubled up, apparently to strike a third blow, when Neagle, who had been observing him all

this time, arose from his seat with his revolver in his hand, and in a very loud voice shouted out: "Stop! stop! I am an officer!" Upon this, Terry turned his attention to Neagle, and, as Neagle testifies, seemed to recognize him, and immediately turned his hand to thrust it in his bosom, as Neagle felt sure, with the purpose of drawing a bowie knife. At this instant, Neagle fired two shots from his revolver into the body of Terry, who immediately sank down and died in a few minutes.

Mrs. Terry entered the room with the satchel in her hand just after Terry sank to the floor. She rushed up to the place where he was, threw herself upon his body, made loud exclamations and moans, and commenced inviting the spectators to avenge her wrong upon Field and Neagle. She appeared to be carried away by passion, and in a very earnest manner charged that Field and Neagle had murdered her husband intentionally, and shortly afterwards she appealed to the persons present to examine the body of Terry to see that he had no weapons. This she did once or twice. The satchel which she had, being taken from her, was found to contain a revolver.

These are the material circumstances produced in evidence before the Circuit Court on the hearing, of this habeas corpus case. It is but a short sketch of a history which is given in over five hundred pages in the record, but we think it is sufficient to enable us to apply the law of the case to the question before us. Without a more minute discussion of this testimony, it produces upon us the conviction of a settled purpose on the part of Terry and his wife, amounting to a conspiracy, to murder Justice Field. And we are quite sure that, if Neagle had been merely a brother or a friend of Judge Field, traveling with him, and aware of all the previous relations of Terry to the Judge -- as he was -- of his bitter animosity, his declared purpose to have revenge even to the point [p54] of killing him, he would have been justified in what he did in defence of Mr. Justice Field's life, and possibly of his own.

But such a justification would be a proper subject for consideration on a trial of the case for murder in the courts of the State of California, and there exists no authority in the courts of the United States to discharge the prisoner while held in custody by the State authorities for this offence unless there be found in aid of the defence of the prisoner some element of power and authority asserted under the government of the United States.

This element is said to be found in the facts that Mr. Justice Field, when attacked, was in the immediate discharge of his duty as judge of the Circuit Courts of the United States within California; that the assault upon him grew out of the animosity of Terry and wife, arising out of the previous discharge of his duty as circuit justice in the case for which they were committed for contempt of court, and that the deputy marshal of the United States, who killed Terry in defence of Field's life, was charged with a duty under the law of the United States to protect Field from the violence which Terry was inflicting, and which was intended to lead to Field's death.

To the inquiry whether this proposition is sustained by law and the facts which we have recited we now address ourselves.

Mr. Justice Field was a member of the Supreme Court of the United States, and had been a member of that court for over a quarter of a century, during which he had become venerable for his age and for his long and valuable service in that court. The business of the Supreme Court

has become so exacting that for many years past, the justices of it have been compelled to remain for the larger part of the year in Washington City, from whatever part of the country they may have been appointed. The term for each year, including the necessary travel and preparations to attend at its beginning, has generally lasted from eight to nine months.

But the justices of this court have imposed upon them other duties, the most important of which arise out of the fact that they are also judges of the Circuit Courts of the United States. [p55] Of these circuits there are nine, to each one of which a justice of the Supreme Court is allotted, under section 606 of the Revised Statutes, the provision of which is as follows:

The chief justice and associate justices of the Supreme Court shall be allotted among the circuits by an order of the court, and a new allotment shall be made whenever it becomes necessary or convenient by reason of the alteration of any circuit, or of the new appointment of a chief justice or associate justice, or otherwise.

Section 610 declares that it

shall be the duty of the chief justice, and of each justice of the Supreme Court, to attend at least one term of the Circuit Court, in each district of the circuit to which he is allotted during every period of two years.

Although this enactment does not require in terms that the justices shall go to their circuits more than once in two years, the effect of it is to compel most of them to do this, because there are so many districts in many of the circuits that it is impossible for the circuit justice to reach them all in one year, and the result of this is that he goes to some of them in one year, and to others in the next year, thus requiring an attendance in the circuit every year.

The justices of the Supreme Court have been members of the Circuit Courts of the United States ever since the organization of the government, and their attendance on the circuit and appearance at the places where the courts are held has always been thought to be a matter of importance. 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. The statutes of the United States, and the established practice of the courts, require that the judge perform a very large share of his judicial labors at what is called "chambers." This chamber work is as important as necessary, as much a discharge of his official duty as that performed [p56] in the courthouse. Important cases are often argued before the judge at any place convenient to the parties concerned, and a decision of the judge is arrived at by investigations made in his own room, wherever he may be, and it is idle to say that this is not as much the performance of judicial duty as the filing of the judgment with the clerk and the announcement of the result in open court.

So it is impossible for a justice of the Supreme Court of the United States, who is compelled by the obligations of duty to be so much in Washington City, to discharge his duties of attendance on the Circuit Courts as prescribed by section 610 without traveling in the usual and most

convenient modes of doing it to the place where the court is to be held. 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."

Justice Field had not only left Washington and traveled the three thousand miles or more which were necessary to reach his circuit, but he had entered upon the duties of that circuit, had held the court at San Francisco for some time; and, taking a short leave of that court, had gone down to Los Angeles, another place where a court was to be held, and sat as a judge there for several days, hearing cases and rendering decisions. It was in the necessary act of returning from Los Angeles to San Francisco, by the usual mode of travel between the two places, where his court was still in session, and where he was required to be, that he was assaulted by Terry in the manner which we have already described.

The occurrence which we are called upon to consider was of so extraordinary a character that it is not to be expected that many cases can be found to cite as authority upon the subject.

In the case of *United States v. The Schooner Little Charles*, 1 Brock. 380, 382, a question arose before Chief Justice Marshall, holding the Circuit Court of the United States for Virginia, as to the validity of an order made by the District Judge at his chambers, and not in court. The act of Congress authorized stated terms of the District Court, and gave the judge [p57] power to hold special courts at his discretion, either at the place appointed by the law or such other place in the district as the nature of the business and his discretion should direct. He says:

It does not seem to be a violent construction of such an act to consider the judge as constituting a court whenever he proceeds on judicial business;

and cites the practice of the courts in support of that view of the subject.

In the case of *United States v. Gleason*, 1 Wool.C.C. 128, 132, the prisoner was indicted for the murder of two enrolling officers who were charged with the duty of arresting deserters, or those who had been drafted into the service and had failed to attend. These men, it was said, had visited the region of country where they were murdered, and, having failed of accomplishing their purpose of arresting the deserters, were on their return to their home when they were killed, and the court was asked to instruct the jury that, under these circumstances, they were not engaged in the duty of arresting the deserters named. "It is claimed by the counsel for the defendant," says the report,

that, if the parties killed had been so engaged, and had come to that neighborhood with the purpose of arresting the supposed deserters, but at the moment of the assault had abandoned the purpose of making the arrests at that time, and were returning to headquarters at Grinnell with a view to making other arrangements for arrest at another time, they were not so engaged as to bring the case within the law.

But the court held that this was not a sound construction of the statute, and

that, if the parties killed had come into that neighborhood with intent to arrest the deserters named, and had been employed by the proper officer for that service, and were in the proper prosecution of that purpose, returning to Grinnell with a view to making other arrangements to discharge this duty, they were still engaged in arresting the deserters within the meaning of the statute. It is not necessary,

said the court,

that the party killed should be engaged in the immediate act of arrest, but it is sufficient if he be employed in and about that business when assaulted. The purpose of the law is to protect the life of the person so employed, and this protection continues so [p58] long as he is engaged in a service necessary and proper to that employment.

We have no doubt that Mr. Justice Field, when attacked by Terry, 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.

It is urged, however, that there exists no statute authorizing any such protection as that which Neagle was instructed to give Judge Field in the present case, and indeed no protection whatever against a vindictive or malicious assault growing out of the faithful discharge of his official duties, and that the language of section 753 of the Revised Statutes, that the party seeking the benefit of the writ of habeas corpus must in this connection show that he is "in custody for an act done or omitted in pursuance of a law of the United States," makes it necessary that, upon this occasion, it should be shown that the act for which Neagle is imprisoned as done by virtue of an act of Congress. It is not supposed that any special act of Congress exists which authorizes the marshals or deputy marshals of the United States in express terms to accompany the judges of the Supreme Court through their circuits, and act as a bodyguard to them, to defend them against malicious assaults against their persons. But we are of opinion that this view of the statute is an unwarranted restriction of the meaning of a law designed to extend in a liberal manner the benefit of the writ of habeas corpus to persons imprisoned for the performance of their duty. And we are satisfied that, if it was the duty of Neagle, under the circumstances, a duty which could only arise under the laws of the United States, to defend Mr. Justice Field from a murderous attack upon him, he brings himself within the meaning of the section we have recited. This view of the subject is confirmed by the alternative provision, that he must be in custody

for an act done or omitted in pursuance of a law of the United States or of an order, process, or decree of a court or judge thereof, or is in custody in violation of the Constitution or of a law or treaty of the United States. [p59]

In the view we take of the Constitution of the United States, any obligation fairly and properly inferrible 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. It would be a great reproach to the system of government of the United States, declared to be within its sphere sovereign and supreme, 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.

It has in modern times become apparent that the physical health of the community is more efficiently promoted by hygienic and preventive means than by the skill which is applied to the cure of disease after it has become fully developed. So also the law, which is intended to prevent crime, in its general spread among the community, by regulations, police organization, and otherwise, which are adapted for the protection of the lives and property of citizens, for the dispersion of mobs, for the arrest of thieves and assassins, for the watch which is kept over the community, as well as over this class of people, is more efficient than punishment of crimes after they have been committed.

If a person in the situation of Judge Field could have no other guarantee of his personal safety, while engaged in the conscientious discharge of a disagreeable duty, than the fact that, if he was murdered, his murderer would be subject to the laws of a State, and by those laws could be punished, the security would be very insufficient. The plan which Terry and wife had in mind of insulting him and assaulting him and drawing him into a defensive physical contest, in the course of which they would slay him, shows the little value of such remedies. We do not believe that the government of the United States is thus inefficient, or that its Constitution and laws have left the high officers of the government so defenceless and unprotected.

The views expressed by this court through Mr. Justice [p60] Bradley, in *Ex parte Siebold*, 100 U.S. 371, 394, are very pertinent to this subject, and express our views with great force. That was a case of a writ of habeas corpus, where Siebold had been indicted in the Circuit Court of the United States for the District of Maryland for an offence committed against the election laws during an election at which members of Congress and officers of the State of Maryland were elected. He was convicted, and sentenced to fine and imprisonment, and filed his petition in this court for a writ of habeas corpus to be relieved on the ground that the court which had convicted him was without jurisdiction. The foundation of this allegation was that the Congress of the United States had no right to prescribe laws for the conduct of the election in question, or for enforcing the laws of the State of Maryland by the courts of the United States. In the course of the discussion of the relative powers of the federal and state courts on this subject, it is said:

Somewhat akin to the argument which has been considered is the objection that the deputy marshals authorized by the act of Congress to be created and to attend the elections are authorized to keep the peace, and that this is a duty which belongs to the state authorities alone. It is argued that the preservation of peace and good order in society is not within the powers confided to the government of the United States, but belongs exclusively to the States. Here again we are met with the theory that the government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that government. We hold it to be an incontrovertible principle that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent. This power to enforce its laws and to execute its functions in all places does not derogate from the power of the State to execute its laws at the same time and in the same [p61] places. The one does not exclude the other, except where both cannot be executed at the same time. In that case, the words of the Constitution itself show which is to yield. "This Constitution, and all laws which shall be made in pursuance thereof, . . . shall be the supreme law

of the land." . . . Without the concurrent sovereignty referred to, the national government would be nothing but an advisory government. Its executive power would be absolutely nullified. Why do we have marshals at all if they cannot physically lay their hands on persons and things in the performance of their proper duties? What functions can they perform if they cannot use force? In executing the processes of the courts, must they call on the nearest constable for protection? must they rely on him to use the requisite compulsion, and to keep the peace, whilst they are soliciting and entreating the parties and bystanders to allow the law to take its course? This is the necessary consequence of the positions that are assumed. If we indulge in such impracticable views as these, and keep on refining and re-refining, we shall drive the national government out of the United States, and relegate it to the District of Columbia, or perhaps to some foreign soil. We shall bring it back to a condition of greater helplessness than that of the old confederation. . . . It must execute its powers, or it is no government. It must execute them on the land as well as on the sea, on things as well as on persons. And, to do this, it must necessarily have power to command obedience, preserve order, and keep the peace, and no person or power in this land has the right to resist or question its authority so long as it keeps within the bounds of its jurisdiction.

At the same term of the court, in the case of *Tennessee v. Davis*, 100 U.S. 257, 262, where the same questions in regard to the relative powers of the federal and state courts were concerned, in regard to criminal offences, the court expressed its views through Mr. Justice Strong, quoting from the case of *Martin v. Hunter*, 1 Wheat. 363, the following language: "The general government must cease to exist whenever it loses the power of protecting itself in the exercise of its Constitutional [p62] powers," and then proceeding:

It can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a state court, for an alleged offence against the law of the State, yet warranted by the federal authority they possess, and if the general government is powerless to interfere at once for their protection -- if their protection must be left to the action of the state court -- the operations of the general government may at any time be arrested at the will of one of its members. The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws. It may deny the authority conferred by those laws. The state court may administer not only the laws of the State, but equally federal law, in such a manner as to paralyze the operations of the government. And even if, after trial and final judgment in the state court, the case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged federal power arrested. We do not think such an element of weakness is to be found in the Constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the States and the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends, it is supreme. No state government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it for a moment the cognizance of any subject which that instrument has committed to it.

To cite all the cases in which this principle of the supremacy of the government of the United States, in the exercise of all the powers conferred upon it by the Constitution, is maintained

would be an endless task. We have selected these as being the most forcible expressions of the views of the court having a direct reference to the nature of the case before us.

Where, then, are we to look for the protection which we [p63] have shown Judge Field was entitled to when engaged in the discharge of his official duties? Not to the courts of the United States, because, as has been more than once said in this court, in the division of the powers of government between the three great departments, executive, legislative and judicial, the judicial is the weakest for the purposes of self-protection and for the enforcement of the powers which it exercises. The ministerial officers through whom its commands must be executed are marshals of the United States, and belong emphatically to the executive department of the government. They are appointed by the President, with the advice and consent of the Senate. They are removable from office at his pleasure. They are subjected by act of Congress to the supervision and control of the Department of Justice, in the hands of one of the cabinet officers of the President, and their compensation is provided by acts of Congress. The same may be said of the district attorneys of the United States, who prosecute and defend the claims of the government in the courts.

The legislative branch of the government can only protect the judicial officers by the enactment of laws for that purpose, and the argument we are now combating assumes that no such law has been passed by Congress.

If we turn to the executive department of the government, we find a very different condition of affairs. The Constitution, section 3, Article 2, declares that the President "shall take care that the laws be faithfully executed," and he is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and, by and with the advice and consent of the Senate, to appoint the most important of them and to fill vacancies. He is declared to be commander-in-chief of the army and navy of the United States. The duties which are thus imposed upon him he is further enabled to perform by the recognition in the Constitution, and the creation by acts of Congress, of executive departments, which have varied in number from four or five to seven or eight, the heads of which are familiarly called cabinet ministers. These aid him in the performance of the [p64] great duties of his office, and represent him in a thousand acts to which it can hardly be supposed his personal attention is called, and thus he is enabled to fulfill the duty of his great department, expressed in the phrase that "he shall take care that the laws be faithfully executed."

Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms*, or does it include the 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?

One of the most remarkable episodes in the history of our foreign relations, and which has become an attractive historical incident, is the case of Martin Koszta, a native of Hungary, who, though not fully a naturalized citizen of the United States, had in due form of law made his declaration of intention to become a citizen. While in Smyrna, he was seized by command of the Austrian consul general at that place, and carried on board the Hussar, an Austrian vessel, where he was held in close confinement. Captain Ingraham, in command of the American sloop of war St. Louis, arriving in port at that critical period, and ascertaining that Koszta had with him his

naturalization papers, demanded his surrender to him, and was compelled to train his guns upon the Austrian vessel before his demands were complied with. It was, however, to prevent bloodshed, agreed that Koszta should be placed in the hands of the French consul subject to the result of diplomatic negotiations between Austria and the United States. The celebrated correspondence between Mr. Marcy, Secretary of State, and Chevalier Hulsemann, the Austrian minister at Washington, which arose out of this affair and resulted in the release and restoration to liberty of Koszta, attracted a great deal of public attention, and the position assumed by Mr. Marcy met the approval of the country and of Congress, who voted a gold medal to Captain Ingraham for his conduct in the affair. Upon what act of Congress then existing can anyone lay his finger in support of the action of our government in this matter? [p65]

So, if the President or the Postmaster General is advised that the mails of the United States, possibly carrying treasure, are liable to be robbed and the mail carriers assaulted and murdered in any particular region of country, who can doubt the authority of the President or of one of the executive departments under him to make an order for the protection of the mail and of the persons and lives of its carriers, by doing exactly what was done in the case of Mr. Justice Field, namely, providing a sufficient guard, whether it be by soldiers of the army or by marshals of the United States, with a *posse comitatus* properly armed and equipped, to secure the safe performance of the duty of carrying the mail wherever it may be intended to go?

The United States is the owner of millions of acres of valuable public land, and has been the owner of much more which it has sold. Some of these lands owe a large part of their value to the forests which grow upon them. These forests are liable to depredations by people living in the neighborhood, known as timber thieves, who make a living by cutting and selling such timber, and who are trespassers. But until quite recently, even if there be one now, there was no statute authorizing any preventive measures for the protection of this valuable public property. Has the President no authority to place guards upon the public territory to protect its timber? No authority to seize the timber when cut and found upon the ground? Has he no power to take any measures to protect this vast domain? Fortunately we find this question answered by this court in the case of *Wells v. Nickles*, 104 U.S. 444. That was a case in which a class of men appointed by local land officers, under instructions from the Secretary of the Interior, having found a large quantity of this timber cut down from the forests of the United States and lying where it was cut, seized it. The question of the title to this property coming in controversy between Wells and Nickles, it became essential to inquire into the authority of these timber agents of the government thus to seize the timber cut by trespassers on its lands. The court said:

The effort we have made to ascertain and fix the authority of these timber agents by any [p66] positive provision of law has been unsuccessful.

But the court, notwithstanding there was no special statute for it, held that the Department of the Interior, acting under the idea of protecting from depredation timber on the lands of the government, had gradually come to assert the right to seize what is cut and taken away from them wherever it can be traced, and in aid of this, the registers and receivers of the Land Office had, by instructions from the Secretary of the Interior, been constituted agents of the United States for these purposes, with power to appoint special agents under themselves. And the court

upheld the authority of the Secretary of the Interior to make these rules and regulations for the protection of the public lands.

One of the cases in this court in which this question was presented in the most imposing form is that of *United States v. San Jacinto Tin Company*, 125 U.S. 273, 279, 280. In that case, a suit was brought in the name of the United States, by order of the Attorney General, to set aside a patent which had been issued for a large body of valuable land on the ground that it was obtained from the government by fraud and deceit practised upon its officers. A preliminary question was raised by counsel for defendant, which was earnestly insisted upon, as to the right of the Attorney General or any other officer of the government to institute such a suit in the absence of any act of Congress authorizing it. It was conceded that there was no express authority given to the Attorney General to institute that particular suit or any suit of that class. The question was one of very great interest, and was very ably argued both in the court below and in this court. The response of this Court to that suggestion conceded that, in the acts of Congress establishing the Department of Justice and defining the duties of the Attorney General, there was no such express authority, and it was said that there was also no express authority to him to bring suits against debtors of the government upon bonds, or to begin criminal prosecutions, or to institute criminal proceedings in any of the cases in which the United States was plaintiff, yet he was invested with the general superintendence of all such suits. It was further said: [p67]

If the United States, in any particular case, has a just cause for calling upon the judiciary of the country, in any of its Courts, for relief by setting aside or annulling any of its contracts, its obligations, or its most solemn instruments, the question of the appeal to the judicial tribunals of the country must primarily be decided by the Attorney General of the United States. That such a power should exist somewhere, and that the United States should not be more helpless in relieving itself of frauds, impostures, and deceptions than the private individual is hardly open to argument. . . . There must, then, be an officer or officers of the government to determine when the United States shall sue, to decide for what it shall sue, and to be responsible that such suits shall be brought in appropriate cases. The attorneys of the United States in every judicial district are officers of this character, and they are by statute under the immediate supervision and control of the Attorney General. How, then, can it be argued that, if the United States has been deceived, entrapped, or defrauded into the making, under the forms of law, of an instrument which injuriously affects its rights of property, or other rights, it cannot bring a suit to avoid the effect of such instrument, thus fraudulently obtained, without a special act of Congress in each case, or without some special authority applicable to this class of cases?

The same question was raised in the earlier case of *United States v. Hughes*, 11 How. 552, and decided the same way.

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. The correspondence already recited in this opinion between the marshal of the Northern District of California and the Attorney General, and the district attorney of the United States for that district, although

prescribing no very specific mode of affording this [p68] protection by the Attorney General, is sufficient, we think, to warrant the marshal in taking the steps which he did take, in making the provisions which he did make, for the protection and defence of Mr. Justice Field.

But there is positive law investing the marshals and their deputies with powers which not only justify what Marshal Neagle did in this matter, but which imposed it upon him as a duty. In chapter fourteen of the Revised Statutes of the United States, which is devoted to the appointment and duties of the district attorneys, marshals, and clerks of the courts of the United States, section 78 declares:

The marshals and their deputies shall have, in each State, the same powers, in executing the laws of the United States, as the sheriffs and their deputies in such State may have, by law, in executing the laws thereof.

If, therefore, a sheriff of the State of California was authorized to do in regard to the laws of California what Neagle did, that is, if he was authorized to keep the peace, to protect a judge from assault and murder, then Neagle was authorized to do the same thing in reference to the laws of the United States.

Section 4176 of the Political Code of California reads as follows:

The sheriff must:

First. Preserve the peace.

Second. Arrest and take before the nearest magistrate for examination all persons who attempt to commit or have committed a public offence.

Third. Prevent and suppress all affrays, breaches of the peace, riots and insurrections, which may come to his knowledge. . . .

And the Penal Code of California declares (section 19) that homicide is justifiable when committed by any person "when resisting any attempt to murder any person or to commit a felony or to do some great bodily injury upon any person;" or

when committed in defence of habitation, property or person against one who manifestly intends or endeavors by violence or surprise to commit a felony. [p69]

That there is a peace of the United States, that a man assaulting a judge of the United States while in the discharge of his duties violates that peace, that, in such case, the marshal of the United States stands in the same relation to the peace of the United States which the sheriff of the county does to the peace of the State of California, are questions too clear to need argument to prove them. That it would be the duty of a sheriff, if one had been present at this assault by Terry upon Judge Field, to prevent this breach of the peace, to prevent this assault, to prevent the murder which was contemplated by it, cannot be doubted. And if, in performing this duty, it became necessary for the protection of Judge Field, or of himself, to kill Terry, in a case where,

like this, it was evidently a question of the choice of who should be killed, the assailant and violator of the law and disturber of the peace or the unoffending man who was in his power, there can be no question of the authority of the sheriff to have killed Terry. So the marshal of the United States, charged with the duty of protecting and guarding the judge of the United States court against this special assault upon his person and his life, being present at the critical moment, when prompt action was necessary, found it to be his duty, a duty which he had no liberty to refuse to perform, to take the steps which resulted in Terry's death. This duty was imposed on him by the section of the Revised Statutes which we have recited, in connection with the powers conferred by the State of California upon its peace officers, which become, by this statute, in proper cases, transferred as duties to the marshals of the United States.

But all these questions being conceded, it is urged against the relief sought by this writ of habeas corpus that the question of the guilt of the prisoner of the crime of murder is a question to be determined by the laws of California and to be decided by its courts, and that there exists no power in the government of the United States to take away the prisoner from the custody of the proper authorities of the State of California and carry him before a judge of the court of the United States, and release him without a trial by jury according [p70] to the laws of the State of California. That the statute of the United States authorizes and directs such a proceeding and such a judgment in a case where the offence charged against the prisoner consists in an act done in pursuance of a law of the United States and by virtue of its authority, and where the imprisonment of the party is in violation of the Constitution and laws of the United States, is clear by its express language.

The enactments now found in the Revised Statutes of the United States on the subject of the writ of habeas corpus are the result of a long course of legislation forced upon Congress by the attempt of the States of the Union to exercise the power of imprisonment over officers and other persons asserting rights under the federal government or foreign governments, which the States denied. The original act of Congress on the subject of the writ of habeas corpus, by its 14th section, authorized the judges and the courts of the United States, in the case of prisoners in jail or in custody under or by color of the authority of the United States, or committed for trial before some court of the same, or when necessary to be brought into court to testify, to issue the writ, and the judge or court before whom they were brought was directed to make inquiry into the cause of commitment. 1 Stat. 81, c. 20, § 14. This did not present the question, or, at least, it gave rise to no question which came before the courts, as to releasing by this writ parties held in custody under the laws of the States. But when, during the controversy growing out of the nullification laws of South Carolina, officers of the United States were arrested and imprisoned for the performance of their duties in collecting the revenue of the United States in that State, and held by the state authorities, it became necessary for the Congress of the United States to take some action for their relief. Accordingly, the act of Congress of March 2, 1833, 4 Stat. 634, c. 7, § , among other remedies for such condition of affairs, provided, by its the section, that the federal judges should grant writs of habeas corpus in all cases of a prisoner in jail or confinement, where he should be committed or confined on or by any authority or law, for any act [p71] done, or omitted to be done, in pursuance of a law of the United States, or any order, process or decree of any judge or court thereof.

The next extension of the circumstances on which a writ of habeas corpus might issue by the federal judges arose out of the celebrated *McLeod Case*, Case, in which McLeod, charged with murder in a state court of New York, had pleaded that he was a British subject, and that what he had done was under and by the authority of his government, and should be a matter of international adjustment, and that he was not subject to be tried by a court of New York under the laws of that State. The federal government acknowledged the force of this reasoning, and undertook to obtain from the government of the State of New York the release of the prisoner, but failed. He was, however, tried and acquitted, and afterwards released by the State of New York. This led to an extension of the powers of the federal judges under the writ of habeas corpus by the act of August 29, 1842, Stat. 39, c. 27, entitled "In act to provide further remedial justice in the courts of the United States." It conferred upon them the power to issue a writ of habeas corpus in all cases where the prisoner claimed that the act for which he was held in custody was done under the sanction of any foreign power, and where the validity and effect of this plea depended upon the law of nations. In advocating the bill, which afterwards became a law, on this subject, Senator Berrien, who introduced it into the Senate, observed:

The object was to allow a foreigner, prosecuted in one of the States of the Union for an offence committed in that State, but which he pleads has been committed under authority of his own sovereign or the authority of the law of nations, to be brought up on that issue before the only competent judicial power to decide upon matters invoked in foreign relations or the law of nations. The plea must show that it has reference to the laws or treaties of the United States or the law of nations, and, showing this, the writ of habeas corpus is awarded to try that issue. If it shall appear that the accused has a bar on the plea alleged, it is right and proper that he should not be delayed in prison awaiting the [p72] proceedings of the state jurisdiction on the preliminary issue of his plea at bar. If satisfied of the existence in fact and validity in law of the bar, the federal jurisdiction will have the power of administering prompt relief.

No more forcible statement of the principle on which the law of the case now before us stands can be made.

The next extension of the powers of the court under the writ of habeas corpus was the act of February 5, 1867, 14 Stat. 38, c. 28, and this contains the broad ground of the present Revised Statutes, under which the relief is sought in the case before us, and includes all cases of restraint of liberty in violation of the Constitution or a law or treaty of the United States, and declares that

the said court or judge shall proceed in a summary way to determine the facts of the case by hearing testimony and the arguments of the parties interested, and if it shall appear that the petitioner is deprived of his or her liberty in contravention of the Constitution or laws of the United States, he or she shall forthwith be discharged and set at liberty.

It would seem as if the argument might close here. If the duty of the United States to protect its officers from violence, even to death, in discharge of the duties which its laws impose upon them, be established, and Congress has made the writ of habeas corpus one of the means by which this protection is made efficient, and if the facts of this case show that the prisoner was acting both under the authority of law and the directions of his superior officers of the

Department of Justice, we can see no reason why this writ should not be made to serve its purpose in the present case.

We have already cited such decisions of this court as are most important and directly in point, and there is a series of cases decided by the Circuit and District Courts to the same purport. Several of these arose out of proceedings under the fugitive slave law, in which the marshal of the United States, while engaged in apprehending the fugitive slave with a view to returning him to his master in another State, was arrested by the authorities of the State. In many of these cases, they made application to the judges of the United States for relief [p73] by the writ of habeas corpus which give rise to several very interesting decisions on this subject.

In *Ex parte Jenkins*, 2 Wall. 521, 529, the marshal, who had been engaged, while executing a warrant, in arresting a fugitive, in a bloody encounter, was himself arrested under a warrant of a justice of the peace for assault with intent to kill, which makes the case very analogous to the one now under consideration. He presented to the Circuit Court of the United States for the Eastern District of Pennsylvania a petition for a writ of habeas corpus, which was heard before Mr. Justice Grier, who held that, under the act of 1833, already referred to, the marshal was entitled to his discharge, because what he had done was in pursuance of and by the authority conferred upon him by the act of Congress concerning the rendition of fugitive slaves. He said:

The authority conferred on the judges of the United States by this act of Congress gives them all the power that any other court could exercise under the writ of habeas corpus or gives them none at all. If under such a writ they may not discharge their officer when imprisoned "by any authority" for an act done in pursuance of a law of the United States, it would be impossible to discover for what useful purpose the act was passed.

It

was passed when a certain state of this Union had threatened to nullify acts of Congress, and to treat those as criminals who should attempt to execute them; and it was intended as a remedy against such state legislation.

This same matter was up again when the fugitive slave, Thomas, had the marshal arrested in a civil suit for an alleged assault and battery. He was carried before Judge Kane on another writ of habeas corpus, and again released. 2 Wall. 531. A third time the marshal, being indicted, was arrested on a bench warrant issued by the state court, and again brought before the circuit court of the United States by a writ of habeas corpus, and discharged. Some remarks of Judge Kane on this occasion are very pertinent to the objections raised in the present case. He said (2 Wall. 543:)

It has been urged that my order, if it shall withdraw the relators from the prosecution pending against them, [in the [p74] state court,] will, in effect, prevent their trial by jury at all, since there is no act of Congress under which they can be indicted for an abuse of process. It will not be an anomaly, however, if the action of this court shall interfere with the trial of these prisoners by a jury. Our Constitutions secure that mode of trial as a right to the accused; but they nowhere recognize it as a right of the government, either state or federal, still less of an individual

prosecutor. The action of a jury is overruled constantly by the granting of new trials after conviction. It is arrested by the entering of *nolle prosequis* while the case is at bar. It is made ineffectual at any time by the discharge on habeas corpus. . . . And there is no harm in this. No one imagines that, because a man is accused, he must therefore, of course, be tried. Public prosecutions are not devised for the purpose of indemnifying the wrongs of individuals, still less of retaliating them.

Many other decisions by the Circuit and District Courts to the same purport are to be found, among them the following: *Ex parte Robinson*, 6 McLean 355, 4 Amer.Law Register 617; *Roberts v. Jailor of Fayette Co.*, 2 U.S. 265; *In re Ramsey*, 2 Flippin 451; *In re Neill*, 8 Blatchford 156; *Ex parte Bridges*, 2 Woods 428; *Ex parte Royall*, 117 U.S. 241.

Similar language was used by Mr. Choate in the Senate of the United States upon the passage of the act of 1842. He said:

If you have the power to interpose after judgment, you have the power to do so before. If you can reverse a judgment, you can anticipate its rendition. If, within the Constitution, your judicial power extends to these cases or these controversies, whether you take hold of the case or controversy at one stage or another is totally immaterial. The single question submitted to the national tribunal, the question whether, under the statute adopting the law of nations, the prisoner is entitled to the exemption or immunity he claims, may as well be extracted from the entire case, and presented and decided in those tribunals before any judgment in the state court, as for it to be revised afterwards on a writ of error. Either way, they pass on no other question. Either [p75] way, they do not administer the criminal law of a state. In the one case as much as in the other, and no more, do they interfere with state judicial power.

The same answer is given in the present case. To the objection, made in argument, that the prisoner is discharged by this writ from the power of the state court to try him for the whole offense, the reply is that if the prisoner is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as marshal of the United States, and if, in doing that act, he did no more than what was necessary and proper for him to do, he *cannot* be guilty of a crime under the law of the state of California. When these things are shown, it is established that he is innocent of any crime against the laws of the state, or of any other authority whatever. There is no occasion for any further trial in the state court, or in any court. The Circuit court of the United States was as competent to ascertain these facts as any other tribunal, and it was not at all necessary that a jury should be impaneled to render a verdict on them. It is the exercise of a power common under all systems of criminal jurisprudence. There must always be a preliminary examination by a committing magistrate, or some similar authority, as to whether there is an offense to be submitted to a jury, and, if this is submitted in the first instance to a grand jury, that is still not the right of trial by jury which is insisted on in the present argument.

We have thus given, in this case, a most attentive consideration to all the questions of law and fact which we have thought to be properly involved in it. We have felt it to be our duty to examine into the facts with a completeness justified by the importance of the case, as well as from the duty imposed upon us by the statute, which we think requires of us to place ourselves,

as far as possible, in the place of the circuit court, and to examine the testimony and the arguments in it, and to dispose of the party as law and justice require. The result at which we have arrived upon this examination is that, in the protection of the person and the life of Mr. Justice Field while in the discharge of his official duties, [p76] Neagle was authorized to resist the attack of Terry upon him; that Neagle was correct in the belief that, without prompt action on his part, the assault of Terry upon the judge would have ended in the death of the latter; that, such being his well founded belief, he was justified in taking the life of Terry as the only means of preventing the death of the man who was intended to be his victim; that, in taking the life of Terry, under the circumstances, he 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.

We therefore affirm the judgment of the circuit court authorizing his discharge from the custody of the sheriff of San Joaquin county.

FIELD, J., did not sit at the hearing of this case, and took no part in its decision.

CHAPTER II: **Foreign Policy Powers of the Executive**

U.S. v. Curtiss-Wright Export Corp. (1936)

On January 27, 1936, an indictment was returned in the court below, the first count of which charges that appellees, beginning with the 29th day of May, 1934, conspired to sell in the United States certain arms of war, namely fifteen machine guns, to Bolivia, a country then engaged in armed conflict in the Chaco, in violation of the Joint Resolution of Congress approved May 28, 1934, and the provisions of a proclamation issued on the same day by the President of the United States pursuant to authority conferred by § 1 of the resolution. In pursuance of the conspiracy, the commission of certain overt acts was alleged, details of which need not be stated. The Joint Resolution (c. 365, 48 Stat. 811) follows:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That if the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, and if after consultation with the governments of other American Republics and with their cooperation, as well as that of such other governments as he may deem necessary, he makes proclamation to that effect, it shall be unlawful to sell, except under such limitations and exceptions as the President prescribes, any arms or munitions of war in any place in the United States to the countries now engaged in that armed conflict, or to any person, company, or association acting in the interest of either country, until otherwise ordered by the President or by Congress."

"Sec. 2. Whoever sells any arms or munitions of war in violation of section 1 shall, on conviction, be punished by a fine not exceeding \$10,000 or by imprisonment not exceeding two years, or both."

The President's proclamation (48 Stat. 1744) [recited] the terms of the Joint Resolution....

On November 14, 1935, this proclamation was revoked [but only after the defendant violated the embargo]....

Appellees severally demurred to the first count of the indictment on the grounds (1) that it did not charge facts sufficient to show the commission by appellees of any offense against any law of the United States; (2) that this count of the indictment charges a conspiracy to violate the joint resolution and the Presidential proclamation, both of which had expired according to the terms of the joint resolution by reason of the revocation contained in the Presidential proclamation of November 14, 1935, and were not in force at the time when the indictment was found. The points urged in support of the demurrers were, first, that the joint resolution effects an invalid delegation of legislative power to the executive; second, that the joint resolution never became effective, because of the failure of the President to find essential jurisdictional facts, and third, that the second proclamation operated to put an end to the alleged liability under the joint resolution.

The court below sustained the demurrers upon the first point, but overruled them on the second and third points. 14 F.Supp. 230. The government appealed to this court under the provisions of the Criminal Appeals Act of March 2, 1907, 34 Stat. 1246, as amended, U.S.C. Title 18, § 682. That act authorizes the United States to appeal from a district court direct to this court in criminal cases where, among other things, the decision sustaining a demurrer to the indictment or any count thereof is based upon the invalidity or construction of the statute upon which the indictment is founded.

First. It is contended that, by the Joint Resolution, the going into effect and continued operation of the resolution was conditioned (a) upon the President's judgment as to its beneficial effect upon the reestablishment of peace between the countries engaged in armed conflict in the Chaco; (b) upon the making of a proclamation, which was left to his unfettered discretion, thus constituting an attempted substitution of the President's will for that of Congress; (c) upon the making of a proclamation putting an end to the operation of the resolution, which again was left to the President's unfettered discretion, and (d) further, that the extent of its operation in particular cases was subject to limitation and exception by the President, controlled by no standard. In each of these particulars, appellees urge that Congress abdicated its essential functions and delegated them to the Executive.

Whether, if the Joint Resolution had related solely to internal affairs, it would be open to the challenge that it constituted an unlawful delegation of legislative power to the Executive we find it unnecessary to determine. The whole aim of the resolution is to affect a situation entirely external to the United States and falling within the category of foreign affairs. The determination which we are called to make, therefore, is whether the Joint Resolution, as applied to that situation, is vulnerable to attack under the rule that forbids a delegation of the lawmaking power. In other words, assuming (but not deciding) that the challenged delegation, if it were confined to internal affairs, would be invalid, may it nevertheless be sustained on the ground that its exclusive aim is to afford a remedy for a hurtful condition within foreign territory?

It will contribute to the elucidation of the question if we first consider the differences between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs. That there are differences between them, and that these differences are fundamental, may not be doubted.

The two classes of powers are different both in respect of their origin and their nature. The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers then possessed by the states such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states. *Carter v. Carter Coal Co.*, 298 U. S. 238, 298 U. S. 294. That this doctrine applies only to powers which the states had is self-evident. And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers, but obviously were transmitted to the United States from some other source. During the colonial period, those powers were possessed exclusively by, and were entirely under the control of, the Crown. By the Declaration of Independence, "the Representatives of the United States of America" declared the

United [not the several] Colonies to be free and independent states, and, as such, to have "full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do."

As a result of the separation from Great Britain by the colonies, acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America....

When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union. *See Penhallow v. Doane*, 3 Dall. 54, 80-81 [argument of counsel -- omitted]....

The Union existed before the Constitution, which was ordained and established, among other things, to form "a more perfect Union." Prior to that event, it is clear that the Union, declared by the Articles of Confederation to be "perpetual," was the sole possessor of external sovereignty, and in the Union it remained without change save insofar as the Constitution, in express terms, qualified its exercise. The Framers' Convention was called, and exerted its powers upon the irrefutable postulate that, though the states were several, their people, in respect of foreign affairs, were one. *Compare The Chinese Exclusion Case*, 130 U. S. 581, 130 U. S. 604, 130 U. S. 606. In that convention, the entire absence of state power to deal with those affairs was thus forcefully stated by Rufus King....

It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality. Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens (*see American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 213 U. S. 356), and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law. As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign....

In *Burnet v. Brooks*, 288 U. S. 378, 288 U. S. 396, we said, "As a nation with all the attributes of sovereignty, the United States is vested with all the powers of government necessary to maintain an effective control of international relations." *Cf. Carter v. Carter Coal Co.*, *supra*, p. 298 U. S. 295.

Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude, and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, "The President is the sole organ of the nation in its external relations, and its sole representative with

foreign nations." Annals, 6th Cong., col. 613. The Senate Committee on Foreign Relations, at a very early day in our history (February 15, 1816), reported to the Senate, among other things, as follows:

"The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations, and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. For his conduct, he is responsible to the Constitution. The committee consider this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility, and thereby to impair the best security for the national safety. The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch." U.S. Senate, Reports, Committee on Foreign Relations, vol. 8, p 24.

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations -- a power which does not require as a basis for its exercise an act of Congress but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment -- perhaps serious embarrassment -- is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty -- a refusal the wisdom of which was recognized by the House itself, and has never since been doubted. In his reply to the request, President Washington said:

"The nature of foreign negotiations requires caution, and their success must often depend on secrecy, and even when brought to a conclusion, a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic, for this might have a pernicious influence on future negotiations or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers. The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate, the principle on which that body was formed confining it to a small number of members. To admit, then, a right in the House of Representatives to demand and to have as a matter of course all the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent." 1 Messages and Papers of the Presidents, p. 194....

When the President is to be authorized by legislation to act in respect of a matter intended to affect a situation in foreign territory, the legislator properly bears in mind the important consideration that the form of the President's action or, indeed, whether he shall act at all -- may well depend, among other things, upon the nature of the confidential information which he has or may thereafter receive, or upon the effect which his action may have upon our foreign relations. This consideration, in connection with what we have already said on the subject, discloses the unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed. As this court said in *Mackenzie v. Hare*, 239 U. S. 299, 239 U. S. 311,

"As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality, it has the powers of nationality, especially those which concern its relations and intercourse with other countries. *We should hesitate long before limiting or embarrassing such powers.*" (Italics supplied.)

In the light of the foregoing observations, it is evident that this court should not be in haste to apply a general rule which will have the effect of condemning legislation like that under review as constituting an unlawful delegation of legislative power. The principles which justify such legislation find overwhelming support in the unbroken legislative practice which has prevailed almost from the inception of the national government to the present day....

Practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs. Many, though not all, of these acts are designated in the footnote....

The result of holding that the joint resolution here under attack is void and unenforceable as constituting an unlawful delegation of legislative power would be to stamp this multitude of comparable acts and resolutions as likewise invalid [the unedited opinion contains numerous examples]. And while this court may not, and should not, hesitate to declare acts of Congress, however many times repeated, to be unconstitutional if beyond all rational doubt it finds them to be so, an impressive array of legislation such as we have just set forth, enacted by nearly every Congress from the beginning of our national existence to the present day, must be given unusual weight in the process of reaching a correct determination of the problem. A legislative practice such as we have here, evidenced not by only occasional instances but marked by the movement of a steady stream for a century and a half of time, goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice, to be found in the origin and history of the power involved, or in its nature, or in both combined.

In *The Laura*, 114 U. S. 411, 114 U. S. 416, this court answered a challenge to the constitutionality of a statute authorizing the Secretary of the Treasury to remit or mitigate fines and penalties in certain cases, by repeating the language of a very early case (*Stuart v. Laird*, 1 Cranch 299, 5 U. S. 309) that the long practice and acquiescence under the statute was a "practical exposition . . . too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed."

In *Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53, 111 U. S. 57, the constitutionality of R.S. § 4952, conferring upon the author, inventor, designer or proprietor of a photograph certain rights, was involved. Mr. Justice Miller, speaking for the court, disposed of the point by saying:

"The construction placed upon the Constitution by the first act of 1790, and the act of 1802, by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is, of itself, entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is almost conclusive."

In *Field v. Clark*, 143 U. S. 649, 143 U. S. 691, this court declared that ". . . the practical construction of the Constitution, as given by so many acts of Congress, and embracing almost the entire period of our national existence, should not be overruled unless upon a conviction that such legislation was clearly incompatible with the supreme law of the land."

The rule is one which has been stated and applied many times by this court. As examples, see *Ames v. Kansas*, 111 U. S. 449, 111 U. S. 469; *McCulloch v. Maryland*, 4 Wheat. 316, 17 U. S. 401; *Downes v. Bidwell*, 182 U. S. 244, 182 U. S. 286.

The uniform, long-continued and undisputed legislative practice just disclosed rests upon an admissible view of the Constitution which, even if the practice found far less support in principle than we think it does, we should not feel at liberty at this late day to disturb.

We deem it unnecessary to consider *seriatim* the several clauses which are said to evidence the unconstitutionality of the Joint Resolution as involving an unlawful delegation of legislative power. It is enough to summarize by saying that, both upon principle and in accordance with precedent, we conclude there is sufficient warrant for the broad discretion vested in the President to determine whether the enforcement of the statute will have a beneficial effect upon the reestablishment of peace in the affected countries; whether he shall make proclamation to bring the resolution into operation; whether and when the resolution shall cease to operate and to make proclamation accordingly, and to prescribe limitations and exceptions to which the enforcement of the resolution shall be subject.

Second. The second point raised by the demurrer was that the Joint Resolution never became effective because the President failed to find essential jurisdictional facts, and the third point was that the second proclamation of the President operated to put an end to the alleged liability of appellees under the Joint Resolution. In respect of both points, the court below overruled the demurrer, and thus far sustained the government.

The government contends that, upon an appeal by the United States under the Criminal Appeals Act from a decision holding an indictment bad, the jurisdiction of the court does not extend to questions decided in favor of the United States, but that such questions may only be reviewed in the usual way, after conviction. We find nothing in the words of the statute or in its purposes which justifies this conclusion. The demurrer in the present case challenges the validity of the statute upon three separate and distinct grounds. If the court below had sustained the demurrer without more, an appeal by the government necessarily would have brought here for our determination all of these grounds, since, in that case, the record would not have disclosed whether the court considered the statute invalid upon one particular ground or upon all of the

grounds alleged. The judgment of the lower court is that the statute is invalid. Having held that this judgment cannot be sustained upon the particular ground which that court assigned, it is now open to this court to inquire whether or not the judgment can be sustained upon the rejected grounds which also challenge the validity of the statute, and, therefore, constitute a proper subject of review by this court under the Criminal Appeals Act. *United States v. Hastings*, 296 U. S. 188, 296 U. S. 192.

In *Langnes v. Green*, 282 U. S. 531, where the decree of a district court had been assailed upon two grounds and the circuit court of appeals had sustained the attack upon one of such grounds only, we held that a respondent in certiorari might nevertheless urge in this court in support of the decree the ground which the intermediate appellate court had rejected. That principle is applicable here.

We proceed, then, to a consideration of the second and third grounds of the demurrers which, as we have said, the court below rejected.

1. The Executive proclamation recites,

"I have found that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, and that I have consulted with the governments of other American Republics *and have been assured of the cooperation of such governments as I have deemed necessary as contemplated by the said joint resolution.*"

This finding satisfies every requirement of the Joint Resolution. There is no suggestion that the resolution is fatally uncertain or indefinite, and a finding which follows its language, as this finding does, cannot well be challenged as insufficient.

But appellees, referring to the words which we have italicized above, contend that the finding is insufficient because the President does not declare that the cooperation of such governments as he deemed necessary included any American republic, and, therefore, the recital contains no affirmative showing of compliance in this respect with the Joint Resolution. The criticism seems to us wholly wanting in substance. The President recites that he has consulted with the governments of other American republics, and that he has been assured of the cooperation of such governments as he deemed necessary *as contemplated by the joint resolution.* These recitals, construed together, fairly include within their meaning American republics.

2. The second proclamation of the President, revoking the first proclamation, it is urged, had the effect of putting an end to the Joint Resolution, and, in accordance with a well settled rule, no penalty could be enforced or punishment inflicted thereafter for an offense committed during the life of the Joint Resolution in the absence of a provision in the resolution to that effect. There is no doubt as to the general rule or as to the absence of a saving clause in the Joint Resolution. But is the case presented one which makes the rule applicable?

It was not within the power of the President to repeal the Joint Resolution, and his second proclamation did not purport to do so. It "revoked" the first proclamation, and the question is, did the revocation of the proclamation have the effect of abrogating the resolution, or of precluding

its enforcement insofar as that involved the prosecution and punishment of offenses committed during the life of the first proclamation? We are of opinion that it did not.

Prior to the first proclamation, the Joint Resolution was an existing law, but dormant, awaiting the creation of a particular situation to render it active. No action or lack of action on the part of the President could destroy its potentiality. Congress alone could do that. The happening of the designated events -- namely, the finding of certain conditions and the proclamation by the President -- did not call the law into being. It created the occasion for it to function. The second proclamation did not put an end to the law, or affect what had been done in violation of the law. The effect of the proclamation was simply to remove, for the future, a condition of affairs which admitted of its exercise.

We should have had a different case if the Joint Resolution had expired by its own terms upon the issue of the second proclamation. Its operative force, it is true, was limited to the period of time covered by the first proclamation. And, when the second proclamation was issued, the resolution ceased to be a rule for the future. It did not cease to be the law for the antecedent period of time. The distinction is clearly pointed out by the Superior Court of Judicature of New Hampshire in *Stevens v. Dimond*, 6 N.H. 330, 332, 333. There, a town by law provided that, if certain animals should be found going at large between the first day of April and the last day of October, etc., the owner would incur a prescribed penalty. The trial court directed the jury that the bylaw, being in force for a year only, had expired, so that the defendant could not be called upon to answer for a violation which occurred during the designated period. The state appellate court reversed, saying that, when laws:

"expire by their own limitation, or are repealed, they cease to be the law in relation to the past, as well as the future, and can no longer be enforced in any case. No case is, however, to be found in which it was ever held before that they thus ceased to be law, unless they expired by express limitation in themselves or were repealed. It has never been decided that they cease to be law merely because the time they were intended to regulate had expired. . . . A very little consideration of the subject will convince anyone that a limitation of the time to which a statute is to apply is a very different thing from the limitation of the time a statute is to continue in force."

The first proclamation of the President was in force from the 28th day of May, 1934, to the 14th day of November, 1935. If the Joint Resolution had in no way depended upon Presidential action, but had provided explicitly that, at any time between May 28, 1934, and November 14, 1935, it should be unlawful to sell arms or munitions of war to the countries engaged in armed conflict in the Chaco, it certainly could not be successfully contended that the law would expire with the passing of the time fixed in respect of offenses committed during the period.

The judgment of the court below must be reversed, and the cause remanded for further proceedings in accordance with the foregoing opinion.

CHAPTER III: **Modern War Powers of the Executive**

Ex Parte Quirin, (1942)

"PER CURIAM."

MR. CHIEF JUSTICE STONE delivered the opinion of the Court.

The question for decision is whether the detention of petitioners by respondent for trial by Military Commission, appointed by Order of the President of July 2, 1942, on charges preferred against them purporting to set out their violations of the law of war and of the Articles of War, is in conformity to the laws and Constitution of the United States. . . .

The following facts appear from the petitions or are stipulated. Except as noted, they are undisputed. All the petitioners were born in Germany; all have lived in the United States. All returned to Germany between 1933 and 1941. All except petitioner Haupt are admittedly citizens of the German Reich, with which the United States is at war. Haupt came to this country with his parents when he was five years old; it is contended that he became a citizen of the United States by virtue of the naturalization of his parents during his minority, and that he has not since lost his citizenship. The Government, however, takes the position that, on attaining his majority he elected to maintain German allegiance and citizenship, or in any case that he has, by his conduct, renounced or abandoned his United States citizenship. *See Perkins v. Elg*, 307 U. S. 325, 307 U. S. 334; *United States ex rel. Rojak v. Marshall*, 34 F.2d 219; *United States ex rel. Scimeca v. Husband*, 6 F.2d 957, 958; 8 U.S.C. § 801, and compare 8 U.S.C. § 808. For reasons presently to be stated we do not find it necessary to resolve these contentions.

After the declaration of war between the United States and the German Reich, petitioners received training at a sabotage school near Berlin, Germany, where they were instructed in the use of explosives and in methods of secret writing. Thereafter petitioners, with a German citizen, Dasch, proceeded from Germany to a seaport in Occupied France, where petitioners Burger, Heinck and Quirin, together with Dasch, boarded a German submarine which proceeded across the Atlantic to Amagansett Beach on Long Island, New York. The four were there landed from the submarine in the hours of darkness, on or about June 13, 1942, carrying with them a supply of explosives, fuses, and incendiary and timing devices. While landing, they wore German

Marine Infantry uniforms or parts of uniforms. Immediately after landing, they buried their uniforms and the other articles mentioned and proceeded in civilian dress to New York City.

The remaining four petitioners at the same French port boarded another German submarine, which carried them across the Atlantic to Ponte Vedra Beach, Florida. On or about June 17, 1942, they came ashore during the hours of darkness, wearing caps of the German Marine Infantry and carrying with them a supply of explosives, fuses, and incendiary and timing devices. They immediately buried their caps and the other articles mentioned, and proceeded in civilian dress to Jacksonville, Florida, and thence to various points in the United States. All were taken into custody in New York or Chicago by agents of the Federal Bureau of Investigation. All had received instructions in Germany from an officer of the German High Command to destroy war industries and war facilities in the United States, for which they or their relatives in Germany were to receive salary payments from the German Government. They also had been paid by the German Government during their course of training at the sabotage school, and had received substantial sums in United States currency, which were in their possession when arrested. The currency had been handed to them by an officer of the German High Command, who had instructed them to wear their German uniforms while landing in the United States.

The President, as President and Commander in Chief of the Army and Navy, by Order of July 2, 1942, appointed a Military Commission and directed it to try petitioners for offenses against the law of war and the Articles of War, and prescribed regulations for the procedure on the trial and for review of the record of the trial and of any judgment or sentence of the Commission. On the same day, by Proclamation, the President declared that "all persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States . . . through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals."

....

We are not here concerned with any question of the guilt or innocence of petitioners. Constitutional safeguards for the protection of all who are charged with offenses are not to be disregarded in order to inflict merited punishment on some who are guilty. *Ex parte Milligan, supra*, 71 U. S. 119, 71 U. S. 132; *Tumey v. Ohio*, 273 U. S. 510, 273 U. S. 535; *Hill v. Texas*, 316 U. S. 400, 316 U. S. 406. But the detention and trial of petitioners -- ordered by the

President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger -- are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted.

Congress and the President, like the courts, possess no power not derived from the Constitution. But one of the objects of the Constitution, as declared by its preamble, is to "provide for the common defence." As a means to that end, the Constitution gives to Congress the power to "provide for the common Defence," Art. I, § 8, cl. 1; "To raise and support Armies," "To provide and maintain a Navy," Art. I, § 8, cl. 12, 13, and "To make Rules for the Government and Regulation of the land and naval Forces," Art. I, § 8, cl. 14. Congress is given authority "To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," Art. I, § 8, cl. 11, and "To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," Art. I, § 8, cl. 10. And finally, the Constitution authorizes Congress "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Art. I, § 8, cl. 18. The Constitution confers on the President the "executive Power," Art. II, § 1, cl. 1, and imposes on him the duty to "take Care that the Laws be faithfully executed." Art. II, § 3. It makes him the Commander in Chief of the Army and Navy, Art. II, § 2, cl. 1, and empowers him to appoint and commission officers of the United States. Art. II, § 3, cl. 1.

The Constitution thus invests the President, as Commander in Chief, with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offenses against the law of nations, including those which pertain to the conduct of war.

By the Articles of War, 10 U.S.C. §§ 1471-1593, Congress has provided rules for the government of the Army. It has provided for the trial and punishment, by courts martial, of violations of the Articles by members of the armed forces and by specified classes of persons associated or serving with the Army. Arts. 1, 2. But the Articles also recognize the "military commission" appointed by military command as an appropriate tribunal for the trial and punishment of offenses against the law of war not ordinarily tried by court martial. *See* Arts. 12, 15. Articles 38 and 46 authorize the President, with certain limitations, to prescribe the procedure for military commissions. Articles 81 and 82 authorize trial, either by court martial or military

commission, of those charged with relieving, harboring or corresponding with the enemy and those charged with spying. And Article 15 declares that

"the provisions of these articles conferring jurisdiction upon courts martial shall not be construed as depriving military commissions . . . or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that, by statute or by the law of war may be triable by such military commissions . . . or other military tribunals."

Article 2 includes among those persons subject to military law the personnel of our own military establishment. But this, as Article 12 provides, does not exclude from that class "any other person who by the law of war is subject to trial by military tribunals" and who, under Article 12, may be tried by court martial or under Article 15 by military commission.

Similarly, the Espionage Act of 1917, which authorizes trial in the district courts of certain offenses that tend to interfere with the prosecution of war, provides that nothing contained in the act "shall be deemed to limit the jurisdiction of the general courts-martial, military commissions, or naval courts-martial." 50 U.S.C. § 38.

From the very beginning of its history, this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations, as well as of enemy individuals. By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals. And the President, as Commander in Chief, by his Proclamation in time of war, has invoked that law. By his Order creating the present Commission, he has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war.

An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have

violated the law of war. It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here, Congress has authorized trial of offenses against the law of war before such commissions. We are concerned only with the question whether it is within the constitutional power of the National Government to place petitioners upon trial before a military commission for the offenses with which they are charged. We must therefore first inquire whether any of the acts charged is an offense against the law of war cognizable before a military tribunal, and, if so, whether the Constitution prohibits the trial. We may assume that there are acts regarded in other countries, or by some writers on international law, as offenses against the law of war which would not be triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by a jury. It was upon such grounds that the Court denied the right to proceed by military tribunal in *Ex parte Milligan, supra*. But, as we shall show, these petitioners were charged with an offense against the law of war which the Constitution does not require to be tried by jury.

It is no objection that Congress, in providing for the trial of such offenses, has not itself undertaken to codify that branch of international law or to mark its precise boundaries, or to enumerate or define by statute all the acts which that law condemns. An Act of Congress punishing "the crime of piracy, as defined by the law of nations" is an appropriate exercise of its constitutional authority, Art. I, § 8, cl. 10, "to define and punish" the offense, since it has adopted by reference the sufficiently precise definition of international law. *United States v. Smith*, 5 Wheat. 153; *See The Marianna Flora*, 11 Wheat. 1, 24 U. S. 40-41; *United States v. Brig Malek Adhel*, 2 How. 210, 43 U. S. 232; *The Ambrose Light*, 25 F. 408, 423-28; 18 U.S.C. § 481. Similarly, by the reference in the 15th Article of War to "offenders or offenses that . . . by the law of war may be triable by such military commissions," Congress has incorporated by reference, as within the jurisdiction of military commissions, all offenses which are defined as such by the law of war (*compare 61 U. S. Hoover*, 20 How. 65, 61 U. S. 82), and which may constitutionally be included within that jurisdiction. Congress had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts. It chose the latter course.

By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations, [Footnote 2/7] and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention

as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but, in addition, they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. [Footnote 2/8] The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals. *See* Winthrop, *Military Law*, 2d ed., pp. 11997, 1219-21; Instructions for the Government of Armies of the United States in the Field, approved by the President, General Order No. 100, April 24, 1863, §§ IV and V.

Such was the practice of our own military authorities before the adoption of the Constitution, and during the Mexican and Civil Wars. . . .

Our Government, by thus defining lawful belligerents entitled to be treated as prisoners of war, has recognized that there is a class of unlawful belligerents not entitled to that privilege, including those who, though combatants, do not wear "fixed and distinctive emblems." And, by Article 15 of the Articles of War, Congress has made provision for their trial and punishment by military commission, according to "the law of war."

By a long course of practical administrative construction by its military authorities, our Government has likewise recognized that those who, during time of war, pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission. This precept of the law of war has been so recognized in practice both here and abroad, and has so generally been accepted as valid by authorities on international law that we think it must be regarded as a rule or principle of the law of war recognized by this Government by its enactment of the Fifteenth Article of War.

Specification 1 of the first charge is sufficient to charge all the petitioners with the offense of unlawful belligerency, trial of which is within the jurisdiction of the Commission, and the admitted facts affirmatively show that the charge is not merely colorable or without foundation. Specification 1 states that petitioners, "being enemies of the United States and acting for . . . the German Reich, a belligerent enemy nation, secretly and covertly passed, in civilian dress,

contrary to the law of war, through the military and naval lines and defenses of the United States . . . and went behind such lines, contrary to the law of war, in civilian dress . . . for the purpose of committing . . . hostile acts, and, in particular, to destroy certain war industries, war utilities and war materials within the United States."

This specification so plainly alleges violation of the law of war as to require but brief discussion of petitioners' contentions. As we have seen, entry upon our territory in time of war by enemy belligerents, including those acting under the direction of the armed forces of the enemy, for the purpose of destroying property used or useful in prosecuting the war, is a hostile and warlike act. It subjects those who participate in it without uniform to the punishment prescribed by the law of war for unlawful belligerents. It is without significance that petitioners were not alleged to have borne conventional weapons or that their proposed hostile acts did not necessarily contemplate collision with the Armed Forces of the United States. Paragraphs 351 and 352 of the Rules of Land Warfare, already referred to, plainly contemplate that the hostile acts and purposes for which unlawful belligerents may be punished are not limited to assaults on the Armed Forces of the United States. Modern warfare is directed at the destruction of enemy war supplies and the implements of their production and transportation, quite as much as at the armed forces. Every consideration which makes the unlawful belligerent punishable is equally applicable whether his objective is the one or the other. The law of war cannot rightly treat those agents of enemy armies who enter our territory, armed with explosives intended for the destruction of war industries and supplies, as any the less belligerent enemies than are agents similarly entering for the purpose of destroying fortified places or our Armed Forces. By passing our boundaries for such purposes without uniform or other emblem signifying their belligerent status, or by discarding that means of identification after entry, such enemies become unlawful belligerents subject to trial and punishment.

Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and, with its aid, guidance and direction, enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war. *Cf. Gates v. Goodloe*, 101 U. S. 612, 101 U. S. 615, 101 U. S. 617-18. It is as an enemy belligerent that petitioner Haupt is charged with entering the United States, and unlawful belligerency is the gravamen of the offense of which he is accused.

Nor are petitioners any the less belligerents if, as they argue, they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations. The argument leaves out of account the nature of the offense which the Government charges and which the Act of Congress, by incorporating the law of war, punishes. It is that each petitioner, in circumstances which gave him the status of an enemy belligerent, passed our military and naval lines and defenses or went behind those lines, in civilian dress and with hostile purpose. The offense was complete when, with that purpose, they entered -- or, having so entered, they remained upon -- our territory in time of war without uniform or other appropriate means of identification. For that reason, even when committed by a citizen, the offense is distinct from the crime of treason defined in Article III, § 3 of the Constitution, since the absence of uniform essential to one is irrelevant to the other. *Cf. Moran v. Devine*, 237 U. S. 632; *Albrecht v. United States*, 273 U. S. 1, 273 U. S. 11-12.

But petitioners insist that, even if the offenses with which they are charged are offenses against the law of war, their trial is subject to the requirement of the Fifth Amendment that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, and that such trials by Article III, § 2, and the Sixth Amendment must be by jury in a civil court. Before the Amendments, § 2 of Article III, the Judiciary Article, had provided, "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury," and had directed that "such Trial shall be held in the State where the said Crimes shall have been committed."

Presentment by a grand jury and trial by a jury of the vicinage where the crime was committed were, at the time of the adoption of the Constitution, familiar parts of the machinery for criminal trials in the civil courts. But they were procedures unknown to military tribunals, which are not courts in the sense of the Judiciary Article, *Ex parte Vallandigham*, 1 Wall. 243; *In re Vidal*, 179 U. S. 126; *cf. Williams v. United States*, 289 U. S. 553, and which, in the natural course of events, are usually called upon to function under conditions precluding resort to such procedures. As this Court has often recognized, it was not the purpose or effect of § 2 of Article III, read in the light of the common law, to enlarge the then existing right to a jury trial. The object was to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law and in all cases of a like nature as they might arise in the future, *District of Columbia v. Colts*, 282 U. S. 63, but not to bring within the sweep of the guaranty those cases in which it was then well understood that a jury trial could not be demanded as of right.

The Fifth and Sixth Amendments, while guaranteeing the continuance of certain incidents of trial by jury which Article III, § 2 had left unmentioned, did not enlarge the right to jury trial as it had been established by that Article. *Callan v. Wilson*, 127 U. S. 540, 127 U. S. 549. Hence, petty offenses triable at common law without a jury may be tried without a jury in the federal courts, notwithstanding Article III, § 2, and the Fifth and Sixth Amendments. *Schick v. United States*, 195 U. S. 65; *District of Columbia v. Clawans*, 300 U. S. 617. Trial by jury of criminal contempts may constitutionally be dispensed with in the federal courts in those cases in which they could be tried without a jury at common law. *Ex parte Terry*, 128 U. S. 289, 128 U. S. 302-304; *Savin, Petitioner*, 131 U. S. 267, 131 U. S. 277; *In re Debs*, 158 U. S. 564, 158 U. S. 594-596; *United States v. Shipp*, 203 U. S. 563, 203 U. S. 572; *Blackmer v. United States*, 284 U. S. 421, 284 U. S. 440; *Nye v. United States*, 313 U. S. 33, 313 U. S. 48; *See United States v. Hudson and Goodwin*, 7 Cranch 32, 11 U. S. 34. Similarly, an action for debt to enforce a penalty inflicted by Congress is not subject to the constitutional restrictions upon criminal prosecutions. *United States v. Zucker*, 161 U. S. 475; *United States v. Regan*, 232 U. S. 37, and cases cited.

All these are instances of offenses committed against the United States, for which a penalty is imposed, but they are not deemed to be within Article III, § 2, or the provisions of the Fifth and Sixth Amendments relating to "crimes" and "criminal prosecutions." In the light of this long-continued and consistent interpretation, we must conclude that § 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts.

The fact that "cases arising in the land or naval forces" are excepted from the operation of the Amendments does not militate against this conclusion. Such cases are expressly excepted from the Fifth Amendment, and are deemed excepted by implication from the Sixth. *Ex parte Milligan, supra*, 71 U. S. 123, 71 U. S. 138-139. It is argued that the exception, which excludes from the Amendment cases arising in the armed forces, has also, by implication, extended its guaranty to all other cases; that, since petitioners, not being members of the Armed Forces of the United States, are not within the exception, the Amendment operates to give to them the right to a jury trial. But we think this argument misconceives both the scope of the Amendment and the purpose of the exception.

We may assume, without deciding, that a trial prosecuted before a military commission created by military authority is not one "arising in the land . . . forces," when the accused is not a

member of or associated with those forces. But even so, the exception cannot be taken to affect those trials before military commissions which are neither within the exception nor within the provisions of Article III, § 2, whose guaranty the Amendments did not enlarge. No exception is necessary to exclude from the operation of these provisions cases never deemed to be within their terms. An express exception from Article III, § 2, and from the Fifth and Sixth Amendments, of trials of petty offenses and of criminal contempts has not been found necessary in order to preserve the traditional practice of trying those offenses without a jury. It is no more so in order to continue the practice of trying, before military tribunals without a jury, offenses committed by enemy belligerents against the law of war.

Section 2 of the Act of Congress of April 10, 1806, 2 Stat. 371, derived from the Resolution of the Continental Congress of August 21, 1776, [Footnote 2/13] imposed the death penalty on alien spies "according to the law and usage of nations, by sentence of a general court martial." This enactment must be regarded as a contemporary construction of both Article III, § 2, and the Amendments as not foreclosing trial by military tribunals, without a jury, of offenses against the law of war committed by enemies not in or associated with our Armed Forces. It is a construction of the Constitution which has been followed since the founding of our Government, and is now continued in the 82nd Article of War. Such a construction is entitled to the greatest respect. *Stuart v. Laird*, 1 Cranch 299, 5 U. S. 309; *Field v. Clark*, 143 U. S. 649, 143 U. S. 691; *United States v. Curtiss-Wright Corp.*, 299 U. S. 304, 299 U. S. 328. It has not hitherto been challenged, and, so far as we are advised, it has never been suggested in the very extensive literature of the subject that an alien spy, in time of war, could not be tried by military tribunal without a jury.

The exception from the Amendments of "cases arising in the land or naval forces" was not aimed at trials by military tribunals, without a jury, of such offenses against the law of war. Its objective was quite different -- to authorize the trial by court martial of the members of our Armed Forces for all that class of crimes which, under the Fifth and Sixth Amendments, might otherwise have been deemed triable in the civil courts. The cases mentioned in the exception are not restricted to those involving offenses against the law of war alone, but extend to trial of all offenses, including crimes which were of the class traditionally triable by jury at common law. *Ex parte Mason*, 105 U. S. 696; *Kahn v. Anderson*, 255 U. S. 1, 255 U. S. 9; *cf. Caldwell v. Parker*, 252 U. S. 376.

Since the Amendments, like § 2 of Article III, do not preclude all trials of offenses against the law of war by military commission without a jury when the offenders are aliens not members of

our Armed Forces, it is plain that they present no greater obstacle to the trial in like manner of citizen enemies who have violated the law of war applicable to enemies. Under the original statute authorizing trial of alien spies by military tribunals, the offenders were outside the constitutional guaranty of trial by jury not because they were aliens, but only because they had violated the law of war by committing offenses constitutionally triable by military tribunal.

We cannot say that Congress, in preparing the Fifth and Sixth Amendments, intended to extend trial by jury to the cases of alien or citizen offenders against the law of war otherwise triable by military commission, while withholding it from members of our own armed forces charged with infractions of the Articles of War punishable by death. It is equally inadmissible to construe the Amendments -- whose primary purpose was to continue unimpaired presentment by grand jury and trial by petit jury in all those cases in which they had been customary -- as either abolishing all trials by military tribunals, save those of the personnel of our own armed forces, or, what in effect comes to the same thing, as imposing on all such tribunals the necessity of proceeding against unlawful enemy belligerents only on presentment and trial by jury. We conclude that the Fifth and Sixth Amendments did not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commission, and that petitioners, charged with such an offense not required to be tried by jury at common law, were lawfully placed on trial by the Commission without a jury.

Petitioners, and especially petitioner Haupt, stress the pronouncement of this Court in the *Milligan* case, *supra*, p. 71 U. S. 121, that the law of war "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open, and their process unobstructed."

Elsewhere in its opinion, at pp. 71 U. S. 118, 71 U. S. 121-122 and 71 U. S. 131, the Court was at pains to point out that Milligan, a citizen twenty years resident in Indiana, who had never been a resident of any of the states in rebellion, was not an enemy belligerent either entitled to the status of a prisoner of war or subject to the penalties imposed upon unlawful belligerents. We construe the Court's statement as to the inapplicability of the law of war to Milligan's case as having particular reference to the facts before it. From them, the Court concluded that Milligan, not being a part of or associated with the armed forces of the enemy, was a nonbelligerent, not subject to the law of war save as -- in circumstances found not there to be present, and not involved here -- martial law might be constitutionally established.

The Court's opinion is inapplicable to the case presented by the present record. We have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war. It is enough that petitioners here, upon the conceded facts, were plainly within those boundaries, and were held in good faith for trial by military commission, charged with being enemies who, with the purpose of destroying war materials and utilities, entered, or after entry remained in, our territory without uniform -- an offense against the law of war. We hold only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission.

Since the first specification of Charge I sets forth a violation of the law of war, we have no occasion to pass on the adequacy of the second specification of Charge I, or to construe the 81st and 82nd Articles of War for the purpose of ascertaining whether the specifications under Charges II and III allege violations of those Articles, or whether, if so construed, they are constitutional. *McNally v. Hill*, 293 U. S. 131.

There remains the contention that the President's Order of July 2, 1942, so far as it lays down the procedure to be followed on the trial before the Commission and on the review of its findings and sentence, and the procedure in fact followed by the Commission, are in conflict with Articles of War 38, 43, 46, 50 1/2 and 70. Petitioners argue that their trial by the Commission, for offenses against the law of war and the 81st and 82nd Articles of War, by a procedure which Congress has prohibited would invalidate any conviction which could be obtained against them, and renders their detention for trial likewise unlawful (*see McClaghry v. Deming*, 186 U. S. 49; *United States v. Brown*, 206 U. S. 240, 206 U. S. 244; *Runkle v. United States*, 122 U. S. 543, 122 U. S. 555-556; *Dynes v. Hoover*, 20 How. 65, 61 U. S. 80-81); that the President's Order prescribes such an unlawful procedure, and that the secrecy surrounding the trial and all proceedings before the Commission, as well as any review of its decision, will preclude a later opportunity to test the lawfulness of the detention.

Petitioners do not argue, and we do not consider, the question whether the President is compelled by the Articles of War to afford unlawful enemy belligerents a trial before subjecting them to disciplinary measures. Their contention is that, if Congress has authorized their trial by military commission upon the charges preferred -- violations of the law of war and the 81st and 82nd Articles of War -- it has by the Articles of War prescribed the procedure by which the trial is to be conducted, and that, since the President has ordered their trial for such offenses by military commission, they are entitled to claim the protection of the procedure which Congress has commanded shall be controlling.

We need not inquire whether Congress may restrict the power of the Commander in Chief to deal with enemy belligerents. For the Court is unanimous in its conclusion that the Articles in question could not at any stage of the proceedings afford any basis for issuing the writ. But a majority of the full Court are not agreed on the appropriate grounds for decision. Some members of the Court are of opinion that Congress did not intend the Articles of War to govern a Presidential military commission convened for the determination of questions relating to admitted enemy invaders, and that the context of the Articles makes clear that they should not be construed to apply in that class of cases. Others are of the view that -- even though this trial is subject to whatever provisions of the Articles of War Congress has in terms made applicable to "commissions" -- the particular Articles in question, rightly construed, do not foreclose the procedure prescribed by the President or that shown to have been employed by the Commission, in a trial of offenses against the law of war and the 81st and 82nd Articles of War, by a military commission appointed by the President.

Accordingly, we conclude that Charge I, on which petitioners were detained for trial by the Military Commission, alleged an offense which the President is authorized to order tried by military commission; that his Order convening the Commission was a lawful order, and that the Commission was lawfully constituted; that the petitioners were held in lawful custody, and did not show cause for their discharge. It follows that the orders of the District Court should be affirmed, and that leave to file petitions for habeas corpus in this Court should be denied.

Hirabayashi v. United States, 320 U.S. 81 (1943)

MR. CHIEF JUSTICE STONE delivered the opinion of the Court.

Appellant, an American citizen of Japanese ancestry, was convicted in the district court of violating the Act of Congress of March 21, 1942, 56 Stat. 173, 18 U.S.C. § 97a, which makes it a misdemeanor knowingly to disregard restrictions made applicable by a military commander to persons in a military area prescribed by him as such, all as authorized by an Executive Order of the President.

The questions for our decision are whether the particular restriction violated, namely, that all persons of Japanese ancestry residing in such an area be within their place of residence daily between the hours of 8:00 p.m. and 6:00 a.m., was adopted by the military commander in the exercise of an unconstitutional delegation by Congress of its legislative power, and whether the

restriction unconstitutionally discriminated between citizens of Japanese ancestry and those of other ancestries in violation of the Fifth Amendment.

The indictment is in two counts. The second charges that appellant, being a person of Japanese ancestry, had on a specified date, contrary to a restriction promulgated by the military commander of the Western Defense Command, Fourth Army, failed to remain in his place of residence in the designated military area between the hours of 8:00 o'clock p.m. and 6:00 a.m. The first count charges that appellant, on May 11 and 12, 1942, had, contrary to a Civilian Exclusion Order issued by the military commander, failed to report to the Civil Control Station within the designated area, it appearing that appellant's required presence there was a preliminary step to the exclusion from that area of persons of Japanese ancestry.

By demurrer and plea in abatement, which the court overruled (46 F.Supp. 657), appellant asserted that the indictment should be dismissed because he was an American citizen who had never been a subject of and had never borne allegiance to the Empire of Japan, and also because the Act of March 21, 1942, was an unconstitutional delegation of Congressional power. On the trial to a jury, it appeared that appellant was born in Seattle in 1918, of Japanese parents who had come from Japan to the United States, and who had never afterward returned to Japan; that he was educated in the Washington public schools, and, at the time of his arrest was a senior in the University of Washington; that he had never been in Japan or had any association with Japanese residing there.

The evidence showed that appellant had failed to report to the Civil Control Station on May 11 or May 12, 1942, as directed, to register for evacuation from the military area. He admitted failure to do so, and stated it had at all times been his belief that he would be waiving his rights as an American citizen by so doing. The evidence also showed that, for like reason, he was away from his place of residence after 8:00 p.m. on May 9, 1942. The jury returned a verdict of guilty on both counts, and appellant was sentenced to imprisonment for a term of three months on each, the sentences to run concurrently

...

The curfew order which appellant violated, and to which the sanction prescribed by the Act of Congress has been deemed to attach, purported to be issued pursuant to an Executive Order of the President. In passing upon the authority of the military commander to make and execute the order, it becomes necessary to consider in some detail the official action which preceded or accompanied the order and from which it derives its purported authority.

On December 8, 1941, one day after the bombing of Pearl Harbor by a Japanese air force, Congress declared war against Japan. 55 Stat. 795. On February 19, 1942, the President promulgated Executive Order No. 9066. 7 Federal Register 1407. The Order recited that

"the successful prosecution of the war requires every possible protection against espionage and against sabotage to national defense material, national defense premises, and national defense

utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655."

By virtue of the authority vested in him as President and as Commander in Chief of the Army and Navy, the President purported to

"authorize and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion."

On February 20, 1942, the Secretary of War designated Lt. General J. L. DeWitt as Military Commander of the Western Defense Command, comprising the Pacific Coast states and some others, to carry out there the duties prescribed by Executive Order No. 9066. On March 2, 1942, General DeWitt promulgated Public Proclamation No. 1. 7 Federal Register 2320. The proclamation recited that the entire Pacific Coast,

"by its geographical location is particularly subject to attack, to attempted invasion by the armed forces of nations with which the United States is now at war, and, in connection therewith, is subject to espionage and acts of sabotage, thereby requiring the adoption of military measures necessary to establish safeguards against such enemy operations."

It stated that

"the present situation requires as matter of military necessity the establishment in the territory embraced by the Western Defense Command of Military Areas and Zones thereof;"

it specified and designated as military areas certain areas within the Western Defense Command; and it declared that "such persons or classes of persons as the situation may require" would, by subsequent proclamation, be excluded from certain of these areas, but might be permitted to enter or remain in certain others, under regulations and restrictions to be later prescribed. Among the military areas so designated by Public Proclamation No. 1 was Military Area No. 1, which embraced, besides the southern part of Arizona, all the coastal region of the three Pacific Coast states, including the City of Seattle, Washington, where appellant resided...

...

An Executive Order of the President, No. 9102, of March 18, 1942, established the War Relocation Authority, in the Office for Emergency Management of the Executive Office of the President; it authorized the Director of War Relocation Authority to formulate and effectuate a program for the removal, relocation, maintenance and supervision of persons designated under Executive Order No. 9066, already referred to; and it conferred on the Director authority to

prescribe regulations necessary or desirable to promote the effective execution of the program. 7
Federal Register 2165.

...

[The curfew order] established that from and after March 27, 1942,

"all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry residing or being within the geographical limits of Military Area No. 1 . . . shall be within their place of residence between the hours of 8:00 P.M. and 6:00 A.M., which period is hereinafter referred to as the hours of curfew."

It also imposed certain other restrictions on persons of Japanese ancestry, and provided that any person violating the regulations would be subject to the criminal penalties provided by the Act of Congress of March 21, 1942.

...

Appellant does not deny that he knowingly failed to obey the curfew order as charged in the second count of the indictment, or that the order was authorized by the terms of Executive Order No. 9066, or that the challenged Act of Congress purports to punish with criminal penalties disobedience of such an order. His contentions are only that Congress unconstitutionally delegated its legislative power to the military commander by authorizing him to impose the challenged regulation, and that, even if the regulation were in other respects lawfully authorized, the Fifth Amendment prohibits the discrimination made between citizens of Japanese descent and those of other ancestry.

The question then is... whether, acting in cooperation, Congress and the Executive have constitutional authority to impose the curfew restriction here complained of. We must consider also whether, acting together, Congress and the Executive could leave it to the designated military commander to appraise the relevant conditions and on the basis of that appraisal to say... whether the order itself was an appropriate means of carrying out the Executive Order for the "protection against espionage and against sabotage" to national defense materials, premises and utilities. For reasons presently to be stated, we conclude that it was within the constitutional power of Congress and the executive arm of the Government to prescribe this curfew order for the period under consideration and that its promulgation by the military commander involved no unlawful delegation of legislative power.

Executive Order No. 9066, promulgated in time of war for the declared purpose of prosecuting the war by protecting national defense resources from sabotage and espionage, and the Act of March 21, 1942, ratifying and confirming the Executive Order, were each an exercise of the power to wage war conferred on the Congress and on the President, as Commander in Chief of the armed forces, by Articles I and II of the Constitution. *See Ex parte Quirin*, 317 U. S. 1, 317 U. S. 25-26... [W]e are immediately concerned with the question whether it is within the

constitutional power of the national government, through the joint action of Congress and the Executive, to impose this restriction as an emergency war measure...

The war power of the national government is "the power to wage war successfully." See Charles Evans Hughes, *War Powers Under the Constitution*, 42 A.B.A.Rep. 232, 238. It extends to every matter and activity so related to war as substantially to affect its conduct and progress. The power is not restricted to the winning of victories in the field and the repulse of enemy forces. It embraces every phase of the national defense, including the protection of war materials and the members of the armed forces from injury and from the dangers which attend the rise, prosecution and progress of war. *Prize Cases*, *supra*; 78 U. S. *United States*, 11 Wall. 268, 78 U. S. 303, 78 U. S. 314; *Stewart v. Kahn*, 11 Wall. 493, 78 U. S. 506-507; *Selective Draft Law Cases*, 245 U. S. 366; *McKinley v. United States*, 249 U. S. 397; *United States v. Macintosh*, 283 U. S. 605, 283 U. S. 622-623. Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it. *Ex parte Quirin*, *supra*, 317 U. S. 28-29; *cf. Prize Cases*, *supra*, 67 U. S. 670; *Martin v. Mott*, 12 Wheat. 19, 25 U. S. 29. Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of warring, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.

...

The challenged orders were defense measures for the avowed purpose of safeguarding the military area in question, at a time of threatened air raids and invasion by the Japanese forces, from the danger of sabotage and espionage. As the curfew was made applicable to citizens residing in the area only if they were of Japanese ancestry, our inquiry must be whether, in the light of all the facts and circumstances, there was any substantial basis for the conclusion, in which Congress and the military commander united, that the curfew as applied was a protective measure necessary to meet the threat of sabotage and espionage which would substantially affect the war effort and which might reasonably be expected to aid a threatened enemy invasion. The alternative, which appellant insists must be accepted, is for the military authorities to impose the curfew on all citizens within the military area, or on none. In a case of threatened danger requiring prompt action, it is a choice between inflicting obviously needless hardship on the many or sitting passive and unresisting in the presence of the threat. We think that constitutional government, in time of war, is not so powerless and does not compel so hard a choice if those charged with the responsibility of our national defense have reasonable ground for believing that the threat is real.

...

... Espionage by persons in sympathy with the Japanese Government had been found to have been particularly effective in the surprise attack on Pearl Harbor. At a time of threatened

Japanese attack upon this country, the nature of our inhabitants' attachments to the Japanese enemy was consequently a matter of grave concern. Of the 126,000 persons of Japanese descent in the United States, citizens and non-citizens, approximately 112,000 resided in California, Oregon and Washington at the time of the adoption of the military regulations. Of these, approximately two-thirds are citizens because born in the United States. Not only did the great majority of such persons reside within the Pacific Coast states, but they were concentrated in or near three of the large cities, Seattle, Portland and Los Angeles, all in Military Area No. 1.

There is support for the view that social, economic and political conditions which have prevailed since the close of the last century, when the Japanese began to come to this country in substantial numbers, have intensified their solidarity and have in large measure prevented their assimilation as an integral part of the white population. In addition, large numbers of children of Japanese parentage are sent to Japanese language schools outside the regular hours of public schools in the locality. Some of these schools are generally believed to be sources of Japanese nationalistic propaganda, cultivating allegiance to Japan. Considerable numbers, estimated to be approximately 10,000, of American-born children of Japanese parentage have been sent to Japan for all or a part of their education.

Congress and the Executive, including the military commander, could have attributed special significance, in its bearing on the loyalties of persons of Japanese descent, to the maintenance by Japan of its system of dual citizenship. Children born in the United States of Japanese alien parents, and especially those children born before December 1, 1924, are, under many circumstances, deemed, by Japanese law, to be citizens of Japan. No official census of those whom Japan regards as having thus retained Japanese citizenship is available, but there is ground for the belief that the number is large.

The large number of resident alien Japanese, approximately one-third of all Japanese inhabitants of the country, are of mature years and occupy positions of influence in Japanese communities. The association of influential Japanese residents with Japanese Consulates has been deemed a ready means for the dissemination of propaganda and for the maintenance of the influence of the Japanese Government with the Japanese population in this country.

As a result of all these conditions affecting the life of the Japanese, both aliens and citizens, in the Pacific Coast area, there has been relatively little social intercourse between them and the white population.

...

Viewing these data in all their aspects, Congress and the Executive could reasonably have concluded that these conditions have encouraged the continued attachment of members of this group to Japan and Japanese institutions. These are only some of the many considerations which those charged with the responsibility for the national defense could take into account in determining the nature and extent of the danger of espionage and sabotage in the event of invasion or air raid attack. The extent of that danger could be definitely known only after the

event, and after it was too late to meet it. Whatever views we may entertain regarding the loyalty to this country of the citizens of Japanese ancestry, we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.

...

But appellant insists that the exercise of the power is inappropriate and unconstitutional because it discriminates against citizens of Japanese ancestry, in violation of the Fifth Amendment. The Fifth Amendment contains no equal protection clause, and it restrains only such discriminatory legislation by Congress as amounts to a denial of due process. *Detroit Bank v. United States*, 317 U. S. 329, 317 U. S. 337-338, and cases cited...

...

Distinctions between citizens solely because of their ancestry are, by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection. *Yick Wo v. Hopkins*, 118 U. S. 356; *Yu Cong Eng v. Trinidad*, 271 U. S. 500; *Hill v. Texas*, 316 U. S. 400. We may assume that these considerations would be controlling here were it not for the fact that the danger of espionage and sabotage, in time of war and of threatened invasion, calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas. Because racial discriminations are in most circumstances irrelevant, and therefore prohibited, it by no means follows that, in dealing with the perils of war, Congress and the Executive are wholly precluded from taking into account those facts and circumstances which are relevant to measures for our national defense and for the successful prosecution of the war, and which may, in fact, place citizens of one ancestry in a different category from others. "We must never forget that it is *a constitution* we are expounding," "a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs." *McCulloch v. Maryland*, 4 Wheat. 316, 17 U. S. 407, 17 U. S. 415. The adoption by Government, in the crisis of war and of threatened invasion, of measures for the public safety, based upon the recognition of facts and circumstances which indicate that a group of one national extraction may menace that safety more than others, is not wholly beyond the limits of the Constitution, and is not to be condemned merely because, in other and in most circumstances, racial distinctions are irrelevant. *Cf. Clarke v. Deckebach*, 274 U. S. 392, and cases cited.

Here, the aim of Congress and the Executive was the protection against sabotage of war materials and utilities in areas thought to be in danger of Japanese invasion and air attack. We have stated in detail facts and circumstances with respect to the American citizens of Japanese

ancestry residing on the Pacific Coast which support the judgment of the war-waging branches of the Government that some restrictive measure was urgent. We cannot say that these facts and circumstances, considered in the particular war setting, could afford no ground for differentiating citizens of Japanese ancestry from other groups in the United States. The fact alone that attack on our shores was threatened by Japan, rather than another enemy power, set these citizens apart from others who have no particular associations with Japan.

Our investigation here does not go beyond the inquiry whether, in the light of all the relevant circumstances preceding and attending their promulgation, the challenged orders and statute afforded a reasonable basis for the action taken in imposing the curfew. We cannot close our eyes to the fact, demonstrated by experience, that, in time of war, residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry. Nor can we deny that Congress, and the military authorities acting with its authorization, have constitutional power to appraise the danger in the light of facts of public notoriety. We need not now attempt to define the ultimate boundaries of the war power. We decide only the issue as we have defined it -- we decide only that the curfew order as applied, and at the time it was applied, was within the boundaries of the war power. In this case, it is enough that circumstances within the knowledge of those charged with the responsibility for maintaining the national defense afforded a rational basis for the decision which they made. Whether we would have made it is irrelevant.

...

The purpose of Executive Order No. 9066, and the standard which the President approved for the orders authorized to be promulgated by the military commander -- as disclosed by the preamble of the Executive Order -- was the protection of our war resources against espionage and sabotage. Public Proclamations No. 1 and 2, by General DeWitt, contain findings that the military areas created and the measures to be prescribed for them were required to establish safeguards against espionage and sabotage. Both the Executive Order and the Proclamations were before Congress when the Act of March 21, 1942, was under consideration. To the extent that the Executive Order authorized orders to be promulgated by the military commander to accomplish the declared purpose of the Order, and to the extent that the findings in the Proclamations establish that such was their purpose, both have been approved by Congress.

...

Affirmed.

MR. JUSTICE DOUGLAS concurring.

While I concur in the result and agree substantially with the opinion of the Court, I wish to add a few words to indicate what, for me, is the narrow ground of decision.

After the disastrous bombing of Pearl Harbor, the military had a grave problem on its hands. The threat of Japanese invasion of the west coast was not fanciful, but real. The presence of many thousands of aliens and citizens of Japanese ancestry in or near to the key points along that coastline aroused special concern in those charged with the defense of the country. They believed that not only among aliens, but also among citizens of Japanese ancestry, there were those who would give aid and comfort to the Japanese invader and act as a fifth column before and during an invasion. If the military were right in their belief that, among citizens of Japanese ancestry, there was an actual or incipient fifth column, we were indeed faced with the imminent threat of a dire emergency. We must credit the military with as much good faith in that belief as we would any other public official acting pursuant to his duties. We cannot possibly know all the facts which lay behind that decision. Some of them may have been as intangible and as imponderable as the factors which influence personal or business decisions in daily life. The point is that we cannot sit in judgment on the military requirements of that hour. Where the orders under the present Act have some relation to "protection against espionage and against sabotage," our task is at an end.

...

Since we cannot override the military judgment which lay behind these orders, it seems to me necessary to concede that the army had the power to deal temporarily with these people on a group basis. Petitioner therefore was not justified in disobeying the orders.

But I think it important to emphasize that we are dealing here with a problem of loyalty, not assimilation. Loyalty is a matter of mind and of heart, not of race. That indeed is the history of America. Moreover, guilt is personal under our constitutional system. Detention for reasonable cause is one thing. Detention on account of ancestry is another.

...

There are other instances in the law where one must obey an order before he can attack as erroneous the classification in which he has been placed. Thus, it is commonly held that one who is a conscientious objector has no privilege to defy the Selective Service Act and to refuse or fail to be inducted. He must submit to the law. But that line of authority holds that, after induction, he may obtain through habeas corpus a hearing on the legality of his classification by the draft board. Whether, in the present situation, that remedy would be available is one of the large and important issues reserved by the present decision. It has been suggested that an administrative procedure has been established to relieve against unwarranted applications of these orders. Whether, in that event, the administrative remedy would be the only one available or would have to be first exhausted is also reserved. The scope of any relief which might be afforded -- whether the liberties of an applicant could be restored only outside the areas in question -- is likewise a distinct issue. But if it were plain that no machinery was available whereby the individual could demonstrate his loyalty as a citizen in order to be reclassified, questions of a more serious character would be presented. The United States, however, takes no such position. We need go

no further here than to deny the individual the right to defy the law. It is sufficient to say that he cannot test in that way the validity of the orders as applied to him.

MR. JUSTICE MURPHY, concurring.

It is not to be doubted that the action taken by the military commander in pursuance of the authority conferred upon him was taken in complete good faith and in the firm conviction that it was required by considerations of public safety and military security. Neither is it doubted that the Congress and the Executive, working together, may generally employ such measures as are necessary and appropriate to provide for the common defense and to wage war "with all the force necessary to make it effective." *United States v. Macintosh*, 283 U. S. 605, 283 U. S. 622. This includes authority to exercise measures of control over persons and property which would not in all cases be permissible in normal times. It does not follow, however, that the broad guaranties of the Bill of Rights and other provisions of the Constitution protecting essential liberties are suspended by the mere existence of a state of war. It has been frequently stated and recognized by this Court that the war power, like the other great substantive powers of government, is subject to the limitations of the Constitution...

Distinctions based on color and ancestry are utterly inconsistent with our traditions and ideals. They are at variance with the principles for which we are now waging war. We cannot close our eyes to the fact that, for centuries, the Old World has been torn by racial and religious conflicts and has suffered the worst kind of anguish because of inequality of treatment for different groups. There was one law for one and a different law for another. Nothing is written more firmly into our law than the compact of the Plymouth voyagers to have just and equal laws. To say that any group cannot be assimilated is to admit that the great American experiment has failed, that our way of life has failed when confronted with the normal attachment of certain groups to the lands of their forefathers. As a nation, we embrace many groups, some of them among the oldest settlements in our midst, which have isolated themselves for religious and cultural reasons.

Today is the first time, so far as I am aware, that we have sustained a substantial restriction of the personal liberty of citizens of the United States based upon the accident of race or ancestry. Under the curfew order here challenged, no less than 70,000 American citizens have been placed under a special ban and deprived of their liberty because of their particular racial inheritance. In this sense, it bears a melancholy resemblance to the treatment accorded to members of the Jewish race in Germany and in other parts of Europe. The result is the creation in this country of two classes of citizens for the purposes of a critical and perilous hour -- to sanction discrimination between groups of United States citizens on the basis of ancestry. In my opinion, this goes to the very brink of constitutional power.

Except under conditions of great emergency, a regulation of this kind applicable solely to citizens of a particular racial extraction would not be regarded as in accord with the requirement

of due process of law contained in the Fifth Amendment. We have consistently held that attempts to apply regulatory action to particular groups solely on the basis of racial distinction or classification is not in accordance with due process of law as prescribed by the Fifth and Fourteenth Amendments.

...

In voting for affirmance of the judgment, I do not wish to be understood as intimating that the military authorities in time of war are subject to no restraints whatsoever, or that they are free to impose any restrictions they may choose on the rights and liberties of individual citizens or groups of citizens in those places which may be designated as "military areas." While this Court sits, it has the inescapable duty of seeing that the mandates of the Constitution are obeyed. That duty exists in time of war as well as in time of peace, and, in its performance, we must not forget that few indeed have been the invasions upon essential liberties which have not been accompanied by pleas of urgent necessity advanced in good faith by responsible men. *Cf.* Mr. Justice Brandeis concurring in *Whitney v. California*, 274 U. S. 357, 274 U. S. 372.

Nor do I mean to intimate that citizens of a particular racial group whose freedom may be curtailed within an area threatened with attack should be generally prevented from leaving the area and going at large in other areas that are not in danger of attack and where special precautions are not needed. Their status as citizens, though subject to requirements of national security and military necessity, should at all times be accorded the fullest consideration and respect. When the danger is past, the restrictions imposed on them should be promptly removed and their freedom of action fully restored.

Korematsu v. U.S. (1944)

The petitioner, an American citizen of Japanese descent, was convicted in a federal district court for remaining in San Leandro, California, a 'Military Area', contrary to Civilian Exclusion Order No. 34 of the Commanding General *216 of the Western Command, U.S. Army, which directed that after May 9, 1942, all persons of Japanese ancestry should be excluded from that area.

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

[The Exclusion] order, issued after we were at war with Japan, declared that "the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities.

In the light of the principles we announced in the Hirabayashi case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude *218 those of Japanese ancestry from **195 the West Coast war area at the time they did. True, exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 p.m. to 6 a.m. Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either. But exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage.

Like curfew, exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of *219 whom we have no doubt were loyal to this country. It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the entire group was rested by the military on the same ground.

In doing so, we are not unmindful of the hardships imposed by it upon a large group of American citizens. . . . But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.

It is [also] argued that the validity of the exclusion order cannot be considered apart from the orders requiring him, after departure from the area, to report and to remain in an assembly or relocation center. The contention is that we must treat these separate orders as one and inseparable; that, for this reason, if detention in the assembly or relocation center would have illegally deprived the petitioner of his liberty, the exclusion order and his conviction under it cannot stand.

Had petitioner here left the prohibited area and gone to an assembly center we cannot say either as a matter of fact or law, that his presence in that center would have resulted in his detention in a relocation center. [Some who did report to the assembly center were not sent to relocation centers, but were released upon condition that they remain outside the prohibited zone until the military orders were modified or lifted. This illustrates that they pose different problems and may be governed by different principles. The lawfulness of one does not necessarily determine the lawfulness of the others. This is made clear *222 when we analyze the requirements of the separate provisions of the separate orders. These separate requirements were that those of Japanese ancestry (1) depart from the area; (2) report to and temporarily remain in an assembly center; (3) go under military control to a relocation center there to remain for an indeterminate period until released conditionally or unconditionally by the military authorities. Each of these requirements, it will be noted, imposed distinct duties in connection with the separate steps in a complete evacuation program.

Since the petitioner has not been convicted of failing to report or to remain in an assembly or relocation center, we cannot in this case determine the validity of those separate provisions of the

order. It is sufficient here for us to pass upon the order which petitioner violated. To do more would be to go beyond the issues raised, and to decide momentous questions not contained within the framework of the pleadings or the evidence in this case.

Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. Regardless of the true nature of the assembly and relocation centers—and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies—we are dealing specifically with nothing but an exclusion order. To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for *224 action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.

Affirmed.

Mr. Justice FRANKFURTER, concurring. [A]dd[s] a few words of [his] own.

Mr. Justice ROBERTS, dissenting.

[This] is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. If this be a correct statement of the facts disclosed by this record, and facts of which we take judicial notice, I need hardly labor the conclusion that Constitutional rights have been violated.

Mr. Justice MURPHY, dissenting.

This exclusion of “all persons of Japanese **202 ancestry, both alien and non-alien,” from the Pacific Coast area on a plea of military necessity in the absence of martial law ought not to be approved. Such exclusion goes over “the very brink of constitutional power” and falls into the ugly abyss of racism.

In dealing with matters relating to the prosecution and progress of a war, we must accord great respect and consideration *234 to the judgments of the military authorities who are on the scene and who have full knowledge of the military facts. The scope of their discretion must, as a matter of necessity and common sense, be wide. And their judgments ought not to be overruled lightly

by those whose training and duties ill-equip them to deal intelligently with matters so vital to the physical security of the nation.

At the same time, however, it is essential that there be definite limits to military discretion, especially where martial law has not been declared. Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support. Thus, like other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled.

The judicial test of whether the Government, on a plea of military necessity, can validly deprive an individual of any of his constitutional rights is whether the deprivation is reasonably related to a public danger that is so 'immediate, imminent, and impending' as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger. . . . Exclusion Order No. 34, banishing from a prescribed area of the Pacific Coast "all persons of Japanese ancestry, both alien and non-alien," clearly does not meet that test. . . . no reasonable relation to an 'immediate, imminent, and impending' public danger is evident to support this racial restriction which is one of the most sweeping and complete deprivations of constitutional rights in the history of this nation in the absence of martial law.

And that relation is lacking because the exclusion order necessarily must rely for its reasonableness upon the assumption that all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage and to aid our Japanese enemy in other ways. It is difficult to believe that reason, logic or experience could be marshalled in support of such an assumption.

That this forced exclusion was the result in good measure of this erroneous assumption of racial guilt rather than *236 bona fide military necessity is evidenced by the Commanding General's Final Report on the evacuation from the Pacific Coast area.¹ **203 In it he refers to all individuals of Japanese descent as 'subversive,' as belonging to 'an enemy race' whose 'racial strains are undiluted,' and as constituting "over 112,000 potential enemies * * * at large today" along the Pacific Coast.² In support of this blanket condemnation of all persons of Japanese descent, however, no reliable evidence is cited to show that such individuals were generally disloyal,³ or had generally so conducted themselves in this area as to constitute a special menace to defense installations or war industries, or had otherwise by their behavior furnished reasonable ground for their exclusion as a group.

*241 No adequate reason is given for the failure to treat these Japanese Americans on an individual basis by holding investigations and hearings to separate the loyal from the disloyal, as was done in the case of persons of German and Italian ancestry. See House Report No. 2124 (77th Cong., 2d Sess.) 247-52. It is asserted merely that the loyalties of this group "were unknown and time was of the essence."

**206 I dissent, therefore, from this legalization of racism.

Mr. Justice JACKSON, dissenting.

If Congress in peace-time legislation should *244 enact such a criminal law, I should suppose this Court would refuse to enforce it.

But the 'law' which this prisoner is convicted of disregarding is not found in an act of Congress, but in a military order.

It would be impracticable and dangerous idealism to expect or insist that each specific military command in an area of probable operations will conform to conventional tests of constitutionality. When an area is so beset that it must be put under military control at all, the paramount consideration is that its measures be successful, rather than legal. The armed services must protect a society, not merely its Constitution.

. . . once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.

*248 Of course the existence of a military power resting on force, so vagrant, so centralized, so necessarily heedless of the individual, is an inherent threat to liberty. But I would not lead people to rely on this Court for a review that seems to me wholly delusive.

My duties as a justice as I see them do not require me to make a military judgment as to whether General DeWitt's evacuation and detention program was a reasonable military necessity. I do not suggest that the courts should have attempted to interfere with the Army in carrying out its task. But I do not think they may be asked to execute a military expedient that has no place in law under the Constitution. I would reverse the judgment and discharge the prisoner.

Ex parte Endo, 323 U.S. 283 (1944)

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

...

Mitsuye Endo, hereinafter designated as the appellant, is an American citizen of Japanese ancestry. She was evacuated from Sacramento, California, in 1942, pursuant to certain military orders which we will presently discuss, and was removed to the Tule Lake War Relocation Center located at Newell, Modoc County, California. In July, 1942, she filed a petition for a writ of habeas corpus in the District Court of the United States for the Northern District of California, asking that she be discharged and restored to liberty. That petition was denied by the District

Court in July, 1943, and an appeal was perfected to the Circuit Court of Appeals in August, 1943. Shortly thereafter, appellant was transferred from the Tule Lake Relocation Center to the Central Utah Relocation Center located at Topaz, Utah, where she is presently detained...

The history of the evacuation of Japanese aliens and citizens of Japanese ancestry from the Pacific coastal regions, following the Japanese attack on our Naval Base at Pearl Harbor on December 7, 1941, and the declaration of war against Japan on December 8, 1941, 55 Stat. 795, has been reviewed in *Hirabayashi v. United States*, 320 U. S. 81. It need be only briefly recapitulated here. On February 19, 1942, the President promulgated Executive Order No. 9066, 7 Fed.Reg. 1407. It recited that

"the successful prosecution of the war requires every possible protection against espionage and against sabotage to national defense material, national defense premises, and national defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655 (U.S.C. Title 50, Sec. 104)."

And it authorized and directed

"the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion...

[The Pacific Coast was subsequently declared a military area under this Executive Order]

... Appellant's exclusion was effected by Civilian Exclusion Order No. 52, dated May 7, 1942. It ordered that "all persons of Japanese ancestry, both alien and nonalien" be excluded from Sacramento, California, beginning at noon on May 16, 1942. Appellant was evacuated to the Sacramento Assembly Center on May 15, 1942, and was transferred from there to the Tule Lake Relocation Center on June 19, 1942.

...

[Endo's] petition for a writ of habeas corpus alleges that she is a loyal and law-abiding citizen of the United States, that no charge has been made against her, that she is being unlawfully detained, and that she is confined in the Relocation Center under armed guard and held there against her will.

It is conceded by the Department of Justice and by the War Relocation Authority that appellant is a loyal and law-abiding citizen. They make no claim that she is detained on any charge, or that she is even suspected of disloyalty. Moreover, they do not contend that she may be held any

longer in the Relocation Center. They concede that it is beyond the power of the War Relocation Authority to detain citizens against whom no charges of disloyalty or subversiveness have been made for a period longer than that necessary to separate the loyal from the disloyal and to provide the necessary guidance for relocation. But they maintain that detention for an additional period after leave clearance has been granted is an essential step in the evacuation program...

...

First. We are of the view that Mitsuye Endo should be given her liberty. In reaching that conclusion, we do not come to the underlying constitutional issues which have been argued. For we conclude that, whatever power the War Relocation Authority may have to detain other classes of citizens, it has no authority to subject citizens who are concededly loyal to its leave procedure.

...

... Broad powers frequently granted to the President or other executive officers by Congress so that they may deal with the exigencies of wartime problems have been sustained. And the Constitution, when it committed to the Executive and to Congress the exercise of the war power, necessarily gave them wide scope for the exercise of judgment and discretion so that war might be waged effectively and successfully. *Hirabayashi v. United States, supra*, p. 320 U. S. 93. At the same time, however, the Constitution is as specific in its enumeration of many of the civil rights of the individual as it is in its enumeration of the powers of his government. Thus, it has prescribed procedural safeguards surrounding the arrest, detention, and conviction of individuals. Some of these are contained in the Sixth Amendment, compliance with which is essential if convictions are to be sustained. *Tot v. United States, 319 U. S. 463*. And the Fifth Amendment provides that no person shall be deprived of liberty (as well as life or property) without due process of law. Moreover, as a further safeguard against invasion of the basic civil rights of the individual, it is provided in Art. I, Sec. 9 of the Constitution that "The Privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion, the public Safety may require it." See *Ex parte Milligan, supra*.

We mention these constitutional provisions not to stir the constitutional issues which have been argued at the bar, but to indicate the approach which we think should be made to an Act of Congress or an order of the Chief Executive that touches the sensitive area of rights specifically guaranteed by the Constitution. This Court has quite consistently given a narrower scope for the operation of the presumption of constitutionality when legislation appeared on its face to violate a specific prohibition of the Constitution. We have likewise favored that interpretation of legislation which gives it the greater chance of surviving the test of constitutionality. Those analogies are suggestive here. We must assume that the Chief Executive and members of Congress, as well as the courts, are sensitive to and respectful of the liberties of the citizen. In interpreting a war-time measure, we must assume that their purpose was to allow for the greatest possible accommodation between those liberties and the exigencies of war. We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the

lawmakers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used.

The Act of March 21, 1942, was a war measure. The House Report (H.Rep. No.1906, 77th Cong., 2d Sess., p. 2) stated,

"The necessity for this legislation arose from the fact that the safe conduct of the war requires the fullest possible protection against either espionage or sabotage to national defense material, national defense premises, and national defense utilities."

That was the precise purpose of Executive Order No. 9066, for, as we have seen, it gave as the reason for the exclusion of persons from prescribed military areas the protection of such property "against espionage and against sabotage." And Executive Order No. 9102, which established the War Relocation Authority, did so, as we have noted, "in order to provide for the removal from designated areas of persons whose removal is necessary in the interests of national security." The purpose and objective of the Act and of these orders are plain. Their single aim was the protection of the war effort against espionage and sabotage. It is in light of that one objective that the powers conferred by the orders must be construed.

...

A citizen who is concededly loyal presents no problem of espionage or sabotage. Loyalty is a matter of the heart and mind, not of race, creed, or color. He who is loyal is, by definition, not a spy or a saboteur. When the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized.

Nor may the power to detain an admittedly loyal citizen or to grant him a conditional release be implied as a useful or convenient step in the evacuation program, whatever authority might be implied in case of those whose loyalty was not conceded or established. If we assume (as we do) that the original evacuation was justified, its lawful character was derived from the fact that it was an espionage and sabotage measure, not that there was community hostility to this group of American citizens. The evacuation program rested explicitly on the former ground, not on the latter, as the underlying legislation shows. The authority to detain a citizen or to grant him a conditional release as protection against espionage or sabotage is exhausted, at least when his loyalty is conceded. If we held that the authority to detain continued thereafter, we would transform an espionage or sabotage measure into something else. That was not done by Executive Order No. 9066 or by the Act of March 21, 1942, which ratified it. What they did not do, we cannot do. Detention which furthered the campaign against espionage and sabotage would be one thing. But detention which has no relationship to that campaign is of a distinct character. Community hostility even to loyal evacuees may have been (and perhaps still is) a serious problem. But if authority for their custody and supervision is to be sought on that ground, the Act of March 21, 1942, Executive Order No. 9066, and Executive Order No. 9102, offer no support. And none other is advanced. To read them that broadly would be to assume that the

Congress and the President intended that this discriminatory action should be taken against these people wholly on account of their ancestry even though the government conceded their loyalty to this country. We cannot make such an assumption. As the President has said of these loyal citizens:

"Americans of Japanese ancestry, like those of many other ancestries, have shown that they can, and want to, accept our institutions and work loyally with the rest of us, making their own valuable contribution to the national wealth and wellbeing. In vindication of the very ideals for which we are fighting this war, it is important to us to maintain a high standard of fair, considerate, and equal treatment for the people of this minority, as of all other minorities."

Sen.Doc. No. 96, *supra*, note 7 p. 2.

Mitsuye Endo is entitled to an unconditional release by the War Relocation Authority.

...

The judgment is reversed, and the cause is remanded to the District Court for proceedings in conformity with this opinion.

Reversed.

MR. JUSTICE MURPHY, concurring.

I join in the opinion of the Court, but I am of the view that detention in Relocation Centers of persons of Japanese ancestry regardless of loyalty is not only unauthorized by Congress or the Executive, but is another example of the unconstitutional resort to racism inherent in the entire evacuation program. As stated more fully in my dissenting opinion in *Korematsu v. United States*, 323 U. S. 214, racial discrimination of this nature bears no reasonable relation to military necessity, and is utterly foreign to the ideals and traditions of the American people.

...

MR. JUSTICE ROBERTS, concurring.

...

I conclude, therefore, that the court is squarely faced with a serious constitutional question -- whether the relator's detention violated the guarantees of the Bill of Rights of the federal Constitution, and especially the guarantee of due process of law. There can be but one answer to that question. An admittedly loyal citizen has been deprived of her liberty for a period of years. Under the Constitution, she should be free to come and go as she pleases. Instead, her liberty of motion and other innocent activities have been prohibited and conditioned. She should be discharged.

CHAPTER IV: **Modern Executive “Inherent Powers”**

Youngstown Sheet and Tube Co. v. Sawyer (1952)

Mr. Justice BLACK delivered the opinion of the Court.

We are asked to decide whether the President was acting within his constitutional power when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills. The mill owners argue that the President's order amounts to lawmaking, a legislative function which the Constitution has expressly confided to the Congress and not to the President. The Government's position is that the order was made on findings of the President that his action was necessary to avert a national catastrophe which would inevitably result from a stoppage of steel production, and that in meeting this grave emergency the President was acting within the aggregate of his constitutional powers as the Nation's Chief Executive and the Commander in Chief of the Armed Forces of the United States.

In the latter part of 1951, a dispute arose between the steel companies and their employees over terms and conditions that should be included in new collective bargaining agreements. Long-continued conferences failed to resolve the dispute. . . . The indispensability of steel as a component of substantially all weapons and other war materials led the President to believe that the proposed work stoppage would immediately jeopardize our national defense and that governmental seizure of the steel mills was necessary in order to assure the continued availability of steel. Reciting these considerations for his action, the President, a few hours before the strike was to begin, issued Executive Order 10340, a copy of which is attached as an appendix, post, 72 S.Ct. 868. The order directed the Secretary of Commerce to take possession of most of the steel mills and keep them running.

Two crucial issues have developed: First. Should final determination of the constitutional validity of the President's order be made in this case which has proceeded no further than the preliminary injunction stage? Second. If so, is the seizure order within the constitutional power of the President?

[First] We agree with the District Court and can see no reason why that question was not ripe for determination on the record presented. We shall therefore consider and determine that question now.

[Second] The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied.

Moreover, the use of the seizure technique to solve labor disputes in order to prevent work stoppages was not only unauthorized by any congressional enactment; prior to this controversy, Congress had refused to adopt that method of settling labor disputes. When the Taft-Hartley Act was under consideration in 1947, Congress rejected an amendment which would have authorized such governmental seizures in cases of emergency.

[And] it is not claimed that express constitutional language grants this power to the President.

The order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces. . . . Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.

In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The *588 first section of the first article says that "All legislative Powers herein granted shall be vested in a Congress of the United States * * *.

The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President.

The power of Congress to adopt such public policies as those proclaimed by the order is beyond question. It can authorize the taking of private property for public use. It can make laws regulating the relationships between employers and employees, prescribing rules designed to settle labor disputes, and fixing wages and working conditions in certain fields of our economy. The Constitution did not subject this law-making power of Congress to presidential or military supervision or control.

The Founders of this Nation entrusted the law making power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand.

Mr. Justice FRANKFURTER.

Although the considerations relevant to the legal enforcement of the principle of separation of powers seem to me more complicated and flexible than any appear from **868 what Mr. Justice BLACK has written, I join his opinion because I thoroughly agree with the application of the principle to the circumstances of this case. Even though such differences in attitude toward this principle may be merely differences in emphasis and nuance, they can hardly be reflected by a

single opinion for the Court. Individual expression of views in reaching a common result is therefore important.

Mr. Justice JACKSON, concurring in the judgment and opinion of the Court.

That comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country will impress anyone who has served as legal adviser to a President in time of transition and public anxiety. . . . The opinions of judges, no less than executives and publicists, often suffer the infirmity of confusing the issue of a power's validity with the cause it is invoked to promote, of confounding the permanent executive office with its temporary occupant. The tendency is strong to emphasize transient results upon policies—such as wages or stabilization—and lose sight of enduring consequences upon the balanced power structure of our Republic.

The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress. We may well begin by a somewhat over-simplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity.

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.² In these circumstances, *636 and in these only, may he be said (for what it may **871 be worth), to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government *637 as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

2. 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 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.³

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling *638 the Congress from acting upon the subject.⁴ Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

640 This leaves the current seizure to be justified only by the severe tests under the third grouping, where it can be supported only by any remainder of executive power after subtraction of such powers as Congress may have over the subject. In short, we can sustain the President only by holding that seizure of such strike-bound industries is within his domain and beyond control by Congress. Thus, this Court's first review of such seizures occurs under circumstances which leave Presidential power most vulnerable to attack and in the least favorable of possible constitutional postures.

I have heretofore, and do now, give to the enumerated powers the scope and elasticity afforded by what seem to be reasonable practical implications instead of the rigidity dictated by a doctrinaire textualism.

Assuming that we are in a war de facto, whether it is or is not a war de jure, does that empower the Commander-in-Chief to seize industries he thinks necessary to supply our army? The Constitution expressly places in Congress power 'to raise and support Armies' and "to provide and maintain a Navy." (Emphasis supplied.) . . . On the other hand, if Congress sees fit to rely on free private enterprise collectively bargaining with free labor for support and maintenance of our armed forces can the Executive because of lawful disagreements incidental to that process, seize the facility for operation upon Government-imposed terms?

He has no monopoly of 'war powers,' whatever they are. While Congress cannot deprive the President of the command of the army and navy, only Congress can provide him an army or navy to command.

In view of the ease, expedition and safety with which Congress can grant and has granted large emergency powers, certainly ample to embrace this crisis, I am quite unimpressed with the argument that we should affirm possession of them without statute. Such power either has no beginning or it has no end. If it exists, it need submit to no legal restraint. I am not alarmed that it would plunge us straightway into dictatorship, but it is at least a step in that wrong direction.

The essence of our free Government is " 'leave to live by no man's leave, underneath the law' — to be governed by those impersonal forces which we call law. Our Government *655 is fashioned to fulfill this concept so far as humanly possible. The Executive, except for recommendation and veto, has no legislative power. The executive action we have here originates in the individual will of the President and represents an exercise of authority without

law. No one, perhaps not even the President, knows the limits of the power he may seek to exert in this instance and the parties affected cannot learn the limit of their rights.

Mr. Justice BURTON, concurring in both the opinion and judgment of the Court.

*660 The controlling fact here is that Congress, within its constitutionally delegated power, has prescribed for the President specific procedures, exclusive of seizure, for his use in meeting the present type of emergency. Congress has reserved to itself the right to determine where and when to authorize the seizure of property in meeting such an emergency. Under these circumstances, the President's order of April 8 invaded the jurisdiction of Congress. It violated the essence of the principle of the separation of governmental powers.

Mr. Justice CLARK, concurring in the judgment of the Court.

Some of our Presidents, such as Lincoln, "felt that measures otherwise unconstitutional might become lawful by becoming indispensable to the preservation of the Constitution through the preservation of the nation."⁵ *662 Others, such as Theodore Roosevelt, thought the President to be capable, as a 'steward' of the people, of exerting all power save that which is specifically prohibited by the Constitution or the Congress.⁶ In my view . . . the Constitution does grant to the President extensive authority in times of grave and imperative national emergency. In fact, to my thinking, such a grant may well be necessary to the very existence of the Constitution itself.

**884 I conclude that where Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis; but that in the absence of such action by Congress, the President's independent power to act depends upon the gravity of the situation confronting the nation. I cannot sustain the seizure in question because here, as in *Little v. Barreme*, 2 Cranch 170, 2 L.Ed. 243, Congress had prescribed methods to be followed by the President in meeting the emergency at hand.

**929 *667 Mr. Chief Justice VINSON, with whom Mr. Justice REED and Mr. Justice MINTON join, dissenting.

*668 Those who suggest that this is a case involving extraordinary powers should be mindful that these are extraordinary times. A world not yet recovered from the devastation of World War II has been forced to face the threat of another and more terrifying global conflict.

Further efforts to protect the free world from aggression are found in the congressional enactments of the Truman Plan for assistance to Greece and Turkey⁴ and *669 the Marshall Plan for economic aid needed to build up the strength of our friends in Western Europe.

Our treaties represent not merely legal obligations but show congressional recognition that mutual security for the free world is the best security against the threat of aggression on a global scale.

Congress also directed the President to build up our own defenses.

Appropriations for the Department of Defense, which had averaged less than \$13 billion per year for the three years before attack in Korea, were increased by Congress to \$48 billion for fiscal year 1951 and to \$60 billion for fiscal year 1952.

The steel mills were seized for a public use. The power of eminent domain, invoked in that case, is an essential attribute of sovereignty and has long been recognized as a power of the Federal Government. *Kohl v. United States*, 1876, 91 U.S. 367, 23 L.Ed. 449. . . . The Fifth Amendment provides: “nor shall private property be taken for public use, without just compensation.” It is no bar to this seizure for, if the taking is not otherwise unlawful, plaintiffs are assured of receiving the required just compensation. *United States v. Pewee Coal Co.*, 1951, 341 U.S. 114, 71 S.Ct. 670, 95 L.Ed. 809.

Under this view, the President is left powerless at the very moment when the need for action may be most pressing and when no one, other than he, is immediately *681 capable of action. Under this view, he is left powerless because a power not expressly given to Congress is nevertheless found to rest exclusively with Congress.

Whatever the extent of Presidential power on more tranquil occasions, and whatever the right of the President to execute legislative programs as he sees fit without reporting the mode of execution to Congress, the single Presidential purpose disclosed on this record is to faithfully execute the laws by acting in an emergency to maintain the status quo, thereby preventing collapse of the legislative programs until Congress could act. The President's action served the same purposes as a judicial stay entered to maintain the status quo in order to preserve the jurisdiction of a court.

Under the Taft-Hartley Act, as under the Wagner Act, collective bargaining and the right to strike are at the heart of our national labor policy. Taft-Hartley preserves the right to strike in any emergency, however serious, subject only to an 80-day delay in cases of strikes imperiling the national health and safety.⁸⁸ In such a case, the President may appoint a board of inquiry to report the facts of the labor dispute. Upon receiving that report, the President may direct the Attorney General to petition a District Court to enjoin the strike. If the injunction is granted, it may continue in effect for no more than 80 days, during which time the board of inquiry makes further report and efforts are made to settle the dispute. When the injunction is dissolved, the President is directed to submit a report to Congress together with his recommendations.

On the contrary, judicial, legislative and executive precedents throughout our history demonstrate that in this case the President acted in full conformity with his duties under the Constitution. Accordingly, we would reverse the order of the District Court.

CHAPTER V: **Executive Privileges, Immunities, and Congress's Power of Impeachment**

United States v. Nixon (1974)

Mr. Chief Justice BURGER delivered the opinion of the Court.

This litigation presents for review the denial of a motion, filed in the District Court on behalf of the President of the United States . . . to quash a third-party subpoena duces tecum issued by the [District Court] . . . The subpoena directed the President to produce certain tape recordings and documents relating to his conversations with aides and advisers.

On March 1, 1974, a grand jury of the United States District Court for the District of Columbia returned an indictment charging seven named individuals³ with various offenses, including conspiracy to defraud the United States and to obstruct justice. Although he was not designated as such in the indictment, the grand jury named the President, among others, as an unindicted coconspirator.⁴ On April 18, 1974, upon motion of the Special *688 Prosecutor, see n. 8, *infra*, a subpoena duces tecum was issued pursuant to Rule 17(c) to the President . . . This subpoena required the production, in advance of the September 9 trial date, of certain tapes, memoranda, papers, transcripts or other writings relating to certain precisely identified meetings between the President and others.⁵ The Special Prosecutor was able to fix the time, place, and persons present at these discussions because the White House daily logs and appointment records had been delivered to him. On April 30, the President publicly released edited transcripts of 43 conversations; portions of 20 conversations subject to subpoena in the present case were included. On May 1, 1974, the President's counsel, filed a 'special appearance' and a motion to quash the subpoena under Rule 17(c). This motion was accompanied by a formal claim of privilege.

I. JURISDICTION

The threshold question presented is whether the May 20, 1974, order of the District Court was an appealable order and whether this case was properly 'in' the Court of Appeals when the petition for certiorari was filed in this Court. 28 U.S.C. s 1254. The Court of Appeals' jurisdiction under 28 U.S.C. s 1291 encompasses only 'final decisions of the district courts.' Since the appeal was timely filed and all other procedural requirements were met, the petition is properly before this Court for consideration **3099 if the District Court order was final. 28 U.S.C. ss 1254(1), 2101(e).

This Court has 'consistently held that the necessity for expedition in the administration of the criminal law justifies putting one who seeks to resist the production of desired information to a choice between compliance with a trial court's order to produce prior to any review of that order,

and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal.’ *United States v. Ryan*, *supra*, 402 U.S., at 533, 91 S.Ct., at 1582.

The requirement of submitting to contempt, however, is not without exception and in some instances the purposes underlying the finality rule require a different result.

Here too, the traditional contempt avenue to immediate appeal is peculiarly inappropriate due to the unique setting in which the question arises. To require a President of the United States to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism for review of the ruling would be *692 unseemly, and would present an unnecessary occasion for constitutional confrontation between two branches of the Government.

**3100

I. JUSTICIABILITY

The President's counsel argues that the federal courts should not intrude into areas committed to the other branches of Government. *693 He views the present dispute as essentially a ‘jurisdictional’ dispute within the Executive Branch which he analogizes to a dispute between two congressional committees. Since the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case, . . . it is contended that a President's decision is final in determining what evidence is to be used in a given criminal case. Although his counsel concedes that the President has delegated certain specific powers to the Special Prosecutor, he has not ‘waived nor delegated to the Special Prosecutor the President's duty to claim privilege as to all materials . . . which fall within the President's inherent authority to refuse to disclose to any executive officer.’ Brief for the President 42. The Special Prosecutor's demand for the items therefore presents, in the view of the President's counsel, a political question under *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), since it involves a ‘textually demonstrable’ grant of power under Art. II.

The mere assertion of a claim of an ‘intra-branch dispute,’ without more, has never operated to defeat federal jurisdiction; justiciability does not depend on such a surface inquiry. In *United States v. ICC*, 337 U.S. 426, 69 S.Ct. 1410, 93 L.Ed. 1451 (1949), the Court observed, ‘courts must look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented.’

694 Our starting point is the nature of the proceeding for which the evidence is sought—here a pending criminal prosecution. It is a judicial proceeding in a federal court alleging violation of federal laws and is brought in the name of the United States as sovereign. *Verges v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935). Under the authority of Art. II, s 2, Congress has vested in the Attorney General the power to conduct the criminal litigation of the United States Government. 28 U.S.C. s 516. It has also vested in him the power to appoint subordinate officers to assist him in the discharge of his duties. 28 U.S.C. ss 509, 510, 515, 533. Acting pursuant to those statutes, the Attorney General has delegated the authority to represent the United States in these particular matters to a Special Prosecutor with unique authority and

tenure.⁸ The regulation gives the *695 Special **3101 Prosecutor explicit power to contest the invocation of executive privilege in the process of seeking evidence deemed relevant to the performance of these specially delegated duties.⁹ 38 Fed.Reg. 30739, as amended by 38 Fed.Reg. 32805.

In *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954), regulations of the Attorney General delegated certain of his discretionary powers to the Board *696 of Immigration Appeals and required that Board to exercise its own discretion on appeals in deportation cases. The Court held that so long as the Attorney General's regulations remained operative, he denied himself the authority to exercise the discretion delegated to the Board even though the original authority was his and he could reassert it by amending the regulations.

Here, as in *Accardi*, it is theoretically possible for the Attorney General to amend or revoke the regulation defining the Special Prosecutor's authority. But he has not done so.¹⁰ So long as this **3102 regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it. Moreover, the delegation of authority to the Special Prosecutor in this case is not an ordinary delegation by the Attorney General to a subordinate officer: with the authorization of the President, the Acting Attorney General provided in the regulation that the Special Prosecutor was not to be removed without the 'consensus' of eight designated leaders of Congress.

In the constitutional sense, controversy means more than disagreement and conflict; rather it means the kind of controversy courts traditionally resolve. Here *697 at issue is the production or nonproduction of specified evidence deemed by the Special Prosecutor to be relevant and admissible in a pending criminal case. It is sought by one official of the Executive Branch within the scope of his express authority; it is resisted by the Chief Executive on the ground of his duty to preserve the confidentiality of the communications of the President. Whatever the correct answer on the merits, these issues are 'of a type which are traditionally justiciable.'

II. Rule 17(c)

The subpoena duces tecum is challenged on the ground that the Special Prosecutor failed to satisfy the requirements of Fed.Rule Crim.Proc. 17(c), which governs *698 the issuance of subpoenas duces tecum in federal criminal proceedings. If we sustained this challenge, there would be no occasion to reach the claim of privilege asserted with respect to the subpoenaed material.

Rule 17(c) provides:

'A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and

may upon their production permit the books, papers, documents or objects or **3103 portions thereof to be inspected by the parties and their attorneys.’

A subpoena for documents may be quashed if their production would be ‘unreasonable or oppressive,’ but not otherwise. The leading case in this Court interpreting this standard is *Bowman Dairy Co. v. United States*, 341 U.S. 214, 71 S.Ct. 675, 95 L.Ed. 879 (1951). This case recognized certain fundamental characteristics of the subpoena duces tecum in criminal cases: (1) it was not intended to provide a means of discovery for criminal cases, *id.*, at 220, 71 S.Ct. 675; (2) its chief innovation was to expedite the trial by providing a time and place before trial for the inspection of *699 subpoenaed materials,¹¹ *ibid.* As both parties agree, cases decided in the wake of *Bowman* have generally followed Judge Weinfeld's formulation in *United States v. Iozia*, 13 F.R.D. 335, 338 (SDNY 1952), as to the required showing. Under this test, in order to require production prior to trial, the moving party must show: (1) that the documents are evidentiary¹² and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that *700 the application is made in good faith and is not intended as a general ‘fishing expedition.’

Against this background, the Special Prosecutor, in order to carry his burden, must clear three hurdles: (1) relevancy; (2) admissibility; (3) specificity. . . . Of course, the contents of the subpoenaed tapes could not at that stage be described fully by the Special Prosecutor, but there was a sufficient likelihood that each of the tapes contains conversations relevant to the offenses charged in the indictment.

*3104 We also conclude there was a sufficient preliminary showing that each of the subpoenaed tapes contains evidence admissible with respect to the offenses charged in the indictment. The most cogent objection to the admissibility of the taped conversations here at issue is that they are a collection of out-of-court statements by declarants who will not be subject to cross-examination and that the statements are therefore inadmissible hearsay. Here, however, most of the tapes apparently contain conversations *701 to which one or more of the defendants named in the indictment were party. The hearsay rule does not automatically bar all out-of-court statements by a defendant in a criminal case.

We also conclude that the Special Prosecutor has made a sufficient showing to justify a subpoena for production before trial.

*703

IV. THE CLAIM OF PRIVILEGE

The first contention is a broad claim that the separation of powers doctrine precludes judicial review of a President's claim of privilege. The second contention is that if he does not prevail on

the claim of absolute privilege, the court should hold as a matter of constitutional law that the privilege prevails over the subpoena duces tecum.

In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. The President's counsel, as we have noted, reads the Constitution as providing an absolute privilege of confidentiality for all Presidential communications. Many decisions of this Court, however, have unequivocally reaffirmed the holding of *Marbury v. Madison*, . . . that '(i)t is emphatically the province and duty of the judicial department to say what the law is.'

Our system of government 'requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch.'

Notwithstanding the deference each branch must accord the others, the 'judicial Power of the United States' vested in the federal courts by Art. III, s 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto.

In support of his claim of absolute privilege, the President's counsel urges two grounds, one of which is common to all governments and one of which is peculiar to our system of separation of powers. The first ground is the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties . . .

The second ground asserted by the President's counsel in support of the claim of absolute privilege rests on the doctrine of separation of powers.

However, neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. The President's need for complete candor and objectivity ^{**3107} from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide.

Since we conclude that the legitimate needs of the judicial process may outweigh Presidential privilege, it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch.

A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.

But this presumptive privilege must be considered in light of our historic commitment to the rule of law. This *709 is nowhere more profoundly manifest than in our view that ‘the twofold aim (of criminal justice) is that guilt shall not escape or innocence suffer.’ . . . The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts.

‘It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate. . .

No case of the Court, however, has extended this high degree of deference to a President's generalized interest in confidentiality.

In this case we must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President's responsibilities against the inroads of such a privilege on the fair *712 administration of criminal justice.¹⁹ The interest in preserving confidentiality is weighty indeed and entitled to great respect. However, we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution.

*3110 On the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts.

Upon receiving a claim of privilege from the Chief Executive, it became the further duty of the District Court to treat the subpoenaed material as presumptively privileged and to require the Special Prosecutor to demonstrate that the Presidential material was ‘essential to the justice of the (pending criminal) case.’

Affirmed.

Clinton v. Jones (1997)

Justice STEVENS delivered the opinion of the Court.

This case raises a constitutional and a prudential question concerning the Office of the President of the United States. Respondent, a private citizen, seeks to recover damages from the current occupant of that office based on actions allegedly taken before his term began. The President submits that in all but the most exceptional cases the Constitution requires federal courts to defer such litigation until his term ends and that, in any event, respect for the office warrants such a stay. Despite the force of the arguments supporting the President's submissions, we conclude that they must be rejected.

Those allegations principally describe events that are said to have occurred on the afternoon of May 8, 1991, during an official conference held at the Excelsior Hotel in Little Rock, Arkansas. The Governor delivered a speech at the conference; respondent—working as a state employee—staffed the registration desk. She alleges that Ferguson persuaded her to leave her desk and to visit the Governor in a business suite at the hotel, where he made “abhorrent”² sexual advances that she vehemently rejected. She further claims that her superiors at work subsequently dealt with her in a hostile and rude manner, and changed her duties to punish her for rejecting those advances.

**1641 The District Judge denied the motion to dismiss on immunity grounds and ruled that discovery in the case could go forward, but ordered any trial stayed until the end of petitioner's Presidency.

Petitioner's principal submission—that “in all but the most exceptional cases,” Brief for Petitioner i, the Constitution affords the President temporary immunity from civil damages litigation arising out of events that occurred before he took office—cannot be sustained on the basis of precedent.

The principal rationale for affording certain public servants immunity from suits for money damages arising out of *693 their official acts is inapplicable to unofficial conduct. In cases involving prosecutors, legislators, and judges we have repeatedly explained that the immunity serves the public interest in enabling such officials to perform their designated functions effectively without fear that a particular decision may give rise to personal liability.

[Previous] reasoning provides no support for an immunity for unofficial conduct.

Moreover, when defining the scope of an immunity for acts clearly taken within an official capacity, we have applied a functional approach. “Frequently our decisions have held that an official's absolute immunity should extend only to acts in performance of particular functions of his office.” *Id.*, at 755, 102 S.Ct., at 2704. Hence, for example, a judge's absolute immunity does not extend to actions performed in a purely administrative *695 capacity.

We are also unpersuaded by the evidence from the historical record to which petitioner has called our attention. . . .

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.... They largely cancel each other.”

Petitioner's strongest argument supporting his immunity claim is based on the text and structure of the Constitution. . . . The President argues merely for a postponement of the judicial proceedings that will determine whether he violated any law.

As a starting premise, petitioner contends that he occupies a unique office with powers and responsibilities so vast and important that the public interest demands that he devote his undivided time and attention to his public duties.

It does not follow, however, that separation-of-powers principles would be violated by allowing this action to proceed. The doctrine of separation of powers is concerned with the allocation of official power among the three coequal branches of our Government.

*701 Of course the lines between the powers of the three branches are not always neatly defined. See *Mistretta v. United States*, 488 U.S. 361, 380–381, 109 S.Ct. 647, 659–660, 102 L.Ed.2d 714 (1989).³⁵ But in this case there **1648 is no suggestion that the Federal Judiciary is being asked to perform any function that might in some way be described as “executive.” Respondent is merely asking the courts to exercise their core Article III jurisdiction to decide cases and controversies.

As we have already noted, in the more than 200–year history of the Republic, only three sitting Presidents have been subjected to suits for their private actions.³⁶ See *supra*, at 1643. If the past is any indicator, it seems unlikely that a deluge of such litigation will ever engulf the Presidency.

First, we have long held that when the President takes official action, the Court has the authority to determine whether he has acted within the law. Perhaps the most dramatic example of such a case is our holding that President Truman exceeded his constitutional authority when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills in order to avert a national catastrophe.

Second, it is also settled that the President is subject to judicial process in appropriate circumstances. Although Thomas Jefferson apparently thought otherwise, Chief Justice Marshall, when presiding in the treason trial of Aaron Burr, ruled that a subpoena duces tecum could be directed *704 to the President.

If the Judiciary may severely burden the Executive Branch by reviewing the legality of the President's official conduct, and if it may direct appropriate process to the President himself, it must follow that the federal courts have power to determine the legality of his unofficial conduct. The burden on the President's time and energy that is a mere byproduct of such review surely

cannot be considered as onerous as the direct burden imposed by judicial review and the occasional invalidation of his official actions.

The decision to postpone the trial was, furthermore, premature. The proponent of a stay bears the burden of establishing its need. *Id.*, at 255, 57 S.Ct., at 166. In this case, at the stage at which the District Court made its ruling, there was no way to assess whether a stay of trial after the completion of discovery would be warranted. Other than the fact that a trial may consume some of the President's time and attention, there is nothing in the record to enable a judge to assess the potential harm that may ensue from scheduling the trial promptly after discovery is concluded.

We add a final comment on two matters that are discussed at length in the briefs: the risk that our decision will generate a large volume of politically motivated harassing and frivolous litigation, and the danger that national security concerns might prevent the President from explaining a legitimate need for a continuance.

Most frivolous and vexatious litigation is terminated at the pleading stage or on summary judgment, with little if any personal involvement by the defendant. See Fed. Rules Civ. Proc. 12, 56. Moreover, the availability of sanctions provides a significant deterrent to litigation directed at the President in his unofficial capacity for purposes of political *709 gain or harassment.⁴² History indicates that the likelihood that a significant number of such cases will be filed is remote.

If Congress deems it appropriate to afford the President stronger protection, it may respond with appropriate legislation.

Justice BREYER, concurring in the judgment.

I agree with the majority that the Constitution does not automatically grant the President an immunity from civil lawsuits based upon his private conduct. Nor does the “doctrine of separation of powers ... require federal courts to stay” virtually “all private actions against the President until he leaves office.”

In my view, however, once the President sets forth and explains a conflict between judicial proceeding and public duties, the matter changes. At that point, the Constitution permits a judge to schedule a trial in an ordinary civil damages action (where postponement normally is possible without overwhelming damage to a plaintiff) only within the constraints of a constitutional principle—a principle that forbids a federal judge in such a case to interfere with the President's discharge of his public duties. I have no doubt that the Constitution contains such a principle applicable to civil suits, based upon Article II's vesting of the entire “executive Power” in a single individual, implemented through the Constitution's *711 structural separation of powers, and revealed both by history and case precedent.

For present purposes, this constitutional structure means that the President is not like Congress, for Congress can function as if it were whole, even when up to half of its members are absent, see U.S. Const., Art. I, § 5, cl. 1. It means that the President is not like the Judiciary, for judges

often can designate other judges, e.g., from other judicial circuits, to sit even should an entire court be detained by personal litigation. It means that, unlike Congress, which is regularly out of session, U.S. Const., Art. I, §§ 4, 5, 7, the President never adjourns.

I agree with the majority's determination that a constitutional defense must await a more specific showing of need; I do not agree with what I *724 believe to be an understatement of the "danger." And I believe that ordinary case-management principles are unlikely to prove sufficient to deal with private civil lawsuits for damages unless supplemented with a constitutionally based requirement that district courts schedule proceedings so as to avoid significant interference with the President's ongoing discharge of his official responsibilities.

It may well be that the trial of this case cannot take place without significantly interfering with the President's ability to carry out his official duties. Yet, I agree with the majority that there is no automatic temporary immunity and that the President should have to provide the District Court with a reasoned explanation of why the immunity is needed; and I also agree that, in the absence of that explanation, the court's postponement of the trial date was premature. For those reasons, I concur in the result.

CHAPTER VI:

Legislative Efforts to Restrain Presidential Powers

Bowsher v. Synar, 478 U.S. 714 (1986)

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented by these appeals is whether the assignment by Congress to the Comptroller General of the United States of certain functions under the Balanced Budget and Emergency Deficit Control Act of 1985 violates the doctrine of separation of powers.

I

A.

On December 12, 1985, the President signed into law the Balanced Budget and Emergency Deficit Control Act of 1985, Pub.L. 99-177, 99 Stat. 1038, 2 U.S.C. § 901 et seq. (1982 ed., Supp. III), popularly known as the "Gramm-Rudman-Hollings Act." The purpose of the Act is to eliminate the federal budget deficit. To that end, the Act sets a "maximum deficit amount" for federal spending for each of fiscal years 1986 through 1991. The size of that maximum deficit amount progressively reduces to zero in fiscal year 1991. If in any fiscal year the federal budget deficit exceeds the maximum deficit amount by more than a specified sum, the Act requires across-the-board cuts in federal spending to reach the targeted deficit level, with half of the cuts made to defense programs and the other half made to nondefense programs. The Act exempts certain priority programs from these cuts. § 255.

These "automatic" reductions are accomplished through a rather complicated procedure, spelled out in § 251, the so-called "reporting provisions" of the Act. Each year, the Directors of the Office of Management and Budget (OMB) and the Congressional Budget Office (CBO) independently estimate the amount of the federal budget deficit for the upcoming fiscal year. If that deficit exceeds the maximum targeted deficit amount for that fiscal year by more than a specified amount, the Directors of OMB and CBO independently calculate, on a program-by-program basis, the budget reductions necessary to ensure that the deficit does not exceed the maximum deficit amount. The Act then requires the Directors to report jointly their deficit estimates and budget reduction calculations to the Comptroller General.

The Comptroller General, after reviewing the Directors' reports, then reports his conclusions to the President. § 251(b). The President, in turn, must issue a "sequestration" order mandating the spending reductions specified by the Comptroller General. § 252. There follows a period during which Congress may by legislation reduce spending to obviate, in whole or in part, the need for

the sequestration order. If such reductions are not enacted, the sequestration order becomes effective and the spending reductions included in that order are made.

Anticipating constitutional challenge to these procedures, the Act also contains a "fallback" deficit reduction process to take effect "[i]n the event that any of the reporting procedures described in section 251 are invalidated." § 274(f). Under these provisions, the report prepared by the Directors of OMB and the CBO is submitted directly to a specially created Temporary Joint Committee on Deficit Reduction, which must report in five days to both Houses a joint resolution setting forth the content of the Directors' report. Congress then must vote on the resolution under special rules, which render amendments out of order. If the resolution is passed and signed by the President, it then serves as the basis for a Presidential sequestration order.

B.

Within hours of the President's signing of the Act, Congressman Synar, who had voted against the Act, filed a complaint seeking declaratory relief that the Act was unconstitutional. Eleven other Members later joined Congressman Synar's suit...

The District Court... held that the role of the Comptroller General in the deficit reduction process violated the constitutionally imposed separation of powers. The court first explained that the Comptroller General exercises executive functions under the Act. However, the Comptroller General, while appointed by the President with the advice and consent of the Senate, is removable not by the President but only by a joint resolution of Congress or by impeachment. The District Court reasoned that this arrangement could not be sustained under this Court's decisions *in Myers v. United States*, 272 U. S. 52 (1926), and *Humphrey's Executor v. United States*, 295 U. S. 602 (1935). Under the separation of powers established by the Framers of the Constitution, the court concluded, Congress may not retain the power of removal over an officer performing executive functions. The congressional removal power created a "here-and-now subservience" of the Comptroller General to Congress. 626 F. Supp. at 1392. The District Court therefore held that, "since the powers conferred upon the Comptroller General as part of the automatic deficit reduction process are executive powers, which cannot constitutionally be exercised by an officer removable by Congress, those powers cannot be exercised, and therefore the automatic deficit reduction process to which they are central cannot be implemented." *Id.* at 1403.

Appeals were taken directly to this Court pursuant to § 274(b) of the Act. We noted probable jurisdiction and expedited consideration of the appeals. 475 U.S. 1009 (1986). We affirm.

II

[The Court found that the appellees had standing to bring the suit.]

III

We noted recently that "[t]he Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial."

INS v. Chadha, 462 U. S. 919, 462 U. S. 951 (1983). The declared purpose of separating and dividing the powers of government, of course, was to "diffus[e] power the better to secure liberty." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 343 U. S. 635 (1952) (Jackson, J., concurring). Justice Jackson's words echo the famous warning of Montesquieu, quoted by James Madison in *The Federalist* No. 47, that "*there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates*". . . ." *The Federalist* No. 47, p. 325 (J. Cooke ed.1961).

Even a cursory examination of the Constitution reveals the influence of Montesquieu's thesis that checks and balances were the foundation of a structure of government that would protect liberty. The Framers provided a vigorous Legislative Branch and a separate and wholly independent Executive Branch, with each branch responsible ultimately to the people. The Framers also provided for a Judicial Branch equally independent, with "[t]he judicial Power . . . extend[ing] to all Cases, in Law and Equity, arising under this Constitution, and the Laws of the United States." Art. III, § 2.

Other, more subtle, examples of separated powers are evident as well. Unlike parliamentary systems such as that of Great Britain, no person who is an officer of the United States may serve as a Member of the Congress. Art. I, § 6. Moreover, unlike parliamentary systems, the President, under Article II, is responsible not to the Congress, but to the people, subject only to impeachment proceedings which are exercised by the two Houses as representatives of the people. Art. II, § 4. And even in the impeachment of a President, the presiding officer of the ultimate tribunal is not a member of the legislative Branch, but the Chief Justice of the United States. Art. I, § 3.

That this system of division and separation of powers produces conflicts, confusion, and discordance at times is inherent, but it was deliberately so structured to assure full, vigorous, and open debate on the great issues affecting the people, and to provide avenues for the operation of checks on the exercise of governmental power.

The Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts. The President appoints "Officers of the United States" with the "Advice and Consent of the Senate. . . ." Art. II, § 2. Once the appointment has been made and confirmed, however, the Constitution explicitly provides for removal of Officers of the United States by Congress only upon impeachment by the House of Representatives and conviction by the Senate. An impeachment by the House and trial by the Senate can rest only on "Treason, Bribery or other high Crimes and Misdemeanors." Art. II, § 4. A direct congressional role in the removal of officers charged with the execution of the laws beyond this limited one is inconsistent with separation of powers.

This was made clear in debate in the First Congress in 1789. When Congress considered an amendment to a bill establishing the Department of Foreign Affairs, the debate centered around whether the Congress "should recognize and declare the power of the President under the Constitution to remove the Secretary of Foreign Affairs without the advice and consent of the Senate." *Myers*, 272 U.S. at 272 U. S. 114. James Madison urged rejection of a congressional role in the removal of Executive Branch officers, other than by impeachment, saying in debate:

"Perhaps there was no argument urged with more success, or more plausibly grounded against the Constitution, under which we are now deliberating, than that founded on the mingling of the Executive and Legislative branches of the Government in one body. It has been objected, that the Senate have too much of the Executive power even, by having a control over the President in the appointment to office. Now, shall we extend this connexion between the Legislative and Executive departments, which will strengthen the objection, and diminish the responsibility we have in the head of the Executive?"

1 *Annals of Cong.* 380 (1789). Madison's position ultimately prevailed, and a congressional role in the removal process was rejected. This "Decision of 1789" provides "contemporaneous and weighty evidence" of the Constitution's meaning, since many of the Members of the First Congress "had taken part in framing that instrument." *Marsh v. Chambers*, 463 U. S. 783, 463 U. S. 790 (1983).

This Court first directly addressed this issue in *Myers v. United States*, 272 U. S. 52 (1925). At issue in *Myers* was a statute providing that certain postmasters could be removed only "by and with the advice and consent of the Senate." The President removed one such Postmaster without Senate approval, and a lawsuit ensued. Chief Justice Taft, writing for the Court, declared the statute unconstitutional on the ground that for Congress to

"draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power . . . would be . . . to infringe the constitutional principle of the separation of governmental powers."

Id. at 272 U. S. 161.

A decade later, in *Humphrey's Executor v. United States*, 295 U. S. 602 (1935), relied upon heavily by appellants, a Federal Trade Commissioner who had been removed by the President sought backpay. *Humphrey's Executor* involved an issue not presented either in the *Myers* case or in this case -- *i.e.*, the power of Congress to limit the President's powers of removal of a Federal Trade Commissioner. 295 U.S. at 295 U. S. 630. The relevant statute permitted removal "by the President," but only "for inefficiency, neglect of duty, or malfeasance in office." Justice Sutherland, speaking for the Court, upheld the statute, holding that "illimitable power of removal is not possessed by the President [with respect to Federal Trade Commissioners]." *Id.* at 295 U. S. 628-629. The Court distinguished *Myers*, reaffirming its holding that congressional participation in the removal of executive officers is unconstitutional. Justice Sutherland's opinion for the Court also underscored the crucial role of separated powers in our system:

"The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others has often been stressed, and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution, and in the rule which recognizes their essential co-equality."

In light of these precedents, we conclude that Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment. To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws. As the District Court observed:

"Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey."

626 F. Supp. at 1401. The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess.

...

IV

Appellants urge that the Comptroller General performs his duties independently and is not subservient to Congress. We agree with the District Court that this contention does not bear close scrutiny.

The critical factor lies in the provisions of the statute defining the Comptroller General's office relating to removability. Although the Comptroller General is nominated by the President from a list of three individuals recommended by the Speaker of the House of Representatives and the President *pro tempore* of the Senate, *see* 31 U.S.C. § 703(a)(2), and confirmed by the Senate, he is removable only at the initiative of Congress. He may be removed not only by impeachment, but also by joint resolution of Congress "at any time" resting on any one of the following bases:

"(i) permanent disability;"

"(ii) inefficiency;"

"(iii) neglect of duty;"

"(iv) malfeasance; or"

"(v) a felony or conduct involving moral turpitude."

31 U.S.C. § 703(e)(1)B. This provision was included, as one Congressman explained in urging passage of the Act, because Congress "felt that [the Comptroller General] should be brought

under the sole control of Congress, so that Congress, at any moment when it found he was inefficient and was not carrying on the duties of his office as he should and as the Congress expected, could remove him without the long tedious process of a trial by impeachment." 61 Cong.Rec. 1081 (1921).

...

This much said, we must also add that the dissent is simply in error to suggest that the political realities reveal that the Comptroller General is free from influence by Congress. The Comptroller General heads the General Accounting Office (GAO), "an instrumentality of the United States Government independent of the executive departments," 31 U.S.C. § 702(a), which was created by Congress in 1921 as part of the Budget and Accounting Act of 1921, 42 Stat. 23. Congress created the office because it believed that it "needed an officer, responsible to it alone, to check upon the application of public funds in accordance with appropriations." H. Mansfield, *The Comptroller General: A Study in the Law and Practice of Financial Administration* 65 (1939).

It is clear that Congress has consistently viewed the Comptroller General as an officer of the Legislative Branch. The Reorganization Acts of 1945 and 1949, for example, both stated that the Comptroller General and the GAO are "a part of the legislative branch of the Government." 59 Stat. 616; 63 Stat. 205. Similarly, in the Accounting and Auditing Act of 1950, Congress required the Comptroller General to conduct audits "as an agent of the Congress." 64 Stat. 835.

Over the years, the Comptrollers General have also viewed themselves as part of the Legislative Branch. In one of the early Annual Reports of Comptroller General, the official seal of his office was described as reflecting

"the independence of judgment to be exercised by the General Accounting Office, subject to the control of the legislative branch. . . . The combination represents an agency of the Congress independent of other authority auditing and checking the expenditures of the Government as required by law and subjecting any questions arising in that connection to quasijudicial determination."

GAO Ann. Rep. 5-6 (1924). Later, Comptroller General Warren, who had been a Member of Congress for 15 years before being appointed Comptroller General, testified:

"During most of my public life, . . . I have been a member of the legislative branch. Even now, although heading a great agency, it is an agency of the Congress, and *I am an agent of the Congress.*"

Against this background, we see no escape from the conclusion that, because Congress has retained removal authority over the Comptroller General, he may not be entrusted with executive powers. The remaining question is whether the Comptroller General has been assigned such powers in the Balanced Budget and Emergency Deficit Control Act of 1985.

V

The primary responsibility of the Comptroller General under the instant Act is the preparation of a "report." This report must contain detailed estimates of projected federal revenues and expenditures. The report must also specify the reductions, if any, necessary to reduce the deficit to the target for the appropriate fiscal year. The reductions must be set forth on a program-by-program basis.

In preparing the report, the Comptroller General is to have "due regard" for the estimates and reductions set forth in a joint report submitted to him by the Director of CBO and the Director of OMB, the President's fiscal and budgetary adviser. However, the Act plainly contemplates that the Comptroller General will exercise his independent judgment and evaluation with respect to those estimates. The Act also provides that the Comptroller General's report "shall explain fully any differences between the contents of such report and the report of the Directors." § 251(b)(2).

Appellants suggest that the duties assigned to the Comptroller General in the Act are essentially ministerial and mechanical, so that their performance does not constitute "execution of the law" in a meaningful sense. On the contrary, we view these functions as plainly entailing execution of the law in constitutional terms. Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of "execution" of the law. Under § 251, the Comptroller General must exercise judgment concerning facts that affect the application of the Act. He must also interpret the provisions of the Act to determine precisely what budgetary calculations are required. Decisions of that kind are typically made by officers charged with executing a statute.

The executive nature of the Comptroller General's functions under the Act is revealed in § 252(a)(3), which gives the Comptroller General the ultimate authority to determine the budget cuts to be made. Indeed, the Comptroller General commands the President himself to carry out, without the slightest variation (with exceptions not relevant to the constitutional issues presented), the directive of the Comptroller General as to the budget reductions:

"The [Presidential] order *must provide* for reductions in the manner specified in section 251(a)(3), *must incorporate* the provisions of the [Comptroller General's] report submitted under section 251(b), and *must be consistent with such report in all respects*. The President *may not modify or recalculate any of the estimates, determinations, specifications, bases, amounts, or percentages* set forth in the report submitted under section 251(b) in determining the reductions to be specified in the order with respect to programs, projects, and activities, or with respect to budget activities, within an account. . . ."

§ 252(a)(3) (emphasis added). *See also* § 251(d)(3)(A).

Congress, of course, initially determined the content of the Balanced Budget and Emergency Deficit Control Act, and undoubtedly the content of the Act determines the nature of the executive duty. However, as *Chadha* makes clear, once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment

only indirectly -- by passing new legislation. *Chadha*, 462 U. S. 958. By placing the responsibility for execution of the Balanced Budget and Emergency Deficit Control Act in the hands of an officer who is subject to removal only by itself, Congress, in effect, has retained control over the execution of the Act, and has intruded into the executive function. The Constitution does not permit such intrusion.

VI

[Chief Justice Burger stated that the proper remedy for this situation was to rely on the "fallback" provisions in the statute, which would kick in if the Comptroller General's role was found improper.]

VII

No one can doubt that Congress and the President are confronted with fiscal and economic problems of unprecedented magnitude, but

"the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives -- or the hallmarks -- of democratic government. . . ."

Chadha, *supra*, at 462 U. S. 944.

We conclude that the District Court correctly held that the powers vested in the Comptroller General under § 251 violate the command of the Constitution that the Congress play no direct role in the execution of the laws. Accordingly, the judgment and order of the District Court are affirmed.

Our judgment is stayed for a period not to exceed 60 days to permit Congress to implement the fallback provisions.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, concurring in the judgment.

When this Court is asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by the President, particularly an Act of Congress that confronts a deeply vexing national problem, it should only do so for the most compelling constitutional reasons. I agree with the Court that the "Gramm-Rudman-Hollings" Act contains a constitutional infirmity so severe that the flawed provision may not stand. I disagree with the Court, however, on the reasons why the Constitution prohibits the Comptroller General from exercising the powers assigned to him by § 251(b) and § 251(c)(2) of the Act. It is not the

dormant, carefully circumscribed congressional removal power that represents the primary constitutional evil. Nor do I agree with the conclusion of both the majority and the dissent that the analysis depends on a labeling of the functions assigned to the Comptroller General as "executive powers." *Ante* at 478 U. S. 732-734; *post* at 478 U. S. 764-765. Rather, I am convinced that the Comptroller General must be characterized as an agent of Congress because of his longstanding statutory responsibilities; that the powers assigned to him under the Gramm-Rudman-Hollings Act require him to make policy that will bind the Nation; and that, when Congress, or a component or an agent of Congress seeks to make policy that will bind the Nation, it must follow the procedures mandated by Article I of the Constitution -- through passage by both Houses and presentment to the President. In short, Congress may not exercise its fundamental power to formulate national policy by delegating that power to one of its two Houses, to a legislative committee, or to an individual agent of the Congress such as the Speaker of the House of Representatives, the Sergeant at Arms of the Senate, or the Director of the Congressional Budget Office. *INS v. Chadha*, 462 U. S. 919 (1983). That principle, I believe, is applicable to the Comptroller General...

JUSTICE WHITE, dissenting.

The Court, acting in the name of separation of powers, takes upon itself to strike down the Gramm-Rudman-Hollings Act, one of the most novel and far-reaching legislative responses to a national crisis since the New Deal. The basis of the Court's action is a solitary provision of another statute that was passed over 60 years ago and has lain dormant since that time. I cannot concur in the Court's action. Like the Court, I will not purport to speak to the wisdom of the policies incorporated in the legislation the Court invalidates; that is a matter for the Congress and the Executive, both of which expressed their assent to the statute barely half a year ago. I will, however, address the wisdom of the Court's willingness to interpose its distressingly formalistic view of separation of powers as a bar to the attainment of governmental objectives through the means chosen by the Congress and the President in the legislative process established by the Constitution. Twice in the past four years I have expressed my view that the Court's recent efforts to police the separation of powers have rested on untenable constitutional propositions leading to regrettable results. *See Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U. S. 50, 458 U. S. 92-118 (1982) (WHITE, J., dissenting); *INS v. Chadha*, 462 U. S. 919, 462 U. S. 967-1003 (1983) (WHITE, J., dissenting). Today's result is even more misguided. As I will explain, the Court's decision rests on a feature of the legislative scheme that is of minimal practical significance and that presents no substantial threat to the basic scheme of separation of powers. In attaching dispositive significance to what should be regarded as a triviality, the Court neglects what has in the past been recognized as a fundamental principle governing consideration of disputes over separation of powers:

"The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles

torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government."

Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579, 343 U. S. 635 (1952) (Jackson, J. concurring).

I

...

It is evident (and nothing in the Court's opinion is to the contrary) that the powers exercised by the Comptroller General under the Gramm-Rudman-Hollings Act are not such that vesting them in an officer not subject to removal at will by the President would in itself improperly interfere with Presidential powers. Determining the level of spending by the Federal Government is not, by nature, a function central either to the exercise of the President's enumerated powers or to his general duty to ensure execution of the laws; rather, appropriating funds is a peculiarly legislative function, and one expressly committed to Congress by Art. I, § 9, which provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." In enacting Gramm-Rudman-Hollings, Congress has chosen to exercise this legislative power to establish the level of federal spending by providing a detailed set of criteria for reducing expenditures below the level of appropriations in the event that certain conditions are met. Delegating the execution of this legislation -- that is, the power to apply the Act's criteria and make the required calculations -- to an officer independent of the President's will does not deprive the President of any power that he would otherwise have or that is essential to the performance of the duties of his office. Rather, the result of such a delegation, from the standpoint of the President, is no different from the result of more traditional forms of appropriation: under either system, the level of funds available to the Executive Branch to carry out its duties is not within the President's discretionary control. To be sure, if the budget-cutting mechanism required the responsible officer to exercise a great deal of policymaking discretion, one might argue that, having created such broad discretion, Congress had some obligation based upon Art. II to vest it in the Chief Executive or his agents. In Gramm-Rudman-Hollings, however, Congress has done no such thing; instead, it has created a precise and articulated set of criteria designed to minimize the degree of policy choice exercised by the officer executing the statute, and to ensure that the relative spending priorities established by Congress in the appropriations it passes into law remain unaltered. Given that the exercise of policy choice by the officer executing the statute would be inimical to Congress' goal in enacting "automatic" budget-cutting measures, it is eminently reasonable and proper for Congress to vest the budget-cutting authority in an officer who is, to the greatest degree possible, nonpartisan and independent of the President and his political agenda, and who therefore may be relied upon not to allow his calculations to be colored by political considerations. Such a delegation deprives the President of no authority that is rightfully his.

II

If, as the Court seems to agree, the assignment of "executive" powers under Gramm-Rudman-Hollings to an officer not removable at will by the President would not, in itself, represent a violation of the constitutional scheme of separated powers, the question remains whether, as the Court concludes, the fact that the officer to whom Congress has delegated the authority to implement the Act is removable by a joint resolution of Congress should require invalidation of the Act. The Court's decision, as I have stated above, is based on a syllogism: the Act vests the Comptroller with "executive power"; such power may not be exercised by Congress or its agents; the Comptroller is an agent of Congress because he is removable by Congress; therefore the Act is invalid. I have no quarrel with the proposition that the powers exercised by the Comptroller under the Act may be characterized as "executive" in that they involve the interpretation and carrying out of the Act's mandate. I can also accept the general proposition that, although Congress has considerable authority in designating the officers who are to execute legislation, *see supra*, at 478 U. S. 760-764, the constitutional scheme of separated powers does prevent Congress from reserving an executive role for itself or for its "agents." *Buckley v. Valeo*, 424 U.S. at 424 U. S. 120-141; *id.* at 424 U. S. 267-282 (WHITE, J., concurring in part and dissenting in part). I cannot accept, however, that the exercise of authority by an officer removable for cause by a joint resolution of Congress is analogous to the impermissible execution of the law by Congress itself, nor would I hold that the congressional role in the removal process renders the Comptroller an "agent" of the Congress, incapable of receiving "executive" power.

...

The majority's contrary conclusion rests on the rigid dogma that, outside of the impeachment process, any "direct congressional role in the removal of officers charged with the execution of the laws . . . is inconsistent with separation of powers." *Ante* at 478 U. S. 723. Reliance on such an unyielding principle to strike down a statute posing no real danger of aggrandizement of congressional power is extremely misguided and insensitive to our constitutional role. The wisdom of vesting "executive" powers in an officer removable by joint resolution may indeed be debatable -- as may be the wisdom of the entire scheme of permitting an unelected official to revise the budget enacted by Congress -- but such matters are, for the most part, to be worked out between the Congress and the President through the legislative process, which affords each branch ample opportunity to defend its interests. The Act vesting budget-cutting authority in the Comptroller General represents Congress' judgment that the delegation of such authority to counteract ever-mounting deficits is "necessary and proper" to the exercise of the powers granted the Federal Government by the Constitution; and the President's approval of the statute signifies his unwillingness to reject the choice made by Congress. *Cf. Nixon v. Administrator of General Services*, 433 U.S. at 433 U. S. 441. Under such circumstances, the role of this Court should be limited to determining whether the Act so alters the balance of authority among the branches of government as to pose a genuine threat to the basic division between the lawmaking power and the power to execute the law. Because I see no such threat, I cannot join the Court in striking down the Act.

I dissent.

Morrison v. Olson, et. al. (1988)

OPINION: CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

This case presents us with a challenge to the independent counsel provisions of the Ethics in Government Act of 1978, 28 U.S.C. §§ 49, 591 *et seq.* (1982 ed., Supp. V). We hold today that these provisions of the Act do not impermissibly interfere with the President's authority under Article II in violation of the constitutional principle of separation of powers.

I

Briefly stated, Title VI of the Ethics in Government Act (Title VI or the Act), 28 U.S.C. §§ 591–599 (1982 ed., Supp. V), allows for the appointment of an “independent counsel” to investigate and, if appropriate, prosecute certain high-ranking Government officials for violations of federal criminal laws. The Act requires the Attorney General, upon receipt of information that he determines is “sufficient to constitute grounds to investigate whether any person [covered by the Act] may have violated any Federal criminal law,” to conduct a preliminary investigation of the matter.... [If] the Attorney General has determined that there are “reasonable grounds to believe that further investigation or prosecution is warranted,” then he “shall apply to the division of the court for the appointment of an independent counsel.” ... Upon receiving this application, the Special Division “shall appoint an appropriate independent counsel and shall define that independent counsel's prosecutorial jurisdiction.” § 593(b).

With respect to all matters within the independent counsel's jurisdiction, the Act grants the counsel “full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice.” § 594(a).

[Two] statutory provisions govern the length of an independent counsel's tenure in office. The first defines the procedure for removing an independent counsel. Section 596(a)(1) provides:

“An independent counsel appointed under this chapter may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties.”

[The] other provision governing the tenure of the independent counsel defines the procedures for “terminating” the counsel's office. Under § 596(b)(1), the office of an independent counsel terminates when he or she notifies the Attorney General that he or she has completed or substantially completed any investigations or prosecutions undertaken pursuant to the Act. In addition, the Special Division, acting either on its own or on the suggestion of the Attorney General, may terminate the office of an independent counsel at any time if it finds that “the investigation of all matters within the prosecutorial jurisdiction of such independent counsel ... have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions.” § 596(b)(2).

[The] proceedings in this case provide an example of how the Act works in practice. In 1982, two Subcommittees of the House of Representatives issued subpoenas directing the Environmental Protection Agency (EPA) to produce certain documents relating to the efforts of the EPA and the Land and Natural Resources Division of the Justice Department to enforce the “Superfund Law.” At that time, appellee Olson was the Assistant Attorney General for the Office of Legal Counsel (OLC), appellee Schmults was Deputy Attorney General, and appellee Dinkins was the Assistant Attorney General for the Land and Natural Resources Division. Acting on the advice of the Justice Department, the President ordered the Administrator of EPA to invoke executive privilege to withhold certain of the documents on the ground that they contained “enforcement sensitive information.” ... In response, the House voted to hold the Administrator in contempt, after which the Administrator and the United States together filed a lawsuit against the House. The conflict abated in March 1983, when the administration agreed to give the House Subcommittees limited access to the documents.

The following year, the House Judiciary Committee began an investigation into the Justice Department's role in the controversy over the EPA documents. During this investigation, appellee Olson testified before a House Subcommittee on March 10, 1983...In 1985, the majority members of the Judiciary Committee published a lengthy report on the Committee's investigation. Report on Investigation of the Role of the Department of Justice in the Withholding of Environmental Protection Agency Documents from Congress in 1982–83, H.R.Rep. No. 99–435 (1985). The report...suggested that appellee Olson had given false and misleading testimony to the Subcommittee on March 10, 1983, and that appellees Schmults and Dinkins had wrongfully withheld certain documents from the Committee, thus obstructing the

Committee's investigation. The Chairman of the Judiciary Committee forwarded a copy of the report to the Attorney General with a request, pursuant to 28 U.S.C. § 592(c), that he seek the appointment of an independent counsel to investigate the allegations against Olson, Schmults, and Dinkins.

[On] April 23, 1986, the Special Division appointed James C. McKay as independent counsel to investigate “whether the testimony of ... Olson and his revision of such testimony on March 10, 1983, violated either 18 U.S.C. § 1505 or § 1001, or any other provision of federal law.” The court also ordered that the independent counsel “shall have jurisdiction to investigate any other allegation of evidence of violation of any Federal criminal law by Theodore Olson developed during investigations, by the Independent Counsel, referred to above, and connected with or arising out of that investigation, and Independent Counsel shall have jurisdiction to prosecute for any such violation.” Order, Div. No. 86–1 (CADC Special Division, April 23, 1986).

McKay later resigned as independent counsel, and on May 29, 1986, the Division appointed appellant Morrison as his replacement, with the same jurisdiction.

In January 1987, appellant asked the Attorney General pursuant to § 594(e) to refer to her as “related matters” the Committee's allegations against appellees Schmults and Dinkins. The Attorney General refused to refer the matters, concluding that his decision not to request the appointment of an independent counsel in regard to those matters was final under § 592(b)(1).... On April 2, 1987, the Division ruled that the Attorney General's decision not to seek appointment of an independent counsel with respect to Schmults and Dinkins was final and unreviewable under § 592(b)(1), and that therefore the court had no authority to make the requested referral. 818 F.2d 34. The court ruled, however, that its original grant of jurisdiction to appellant was broad enough to permit inquiry into whether Olson may have conspired with others, including Schmults and Dinkins, to obstruct the Committee's investigation. *Id.*, at 47–48.

Following this ruling, in May and June 1987, appellant caused a grand jury to issue and serve subpoenas *ad testificandum* and *duces tecum* on appellees. All three appellees moved to quash the subpoenas, claiming, among other things, that the independent counsel provisions of the Act were unconstitutional and that appellant accordingly had no authority to proceed. On July 20, 1987, the District Court upheld the constitutionality of the Act and denied the motions to quash. *In re Sealed Case*, 665 F.Supp. 56 (DC). The court subsequently ordered that appellees be held in contempt pursuant to 28 U.S.C. § 1826(a) for continuing to refuse to comply with the subpoenas. See App. to Juris. Statement 140a, 143a, 146a. The court stayed the effect of its contempt orders pending expedited appeal.

A divided Court of Appeals reversed. 838 F.2d 476 (1988)....Appellant then sought review by this Court, and we noted probable jurisdiction. 484 U.S. 1058, 108 S.Ct. 1010, 98 L.Ed.2d 976 (1988). We now reverse.

...

V

We now turn to consider whether the Act is invalid under the constitutional principle of separation of powers. Two related issues must be addressed: The first is whether the provision of the Act restricting the Attorney General's power to remove the independent counsel to only those instances in which he can show "good cause," taken by itself, impermissibly interferes with the President's exercise of his constitutionally appointed functions. The second is whether, taken as a whole, the Act violates the separation of powers by reducing the President's ability to control the prosecutorial powers wielded by the independent counsel.

A

Two Terms ago we had occasion to consider whether it was consistent with the separation of powers for Congress to pass a statute that authorized a Government official who is removable only by Congress to participate in what we found to be "executive powers." *Bowsher v. Synar*, 478 U.S. 714 (1986). We held in *Bowsher* that "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment." *Id.*, at 726. A primary antecedent for this ruling was our 1926 decision in *Myers v. United States*, 272 U.S. 52 (1926). ...There too, Congress' attempt to involve itself in the removal of an executive official was found to be sufficient grounds to render the statute invalid. As we observed in *Bowsher*, the essence of the decision in *Myers* was the judgment that the Constitution prevents Congress from "draw[ing] to itself ... the power to remove or the right to participate in the exercise of that power. To do this would be to go beyond the words and implications of the [Appointments Clause] and to infringe the constitutional principle of the separation of governmental powers." *Myers, supra*, at 161.

Unlike both *Bowsher* and *Myers*, this case does not involve an attempt by Congress itself to gain a role in the removal of executive officials other than its established powers of impeachment and conviction. The Act instead puts the removal power squarely in the hands of the Executive Branch; an independent counsel may be removed from office, “only by the personal action of the Attorney General, and only for good cause.” § 596(a)(1). There is no requirement of congressional approval of the Attorney General's removal decision, though the decision is subject to judicial review. § 596(a)(3). In our view, the removal provisions of the Act make this case more analogous to *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), and *Wiener v. United States*, 357 U.S. 349 (1958), than to *Myers* or *Bowsher*.

In *Humphrey's Executor*, the issue was whether a statute restricting the President's power to remove the Commissioners of the Federal Trade Commission (FTC) only for “inefficiency, neglect of duty, or malfeasance in office” was consistent with the Constitution. 295 U.S., at 619. We stated that whether Congress can “condition the [President's power of removal] by fixing a definite term and precluding a removal except for cause, will depend upon the character of the office.” *Id.*, at 631. Contrary to the implication of some dicta in *Myers*, the President's power to remove Government officials simply was not “all-inclusive in respect of civil officers with the exception of the judiciary provided for by the Constitution.” 295 U.S., at 629. At least in regard to “quasi-legislative” and “quasi-judicial” agencies such as the FTC, “[t]he authority of Congress, in creating [such] agencies, to require them to act in discharge of their duties independently of executive control ... includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime.” *Ibid.* In *Humphrey's Executor*, we found it “plain” that the Constitution did not give the President “illimitable power of removal” over the officers of independent agencies. *Ibid.* Were the President to have the power to remove FTC Commissioners at will, the “coercive influence” of the removal power would “threaten the independence of [the] commission.” *Id.*, at 630.

Similarly, in *Wiener* we considered whether the President had unfettered discretion to remove a member of the War Claims Commission, which had been established by Congress in the War Claims Act of 1948, 62 Stat. 1240. The Commission's function was to receive and adjudicate certain claims for compensation from those who had suffered personal injury or property damage at the hands of the enemy during World War II. Commissioners were appointed by the President, with the advice and consent of the Senate, but the statute made no provision for the removal of officers, perhaps because the Commission itself was to have a limited existence. As in *Humphrey's Executor*, however, the Commissioners were entrusted by Congress with adjudicatory powers that were to be exercised free from executive control. In this context, “Congress did not wish to have hang over the Commission the Damocles' sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing.” 357 U.S., at 356. Accordingly, we rejected the President's attempt to remove a

Commissioner “merely because he wanted his own appointees on [the] Commission,” stating that “no such power is given to the President directly by the Constitution, and none is impliedly conferred upon him by statute.” *Ibid.*

Appellees contend that *Humphrey's Executor* and *Wiener* are distinguishable from this case because they did not involve officials who performed a “core executive function.” They argue that our decision in *Humphrey's Executor* rests on a distinction between “purely executive” officials and officials who exercise “quasi-legislative” and “quasi-judicial” powers. In their view, when a “purely executive” official is involved, the governing precedent is *Myers*, not *Humphrey's Executor*. See *Humphrey's Executor*, *supra*, 295 U.S., at 628. And, under *Myers*, the President must have absolute discretion to discharge “purely” executive officials at will. See *Myers*, 272 U.S., at 132–134.

We undoubtedly did rely on the terms “quasi-legislative” and “quasi-judicial” to distinguish the officials involved in *Humphrey's Executor* and *Wiener* from those in *Myers*, but our present considered view is that the determination of whether the Constitution allows Congress to impose a “good cause”-type restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as “purely executive.” The analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President's exercise of the “executive power” and his constitutionally appointed duty to “take care that the laws be faithfully executed” under Article II. *Myers* was undoubtedly correct in its holding, and in its broader suggestion that there are some “purely executive” officials who must be removable by the President at will if he is to be able to accomplish his constitutional role. See 272 U.S., at 132–134.

[At] the other end of the spectrum from *Myers*, the characterization of the agencies in *Humphrey's Executor* and *Wiener* as “quasi-legislative” or “quasi-judicial” in large part reflected our judgment that it was not essential to the President's proper execution of his Article II powers that these agencies be headed up by individuals who were removable at will.

[There] is no real dispute that the functions performed by the independent counsel are “executive” in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch. As we noted above, however, the independent counsel is an inferior officer under the Appointments Clause, with limited jurisdiction and tenure and lacking policymaking or significant administrative authority. Although the counsel exercises no small amount of discretion and judgment in deciding how to

carry out his or her duties under the Act, we simply do not see how the President's need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President.

[This] is not a case in which the power to remove an executive official has been completely stripped from the President, thus providing no means for the President to ensure the “faithful execution” of the laws. Rather, because the independent counsel may be terminated for “good cause,” the Executive, through the Attorney General, retains ample authority to assure that the counsel is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act. Although we need not decide in this case exactly what is encompassed within the term “good cause” under the Act, the legislative history of the removal provision also makes clear that the Attorney General may remove an independent counsel for “misconduct.” See H.R.Conf.Rep. No. 100–452, p. 37 (1987). Here, as with the provision of the Act conferring the appointment authority of the independent counsel on the special court, the congressional determination to limit the removal power of the Attorney General was essential, in the view of Congress, to establish the necessary independence of the office. We do not think that this limitation as it presently stands sufficiently deprives the President of control over the independent counsel to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws.

B

The final question to be addressed is whether the Act, taken as a whole, violates the principle of separation of powers by unduly interfering with the role of the Executive Branch.

[We] observe first that this case does not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch. Cf. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S., at 856. ... The Act does empower certain Members of Congress to request the Attorney General to apply for the appointment of an independent counsel, but the Attorney General has no duty to comply with the request, although he must respond within a certain time limit. § 529(g). ...

[Similarly], we do not think that the Act works any *judicial* usurpation of properly executive functions. ... [T]he Special Division has no power to appoint an independent counsel *sua sponte*; it may only do so upon the specific request of the Attorney General, and the courts are

specifically prevented from reviewing the Attorney General's decision not to seek appointment, § 592(f). In addition, once the court has appointed a counsel and defined his or her jurisdiction, it has no power to supervise or control the activities of the counsel. As we pointed out in our discussion of the Special Division in relation to Article III, the various powers delegated by the statute to the Division are not supervisory or administrative, nor are they functions that the Constitution requires be performed by officials within the Executive Branch. The Act does give a federal court the power to review the Attorney General's decision to remove an independent counsel, but in our view this is a function that is well within the traditional power of the Judiciary.

Finally, we do not think that the Act “impermissibly undermine[s]” the powers of the Executive Branch, *Schor, supra*, 478 U.S., at 856, or “disrupts the proper balance between the coordinate branches [by] prevent [ing] the Executive Branch from accomplishing its constitutionally assigned functions,” *Nixon v. Administrator of General Services, supra*, 433 U.S., at 443. It is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity. The Attorney General is not allowed to appoint the individual of his choice; he does not determine the counsel's jurisdiction; and his power to remove a counsel is limited. Nonetheless, the Act does give the Attorney General several means of supervising or controlling the prosecutorial powers that may be wielded by an independent counsel. Most importantly, the Attorney General retains the power to remove the counsel for “good cause,” a power that we have already concluded provides the Executive with substantial ability to ensure that the laws are “faithfully executed” by an independent counsel. No independent counsel may be appointed without a specific request by the Attorney General, and the Attorney General's decision not to request appointment if he finds “no reasonable grounds to believe that further investigation is warranted” is committed to his unreviewable discretion. The Act thus gives the Executive a degree of control over the power to initiate an investigation by the independent counsel. In addition, the jurisdiction of the independent counsel is defined with reference to the facts submitted by the Attorney General, and once a counsel is appointed, the Act requires that the counsel abide by Justice Department policy unless it is not “possible” to do so. Notwithstanding the fact that the counsel is to some degree “independent” and free from executive supervision to a greater extent than other federal prosecutors, in our view these features of the Act give the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties.

....

The decision of the Court of Appeals is therefore

Reversed.

Justice KENNEDY took no part in the consideration or decision of this case.

DISSENT: JUSTICE SCALIA

It is the proud boast of our democracy that we have “a government of laws and not of men.” Many Americans are familiar with that phrase; not many know its derivation. It comes from Part the First, Article XXX, of the Massachusetts Constitution of 1780, which reads in full as follows:

“In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.”

The Framers of the Federal Constitution similarly viewed the principle of separation of powers as the absolutely central guarantee of a just Government. In No. 47 of *The Federalist*, Madison wrote that “[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty.” *The Federalist* No. 47, p. 301 (C. Rossiter ed. 1961) (hereinafter *Federalist*). Without a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of many nations of the world that have adopted, or even improved upon, the mere words of ours.

The principle of separation of powers is expressed in our Constitution in the first section of each of the first three Articles... [T]he provision at issue here, Art. II, § 1, cl. 1, provides that “[t]he executive Power shall be vested in a President of the United States of America.”

But just as the mere words of a Bill of Rights are not self-effectuating, the Framers recognized “[t]he insufficiency of a mere parchment delineation of the boundaries” to achieve the separation of powers. *Federalist* No. 73, p. 442 (A. Hamilton). “[T]he great security,” wrote Madison, “against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all

other cases, be made commensurate to the danger of attack.” Federalist No. 51, pp. 321–322. Madison continued:

“But it is not possible to give to each department an equal power of self-defense. In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit.... As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified.” *Id.*, at 322–323.

The major “fortification” provided, of course, was the veto power. But in addition to providing fortification, the Founders conspicuously and very consciously declined to sap the Executive’s strength in the same way they had weakened the Legislature: by dividing the executive power. Proposals to have multiple executives, or a council of advisers with separate authority were rejected. See 1 M. Farrand, *Records of the Federal Convention of 1787*, pp. 66, 71–74, 88, 91–92 (rev. ed. 1966); 2 *id.*, at 335–337, 533, 537, 542. Thus, while “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate *and* House of Representatives,” U.S. Const., Art. I, § 1 (emphasis added), “[t]he executive Power shall be vested in *a President of the United States*,” Art. II, § 1, cl. 1 (emphasis added).

That is what this suit is about. Power. The allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish—so that “a gradual concentration of the several powers in the same department,” Federalist No. 51, p. 321 (J. Madison), can effectively be resisted. Frequently an issue of this sort will come before the Court clad, so to speak, in sheep’s clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.

[It] effects a revolution in our constitutional jurisprudence for the Court, once it has determined that (1) purely executive functions are at issue here, and (2) those functions have been given to a person whose actions are not fully within the supervision and control of the President, nonetheless to proceed further to sit in judgment of whether “the President’s need to control the exercise of [the independent counsel’s] discretion is *so central* to the functioning of the Executive Branch” as to require complete control, *ante*, at 2619 (emphasis added), whether the conferral of his powers upon someone else “*sufficiently* deprives the President of control over the independent counsel to interfere impermissibly with [his] constitutional obligation to ensure the

faithful execution of the laws,” *ante*, at 2619–2620 (emphasis added), and whether “the Act give[s] the Executive Branch *sufficient* control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties,” *ante*, at 2621 (emphasis added). It is not for us to determine, and we have never presumed to determine, how much of the purely executive powers of government must be within the full control of the President. The Constitution prescribes that they *all* are.

[Once] we depart from the text of the Constitution, just where short of that do we stop? The most amazing feature of the Court's opinion is that it does not even purport to give an answer. It simply *announces*, with no analysis, that the ability to control the decision whether to investigate and prosecute the President's closest advisers, and indeed the President himself, is not “so central to the functioning of the Executive Branch” as to be constitutionally required to be within the President's control. Apparently that is so because we say it is so. Having abandoned as the basis for our decision-making the text of Article II that “the executive Power” must be vested in the President, the Court does not even attempt to craft a *substitute* criterion.... Evidently, the governing standard is to be what might be called the unfettered wisdom of a majority of this Court, revealed to an obedient people on a case-by-case basis. This is not only not the government of laws that the Constitution established; it is not a government of laws at all.

In my view, moreover, even as an ad hoc, standardless judgment the Court's conclusion must be wrong. Before this statute was passed, the President, in taking action disagreeable to the Congress, or an executive officer giving advice to the President or testifying before Congress concerning one of those many matters on which the two branches are from time to time at odds, could be assured that his acts and motives would be adjudged—insofar as the decision whether to conduct a criminal investigation and to prosecute is concerned—in the Executive Branch, that is, in a forum attuned to the interests and the policies of the Presidency. That was one of the natural advantages the Constitution gave to the Presidency, just as it gave Members of Congress (and their staffs) the advantage of not being prosecutable for anything said or done in their legislative capacities. See U.S. Const., Art. I, § 6, cl. 1; *Gravel v. United States*, 408 U.S. 606 (1972).... It deeply wounds the President, by substantially reducing the President's ability to protect himself and his staff. That is the whole object of the law, of course, and I cannot imagine why the Court believes it does not succeed.

[Worse] than what [the court] has done, however, is the manner in which it has done it. A government of laws means a government of rules. Today's decision on the basic issue of fragmentation of executive power is ungoverned by rule, and hence ungoverned by law. Taking all things into account, we conclude that the power taken away from the President here is not really *too* much.... This is not analysis; it is ad hoc judgment. And it fails to explain why it is not true that—as the text of the Constitution seems to require, as the Founders seemed to expect, and

as our past cases have uniformly assumed—all purely executive power must be under the control of the President.

The ad hoc approach to constitutional adjudication has real attraction, even apart from its work-saving potential. It is guaranteed to produce a result, in every case, that will make a majority of the Court happy with the law. The law is, by definition, precisely what the majority thinks, taking all things into account, it *ought* to be. I prefer to rely upon the judgment of the wise men who constructed our system, and of the people who approved it, and of two centuries of history that have shown it to be sound. Like it or not, that judgment says, quite plainly, that “[t]he executive Power shall be vested in a President of the United States.”

Clinton V. New York (1988)

JUSTICE STEVENS delivered the opinion of the Court.

The Line Item Veto Act (Act), 110 Stat. 1200, 2 U.S.C. § 691 et seq. (1994 ed., Supp. II), was enacted in April 1996 and became effective on January 1, 1997. The following day, six Members of Congress who had voted against the Act brought suit in the District Court for the District of Columbia challenging its constitutionality. On April 10, 1997, the District Court entered an order holding that the Act is unconstitutional. *Byrd v. Raines*, 956 F.Supp. 25 (D.D.C.1997). In obedience to the statutory direction to allow a direct, expedited appeal to this Court, see §§ 692(b)–(c), we promptly noted probable jurisdiction and expedited review, 520 U.S. 1194, 117 S.Ct. 1489, 137 L.Ed.2d 699 (1997). We determined, however, that the Members of Congress did not have standing...

[Less] than two months after our decision in that case, the President exercised his authority to cancel one provision in the Balanced Budget Act of 1997, Pub.L. 105–33, 111 Stat. 251, 515, and two provisions in the Taxpayer Relief Act of 1997. Appellees, claiming that they had been injured by two of those cancellations, filed these cases in the District Court. That Court again held the statute invalid, 985 F.Supp. 168, 177–182 (1998), and we again expedited our review, 522 U.S. 1144, 118 S.Ct. 1123, 140 L.Ed.2d 172 (1998). We now hold that these appellees have standing to challenge the constitutionality of the Act and, reaching the merits, we agree that the cancellation procedures set forth in the Act violate the Presentment Clause, Art. I, § 7, cl. 2, of the Constitution.

IV.

[The] Line Item Veto Act gives the President the power to “cancel in whole” three types of provisions that have been signed into law: “(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit.” 2 U.S.C. § 691(a) (1994 ed., Supp. II). It is undisputed that the New York case involves an “item of new direct spending” and that the Snake River case involves a “limited tax benefit” as those terms are defined in the Act. It is also undisputed that each of those provisions had been signed into law pursuant to Article I, § 7, of the Constitution before it was canceled.

The Act requires the President to adhere to precise procedures whenever he exercises his cancellation authority. In identifying items for cancellation he must consider the legislative history, the purposes, and other relevant information about the items. See 2 U.S.C. § 691(b) (1994 ed., Supp. II). He must determine, with respect to each cancellation, that it will “(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest.” § 691(a)(3)(A). Moreover, he must transmit a special message to Congress notifying it of each cancellation within five calendar days (excluding Sundays) after the enactment of the canceled provision. See § 691(a)(3)(B). It is undisputed that the President meticulously followed these procedures in these cases.

A cancellation takes effect upon receipt by Congress of the special message from the President. See § 691b(a). If, however, a “disapproval bill” pertaining to a special message is enacted into law, the cancellations set forth in that message become “null and void.” *Ibid.* The Act sets forth a detailed expedited procedure for the consideration of a “disapproval bill,” see § 691d, but no such bill was passed for either of the cancellations involved in these cases.²⁴ A majority vote of both Houses is sufficient to enact a disapproval bill. The Act does not grant the President the authority to cancel a disapproval bill, see § 691(c), but he does, of course, retain his constitutional authority to veto such a bill.²⁵

The effect of a cancellation is plainly stated in § 691e, which defines the principal terms used in the Act. With respect to both an item of new direct spending and a limited tax benefit, the cancellation prevents the item “from having legal force or effect.” §§ 691e(4)(B)–(C).²⁶ Thus, under the plain text of the statute, the two actions of the President that are challenged in these cases prevented one section of the Balanced Budget Act of 1997 and one section of the Taxpayer Relief Act of 1997 “from having legal force or effect.”

[In] both legal and practical effect, the President has amended two Acts of Congress by repealing a portion of each. “[R]epeal of statutes, no less than enactment, must conform with Art. I.” *INS v. Chadha*, 462 U.S. 919, 954, 103 S.Ct. 2764, 2785–2786, 77 L.Ed.2d 317 (1983). There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes. Both Article I and Article II assign responsibilities to the President that directly relate to the lawmaking process, but neither addresses the issue presented by these cases. The President “shall from time to time give to the Congress Information on the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient”

Art. II, § 3. Thus, he may initiate and influence legislative proposals. Moreover, after a bill has passed both Houses of Congress, but “before it become[s] a Law,” it must be presented to the President. If he approves it, “he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it.” Art. I, § 7, cl. 2.²⁸ His “return” of a bill, which is usually described as a “veto,”²⁹ is subject to being overridden by a two-thirds vote in each House.

There are important differences between the President's “return” of a bill pursuant to Article I, § 7, and the exercise of the President's cancellation authority pursuant to the Line Item Veto Act. The constitutional return takes place before the bill becomes law; the statutory cancellation occurs after the bill becomes law. The constitutional return is of the entire bill; the statutory cancellation is of only a part. Although the Constitution expressly authorizes the President to play a role in the process of enacting statutes, it is silent on the subject of unilateral Presidential action that either repeals or amends parts of duly enacted statutes.

There are powerful reasons for construing constitutional silence on this profoundly important issue as equivalent to an express prohibition. The procedures governing the enactment of statutes set forth in the text of Article I were the product of the great debates and compromises that produced the Constitution itself. Familiar historical materials provide abundant support for the conclusion that the power to enact statutes may only “be exercised in accord with a single, finely wrought and exhaustively considered, procedure.” *Chadha*, 462 U.S., at 951, 103 S.Ct., at 2784. Our first President understood the text of the Presentment Clause as requiring that he either “approve all the parts of a Bill, or reject it in toto.”³⁰ What has emerged in these cases from the President's exercise of his statutory cancellation powers, however, are truncated versions of two bills that passed both Houses of Congress. They are not the product of the “finely wrought” procedure that the Framers designed.

At oral argument, the Government suggested that the cancellations at issue in these cases do not effect a “repeal” of the canceled items because under the special “lockbox” provisions of the Act,³¹ a canceled item “retain[s] real, legal budgetary effect” insofar as it prevents Congress and the President from spending the savings that result from the cancellation. *Tr. of Oral Arg.* 10.³² The text of the Act expressly provides, however, that a cancellation prevents a direct spending or tax benefit provision “from having legal force or effect.” 2 U.S.C. §§ 691e(4)(B)–(C). That a canceled item may have “real, legal budgetary effect” as a result of the lockbox procedure does not change the fact that by canceling the items at issue in these cases, the President made them entirely inoperative as to appellees. [The] cancellation of one section of a statute may be the functional equivalent of a partial repeal even if a portion of the section is not canceled.

The Government advances two related arguments to support its position that despite the unambiguous provisions of the Act, cancellations do not amend or repeal properly enacted statutes in violation of the Presentment Clause. First, relying primarily on *Field v. Clark*, 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294 (1892), the Government contends that the cancellations were merely exercises of discretionary authority granted to the President by the Balanced Budget Act and the Taxpayer Relief Act read in light of the previously enacted Line Item Veto Act.

Second, the Government submits that the substance of the authority to cancel tax and spending items “is, in practical effect, no more and no less than the power to ‘decline to spend’ specified sums of money, or to ‘decline to implement’ specified tax measures.” Brief for Appellants 40. Neither argument is persuasive.

In *Field v. Clark*, the Court upheld the constitutionality of the Tariff Act of 1890... [The] Court provided this explanation for its conclusion that § 3 had not delegated legislative power to the President:

“Nothing involving the expediency or the just operation of such legislation was left to the determination of the President.... [W]hen he ascertained the fact that duties and exactions, reciprocally unequal and unreasonable, were imposed upon the agricultural or other products of the United States by a country producing and exporting sugar, molasses, coffee, tea or hides, it became his duty to issue a proclamation declaring the suspension, as to that country, which Congress had determined should occur. He had no discretion in the premises except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by Congress. As the suspension was absolutely required when the President ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws.... It was a part of the law itself as it left the hands of Congress that the provisions, full and complete in themselves, permitting the free introduction of sugars, molasses, coffee, tea and hides, from particular countries, should be suspended, in a given contingency, and that in case of such suspensions certain duties should be imposed.” *Id.*, at 693, 12 S.Ct., at 504–505.

This passage identifies three critical differences between the power to suspend the exemption from import duties and the power to cancel portions of a duly enacted statute. First, the exercise of the suspension power was contingent upon a condition that did not exist when the Tariff Act was passed: the imposition of “reciprocally unequal and unreasonable” import duties by other countries. In contrast, the exercise of the cancellation power within five days after the enactment of the Balanced Budget and Tax Reform Acts necessarily was based on the same conditions that Congress evaluated when it passed those statutes. Second, under the Tariff Act, when the President determined that the contingency had arisen, he had a duty to suspend; in contrast, while it is true that the President was required by the Act to make three determinations before he canceled a provision, see 2 U.S.C. § 691(a)(A) (1994 ed., Supp. II), those determinations did not qualify his discretion to cancel or not to cancel. Finally, whenever the President suspended an exemption under the Tariff Act, he was executing the policy that Congress had embodied in the statute. In contrast, whenever the President cancels an item of new direct spending or a limited tax benefit he is rejecting the policy judgment made by Congress and relying on his own policy judgment.³⁵ Thus, the conclusion in *Field v. Clark* that the suspensions mandated by the Tariff Act were not exercises of legislative power does not undermine our opinion that cancellations pursuant to the Line Item Veto Act are the functional equivalent of partial repeals of Acts of Congress that fail to satisfy Article I, § 7.

The Government's reliance upon other tariff and import statutes, discussed in *Field*, that contain provisions similar to the one challenged in *Field* is unavailing for the same reasons.³⁶ Some of those statutes authorized the President to “suspend and discontinue” statutory duties upon his determination that discriminatory duties imposed by other nations had been abolished. See 143 U.S., at 686–687, 12 S.Ct., at 502–503 (discussing Act of Jan. 7, 1824, ch. 4, § 4, 4 Stat. 3, and Act of May 24, 1828, ch. 111, 4 Stat. 308).³⁷ A slightly different statute, Act of May 31, 1830, ch. 219, § 2, 4 Stat. 425, provided that certain statutory provisions imposing duties on foreign ships “shall be repealed” upon the same no-discrimination determination by the President. See 143 U.S., at 687, 12 S.Ct., at 503; see also *id.*, at 686, 12 S.Ct., at 502–503 (discussing similar tariff statute, Act of Mar. 3, 1815, ch. 77, 3 Stat. 224, which provided that duties “are hereby repealed,” “[s]uch repeal to take effect ... whenever the President” makes the required determination).

The cited statutes all relate to foreign trade, and this Court has recognized that in the foreign affairs arena, the President has “a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.” *United States v. Curtiss–Wright Export Corp.*, 299 U.S. 304, 320, 57 S.Ct. 216, 221, 81 L.Ed. 255 (1936). “Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries.” *Ibid.*³⁸ More important, when enacting the statutes discussed in *Field*, Congress itself made the decision to suspend or repeal the particular provisions at issue upon the occurrence of particular events subsequent to enactment, and it left only the determination of whether such events occurred up to the President.³⁹ The Line Item Veto Act authorizes the President himself to effect the repeal of laws, for his own policy reasons, without observing the procedures set out in Article I, § 7. The fact that Congress intended such a result is of no moment. Although Congress presumably anticipated that the President might cancel some of the items in the Balanced Budget Act and in the Taxpayer Relief Act, Congress cannot alter the procedures set out in Article I, § 7, without amending the Constitution.

Neither are we persuaded by the Government's contention that the President's authority to cancel new direct spending and tax benefit items is no greater than his traditional authority to decline to spend appropriated funds. The Government has reviewed in some detail the series of statutes in which Congress has given the Executive broad discretion over the expenditure of appropriated funds. For example, the First Congress appropriated “sum[s] not exceeding” specified amounts to be spent on various Government operations. In those statutes, as in later years, the President was given wide discretion with respect to both the amounts to be spent and how the money would be allocated among different functions. It is argued that the Line Item Veto Act merely confers comparable discretionary authority over the expenditure of appropriated funds. The critical difference between this statute and all of its predecessors, however, is that unlike any of them, this Act gives the President the unilateral power to change the text of duly enacted statutes. None of the Act's predecessors could even arguably have been construed to authorize such a change.

VI

Although they are implicit in what we have already written, the profound importance of these cases makes it appropriate to emphasize three points.

First, we express no opinion about the wisdom of the procedures authorized by the Line Item Veto Act. [We] do not lightly conclude that their action was unauthorized by the Constitution.⁴² We have, however, twice had full argument and briefing on the question and have concluded that our duty is clear.

Second, although appellees challenge the validity of the Act on alternative grounds, the only issue we address concerns the “finely wrought” procedure commanded by the Constitution. *Chadha*, 462 U.S., at 951, 103 S.Ct., at 2784. We have been favored with extensive debate about the scope of Congress' power to delegate lawmaking authority, or its functional equivalent, to the President [Thus], because we conclude that the Act's cancellation provisions violate Article I, § 7, of the Constitution, we find it unnecessary to consider the District Court's alternative holding that the Act “impermissibly disrupts the balance of powers among the three branches of government.” 985 F.Supp., at 179.⁴³

Third, our decision rests on the narrow ground that the procedures authorized by the Line Item Veto Act are not authorized by the Constitution. The Balanced Budget Act of 1997 is a 500–page document that became “Public Law 105–33” after three procedural steps were taken: (1) a bill containing its exact text was approved by a majority of the Members of the House of Representatives; (2) the Senate approved precisely the same text; and (3) that text was signed into law by the President. The Constitution explicitly requires that each of those three steps be taken before a bill may “become a law.” Art. I, § 7. If one paragraph of that text had been omitted at any one of those three stages, Public Law 105–33 would not have been validly enacted. If the Line Item Veto Act were valid, it would authorize the President to create a different law—one whose text was not voted on by either House of Congress or presented to the President for signature. Something that might be known as “Public Law 105–33 as modified by the President” may or may not be desirable, but it is surely not a document that may “become a law” pursuant to the procedures designed by the Framers of Article I, § 7, of the Constitution.

If there is to be a new procedure in which the President will play a different role in determining the final text of what may “become a law,” such change must come not by legislation but through the amendment procedures set forth in Article V of the Constitution.

The judgment of the District Court is affirmed.

It is so ordered.

CONCURRENCE:

Justice KENNEDY, concurring.

[To] say the political branches have a somewhat free hand to reallocate their own authority would seem to require acceptance of two premises: first, that the public good demands it, and second, that liberty is not at risk. The former premise is inadmissible. The Constitution's structure requires a stability which transcends the convenience of the moment. [The] latter premise, too, is flawed. Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.

Separation of powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty...

[If] a citizen who is taxed has the measure of the tax or the decision to spend determined by the Executive alone, without adequate control by the citizen's Representatives in Congress, liberty is threatened.

DISSENT: Justice SCALIA, with whom Justice O'CONNOR joins, and with whom Justice BREYER joins as to Part III, concurring in part and dissenting in part.

[Article I, § 7.] of the Constitution obviously prevents the President from canceling a law that Congress has not authorized him to cancel.

[It] no more categorically prohibits the Executive reduction of congressional dispositions in the course of implementing statutes that authorize such reduction, than it categorically prohibits the Executive augmentation of congressional dispositions in the course of implementing statutes that authorize such augmentation—generally known as substantive rulemaking.

[I] turn, then, to the crux of the matter: whether Congress's authorizing the President to cancel an item of spending gives him a power that our history and traditions show must reside exclusively in the Legislative Branch. [Insofar] as the degree of political, “lawmaking” power conferred upon the Executive is concerned, there is not a dime's worth of difference between Congress's authorizing the President to cancel a spending item, and Congress's authorizing money to be spent on a particular item at the President's discretion. And the latter has been done since the founding of the Nation. From 1789–1791, the First Congress made lump-sum appropriations for the entire Government— “sum[s] not exceeding” specified amounts for broad purposes. [From] a very early date Congress also made permissive individual appropriations, leaving the decision whether to spend the money to the President's unfettered discretion.

[The] short of the matter is this: Had the Line Item Veto Act authorized the President to “decline to spend” any item of spending contained in the Balanced Budget Act of 1997, there is not the slightest doubt that authorization would have been constitutional.

DISSENT: Justice BREYER, with whom Justice O'CONNOR and Justice SCALIA join as to Part III, dissenting.

III

[Imagine] that the canceled New York health care tax provision at issue here, Pub.L. 105–33, § 4722(c), 111 Stat. 515 (quoted in full ante, at 2095, n. 2), had instead said the following:

“Section One. Taxes ... that were collected by the State of New York from a health care provider before June 1, 1997, and for which a waiver of the provisions [requiring payment] have been sought ... are deemed to be permissible health care related taxes ... provided however that the President may prevent the just-mentioned provision from having legal force or effect if he determines x, y, and z. (Assume x, y and z to be the same determinations required by the Line Item Veto Act).

Whatever a person might say, or think, about the constitutionality of this imaginary law, there is one thing the English language would prevent one from saying. One could not say that a President who “prevent[s]” the deeming language from “having legal force or effect,” see 2 U.S.C. § 691e(4)(B) (1994 ed., Supp. II), has either repealed or amended this particular hypothetical statute. Rather, the President has followed that law to the letter. He has exercised the power it explicitly delegates to him. He has executed the law, not repealed it.

It could make no significant difference to this linguistic point were the italicized proviso to appear, not as part of what I have called Section One, but, instead, at the bottom of the statute page, say, referenced by an asterisk, with a statement that it applies to every spending provision in the Act next to which a similar asterisk appears. And that being so, it could make no difference if that proviso appeared, instead, in a different, earlier enacted law, along with legal language that makes it applicable to every future spending provision picked out according to a specified formula. [Literally] speaking, the President has not “repealed” or “amended” anything. He has simply executed a power conferred upon him by Congress, which power is contained in laws that were enacted in compliance with the exclusive method set forth in the Constitution.

IV

[Because] I disagree with the Court's holding of literal violation, I must consider whether the Act nonetheless violates separation-of-powers principles—principles that arise out of the Constitution's vesting of the “executive Power” in “a President,” U.S. Const., Art. II, § 1, and “[a]ll legislative Powers” in “a Congress,” Art. I, § 1. There are three relevant separation-of-powers questions here: (1) Has Congress given the President the wrong kind of power, i.e., “non-Executive” power? (2) Has Congress given the President the power to “encroach” upon Congress' own constitutionally reserved territory? (3) Has Congress given the President too much power, violating the doctrine of “nondelegation?” These three limitations help assure “adequate control by the citizen's Representatives in Congress,” upon which Justice KENNEDY

properly insists. See ante, at 2109 (concurring opinion). And with respect to this Act, the answer to all these questions is “no.”

A

Viewed conceptually, the power the Act conveys is the right kind of power. It is “executive.” [The] fact that one could also characterize this kind of power as “legislative,” say, if Congress itself (by amending the appropriations bill) prevented a provision from taking effect, is beside the point. This Court has frequently found that the exercise of a particular power, such as the power to make rules of broad applicability. [The] Court does not “carry out the distinction between legislative and executive action with mathematical precision” or “divide the branches into watertight compartments,” *Springer v. Philippine Islands*, 277 U.S. 189, 211, 48 S.Ct. 480, 485–486, 72 L.Ed. 845 (1928) (Holmes, J., dissenting), for, as others have said, the Constitution “blend[s]” as well as “separat[es]” powers in order to create a workable government. 1 K. Davis, *Administrative Law* § 1.09, p. 68 (1958).

B

[The] Act does not undermine what this Court has often described as the principal function of the separation-of-powers, which is to maintain the tripartite structure of the Federal Government—and thereby protect individual liberty. [One] cannot say that the Act “encroaches” upon Congress' power, when Congress retained the power to insert, by simple majority, into any future appropriations bill, into any section of any such bill, or into any phrase of any section, a provision that says the Act will not apply. [And] it is Congress that drafts and enacts the appropriations statutes that are subject to the Act in the first place—and thereby defines the outer limits of the President's cancellation authority. Thus this Act is not the sort of delegation “without ... sufficient check” that concerns Justice KENNEDY.

[Nor] can one say that the Act's basic substantive objective is constitutionally improper, for the earliest Congresses could, see Part II, supra, and often did, confer on the President this sort of discretionary authority over spending. [Nor] can one say the Act's grant of power “aggrandizes” the Presidential office. The grant is limited to the context of the budget. It is limited to the power to spend, or not to spend, particular appropriated items, and the power to permit, or not to permit, specific limited exemptions from generally applicable tax law from taking effect.

C

[The] “nondelegation” doctrine represents an added constitutional check upon Congress' authority to delegate power to the Executive Branch. And it raises a more serious constitutional obstacle here. [The] Constitution permits only those delegations where Congress “shall lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.”

[The] resulting standards are broad. But this Court has upheld standards that are equally broad, or broader. [Indeed], the Court has only twice in its history found that a congressional delegation of power violated the “nondelegation” doctrine.

[The] relevant similarities and differences among and between this case and other “nondelegation” cases can be listed more systematically as follows: First, as I have just said, like statutes delegating power to award broadcast television licenses, or to regulate the securities industry, or to develop and enforce workplace safety rules, the Act is aimed at a discrete problem: namely, a particular set of expenditures within the federal budget.

[Second], like the award of television licenses, the particular problem involved—determining whether or not a particular amount of money should be spent or whether a particular dispensation from tax law should be granted a few individuals—does not readily lend itself to a significantly more specific standard.

[Third], insofar as monetary expenditure (but not “tax expenditure”) is at issue, the President acts in an area where history helps to justify the discretionary power that Congress has delegated, and where history may inform his exercise of the Act's delegated authority. Congress has frequently delegated the President the authority to spend, or not to spend, particular sums of money.

[Fourth], the Constitution permits Congress to rely upon context and history as providing the necessary standard for the exercise of the delegated power.

[Consequently] I believe that the power the Act grants the President to prevent spending items from taking effect does not violate the “nondelegation” doctrine.

Most, but not all, of the considerations mentioned in the previous subsection apply to the Act's delegation to the President of the authority to prevent “from having legal force or effect” a “limited tax benefit,” which term the Act defines in terms of special tax relief for fewer than 100 (or in some instances 10) beneficiaries, which tax relief is not available to others who are somewhat similarly situated. 2 U.S.C. § 691e(9) (1994 ed., Supp. II). There are, however, two related significant differences between the “limited tax benefit” and the spending items considered above, which make the “limited tax benefit” question more difficult. First, the history is different. The history of Presidential authority to pick and to choose is less voluminous. Second, the subject matter (increasing or decreasing an individual's taxes) makes the considerations discussed at the end of the last section (i.e., the danger of an arbitrary exercise of delegated power) of greater concern. But these differences, in my view, are not sufficient to change the “nondelegation” result.

[For] another thing, this Court has upheld tax statutes that delegate to the President the power to change taxes under very broad standards. [Congress], however, has not limited its delegations of taxation authority to the “foreign policy” arena.

V

[In] sum, I recognize that the Act before us is novel. [The] Constitution, in my view, authorizes Congress and the President to try novel methods in this way. [Consequently], with respect, I dissent.

CHAPTER VII: **Presidential Powers in the** **“War on Terror”**

Hamdi v. Rumsfeld, (2004)

OPINION: Justice O'CONNOR announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, Justice KENNEDY, and Justice BREYER join.

At this difficult time in our Nation's history, we are called upon to consider the legality of the Government's detention of a United States citizen on United States soil as an “enemy combatant” and to address the process that is constitutionally owed to one who seeks to challenge his classification as such. [We] hold that although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.

II.

[The] threshold question before us is whether the Executive has the authority to detain citizens who qualify as “enemy combatants.” There is some debate as to the proper scope of this term, and the Government has never provided any court with the full criteria that it uses in classifying individuals as such. It has made clear, however, that, for purposes of this case, the “enemy combatant” that it is seeking to detain is an individual who, it alleges, was ““part of or supporting forces hostile to the United States or coalition partners”” in Afghanistan and who ““engaged in an armed conflict against the United States”” there. We therefore answer only the narrow question before us: whether the detention of citizens falling within that definition is authorized.

The Government maintains that no explicit congressional authorization is required, because the Executive possesses plenary authority to detain pursuant to Article II of the Constitution. We do not reach the question whether Article II provides such authority, however, because we agree

[that] Congress has in fact authorized Hamdi's detention, through the AUMF. [We] conclude that the AUMF is explicit congressional authorization for the detention of individuals in the narrow category we describe (assuming, without deciding, that such authorization is required), and that the AUMF satisfied § 4001(a)'s [(the Non-Detention Act)] requirement that a detention be “pursuant to an Act of Congress” (assuming, without deciding, that § 4001(a) applies to military detentions).

The AUMF authorizes the President to use “all necessary and appropriate force” against “nations, organizations, or persons” associated with the September 11, 2001, terrorist attacks. There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF. We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the “necessary and appropriate force” Congress has authorized the President to use.

The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by “universal agreement and practice,” are “important incident[s] of war.” *Ex parte Quirin*. The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again. There is no bar to this Nation's holding one of its own citizens as an enemy combatant. In *Quirin*, one of the detainees, Haupt, alleged that he was a naturalized United States citizen. [It] is of no moment that the AUMF does not use specific language of detention. Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of “necessary and appropriate force,” Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.

Hamdi objects, nevertheless, that Congress has not authorized the *indefinite* detention to which he is now subject. The Government responds that “the detention of enemy combatants during World War II was just as ‘indefinite’ while that war was being fought.” We take Hamdi's objection to be not to the lack of certainty regarding the date on which the conflict will end, but to the substantial prospect of perpetual detention. We recognize that the national security underpinnings of the “war on terror,” although crucially important, are broad and malleable. As the Government concedes, “given its unconventional nature, the current conflict is unlikely to end with a formal cease-fire agreement.” The prospect Hamdi raises is therefore not farfetched. If the Government does not consider this unconventional war won for two generations, and if it

maintains during that time that Hamdi might, if released, rejoin forces fighting against the United States, then [Hamdi's] detention could last for the rest of his life.

It is a clearly established principle of the law of war that detention may last no longer than active hostilities. [Certainly,] we agree that indefinite detention for the purpose of interrogation is not authorized. Further, we understand Congress' grant of authority for the use of “necessary and appropriate force” to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. [Active] combat operations against Taliban fighters apparently are ongoing in Afghanistan. The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who “engaged in an armed conflict against the United States.”

[Ex] parte Milligan does not undermine our holding about the Government's authority to seize enemy combatants, as we define that term today. In that case, the Court made repeated reference to the fact that its inquiry into whether the military tribunal had jurisdiction to try and punish Milligan turned in large part on the fact that Milligan was not a prisoner of war, but a resident of Indiana arrested while at home there. That fact was central to its conclusion. Had Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different. The Court's repeated explanations that Milligan was not a prisoner of war suggest that had these different circumstances been present he could have been detained under military authority for the duration of the conflict, whether or not he was a citizen.

Moreover, as Justice SCALIA acknowledges, the Court in *Ex parte Quirin* dismissed the language of *Milligan* that the petitioners had suggested prevented them from being subject to military process. Even accepting that [Milligan] once could have been viewed as standing for the sweeping proposition for which Justice SCALIA cites [it]—that the military does not have authority to try an American citizen accused of spying against his country during wartime—*Quirin* makes undeniably clear that this is not the law today. Haupt was accused of being a spy. The Court in *Quirin* found him “subject to trial and punishment by [a] military tribuna[1]” for those acts, and held that his citizenship did not change this result.

Quirin was a unanimous opinion. It both postdates and clarifies *Milligan*, providing us with the most apposite precedent that we have on the question of whether citizens may be detained in such circumstances. Brushing aside such precedent—particularly when doing so gives rise to a host of new questions never dealt with by this Court—is unjustified and unwise.

To the extent that Justice SCALIA accepts the precedential value of *Quirin*, he argues that it cannot guide our inquiry here because “[i]n *Quirin* it was uncontested that the petitioners were members of enemy forces,” while Hamdi challenges his classification as an enemy combatant. But it is unclear why, in the paradigm outlined by Justice SCALIA, such a concession should have any relevance. Justice SCALIA envisions a system in which the only options are congressional suspension of the writ of habeas corpus or prosecution for treason or some other crime. He does not explain how his historical analysis supports the addition of a third option—detention under some other process after concession of enemy-combatant status—or why a concession should carry any different effect than proof of enemy-combatant status in a proceeding that comports with due process. To be clear, our opinion only finds legislative authority to detain under the AUMF once it is sufficiently clear that the individual is, in fact, an enemy combatant; whether that is established by concession or by some other process that verifies this fact with sufficient certainty seems beside the point.

[Moreover,] Justice SCALIA presumably would come to a different result if Hamdi had been kept in Afghanistan or even Guantanamo Bay. See *post*, at 2673. This creates a perverse incentive. Military authorities faced with the stark choice of submitting to the full-blown criminal process or releasing a suspected enemy combatant captured on the battlefield will simply keep citizen-detainees abroad. Indeed, the Government transferred Hamdi from Guantanamo Bay to the United States naval brig only after it learned that he might be an American citizen. It is not at all clear why that should make a determinative constitutional difference.

III.

Even in cases in which the detention of enemy combatants is legally authorized, there remains the question of what process is constitutionally due to a citizen who disputes his enemy-combatant status. [All] agree that, absent suspension, the writ of habeas corpus remains available to every individual detained within the United States. Only in the rarest of circumstances has Congress seen fit to suspend the writ. At all other times, it has remained a critical check on the Executive, ensuring that it does not detain individuals except in accordance with law. All agree suspension of the writ has not occurred here. Thus, it is undisputed that Hamdi was properly before an Article III court to challenge his detention under 28 U.S.C. § 2241.

[The] Government urges [that] because it is “undisputed” that Hamdi's seizure took place in a combat zone, the habeas determination can be made purely as a matter of law, with no further hearing or factfinding necessary. This argument is easily rejected. [The] circumstances

surrounding Hamdi's seizure cannot in any way be characterized as “undisputed.” [Under] the definition of enemy combatant that we accept today as falling within the scope of Congress' authorization, Hamdi would need to be “part of or supporting forces hostile to the United States or coalition partners” and “engaged in an armed conflict against the United States” to justify his detention in the United States for the duration of the relevant conflict. The habeas petition states only that “[w]hen seized by the United States Government, Mr. Hamdi resided in Afghanistan.” [Accordingly,] we reject any argument that Hamdi has made concessions that eliminate any right to further process.

[The] Government [argues also] that further factual exploration is unwarranted and inappropriate in light of the extraordinary constitutional interests at stake. Under the Government's most extreme rendition of this argument, “[r]espect for separation of powers and the limited institutional capabilities of courts in matters of military decision-making in connection with an ongoing conflict” ought to eliminate entirely any individual process, restricting the courts to investigating only whether legal authorization exists for the broader detention scheme. At most, the Government argues, courts should review its determination that a citizen is an enemy combatant under a very deferential “some evidence” standard. Under this review, a court would assume the accuracy of the Government's articulated basis for Hamdi's detention, as set forth in the Mobbs Declaration, and assess only whether that articulated basis was a legitimate one. In response, Hamdi emphasizes that this Court consistently has recognized that an individual challenging his detention may not be held at the will of the Executive without recourse to some proceeding before a neutral tribunal to determine whether the Executive's asserted justifications for that detention have basis in fact and warrant in law.

[Both] of these positions highlight legitimate concerns. [The] ordinary mechanism that we use for balancing such serious competing interests, and for determining the procedures that are necessary to ensure that a citizen is not “deprived of life, liberty, or property, without due process of law,” is the test that we articulated in *Mathews v. Eldridge*. *Mathews* dictates that the process due in any given instance is determined by weighing “the private interest that will be affected by the official action” against the Government's asserted interest, “including the function involved” and the burdens the Government would face in providing greater process.

[It] is beyond question that substantial interests lie on both sides of the scale in this case. Hamdi's “private interest ... affected by the official action,” is the most elemental of liberty interests—the interest in being free from physical detention by one's own government. [Nor] is the weight on this side of the *Mathews* scale offset by the circumstances of war or the accusation of treasonous behavior. [On] the other side of the scale are the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle

against the United States. [Our] Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them. [Striking] the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.

[We] therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker. [These] essential constitutional promises may not be eroded. At the same time, the exigencies of the circumstances may demand that, aside from these core elements, enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. [We] think it unlikely that this basic process will have the dire impact on the central functions of warmaking that the Government forecasts. The parties agree that initial captures on the battlefield need not receive the process we have discussed here; that process is due only when the determination is made to *continue* to hold those who have been seized. [While] we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.

[In] so holding, we necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. *Youngstown*. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.

Likewise, we have made clear that, unless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions. Thus, while we do not question that our due process assessment must pay keen attention to the particular burdens faced by the Executive in the context of military action, it would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his Government, simply because the Executive opposes making available such a challenge. Absent suspension of the writ by Congress, a citizen detained as an enemy combatant is entitled to this process.

Because we conclude that due process demands some system for a citizen-detainee to refute his classification, the proposed “some evidence” standard is inadequate. Any process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short. [An] interrogation by one's captor, however effective an intelligence-gathering tool, hardly constitutes a constitutionally adequate factfinding before a neutral decisionmaker. [Plainly,] the “process” Hamdi has received is not that to which he is entitled under the Due Process Clause.

There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal. [In] the absence of such process, however, a court that receives a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved.

The judgment of the United States Court of Appeals for the Fourth Circuit is vacated, and the case is remanded for further proceedings.

It is so ordered.

Justice SOUTER, with whom Justice GINSBURG joins, concurring in part, dissenting in part, and concurring in the judgment.

[The] Government has failed to demonstrate that the [AUMF] authorizes the detention complained of here even on the facts the Government claims. If the Government raises nothing further than the record now shows, the Non–Detention Act entitles Hamdi to be released. [In] requiring that any Executive detention be “pursuant to an Act of Congress,” then, Congress

necessarily meant to require a congressional enactment that clearly authorized detention or imprisonment. [The] defining character of American constitutional government is its constant tension between security and liberty, serving both by partial helpings of each. In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security. For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation's entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises. A reasonable balance is more likely to be reached on the judgment of a different branch. [Hence] the need for an assessment by Congress before citizens are subject to lockup, and likewise the need for a clearly expressed congressional resolution of the competing claims.

[Under] this principle of reading § 4001(a) [of the Non-Detention Act] robustly to require a clear statement of authorization to detain, none of the Government's arguments suffices to justify Hamdi's detention. [The AUMF's] focus is clear, and that is on the use of military power. It is fairly read to authorize the use of armies and weapons, whether against other armies or individual terrorists. But, it never so much as uses the word detention, and there is no reason to think Congress might have perceived any need to augment Executive power to deal with dangerous citizens within the United States, given the well-stocked statutory arsenal of defined criminal offenses covering the gamut of actions that a citizen sympathetic to terrorists might commit.

[In] a moment of genuine emergency, when the Government must act with no time for deliberation, the Executive may be able to detain a citizen if there is reason to fear he is an imminent threat to the safety of the Nation and its people. This case, however, does not present that question, because an emergency power of necessity must at least be limited by the emergency; Hamdi has been locked up for over two years. [Because] I find Hamdi's detention forbidden by § 4001(a) and unauthorized by the [AUMF], I would not reach any questions of what process he may be due in litigating disputed issues in a proceeding under the habeas statute or prior to the habeas enquiry itself. For me, it suffices that the Government has failed to justify holding him in the absence of a further Act of Congress, criminal charges, a showing that the detention conforms to the laws of war, or a demonstration that § 4001(a) is unconstitutional.

Justice SCALIA, with whom Justice STEVENS joins, dissenting.

[Where] the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime. Where the exigencies of war prevent that, the Constitution's Suspension Clause, Art. I, § 9, cl. 2, allows Congress to relax the usual protections temporarily. Absent suspension, however, the Executive's assertion of military exigency has not been thought sufficient to permit detention without charge. No one contends that the congressional Authorization for Use of Military Force, on which the Government relies to justify its actions here, is an implementation of the Suspension Clause. Accordingly, I would reverse the judgment below.

The very core of liberty secured by our Anglo–Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive. [The] gist of the Due Process Clause, as understood at the founding and since, was to force the Government to follow those common-law procedures traditionally deemed necessary before depriving a person of life, liberty, or property. [These] due process rights have historically been vindicated by the writ of habeas corpus. In England before the founding, the writ developed into a tool for challenging executive confinement. [The] writ of habeas corpus was preserved in the Constitution—the only common-law writ to be explicitly mentioned. Hamilton lauded “the establishment of the writ of *habeas corpus*” in his Federalist defense as a means to protect against “the practice of arbitrary imprisonments ... in all ages, [one of] the favourite and most formidable instruments of tyranny.” The Federalist No. 84.

[The] reasoning and conclusion of *Milligan* logically cover the present case. The Government justifies imprisonment of Hamdi on principles of the law of war and admits that, absent the war, it would have no such authority. But if the law of war cannot be applied to citizens where courts are open, then Hamdi's imprisonment without criminal trial is no less unlawful than Milligan's trial by military tribunal.

Milligan responded to the argument, repeated by the Government in this case, that it is dangerous to leave suspected traitors at large in time of war:

“If it was dangerous, in the distracted condition of affairs, to leave Milligan unrestrained of his liberty, because he ‘conspired against the government, afforded aid and comfort to rebels, and incited the people to insurrection,’ the *law* said arrest him, confine him closely, render him powerless to do further mischief; and then present his case to the grand jury of the district, with proofs of his guilt, and, if indicted, try him according to the course of the common law.

[Thus,] criminal process was viewed as the primary means—and the only means absent congressional action suspending the writ—not only to punish traitors, but to incapacitate them.

[Except] for the actual command of military forces, all authorization for their maintenance and all explicit authorization for their use is placed in the control of Congress under Article I, rather than the President under Article II. As Hamilton explained, the President's military authority would be “much inferior” to that of the British King. The Federalist No. 69. A view of the Constitution that gives the Executive authority to use military force rather than the force of law against citizens on American soil flies in the face of the mistrust that engendered these provisions.

The Government argues that our more recent jurisprudence ratifies its indefinite imprisonment of a citizen within the territorial jurisdiction of federal courts. It places primary reliance upon *Ex parte Quirin*, a World War II case upholding the trial by military commission of eight German saboteurs, one of whom, Herbert Haupt, was a U.S. citizen. The case was not this Court's finest hour. The Court upheld the commission and denied relief in a brief *per curiam* issued the day after oral argument concluded; a week later the Government carried out the commission's death sentence upon six saboteurs, including Haupt. The Court eventually explained its reasoning in a written opinion issued several months later.

Only three paragraphs of the Court's lengthy opinion dealt with the particular circumstances of Haupt's case. The Government argued that Haupt, like the other petitioners, could be tried by military commission under the laws of war. In agreeing with that contention, *Quirin* purported to interpret the language of *Milligan* ([that] the law of war “can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed”) in the following manner:

“Elsewhere in its opinion ... the Court was at pains to point out that Milligan, a citizen twenty years resident in Indiana, who had never been a resident of any of the states in rebellion, was not an enemy belligerent either entitled to the status of a prisoner of war or subject to the penalties imposed upon unlawful belligerents. We construe the Court's statement as to the inapplicability of the law of war to Milligan's case as having particular reference to the facts before it. From them the Court concluded that Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war”

In my view this seeks to revise *Milligan* rather than describe it. [But] even if *Quirin* gave a correct description of *Milligan*, or made an irrevocable revision of it, *Quirin* would still not justify denial of the writ here. In *Quirin* it was uncontested that the petitioners were members of enemy forces. They were “admitted enemy invaders,” and it was “undisputed” that they had landed in the United States in service of German forces. [Where] the petitioner insists that he

is *not* a belligerent—*Quirin* left the pre-existing law in place: Absent suspension of the writ, a citizen held where the courts are open is entitled either to criminal trial or to a judicial decree requiring his release. It follows [that] Hamdi is entitled to a habeas decree requiring his release unless (1) criminal proceedings are promptly brought, or (2) Congress has suspended the writ of habeas corpus. A suspension of the writ could, of course, lay down conditions for continued detention, similar to those that today's opinion prescribes under the Due Process Clause. But there is a world of difference between the people's representatives' determining the need for that suspension (and prescribing the conditions for it), and this Court's doing so.

The plurality finds justification for Hamdi's imprisonment in the [AUMF]. [This] is not remotely a congressional suspension of the writ, and no one claims that it is. Contrary to the plurality's view, I do not think this statute even authorizes detention of a citizen with the clarity necessary. But even if it did, I would not permit it to overcome Hamdi's entitlement to habeas corpus relief. The Suspension Clause of the Constitution, which carefully circumscribes the conditions under which the writ can be withheld, would be a sham if it could be evaded by congressional prescription of requirements other than the common-law requirement of committal for criminal prosecution that render the writ, though available, unavailing.

[Having] distorted the Suspension Clause, the plurality finishes up by transmogrifying the Great Writ—disposing of the present habeas petition by remanding for the District Court to “engag[e] in a factfinding process that is both prudent and incremental.” [This] judicial remediation of executive default is unheard of. The role of habeas corpus is to determine the legality of executive detention, not to supply the omitted process necessary to make it legal. It is not the habeas court's function to make illegal detention legal by supplying a process that the Government could have provided, but chose not to. If Hamdi is being imprisoned in violation of the Constitution (because without due process of law), then his habeas petition should be granted; the Executive may then hand him over to the criminal authorities, whose detention for the purpose of prosecution will be lawful, or else must release him.

There is a certain harmony of approach in the plurality's making up for Congress's failure to invoke the Suspension Clause and its making up for the Executive's failure to apply what it says are needed procedures—an approach that reflects what might be called a Mr. Fix-it Mentality. The plurality seems to view it as its mission to Make Everything Come Out Right, rather than merely to decree the consequences, as far as individual rights are concerned, of the *577 other two branches' actions and omissions. Has the Legislature failed to suspend the writ in the current dire emergency? Well, we will remedy that failure by prescribing the reasonable conditions that a suspension should have included. And has the Executive failed to live up to those reasonable conditions? Well, we will ourselves make that failure good, so that this dangerous fellow (if he is

dangerous) need not be set free. The problem with this approach is not only that it steps out of the courts' modest and limited role in a democratic society; but that by repeatedly doing what it thinks the political branches ought to do it encourages their lassitude and saps the vitality of government by the people.

[Where] the citizen is captured outside and held outside the United States, the constitutional requirements may be different. Moreover, even within the United States, the accused citizen-enemy combatant may lawfully be detained once prosecution is in progress or in contemplation. [I] frankly do not know whether these tools are sufficient to meet the Government's security needs, including the need to obtain intelligence through interrogation. It is far beyond my competence, or the Court's competence, to determine that. But it is not beyond Congress's. If the situation demands it, the Executive can ask Congress to authorize suspension of the writ—which can be made subject to whatever conditions Congress deems appropriate, including even the procedural novelties invented by the plurality today. To be sure, suspension is limited by the Constitution to cases of rebellion or invasion. But whether the attacks of September 11, 2001, constitute an “invasion,” and whether those attacks still justify suspension several years later, are questions for Congress rather than this Court. If civil rights are to be curtailed during wartime, it must be done openly and democratically, as the Constitution requires, rather than by silent erosion through an opinion of this Court.

Many think it not only inevitable but entirely proper that liberty give way to security in times of national crisis—that, at the extremes of military exigency, *inter arma silent leges*. Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it. Because the Court has proceeded to meet the current emergency in a manner the Constitution does not envision, I respectfully dissent.

Justice THOMAS, dissenting.

The Executive Branch, acting pursuant to the powers vested in the President by the Constitution and with explicit congressional approval, has determined that Yaser Hamdi is an enemy combatant and should be detained. This detention falls squarely within the Federal Government's war powers, and we lack the expertise and capacity to second-guess that decision. [The] national security [is] the primary responsibility and purpose of the Federal Government. [Because] the Founders understood that they could not foresee the myriad potential threats to national security that might later arise, they chose to create a Federal Government that necessarily possesses

sufficient power to handle any threat to the security of the Nation. [The] Founders intended that the President have primary responsibility—along with the necessary power—to protect the national security and to conduct the Nation's foreign relations. They did so principally because the structural advantages of a unitary Executive are essential in these domains. “Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks.” [These] structural advantages are most important in the national-security and foreign-affairs contexts. [Congress], to be sure, has a substantial and essential role in both foreign affairs and national security. But it is crucial to recognize that *judicial* interference in these domains destroys the purpose of vesting primary responsibility in a unitary Executive.

[Although] the President very well may have inherent authority to detain those arrayed against our troops, I agree with the plurality that we need not decide that question because Congress has authorized the President to do so [under the AUMF]. Accordingly, the President's action here is “supported by the strongest of presumptions and the widest latitude of judicial interpretation.” *Dames & Moore*. [In] this context, due process requires nothing more than a good-faith executive determination. [The] Executive's decision that a detention is necessary to protect the public need not and should not be subjected to judicial second-guessing. Indeed, at least in the context of enemy-combatant determinations, this would defeat the unity, secrecy, and dispatch that the Founders believed to be so important to the warmaking function.

Boumediene V. Bush (2008)

Opinion: Justice Kennedy delivered the opinion of the Court

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Petitioners are aliens designated as enemy combatants and detained at the United States Naval Station at Guantanamo Bay, Cuba. There are others detained there, also aliens, who are not parties to this suit.

Petitioners present a question not resolved by our earlier cases relating to the detention of aliens at Guantanamo: whether they have the constitutional privilege of habeas corpus, a privilege not to be withdrawn except in conformance with the Suspension Clause, Art. I, § 9, cl. 2. We hold these petitioners do have the habeas corpus privilege. Congress has enacted a statute, the Detainee Treatment Act of 2005 (DTA), 119 Stat. 2739, that provides certain procedures for review of the detainees' status. We hold that those procedures are not an adequate and effective substitute for habeas corpus. Therefore § 7 of the Military Commissions Act of 2006(MCA), 28 U.S.C. § 2241(e), operates as an unconstitutional suspension of the writ. We do not address whether the President has authority to detain these petitioners nor do we hold that the writ must

issue. These and other questions regarding the legality of the detention are to be resolved in the first instance by the District Court.

I

Under the Authorization for Use of Military Force (AUMF), § 2(a), 115 Stat. 224, note following 50 U.S.C. § 1541, the President is authorized “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”

III

[In] deciding the constitutional questions now presented we must determine whether petitioners are barred from seeking the writ or invoking the protections of the Suspension Clause either because of their status, i.e., petitioners' designation by the Executive Branch as enemy combatants, or their physical location, i.e., their presence at Guantanamo Bay. The Government contends that noncitizens designated as enemy combatants and detained in territory located outside our Nation's borders have no constitutional rights and no privilege of habeas corpus. Petitioners contend they do have cognizable constitutional rights and that Congress, in seeking to eliminate recourse to habeas corpus as a means to assert those rights, acted in violation of the Suspension Clause.

[Because] the Constitution's separation-of-powers structure, like the substantive guarantees of the Fifth and Fourteenth Amendments, protects persons as well as citizens, foreign nationals who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles. That the Framers considered the writ a vital instrument for the protection of individual liberty is evident from the care taken to specify the limited grounds for its suspension: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”

[Framers] deemed the writ to be an essential mechanism in the separation-of-powers scheme. [A] resolution passed by the New York ratifying convention made clear its understanding that the Clause not only protects against arbitrary suspensions of the writ but also guarantees an affirmative right to judicial inquiry into the causes of detention.

[In] our own system the Suspension Clause is designed to protect against these cyclical abuses. The Clause protects the rights of the detained by a means consistent with the essential design of the Constitution. It ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the “delicate balance of governance” that is itself the surest safeguard of liberty. [The] separation-of-powers doctrine, and the history that influenced its design, therefore must inform the reach and purpose of the Suspension Clause.

[The] prudential barriers that may have prevented the English courts from issuing the writ to Scotland and Hanover are not relevant here. We have no reason to believe an order from a federal court would be disobeyed at Guantanamo. No Cuban court has jurisdiction to hear these petitioners' claims, and no law other than the laws of the United States applies at the naval station. [This] is reason enough for us to discount the relevance of the Government's analogy.

Each side in the present matter argues that the very lack of a precedent on point supports its position. [Drawing] from its position that at common law the writ ran only to territories over which the Crown was sovereign, the Government says the Suspension Clause affords petitioners no rights because the United States does not claim sovereignty over the place of detention.

Guantanamo Bay is not formally part of the United States. See DTA § 1005(g), 119 Stat. 2743. And under the terms of the lease between the United States and Cuba, Cuba retains “ultimate sovereignty” over the territory while the United States exercises “complete jurisdiction and control.”

[We] therefore do not question the Government's position that Cuba, not the United States, maintains sovereignty, in the legal and technical sense of the term, over Guantanamo Bay. But this does not end the analysis. Our cases do not hold it is improper for us to inquire into the objective degree of control the Nation asserts over foreign territory. As commentators have noted, “‘[s]overeignty’ is a term used in many senses and is much abused.” See 1 Restatement (Third) of Foreign Relations Law of the United States § 206, Comment b, p. 94 (1986). When we have stated that sovereignty is a political question, we have referred not to sovereignty in the general, colloquial sense, meaning the exercise of dominion or power, see Webster's New International Dictionary 2406 (2d ed.1934) (“sovereignty,” definition 3), but sovereignty in the narrow, legal sense of the term, meaning a claim of right. [Indeed], it is not altogether uncommon for a territory to be under the de jure sovereignty of one nation, while under the plenary control, or practical sovereignty, of another. [Were] we to hold that the present cases turn on the political question doctrine, we would be required first to accept the Government's premise that de jure sovereignty is the touchstone of habeas corpus jurisdiction. This premise, however, is unfounded. For the reasons indicated above, the history of common-law habeas corpus provides scant support for this proposition; and, for the reasons indicated below, that position would be inconsistent with our precedents and contrary to fundamental separation-of-powers principles.

A

[Fundamental] questions regarding the Constitution's geographic scope first arose at the dawn of the 20th century when the Nation acquired noncontiguous Territories: Puerto Rico, Guam, and the Philippines—ceded to the United States by Spain at the conclusion of the Spanish–American War. [In] a series of opinions later known as the Insular Cases, the Court addressed whether the Constitution, by its own force, applies in any territory that is not a State. [Prior] to their cession to the United States, the former Spanish colonies operated under a civil-law system, without experience in the various aspects of the Anglo–American legal tradition, for instance the use of grand and petit juries. [The] Court thus was reluctant to risk the uncertainty and instability that

could result from a rule that displaced altogether the existing legal systems in these newly acquired Territories.

[These] considerations resulted in the doctrine of territorial incorporation, under which the Constitution applies in full in incorporated Territories surely destined for statehood but only in part in unincorporated Territories

[Practical] considerations weighed heavily as well in *Johnson v. Eisentrager*, 339 U.S. 763, 70 S.Ct. 936, 94 L.Ed. 1255 (1950), where the Court addressed whether habeas corpus jurisdiction extended to enemy aliens who had been convicted of violating the laws of war. The prisoners were detained at Landsberg Prison in Germany during the Allied Powers' post-war occupation. The Court stressed the difficulties of ordering the Government to produce the prisoners in a habeas corpus proceeding. It “would require allocation of shipping space, guarding personnel, billeting and rations” and would damage the prestige of military commanders at a sensitive time. [True,] the Court in *Eisentrager* denied access to the writ, and it noted the prisoners “at no relevant time were within any territory over which the United States is sovereign, and [that] the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States.” 339 U.S., at 778, 70 S.Ct. 936. The Government seizes upon this language as proof positive that the *Eisentrager* Court adopted a formalistic, sovereignty-based test for determining the reach of the Suspension Clause. See Brief for Federal Respondents 18–20. We reject this reading for three reasons. [B]ecause the United States lacked both *de jure* sovereignty and plenary control over Landsberg Prison, see *infra*, at 2258 – 2259, it is far from clear that the *Eisentrager* Court used the term sovereignty only in the narrow technical sense and not to connote the degree of control the military asserted over the facility. [In] its principal brief in *Eisentrager*, the Government advocated a bright-line test for determining the scope of the writ, similar to the one it advocates in these cases. Yet the Court mentioned the concept of territorial sovereignty only twice in its opinion. [Even] if we assume the *Eisentrager* Court considered the United States' lack of formal legal sovereignty over Landsberg Prison as the decisive *764 factor in that case, its holding is not inconsistent with a functional approach to questions of extraterritoriality. The formal legal status of a given territory affects, at least to some extent, the political branches' control over that territory. *De jure* sovereignty is a factor that bears upon which constitutional guarantees apply there.

Third, if the Government's reading of *Eisentrager* were correct, the opinion would have marked not only a change in, but a complete repudiation of, the *Insular Cases'* (and later *Reid's*) functional approach to questions of extraterritoriality. We cannot accept the Government's view. Nothing in *Eisentrager* says that *de jure* sovereignty is or has ever been the only relevant consideration in determining the geographic reach of the Constitution or of habeas corpus. Were that the case, there would be considerable tension between *Eisentrager*, on the one hand, and the *Insular Cases* and *Reid*, on the other. Our cases need not be read to conflict in this manner. A constricted reading of *Eisentrager* overlooks what we see as a common thread uniting the *Insular Cases*, *Eisentrager*, and *Reid*: the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism.

B

The Government's formal sovereignty-based test raises troubling separation-of-powers concerns as well. The political history of Guantanamo illustrates the deficiencies of this approach. The United States has maintained complete and uninterrupted control of the bay for over 100 years. [The] necessary implication of the [government's] argument is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint.

Our basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. Even when the United States acts outside its borders, its powers are not “absolute and unlimited” but are subject “to such restrictions as are expressed in the Constitution.” *Murphy v. Ramsey*, 114 U.S. 15, 44, 5 S.Ct. 747, 29 L.Ed. 47 (1885).

C

[Based] on [language] from *Eisentrager*, and the reasoning in our other extraterritoriality opinions, we conclude that at least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.

Applying this framework, we note at the onset that the status of these detainees is a matter of dispute. Petitioners, like those in *Eisentrager*, are not American citizens. But the petitioners in *Eisentrager* did not contest, it seems, the Court's assertion that they were “enemy alien[s].” *Ibid.* In the instant cases, by contrast, the detainees deny they are enemy combatants. They have been afforded some process in CSRT proceedings to determine their status; but, unlike in *Eisentrager*, *supra*, at 766, 70 S.Ct. 936, there has been no trial by military commission for violations of the laws of war.

[In] comparison the procedural protections afforded to the detainees in the CSRT hearings are far more limited, and, we conclude, fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review. Although the detainee is assigned a “Personal Representative” to assist him during CSRT proceedings, the Secretary of the Navy's memorandum makes clear that person is not the detainee's lawyer or even his “advocate. The Government's evidence is accorded a presumption of validity. *Id.*, at 159.

[As] to the second factor relevant to this analysis, the detainees here are similarly situated to the *Eisentrager* petitioners in that the sites of their apprehension and detention are technically outside the sovereign territory of the United States. [As] to the third factor, we recognize, as the Court did in *Eisentrager*, that there are costs to holding the Suspension Clause applicable in a case of

military detention abroad. [However,] we do not find them dispositive. Compliance with any judicial process requires some incremental expenditure of resources. [The] Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims.

[It] is true that before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains de jure sovereignty have any rights under our Constitution. But the cases before us lack any precise historical parallel. [We] hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay. If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause.

[T]he question becomes whether the statute stripping jurisdiction to issue the writ avoids the Suspension Clause mandate because Congress has provided adequate substitute procedures for habeas corpus.

B

[We] do not endeavor to offer a comprehensive summary of the requisites for an adequate substitute for habeas corpus. We do consider it uncontroversial, however, that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to “the erroneous application or interpretation” of relevant law. And the habeas court must have the power to order the conditional release of an individual unlawfully detained—though release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted.

[To] determine the necessary scope of habeas corpus review, therefore, we must assess the CSRT process. [The] Government defends the CSRT process, arguing that it was designed to conform to the procedures suggested by the plurality in *Hamdi*. See 542 U.S., at 538, 124 S.Ct. 2633. Setting aside the fact that the relevant language in *Hamdi* did not garner a majority of the Court, it does not control the matter at hand.

[Even] if we were to assume that the CSRTs satisfy due process standards, it would not end our inquiry. Habeas corpus is a collateral process that exists, in Justice Holmes' words, to “cu[t] through all forms and g[o] to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell.” *Frank v. Mangum*, 237 U.S. 309, 346, 35 S.Ct. 582, 59 L.Ed. 969 (1915) (dissenting opinion). Even when the procedures authorizing detention are structurally sound, the Suspension Clause remains applicable and the writ relevant.

C

[The] DTA does not explicitly empower the Court of Appeals to order the applicant in a DTA review proceeding released should the court find that the standards and procedures used at his

CSRT hearing were insufficient to justify detention. This is troubling. Yet, for present purposes, we can assume congressional silence permits a constitutionally required remedy. In that case it would be possible to hold that a remedy of release is impliedly provided for. The DTA might be read, furthermore, to allow petitioners to assert most, if not all, of the legal claims they seek to advance, including their most basic claim: that the President has no authority under the AUMF to detain them indefinitely.

[M]ore difficult question is whether the DTA permits the Court of Appeals to make requisite findings of fact. [Assuming] the DTA can be construed to allow the Court of Appeals to review or correct the CSRT's factual determinations, as opposed to merely certifying that the tribunal applied the correct standard of proof, we see no way to construe the statute to allow what is also constitutionally required in this context: an opportunity for the detainee to present relevant exculpatory evidence that was not made part of the record in the earlier proceedings.

[There] is no language in the DTA that can be construed to allow the Court of Appeals to admit and consider newly discovered evidence [however, it] may be critical to the detainee's argument that he is not an enemy combatant and there is no cause to detain him. This is not a remote hypothetical. One of the petitioners, Mohamed Nechla, requested at his CSRT hearing that the Government contact his employer. Petitioner claimed the employer would corroborate Nechla's contention he had no affiliation with al Qaeda. Although the CSRT determined this testimony would be relevant, it also found the witness was not reasonably available to testify at the time of the hearing. Petitioner's counsel, however, now represents the witness is available to be heard.

[We] do not imply DTA review would be a constitutionally sufficient replacement for habeas corpus but for these limitations on the detainee's ability to present exculpatory evidence. For even if it were possible, as a textual matter, to read into the statute each of the necessary procedures we have identified, we could not overlook the cumulative effect of our doing so. To hold that the detainees at Guantanamo may, under the DTA, challenge the President's legal authority to detain them, contest the CSRT's findings of fact, supplement the record on review with exculpatory evidence, and request an order of release would come close to reinstating the § 2241 habeas corpus process Congress sought to deny them. The language of the statute, read in light of Congress' reasons for enacting it, cannot bear this interpretation.

A

[In] cases involving foreign citizens detained abroad by the Executive, it likely would be both an impractical and unprecedented extension of judicial power to assume that habeas corpus would be available at the moment the prisoner is taken into custody. [P]roper deference can be accorded to reasonable procedures for screening and initial detention under lawful and proper conditions of confinement and treatment for a reasonable period of time.

[The] cases before us, however, do not involve detainees who have been held for a short period of time while awaiting their CSRT determinations. [And] there has been no showing that the Executive faces such onerous burdens that it cannot respond to habeas corpus actions. To require

these detainees to complete DTA review before proceeding with their habeas corpus actions would be to require additional months, if not years, of delay. [The] only law we identify as unconstitutional is MCA § 7, 28 U.S.C. § 2241(e). Accordingly, both the DTA and the CSRT process remain intact. [Except] in cases of undue delay, federal courts should refrain from entertaining an enemy combatant's habeas corpus petition at least until after the Department, acting via the CSRT, has had a chance to review his status.

B

[We] make no attempt to anticipate all of the evidentiary and access-to-counsel issues that will arise during the course of the detainees' habeas corpus proceedings. We recognize, however, that the Government has a legitimate interest in protecting sources and methods of intelligence gathering; and we expect that the District Court will use its discretion to accommodate this interest to the greatest extent possible. [These] and the other remaining questions are within the expertise and competence of the District Court to address in the first instance.

Security depends upon a sophisticated intelligence apparatus and the ability of our Armed Forces to act and to interdict. There are further considerations, however. Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law.

DISSENT

Chief Justice ROBERTS, with whom Justice SCALIA, Justice THOMAS, and Justice ALITO join, dissenting.

[The] critical threshold question in these cases, prior to any inquiry about the writ's scope, is whether the system the political branches designed protects whatever rights the detainees may possess. [If] the CSRT procedures meet the minimal due process requirements outlined in Hamdi, and if an Article III court is available to ensure that these procedures are followed in future cases, there is no need to reach the Suspension Clause question. [Hamdi] concluded that American citizens detained as enemy combatants are entitled to only limited process, and that much of that process could be supplied by a military tribunal, with review to follow in an Article III court. That is precisely the system we have here. It is adequate to vindicate whatever due process rights petitioners may have.

D

Despite these guarantees, the Court finds the DTA system an inadequate habeas substitute, for one central reason: Detainees are unable to introduce at the appeal stage exculpatory evidence

discovered after the conclusion of their CSRT proceedings. See ante, at 2271. The Court hints darkly that the DTA may suffer from other infirmities,[but] it does not bother to name them.

III

[The] Court objects to the detainees' limited access to witnesses and classified material, but proposes no alternatives of its own. Indeed, it simply ignores the many difficult questions its holding presents. What, for example, will become of the CSRT process? The majority says federal courts should generally refrain from entertaining detainee challenges until after the petitioner's CSRT proceeding has finished. See ante, at 2275 – 2276 (“[e]xcept in cases of undue delay”). But to what deference, if any, is that CSRT determination entitled?

There are other problems. Take witness availability. What makes the majority think witnesses will become magically available when the review procedure is labeled “habeas”? Will the location of most of these witnesses change—will they suddenly become easily susceptible to service of process? Or will subpoenas issued by American habeas courts run to Basra? And if they did, how would they be enforced? Speaking of witnesses, will detainees be able to call active-duty military officers as witnesses? If not, why not?

The majority has no answers for these difficulties. What it does say leaves open the distinct possibility that its “habeas” remedy will, when all is said and done, end up looking a great deal like the DTA review it rejects.

[So] who has won? Not the detainees. The Court's analysis leaves them with only the prospect of further litigation to determine the content of their new habeas right, followed by further litigation to resolve their particular cases, followed by further litigation before the D.C. Circuit—where they could have started had they invoked the DTA procedure. Not Congress, whose attempt to “determine—through democratic means—how best” to balance the security of the American people with the detainees' liberty interests, see *Hamdan v. Rumsfeld*, 548 U.S. 557, 636, 126 S.Ct. 2749, 165 L.Ed.2d 723 (2006) (BREYER, J., concurring), has been unceremoniously brushed aside. Not the Great Writ, whose majesty is hardly enhanced by its extension to a jurisdictionally quirky outpost, with no tangible benefit to anyone. Not the rule of law, unless by that is meant the rule of lawyers, who will now arguably have a greater role than military and intelligence officials in shaping policy for alien enemy combatants. And certainly not the American people, who today lose a bit more control over the conduct of this Nation's foreign policy to unelected, politically unaccountable judges.

DISSENT

Justice SCALIA, with whom THE CHIEF JUSTICE, Justice THOMAS, and Justice ALITO join, dissenting.

[The] writ of habeas corpus does not, and never has, run in favor of aliens abroad; the Suspension Clause thus has no application, and the Court's intervention in this military matter is entirely ultra vires.

I

[The] game of bait-and-switch that today's opinion plays upon the Nation's Commander in Chief will make the war harder on us. It will almost certainly cause more Americans to be killed. [At] least 30 of those prisoners hitherto released from Guantanamo Bay have returned to the battlefield. But others have succeeded in carrying on their atrocities against innocent civilians. [These], mind you, were detainees whom the military had concluded were not enemy combatants. Their return to the kill illustrates the incredible difficulty of assessing who is and who is not an enemy combatant in a foreign theater of operations where the environment does not lend itself to rigorous evidence collection. Astoundingly, the Court today raises the bar, requiring military officials to appear before civilian courts and defend their decisions under procedural and evidentiary rules that go beyond what Congress has specified. [But] even when the military has evidence that it can bring forward, it is often foolhardy to release that evidence to the attorneys representing our enemies. [During] the 1995 prosecution of Omar Abdel Rahman, federal prosecutors gave the names of 200 unindicted co-conspirators to the “Blind Sheik's” defense lawyers; that information was in the hands of Osama Bin Laden within two weeks. See Minority Report 14–15. In another case, trial testimony revealed to the enemy that the United States had been monitoring their cellular network, whereupon they promptly stopped using it, enabling more of them to evade capture and continue their atrocities.

[What] competence does the Court have to second-guess the judgment of Congress and the President on such a point? None whatever.

C

What drives today's decision is neither the meaning of the Suspension Clause, nor the principles of our precedents, but rather an inflated notion of judicial supremacy. The Court says that if the extraterritorial applicability of the Suspension Clause turned on formal notions of sovereignty, “it would be possible for the political branches to govern without legal constraint” in areas beyond the sovereign territory of the United States. Ante, at 2258 – 2259. That cannot be, the Court says, because it is the duty of this Court to say what the law is. Ante, at 2258 – 2259. It would be difficult to imagine a more question-begging analysis. “The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them.” *United States v. Raines*, 362 U.S. 17, 20–21, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960) (citing *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803); emphasis added). Our power “to say what the law is” is circumscribed by the limits of our statutorily and constitutionally conferred jurisdiction. See *843 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–578, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). And that is precisely the question in these cases: whether the Constitution confers habeas

jurisdiction on federal courts to decide petitioners' claims. It is both irrational and arrogant to say that the answer must be yes, because otherwise we would not be supreme.

[The Court] breaks a chain of precedent as old as the common law that prohibits judicial inquiry into detentions of aliens abroad absent statutory authorization. And, most tragically, it sets our military commanders the impossible task of proving to a civilian court, under whatever standards this Court devises in the future, that evidence supports the confinement of each and every enemy prisoner.

The Nation will live to regret what the Court has done today. I dissent.

CHAPTER VIII: President Obama, the Roberts Court, and Presidential Recess Power

National Labor Relations Board V. Canning, et. al. (2014)

Opinion: Justice BREYER delivered the opinion of the Court.

Ordinarily the President must obtain “the Advice and Consent of the Senate” before appointing an “Office[r] of the United States.” U.S. Const., Art. II, § 2, cl. 2. But the Recess Appointments Clause creates an exception. It gives the President alone the power “to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.” Art. II, § 2, cl. 3. We here consider three questions about the application of this Clause.

The first concerns the scope of the words “recess of the Senate.” Does that phrase refer only to an inter-session recess (*i.e.*, a break between formal sessions of Congress), or does it also include an intra-session recess, such as a summer recess in the midst of a session? We conclude that the Clause applies to both kinds of recess.

The second question concerns the scope of the words “vacancies that may happen.” Does that phrase refer only to vacancies that first come into existence during a recess, or does it also include vacancies that arise prior to a recess but continue to exist during the recess? We conclude that the Clause applies to both kinds of vacancy.

The third question concerns calculation of the length of a “recess.” The President made the appointments here at issue on January 4, 2012. At that time the Senate was in recess pursuant to a December 17, 2011, resolution providing for a series of brief recesses punctuated by “*pro forma* session[s],” with “no business ... transacted,” every Tuesday and Friday through January 20, 2012. S. J., 112th Cong., 1st Sess., 923 (2011) (hereinafter 2011 S. J.). In calculating the

length of a recess are we to ignore the *pro forma* sessions, thereby treating the series of brief recesses as a single, month-long recess? We conclude that we cannot ignore these *pro forma* sessions.

Our answer to the third question means that, when the appointments before us took place, the Senate was in the midst of a 3-day recess. Three days is too short a time to bring a recess within the scope of the Clause. Thus we conclude that the President lacked the power to make the recess appointments here at issue.

I

The case before us arises out of a labor dispute. The National Labor Relations Board (NLRB) found that a Pepsi-Cola distributor, Noel Canning, had unlawfully refused to reduce to writing and execute a collective-bargaining agreement with a labor union. The Board ordered the distributor to execute the agreement and to make employees whole for any losses. *Noel Canning*, 358 N.L.R.B. No. 4 (2012).

The Pepsi-Cola distributor subsequently asked the Court of Appeals for the District of Columbia Circuit to set the Board's order aside. It claimed that three of the five Board members had been invalidly appointed, leaving the Board without the three lawfully appointed members necessary for it to act. See 29 U.S.C. § 160(f) (providing for judicial review); § 153(a) (providing for a 5-member Board); § 153(b) (providing for a 3-member quorum); *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 687–688, 130 S.Ct. 2635, 177 L.Ed.2d 162 (2010) (in the absence of a lawfully appointed quorum, the Board cannot exercise its powers).

The three members in question were Sharon Block, Richard Griffin, and Terence Flynn. In 2011 the President had nominated each of them to the Board. As of January 2012, Flynn's nomination had been pending in the Senate awaiting confirmation for approximately a year. The nominations of each of the other two had been pending for a few weeks. On January 4, 2012, the President, invoking the Recess Appointments Clause, appointed all three to the Board.

The distributor argued that the Recess Appointments Clause did not authorize those appointments. It pointed out that on December 17, 2011, the Senate, by unanimous consent, had

adopted a resolution providing that it would take a series of brief recesses beginning the following day. See 2011 S.J. 923. Pursuant to that resolution, the Senate held *pro forma* sessions every Tuesday and Friday until it returned for ordinary business on January 23, 2012. *Ibid.*; 158 Cong. Rec. S1–S11 (Jan. 3–20, 2012). The President's January 4 appointments were made between the January 3 and January 6 *pro forma* sessions. In the distributor's view, each *pro forma* session terminated the immediately preceding recess. Accordingly, the appointments were made during a 3–day adjournment, which is not long enough to trigger the Recess Appointments Clause.

The Court of Appeals agreed that the appointments fell outside the scope of the Clause. But the court set forth different reasons. It held that the Clause's words “the recess of the Senate” do not include recesses that occur *within* a formal session of Congress, *i.e.*, intra-session recesses. Rather those words apply only to recesses *between* those formal sessions, *i.e.*, inter-session recesses. Since the second session of the 112th Congress began on January 3, 2012, the day before the President's appointments, those appointments occurred during an intra-session recess, and the appointments consequently fell outside the scope of the Clause. 705 F.3d 490, 499–507 (C.A.D.C.2013).

The Court of Appeals added that, in any event, the phrase “vacancies that may happen during the recess” applies only to vacancies that come into existence during a recess. *Id.*, at 507–512. The vacancies that Members Block, Griffin, and Flynn were appointed to fill had arisen before the beginning of the recess during which they were appointed. For this reason too the President's appointments were invalid. And, because the Board lacked a quorum of validly appointed members when it issued its order, the order was invalid. 29 U.S.C. § 153(b); *New Process Steel, supra*.

We granted the Solicitor General's petition for certiorari. We asked the parties to address not only the Court of Appeals' interpretation of the Clause but also the distributor's initial argument, namely, “[w]hether the President's recess-appointment power may be exercised when the Senate is convening every three days in *pro forma* sessions.” 570 U.S. —, 133 S.Ct. 2861, 186 L.Ed.2d 908 (2013).

II

Before turning to the specific questions presented, we shall mention two background considerations that we find relevant to all three. First, *the Recess Appointments Clause sets forth a subsidiary, not a primary, method for appointing officers of the United States*. The immediately preceding Clause—Article II, Section 2, Clause 2—provides the primary method of appointment. It says that the President “shall nominate, *and by and with the Advice and Consent of the Senate*, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States” (emphasis added).

The Federalist Papers make clear that the Founders intended this method of appointment, requiring Senate approval, to be the norm (at least for principal officers). Alexander Hamilton wrote that the Constitution vests the power of *nomination* in the President alone because “one man of discernment is better fitted to analyse and estimate the peculiar qualities adapted to particular offices, than a body of men of equal, or perhaps even of superior discernment.” The Federalist No. 76, p. 510 (J. Cooke ed. 1961). At the same time, the need to secure Senate approval provides “an excellent check upon a spirit of favoritism in the President, and would tend greatly to preventing the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.” *Id.*, at 513. Hamilton further explained that the “ordinary power of appointment is confided to the President and Senate *jointly*, and can therefore only be exercised during the session of the Senate; but as it would have been improper to oblige this body to be continually in session for the appointment of officers; and as vacancies might happen *in their recess*, which it might be necessary for the public service to fill without delay, the succeeding clause is evidently intended to authorise the President *singly* to make temporary appointments.” *Id.*, No. 67, at 455.

Thus the Recess Appointments Clause reflects the tension between, on the one hand, the President's continuous need for “the assistance of subordinates,” *Myers v. United States*, 272 U.S. 52, 117, 47 S.Ct. 21, 71 L.Ed. 160 (1926), and, on the other, the Senate's practice, particularly during the Republic's early years, of meeting for a single brief session each year, see Art. I, § 4, cl. 2; Amdt. 20, § 2 (requiring the Senate to “assemble” only “once in every year”)[.]

Second, *in interpreting the Clause, we put significant weight upon historical practice*. For one thing, the interpretive questions before us concern the allocation of power between two elected branches of Government. Long ago Chief Justice Marshall wrote that “a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice

of the government, ought to receive a considerable impression from that practice.” *McCulloch v. Maryland*, 4 Wheat. 316, 401, 4 L.Ed. 579 (1819).

And we later confirmed that “[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions” regulating the relationship between Congress and the President. *The Pocket Veto Case*, 279 U.S. 655, 689, 49 S.Ct. 463, 73 L.Ed. 894 (1929)[.]

We recognize, of course, that the separation of powers can serve to safeguard individual liberty, *Clinton v. City of New York*, 524 U.S. 417, 449–450, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998) (KENNEDY, J., concurring), and that it is the “duty of the judicial department”—in a separation-of-powers case as in any other—“to say what the law is,” *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803). But it is equally true that the longstanding “practice of the government,” *McCulloch*, *supra*, at 401, can inform our determination of “what the law is,” *Marbury*, *supra*, at 177.

That principle is neither new nor controversial. As James Madison wrote, it “was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms & phrases necessarily used in such a charter ... and that it might require a regular course of practice to liquidate & settle the meaning of some of them.” Letter to Spencer Roane (Sept. 2, 1819), in 8 Writings of James Madison 450 (G. Hunt ed. 1908). And our cases have continually confirmed Madison's view.

[P]recedents show that this Court has treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era. ... There is a great deal of history to consider here. Presidents have made recess appointments since the beginning of the Republic. Their frequency suggests that the Senate and President have recognized that recess appointments can be both necessary and appropriate in certain circumstances. We have not previously interpreted the Clause, and, when doing so for the first time in more than 200 years, we must hesitate to upset the compromises and working arrangements that the elected branches of Government themselves have reached.

III

The first question concerns the scope of the phrase “*the recess* of the Senate.” Art. II, § 2, cl. 3 (emphasis added). The Constitution provides for congressional elections every two years. And the 2–year life of each elected Congress typically consists of two formal 1–year sessions, each separated from the next by an “inter-session recess.” Congressional Research Service, H. Hogue, *Recess Appointments: Frequently Asked Questions 2* (2013). The Senate or the House of Representatives announces an inter-session recess by approving a resolution stating that it will “adjourn *sine die*,” *i.e.*, without specifying a date to return (in which case Congress will reconvene when the next formal session is scheduled to begin).

The Senate and the House also take breaks in the midst of a session. The Senate or the House announces any such “intra-session recess” by adopting a resolution stating that it will “adjourn” to a fixed date, a few days or weeks or even months later. All agree that the phrase “the recess of the Senate” covers inter-session recesses. The question is whether it includes intra-session recesses as well.

In our view, the phrase “the recess” includes an intra-session recess of substantial length. Its words taken literally can refer to both types of recess. Founding-era dictionaries define the word “recess,” much as we do today, simply as “a period of cessation from usual work.” 13 *The Oxford English Dictionary* 322–323 (2d ed. 1989) (hereinafter OED) (citing 18th- and 19th-century sources for that definition of “recess”)[.]

We recognize that the word “the” in “*the recess*” might suggest that the phrase refers to the single break separating formal sessions of Congress. That is because the word “the” frequently (but not always) indicates “a particular thing.” 2 Johnson 2003. But the word can also refer “to a term used generically or universally.” 17 OED 879. The Constitution, for example, directs the Senate to choose a President *pro tempore* “in *the* Absence of the Vice–President.” Art. I, § 3, cl. 5 (emphasis added). And the Federalist Papers refer to the chief magistrate of an ancient Achaean league who “administered the government in *the* recess of the Senate.” The Federalist No. 18, at 113 (J. Madison) (emphasis added). Reading “the” generically in this way, there is no linguistic problem applying the Clause's phrase to both kinds of recess. And, in fact, the phrase “the recess” was used to refer to intra-session recesses at the time of the founding. See, *e.g.*, 3 Farrand 76 (letter from Washington to Jay); New Jersey Legislative–Council Journal, 5th Sess., 1st Sitting 70, 2d Sitting 9 (1781)[.]

The constitutional text is thus ambiguous. And we believe the Clause's purpose demands the broader interpretation. The Clause gives the President authority to make appointments during “the recess of the Senate” so that the President can ensure the continued functioning of the Federal Government when the Senate is away. The Senate is equally away during both an inter-session and an intra-session recess, and its capacity to participate in the appointments process has nothing to do with the words it uses to signal its departure.

[We] recognize that the Senate cannot easily register opposition as a body to every governmental action that many, perhaps most, Senators oppose. But the Senate has not been silent or passive regarding the meaning of the Clause: A Senate Committee did register opposition to President Theodore Roosevelt's use of the Clause, and the Senate as a whole has legislated in an effort to discourage certain kinds of recess appointments. And yet we are not aware of any formal action it has taken to call into question the broad and functional definition of “recess” first set out in the 1905 Senate Report and followed by the Executive Branch since at least 1921. Nor has Justice SCALIA identified any. All the while, the President has made countless recess appointments during intra-session recesses.

The upshot is that restricting the Clause to inter-session recesses would frustrate its purpose. It would make the President's recess-appointment power dependent on a formalistic distinction of Senate procedure. Moreover, the President has consistently and frequently interpreted the word “recess” to apply to intra-session recesses, and has acted on that interpretation. The Senate as a body has done nothing to deny the validity of this practice for at least three-quarters of a century. And three-quarters of a century of settled practice is long enough to entitle a practice to “great weight in a proper interpretation” of the constitutional provision. *The Pocket Veto Case*, 279 U.S., at 689, 49 S.Ct. 463.

[We] agree with the Solicitor General that a 3–day recess would be too short... The Adjournments Clause reflects the fact that a 3–day break is not a significant interruption of legislative business. As the Solicitor General says, it is constitutionally *de minimis*. Brief for Petitioner 18. A Senate recess that is so short that it does not require the consent of the House is not long enough to trigger the President's recess-appointment power.

That is not to say that the President may make recess appointments during any recess that is “more than three days.” Art. I, § 5, cl. 4. The Recess Appointments Clause seeks to permit the Executive Branch to function smoothly when Congress is unavailable. And though Congress has taken short breaks for almost 200 years, and there have been many thousands of recess appointments in that time, we have not found a single example of a recess appointment made

during an intra-session recess that was shorter than 10 days. Nor has the Solicitor General. Reply Brief 23. Indeed, the Office of Legal Counsel once informally advised against making a recess appointment during a 6–day intra-session recess. 3 Op. OLC, at 315–316. The lack of examples suggests that the recess-appointment power is not needed in that context. (The length of a recess is “ordinarily calculated by counting the calendar days running from the day after the recess begins and including the day the recess ends.” 36 Op. OLC, at ___, n. 1 (citation omitted).)

[We] conclude ... that a recess of more than 3 days but less than 10 days is presumptively too short to fall within the Clause. We add the word “presumptively” to leave open the possibility that some very unusual circumstance—a national catastrophe, for instance, that renders the Senate unavailable but calls for an urgent response—could demand the exercise of the recess-appointment power during a shorter break.

[In] sum, we conclude that the phrase “the recess” applies to both intra-session and inter-session recesses. If a Senate recess is so short that it does not require the consent of the House, it is too short to trigger the Recess Appointments Clause. See Art. I, § 5, cl. 4. And a recess lasting less than 10 days is presumptively too short as well.

[The] President has consistently and frequently interpreted the Recess Appointments Clause to apply to vacancies that initially occur before, but continue to exist during, a recess of the Senate. The Senate as a body has not countered this practice for nearly three-quarters of a century, perhaps longer. See A. Amar, *The Unwritten Constitution* 576–577, n. 16 (2012) (for nearly 200 years “the overwhelming mass of actual practice” supports the President’s interpretation); *Mistretta v. United States*, 488 U.S. 361, 401, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989) (a “200–year tradition” can “‘give meaning’ to the Constitution” (quoting *Youngstown*, 343 U.S., at 610, 72 S.Ct. 863 (Frankfurter, J., concurring))). The tradition is long enough to entitle the practice “to great regard in determining the true construction” of the constitutional provision. *The Pocket Veto Case*, 279 U.S., at 690, 49 S.Ct. 463. And we are reluctant to upset this traditional practice where doing so would seriously shrink the authority that Presidents have believed existed and have exercised for so long.

In light of some linguistic ambiguity, the basic purpose of the Clause, and the historical practice we have described, we conclude that the phrase “all vacancies” includes vacancies that come into existence while the Senate is in session.

[The] Recess Appointments Clause is not designed to overcome serious institutional friction. It simply provides a subsidiary method for appointing officials when the Senate is away during a recess. Here, as in other contexts, friction between the branches is an inevitable consequence of our constitutional structure. See *Myers*, 272 U.S., at 293, 47 S.Ct. 21 (Brandeis, J., dissenting). That structure foresees resolution not only through judicial interpretation and compromise among the branches but also by the ballot box.

VI

The Recess Appointments Clause responds to a structural difference between the Executive and Legislative Branches: The Executive Branch is perpetually in operation, while the Legislature only acts in intervals separated by recesses. The purpose of the Clause is to allow the Executive to continue operating while the Senate is unavailable. We believe that the Clause's text, standing alone, is ambiguous. It does not resolve whether the President may make appointments during intra-session recesses, or whether he may fill pre-recess vacancies. But the broader reading better serves the Clause's structural function. Moreover, that broader reading is reinforced by centuries of history, which we are hesitant to disturb. We thus hold that the Constitution empowers the President to fill any existing vacancy during any recess—intra-session or inter-session—of sufficient length.

Justice SCALIA, with whom THE CHIEF JUSTICE, Justice THOMAS, and Justice ALITO join, concurring in the judgment.

Except where the Constitution or a valid federal law provides otherwise, all “Officers of the United States” must be appointed by the President “by and with the Advice and Consent of the Senate.” U.S. Const., Art. II, § 2, cl. 2. That general rule is subject to an exception: “The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.” *Id.*, § 2, cl. 3. This case requires us to decide whether the Recess Appointments Clause authorized three appointments made by President Obama to the National Labor Relations Board in January 2012 without the Senate's consent.

To prevent the President's recess-appointment power from nullifying the Senate's role in the appointment process, the Constitution cabins that power in two significant ways. First, it may be exercised only in "the Recess of the Senate," that is, the intermission between two formal legislative sessions. Second, it may be used to fill only those vacancies that "happen during the Recess," that is, offices that become vacant during that intermission. Both conditions are clear from the Constitution's text and structure, and both were well understood at the founding. The Court of Appeals correctly held that the appointments here at issue are invalid because they did not meet either condition.

Today's Court agrees that the appointments were invalid, but for the far narrower reason that they were made during a 3-day break in the Senate's session. On its way to that result, the majority sweeps away the key textual limitations on the recess-appointment power. It holds, first, that the President can make appointments without the Senate's participation even during short breaks in the middle of the Senate's session, and second, that those appointments can fill offices that became vacant long before the break in which they were filled. The majority justifies those atextual results on an adverse-possession theory of executive authority: Presidents have long claimed the powers in question, and the Senate has not disputed those claims with sufficient vigor, so the Court should not "upset the compromises and working arrangements that the elected branches of Government themselves have reached." *Ante*, at 2560.

The Court's decision transforms the recess-appointment power from a tool carefully designed to fill a narrow and specific need into a weapon to be wielded by future Presidents against future Senates. To reach that result, the majority casts aside the plain, original meaning of the constitutional text in deference to late-arising historical practices that are ambiguous at best. The majority's insistence on deferring to the Executive's untenably broad interpretation of the power is in clear conflict with our precedent and forebodes a diminution of this Court's role in controversies involving the separation of powers and the structure of government. I concur in the judgment only.

[What] the majority needs to sustain its judgment is an ambiguous text and a clear historical practice. What it has is a clear text and an at-best-ambiguous historical practice. Even if the Executive could accumulate power through adverse possession by engaging in a *consistent* and *unchallenged* practice over a long period of time, the oft-disputed practices at issue here would not meet that standard. Nor have those practices created any justifiable expectations that could be disappointed by enforcing the Constitution's original meaning. There is thus no ground for the majority's deference to the unconstitutional recess-appointment practices of the Executive Branch.

The majority replaces the Constitution's text with a new set of judge-made rules to govern recess appointments. Henceforth, the Senate can avoid triggering the President's now-vast recess-appointment power by the odd contrivance of never adjourning for more than three days without holding a *pro forma* session at which it is understood that no business will be conducted. *Ante*, at 2555 – 2556. How this new regime will work in practice remains to be seen. Perhaps it will reduce the prevalence of recess appointments. But perhaps not: Members of the President's party in Congress may be able to prevent the Senate from holding *pro forma* sessions with the necessary frequency, and if the House and Senate disagree, the President may be able to adjourn both “to such Time as he shall think proper.” U.S. Const., Art. II, § 3. In any event, the limitation upon the President's appointment power is there not for the benefit of the Senate, but for the protection of the people; it should not be dependent on Senate action for its existence.

The real tragedy of today's decision is not simply the abolition of the Constitution's limits on the recess-appointment power and the substitution of a novel framework invented by this Court. It is the damage done to our separation-of-powers jurisprudence more generally. It is not every day that we encounter a proper case or controversy requiring interpretation of the Constitution's structural provisions. Most of the time, the interpretation of those provisions is left to the political branches—which, in deciding how much respect to afford the constitutional text, often take their cues from this Court. We should therefore take every opportunity to affirm the primacy of the Constitution's enduring principles over the politics of the moment. Our failure to do so today will resonate well beyond the particular dispute at hand. Sad, but true: The Court's embrace of the adverse-possession theory of executive power (a characterization the majority resists but does not refute) will be cited in diverse contexts, including those presently unimagined, and will have the effect of aggrandizing the Presidency beyond its constitutional bounds and undermining respect for the separation of powers.

I concur in the judgment only.

CHAPTER IX:

President Obama, the Roberts Court, and Presidential versus Congressional Powers

N.F.I.B. v. Sebelius, (2012)

OPINION: Chief Justice ROBERTS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III–C, an opinion with respect to Part IV, in which Justice BREYER and Justice KAGAN join, and an opinion with respect to Parts III–A, III–B, and III–D.

Today we resolve constitutional challenges to two provisions of the Patient Protection and Affordable Care Act of 2010: the individual mandate, which requires individuals to purchase a health insurance policy providing a minimum level of coverage; and the Medicaid expansion, which gives funds to the States on the condition that they provide specified health care to all citizens whose income falls below a certain threshold.

[The] Government advances two theories for the proposition that Congress had constitutional authority to enact the individual mandate. First, the Government argues that Congress had the power to enact the mandate under the Commerce Clause. Under that theory, Congress may order individuals to buy health insurance because the failure to do so affects interstate commerce, and could undercut the Affordable Care Act’s other reforms. Second, the Government argues that if the commerce power does not support the mandate, we should nonetheless uphold it as an exercise of Congress’s power to tax. According to the Government, even if Congress lacks the power to direct individuals to buy insurance, the only effect of the individual mandate is to raise taxes on those who do not do so, and thus the law may be upheld as a tax.

[The Commerce Clause]

The Government’s first argument is that the individual mandate is a valid exercise of Congress’s power under the Commerce Clause and the Necessary and Proper Clause. According to the Government, the health care market is characterized by a significant cost-shifting problem. Everyone will eventually need health care at a time and to an extent they cannot predict, but if they do not have insurance, they often will not be able to pay for it. Because state and federal laws nonetheless require hospitals to provide a certain degree of care to individuals without regard to their ability to pay, hospitals end up receiving compensation for only a portion of the

services they provide. To recoup the losses, hospitals pass on the cost to insurers through higher rates, and insurers, in turn, pass on the cost to policy holders in the form of higher premiums. Congress estimated that the cost of uncompensated care raises family health insurance premiums, on average, by over \$1,000 per year.

In the Affordable Care Act, Congress addressed the problem of those who cannot obtain insurance coverage because of preexisting conditions or other health issues. It did so through the Act's "guaranteed-issue" and "community-rating" provisions. These provisions together prohibit insurance companies from denying coverage to those with such conditions or charging unhealthy individuals higher premiums than healthy individuals. The guaranteed-issue and community-rating reforms do not, however, address the issue of healthy individuals who choose not to purchase insurance to cover potential health care needs. In fact, the reforms sharply exacerbate that problem, by providing an incentive for individuals to delay purchasing health insurance until they become sick, relying on the promise of guaranteed and affordable coverage. The reforms also threaten to impose massive new costs on insurers, who are required to accept unhealthy individuals but prohibited from charging them rates necessary to pay for their coverage. This will lead insurers to significantly increase premiums on everyone. The individual mandate was Congress's solution to these problems. By requiring that individuals purchase health insurance, the mandate prevents cost-shifting by those who would otherwise go without it. In addition, the mandate forces into the insurance risk pool more healthy individuals, whose premiums on average will be higher than their health care expenses. This allows insurers to subsidize the costs of covering the unhealthy individuals the reforms require them to accept.

[The] Government contends that the individual mandate is within Congress's power because the failure to purchase insurance "has a substantial and deleterious effect on interstate commerce" by creating the cost-shifting problem. [Given] its expansive scope, it is no surprise that Congress has employed the commerce power in a wide variety of ways to address the pressing needs of the time. But Congress has never attempted to rely on that power to compel individuals not engaged in commerce to purchase an unwanted product. [The] power to *regulate* commerce presupposes the existence of commercial activity to be regulated. If the power to "regulate" something included the power to create it, many of the provisions in the Constitution would be superfluous. [Our] precedent also reflects this understanding. As expansive as our cases construing the scope of the commerce power have been, they all have one thing in common: They uniformly describe the power as reaching "activity." [The] individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce. Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority.

[Applying] the Government's logic to the familiar case of *Wickard v. Filburn* shows how far that logic would carry us from the notion of a government of limited powers. [*Wickard*] has long

been regarded as “perhaps the most far reaching example of Commerce Clause authority over intrastate activity,” *Lopez*, but the Government’s theory in this case would go much further. [The] farmer in *Wickard* was at least actively engaged in the production of wheat, and the Government could regulate that activity because of its effect on commerce. The Government’s theory here would effectively override that limitation, by establishing that individuals may be regulated under the Commerce Clause whenever enough of them are not doing something the Government would have them do.

Indeed, the Government’s logic would justify a mandatory purchase to solve almost any problem. To consider a different example in the health care market, many Americans do not eat a balanced diet. That group makes up a larger percentage of the total population than those without health insurance. The failure of that group to have a healthy diet increases health care costs, to a greater extent than the failure of the uninsured to purchase insurance. Those increased costs are borne in part by other Americans who must pay more, just as the uninsured shift costs to the insured. Congress addressed the insurance problem by ordering everyone to buy insurance. Under the Government’s theory, Congress could address the diet problem by ordering everyone to buy vegetables. People, for reasons of their own, often fail to do things that would be good for them or good for society. Those failures—joined with the similar failures of others—can readily have a substantial effect on interstate commerce. Under the Government’s logic, that authorizes Congress to use its commerce power to compel citizens to act as the Government would have them act. That is not the country the Framers of our Constitution envisioned.

[The] Government sees things differently. It argues that because sickness and injury are unpredictable but unavoidable, “the uninsured as a class are active in the market for health care, which they regularly seek and obtain.” [Everyone] will likely participate in the markets for food, clothing, transportation, shelter, or energy; that does not authorize Congress to direct them to purchase particular products in those or other markets today. The Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions. Any police power to regulate individuals as such, as opposed to their activities, remains vested in the States. [The] individual mandate forces individuals into commerce precisely because they elected to refrain from commercial activity. Such a law cannot be sustained under a clause authorizing Congress to “regulate Commerce.”

[Necessary and Proper Clause]

The Government next contends that Congress has the power under the Necessary and Proper Clause to enact the individual mandate because the mandate is an “integral part of a comprehensive scheme of economic regulation”—the guaranteed-issue and community-rating insurance reforms. [The Necessary and Proper Clause] vests Congress with authority to enact provisions “incidental to the [enumerated] power, and conducive to its beneficial exercise,” *McCulloch*. Although the Clause gives Congress authority to “legislate on that vast mass of incidental powers which must be involved in the constitution,” it does not license the exercise of any “great substantive and independent power[s]” beyond those specifically enumerated. [As]

our jurisprudence under the Necessary and Proper Clause has developed, we have been very deferential to Congress's determination that a regulation is "necessary." We have thus upheld laws that are " 'convenient, or useful' or 'conducive' to the authority's 'beneficial exercise.' " *Comstock*. But we have also carried out our responsibility to declare unconstitutional those laws that undermine the structure of government established by the Constitution. Such laws, which are not "consist[ent] with the letter and spirit of the constitution," are not "*proper* [means] for carrying into Execution" Congress's enumerated powers. Rather, they are, "in the words of The Federalist, 'merely acts of usurpation' which 'deserve to be treated as such.' "

Applying these principles, the individual mandate cannot be sustained under the Necessary and Proper Clause as an essential component of the insurance reforms. Each of our prior cases upholding laws under that Clause involved exercises of authority derivative of, and in service to, a granted power. [The] individual mandate, by contrast, vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power. This is in no way an authority that is "narrow in scope" or "incidental" to the exercise of the commerce power. Rather, such a conception of the Necessary and Proper Clause would work a substantial expansion of federal authority. No longer would Congress be limited to regulating under the Commerce Clause those who by some preexisting activity bring themselves within the sphere of federal regulation. Instead, Congress could reach beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be outside of it. Even if the individual mandate is "necessary" to the Act's insurance reforms, such an expansion of federal power is not a "proper" means for making those reforms effective.

[Just] as the individual mandate cannot be sustained as a law regulating the substantial effects of the failure to purchase health insurance, neither can it be upheld as a "necessary and proper" component of the insurance reforms. The commerce power thus does not authorize the mandate. Accord, *post*, at 2644 – 2650 (joint opinion of SCALIA, KENNEDY, THOMAS, and ALITO, JJ., dissenting).

[Taxing Power]

That is not the end of the matter. Because the Commerce Clause does not support the individual mandate, it is necessary to turn to the Government's second argument: that the mandate may be upheld as within Congress's enumerated power to "lay and collect Taxes." Art. I, § 8, cl. 1.

The Government's tax power argument asks us to view the statute differently than we did in considering its commerce power theory. In making its Commerce Clause argument, the Government defended the mandate as a regulation requiring individuals to purchase health insurance. The Government does not claim that the taxing power allows Congress to issue such a command. Instead, the Government asks us to read the mandate not as ordering individuals to buy insurance, but rather as imposing a tax on those who do not buy that product.

[Under] the mandate, if an individual does not maintain health insurance, the only consequence is that he must make an additional payment to the IRS when he pays his taxes. That, according to the Government, means the mandate can be regarded as establishing a condition—not owning health insurance—that triggers a tax—the required payment to the IRS. Under that theory, the mandate is not a legal command to buy insurance. Rather, it makes going without insurance just another thing the Government taxes, like buying gasoline or earning income. And if the mandate is in effect just a tax hike on certain taxpayers who do not have health insurance, it may be within Congress’s constitutional power to tax.

[The] exaction the Affordable Care Act imposes on those without health insurance looks like a tax in many respects. The “[s]hared responsibility payment,” as the statute entitles it, is paid into the Treasury by “taxpayer[s]” when they file their tax returns. [The] requirement to pay is found in the Internal Revenue Code and enforced by the IRS, which—as we previously explained—must assess and collect it “in the same manner as taxes.” This process yields the essential feature of any tax: it produces at least some revenue for the Government. [It] is of course true that the Act describes the payment as a “penalty,” not a “tax.” But while that label is fatal to the application of the Anti-Injunction Act, it does not determine whether the payment may be viewed as an exercise of Congress’s taxing power. It is up to Congress whether to apply the Anti-Injunction Act to any particular statute, so it makes sense to be guided by Congress’s choice of label on that question. That choice does not, however, control whether an exaction is within Congress’s constitutional power to tax.

[In] *Drexel Furniture*, we focused on three practical characteristics of the so-called tax on employing child laborers that convinced us the “tax” was actually a penalty. First, the tax imposed an exceedingly heavy burden—10 percent of a company’s net income—on those who employed children, no matter how small their infraction. Second, it imposed that exaction only on those who knowingly employed underage laborers. Such scienter requirements are typical of punitive statutes, because Congress often wishes to punish only those who intentionally break the law. Third, this “tax” was enforced in part by the Department of Labor, an agency responsible for punishing violations of labor laws, not collecting revenue. The same analysis here suggests that the shared responsibility payment may for constitutional purposes be considered a tax, not a penalty: First, for most Americans the amount due will be far less than the price of insurance, and, by statute, it can never be more. It may often be a reasonable financial decision to make the payment rather than purchase insurance, unlike the “prohibitory” financial punishment in *Drexel Furniture*. Second, the individual mandate contains no scienter requirement. Third, the payment is collected solely by the IRS through the normal means of taxation.

[None] of this is to say that the payment is not intended to affect individual conduct. Although the payment will raise considerable revenue, it is plainly designed to expand health insurance coverage. But taxes that seek to influence conduct are nothing new. [Today,] federal and state taxes can compose more than half the retail price of cigarettes, not just to raise more money, but

to encourage people to quit smoking. [Indeed,] “[e]very tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed.” That [the individual mandate] seeks to shape decisions about whether to buy health insurance does not mean that it cannot be a valid exercise of the taxing power. In distinguishing penalties from taxes, this Court has explained that “if the concept of penalty means anything, it means punishment for an unlawful act or omission.” While the individual mandate clearly aims to induce the purchase of health insurance, it need not be read to declare that failing to do so is unlawful. Neither the Act nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS.

[Congress’s] ability to use its taxing power to influence conduct is not without limits. A few of our cases policed these limits aggressively, invalidating punitive exactions obviously designed to regulate behavior otherwise regarded at the time as beyond federal authority. *See, e.g., United States v. Butler; Drexel Furniture*. [We] have already explained that the shared responsibility payment’s practical characteristics pass muster as a tax under our narrowest interpretations of the taxing power. Because the tax at hand is within even those strict limits, we need not here decide the precise point at which an exaction becomes so punitive that the taxing power does not authorize it. [Although] the breadth of Congress’s power to tax is greater than its power to regulate commerce, the taxing power does not give Congress the same degree of control over individual behavior. Once we recognize that Congress may regulate a particular decision under the Commerce Clause, the Federal Government can bring its full weight to bear. Congress may simply command individuals to do as it directs. [By] contrast, Congress’s authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, no more. [The] Affordable Care Act’s requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness.

The Federal Government does not have the power to order people to buy health insurance. [The Individual Mandate] would therefore be unconstitutional if read as a command. The Federal Government does have the power to impose a tax on those without health insurance. [The Individual Mandate] is therefore constitutional, because it can reasonably be read as a tax.

[Medicaid Expansion]

As for the Medicaid expansion, that portion of the Affordable Care Act violates the Constitution by threatening existing Medicaid funding. Congress has no authority to order the States to regulate according to its instructions. Congress may offer the States grants and require the States to comply with accompanying conditions, but the States must have a genuine choice whether to accept the offer. The States are given no such choice in this case: They must either accept a basic change in the nature of Medicaid, or risk losing all Medicaid funding. The remedy for that

constitutional violation is to preclude the Federal Government from imposing such a sanction. That remedy does not require striking down other portions of the Affordable Care Act.

It is so ordered.

Justice GINSBURG, with whom Justice SOTOMAYOR joins, and with whom Justice BREYER and Justice KAGAN join as to Parts I, II, III, and IV, concurring in part, concurring in the judgment in part, and dissenting in part.

Unlike THE CHIEF JUSTICE, I would hold, alternatively, that the Commerce Clause authorizes Congress to enact the minimum coverage provision. I would also hold that the Spending Clause permits the Medicaid expansion exactly as Congress enacted it.

[Commerce Clause]

[In] enacting the Patient Protection and Affordable Care Act (ACA), Congress comprehensively reformed the national market for health-care products and services. By any measure, that market is immense. Collectively, Americans spent \$2.5 trillion on health care in 2009, accounting for 17.6% of our Nation's economy. Within the next decade, it is anticipated, spending on health care will nearly double. [Unlike] the market for almost any other product or service, the market for medical care is one in which all individuals inevitably participate. Virtually every person residing in the United States, sooner or later, will visit a doctor or other health-care professional. When individuals make those visits, they face another reality of the current market for medical care: its high cost. In 2010, on average, an individual in the United States incurred over \$7,000 in health-care expenses. Over a lifetime, costs mount to hundreds of thousands of dollars. When a person requires nonroutine care, the cost will generally exceed what he or she can afford to pay. [Although] every U.S. domiciliary will incur significant medical expenses during his or her lifetime, the time when care will be needed is often unpredictable. An accident, a heart attack, or a cancer diagnosis commonly occurs without warning. Inescapably, we are all at peril of needing medical care without a moment's notice.

To manage the risks associated with medical care—its high cost, its unpredictability, and its inevitability—most people in the United States obtain health insurance. [Not] all U.S. residents, however, have health insurance. In 2009, approximately 50 million people were uninsured, either by choice or, more likely, because they could not afford private insurance and did not qualify for government aid. [Unlike] markets for most products, however, the inability to pay for care does not mean that an uninsured individual will receive no care. Federal and state law, as well as professional obligations and embedded social norms, require hospitals and physicians to provide care when it is most needed, regardless of the patient's ability to pay. As a consequence, medical-care providers deliver significant amounts of care to the uninsured for which the

providers receive no payment. [Health-care] providers do not absorb these bad debts. Instead, they raise their prices, passing along the cost of uncompensated care to those who do pay reliably: the government and private insurance companies. In response, private insurers increase their premiums, shifting the cost of the elevated bills from providers onto those who carry insurance. The net result: Those with health insurance subsidize the medical care of those without it. As economists would describe what happens, the uninsured “free ride” on those who pay for health insurance. The size of this subsidy is considerable. Congress found that the cost-shifting just described “increases family [insurance] premiums by on average over \$1,000 a year.”

States cannot resolve the problem of the uninsured on their own. [An] influx of unhealthy individuals into a State with universal health care would result in increased spending on medical services. To cover the increased costs, a State would have to raise taxes, and private health-insurance companies would have to increase premiums. Higher taxes and increased insurance costs would, in turn, encourage businesses and healthy individuals to leave the State. [Facing] that risk, individual States are unlikely to take the initiative in addressing the problem of the uninsured, even though solving that problem is in all States’ best interests. Congress’ intervention was needed to overcome this collective-action impasse.

Aware that a national solution was required, Congress could have taken over the health-insurance market by establishing a tax-and-spend federal program like Social Security. Such a program, commonly referred to as a single-payer system (where the sole payer is the Federal Government), would have left little, if any, room for private enterprise or the States. Instead of going this route, Congress enacted the ACA, a solution that retains a robust role for private insurers and state governments. [To] ensure that individuals with medical histories have access to affordable insurance, Congress devised a three-part solution. First, Congress imposed a “guaranteed issue” requirement, which bars insurers from denying coverage to any person on account of that person’s medical condition or history. Second, Congress required insurers to use “community rating” to price their insurance policies. See § 300gg. Community rating, in effect, bars insurance companies from charging higher premiums to those with preexisting conditions. But these two provisions, Congress comprehended, could not work effectively unless individuals were given a powerful incentive to obtain insurance. [When] insurance companies are required to insure the sick at affordable prices, individuals can wait until they become ill to buy insurance. Pretty soon, those in need of immediate medical care—*i.e.*, those who cost insurers the most—become the insurance companies’ main customers. This “adverse selection” problem leaves insurers with two choices: They can either raise premiums dramatically to cover their ever-increasing costs or they can exit the market. [Massachusetts,] Congress was told, cracked the adverse selection problem. By requiring most residents to obtain insurance, the Commonwealth ensured that insurers would not be left with only the sick as customers. [In] coupling the minimum coverage provision with guaranteed-issue and community-rating prescriptions, Congress followed Massachusetts’ lead.

[Consistent] with the Framers' intent, we have repeatedly emphasized that Congress' authority under the Commerce Clause is dependent upon "practical" considerations, including "actual experience." [We] afford Congress the leeway "to undertake to solve national problems directly and realistically." [Congress] had a rational basis for concluding that the uninsured, as a class, substantially affect interstate commerce [and that] their inability to pay for [their health care] drives up market prices, foists costs on other consumers, and reduces market efficiency and stability. [The] minimum coverage provision, furthermore, bears a "reasonable connection" to Congress' goal of protecting the health-care market from the disruption caused by individuals who fail to obtain insurance. By requiring those who do not carry insurance to pay a toll, the minimum coverage provision gives individuals a strong incentive to insure. This incentive, Congress had good reason to believe, would reduce the number of uninsured and, correspondingly, mitigate the adverse impact the uninsured have on the national health-care market.

[The] inevitable yet unpredictable need for medical care and the guarantee that emergency care will be provided when required are conditions nonexistent in other markets. That is so of the market for cars, and of the market for broccoli as well. Although an individual *might* buy a car or a crown of broccoli one day, there is no certainty she will ever do so. And if she eventually wants a car or has a craving for broccoli, she will be obliged to pay at the counter before receiving the vehicle or nourishment. She will get no free ride or food, at the expense of another consumer forced to pay an inflated price. Upholding the minimum coverage provision on the ground that all are participants or will be participants in the health-care market would therefore carry no implication that Congress may justify under the Commerce Clause a mandate to buy other products and services.

[Necessary and Proper Clause]

For the reasons explained above, the minimum coverage provision is valid Commerce Clause legislation. See *supra*, Part II. When viewed as a component of the entire ACA, the provision's constitutionality becomes even plainer.

The Necessary and Proper Clause "empowers Congress to enact laws in effectuation of its [commerce] powe[r] that are not within its authority to enact in isolation." Hence, "[a] complex regulatory program ... can survive a Commerce Clause challenge without a showing that every single facet of the program is independently and directly related to a valid congressional goal." "It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test." [The] minimum coverage provision, along with other provisions of the ACA, addresses the very sort of interstate problem that made the commerce power essential in our federal system. The crisis created by the large number of U.S. residents who lack health insurance is one of national dimension that States

are “separately incompetent” to handle. Far from trampling on States’ sovereignty, the ACA attempts a federal solution for the very reason that the States, acting separately, cannot meet the need. Notably, the ACA serves the general welfare of the people of the United States while retaining a prominent role for the States.

Ultimately, the Court upholds the individual mandate as a proper exercise of Congress’ power to tax and spend “for the ... general Welfare of the United States.” I concur in that determination, which makes THE CHIEF JUSTICE’s Commerce Clause essay all the more puzzling. Why should THE CHIEF JUSTICE strive so mightily to hem in Congress’ capacity to meet the new problems arising constantly in our ever-developing modern economy? I find no satisfying response to that question in his opinion.

Justice SCALIA, Justice KENNEDY, Justice THOMAS, and Justice ALITO, dissenting.

[This] case is in one respect difficult: it presents two questions of first impression. The first of those is whether failure to engage in economic activity (the purchase of health insurance) is subject to regulation under the Commerce Clause. Failure to act does result in an effect on commerce, and hence might be said to come under this Court’s “affecting commerce” criterion of Commerce Clause jurisprudence. But in none of its decisions has this Court extended the Clause that far. The second question is whether the congressional power to tax and spend, U.S. Const., Art. I, § 8, cl. 1, permits the conditioning of a State’s continued receipt of all funds under a massive state-administered federal welfare program upon its acceptance of an expansion to that program. Several of our opinions have suggested that the power to tax and spend cannot be used to coerce state administration of a federal program, but we have never found a law enacted under the spending power to be coercive. Those questions are difficult.

The case is easy and straightforward, however, in another respect. What is absolutely clear, affirmed by the text of the 1789 Constitution, by the Tenth Amendment ratified in 1791, and by innumerable cases of ours in the 220 years since, is that there are structural limits upon federal power—upon what it can prescribe with respect to private conduct, and upon what it can impose upon the sovereign States. Whatever may be the conceptual limits upon the Commerce Clause and upon the power to tax and spend, they cannot be such as will enable the Federal Government to regulate all private conduct and to compel the States to function as administrators of federal programs.

That clear principle carries the day here. The striking case of *Wickard v. Filburn*, which held that the economic activity of growing wheat, even for one’s own consumption, affected commerce sufficiently that it could be regulated, always has been regarded as the *ne plus ultra* of expansive

Commerce Clause jurisprudence. To go beyond that, and to say the *failure* to grow wheat (which is *not* an economic activity, or any activity at all) nonetheless affects commerce and therefore can be federally regulated, is to make mere breathing in and out the basis for federal prescription and to extend federal power to virtually all human activity.

[Commerce Clause and Necessary and Proper Clause]

[Article] I, § 8, of the Constitution gives Congress the power to “regulate Commerce ... among the several States.” The Individual Mandate in the Act commands that every “applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage.” If this provision “regulates” anything, it is the *failure* to maintain minimum essential coverage. One might argue that it regulates that failure by requiring it to be accompanied by payment of a penalty. But that failure—that abstention from commerce—is not “Commerce.” To be sure, *purchasing* insurance *is* “Commerce”; but one does not regulate commerce that does not exist by compelling its existence.

[The] Government presents the Individual Mandate as a unique feature of a complicated regulatory scheme governing many parties with countervailing incentives that must be carefully balanced. Congress has imposed an extensive set of regulations on the health insurance industry, and compliance with those regulations will likely cost the industry a great deal. If the industry does not respond by increasing premiums, it is not likely to survive. [This] is not a dilemma unique to regulation of the health-insurance industry. Government regulation typically imposes costs on the regulated industry. [When] Congress is regulating these industries directly, it enjoys the broad power to enact “ ‘all appropriate legislation’ ” to “ ‘protec[t]’ ” and “ ‘advanc[e]’ ” commerce, *NLRB v. Jones & Laughlin Steel Corp.* Thus, Congress might protect the ***2646** imperiled industry by prohibiting low-cost competition, or by according it preferential tax treatment, or even by granting it a direct subsidy. Here, however, Congress has impressed into service third parties, healthy individuals who could be but are not customers of the relevant industry, to offset the undesirable consequences of the regulation.

[At] the outer edge of the commerce power, this Court has insisted on careful scrutiny of regulations that do not act directly on an interstate market or its participants. The lesson of [New York, Printz, Lopez, and Morrison] is that the Commerce Clause, even when supplemented by the Necessary and Proper Clause, is not *carte blanche* for doing whatever will help achieve the ends Congress seeks by the regulation of commerce. And the last two of these cases show that the scope of the Necessary and Proper Clause is exceeded not only when the congressional action directly violates the sovereignty of the States but also when it violates the background principle of enumerated (and hence limited) federal power.

The case upon which the Government principally relies to sustain the Individual Mandate under the Necessary and Proper Clause is *Gonzales v. Raich*. That case held that Congress could, in an effort to restrain the interstate market in marijuana, ban the local cultivation and possession of that drug. *Raich* is no precedent for what Congress has done here. That case's prohibition of growing, and of possession did not represent the expansion of the federal power to direct into a broad new field. The mandating of economic activity does, and since it is a field so limitless that it converts the Commerce Clause into a general authority to direct the economy, that mandating is not "consist[ent] with the letter and spirit of the constitution." *McCulloch v. Maryland*.

Moreover, [the] Court's opinion in *Raich* pointed out that the growing and possession prohibitions were the only practicable way of enabling the prohibition of interstate traffic in marijuana to be effectively enforced. [With] the present statute, by contrast, there are many ways other than this unprecedented Individual Mandate by which the regulatory scheme's goals of reducing insurance premiums and ensuring the profitability of insurers could be achieved. For instance, those who did not purchase insurance could be subjected to a surcharge when they do enter the health insurance system. Or they could be denied a full income tax credit given to those who do purchase the insurance.

The Government was invited, at oral argument, to suggest what federal controls over private conduct (other than those explicitly prohibited by the Bill of Rights or other constitutional controls) could *not* be justified as necessary and proper for the carrying out of a general regulatory scheme. It was unable to name any.

The Government's second theory in support of the Individual Mandate is that [it] is valid because it is actually a "regulat[ion of] activities having a substantial relation to interstate commerce, ... *i.e.*, ... activities that substantially affect interstate commerce." [The] primary problem with this argument is that [the mandate] does not apply only to persons who purchase all, or most, or even any, of the health care services or goods that the mandated insurance covers. Indeed, the main objection many have to the Mandate is that they have no intention of purchasing most or even any of such goods or services and thus no need to buy insurance for those purchases. The Government responds that the health-care market involves "essentially universal participation." The principal difficulty with this response is that it is, in the only relevant sense, not true. It is true enough that everyone consumes "health care," if the term is taken to include the purchase of a bottle of aspirin. But the health care "market" that is the object of the Individual Mandate not only includes but principally consists of goods and services that the young people primarily affected by the Mandate *do not purchase*. They are quite simply not participants in that market, and cannot be made so (and thereby subjected to regulation) by the simple device of defining participants to include all those who will, later in their lifetime, probably purchase the goods or services covered by the mandated insurance. Such a definition of market participants is unprecedented, and were it to be a premise for the exercise of national power, it would have no principled limits.

[It] is true that, at the end of the day, it is inevitable that each American will affect commerce and become a part of it, even if not by choice. But if every person comes within the Commerce Clause power of Congress to regulate by the simple reason that he will one day engage in commerce, the idea of a limited Government power is at an end. [All] of us consume food, and when we do so the Federal Government can prescribe what its quality must be and even how much we must pay. But the mere fact that we all consume food and are thus, sooner or later, participants in the “market” for food, does not empower the Government to say when and what we will buy. That is essentially what this Act seeks to do with respect to the purchase of health care. It exceeds federal power.

[It] is true enough that Congress needs only a “ ‘rational basis’ for concluding that the *regulated activity* substantially affects interstate commerce,” *ante*, at 2616 (emphasis added). But it must be *activity* affecting commerce that is regulated, and not merely the failure to engage in commerce. And one is not now purchasing the health care covered by the insurance mandate simply because one is likely to be purchasing it in the future. Our test’s premise of regulated activity is not invented out of whole cloth, but rests upon the Constitution’s requirement that it be commerce which is regulated. If all inactivity affecting commerce is commerce, commerce is everything.

[*The Taxing Power*]

[In] many cases what was a regulatory mandate enforced by a penalty *could have been* imposed as a tax upon permissible action; or what was imposed as a tax upon permissible action *could have been* a regulatory mandate enforced by a penalty. But we know of no case, and the Government cites none, in which the imposition was, for constitutional purposes, both. The two are mutually exclusive. [The] issue is not whether Congress had the *power* to frame the minimum-coverage provision as a tax, but whether it *did* so.

[Our] cases establish a clear line between a tax and a penalty: “ ‘[A] tax is an enforced contribution to provide for the support of government; a penalty ... is an exaction imposed by statute as punishment for an unlawful act.’ ” In a few cases, this Court has held that a “tax” imposed upon private conduct was so onerous as to be in effect a penalty. But we have never held—*never*—that a penalty imposed for violation of the law was so trivial as to be in effect a tax. We have never held that *any* exaction imposed for violation of the law is an exercise of Congress’ taxing power—even when the statute *calls* it a tax, much less when (as here) the statute repeatedly calls it a penalty. When an act “adopt[s] the criteria of wrongdoing” and then imposes a monetary penalty as the “principal consequence on those who transgress its standard,” it creates a regulatory penalty, not a tax. *Child Labor Tax Case*.

[So] the question is, quite simply, whether the exaction here is imposed for violation of the law. It unquestionably is. [The] fact that Congress (in its own words) “imposed ... a penalty,” for

failure to buy insurance is alone sufficient to render that failure unlawful. [To] say that the Individual Mandate merely imposes a tax is not to interpret the statute but to rewrite it. Judicial tax-writing is particularly troubling. Taxes have never been popular, see, *e.g.*, Stamp Act of 1765, and in part for that reason, the Constitution requires tax increases to originate in the House of Representatives. See Art. I, § 7, cl. 1. That is to say, they must originate in the legislative body most accountable to the people, where legislators must weigh the need for the tax against the terrible price they might pay at their next election, which is never more than two years off. The Federalist No. 58 “defend[ed] the decision to give the origination power to the House on the ground that the Chamber that is more accountable to the people should have the primary role in raising revenue.” [Imposing] a tax through judicial legislation inverts the constitutional scheme, and places the power to tax in the branch of government least accountable to the citizenry.

Justice THOMAS, dissenting.

I dissent for the reasons stated in our joint opinion, but I write separately to say a word about the Commerce Clause. The joint dissent and THE CHIEF JUSTICE correctly apply our precedents to conclude that the Individual Mandate is beyond the power granted to Congress under the Commerce Clause and the Necessary and Proper Clause. Under those precedents, Congress may regulate “economic activity [that] substantially affects interstate commerce.” I adhere to my view that “the very notion of a ‘substantial effects’ test under the Commerce Clause is inconsistent with the original understanding of Congress’ powers and with this Court’s early Commerce Clause cases.” As I have explained, the Court’s continued use of that test “has encouraged the Federal Government to persist in its view that the Commerce Clause has virtually no limits.” The Government’s unprecedented claim in this suit that it may regulate not only economic activity but also *inactivity* that substantially affects interstate commerce is a case in point.

King V. Burwell, (2015)

Opinion: Chief Justice ROBERTS delivered the opinion of the Court.

The Patient Protection and Affordable Care Act adopts a series of interlocking reforms designed to expand coverage in the individual health insurance market. First, the Act bars insurers from taking a person's health into account when deciding whether to sell health insurance or how much to charge. Second, the Act generally requires each person to maintain insurance coverage or make a payment to the Internal Revenue Service. And third, the Act gives tax credits to certain people to make insurance more affordable.

In addition to those reforms, the Act requires the creation of an “Exchange” in each State—basically, a marketplace that allows people to compare and purchase insurance plans. The Act

gives each State the opportunity to establish its own Exchange, but provides that the Federal Government will establish the Exchange if the State does not.

This case is about whether the Act's interlocking reforms apply equally in each State no matter who establishes the State's Exchange. Specifically, the question presented is whether the Act's tax credits are available in States that have a Federal Exchange.

I

A

The Patient Protection and Affordable Care Act, 124 Stat. 119, grew out of a long history of failed health insurance reform. In the 1990s, several States began experimenting with ways to expand people's access to coverage. One common approach was to impose a pair of insurance market regulations—a “guaranteed issue” requirement, which barred insurers from denying coverage to any person because of his health, and a “community rating” requirement, which barred insurers from charging a person higher premiums for the same reason. Together, those requirements were designed to ensure that anyone who wanted to buy health insurance could do so.

The guaranteed issue and community rating requirements achieved that goal, but they had an unintended consequence: They encouraged people to wait until they got sick to buy insurance. Why buy insurance coverage when you are healthy, if you can buy the same coverage for the same price when you become ill? This consequence—known as “adverse selection”—led to a second: Insurers were forced to increase premiums to account for the fact that, more and more, it was the sick rather than the healthy who were buying insurance. And that consequence fed back into the first: As the cost of insurance rose, even more people waited until they became ill to buy it.

This led to an economic “death spiral.”

[In] 1996, Massachusetts adopted the guaranteed issue and community rating requirements and experienced similar results. But in 2006, Massachusetts added two more reforms: The Commonwealth required individuals to buy insurance or pay a penalty, and it gave tax credits to certain individuals to ensure that they could afford the insurance they were required to buy. The combination of these three reforms—insurance market regulations, a coverage mandate, and tax credits—reduced the uninsured rate in Massachusetts to 2.6 percent, by far the lowest in the Nation.

B

The Affordable Care Act adopts a version of the three key reforms that made the Massachusetts system successful. First, the Act adopts the guaranteed issue and community rating requirements.

[Second], the Act generally requires individuals to maintain health insurance coverage or make a payment to the IRS. [Congress] adopted a coverage requirement to “minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums.”

C

[In] addition to those three reforms, the Act requires the creation of an “Exchange” in each State where people can shop for insurance, usually online. 42 U.S.C. § 18031(b)(1). An Exchange may be created in one of two ways. First, the Act provides that “[e]ach State shall ... establish an American Health Benefit Exchange ... for the State.” Ibid. Second, if a State nonetheless chooses not to establish its own Exchange, the Act provides that the Secretary of Health and Human Services “shall ... establish and operate such Exchange within the State.” § 18041(c)(1).

The issue in this case is whether the Act's tax credits are available in States that have a Federal Exchange rather than a State Exchange. The Act initially provides that tax credits “shall be allowed” for any “applicable taxpayer.” 26 U.S.C. § 36B(a). The Act then provides that the amount of the tax credit depends in part on whether the taxpayer has enrolled in an insurance plan through “an Exchange established by the State under section 1311 of the Patient Protection and Affordable Care Act [hereinafter 42 U.S.C. § 18031].” 26 U.S.C. §§ 36B(b)-(c) (emphasis added).

The IRS addressed the availability of tax credits by promulgating a rule that made them available on both State and Federal Exchanges.

D

[Petitioners] are four individuals who live in Virginia, which has a Federal Exchange. They do not wish to purchase health insurance. In their view, Virginia's Exchange does not qualify as “an Exchange established by the State under [42 U.S.C. § 18031],” so they should not receive any tax credits. That would make the cost of buying insurance more than eight percent of their income, which would exempt them from the Act's coverage requirement. 26 U.S.C. § 5000A(e)(1).

Under the IRS Rule, however, Virginia's Exchange would qualify as “an Exchange established by the State under [42 U.S.C. § 18031],” so petitioners would receive tax credits. That would make the cost of buying insurance less than eight percent of petitioners' income, which would subject them to the Act's coverage requirement. The IRS Rule therefore requires petitioners to either buy health insurance they do not want, or make a payment to the IRS.

II

[The] Affordable Care Act addresses tax credits in what is now Section 36B of the Internal Revenue Code. That section provides: “In the case of an applicable taxpayer, there shall be allowed as a credit against the tax imposed by this subtitle ... an amount equal to the premium

assistance credit amount.” 26 U.S.C. § 36B(a). Section 36B then defines the term “premium assistance credit amount” as “the sum of the premium assistance amounts determined under paragraph (2) with respect to all coverage months of the taxpayer occurring during the taxable year.” § 36B(b)(1) (emphasis added). Section 36B goes on to define the two italicized terms—“premium assistance amount” and “coverage month”—in part by referring to an insurance plan that is enrolled in through “an Exchange established by the State under [42 U.S.C. § 18031].” 26 U.S.C. §§ 36B(b)(2)(A), (c)(2)(A)(i).

The parties dispute whether Section 36B authorizes tax credits for individuals who enroll in an insurance plan through a Federal Exchange. Petitioners argue that a Federal Exchange is not “an Exchange established by the State under [42 U.S.C. § 18031],” and that the IRS Rule therefore contradicts Section 36B. Brief for Petitioners 18–20. The Government responds that the IRS Rule is lawful because the phrase “an Exchange established by the State under [42 U.S.C. § 18031]” should be read to include Federal Exchanges. Brief for Respondents 20–25.

When analyzing an agency's interpretation of a statute, we often apply the two-step framework announced in *Chevron*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694. Under that framework, we ask whether the statute is ambiguous and, if so, whether the agency's interpretation is reasonable. “In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.” *Ibid.*

This is one of those cases. The tax credits are among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep “economic and political significance” that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly. [This] is not a case for the IRS.

It is instead our task to determine the correct reading of Section 36B. If the statutory language is plain, we must enforce it according to its terms.

A

[We] begin with the text of Section 36B. As relevant here, Section 36B allows an individual to receive tax credits only if the individual enrolls in an insurance plan through “an Exchange established by the State under [42 U.S.C. § 18031].” In other words, three things must be true: First, the individual must enroll in an insurance plan through “an Exchange.” Second, that Exchange must be “established by the State.” And third, that Exchange must be established “under [42 U.S.C. § 18031].” We address each requirement in turn.

First, all parties agree that a Federal Exchange qualifies as “an Exchange” for purposes of Section 36B. Although phrased as a requirement, the Act gives the States “flexibility” by allowing them to “elect” whether they want to establish an Exchange. § 18041(b). If the State

chooses not to do so, Section 18041 provides that the Secretary “shall ... establish and operate such Exchange within the State.” § 18041(c)(1) (emphasis added).

By using the phrase “such Exchange,” Section 18041 instructs the Secretary to establish and operate the same Exchange that the State was directed to establish under Section 18031. Although State and Federal Exchanges are established by different sovereigns, Sections 18031 and 18041 do not suggest that they differ in any meaningful way. A Federal Exchange therefore counts as “an Exchange” under Section 36B.

Second, we must determine whether a Federal Exchange is “established by the State” for purposes of Section 36B. At the outset, it might seem that a Federal Exchange cannot fulfill this requirement. After all, the Act defines “State” to mean “each of the 50 States and the District of Columbia”—a definition that does not include the Federal Government. 42 U.S.C. § 18024(d). But when read in context, “with a view to [its] place in the overall statutory scheme,” the meaning of the phrase “established by the State” is not so clear.

After telling each State to establish an Exchange, Section 18031 provides that all Exchanges “shall make available qualified health plans to qualified individuals.” 42 U.S.C. § 18031(d)(2)(A). Section 18032 then defines the term “qualified individual” in part as an individual who “resides in the State that established the Exchange.” § 18032(f)(1)(A). And that's a problem: If we give the phrase “the State that established the Exchange” its most natural meaning, there would be no “qualified individuals” on Federal Exchanges. But the Act clearly contemplates that there will be qualified individuals on every Exchange. As we just mentioned, the Act requires all Exchanges to “make available qualified health plans to qualified individuals”—something an Exchange could not do if there were no such individuals. § 18031(d)(2)(A). And the Act tells the Exchange, in deciding which health plans to offer, to consider “the interests of qualified individuals ... in the State or States in which such Exchange operates”—again, something the Exchange could not do if qualified individuals did not exist. § 18031(e)(1)(B). This problem arises repeatedly throughout the Act. See, e.g., § 18031(b)(2) (allowing a State to create “one Exchange ... for providing ... services to both qualified individuals and qualified small employers,” rather than creating separate Exchanges for those two groups).¹

These provisions suggest that the Act may not always use the phrase “established by the State” in its most natural sense. Thus, the meaning of that phrase may not be as clear as it appears when read out of context.

Third, we must determine whether a Federal Exchange is established “under [42 U.S.C. § 18031].” This too might seem a requirement that a Federal Exchange cannot fulfill, because it is Section 18041 that tells the Secretary when to “establish and operate such Exchange.” But here again, the way different provisions in the statute interact suggests otherwise.

The Act defines the term “Exchange” to mean “an American Health Benefit Exchange established under section 18031.” § 300gg–91(d)(21). If we import that definition into Section

18041, the Act tells the Secretary to “establish and operate such ‘American Health Benefit Exchange established under section 18031.’ ” That suggests that Section 18041 authorizes the Secretary to establish an Exchange under Section 18031, not (or not only) under Section 18041. Otherwise, the Federal Exchange, by definition, would not be an “Exchange” at all. See Halbig, 758 F.3d, at 399–400 (acknowledging that the Secretary establishes Federal Exchanges under Section 18031).

This interpretation of “under [42 U.S.C. § 18031]” fits best with the statutory context. All of the requirements that an Exchange must meet are in Section 18031, so it is sensible to regard all Exchanges as established under that provision. In addition, every time the Act uses the word “Exchange,” the definitional provision requires that we substitute the phrase “Exchange established under section 18031.” If Federal Exchanges were not established under Section 18031, therefore, literally none of the Act’s requirements would apply to them. Finally, the Act repeatedly uses the phrase “established under [42 U.S.C. § 18031]” in situations where it would make no sense to distinguish between State and Federal Exchanges. A Federal Exchange may therefore be considered one established “under [42 U.S.C. § 18031].”

The upshot of all this is that the phrase “an Exchange established by the State under [42 U.S.C. § 18031]” is properly viewed as ambiguous. The phrase may be limited in its reach to State Exchanges. But it is also possible that the phrase refers to all Exchanges—both State and Federal—at least for purposes of the tax credits. If a State chooses not to follow the directive in Section 18031 that it establish an Exchange, the Act tells the Secretary to establish “such Exchange.” § 18041. And by using the words “such Exchange,” the Act indicates that State and Federal Exchanges should be the same. But State and Federal Exchanges would differ in a fundamental way if tax credits were available only on State Exchanges—one type of Exchange would help make insurance more affordable by providing billions of dollars to the States’ citizens; the other type of Exchange would not.²

The conclusion that Section 36B is ambiguous is further supported by several provisions that assume tax credits will be available on both State and Federal Exchanges. For example, the Act requires all Exchanges to create outreach programs that must “distribute fair and impartial information concerning ... the availability of premium tax credits under section 36B.” § 18031(i)(3)(B). The Act also requires all Exchanges to “establish and make available by electronic means a calculator to determine the actual cost of coverage after the application of any premium tax credit under section 36B.” § 18031(d)(4)(G). And the Act requires all Exchanges to report to the Treasury Secretary information about each health plan they sell, including the “aggregate amount of any advance payment of such credit,” “[a]ny information ... necessary to determine eligibility for, and the amount of, such credit,” and any “[i]nformation necessary to determine whether a taxpayer has received excess advance payments.” 26 U.S.C. § 36B(f)(3). If tax credits were not available on Federal Exchanges, these provisions would make little sense.

6 Petitioners and the dissent respond that the words “established by the State” would be unnecessary if Congress meant to extend tax credits to both State and Federal Exchanges. Brief for Petitioners 20; post, at 2497 – 2498. But “our preference for avoiding surplusage

constructions is not absolute.” *Lamie v. United States Trustee*, 540 U.S. 526, 536, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004). And specifically with respect to this Act, rigorous application of the canon does not seem a particularly useful guide to a fair construction of the statute.

The Affordable Care Act contains more than a few examples of inartful drafting.

Anyway, we “must do our best, bearing in mind the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” After reading Section 36B along with other related provisions in the Act, we cannot conclude that the phrase “an Exchange established by the State under [Section 18031]” is unambiguous.

B

789 Given that the text is ambiguous, we must turn to the broader structure of the Act to determine the meaning of Section 36B. Here, the statutory scheme compels us to reject petitioners' interpretation because it would destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very “death spirals” that Congress designed the Act to avoid.

As discussed above, Congress based the Affordable Care Act on three major reforms. [In] a State that establishes its own Exchange, these three reforms work together to expand insurance coverage. [Together], those reforms “minimize ... adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums.” 42 U.S.C. § 18091(2)(I).

Under petitioners' reading, however, the Act would operate quite differently in a State with a Federal Exchange. As they see it, one of the Act's three major reforms—the tax credits—would not apply. And a second major reform—the coverage requirement—would not apply in a meaningful way. As explained earlier, the coverage requirement applies only when the cost of buying health insurance (minus the amount of the tax credits) is less than eight percent of an individual's income. 26 U.S.C. §§ 5000A(e)(1)(A), (e)(1)(B)(ii). So without the tax credits, the coverage requirement would apply to fewer individuals. [If] petitioners are right, therefore, only one of the Act's three major reforms would apply in States with a Federal Exchange.

The combination of no tax credits and an ineffective coverage requirement could well push a State's individual insurance market into a death spiral.

[It] is implausible that Congress meant the Act to operate in this manner. See *National Federation of Independent Business v. Sebelius*, 567 U.S. —, —, 132 S.Ct. 2566, 2674, 183 L.Ed.2d 450 (2012) (SCALIA, KENNEDY, THOMAS, and ALITO, JJ., dissenting) (“Without the federal subsidies ... the exchanges would not operate as Congress intended and may not operate at all.”). Congress made the guaranteed issue and community rating requirements applicable in every State in the Nation. But those requirements only work when combined with

the coverage requirement and the tax credits. So it stands to reason that Congress meant for those provisions to apply in every State as well.⁴

Petitioners respond that Congress was not worried about the effects of withholding tax credits from States with Federal Exchanges because “Congress evidently believed it was offering states a deal they would not refuse.” Brief for Petitioners 36. Congress may have been wrong about the States' willingness to establish their own Exchanges, petitioners continue, but that does not allow this Court to rewrite the Act to fix that problem. That is particularly true, petitioners conclude, because the States likely would have created their own Exchanges in the absence of the IRS Rule, which eliminated any incentive that the States had to do so. *Id.*, at 36–38.

Section 18041 refutes the argument that Congress believed it was offering the States a deal they would not refuse. That section provides that, if a State elects not to establish an Exchange, the Secretary “shall ... establish and operate such Exchange within the State.” 42 U.S.C. § 18041(c)(1)(A). The whole point of that provision is to create a federal fallback in case a State chooses not to establish its own Exchange. Contrary to petitioners' argument, Congress did not believe it was offering States a deal they would not refuse—it expressly addressed what would happen if a State did refuse the deal.

C

Finally, the structure of Section 36B itself suggests that tax credits are not limited to State Exchanges. Section 36B(a) initially provides that tax credits “shall be allowed” for any “applicable taxpayer.” Section 36B(c)(1) then defines an “applicable taxpayer” as someone who (among other things) has a household income between 100 percent and 400 percent of the federal poverty line. Together, these two provisions appear to make anyone in the specified income range eligible to receive a tax credit.

According to petitioners, however, those provisions are an empty promise in States with a Federal Exchange. In their view, an applicable taxpayer in such a State would be eligible for a tax credit—but the amount of that tax credit would always be zero.

[We] have held that Congress “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions.” *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001). But in petitioners' view, Congress made the viability of the entire Affordable Care Act turn on the ultimate ancillary provision: a sub-sub-sub section of the Tax Code. We doubt that is what Congress meant to do. Had Congress meant to limit tax credits to State Exchanges, it likely would have done so in the definition of “applicable taxpayer” or in some other prominent manner. It would not have used such a winding path of connect-the-dots provisions about the amount of the credit.

D

[In] a democracy, the power to make the law rests with those chosen by the people. Our role is more confined—“to say what the law is.” *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60

(1803). That is easier in some cases than in others. But in every case we must respect the role of the Legislature, and take care not to undo what it has done. A fair reading of legislation demands a fair understanding of the legislative plan.

Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter. Section 36B can fairly be read consistent with what we see as Congress's plan, and that is the reading we adopt.

The judgment of the United States Court of Appeals for the Fourth Circuit is

Affirmed.

.....
Justice SCALIA, with whom Justice THOMAS and Justice ALITO join, dissenting.

The Court holds that when the Patient Protection and Affordable Care Act says “Exchange established by the State” it means “Exchange established by the State or the Federal Government.” That is of course quite absurd, and the Court's 21 pages of explanation make it no less so.

I

[Words] no longer have meaning if an Exchange that is not established by a State is “established by the State.” It is hard to come up with a clearer way to limit tax credits to state Exchanges than to use the words “established by the State.” And it is hard to come up with a reason to include the words “by the State” other than the purpose of limiting credits to state Exchanges. “[T]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.” *Lynch v. Alworth–Stephens Co.*, 267 U.S. 364, 370, 45 S.Ct. 274, 69 L.Ed. 660 (1925) (internal quotation marks omitted). Under all the usual rules of interpretation, in short, the Government should lose this case. But normal rules of interpretation seem always to yield to the overriding principle of the present Court: The Affordable Care Act must be saved.

II

The Court interprets § 36B to award tax credits on both federal and state Exchanges. It accepts that the “most natural sense” of the phrase “Exchange established by the State” is an Exchange established by a State. Ante, at 2502. (Understatement, thy name is an opinion on the Affordable Care Act!) Yet the opinion continues, with no semblance of shame, that “it is also possible that the phrase refers to all Exchanges—both State and Federal.” Ante, at 2491. (Impossible possibility, thy name is an opinion on the Affordable Care Act!) The Court claims that “the

context and structure of the Act compel [it] to depart from what would otherwise be the most natural reading of the pertinent statutory phrase.” Ante, at 2495.

I wholeheartedly agree with the Court that sound interpretation requires paying attention to the whole law, not homing in on isolated words or even isolated sections. Context always matters. Let us not forget, however, why context matters: It is a tool for understanding the terms of the law, not an excuse for rewriting them.

Any effort to understand rather than to rewrite a law must accept and apply the presumption that lawmakers use words in “their natural and ordinary signification.” *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U.S. 1, 12, 24 L.Ed. 708 (1878). Ordinary connotation does not always prevail, but the more unnatural the proposed interpretation of a law, the more compelling the contextual evidence must be to show that it is correct. Today's interpretation is not merely unnatural; it is unheard of. Who would ever have dreamt that “Exchange established by the State” means “Exchange established by the State or the Federal Government ”? Little short of an express statutory definition could justify adopting this singular reading. Yet the only pertinent definition here provides that “State” means “each of the 50 States and the District of Columbia.” 42 U.S.C. § 18024(d). Because the Secretary is neither one of the 50 States nor the District of Columbia, that definition positively contradicts the eccentric theory that an Exchange established by the Secretary has been established by the State.

[Equating] establishment “by the State” with establishment by the Federal Government makes nonsense of other parts of the Act. The Act requires States to ensure (on pain of losing Medicaid funding) that any “Exchange established by the State” uses a “secure electronic interface” to determine an individual's eligibility for various benefits (including tax credits). 42 U.S.C. § 1396w–3(b)(1)(D). How could a State control the type of electronic interface used by a federal Exchange? The Act allows a State to control contracting decisions made by “an Exchange established by the State.” § 18031(f)(3). Why would a State get to control the contracting decisions of a federal Exchange? The Act also provides “Assistance to States to establish American Health Benefit Exchanges” and directs the Secretary to renew this funding “if the State ... is making progress ... toward ... establishing an Exchange.” § 18031(a). Does a State that refuses to set up an Exchange still receive this funding, on the premise that Exchanges established by the Federal Government are really established by States? It is presumably in order to avoid these questions that the Court concludes that federal Exchanges count as state Exchanges only “for purposes of the tax credits.” Ante, at 2491. (Contrivance, thy name is an opinion on the Affordable Care Act!)

It is probably piling on to add that the Congress that wrote the Affordable Care Act knew how to equate two different types of Exchanges when it wanted to do so. The Act includes a clause providing that “[a] territory that ... establishes ... an Exchange ... shall be treated as a State” for certain purposes. § 18043(a) (emphasis added). Tellingly, it does not include a comparable clause providing that the Secretary shall be treated as a State for purposes of § 36B when she establishes an Exchange.

Faced with overwhelming confirmation that “Exchange established by the State” means what it looks like it means, the Court comes up with argument after feeble argument to support its contrary interpretation. None of its tries comes close to establishing the implausible conclusion that Congress used “by the State” to mean “by the State or not by the State.”

IV

[Perhaps] sensing the dismal failure of its efforts to show that “established by the State” means “established by the State or the Federal Government,” the Court tries to palm off the pertinent statutory phrase as “inartful drafting.” Ante, at 2495. This Court, however, has no free-floating power “to rescue Congress from its drafting errors.” *Lamie v. United States Trustee*, 540 U.S. 526, 542, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004) (internal quotation marks omitted). Only when it is patently obvious to a reasonable reader that a drafting mistake has occurred may a court correct the mistake. The occurrence of a misprint may be apparent from the face of the law, as it is where the Affordable Care Act “creates three separate Section 1563s.” Ante, at 2492. But the Court does not pretend that there is any such indication of a drafting error on the face of § 36B. The occurrence of a misprint may also be apparent because a provision decrees an absurd result—a consequence “so monstrous, that all mankind would, without hesitation, unite in rejecting the application.” *Sturges, 4 Wheat.*, at 203. But § 36B does not come remotely close to satisfying that demanding standard. It is entirely plausible that tax credits were restricted to state Exchanges deliberately—for example, in order to encourage States to establish their own Exchanges. We therefore have no authority to dismiss the terms of the law as a drafting fumble.

Let us not forget that the term “Exchange established by the State” appears twice in § 36B and five more times in other parts of the Act that mention tax credits. What are the odds, do you think, that the same slip of the pen occurred in seven separate places? No provision of the Act—none at all—contradicts the limitation of tax credits to state Exchanges. And as I have already explained, uses of the term “Exchange established by the State” beyond the context of tax credits look anything but accidental. *Supra*, at 2487. If there was a mistake here, context suggests it was a substantive mistake in designing this part of the law, not a technical mistake in transcribing it.

V

The Court's decision reflects the philosophy that judges should endure whatever interpretive distortions it takes in order to correct a supposed flaw in the statutory machinery. That philosophy ignores the American people's decision to give Congress “[a]ll legislative Powers” enumerated in the Constitution. Art. I, § 1. They made Congress, not this Court, responsible for both making laws and mending them. This Court holds only the judicial power—the power to pronounce the law as Congress has enacted it. We lack the prerogative to repair laws that do not work out in practice, just as the people lack the ability to throw us out of office if they dislike the solutions we concoct. We must always remember, therefore, that “[o]ur task is to apply the text, not to improve upon it.” *Pavelic & LeFlore v. Marvel Entertainment Group, Div. of Cadence Industries Corp.*, 493 U.S. 120, 126, 110 S.Ct. 456, 107 L.Ed.2d 438 (1989).

Trying to make its judge-empowering approach seem respectful of congressional authority, the Court asserts that its decision merely ensures that the Affordable Care Act operates the way Congress “meant [it] to operate.” Ante, at 2494. First of all, what makes the Court so sure that Congress “meant” tax credits to be available everywhere? Our only evidence of what Congress meant comes from the terms of the law, and those terms show beyond all question that tax credits are available only on state Exchanges. More importantly, the Court forgets that ours is a government of laws and not of men. That means we are governed by the terms of our laws, not by the unenacted will of our lawmakers. “If Congress enacted into law something different from what it intended, then it should amend the statute to conform to its intent.” Lamie, supra, at 542, 124 S.Ct. 1023. In the meantime, this Court “has no roving license ... to disregard clear language simply on the view that ... Congress ‘must have intended’ something broader.” Bay Mills, 572 U.S., at —, 134 S.Ct., at 2034.

Even less defensible, if possible, is the Court's claim that its interpretive approach is justified because this Act “does not reflect the type of care and deliberation that one might expect of such significant legislation.” Ante, at 2492 – 2493. It is not our place to judge the quality of the care and deliberation that went into this or any other law. A law enacted by voice vote with no deliberation whatever is fully as binding upon us as one enacted after years of study, months of committee hearings, and weeks of debate. Much less is it our place to make everything come out right when Congress does not do its job properly. It is up to Congress to design its laws with care, and it is up to the people to hold them to account if they fail to carry out that responsibility.

Rather than rewriting the law under the pretense of interpreting it, the Court should have left it to Congress to decide what to do about the Act's limitation of tax credits to state Exchanges. If Congress values above everything else the Act's applicability across the country, it could make tax credits available in every Exchange. If it prizes state involvement in the Act's implementation, it could continue to limit tax credits to state Exchanges while taking other steps to mitigate the economic consequences predicted by the Court. If Congress wants to accommodate both goals, it could make tax credits available everywhere while offering new incentives for States to set up their own Exchanges. And if Congress thinks that the present design of the Act works well enough, it could do nothing. Congress could also do something else altogether, entirely abandoning the structure of the Affordable Care Act. The Court's insistence on making a choice that should be made by Congress both aggrandizes judicial power and encourages congressional lassitude.

Just ponder the significance of the Court's decision to take matters into its own hands. The Court's revision of the law authorizes the Internal Revenue Service to spend tens of billions of dollars every year in tax credits on federal Exchanges. It affects the price of insurance for millions of Americans. It diminishes the participation of the States in the implementation of the Act. It vastly expands the reach of the Act's individual mandate, whose scope depends in part on the availability of credits. What a parody today's decision makes of Hamilton's assurances to the people of New York: “The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over ... the purse; no direction ... of the wealth of society, and can take no active

resolution whatever. It may truly be said to have neither force nor will but merely judgment.”
The Federalist No. 78, p. 465 (C. Rossiter ed. 1961).

* * *

Today's opinion changes the usual rules of statutory interpretation for the sake of the Affordable Care Act. That, alas, is not a novelty. In *National Federation of Independent Business v. Sebelius*, 567 U.S. —, 132 S.Ct. 2566, 183 L.Ed.2d 450 this Court revised major components of the statute in order to save them from unconstitutionality. The Act that Congress passed provides that every individual “shall” maintain insurance or else pay a “penalty.” 26 U.S.C. § 5000A. This Court, however, saw that the Commerce Clause does not authorize a federal mandate to buy health insurance. So it rewrote the mandate-cum-penalty as a tax. 567 U.S., at — — —, 132 S.Ct., at 2583–2601 (principal opinion). The Act that Congress passed also requires every State to accept an expansion of its Medicaid program, or else risk losing all Medicaid funding. 42 U.S.C. § 1396c. This Court, however, saw that the Spending Clause does not authorize this coercive condition. So it rewrote the law to withhold only the incremental funds associated with the Medicaid expansion. 567 U.S., at — — —, 132 S.Ct., at 2601–2608 (principal opinion). Having transformed two major parts of the law, the Court today has turned its attention to a third. The Act that Congress passed makes tax credits available only on an “Exchange established by the State.” This Court, however, concludes that this limitation would prevent the rest of the Act from working as well as hoped. So it rewrites the law to make tax credits available everywhere. We should start calling this law SCOTUScare.

Perhaps the Patient Protection and Affordable Care Act will attain the enduring status of the Social Security Act or the Taft–Hartley Act; perhaps not. But this Court's two decisions on the Act will surely be remembered through the years. The somersaults of statutory interpretation they have performed (“penalty” means tax, “further [Medicaid] payments to the State” means only incremental Medicaid payments to the State, “established by the State” means not established by the State) will be cited by litigants endlessly, to the confusion of honest jurisprudence. And the cases will publish forever the discouraging truth that the Supreme Court of the United States favors some laws over others, and is prepared to do whatever it takes to uphold and assist its favorites.

I dissent.

Zivotofsky V. Kerry (2015)

FACTS

Petitioner Zivotofsky was born to United States citizens living in Jerusalem. Pursuant to §214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, his mother asked American

Embassy officials to list his place of birth as “Israel” on, *inter alia*, his passport. Section 214(d) states for “purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen’s legal guardian, record the place of birth as Israel.” The Embassy officials refused to list Zivotofsky’s place of birth as “Israel” on his passport, citing the Executive Branch’s longstanding position that the United States does not recognize any country as having sovereignty over Jerusalem. Zivotofsky’s parents brought suit on his behalf in federal court, seeking to enforce §214(d). Ultimately, the D. C. Circuit held the statute unconstitutional, concluding that it contradicts the Executive Branch’s exclusive power to recognize foreign sovereigns.

JUSTICE KENNEDY delivered the opinion of the Court.

A delicate subject lies in the background of this case. That subject is Jerusalem. Questions touching upon the history of the ancient city and its present legal and international status are among the most difficult and complex in international affairs. In our constitutional system these matters are committed to the Legislature and the Executive, not the Judiciary. As a result, in this opinion the Court does no more, and must do no more, than note the existence of international debate and tensions respecting Jerusalem. Those matters are for Congress and the President to discuss and consider as they seek to shape the Nation’s foreign policies.

The Court addresses two questions to resolve the interbranch dispute now before it. First, it must determine whether the President has the exclusive power to grant formal recognition to a foreign sovereign. Second, if he has that power, the Court must determine whether Congress can command the President and his Secretary of State to issue a formal statement that contradicts the earlier recognition. The statement in question here is a congressional mandate that allows a United States citizen born in Jerusalem to direct the President and Secretary of State, when issuing his passport, to state that his place of birth is “Israel.”

I

A

Jerusalem’s political standing has long been, and remains, one of the most sensitive issues in American foreign policy, and indeed it is one of the most delicate issues in current international affairs. In 1948, President Truman formally recognized Israel in a signed statement of “recognition.” See Statement by the President Announcing Recognition of the State of Israel, Public Papers of the Presidents, May 14, 1948, p. 258 (1964). That statement did not recognize Israeli sovereignty over Jerusalem. Over the last 60 years, various actors have sought to assert full or partial sovereignty over the city, including Israel, Jordan, and the Palestinians. Yet, in contrast to a consistent policy of formal recognition of Israel, neither President Truman nor any later United States President has issued an official statement or declaration acknowledging any country’s sovereignty over Jerusalem. Instead, the Executive Branch has maintained that “ ‘the status of Jerusalem . . . should be decided not unilaterally but in consultation with all concerned.’ ” United Nations Gen. Assembly Official Records, 5th Emergency Sess., 1554th Plenary Meetings, United Nations Doc. No. 1 APV.1554, p. 10 (July 14, 1967);

see, *e.g.*, Remarks by President Obama in Address to the United Nations Gen. Assembly (Sept. 21, 2011), 2011 Daily Comp. of Pres. Doc. No. 00661, p. 4 (“Ultimately, it is the Israelis and the Palestinians, not us, who must reach agreement on the issues that divide them,” including “Jerusalem”). In a letter to Congress then-Secretary of State Warren Christopher expressed the Executive’s concern that “[t]here is no issue related to the Arab-Israeli negotiations that is more sensitive than Jerusalem.” See 141 Cong. Rec. 28967 (1995) (letter to Robert Dole, Majority Leader, (June 20, 1995)). He further noted the Executive’s opinion that “any effort . . . to bring it to the forefront” could be “very damaging to the success of the peace process.” *Ibid.*

The President’s position on Jerusalem is reflected in State Department policy regarding passports and consular reports of birth abroad. Understanding that passports will be construed as reflections of American policy, the State Department’s Foreign Affairs Manual instructs its employees, in general, to record the place of birth on a passport as the “country [having] present sovereignty over the actual area of birth.” Dept. of State, 7 Foreign Affairs Manual (FAM) §1383.4 (1987). If a citizen objects to the country listed as sovereign by the State Department, he or she may list the city or town of birth rather than the country. See *id.*, §1383.6. The FAM, however, does not allow citizens to list a sovereign that conflicts with Executive Branch policy. See generally *id.*, §1383. Because the United States does not recognize any country as having sovereignty over Jerusalem, the FAM instructs employees to record the place of birth for citizens born there as “Jerusalem.” *Id.*, §1383.5–6 (emphasis deleted).

In 2002, Congress passed the Act at issue here, the Foreign Relations Authorization Act, Fiscal Year 2003, 116 Stat. 1350. Section 214 of the Act is titled “United States Policy with Respect to Jerusalem as the Capital of Israel.” *Id.*, at 1365. The subsection that lies at the heart of this case, §214(d), addresses passports. That subsection seeks to override the FAM by allowing citizens born in Jerusalem to list their place of birth as “Israel.” Titled “Record of Place of Birth as Israel for Passport Purposes,” §214(d) states “[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen’s legal guardian, record the place of birth as Israel.” *Id.*, at 1366.

When he signed the Act into law, President George W. Bush issued a statement declaring his position that §214 would, “if construed as mandatory rather than advisory, impermissibly interfere with the President’s constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states.” Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003, Public Papers of the Presidents, George W. Bush, Vol. 2, Sept. 30, 2002, p. 1698 (2005). The President concluded, “U. S. policy regarding Jerusalem has not changed.” *Ibid.*

Some parties were not reassured by the President’s statement. A cable from the United States Consulate in Jerusalem noted that the Palestine Liberation Organization Executive Committee, Fatah Central Committee, and the Palestinian Authority Cabinet had all issued statements claiming that the Act “ ‘undermines the role of the U. S. as a sponsor of the peace process.’ ” App. 231. In the Gaza Strip and elsewhere residents marched in protest. See The Associated Press and Reuters, Palestinians Stone Police Guarding Western Wall, *The Seattle Times*, Oct. 5, 2002, p. A7.

In response the Secretary of State advised diplomats to express their understanding of “Jerusalem’s importance to both sides and to many others around the world.” App. 228. He noted his belief that America’s “policy towards Jerusalem” had not changed. *Ibid.*

B

In 2002, petitioner Menachem Binyamin Zivotofsky was born to United States citizens living in Jerusalem. App. 24–25. In December 2002, Zivotofsky’s mother visited the American Embassy in Tel Aviv to request both a passport and a consular report of birth abroad for her son. *Id.*, at 25. She asked that his place of birth be listed as “ ‘Jerusalem, Israel.’ ” *Ibid.* The Embassy clerks explained that, pursuant to State Department policy, the passport would list only “Jerusalem.” *Ibid.* Zivotofsky’s parents objected and, as his guardians, brought suit on his behalf in the United States District Court for the District of Columbia, seeking to enforce §214(d).

Pursuant to §214(d), Zivotofsky claims the right to have “Israel” recorded as his place of birth in his passport. See *Zivotofsky v. Clinton*, 566 U. S. ___, ___ (2012) (slip op., at 4) (“[W]hile Zivotofsky had originally asked that ‘Jerusalem, Israel’ be recorded on his passport, ‘[b]oth sides agree that the question now is whether §214(d) entitles [him] to have just ‘Israel’ listed’ ”). The arguments in Zivotofsky’s brief center on his passport claim, as opposed to the consular report of birth abroad. Indeed, in the court below, Zivotofsky waived any argument that his consular report of birth abroad should be treated differently than his passport. *Zivotofsky v. Secretary of State*, 725 F. 3d 197, 203, n. 3 (CADDC 2013). He has also waived the issue here by failing to differentiate between the two documents. As a result, the Court addresses Zivotofsky’s passport arguments and need not engage in a separate analysis of the validity of §214(d) as applied to consular reports of birth abroad.

After Zivotofsky brought suit, the District Court dismissed his case, reasoning that it presented a nonjusticiable political question and that Zivotofsky lacked standing. App. 28–39. The Court of Appeals for the District of Columbia Circuit reversed on the standing issue, *Zivotofsky v. Secretary of State*, 444 F. 3d 614, 617–619 (2006), but later affirmed the District Court’s political question de termination. See *Zivotofsky v. Secretary of State*, 571 F. 3d 1227, 1228 (2009).

This Court granted certiorari, vacated the judgment, and remanded the case. Whether §214(d) is constitutional, the Court held, is not a question reserved for the political branches. In reference to Zivotofsky’s claim the Court observed “the Judiciary must decide if Zivotofsky’s interpretation of the statute is correct, and whether the statute is constitutional”—not whether Jerusalem is, in fact, part of Israel. *Zivotofsky v. Clinton*, *supra*, at ___ (slip op., at 7).

On remand the Court of Appeals held the statute unconstitutional. It determined that “the President exclusively holds the power to determine whether to recognize a foreign sovereign,” 725 F. 3d, at 214, and that “section 214(d) directly contradicts a carefully considered exercise of the Executive branch’s recognition power.” *Id.*, at 217.

This Court again granted certiorari. 572 U. S. ___ (2014).

II

In considering claims of Presidential power this Court refers to Justice Jackson's familiar tripartite framework from *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 635–638 (1952) (concurring opinion). The framework divides exercises of Presidential power into three categories: First, when “the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.” *Id.*, at 635. Second, “in absence of either a congressional grant or denial of authority” there is a “zone of twilight in which he and Congress may have concurrent authority,” and where “congressional inertia, indifference or quiescence may” invite the exercise of executive power. *Id.*, at 637. Finally, when “the President takes measures incompatible with the expressed or implied will of Congress . . . he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.” *Ibid.* To succeed in this third category, the President's asserted power must be both “exclusive” and “conclusive” on the issue. *Id.*, at 637–638.

In this case the Secretary contends that §214(d) in- fringes on the President's exclusive recognition power by “requiring the President to contradict his recognition posi- tion regarding Jerusalem in official communications with foreign sovereigns.” Brief for Respondent 48. In so doing the Secretary acknowledges the President's power is “at its lowest ebb.” *Youngstown*, 343 U. S., at 637. Because the President's refusal to implement §214(d) falls into Justice Jackson's third category, his claim must be “scrutinized with caution,” and he may rely solely on powers the Constitution grants to him alone. *Id.*, at 638.

To determine whether the President possesses the exclusive power of recognition the Court examines the Constitution's text and structure, as well as precedent and history bearing on the question.

A

Recognition is a “formal acknowledgement” that a particular “entity possesses the qualifications for statehood” or “that a particular regime is the effective government of a state.” Restatement (Third) of Foreign Relations Law of the United States §203, Comment *a*, p. 84 (1986). It may also involve the determination of a state's territorial bounds. See 2 M. Whiteman, Digest of International Law §1, p. 1 (1963) (Whiteman) (“[S]tates may recognize or decline to recognize territory as belonging to, or under the sovereignty of, or having been acquired or lost by, other states”). Recognition is often effected by an express “written or oral declaration.” 1 J. Moore, Digest of International Law §27, p. 73 (1906) (Moore). It may also be implied— for example, by concluding a bilateral treaty or by sending or receiving diplomatic agents. *Ibid.*; I. Brownlie, Prin- ciples of Public International Law 93 (7th ed. 2008) (Brownlie).

Legal consequences follow formal recognition. Recognized sovereigns may sue in United States courts, see *Guaranty Trust Co. v. United States*, 304 U. S. 126, 137 (1938), and may benefit from sovereign immunity when they are sued, see *National City Bank of N. Y. v. Republic of China*, 348 U. S. 356, 358–359 (1955). The actions of a recognized sovereign committed within its own territory also receive deference in domestic courts under the act of state doctrine. See *Oetjen v. Central Leather Co.*, 246 U. S. 297, 302–303 (1918). Recognition at

international law, furthermore, is a precondition of regular diplomatic relations. 1 Moore §27, at 72. Recognition is thus “useful, even necessary,” to the existence of a state. *Ibid.*

Despite the importance of the recognition power in foreign relations, the Constitution does not use the term “recognition,” either in Article II or elsewhere. The Secretary asserts that the President exercises the recognition power based on the Reception Clause, which directs that the President “shall receive Ambassadors and other public Ministers.” Art. II, §3. As Zivotofsky notes, the Reception Clause received little attention at the Constitutional Convention. See Reinstein, Recognition: A Case Study on the Original Understanding of Executive Power, 45 U. Rich. L. Rev. 801, 860–862 (2011). In fact, during the ratification debates, Alexander Hamilton claimed that the power to receive ambassadors was “more a matter of dignity than of authority,” a ministerial duty largely “without consequence.” The Federalist No. 69, p. 420 (C. Rossiter ed. 1961).

At the time of the founding, however, prominent international scholars suggested that receiving an ambassador was tantamount to recognizing the sovereignty of the sending state. See E. de Vattel, *The Law of Nations* §78, p. 461 (1758) (J. Chitty ed. 1853) (“[E]very state, truly possessed of sovereignty, has a right to send ambassadors” and “to contest their right in this instance” is equivalent to “contesting their sovereign dignity”); see also 2 C. van Bynkershoek, *On Questions of Public Law 156–157* (1737) (T. Frank ed. 1930) (“Among writers on public law it is usually agreed that only a sovereign power has a right to send ambassadors”); 2 H. Grotius, *On the Law of War and Peace* 440–441 (1625) (F. Kelsey ed. 1925) (discussing the duty to admit ambassadors of sovereign powers). It is a logical and proper inference, then, that a Clause directing the President alone to receive ambassadors would be understood to acknowledge his power to recognize other nations.

This in fact occurred early in the Nation’s history when President Washington recognized the French Revolutionary Government by receiving its ambassador. See A. Hamilton, *Pacificus* No. 1, in *The Letters of Pacificus and Helvidius* 5, 13–14 (1845) (reprint 1976) (President “acknowledged the republic of France, by the reception of its minister”). After this incident the import of the Reception Clause became clear—causing Hamilton to change his earlier view. He wrote that the Reception Clause “includes th[e power] of judging, in the case of a revolution of government in a foreign country, whether the new rulers are competent organs of the national will, and ought to be recognised, or not.” See *id.*, at 12; see also 3 J. Story, *Commentaries on the Constitution of the United States* §1560, p. 416 (1833) (“If the executive receives an ambassador, or other minister, as the representative of a new nation . . . it is an acknowledgment of the sovereign authority *de facto* of such new nation, or party”). As a result, the Reception Clause provides support, although not the sole authority, for the President’s power to recognize other nations.

The inference that the President exercises the recognition power is further supported by his additional Article II powers. It is for the President, “by and with the Advice and Consent of the Senate,” to “make Treaties, provided two thirds of the Senators present concur.” Art. II, §2, cl. 2. In addition, “he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors” as well as “other public Ministers and Consuls.” *Ibid.*

As a matter of constitutional structure, these additional powers give the President control over recognition decisions. At international law, recognition may be effected by different means, but each means is dependent upon Presidential power. In addition to receiving an ambassador,

recognition may occur on “the conclusion of a bilateral treaty,” or the “formal initiation of diplomatic relations,” including the dispatch of an ambassador. Brownlie 93; see also 1 Moore §27, at 73. The President has the sole power to negotiate treaties, see *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 319 (1936), and the Senate may not conclude or ratify a treaty without Presidential action. The President, too, nominates the Nation’s ambassadors and dispatches other diplomatic agents. Congress may not send an ambassador without his involvement. Beyond that, the President himself has the power to open diplomatic channels simply by engaging in direct diplomacy with foreign heads of state and their ministers. The Constitution thus assigns the President means to effect recognition on his own initiative. Congress, by contrast, has no constitutional power that would enable it to initiate diplomatic relations with a foreign nation. Because these specific Clauses confer the recognition power on the President, the Court need not consider whether or to what extent the Vesting Clause, which provides that the “executive Power” shall be vested in the President, provides further support for the President’s action here. Art. II, §1, cl. 1.

The text and structure of the Constitution grant the President the power to recognize foreign nations and governments. The question then becomes whether that power is exclusive. The various ways in which the President may unilaterally effect recognition—and the lack of any similar power vested in Congress—suggest that it is. So, too, do functional considerations. Put simply, the Nation must have a single policy regarding which governments are legitimate in the eyes of the United States and which are not. Foreign countries need to know, before entering into diplomatic relations or commerce with the United States, whether their ambassadors will be received; whether their officials will be immune from suit in federal court; and whether they may initiate lawsuits here to vindicate their rights. These assurances cannot be equivocal.

Recognition is a topic on which the Nation must “ ‘speak . . . with one voice.’ ” *American Ins. Assn. v. Garamendi*, 539 U. S. 396, 424 (2003) (quoting *Crosby v. National Foreign Trade Council*, 530 U. S. 363, 381 (2000)). That voice must be the President’s. Between the two political branches, only the Executive has the characteristic of unity at all times. And with unity comes the ability to exercise, to a greater degree, “[d]ecision, activity, secrecy, and dispatch.” The Federalist No. 70, p. 424 (A. Hamilton). The President is capable, in ways Congress is not, of engaging in the delicate and often secret diplomatic contacts that may lead to a decision on recognition. See, e.g., *United States v. Pink*, 315 U. S. 203, 229 (1942). He is also better positioned to take the decisive, unequivocal action necessary to recognize other states at international law. 1 Oppenheim’s International Law §50, p. 169 (R. Jennings & A. Watts eds., 9th ed. 1992) (act of recognition must “leave no doubt as to the intention to grant it”). These qualities explain why the Framers listed the traditional avenues of recognition—receiving ambassadors, making treaties, and sending ambassadors—as among the President’s Article II powers.

As described in more detail below, the President since the founding has exercised this unilateral power to recognize new states—and the Court has endorsed the practice. See *Banco Nacional de Cuba v. Sabbatino*, 376 U. S. 398, 410 (1964); *Pink*, *supra*, at 229; *Williams v. Suffolk Ins. Co.*, 13 Pet. 415, 420 (1839). Texts and treatises on international law treat the President’s word as the final word on recognition. See, e.g., Restatement (Third) of Foreign Relations Law §204, at 89 (“Under the Constitution of the United States the President has exclusive authority to recognize or not to recognize a foreign state or government”); see also L. Henkin, *Foreign Affairs and the U. S. Constitution* 43 (2d ed. 1996) (“It is no longer

questioned that the President does not merely perform the ceremony of receiving foreign ambassadors but also determines whether the United States should recognize or refuse to recognize a foreign government”). In light of this authority all six judges who considered this case in the Court of Appeals agreed that the President holds the exclusive recognition power. See 725 F. 3d, at 214 (“[W]e conclude that the President exclusively holds the power to determine whether to recognize a foreign sovereign”); *Zivotofsky*, 571 F. 3d, at 1231 (“That this power belongs solely to the President has been clear from the earliest days of the Republic”); *id.*, at 1240 (Edwards, J., concurring) (“The Executive has exclusive and unreviewable authority to recognize foreign sovereigns”).

It remains true, of course, that many decisions affecting foreign relations—including decisions that may determine the course of our relations with recognized countries—require congressional action. Congress may “regulate Commerce with foreign Nations,” “establish an uniform Rule of Naturalization,” “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations,” “declare War,” “grant Letters of Marque and Reprisal,” and “make Rules for the Government and Regulation of the land and naval Forces.” U. S. Const., Art. I, §8. In addition, the President cannot make a treaty or appoint an ambassador without the approval of the Senate. Art. II, §2, cl. 2. The President, furthermore, could not build an American Embassy abroad without congressional appropriation of the necessary funds. Art. I, §8, cl. 1. Under basic separation-of-powers principles, it is for the Congress to enact the laws, including “all Laws which shall be necessary and proper for carrying into Execution” the powers of the Federal Government. §8, cl. 18.

In foreign affairs, as in the domestic realm, the Constitution “enjoins upon its branches separateness but interdependence, autonomy but reciprocity.” *Youngstown*, 343 U. S., at 635 (Jackson, J., concurring). Although the President alone effects the formal act of recognition, Congress’ powers, and its central role in making laws, give it substantial authority regarding many of the policy determinations that precede and follow the act of recognition itself. If Congress disagrees with the President’s recognition policy, there may be consequences. Formal recognition may seem a hollow act if it is not accompanied by the dispatch of an ambassador, the easing of trade restrictions, and the conclusion of treaties. And those decisions require action by the Senate or the whole Congress.

In practice, then, the President’s recognition determination is just one part of a political process that may require Congress to make laws. The President’s exclusive recognition power encompasses the authority to acknowledge, in a formal sense, the legitimacy of other states and governments, including their territorial bounds. Albeit limited, the exclusive recognition power is essential to the conduct of Presidential duties. The formal act of recognition is an executive power that Congress may not qualify. If the President is to be effective in negotiations over a formal recognition determination, it must be evident to his counterparts abroad that he speaks for the Nation on that precise question.

A clear rule that the formal power to recognize a foreign government subsists in the President therefore serves a necessary purpose in diplomatic relations. All this, of course, underscores that Congress has an important role in other aspects of foreign policy, and the President may be bound by any number of laws Congress enacts. In this way ambition counters ambition, ensuring that the democratic will of the people is observed and respected in foreign affairs as in the domestic realm. See *The Federalist* No. 51, p. 322 (J. Madison).

B

No single precedent resolves the question whether the President has exclusive recognition authority and, if so, how far that power extends. In part that is because, until today, the political branches have resolved their disputes over questions of recognition. The relevant cases, though providing important instruction, address the division of recognition power between the Federal Government and the States, see, e.g., *Pink*, 315 U. S. 203, or between the courts and the political branches, see, e.g., *Banco Nacional de Cuba*, 376 U. S., at 410—not between the President and Congress. As the parties acknowledge, some isolated statements in those cases lend support to the position that Congress has a role in the recognition process. In the end, however, a fair reading of the cases shows that the President’s role in the recognition process is both central and exclusive.

During the administration of President Van Buren, in a case involving a dispute over the status of the Falkland Islands, the Court noted that “when the executive branch of the government” assumes “a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department.” *Williams*, 13 Pet., at 420. Once the President has made his determination, it “is enough to know, that in the exercise of his constitutional functions, he has decided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and government of the Union.” *Ibid.*

Later, during the 1930’s and 1940’s, the Court addressed issues surrounding President Roosevelt’s decision to recognize the Soviet Government of Russia. In *United States v. Belmont*, 301 U. S. 324 (1937), and *Pink*, 315 U. S. 203, New York state courts declined to give full effect to the terms of executive agreements the President had concluded in negotiations over recognition of the Soviet regime. In particular the state courts, based on New York public policy, did not treat assets that had been seized by the Soviet Government as property of Russia and declined to turn those assets over to the United States. The Court stated that it “may not be doubted” that “recognition, establishment of diplomatic relations, . . . and agreements with respect thereto” are “within the competence of the President.” *Belmont*, 301 U. S., at 330. In these matters, “the Executive ha[s] authority to speak as the sole organ of th[e] government.” *Ibid.* The Court added that the President’s authority “is not limited to a determination of the government to be recognized. It includes the power to determine the policy which is to govern the question of recognition.” *Pink*, *supra*, at 229; see also *Guaranty Trust Co.*, 304 U. S., at 137–138 (The “political department[’s] . . . action in recognizing a foreign government and in receiving its diplomatic representatives is conclusive on all domestic courts”). Thus, New York state courts were required to respect the executive agreements.

It is true, of course, that *Belmont* and *Pink* are not direct holdings that the recognition power is exclusive. Those cases considered the validity of executive agreements, not the initial act of recognition. The President’s determination in those cases did not contradict an Act of Congress. And the primary issue was whether the executive agreements could supersede state law. Still, the language in *Pink* and *Belmont*, which confirms the President’s competence to determine questions of recognition, is strong support for the conclusion that it is for the President alone to determine which foreign governments are legitimate.

Banco Nacional de Cuba contains even stronger statements regarding the President’s authority over recognition. There, the status of Cuba’s Government and its acts as a sovereign were at

issue. As the Court explained, “Political recognition is exclusively a function of the Executive.” 376 U. S., at 410. Because the Executive had recognized the Cuban Government, the Court held that it should be treated as sovereign and could benefit from the “act of state” doctrine. See also *Baker v. Carr*, 369 U. S. 186, 213 (1962) (“[I]t is the executive that determines a person’s status as representative of a foreign government”); *National City Bank of N. Y.*, 348 U. S., at 358 (“The status of the Republic of China in our courts is a matter for determination by the Executive and is outside the competence of this Court”). As these cases illustrate, the Court has long considered recognition to be the exclusive prerogative of the Executive.

The Secretary now urges the Court to define the executive power over foreign relations in even broader terms. He contends that under the Court’s precedent the President has “exclusive authority to conduct diplomatic relations,” along with “the bulk of foreign-affairs powers.” Brief for Respondent 18, 16. In support of his submission that the President has broad, undefined powers over foreign affairs, the Secretary quotes *United States v. Curtiss-Wright Export Corp.*, which described the President as “the sole organ of the federal government in the field of international relations.” 299 U. S., at 320. This Court declines to acknowledge that unbounded power. A formulation broader than the rule that the President alone determines what nations to formally recognize as legitimate—and that he consequently controls his statements on matters of recognition—presents different issues and is unnecessary to the resolution of this case.

The *Curtiss-Wright* case does not extend so far as the Secretary suggests. In *Curtiss-Wright*, the Court considered whether a congressional delegation of power to the President was constitutional. Congress had passed a joint resolution giving the President the discretion to prohibit arms sales to certain militant powers in South America. The resolution provided criminal penalties for violation of those orders. *Id.*, at 311–312. The Court held that the delegation was constitutional, reasoning that Congress may grant the President substantial authority and discretion in the field of foreign affairs. *Id.*, at 315–329. Describing why such broad delegation may be appropriate, the opinion stated:

“In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, ‘The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.’ [10 Annals of Cong.] 613.” *Id.*, at 319.

This description of the President’s exclusive power was not necessary to the holding of *Curtiss-Wright*—which, after all, dealt with congressionally authorized action, not a unilateral Presidential determination. Indeed, *Curtiss-Wright* did not hold that the President is free from Congress’ lawmaking power in the field of international relations. The President does have a unique role in communicating with foreign governments, as then-Congressman John Marshall acknowledged. See 10 Annals of Cong. 613 (1800) (cited in *Curtiss-Wright, supra*, at 319). But whether the realm is foreign or domestic, it is still the Legislative Branch, not the Executive Branch, that makes the law.

In a world that is ever more compressed and interdependent, it is essential the congressional role in foreign affairs be understood and respected. For it is Congress that makes laws, and in countless ways its laws will and should shape the Nation’s course. The Executive is not free

from the ordinary controls and checks of Congress merely because foreign affairs are at issue. See, e.g., *Medellín v. Texas*, 552 U. S. 491, 523–532 (2008); *Youngstown*, 343 U. S., at 589; *Little v. Barreme*, 2 Cranch 170, 177–179 (1804); Glennon, Two Views of Presidential Foreign Affairs Power: *Little v. Barreme* or *Curtiss-Wright*? 13 Yale J. Int'l L. 5, 19–20 (1988); cf. *Dames & Moore v. Regan*, 453 U. S. 654, 680–681 (1981). It is not for the President alone to determine the whole content of the Nation's foreign policy.

That said, judicial precedent and historical practice teach that it is for the President alone to make the specific decision of what foreign power he will recognize as legitimate, both for the Nation as a whole and for the purpose of making his own position clear within the context of recognition in discussions and negotiations with foreign nations. Recognition is an act with immediate and powerful significance for international relations, so the President's position must be clear. Congress cannot require him to contradict his own statement regarding a determination of formal recognition.

Zivotofsky's contrary arguments are unconvincing. The decisions he relies upon are largely inapposite. This Court's cases do not hold that the recognition power is shared. *Jones v. United States*, 137 U. S. 202 (1890), and *Boumediene v. Bush*, 553 U. S. 723 (2008), each addressed the status of territories controlled or acquired by the United States—not whether a province ought to be recognized as part of a foreign country. See also *Vermilya-Brown Co. v. Connell*, 335 U. S. 377, 380 (1948) (“[D]etermination of [American] sovereignty over an area is for the legislative and executive departments”). And no one disputes that Congress has a role in determining the status of United States territories. See U. S. Const., Art. IV, §3, cl. 2 (Congress may “dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States”). Other cases describing a shared power address the recognition of Indian tribes—which is, similarly, a distinct issue from the recognition of foreign countries. See *Cherokee Nation v. Georgia*, 5 Pet. 1 (1831).

To be sure, the Court has mentioned both of the political branches in discussing international recognition, but it has done so primarily in affirming that the Judiciary is not responsible for recognizing foreign nations. See *Oetjen*, 246 U. S., at 302 (“ ‘Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but is a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges’ ” (quoting *Jones*, *supra*, at 212)); *United States v. Palmer*, 3 Wheat. 610, 643 (1818) (“[T]he courts of the union must view [a] newly constituted government as it is viewed by the legislative and executive departments of the government of the United States”). This is consistent with the fact that Congress, in the ordinary course, does support the President's recognition policy, for instance by confirming an ambassador to the recognized foreign government. Those cases do not cast doubt on the view that the Executive Branch determines whether the United States will recognize foreign states and governments and their territorial bounds.

C

Having examined the Constitution's text and this Court's precedent, it is appropriate to turn to accepted understandings and practice. In separation-of-powers cases this Court has often “put significant weight upon historical practice.” *NLRB v. Noel Canning*, 573 U. S. ___, ___ (2014) (slip op., at 6) (emphasis deleted). Here, history is not all on one side, but on balance it provides

strong support for the conclusion that the recognition power is the President's alone. As Zivotofsky argues, certain historical incidents can be interpreted to support the position that recognition is a shared power. But the weight of historical evidence supports the opposite view, which is that the formal determination of recognition is a power to be exercised only by the President.

The briefs of the parties and *amici*, which have been of considerable assistance to the Court, give a more complete account of the relevant history, as do the works of scholars in this field. See, e.g., Brief for Respondent 26–39; Brief for Petitioner 34–57; Brief for American Jewish Committee as *Amicus Curiae* 6–24; J. Goebel, *The Recognition Policy of the United States* 97–170 (1915) (Goebel); 1 Moore §§28–58, 74–164; Reinstein, *Is the President's Recognition Power Exclusive?* 86 *Temp. L. Rev.* 1, 3–50 (2013). But even a brief survey of the major historical examples, with an emphasis on those said to favor Zivotofsky, establishes no more than that some Presidents have chosen to cooperate with Congress, not that Congress itself has exercised the recognition power.

From the first Administration forward, the President has claimed unilateral authority to recognize foreign sovereigns. For the most part, Congress has acquiesced in the Executive's exercise of the recognition power. On occasion, the President has chosen, as may often be prudent, to consult and coordinate with Congress. As Judge Tatel noted in this case, however, “the most striking thing” about the history of recognition “is what is absent from it: a situation like this one,” where Congress has enacted a statute contrary to the President's formal and considered statement concerning recognition. 725 F. 3d, at 221 (concurring opinion).

The first debate over the recognition power arose in 1793, after France had been torn by revolution. See Prakash & Ramsey, *The Executive Power over Foreign Affairs*, 111 *Yale L. J.* 231, 312 (2001). Once the Revolutionary Government was established, Secretary of State Jefferson and President Washington, without consulting Congress, authorized the American Ambassador to resume relations with the new regime. See Letter to Gouverneur Morris (Mar. 12, 1793), in 25 *Papers of Thomas Jefferson* 367, 367–368 (J. Catanzariti ed. 1992); Goebel 99–104. Soon thereafter, the new French Government proposed to send an ambassador, Citizen Genet, to the United States. See *id.*, at 105. Members of the President's Cabinet agreed that receiving Genet would be a binding and public act of recognition. See Opinion on the Treaties with France (Apr. 28, 1793), in 25 *Papers of Thomas Jefferson*, at 608, 612 (“The reception of the Minister at all . . . is an ackno[w]le[d]gement of the legitimacy of their government”); see also Letter from A. Hamilton to G. Washington (Cabinet Paper) (Apr. 1793), in 4 *Works of Alexander Hamilton* 369, 369–396 (H. Lodge ed. 1904). They decided, however, both that Genet should be received and that consultation with Congress was not necessary. See T. Jefferson, *Anas* (Apr. 18, 1793), in 1 *Writings of Thomas Jefferson* 226, 227 (P. Ford ed. 1892); Cabinet Opinion on Washington's Questions on Neutrality and the Alliance with France (Apr. 19, 1793), in 25 *Papers of Thomas Jefferson*, at 570. Congress expressed no disagreement with this position, and Genet's reception *supra* marked the Nation's first act of recognition—one made by the President alone. See Prakash, *supra*, at 312–313.

The recognition power again became relevant when yet another revolution took place—this time, in South America, as several colonies rose against Spain. In 1818, Speaker of the House Henry Clay announced he “intended moving the recognition of Buenos Ayres and probably of Chile.” Goebel 121. Clay thus sought to appropriate money “ ‘[f]or one year's salary’ ” for “ ‘a

Minister' ” to present-day Argentina. 32 Annals of Cong. 1500 (1818). President Monroe, however, did not share that view. Although Clay gave “one of the most remarkable speeches of his career,” his proposed bill was defeated. Goebel 123; 32 Annals of Cong. 1655. That action has been attributed, in part, to the fact that Congress agreed the recognition power rested solely with the President. Goebel 124; see, *e.g.*, 32 Annals of Cong. 1570 (statement of Rep. Alexander Smyth) (“[T]he acknowledgment of the independence of a new Power is an exercise of Executive authority; consequently, for Congress to direct the Executive how he shall exercise this power, is an act of usurpation”). Four years later, after the President had decided to recognize the South American republics, Congress did pass a resolution, on his request, appropriating funds for “such missions to the independent nations on the American continent, as the President of the United States may deem proper.” Act of May 4, 1822, ch. 52, 3 Stat. 678.

A decade later, President Jackson faced a recognition crisis over Texas. In 1835, Texas rebelled against Mexico and formed its own government. See Goebel 144–147. But the President feared that recognizing the new government could ignite a war. See A. Jackson, To the Senate and House of Representatives of the United States (Dec. 21, 1836), in 3 Messages and Papers of the Presidents 265, 266–267 (J. Richardson ed. 1899). After Congress urged him to recognize Texas, see Cong. Globe, 24th Cong., 1st Sess., 453 (1836); H. R. Rep. No. 854, 24th Cong., 1st Sess. (1836), the President delivered a message to the Legislature. He concluded there had not been a “deliberate inquiry” into whether the President or Congress possessed the recognition power. See A. Jackson, in 3 Messages and Papers of the Presidents, at 267. He stated, however, “on the ground of expediency, I am disposed to concur” with Congress’ preference regarding Texas. *Ibid.* In response Congress appropriated funds for a “diplomatic agent to be sent to the Republic of Texas, whenever the President of the United States . . . shall deem it expedient to appoint such minister.” Act of Mar. 3, 1837, 5 Stat. 170. Thus, although he cooperated with Congress, the President was left to execute the formal act of recognition.

President Lincoln, too, sought to coordinate with Congress when he requested support for his recognition of Liberia and Haiti. In his first annual message to Congress he said he could see no reason “why we should persevere longer in withholding our recognition of the independence and sovereignty of Hayti and Liberia.” Lincoln’s First Annual Message to Congress (Dec. 3, 1861), in 6 Messages and Papers of the Presidents 44, 47. Nonetheless, he was “[u]nwillingly” to “inaugurate a novel policy in regard to them without the approbation of Congress.” *Ibid.* In response Congress concurred in the President’s recognition determination and enacted a law appropriating funds to appoint diplomatic representatives to the two countries—leaving, as usual, the actual dispatch of ambassadors and formal statement of recognition to the President. Act of June 5, 1862, 12 Stat. 421.

Three decades later, the branches again were able to reach an accord, this time with regard to Cuba. In 1898, an insurgency against the Spanish colonial government was raging in Cuba. President McKinley determined to ask Congress for authorization to send armed forces to Cuba to help quell the violence. See 31 Cong. Rec. 3699–3702 (1898). Although McKinley thought Spain was to blame for the strife, he opposed recognizing either Cuba or its insurgent government. *Id.*, at 3701. At first, the House proposed a resolution consistent with McKinley’s wishes. *Id.*, at 3810. The Senate countered with a resolution that authorized the use of force but that did recognize both Cuban independence and the insurgent government. *Id.*, at 3993. When the Senate’s version reached the House, the House again rejected the language recognizing Cuban independence. *Id.*, at 4017. The resolution went to Conference, which, after debate,

reached a compromise. See Reinstein, 86 Temp. L. Rev., at 40–41. The final resolution stated “the people of the Island of Cuba are, and of right ought to be, free and independent,” but made no mention of recognizing a new Cuban Government. Act of Apr. 20, 1898, 30 Stat. 738. Accepting the compromise, the President signed the joint resolution. See Reinstein, 86 Temp. L. Rev., at 41.

For the next 80 years, “[P]residents consistently recognized new states and governments without any serious opposition from, or activity in, Congress.” *Ibid.*; see 2 Whiteman §§6–60, at 133–242 (detailing over 50 recognition decisions made by the Executive). The next debate over recognition did not occur until the late 1970’s. It concerned China.

President Carter recognized the People’s Republic of China (PRC) as the government of China, and derecognized the Republic of China, located on Taiwan. See S. Kan, Cong. Research Serv., *China/Taiwan: Evolution of the “One China” Policy—Key Statements from Washington, Beijing, and Taipei* 1, 10 (Oct. 10, 2014). As to the status of Taiwan, the President “acknowledge[d] the Chinese position” that “Taiwan is part of China,” *id.*, at 39 (text of U. S.–PRC Joint Communique on the Establishment of Diplomatic Relations (Jan. 1, 1979)), but he did not accept that claim. The President proposed a new law defining how the United States would conduct business with Taiwan. See Hearings on Taiwan Legislation before the House Committee on Foreign Affairs, 96th Cong., 1st Sess., 2–6 (1979) (statement of Warren Christopher, Deputy Secretary of State). After extensive revisions, Congress passed, and the President signed, the Taiwan Relations Act, 93 Stat. 14 (1979) (codified as amended at 22 U. S. C. §§3301–3316). The Act (in a simplified summary) treated Taiwan as if it were a legally distinct entity from China—an entity with which the United States intended to maintain strong ties. See, *e.g.*, §§3301, 3303(a), (b)(1), (b)(7).

Throughout the legislative process, however, no one raised a serious question regarding the President’s exclusive authority to recognize the PRC—or to decline to grant formal recognition to Taiwan. See, *e.g.*, 125 Cong. Rec. 6709 (1979) (statement of Sen. Jacob Javits) (“Neither bill [proposed by either Chamber] sought to reestablish official relations between the United States and the Republic of China on Taiwan; Congress . . . does not have the authority to do that even if it wanted to do so”). Rather, Congress accepted the President’s recognition determination as a completed, lawful act; and it proceeded to outline the trade and policy provisions that, in its judgment, were appropriate in light of that decision.

This history confirms the Court’s conclusion in the instant case that the power to recognize or decline to recognize a foreign state and its territorial bounds resides in the President alone. For the most part, Congress has respected the Executive’s policies and positions as to formal recognition. At times, Congress itself has defended the President’s constitutional prerogative. Over the last 100 years, there has been scarcely any debate over the President’s power to recognize foreign states. In this respect the Legislature, in the narrow context of recognition, on balance has acknowledged the importance of speaking “with one voice.” *Crosby*, 530 U. S., at 381. The weight of historical evidence indicates Congress has accepted that the power to recognize foreign states and governments and their territorial bounds is exclusive to the Presidency.

III

As the power to recognize foreign states resides in the President alone, the question becomes whether §214(d) infringes on the Executive's consistent decision to withhold recognition with respect to Jerusalem. See *Nixon v. Administrator of General Services*, 433 U. S. 425, 443 (1977) (action unlawful when it "prevents the Executive Branch from accomplishing its constitutionally assigned functions").

Section 214(d) requires that, in a passport or consular report of birth abroad, "the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel" for a "United States citizen born in the city of Jerusalem." 116 Stat. 1366. That is, §214(d) requires the President, through the Secretary, to identify citizens born in Jerusalem who so request as being born in Israel. But according to the President, those citizens were not born in Israel. As a matter of United States policy, neither Israel nor any other country is acknowledged as having sovereignty over Jerusalem. In this way, §214(d) "directly contradicts" the "carefully calibrated and longstanding Executive branch policy of neutrality toward Jerusalem." 725 F. 3d, at 217, 216.

If the power over recognition is to mean anything, it must mean that the President not only makes the initial, formal recognition determination but also that he may maintain that determination in his and his agent's statements. This conclusion is a matter of both common sense and necessity. If Congress could command the President to state a recognition position inconsistent with his own, Congress could override the President's recognition determination. Under international law, recognition may be effected by "written or oral declaration of the recognizing state." 1 Moore §27, at 73. In addition an act of recognition must "leave no doubt as to the intention to grant it." 1 Oppenheim's International Law §50, at 169. Thus, if Congress could alter the President's statements on matters of recognition or force him to contradict them, Congress in effect would exercise the recognition power.

As Justice Jackson wrote in *Youngstown*, when a Presidential power is "exclusive," it "disabl[es] the Congress from acting upon the subject." 343 U. S., at 637–638 (concurring opinion). Here, the subject is quite narrow: The Executive's exclusive power extends no further than his formal recognition determination. But as to that determination, Congress may not enact a law that directly contradicts it. This is not to say Congress may not express its disagreement with the President in myriad ways. For example, it may enact an embargo, decline to confirm an ambassador, or even declare war. But none of these acts would alter the President's recognition decision.

If Congress may not pass a law, speaking in its own voice, that effects formal recognition, then it follows that it may not force the President himself to contradict his earlier statement. That congressional command would not only prevent the Nation from speaking with one voice but also prevent the Executive itself from doing so in conducting foreign relations.

Although the statement required by §214(d) would not itself constitute a formal act of recognition, it is a mandate that the Executive contradict his prior recognition determination in an official document issued by the Secretary of State. See *Urtetiqui v. D'Arcy*, 9 Pet. 692, 699 (1835) (a passport "from its nature and object, is addressed to for eign powers" and "is to be considered . . . in the character of a political document"). As a result, it is unconstitu- tional. This is all the more clear in light of the longstanding treatment of a passport's place-of-birth section as

an official executive statement implicating recognition. See 725 F. 3d, at 224 (Tatel, J., concurring). The Secretary’s position on this point has been consistent: He will not place information in the place-of-birth section of a passport that contradicts the President’s recognition policy. See 7 FAM §1383. If a citizen objects to the country listed as sovereign over his place of birth, then the Secretary will accommodate him by listing the city or town of birth rather than the country. See *id.*, §1383.6. But the Secretary will not list a sovereign that contradicts the President’s recognition policy in a passport. Thus, the Secretary will not list “Israel” in a passport as the country containing Jerusalem.

The flaw in §214(d) is further underscored by the undoubted fact that that the purpose of the statute was to infringe on the recognition power—a power the Court now holds is the sole prerogative of the President. The statute is titled “United States Policy with Respect to Jerusalem as the Capital of Israel.” §214, 116 Stat. 1365. The House Conference Report proclaimed that §214 “contains four provisions related to the recognition of Jerusalem as Israel’s capital.” H. R. Conf. Rep. No. 107–671, p. 123 (2002). And, indeed, observers interpreted §214 as altering United States policy regarding Jerusalem—which led to protests across the region. See *supra*, at 4. From the face of §214, from the legislative history, and from its reception, it is clear that Congress wanted to express its displeasure with the President’s policy by, among other things, commanding the Executive to contradict his own, earlier stated position on Jerusalem. This Congress may not do.

It is true, as Zivotofsky notes, that Congress has substantial authority over passports. See *Haig v. Agee*, 453 U. S. 280 (1981); *Zemel v. Rusk*, 381 U. S. 1 (1965); *Kent v. Dulles*, 357 U. S. 116 (1958). The Court does not question the power of Congress to enact passport legislation of wide scope. In *Kent v. Dulles*, for example, the Court held that if a person’s “ ‘liberty’ ” to travel “is to be regulated” through a passport, “it must be pursuant to the law-making functions of the Congress.” See *id.*, at 129. Later cases, such as *Zemel v. Rusk* and *Haig v. Agee*, also proceeded on the assumption that Congress must authorize the grounds on which passports may be approved or denied. See *Zemel, supra*, at 7–13; *Haig, supra*, at 289–306. This is consistent with the extensive lawmaking power the Constitution vests in Congress over the Nation’s foreign affairs.

The problem with §214(d), however, lies in how Congress exercised its authority over passports. It was an improper act for Congress to “aggrandiz[e] its power at the expense of another branch” by requiring the President to contradict an earlier recognition determination in an official document issued by the Executive Branch. *Freytag v. Commissioner*, 501 U. S. 868, 878 (1991). To allow Congress to control the President’s communication in the context of a formal recognition determination is to allow Congress to exercise that exclusive power itself. As a result, the statute is unconstitutional.

* * *

In holding §214(d) invalid the Court does not question the substantial powers of Congress over foreign affairs in general or passports in particular. This case is confined solely to the exclusive power of the President to control recognition determinations, including formal statements by the Executive Branch acknowledging the legitimacy of a state or government and its territorial bounds. Congress cannot command the President to contradict an earlier recognition determination in the issuance of passports.

The judgment of the Court of Appeals for the District of Columbia Circuit is Affirmed.

CHIEF JUSTICE ROBERTS, with whom JUSTICE ALITO joins, dissenting.

Today’s decision is a first: Never before has this Court accepted a President’s direct defiance of an Act of Congress in the field of foreign affairs. We have instead stressed that the President’s power reaches “its lowest ebb” when he contravenes the express will of Congress, “for what is at stake is the equilibrium established by our constitutional system.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 637–638 (1952) (Jackson, J., concurring).

JUSTICE SCALIA’s principal dissent, which I join in full, refutes the majority’s unprecedented holding in detail. I write separately to underscore the stark nature of the Court’s error on a basic question of separation of powers.

The first principles in this area are firmly established. The Constitution allocates some foreign policy powers to the Executive, grants some to the Legislature, and enjoins the President to “take Care that the Laws be faithfully executed.” Art. II, §3. The Executive may disregard “the expressed or implied will of Congress” only if the Constitution grants him a power “at once so conclusive and preclusive” as to “disabl[e] the Congress from acting upon the subject.” *Youngstown*, 343 U. S., at 637–638 (Jackson, J., concurring).

Assertions of exclusive and preclusive power leave the Executive “in the least favorable of possible constitutional postures,” and such claims have been “scrutinized with caution” throughout this Court’s history. *Id.*, at 640, 638; see *Dames & Moore v. Regan*, 453 U. S. 654, 668–669 (1981). For our first 225 years, no President prevailed when contradicting a statute in the field of foreign affairs. See *Medellín v. Texas*, 552 U. S. 491, 524–532 (2008); *Hamdan v. Rumsfeld*, 548 U. S. 557, 590–595, 613–625 (2006); *Youngstown*, 343 U. S., at 587–589 (majority opinion); *Little v. Barreme*, 2 Cranch 170, 177–179 (1804).

In this case, the President claims the exclusive and preclusive power to recognize foreign sovereigns. The Court devotes much of its analysis to accepting the Executive’s contention. *Ante*, at 6–26. I have serious doubts about that position. The majority places great weight on the Reception Clause, which directs that the Executive “shall receive Ambassadors and other public Ministers.” Art. II, §3. But that provision, framed as an obligation rather than an authorization, appears alongside the *duties* imposed on the President by Article II, Section 3, not the *powers* granted to him by Article II, Section 2. Indeed, the People ratified the Constitution with Alexander Hamilton’s assurance that executive reception of ambassadors “is more a matter of dignity than of authority” and “will be without consequence in the administration of the government.” The Federalist No. 69, p. 420 (C. Rossiter ed. 1961). In short, at the time of the founding, “there was no reason to view the reception clause as a source of discretionary authority for the president.” Adler, *The President’s Recognition Power: Ministerial or Discretionary?* 25 *Presidential Studies Q.* 267, 269 (1995).

The majority’s other asserted textual bases are even more tenuous. The President does have power to make treaties and appoint ambassadors. Art. II, §2. But those authorities

are *shared* with Congress, *ibid.*, so they hardly support an inference that the recognition power is *exclusive*.

Precedent and history lend no more weight to the Court's position. The majority cites dicta suggesting an exclusive executive recognition power, but acknowledges contrary dicta suggesting that the power is shared. See, *e.g.*, *United States v. Palmer*, 3 Wheat. 610, 643 (1818) (“the courts of the union must view [a] newly constituted government as it is viewed by *the legislative and executive departments* of the government of the United States” (emphasis added)). When the best you can muster is conflicting dicta, precedent can hardly be said to support your side.

As for history, the majority admits that it too points in both directions. Some Presidents have claimed an exclusive recognition power, but others have expressed uncertainty about whether such preclusive authority exists. Those in the skeptical camp include Andrew Jackson and Abraham Lincoln, leaders not generally known for their cramped conceptions of Presidential power. Congress has also asserted its authority over recognition determinations at numerous points in history. The majority therefore falls short of demonstrating that “Congress has accepted” the President's exclusive recognition power. *Ante*, at 26. In any event, we have held that congressional acquiescence is only “pertinent” when the President acts in the absence of express congressional authorization, not when he asserts power to disregard a statute, as the Executive does here. *Medellín*, 552 U. S., at 528; see *Dames & Moore*, 453 U. S., at 678–679.

In sum, although the President has authority over recognition, I am not convinced that the Constitution provides the “conclusive and preclusive” power required to justify defiance of an express legislative mandate. *Youngstown*, 343 U. S., at 638 (Jackson, J., concurring). As the leading scholar on this issue has concluded, the “text, original understanding, post-ratification history, and structure of the Constitution do not support the . . . expansive claim that this executive power is plenary.” Reinstein, *Is the President's Recognition Power Exclusive?* 86 Temp. L. Rev. 1, 60 (2013).

But even if the President does have exclusive recognition power, he still cannot prevail in this case, because the statute at issue *does not implicate recognition*. See *Zivotofsky v. Clinton*, 566 U. S. ___, ___ (2012) (ALITO, J., concurring in judgment) (slip op., at 1); *post*, at 5–10 (SCALIA, J., dissenting). The relevant provision, §214(d), simply gives an American citizen born in Jerusalem the option to designate his place of birth as Israel “[f]or purposes of” passports and other documents. Foreign Relations Authorization Act, Fiscal Year 2003, 116 Stat. 1366. The State Department itself has explained that “identification”—not recognition—“is the principal reason that U. S. passports require ‘place of birth.’ ” App. 42. Congress has not disputed the Executive's assurances that §214(d) does not alter the longstanding United States position on Jerusalem. And the annals of diplomatic history record no examples of official recognition accomplished via optional passport designation.

The majority acknowledges both that the “Executive's exclusive power extends no further than his formal recognition determination” and that §214(d) does “not itself constitute a formal act of recognition.” *Ante*, at 27. Taken together, these statements come close to a confession of error. The majority attempts to reconcile its position by reconceiving §214(d) as a “mandate that the Executive contradict his prior recognition determination in an official document issued by the Secretary of State.” *Ante*, at 27. But as just noted, neither Congress nor the Executive Branch

regards §214(d) as a recognition determination, so it is hard to see how the statute could contradict any such determination.

At most, the majority worries that there may be a *perceived* contradiction based on a *mistaken* understanding of the effect of §214(d), insisting that some “observers interpreted §214 as altering United States policy regarding Jerusalem.” *Ante*, at 28. To afford controlling weight to such impressions, however, is essentially to subject a duly enacted statute to an international heckler’s veto.

Moreover, expanding the President’s purportedly exclusive recognition power to include authority to avoid potential misunderstandings of legislative enactments proves far too much. Congress could validly exercise its enumerated powers in countless ways that would create more severe perceived contradictions with Presidential recognition decisions than does §214(d). If, for example, the President recognized a particular country in opposition to Congress’s wishes, Congress could declare war or impose a trade embargo on that country. A neutral observer might well conclude that these legislative actions had, to put it mildly, created a perceived contradiction with the President’s recognition decision. And yet each of them would undoubtedly be constitutional. See *ante*, at 27. So too would statements by nonlegislative actors that might be seen to contradict the President’s recognition positions, such as the declaration in a political party platform that “Jerusalem is and will remain the capital of Israel.” Landler, Pushed by Obama, Democrats Alter Platform Over Jerusalem, N. Y. Times, Sept. 6, 2012, p. A14.

Ultimately, the only power that could support the President’s position is the one the majority purports to reject: the “exclusive authority to conduct diplomatic relations.” Brief for Respondent 18. The Government offers a single citation for this allegedly exclusive power: *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 319–320 (1936). But as the majority rightly acknowledges, *Curtiss-Wright* did not involve a claim that the Executive could contravene a statute; it held only that he could act pursuant to a legislative delegation. *Ante*, at 17.

The expansive language in *Curtiss-Wright* casting the President as the “sole organ” of the Nation in foreign affairs certainly has attraction for members of the Executive Branch. The Solicitor General invokes the case no fewer than ten times in his brief. Brief for Respondent 9, 10, 18, 19, 23, 24, 53, 54. But our precedents have never accepted such a sweeping understanding of executive power. See *Hamdan*, 548 U. S., at 591–592; *Dames & Moore*, 453 U. S., at 661–662; *Youngstown*, 343 U. S., at 587 (majority opinion); *id.*, at 635, n. 2 (Jackson, J., concurring); cf. *Little*, 2 Cranch, at 179 (Marshall, C. J.) (“I confess the first bias of my mind was very strong in favour of . . . the executive . . . [b]ut I have been convinced that I was mistaken.”).

Just a few Terms ago, this Court rejected the President’s argument that a broad foreign relations power allowed him to override a state court decision that contradicted U. S. international law obligations. *Medellín*, 552 U. S., at 523–532. If the President’s so-called general foreign relations authority does not permit him to countermand a State’s lawful action, it surely does not authorize him to disregard an express statutory directive enacted by Congress, which—unlike the States—has extensive foreign relations powers of its own. Unfortunately, despite its protest to the contrary, the majority today allows the Executive to do just that.

Resolving the status of Jerusalem may be vexing, but resolving this case is not. Whatever recognition power the President may have, exclusive or otherwise, is not implicated by §214(d).

It has not been necessary over the past 225 years to definitively resolve a dispute between Congress and the President over the recognition power. Perhaps we could have waited another 225 years. But instead the majority strains to reach the question based on the mere possibility that observers overseas might misperceive the significance of the birthplace designation at issue in this case. And in the process, the Court takes the perilous step—for the first time in our history—of allowing the President to defy an Act of Congress in the field of foreign affairs.

I respectfully dissent.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE ALITO join, dissenting.

Before this country declared independence, the law of England entrusted the King with the exclusive care of his kingdom’s foreign affairs. The royal prerogative included the “sole power of sending ambassadors to foreign states, and receiving them at home,” the sole authority to “make treaties, leagues, and alliances with foreign states and princes,” “the sole prerogative of making war and peace,” and the “sole power of raising and regulating fleets and armies.” 1 W. Blackstone, Commentaries *253, *257, *262. The People of the United States had other ideas when they organized our Government. They considered a sound structure of balanced powers essential to the preservation of just government, and international relations formed no exception to that principle.

The People therefore adopted a Constitution that divides responsibility for the Nation’s foreign concerns between the legislative and executive departments. The Constitution gave the President the “executive Power,” authority to send and responsibility to receive ambassadors, power to make treaties, and command of the Army and Navy—though they qualified some of these powers by requiring consent of the Senate. Art. II, §§1–3. At the same time, they gave Congress powers over war, foreign commerce, naturalization, and more. Art. I, §8. “Fully eleven of the powers that Article I, §8 grants Congress deal in some way with foreign affairs.” L. Tribe, American Constitutional Law, §5–18, p. 965.

This case arises out of a dispute between the Executive and Legislative Branches about whether the United States should treat Jerusalem as a part of Israel. The Constitution contemplates that the political branches will make policy about the territorial claims of foreign nations the same way they make policy about other international matters: The President will exercise his powers on the basis of his views, Congress its powers on the basis of its views. That is just what has happened here.

I

The political branches of our Government agree on the real-world fact that Israel controls the city of Jerusalem. See Jerusalem Embassy Act of 1995, 109 Stat. 398; Brief for Respondent 3. They disagree, however, about how official documents should record the birthplace of an

American citizen born in Jerusalem. The Executive does not accept any state's claim to sovereignty over Jerusalem, and it maintains that the birthplace designation "Israel" would clash with this stance of neutrality. But the National Legislature has enacted a statute that provides: "For purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary [of State] shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel." Foreign Relations Authorization Act, Fiscal Year 2003, §214(d), 116 Stat. 1366. Menachem Zivotofsky's parents seek enforcement of this statutory right in the issuance of their son's passport and consular report of birth abroad. They regard their son's birthplace as a part of Israel and insist as "a matter of conscience" that his Israeli nativity "not be erased" from his identity documents. App. 26.

Before turning to Presidential power under Article II, I think it well to establish the statute's basis in congressional power under Article I. Congress's power to "establish an uniform Rule of Naturalization," Art. I, §8, cl. 4, enables it to grant American citizenship to someone born abroad. *United States v. Wong Kim Ark*, 169 U. S. 649, 702–703 (1898). The naturalization power also enables Congress to furnish the people it makes citizens with papers verifying their citizenship—say a consular report of birth abroad (which certifies citizenship of an American born outside the United States) or a passport (which certifies citizenship for purposes of international travel). As the Necessary and Proper Clause confirms, every congressional power "carries with it all those incidental powers which are necessary to its complete and effectual execution." *Cohens v. Virginia*, 6 Wheat. 264, 429 (1821). Even on a miserly understanding of Congress's incidental authority, Congress may make grants of citizenship "effectual" by providing for the issuance of certificates authenticating them.

One would think that if Congress may grant Zivotofsky a passport and a birth report, it may also require these papers to record his birthplace as "Israel." The birthplace specification promotes the document's citizenship-authenticating function by identifying the bearer, distinguishing people with similar names but different birthplaces from each other, helping authorities uncover identity fraud, and facilitating retrieval of the Government's citizenship records. See App. 70. To be sure, recording Zivotofsky's birthplace as "Jerusalem" rather than "Israel" would fulfill these objectives, but when faced with alternative ways to carry its powers into execution, Congress has the "discretion" to choose the one it deems "most beneficial to the people." *McCulloch v. Maryland*, 4 Wheat. 316, 421 (1819). It thus has the right to decide that recording birthplaces as "Israel" makes for better foreign policy. Or that regardless of international politics, a passport or birth report should respect its bearer's conscientious belief that Jerusalem belongs to Israel.

No doubt congressional discretion in executing legislative powers has its limits; Congress's chosen approach must be not only "necessary" to carrying its powers into execution, but also "proper." Congress thus may not transcend boundaries upon legislative authority stated or implied elsewhere in the Constitution. But as we shall see, §214(d) does not transgress any such restriction.

II

The Court frames this case as a debate about recognition. Recognition is a sovereign's official acceptance of a status under international law. A sovereign might recognize a foreign entity as a

state, a regime as the other state's government, a place as part of the other state's territory, rebel forces in the other state as a belligerent power, and so on. 2 M. Whiteman, Digest of International Law §1 (1963) (hereinafter Whiteman). President Truman recognized Israel as a state in 1948, but Presidents have consistently declined to recognize Jerusalem as a part of Israel's (or any other state's) sovereign territory.

The Court holds that the Constitution makes the President alone responsible for recognition and that §214(d) invades this exclusive power. I agree that the Constitution *empowers* the President to extend recognition on behalf of the United States, but I find it a much harder question whether it makes that power exclusive. The Court tells us that “the weight of historical evidence” supports exclusive executive authority over “the formal determination of recognition.” *Ante*, at 20. But even with its attention confined to formal recognition, the Court is forced to admit that “history is not all on one side.” *Ibid*. To take a stark example, Congress legislated in 1934 to grant independence to the Philippines, which were then an American colony. 48 Stat. 456. In the course of doing so, Congress directed the President to “recognize the independence of the Philippine Islands as a separate and self-governing nation” and to “acknowledge the authority and control over the same of the government instituted by the people thereof.” §10, *id.*, at 463. Constitutional? And if Congress may control recognition when exercising its power “to dispose of . . . the Territory or other Property belonging to the United States,” Art. IV, §3, cl. 2, why not when exercising other enumerated powers? Neither text nor history nor precedent yields a clear answer to these questions. Fortunately, I have no need to confront these matters today—nor does the Court—because §214(d) plainly does not concern recognition.

Recognition is more than an announcement of a policy. Like the ratification of an international agreement or the termination of a treaty, it is a formal legal act with effects under international law. It signifies acceptance of an international status, and it makes a commitment to continued acceptance of that status and respect for any attendant rights. See, *e.g.*, Convention on the Rights and Duties of States, Art. 6, Dec. 26, 1933, 49 Stat. 3100, T. S. No. 881. “Its legal effect is to create an estoppel. By granting recognition, [states] debar themselves from challenging in future whatever they have previously acknowledged.” 1 G. Schwarzenberger, *International Law* 127 (3d ed. 1957). In order to extend recognition, a state must perform an act that unequivocally manifests that intention. Whiteman §3. That act can consist of an express conferral of recognition, or one of a handful of acts that by international custom imply recognition—chiefly, entering into a bilateral treaty, and sending or receiving an ambassador. *Ibid*.

To know all this is to realize at once that §214(d) has nothing to do with recognition. Section 214(d) does not require the Secretary to make a formal declaration about Israel's sovereignty over Jerusalem. And nobody suggests that international custom infers acceptance of sovereignty from the birthplace designation on a passport or birth report, as it does from bilateral treaties or exchanges of ambassadors. Recognition would preclude the United States (as a matter of international law) from later contesting Israeli sovereignty over Jerusalem. But making a notation in a passport or birth report does not encumber the Republic with any international obligations. It leaves the Nation free (so far as international law is concerned) to change its mind in the future. That would be true even if the statute required *all* passports to list “Israel.” But in fact it requires only those passports to list “Israel” for which the citizen (or his guardian) *requests* “Israel”; all the rest, under the Secretary's policy, list “Jerusalem.” It is utterly

impossible for this deference to private requests to constitute an act that unequivocally manifests an intention to grant recognition.

Section 214(d) performs a more prosaic function than extending recognition. Just as foreign countries care about what our Government has to say about their borders, so too American citizens often care about what our Government has to say about their identities. Cf. *Bowen v. Roy*, 476 U. S. 693 (1986). The State Department does not grant or deny recognition in order to accommodate these individuals, but it does make exceptions to its rules about how it records birthplaces. Although normal protocol requires specifying the bearer's country of birth in his passport, Dept. of State, 7 Foreign Affairs Manual (FAM) §1300, App. D, §1330(a) (2014), the State Department will, if the bearer protests, specify the city of birth instead—so that an Irish nationalist may have his birthplace recorded as “Belfast” rather than “United Kingdom,” *id.*, §1380(a). And although normal protocol requires specifying the country with *present* sovereignty over the bearer's place of birth, *id.*, §1330(b), a special exception allows a bearer born before 1948 in what was then Palestine to have his birthplace listed as “Palestine,” *id.*, §1360(g). Section 214(d) requires the State Department to make a further accommodation. Even though the Department normally refuses to specify a country that lacks recognized sovereignty over the bearer's birthplace, it must suspend that policy upon the request of an American citizen born in Jerusalem. Granting a request to specify “Israel” rather than “Jerusalem” does not recognize Israel's sovereignty over Jerusalem, just as granting a request to specify “Belfast” rather than “United Kingdom” does not derecognize the United Kingdom's sovereignty over Northern Ireland.

The best indication that §214(d) does not concern recognition comes from the State Department's policies concerning Taiwan. According to the Solicitor General, the United States “acknowledges the Chinese position” that Taiwan is a part of China, but “does not take a position” of its own on that issue. Brief for Respondent 51–52. Even so, the State Department has for a long time recorded the birthplace of a citizen born in Taiwan as “China.” It indeed *insisted* on doing so until Congress passed a law (on which §214(d) was modeled) giving citizens the option to have their birthplaces recorded as “Taiwan.” See §132, 108 Stat. 395, as amended by §1(r), 108 Stat. 4302. The Solicitor General explains that the designation “China” “involves a geographic description, not an assertion that Taiwan is . . . part of sovereign China.” Brief for Respondent 51–52. Quite so. Section 214(d) likewise calls for nothing beyond a “geographic description”; it does not require the Executive even to assert, never mind formally recognize, that Jerusalem is a part of sovereign Israel. Since birthplace specifications in citizenship documents are matters within Congress's control, Congress may treat Jerusalem as a part of Israel when regulating the recording of birthplaces, even if the President does not do so when extending recognition. Section 214(d), by the way, expressly directs the Secretary to “record the place of birth as Israel” “[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport.” (Emphasis added.) And the law bears the caption, “Record of Place of Birth as Israel for Passport Purposes.” (Emphasis added.) Finding recognition in this provision is rather like finding admission to the Union in a provision that treats American Samoa as a State for purposes of a federal highway safety program, 23 U. S. C. §401.

III

The Court complains that §214(d) requires the Secretary of State to issue official documents implying that Jerusalem is a part of Israel; that it appears in a section of the statute bearing the title “United States Policy with Respect to Jerusalem as the Capital of Israel”; and that foreign “observers interpreted [it] as altering United States policy regarding Jerusalem.” *Ante*, at 28. But these features do not show that §214(d) recognizes Israel’s sovereignty over Jerusalem. They show only that the law displays symbolic support for Israel’s territorial claim. That symbolism may have tremendous significance as a matter of international diplomacy, but it makes no difference as a matter of constitutional law.

Even if the Constitution gives the President sole power to extend recognition, it does not give him sole power to make all decisions relating to foreign disputes over sovereignty. To the contrary, a fair reading of Article I allows Congress to decide for itself how its laws should handle these controversies. Read naturally, power to “regulate Commerce with foreign Nations,” §8, cl. 3, includes power to regulate imports from Gibraltar as British goods or as Spanish goods. Read naturally, power to “regulate the Value . . . of foreign Coin,” §8, cl. 5, includes power to honor (or not) currency issued by Taiwan. And so on for the other enumerated powers. These are not airy hypotheticals. A trade statute from 1800, for example, provided that “the whole of the island of Hispaniola”—whose status was then in controversy—“shall for purposes of [the] act be considered as a dependency of the French Republic.” §7, 2 Stat. 10. In 1938, Congress allowed admission of the Vatican City’s public records in federal courts, decades before the United States extended formal recognition. ch. 682, 52 Stat. 1163; Whiteman §68. The Taiwan Relations Act of 1979 grants Taiwan capacity to sue and be sued, even though the United States does not recognize it as a state. 22 U. S. C. §3303(b)(7). Section 214(d) continues in the same tradition.

The Constitution likewise does not give the President exclusive power to determine which claims to statehood and territory “are legitimate in the eyes of the United States,” *ante*, at 11. Congress may express its own views about these matters by declaring war, restricting trade, denying foreign aid, and much else besides. To take just one example, in 1991, Congress responded to Iraq’s invasion of Kuwait by enacting a resolution authorizing use of military force. 105 Stat. 3. No doubt the resolution reflected Congress’s views about the legitimacy of Iraq’s territorial claim. The preamble referred to Iraq’s “illegal occupation” and stated that “the international community has demanded . . . that Kuwait’s independence and legitimate government be restored.” *Ibid*. These statements are far more categorical than the caption “United States Policy with Respect to Jerusalem as the Capital of Israel.” Does it follow that the authorization of the use of military force invaded the President’s exclusive powers? Or that it would have done so had the President recognized Iraqi sovereignty over Kuwait?

History does not even support an exclusive Presidential power to make what the Court calls “formal statements” about “the legitimacy of a state or government and its territorial bounds,” *ante*, at 29. For a long time, the Houses of Congress have made formal statements announcing their own positions on these issues, again without provoking constitutional objections. A recent resolution expressed the House of Representatives’ “strong support for the legitimate, democratically-elected Government of Lebanon” and condemned an “illegitimate” and “unjustifiable” insurrection by “the terrorist group Hizballah.” H. Res. 1194, 110th Cong, 2d Sess., 1, 4 (2008). An earlier enactment declared “the sense of the Congress that . . . Tibet . . . is an occupied country under the established principles of international law” and that “Tibet’s true

representatives are the Dalai Lama and the Tibetan Government in exile.” §355, 105 Stat. 713 (1991). After Texas won independence from Mexico, the Senate resolved that “the State of Texas having established and maintained an independent Government, . . . it is expedient and proper . . . that the independent political existence of the said State be acknowledged by the Government of the United States.” Cong. Globe, 24th Cong., 2d Sess., 83 (1837); see *id.*, at 270.

In the final analysis, the Constitution may well deny Congress power to recognize—the power to make an international commitment accepting a foreign entity as a state, a regime as its government, a place as a part of its territory, and so on. But whatever else §214(d) may do, it plainly does not make (or require the President to make) a commitment accepting Israel’s sovereignty over Jerusalem.

IV

The Court does not try to argue that §214(d) extends recognition; nor does it try to argue that the President holds the exclusive power to make all nonrecognition decisions relating to the status of Jerusalem. As just shown, these arguments would be impossible to make with a straight face.

The Court instead announces a rule that is blatantly gerrymandered to the facts of this case. It concludes that, in addition to the exclusive power to make the “formal recognition determination,” the President holds an ancillary exclusive power “to control . . . formal statements by the Executive Branch acknowledging the legitimacy of a state or government and its territorial bounds.” *Ante*, at 29. It follows, the Court explains, that Congress may not “requir[e] the President to contradict an earlier recognition determination in an official document issued by the Executive Branch.” *Ibid.* So requiring imports from Jerusalem to be taxed like goods from Israel is fine, but requiring Customs to issue an official invoice to that effect is not? Nonsense.

Recognition is a type of legal act, not a type of statement. It is a leap worthy of the Mad Hatter to go from exclusive authority over making legal commitments about sovereignty to exclusive authority over making statements or issuing documents about national borders. The Court may as well jump from power over issuing declaratory judgments to a monopoly on writing law-review articles.

No consistent or coherent theory supports the Court’s decision. At times, the Court seems concerned with the possibility of congressional interference with the President’s ability to extend or withhold legal recognition. The Court concedes, as it must, that the notation required by §214(d) “would not itself constitute a formal act of recognition.” *Ante*, at 27. It still frets, however, that Congress *could* try to regulate the President’s “statements” in a way that “override[s] the President’s recognition determination.” *Ibid.* But “[t]he circumstance, that . . . [a] power may be abused, is no answer. All powers may be abused.” 2 J. Story, Commentaries on the Constitution of the United States §921, p. 386 (1833). What matters is whether *this* law interferes with the President’s ability to withhold recognition. It would be comical to claim that it does. The Court identifies no reason to believe that the United States—or indeed any other country—uses the place-of-birth field in passports and birth reports as a forum for performing the act of recognition. That is why nobody thinks the United States withdraws recognition from

Canada when it accommodates a Quebec nationalist's request to have his birthplace recorded as "Montreal."

To the extent doubts linger about whether the United States recognizes Israel's sovereignty over Jerusalem, §214(d) leaves the President free to dispel them by issuing a disclaimer of intent to recognize. A disclaimer always suffices to prevent an act from effecting recognition. Restatement (Second) of Foreign Relations Law of the United States §104(1) (1962). Recall that an earlier law grants citizens born in Taiwan the right to have their birthplaces recorded as "Taiwan." The State Department has complied with the law, but states in its Foreign Affairs Manual: "The United States does not officially recognize Taiwan as a 'state' or 'country,' although passport issuing officers may enter 'Taiwan' as a place of birth." 7 FAM §1300, App. D, §1340(d)(6). Nothing stops a similar disclaimer here.

At other times, the Court seems concerned with Congress's failure to give effect to a recognition decision that the President has already made. The Court protests, for instance, that §214(d) "directly contradicts" the President's refusal to recognize Israel's sovereignty over Jerusalem. *Ante*, at 27. But even if the Constitution empowers the President alone to extend recognition, it nowhere obliges Congress to align its laws with the President's recognition decisions. Because the President and Congress are "perfectly co-ordinate by the terms of their common commission," *The Federalist* No. 49, p. 314 (C. Ros siter ed. 1961) (Madison), the President's use of the recognition power does not constrain Congress's use of its legislative powers.

Congress has legislated without regard to recognition for a long time and in a range of settings. For example, responding in 1817 and 1818 to revolutions in Latin America, Congress amended federal neutrality laws—which originally prohibited private military action for or against *recognized* states—to prohibit private hostilities against *unrecognized* states too. ch. 58, 3 Stat. 370; ch. 88, 3 Stat. 447; see *The Three Friends*, 166 U. S. 1, 52–59 (1897). Legislation from 90 years ago provided for the revision of national immigration quotas upon one country's surrender of territory to another, even if "the transfer . . . has not been recognized by the United States." §12(c), 43 Stat. 161 (1924). Federal law today prohibits murdering a foreign government's officials, 18 U. S. C. §1116, counterfeiting a foreign government's bonds, §478, and using American vessels to smuggle goods in violation of a foreign government's laws, §546—all "irrespective of recognition by the United States," §§11, 1116. Just as Congress may legislate independently of recognition in all of those areas, so too may it legislate independently of recognition when regulating the recording of birthplaces.

The Court elsewhere objects that §214(d) interferes with the autonomy and unity of the Executive Branch, setting the branch against itself. The Court suggests, for instance, that the law prevents the President from maintaining his neutrality about Jerusalem in "his and his agent's statements." *Ante*, at 26. That is of no constitutional significance. As just shown, Congress has power to legislate without regard to recognition, and where Congress has the power to legislate, the President has a duty to "take Care" that its legislation "be faithfully executed," Art. II, §3. It is likewise "the duty of the secretary of state to conform to the law"; where Congress imposes a responsibility on him, "he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others." *Marbury v. Madison*, 1 Cranch 137, 158, 166 (1803). The Executive's involvement in carrying out this law does not affect its constitutionality; the Executive carries out every law.

The Court's error could be made more apparent by applying its reasoning to the President's power "to make Treaties," Art. II, §2, cl. 2. There is no question that Congress may, if it wishes, pass laws that openly flout treaties made by the President. *Head Money Cases*, 112 U. S. 580, 597 (1884). Would anyone have dreamt that the President may refuse to carry out such laws—or, to bring the point closer to home, refuse to execute federal courts' judgments under such laws—so that the Executive may "speak with one voice" about the country's international obligations? To ask is to answer. Today's holding puts the implied power to recognize territorial claims (which the Court infers from the power to recognize states, which it infers from the responsibility to receive ambassadors) on a higher footing than the express power to make treaties. And this, even though the Federalist describes the making of treaties as a "delicate and important prerogative," but the reception of ambassadors as "more a matter of dignity than of authority," "a circumstance which will be without consequence in the administration of the government." The Federalist No. 69, p. 420 (Hamilton).

In the end, the Court's decision does not rest on text or history or precedent. It instead comes down to "functional considerations"—principally the Court's perception that the Nation "must speak with one voice" about the status of Jerusalem. *Ante*, at 11 (ellipsis and internal quotation marks omitted). The vices of this mode of analysis go beyond mere lack of footing in the Constitution. Functionalism of the sort the Court practices today will *systematically* favor the unitary President over the plural Congress in disputes involving foreign affairs. It is possible that this approach will make for more effective foreign policy, perhaps as effective as that of a monarchy. It is certain that, in the long run, it will erode the structure of separated powers that the People established for the protection of their liberty.

V

JUSTICE THOMAS's concurrence deems §214(d) constitutional to the extent it regulates birth reports, but unconstitutional to the extent it regulates passports. *Ante*, at 10 (opinion concurring in judgment in part and dissenting in part). The concurrence finds no congressional power that would extend to the issuance or contents of passports. Including the power to regulate foreign commerce—even though passports facilitate the transportation of passengers, "a part of our commerce with foreign nations," *Henderson v. Mayor of New York*, 92 U. S. 259, 270 (1876). Including the power over naturalization—even though passports issued to citizens, like birth reports, "have the same force and effect as proof of United States citizenship as certificates of naturalization," 22 U. S. C. §2705. Including the power to enforce the Fourteenth Amendment's guarantee that "[a]ll persons born or naturalized in the United States . . . are citizens of the United States"—even though a passport provides evidence of citizenship and so helps enforce this guarantee abroad. Including the power to exclude persons from the territory of the United States, see Art. I, §9, cl. 1—even though passports are the principal means of identifying citizens entitled to entry. Including the powers under which Congress has restricted the ability of various people to leave the country (fugitives from justice, for example, see 18 U. S. C. §1073)—even though passports are the principal means of controlling exit. Including the power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," Art. IV, §3, cl. 2—even though "[a] passport remains at all times the property of the United States," 7 FAM §1317 (2013). The concurrence's stingy interpretation of the enumerated powers forgets that the Constitution does not "partake of the prolixity of a legal code," that "only its great outlines [are] marked, its important objects

designated, and the minor ingredients which compose those objects [left to] be deduced from the nature of the objects themselves.” *McCulloch*, 4 Wheat., at 407. It forgets, in other words, “that it is a *constitution* we are expounding.” *Ibid.*

Defending Presidential primacy over passports, the concurrence says that the royal prerogative in England included the power to issue and control travel documents akin to the modern passport. *Ante*, at 10–11. Perhaps so, but that power was assuredly not exclusive. The Aliens Act 1793, for example, enacted almost contemporaneously with our Constitution, required an alien traveling within England to obtain “a passport from [a] mayor or . . . [a] justice of [the] peace,” “in which passport shall be expressed the name and rank, occupation or description, of such alien.” 33 Geo. III, ch. 4, §8, in 39 Eng. Stat. at Large 12. The Aliens Act 1798 prohibited aliens from leaving the country without “a passport . . . first obtained from one of his Majesty’s principal secretaries of state,” and instructed customs officers to mark, sign, and date passports before allowing their bearers to depart. 38 Geo. III, ch. 50, §8, in 41 Eng. Stat. at Large 684. These and similar laws discredit any claim that, in the “Anglo-American legal tradition,” travel documents have “consistently been issued *and controlled* by the body exercising executive power,” *ante*, at 10 (emphasis added).

Returning to this side of the Atlantic, the concurrence says that passports have a “historical pedigree uniquely associated with the President.” *Ante*, at 28. This statement overlooks the reality that, until Congress restricted the issuance of passports to the State Department in 1856, “passports were also issued by governors, mayors, and even . . . notaries public.” Assn. of the Bar of the City of New York, Special Committee to Study Passport Procedures, Freedom to Travel 6 (1958). To be sure, early Presidents granted passports without express congressional authorization. *Ante*, at 11–12. But this point establishes Presidential authority over passports in the face of congressional *silence*, not Presidential authority in the face of congressional *opposition*. Early in the Republic’s history, Congress made it a crime for a consul to “grant a passport or other paper certifying that any alien, knowing him or her to be such, is a citizen of the United States.” §8, 2 Stat. 205 (1803). Closer to the Civil War, Congress expressly authorized the granting of passports, regulated passport fees, and prohibited the issuance of passports to foreign citizens. §23, 11 Stat. 60–61 (1856). Since then, Congress has made laws about eligibility to receive passports, the duration for which passports remain valid, and even the type of paper used to manufacture passports. 22 U. S. C. §§212, 217a; §617(b), 102 Stat. 1755. (The concurrence makes no attempt to explain how these laws were supported by congressional powers other than those it rejects in the present case.) This Court has held that the President may not curtail a citizen’s travel by withholding a passport, *except on grounds approved by Congress*. *Kent v. Dulles*, 357 U. S. 116, 129 (1958). History and precedent thus refute any suggestion that the Constitution disables Congress from regulating the President’s issuance and formulation of passports.

The concurrence adds that a passport “contains [a] communication directed at a foreign power.” *Ante*, at 28. The “communication” in question is a message that traditionally appears in each passport (though no statute, to my knowledge, expressly requires its inclusion): “The Secretary of State of the United States of America hereby requests all whom it may concern to permit the citizen/national of the United States named herein to pass without delay or hindrance and in case of need to give all lawful aid and protection.” App. 22. I leave it to the reader to judge whether a request to “all whom it may concern” qualifies as a “communication directed at a foreign power.” Even if it does, its presence does not affect §214(d)’s constitutionality.

Requesting protection is only a “sub- ordinate” function of a passport. *Kent, supra*, at 129. This subordinate function has never been thought to invalidate other laws regulating the contents of passports; why then would it invalidate this one?

That brings me, in analytic crescendo, to the concurrence’s suggestion that *even if* Congress’s enumerated powers otherwise encompass §214(d), and *even if* the President’s power to regulate the contents of passports is not exclusive, the law might *still* violate the Constitution, because it “conflict[s]” with the President’s passport policy. *Ante*, at 24. It turns the Constitution upside-down to suggest that in areas of shared authority, it is the executive policy that preempts the law, rather than the other way around. Congress *may* make laws necessary and proper for carrying into execution the President’s powers, Art. I, §8, cl. 18, but the President *must* “take Care” that Congress’s legislation “be faithfully executed,” Art. II, §3. And Acts of Congress made in pursuance of the Constitution are the “supreme Law of the Land”; acts of the President (apart from treaties) are not. Art. VI, cl. 2. That is why Chief Justice Marshall was right to think that a law prohibiting the seizure of foreign ships trumped a military order requiring it. *Little v. Barreme*, 2 Cranch 170, 178–179 (1804). It is why Justice Jackson was right to think that a President who “takes measures incompatible with the expressed or implied will of Congress” may “rely only upon his own constitutional powers *minus any constitutional powers of Congress over the matter.*” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 637 (1952) (concurring opinion) (emphasis added). And it is why JUSTICE THOMAS is wrong to think that even if §214(d) operates in a field of shared authority the President might still prevail.

Whereas the Court’s analysis threatens congressional power over foreign affairs with gradual erosion, the concurrence’s approach shatters it in one stroke. The combination of (a) the concurrence’s assertion of broad, unenumerated “residual powers” in the President, see *ante*, at 2–9; (b) its parsimonious interpretation of Congress’s enumerated powers, see *ante*, at 13–17; and (c) its even more parsimonious interpretation of Congress’s authority to enact laws “necessary and proper for carrying into Execution” the President’s executive powers, see *ante*, at 17–20; produces (d) a presidency more reminiscent of George III than George Washington.

* * *

International disputes about statehood and territory are neither rare nor obscure. Leading foreign debates during the 19th century concerned how the United States should respond to revolutions in Latin America, Texas, Mexico, Hawaii, Cuba. During the 20th century, attitudes toward Communist governments in Russia and China became conspicuous subjects of agitation. Disagreements about Taiwan, Kashmir, and Crimea remain prominent today. A President empowered to decide all questions relating to these matters, immune from laws embodying congressional disagreement with his position, would have un- controlled mastery of a vast share of the Nation’s foreign affairs.

That is not the chief magistrate under which the American People agreed to live when they adopted the national charter. They believed that “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, . . . may justly be pronounced the very definition of tyranny.” The Federalist No. 47, p. 301 (Madison). For this reason, they did not entrust either the President or Congress with sole power to adopt uncontradictable policies about *any* subject—foreign-sovereignty disputes included. They instead gave each political department its own powers, and with that the freedom to contradict the other’s policies. Under the Constitution they

approved, Congress may require Zivotofsky's passport and birth report to record his birthplace as Israel, even if that requirement clashes with the President's preference for neutrality about the status of Jerusalem.

I dissent.

CHAPTER X:

President Trump, the Roberts Court, and Presidential Powers in a Separation of Powers System

**DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS
v. HAWAII, ET AL.**

(2018)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Under the Immigration and Nationality Act, foreign nationals seeking entry into the United States undergo a vetting process to ensure that they satisfy the numerous requirements for admission. The Act also vests the President with authority to restrict the entry of aliens whenever he finds that their entry “would be detrimental to the interests of the United States.” 8 U. S. C. §1182(f). Relying on that delegation, the President concluded that it was necessary to impose entry restrictions on nationals of countries that do not share adequate information for an informed entry determination, or that otherwise present national security risks. Presidential Proclamation No. 9645, 82 Fed. Reg. 45161 (2017) (Proclamation). The plaintiffs in this litigation, respondents here, challenged the application of those entry restrictions to certain aliens abroad. We now decide whether the President had authority under the Act to issue the Proclamation, and whether the entry policy violates the Establishment Clause of the First Amendment.

I

A

...

On September 24, 2017, after completion of the world-wide review, the President issued the Proclamation before us—Proclamation No. 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats. 82 Fed. Reg. 45161. The Proclamation (as its title indicates) sought to improve vetting procedures by identifying ongoing deficiencies in the information needed to assess whether nationals of particular countries present “public safety threats.” §1(a). To further that purpose, the Proclamation placed entry restrictions on the nationals of eight foreign states whose systems for managing and sharing information about their nationals the President deemed inadequate.

The Proclamation described how foreign states were selected for inclusion based on the review undertaken pursuant to EO–2. As part of that review, the Department of Homeland Security (DHS), in consultation with the State Department and several intelligence agencies, developed a “baseline” for the information required from foreign governments to confirm the identity of individuals seeking entry into the United States, and to determine whether those individuals pose a security threat. §1(c). The baseline included three components. The first, “identity-management information,” focused on whether a foreign government ensures the integrity of travel documents by issuing electronic passports, reporting lost or stolen passports, and making available additional identity-related information. Second, the agencies considered the extent to which the country discloses information on criminal history and suspected terrorist links, provides travel document exemplars, and facilitates the U. S. Government’s receipt of information about airline passengers and crews traveling to the United States. Finally, the agencies weighed various indicators of national security risk, including whether the foreign state is a known or potential terrorist safe haven and whether it regularly declines to receive returning nationals following final orders of removal from the United States. *Ibid.*

DHS collected and evaluated data regarding all foreign governments. §1(d). It identified 16 countries as having deficient information-sharing practices and presenting national security concerns, and another 31 countries as “at risk” of similarly failing to meet the baseline. §1(e). The State Department then undertook diplomatic efforts over a 50-day period to encourage all foreign governments to improve their practices. §1(f). As a result of that effort, numerous countries provided DHS with travel document exemplars and agreed to share information on known or suspected terrorists. *Ibid.*

Following the 50-day period, the Acting Secretary of Homeland Security concluded that eight countries—Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen—remained deficient in terms of their risk profile and willingness to provide requested information. The Acting Secretary recommended that the President impose entry restrictions on certain nationals from all of those countries except Iraq. §§1(g), (h). She also concluded that although Somalia generally satisfied the information-sharing component of the baseline standards, its “identity-management deficiencies” and “significant terrorist presence” presented special circumstances justifying additional limitations. She therefore recommended entry limitations for certain nationals of that country. §1(i). As for Iraq, the Acting Secretary found that entry limitations on

its nationals were not warranted given the close cooperative relationship between the U. S. and Iraqi Governments and Iraq's commitment to combating ISIS. §1(g).

After consulting with multiple Cabinet members and other officials, the President adopted the Acting Secretary's recommendations and issued the Proclamation. Invoking his authority under 8 U. S. C. §§1182(f) and 1185(a), the President determined that certain entry restrictions were necessary to "prevent the entry of those foreign nationals about whom the United States Government lacks sufficient information"; "elicit improved identity-management and information-sharing protocols and practices from foreign governments"; and otherwise "advance [the] foreign policy, national security, and counter- terrorism objectives" of the United States. Proclamation §1(h). The President explained that these restrictions would be the "most likely to encourage cooperation" while "protect[ing] the United States until such time as improvements occur." *Ibid.*

The Proclamation imposed a range of restrictions that vary based on the "distinct circumstances" in each of the eight countries. *Ibid.* For countries that do not cooperate with the United States in identifying security risks (Iran, North Korea, and Syria), the Proclamation suspends entry of all nationals, except for Iranians seeking nonimmigrant student and exchange-visitor visas. §§2(b)(ii), (d)(ii), (e)(ii). For countries that have information-sharing deficiencies but are nonetheless "valuable counterterrorism partner[s]" (Chad, Libya, and Yemen), it restricts entry of nationals seeking immigrant visas and nonimmigrant business or tourist visas. §§2(a)(i), (c)(i), (g)(i). Because Somalia generally satisfies the baseline standards but was found to present special risk factors, the Proclamation suspends entry of nationals seeking immigrant visas and requires additional scrutiny of nationals seeking nonimmigrant visas. §2(h)(ii). And for Venezuela, which refuses to cooperate in information sharing but for which alternative means are available to identify its nationals, the Proclamation limits entry only of certain government officials and their family members on nonimmigrant business or tourist visas. §2(f)(ii).

The Proclamation exempts lawful permanent residents and foreign nationals who have been granted asylum. §3(b). It also provides for case-by-case waivers when a foreign national demonstrates undue hardship, and that his entry is in the national interest and would not pose a threat to public safety. §3(c)(i); see also §3(c)(iv) (listing examples of when a waiver might be appropriate, such as if the foreign national seeks to reside with a close family member, obtain urgent medical care, or pursue significant business obligations). The Proclamation further directs DHS to assess on a continuing basis whether entry restrictions should be modified or continued, and to report to the President every 180 days. §4. Upon completion of the first such review period, the President, on the recommendation of the Secretary of Homeland Security, determined that Chad had sufficiently improved its practices, and he accordingly lifted restrictions on its nationals. Presidential Proclamation No. 9723, 83 Fed. Reg. 15937 (2018).

B

Plaintiffs in this case are the State of Hawaii, three individuals (Dr. Ismail Elshikh, John Doe #1, and John Doe #2), and the Muslim Association of Hawaii. The State operates the

University of Hawaii system, which recruits students and faculty from the designated countries. The three individual plaintiffs are U.S. citizens or lawful permanent residents who have relatives from Iran, Syria, and Yemen applying for immigrant or nonimmigrant visas. The Association is a nonprofit organization that operates a mosque in Hawaii.

Plaintiffs challenged the Proclamation—except as applied to North Korea and Venezuela—on several grounds. As relevant here, they argued that the Proclamation contravenes provisions in the Immigration and Nationality Act (INA), 66 Stat. 187, as amended. Plaintiffs further claimed that the Proclamation violates the Establishment Clause of the First Amendment, because it was motivated not by concerns pertaining to national security but by animus toward Islam.

...

III

The INA establishes numerous grounds on which an alien abroad may be inadmissible to the United States and ineligible for a visa. See, e.g., 8 U. S. C. §§1182(a)(1) (health-related grounds), (a)(2) (criminal history), (a)(3)(B) (terrorist activities), (a)(3)(C) (foreign policy grounds). Congress has also delegated to the President authority to suspend or restrict the entry of aliens in certain circumstances. The principal source of that authority, §1182(f), enables the President to “suspend the entry of all aliens or any class of aliens” whenever he “finds” that their entry “would be detrimental to the interests of the United States.”¹

Plaintiffs argue that the Proclamation is not a valid exercise of the President’s authority under the INA. In their view, §1182(f) confers only a residual power to temporarily halt the entry of a discrete group of aliens engaged in harmful conduct. They also assert that the Proclamation violates another provision of the INA—8 U. S. C. §1152(a)(1)(A)—because it discriminates on the basis of nationality in the issuance of immigrant visas.

By its plain language, §1182(f) grants the President broad discretion to suspend the entry of aliens into the United States. The President lawfully exercised that discretion based on his findings—following a worldwide, multi-agency review—that entry of the covered aliens would be detrimental to the national interest. And plaintiffs’ attempts to identify a conflict with other

¹ The President also invoked his power under 8 U. S. C. §1185(a)(1), which grants the President authority to adopt “reasonable rules, regulations, and orders” governing entry or removal of aliens, “subject to such limitations and exceptions as [he] may prescribe.” Because this provision “substantially overlap[s]” with §1182(f), we agree with the Government that we “need not resolve . . . the precise relationship between the two statutes” in evaluating the validity of the Proclamation. Brief for Petitioners 32–33.

provisions in the INA, and their appeal to the statute’s purposes and legislative history, fail to overcome the clear statutory language.

A

The text of §1182(f) states:

“Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.”

By its terms, §1182(f) exudes deference to the President in every clause. It entrusts to the President the decisions whether and when to suspend entry (“[w]henver [he] finds that the entry” of aliens “would be detrimental” to the national interest); whose entry to suspend (“all aliens or any class of aliens”); for how long (“for such period as he shall deem necessary”); and on what conditions (“any restrictions he may deem to be appropriate”). It is therefore unsurprising that we have previously observed that §1182(f) vests the President with “ample power” to impose entry restrictions in addition to those elsewhere enumerated in the INA. [...].

The Proclamation falls well within this comprehensive delegation. The sole prerequisite set forth in §1182(f) is that the President “find[]” that the entry of the covered aliens “would be detrimental to the interests of the United States.” The President has undoubtedly fulfilled that requirement here. He first ordered DHS and other agencies to conduct a comprehensive evaluation of every single country’s compliance with the information and risk assessment baseline. The President then issued a Proclamation setting forth extensive findings describing how deficiencies in the practices of select foreign governments—several of which are state sponsors of terrorism—deprive the Government of “sufficient information to assess the risks [those countries’ nationals] pose to the United States.” Proclamation §1(h)(i). Based on that review, the President found that it was in the national interest to restrict entry of aliens who could not be vetted with adequate information—both to protect national security and public safety, and to induce improvement by their home countries. The Proclamation therefore “craft[ed] . . . country-specific restrictions that would be most likely to encourage cooperation given each country’s distinct circumstances,” while securing the Nation “until such time as improvements occur.” *Ibid.*²

² The Proclamation states that it does not disclose every ground for the country-specific restrictions because “[d]escribing all of those reasons publicly . . . would cause serious damage to the national security of the United States, and many such descriptions are classified.” §1(j).

...

The Proclamation also comports with the remaining textual limits in §1182(f). We agree with plaintiffs that the word “suspend” often connotes a “defer[ral] till later,” Webster’s Third New International Dictionary 2303 (1966). But that does not mean that the President is required to prescribe in advance a fixed end date for the entry restrictions. Section 1182(f) authorizes the President to suspend entry “for such period as he shall deem necessary.” It follows that when a President suspends entry in response to a diplomatic dispute or policy concern, he may link the duration of those restrictions, implicitly or explicitly, to the resolution of the triggering condition. [...]. In fact, not one of the 43 suspension orders issued prior to this litigation has specified a precise end date.

...

Finally, the Proclamation properly identifies a “class of aliens”—nationals of select countries—whose entry is suspended. Plaintiffs argue that “class” must refer to a well-defined group of individuals who share a common “characteristic” apart from nationality. Brief for Respondents 42. But the text of §1182(f), of course, does not say that, and the word “class” comfortably encompasses a group of people linked by nationality. Plaintiffs also contend that the class cannot be “overbroad.” Brief for Respondents 42. But that simply amounts to an unspoken tailoring requirement found nowhere in Congress’s grant of authority to suspend entry of not only “any class of aliens” but “all aliens.”

In short, the language of §1182(f) is clear, and the Proclamation does not exceed any textual limit on the President’s authority.

B

Confronted with this “facially broad grant of power,” 878 F. 3d, at 688, plaintiffs focus their attention on statutory structure and legislative purpose. They seek support in, first, the immigration scheme reflected in the INA as a whole, and, second, the legislative history of §1182(f) and historical practice. Neither argument justifies departing from the clear text of the statute.

1

Plaintiffs’ structural argument starts with the premise that §1182(f) does not give the President authority to countermand Congress’s considered policy judgments. The President, they say, may supplement the INA, but he cannot supplant it. And in their view, the Proclamation falls in the latter category because Congress has already specified a two-part solution to the problem of aliens seeking entry from countries that do not share sufficient information with the United States. First, Congress designed an individualized vetting system that places the burden on the alien to prove his admissibility. See §1361. Second, instead of banning the entry of nationals from particular countries, Congress sought to encourage information sharing through a

Visa Waiver Program offering fast-track admission for countries that cooperate with the United States. See §1187.

We may assume that §1182(f) does not allow the President to expressly override particular provisions of the INA. But plaintiffs have not identified any conflict between the statute and the Proclamation that would implicitly bar the President from addressing deficiencies in the Nation’s vetting system.

To the contrary, the Proclamation supports Congress’s individualized approach for determining admissibility. The INA sets forth various inadmissibility grounds based on connections to terrorism and criminal history, but those provisions can only work when the consular officer has sufficient (and sufficiently reliable) information to make that determination. The Proclamation promotes the effectiveness of the vetting process by helping to ensure the availability of such information.

...

Nor is there a conflict between the Proclamation and the Visa Waiver Program. The Program allows travel without a visa for short-term visitors from 38 countries that have entered into a “rigorous security partnership” with the United States. DHS, U. S. Visa Waiver Program (Apr. 6, 2016), <http://www.dhs.gov/visa-waiver-program> (as last visited June 25, 2018). Eligibility for that partnership involves “broad and consequential assessments of [the country’s] foreign security standards and operations.” *Ibid.* A foreign government must (among other things) undergo a comprehensive evaluation of its “counterterrorism, law enforcement, immigration enforcement, passport security, and border management capabilities,” often including “operational site inspections of airports, seaports, land borders, and passport production and issuance facilities.” *Ibid.*

...

Because plaintiffs do not point to any contradiction with another provision of the INA, the President has not exceeded his authority under §1182(f).

...

Plaintiffs also strive to infer limitations from executive practice. By their count, every previous suspension order under §1182(f) can be slotted into one of two categories. The vast majority targeted discrete groups of foreign nationals engaging in conduct “deemed harmful by the immigration laws.” And the remaining entry restrictions that focused on entire nationalities—namely, President Carter’s response to the Iran hostage crisis and President Reagan’s suspension of immigration from Cuba—were, in their view, designed as a response to diplomatic emergencies “that the immigration laws do not address.” Brief for Respondents 40–41.

Even if we were willing to confine expansive language in light of its past applications, the historical evidence is more equivocal than plaintiffs acknowledge. Presidents have repeatedly suspended entry not because the covered nationals themselves engaged in harmful acts but instead to retaliate for conduct by their governments that conflicted with U. S. foreign policy interests. See, *e.g.*, Exec. Order No. 13662, 3 CFR 233 (2014) (President Obama) (suspending entry of Russian nationals working in the financial services, energy, mining, engineering, or defense sectors, in light of the Russian Federation’s “annexation of Crimea and its use of force in Ukraine”); Presidential Proclamation No. 6958, 3 CFR 133 (1997) (President Clinton) (suspending entry of Sudanese governmental and military personnel, citing “foreign policy interests of the United States” based on Sudan’s refusal to comply with United Nations resolution). And while some of these reprisals were directed at subsets of aliens from the countries at issue, others broadly suspended entry on the basis of nationality due to ongoing diplomatic disputes. For example, President Reagan invoked §1182(f) to suspend entry “as immigrants” by almost all Cuban nationals, to apply pressure on the Cuban Government. Presidential Proclamation No. 5517, 3 CFR 102 (1986). Plaintiffs try to fit this latter order within their carve-out for emergency action, but the proclamation was based in part on Cuba’s decision to breach an immigration agreement some 15 months earlier.

More significantly, plaintiffs’ argument about historical practice is a double-edged sword. The more ad hoc their account of executive action—to fit the history into their theory—the harder it becomes to see such a refined delegation in a statute that grants the President sweeping authority to decide whether to suspend entry, whose entry to suspend, and for how long.

C

Plaintiffs’ final statutory argument is that the President’s entry suspension violates §1152(a)(1)(A), which provides that “no person shall . . . be discriminated against in the issuance of an immigrant visa because of the person’s race, sex, nationality, place of birth, or place of residence.” They contend that we should interpret the provision as prohibiting nationality-based discrimination throughout the *entire* immigration process, despite the reference in §1152(a)(1)(A) to the act of visa issuance alone. Specifically, plaintiffs argue that §1152(a)(1)(A) applies to the predicate question of a visa applicant’s eligibility for admission and the subsequent question whether the holder of a visa may in fact enter the country. Any other conclusion, they say, would allow the President to circumvent the protections against discrimination enshrined in §1152(a)(1)(A).

As an initial matter, this argument challenges only the validity of the entry restrictions on *immigrant* travel. Section 1152(a)(1)(A) is expressly limited to the issuance of “immigrant visa[s]” while §1182(f) allows the President to suspend entry of “immigrants or nonimmigrants.” At a minimum, then, plaintiffs’ reading would not affect any of the limitations on nonimmigrant travel in the Proclamation.

In any event, we reject plaintiffs’ interpretation because it ignores the basic distinction between admissibility determinations and visa issuance that runs throughout the INA.³ Section 1182 defines the pool of individuals who are admissible to the United States. Its restrictions come into play at two points in the process of gaining entry (or admission)⁴ into the United States. First, any alien who is inadmissible under §1182 (based on, for example, health risks, criminal history, or foreign policy consequences) is screened out as “ineligible to receive a visa.” 8 U. S. C. §1201(g). Second, even if a consular officer issues a visa, entry into the United States is not guaranteed. As every visa application explains, a visa does not entitle an alien to enter the United States “if, upon arrival,” an immigration officer determines that the applicant is “inadmissible under this chapter, or any other provision of law”— including §1182(f). §1201(h).

Sections 1182(f) and 1152(a)(1)(A) thus operate in different spheres: Section 1182 defines the universe of aliens who are admissible into the United States (and therefore eligible to receive a visa). Once §1182 sets the boundaries of admissibility into the United States, §1152(a)(1)(A) prohibits discrimination in the allocation of immigrant visas based on nationality and other traits. The distinction between admissibility—to which §1152(a)(1)(A) does not apply—and visa issuance—to which it does—is apparent from the text of the provision, which specifies only that its protections apply to the “issuance” of “immigrant visa[s],” without mentioning admissibility or entry. [...].

...

IV

...

B

The First Amendment provides, in part, that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” Our cases recognize that “[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.” *Larson v. Valente*, 456 U. S. 228, 244 (1982). Plaintiffs believe that the Proclamation violates this prohibition by singling out Muslims for disfavored

³ The Act is rife with examples distinguishing between the two concepts. See, e.g., 8 U. S. C. §1101(a)(4) (“The term ‘application for admission’ has reference to the application for admission into the United States and not to the application for the issuance of an immigrant or nonimmigrant visa.”); §1182(a) (“ineligible to receive visas and ineligible to be admitted”); §1182(a)(3)(D)(iii) (“establishes to the satisfaction of the consular officer when applying for a visa . . . or to the satisfaction of the Attorney General when applying for admission”); §1182(h)(1)(A)(i) (“alien’s application for a visa, admission, or adjustment of status”); §1187 (permitting entry without a visa); §1361 (establishing burden of proof for when a person “makes application for a visa . . . , or makes application for admission, or otherwise attempts to enter the United States”).

⁴ The concepts of entry and admission—but not issuance of a visa—are used interchangeably in the INA. See §1101(a)(13)(A) (defining “admission” as the “lawful entry of the alien into the United States”).

treatment. The entry suspension, they contend, operates as a “religious gerrymander,” in part because most of the countries covered by the Proclamation have Muslim-majority populations. And in their view, deviations from the information-sharing baseline criteria suggest that the results of the multi-agency review were “foreordained.” Relying on Establishment Clause precedents concerning laws and policies applied domestically, plaintiffs allege that the primary purpose of the Proclamation was religious animus and that the President’s stated concerns about vetting protocols and national security were but pretexts for discriminating against Muslims. Brief for Respondents 69–73.

At the heart of plaintiffs’ case is a series of statements by the President and his advisers casting doubt on the official objective of the Proclamation. For example, while a candidate on the campaign trail, the President published a “Statement on Preventing Muslim Immigration” that called for a “total and complete shutdown of Muslims entering the United States until our country’s representatives can figure out what is going on.” App. 158. That statement remained on his campaign website until May 2017. *Id.*, at 130–131. Then-candidate Trump also stated that “Islam hates us” and asserted that the United States was “having problems with Muslims coming into the country.” *Id.*, at 120–121, 159. Shortly after being elected, when asked whether violence in Europe had affected his plans to “ban Muslim immigration,” the President replied, “You know my plans. All along, I’ve been proven to be right.” *Id.*, at 123.

...

Plaintiffs argue that this President’s words strike at fundamental standards of respect and tolerance, in violation of our constitutional tradition. But the issue before us is not whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility. In doing so, we must consider not only the statements of a particular President, but also the authority of the Presidency itself.

The case before us differs in numerous respects from the conventional Establishment Clause claim. Unlike the typical suit involving religious displays or school prayer, plaintiffs seek to invalidate a national security directive regulating the entry of aliens abroad. Their claim accordingly raises a number of delicate issues regarding the scope of the constitutional right and the manner of proof. The Proclamation, moreover, is facially neutral toward religion. Plaintiffs therefore ask the Court to probe the sincerity of the stated justifications for the policy by reference to extrinsic statements—many of which were made before the President took the oath of office. These various aspects of plaintiffs’ challenge inform our standard of review.

...

D

Given the standard of review, it should come as no surprise that the Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny. On the few occasions where

we have done so, a common thread has been that the laws at issue lack any purpose other than a “bare . . . desire to harm a politically unpopular group.” *Department of Agriculture v. Moreno*, 413 U. S. 528, 534 (1973). [...].

The Proclamation does not fit this pattern. It cannot be said that it is impossible to “discern a relationship to legitimate state interests” or that the policy is “inexplicable by anything but animus.” Indeed, the dissent can only attempt to argue otherwise by refusing to apply anything resembling rational basis review. But because there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification.

The Proclamation is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices. The text says nothing about religion. Plaintiffs and the dissent nonetheless emphasize that five of the seven nations currently included in the Proclamation have Muslim-majority populations. Yet that fact alone does not support an inference of religious hostility, given that the policy covers just 8% of the world’s Muslim population and is limited to countries that were previously designated by Congress or prior administrations as posing national security risks. See 8 U. S. C. §1187(a)(12)(A) (identifying Syria and state sponsors of terrorism such as Iran as “countr[ies] or area[s] of concern” for purposes of administering the Visa Waiver Program); Dept. of Homeland Security, DHS Announces Further Travel Restrictions for the Visa Waiver Program (Feb. 18, 2016) (designating Libya, Somalia, and Yemen as additional countries of concern); see also *Rajah*, 544 F. 3d, at 433, n. 3 (describing how nonimmigrant aliens from Iran, Libya, Somalia, Syria, and Yemen were covered by the National Security Entry-Exit Registration System).

The Proclamation, moreover, reflects the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies. Plaintiffs seek to discredit the findings of the review, pointing to deviations from the review’s baseline criteria resulting in the inclusion of Somalia and omission of Iraq. But as the Proclamation explains, in each case the determinations were justified by the distinct conditions in each country. Although Somalia generally satisfies the information-sharing component of the baseline criteria, it “stands apart . . . in the degree to which [it] lacks command and control of its territory.” Proclamation §2(h)(i). As for Iraq, the Secretary of Homeland Security determined that entry restrictions were not warranted in light of the close cooperative relationship between the U. S. and Iraqi Governments and the country’s key role in combating terrorism in the region. §1(g). It is, in any event, difficult to see how exempting one of the largest predominantly Muslim countries in the region from coverage under the Proclamation can be cited as evidence of animus toward Muslims.

The dissent likewise doubts the thoroughness of the multi-agency review because a recent Freedom of Information Act request shows that the final DHS report “was a mere 17 pages.” Post, at 19. Yet a simple page count offers little insight into the actual substance of the final report, much less pre-decisional materials underlying it. See 5 U. S. C. §552(b)(5) (exempting deliberative materials from FOIA disclosure).

More fundamentally, plaintiffs and the dissent challenge the entry suspension based on their perception of its effectiveness and wisdom. They suggest that the policy is overbroad and does little to serve national security interests. But we cannot substitute our own assessment for the Executive’s predictive judgments on such matters, all of which “are delicate, complex, and involve large elements of prophecy.” *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U. S. 103, 111 (1948); see also *Regan v. Wald*, 468 U. S. 222, 242–243 (1984) (declining invitation to conduct an “independent foreign policy analysis”). While we of course “do not defer to the Government’s reading of the First Amendment,” the Executive’s evaluation of the underlying facts is entitled to appropriate weight, particularly in the context of litigation involving “sensitive and weighty interests of national security and foreign affairs.” *Humanitarian Law Project*, 561 U. S., at 33–34.⁵

Three additional features of the entry policy support the Government’s claim of a legitimate national security interest. First, since the President introduced entry restrictions in January 2017, three Muslim-majority countries—Iraq, Sudan, and Chad—have been removed from the list of covered countries. The Proclamation emphasizes that its “conditional restrictions” will remain in force only so long as necessary to “address” the identified “inadequacies and risks,” Proclamation Preamble, and §1(h), and establishes an ongoing process to engage covered nations and assess every 180 days whether the entry restrictions should be terminated, §§4(a), (b). In fact, in announcing the termination of restrictions on nationals of Chad, the President also described Libya’s ongoing engagement with the State Department and the steps Libya is taking “to improve its practices.” Proclamation No. 9723, 83 Fed. Reg. 15939.

Second, for those countries that remain subject to entry restrictions, the Proclamation includes significant exceptions for various categories of foreign nationals. The policy permits nationals from nearly every covered country to travel to the United States on a variety of nonimmigrant visas. See, e.g., §§2(b)–(c), (g), (h) (permitting student and exchange visitors from Iran, while restricting only business and tourist nonimmigrant entry for nationals of Libya and Yemen, and imposing no restrictions on nonimmigrant entry for Somali nationals). These carve-outs for nonimmigrant visas are substantial: Over the last three fiscal years—before the Proclamation was in effect—the majority of visas issued to nationals from the covered countries were nonimmigrant visas. Brief for Petitioners 57. The Proclamation also exempts permanent residents and individuals who have been granted asylum. §§3(b)(i), (vi).

⁵The dissent finds “perplexing” the application of rational basis re- view in this context. *Post*, at 15. But what is far more problematic is the dissent’s assumption that courts should review immigration policies, diplomatic sanctions, and military actions under the *de novo* “reasonable observer” inquiry applicable to cases involving holiday displays and graduation ceremonies. The dissent criticizes application of a more constrained standard of review as “throw[ing] the Establishment Clause out the window.” *Post*, at 16, n. 6. But as the numerous precedents cited in this section make clear, such a circumscribed inquiry applies to any constitutional claim concerning the entry of foreign nationals. See Part IV–C, *supra*. The dissent can cite no authority for its proposition that the more free-ranging inquiry it proposes is appropriate in the national security and foreign affairs context.

Third, the Proclamation creates a waiver program open to all covered foreign nationals seeking entry as immigrants or nonimmigrants. According to the Proclamation, consular officers are to consider in each admissibility determination whether the alien demonstrates that (1) denying entry would cause undue hardship; (2) entry would not pose a threat to public safety; and (3) entry would be in the interest of the United States. §3(c)(i); see also §3(c)(iv) (listing examples of when a waiver might be appropriate, such as if the foreign national seeks to reside with a close family member, obtain urgent medical care, or pursue significant business obligations). On its face, this program is similar to the humanitarian exceptions set forth in President Carter’s order during the Iran hostage crisis. See Exec. Order No. 12206, 3 CFR 249; Public Papers of the Presidents, Jimmy Carter, Sanctions Against Iran, at 611–612 (1980) (outlining exceptions). The Proclamation also directs DHS and the State Department to issue guidance elaborating upon the circumstances that would justify a waiver.⁶

Finally, the dissent invokes *Korematsu v. United States*, 323 U. S. 214 (1944). Whatever rhetorical advantage the dissent may see in doing so, *Korematsu* has nothing to do with this case. The forcible relocation of U. S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority. But it is wholly inapt to liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission. See post, at 26–28. The entry suspension is an act that is well within executive authority and could have been taken by any other President—the only question is evaluating the actions of this particular President in promulgating an otherwise valid Proclamation.

The dissent’s reference to *Korematsu*, however, affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—“has no place in law under the Constitution.” 323 U. S., at 248 (Jackson, J., dissenting).

* * *

Under these circumstances, the Government has set forth a sufficient national security justification to survive rational basis review. We express no view on the soundness of the policy. We simply hold today that plaintiffs have not demonstrated a likelihood of success on the merits of their constitutional claim.

V

⁶ JUSTICE BREYER focuses on only one aspect of our consideration—the waiver program and other exemptions in the Proclamation. Citing selective statistics, anecdotal evidence, and a declaration from unrelated litigation, JUSTICE BREYER suggests that not enough individuals are receiving waivers or exemptions. Post, at 4–8 (dissenting opinion). Yet even if such an inquiry were appropriate under rational basis review, the evidence he cites provides “but a piece of the picture,” post, at 6, and does not affect our analysis.

Because plaintiffs have not shown that they are likely to succeed on the merits of their claims, we reverse the grant of the preliminary injunction as an abuse of discretion. *Winter v. Natural Resources Defense Council, Inc.*, 555 U. S. 7, 32 (2008). The case now returns to the lower courts for such further proceedings as may be appropriate.

Our disposition of the case makes it unnecessary to consider the propriety of the nationwide scope of the injunction issued by the District Court.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KENNEDY, concurring.

I join the Court's opinion in full.

...

In all events, it is appropriate to make this further observation. There are numerous instances in which the statements and actions of Government officials are not subject to judicial scrutiny or intervention. That does not mean those officials are free to disregard the Constitution and the rights it proclaims and protects. The oath that all officials take to adhere to the Constitution is not confined to those spheres in which the Judiciary can correct or even comment upon what those officials say or do. Indeed, the very fact that an official may have broad discretion, discretion free from judicial scrutiny, makes it all the more imperative for him or her to adhere to the Constitution and to its meaning and its promise.

The First Amendment prohibits the establishment of religion and promises the free exercise of religion. From these safeguards, and from the guarantee of freedom of speech, it follows there is freedom of belief and expression. It is an urgent necessity that officials adhere to these constitutional guarantees and mandates in all their actions, even in the sphere of foreign affairs. An anxious world must know that our Government remains committed always to the liberties the Constitution seeks to preserve and protect, so that freedom extends outward, and lasts.

DISSENTS

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

The United States of America is a Nation built upon the promise of religious liberty. Our Founders honored that core promise by embedding the principle of religious neutrality in the First Amendment. The Court’s decision today fails to safeguard that fundamental principle. It leaves undisturbed a policy first advertised openly and unequivocally as a “total and complete shutdown of Muslims entering the United States” because the policy now masquerades behind a façade of national-security concerns. But this repackaging does little to cleanse Presidential Proclamation No. 9645 of the appearance of discrimination that the President’s words have created. Based on the evidence in the record, a reasonable observer would conclude that the Proclamation was motivated by anti-Muslim animus. That alone suffices to show that plaintiffs are likely to succeed on the merits of their Establishment Clause claim. The majority holds otherwise by ignoring the facts, misconstruing our legal precedent, and turning a blind eye to the pain and suffering the Proclamation inflicts upon countless families and individuals, many of whom are United States citizens. Because that troubling result runs contrary to the Constitution and our precedent, I dissent.

I

Plaintiffs challenge the Proclamation on various grounds, both statutory and constitutional. Ordinarily, when a case can be decided on purely statutory grounds, we strive to follow a “prudential rule of avoiding constitutional questions.” *Zobrest v. Catalina Foothills School Dist.*, 509 U. S. 1, 8 (1993). But that rule of thumb is far from categorical, and it has limited application where, as here, the constitutional question proves far simpler than the statutory one. Whatever the merits of plaintiffs’ complex statutory claims, the Proclamation must be enjoined for a more fundamental reason: It runs afoul of the Establishment Clause’s guarantee of religious neutrality.

A

The Establishment Clause forbids government policies “respecting an establishment of religion.” U. S. Const., Amdt. 1. The “clearest command” of the Establishment Clause is that the Government cannot favor or disfavor one religion over another. [...]. Consistent with that clear command, this Court has long acknowledged that governmental actions that favor one religion “inevitabl[y]” foster “the hatred, disrespect and even contempt of those who [hold] contrary beliefs.” *Engel v. Vitale*, 370 U. S. 421, 431 (1962). That is so, this Court has held, because such acts send messages to members of minority faiths “that they are outsiders, not full members of the political community.” *Santa Fe Independent School Dist. v. Doe*, 530 U. S. 290, 309

(2000). To guard against this serious harm, the Framers mandated a strict “principle of denominational neutrality.” *Larson*, 456 U. S., at 246; *Board of Ed. of Kiryas Joel Village School Dist. v. Grumet*, 512 U. S. 687, 703 (1994) (recognizing the role of courts in “safeguarding a principle at the heart of the Establishment Clause, that government should not prefer one religion to another, or religion to irreligion”).

“When the government acts with the ostensible and predominant purpose” of disfavoring a particular religion, “it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government’s ostensible object is to take sides.” *McCreary County v. American Civil Liberties Union of Ky.*, 545 U. S. 844, 860 (2005). To determine whether plaintiffs have proved an Establishment Clause violation, the Court asks whether a reasonable observer would view the government action as enacted for the purpose of disfavoring a religion. See *id.*, at 862, 866; accord, *Town of Greece v. Galloway*, 572 U. S. ____, ____ (2014) (plurality opinion) (slip op., at 19).

In answering that question, this Court has generally considered the text of the government policy, its operation, and any available evidence regarding “the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by” the decisionmaker. *Lukumi*, 508 U. S., at 540 (opinion of KENNEDY, J.); *McCreary*, 545 U. S., at 862 (courts must evaluate “text, legislative history, and implementation . . . , or comparable official act” (internal quotation marks omitted)). At the same time, however, courts must take care not to engage in “any judicial psychoanalysis of a drafter’s heart of hearts.” *Id.*, at 862.

B

1

Although the majority briefly recounts a few of the statements and background events that form the basis of plaintiffs’ constitutional challenge, *ante*, at 27–28, that highly abridged account does not tell even half of the story. See Brief for The Roderick & Solange MacArthur Justice Center as *Amicus Curiae* 5–31 (outlining President Trump’s public statements expressing animus toward Islam). The full record paints a far more harrowing picture, from which a reasonable observer would readily conclude that the Proclamation was motivated by hostility and animus toward the Muslim faith.

During his Presidential campaign, then-candidate Donald Trump pledged that, if elected, he would ban Muslims from entering the United States. Specifically, on December 7, 2015, he issued a formal statement “calling for a total and complete shutdown of Muslims entering the United States.” App. 119.

...

On December 8, 2015, Trump justified his proposal during a television interview by noting that President Franklin D. Roosevelt “did the same thing” with respect to the internment of Japanese Americans during World War II. *Id.*, at 120. In January 2016, during a Republican primary debate, Trump was asked whether he wanted to “rethink [his] position” on “banning Muslims from entering the country.” *Ibid.* He answered, “No.” *Ibid.* A month later, at a rally in South Carolina, Trump told an apocryphal story about United States General John J. Pershing killing a large group of Muslim insurgents in the Philippines with bullets dipped in pigs’ blood in the early 1900’s. *Id.*, at 163–164. In March 2016, he expressed his belief that “Islam hates us. . . . [W]e can’t allow people coming into this country who have this hatred of the United States . . . [a]nd of people that are not Muslim.” *Id.*, at 120–121. That same month, Trump asserted that “[w]e’re having problems with the Muslims, and we’re having problems with Muslims coming into the country.” *Id.*, at 121. He therefore called for surveillance of mosques in the United States, blaming terrorist attacks on Muslims’ lack of “assimilation” and their commitment to “sharia law.” *Ibid.*; *id.*, at 164. A day later, he opined that Muslims “do not respect us at all” and “don’t respect a lot of the things that are happening throughout not only our country, but they don’t respect other things.” *Ibid.*

As Trump’s presidential campaign progressed, he began to describe his policy proposal in slightly different terms. In June 2016, for instance, he characterized the policy proposal as a suspension of immigration from countries “where there’s a proven history of terrorism.” *Id.*, at 121. He also described the proposal as rooted in the need to stop “importing radical Islamic terrorism to the West through a failed immigration system.” *Id.*, at 121–122. Asked in July 2016 whether he was “pull[ing] back from” his pledged Muslim ban, Trump responded, “I actually don’t think it’s a rollback. In fact, you could say it’s an expansion.” *Id.*, at 122–123. He then explained that he used different terminology because “[p]eople were so upset when [he] used the word Muslim.” *Id.*, at 123.

A month before the 2016 election, Trump reiterated that his proposed “Muslim ban” had “morphed into a[n] extreme vetting from certain areas of the world.” *Ibid.* Then, on December 21, 2016, President-elect Trump was asked whether he would “rethink” his previous “plans to create a Muslim registry or ban Muslim immigration.” *Ibid.* He replied: “You know my plans. All along, I’ve proven to be right.” *Ibid.*

...

In September 2017, President Trump tweeted that “[t]he travel ban into the United States should be far larger, tougher and more specific—but stupidly, that would not be politically correct!” App. 133. Later that month, on September 24, 2017, President Trump issued Presidential Proclamation No. 9645, 82 Fed. Reg. 45161 (2017) (Proclamation), which restricts entry of certain nationals from six Muslim-majority countries. On November 29, 2017, President Trump “retweeted” three anti-Muslim videos, entitled “Muslim Destroys a Statue of Virgin Mary!”, “Islamist mob pushes teenage boy off roof and beats him to death!”, and “Muslim

migrant beats up Dutch boy on crutches!”⁷ IRAP II, 883 F. 3d, at 267. Those videos were initially tweeted by a British political party whose mission is to oppose “all alien and destructive politic[al] or religious doctrines, including . . . Islam.” *Ibid.* When asked about these videos, the White House Deputy Press Secretary connected them to the Proclamation, responding that the “President has been talking about these security issues for years now, from the campaign trail to the White House” and “has addressed these issues with the travel order that he issued earlier this year and the companion proclamation.” *Ibid.*

2

As the majority correctly notes, “the issue before us is not whether to denounce” these offensive statements. *Ante*, at 29. Rather, the dispositive and narrow question here is whether a reasonable observer, presented with all “openly available data,” the text and “historical context” of the Proclamation, and the “specific sequence of events” leading to it, would conclude that the primary purpose of the Proclamation is to disfavor Islam and its adherents by excluding them from the country. See *McCreary*, 545 U. S., at 862–863. The answer is unquestionably yes.

Taking all the relevant evidence together, a reasonable observer would conclude that the Proclamation was driven primarily by anti-Muslim animus, rather than by the Government’s asserted national-security justifications. Even before being sworn into office, then-candidate Trump stated that “Islam hates us,” App. 399, warned that “[w]e’re having problems with the Muslims, and we’re having problems with Muslims coming into the country,” *id.*, at 121, promised to enact a “total and complete shut-down of Muslims entering the United States,” *id.*, at 119, and instructed one of his advisers to find a “lega[l]” way to enact a Muslim ban, *id.*, at 125.⁸

⁷ The content of these videos is highly inflammatory, and their titles are arguably misleading. For instance, the person depicted in the video entitled “Muslim migrant beats up Dutch boy on crutches!” was reportedly not a “migrant,” and his religion is not publicly known. See Brief for Plaintiffs in *International Refugee Assistance Project v. Trump as Amici Curiae* 12, n. 4; P. Baker & E. Sullivan, *Trump Shares Inflammatory Anti-Muslim Videos, and Britain’s Leader Condemns Them*, N. Y. Times, Nov. 29, 2017 (“[A]ccording to local officials, both boys are Dutch”), <https://www.nytimes.com/2017/11/29/us/politics/trump-anti-muslim-videos-jayda-fransen.html> (all Internet materials as last visited June 25, 2018).

⁸ The Government urges us to disregard the President’s campaign statements. Brief for Petitioners 66–67. But nothing in our precedent supports that blinkered approach. To the contrary, courts must consider “the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history.” *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520, 540 (1993) (opinion of KENNEDY, J.). Moreover, President Trump and his advisers have repeatedly acknowledged that the Proclamation and its predecessors are an outgrowth of the President’s campaign statements. For example, just last November, the Deputy White House Press Secretary reminded the media that the Proclamation addresses “issues” the President has been talking about “for years,” including on “the campaign trail.” IRAP II, 883 F. 3d 233, 267 (CA4 2018). In any case, as the Fourth Circuit correctly recognized, even without relying on any of the President’s campaign statements, a reasonable observer would conclude that the Proclamation was enacted for the impermissible purpose of disfavoring Muslims. *Id.*, at 266, 268

The President continued to make similar statements well after his inauguration, as detailed above, see *supra*, at 6–10.

Moreover, despite several opportunities to do so, President Trump has never disavowed any of his prior statements about Islam.⁹ Instead, he has continued to make remarks that a reasonable observer would view as an unrelenting attack on the Muslim religion and its followers. Given President Trump’s failure to correct the reasonable perception of his apparent hostility toward the Islamic faith, it is unsurprising that the President’s lawyers have, at every step in the lower courts, failed in their attempts to launder the Proclamation of its discriminatory taint. See *United States v. Fordice*, 505 U. S. 717, 746–747 (1992) (“[G]iven an initially tainted policy, it is eminently reasonable to make the [Government] bear the risk of nonpersuasion with respect to intent at some future time, both because the [Government] has created the dispute through its own prior unlawful conduct, and because discriminatory intent does tend to persist through time” (citation omitted)). Notably, the Court recently found less pervasive official expressions of hostility and the failure to disavow them to be constitutionally significant. Cf. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 584 U. S. ___, ___ (2018) (slip op., at 18) (“The official expressions of hostility to religion in some of the commissioners’ comments—comments that were not disavowed at the Commission or by the State at any point in the proceedings that led to the affirmance of the order—were inconsistent with what the Free Exercise Clause requires”). It should find the same here.

Ultimately, what began as a policy explicitly “calling for a total and complete shutdown of Muslims entering the United States” has since morphed into a “Proclamation” putatively based on national-security concerns. But this new window dressing cannot conceal an unassailable fact: the words of the President and his advisers create the strong perception that the Proclamation is contaminated by impermissible discriminatory animus against Islam and its followers.

⁹ At oral argument, the Solicitor General asserted that President Trump “made crystal-clear on September 25 that he had no intention of imposing the Muslim ban” and “has praised Islam as one of the great countries [sic] of the world.” Tr. of Oral Arg. 81. Because the record contained no evidence of any such statement made on September 25th, however, the Solicitor General clarified after oral argument that he actually intended to refer to President Trump’s statement during a television interview on January 25, 2017. Letter from N. Francisco, Solicitor General, to S. Harris, Clerk of Court (May 1, 2018); Reply Brief 28, n. 8. During that interview, the President was asked whether EO–1 was “the Muslim ban,” and answered, “no it’s not the Muslim ban.” See Transcript: ABC News anchor David Muir interviews President Trump, ABC News, Jan. 25, 2017, <http://abcnews.go.com/Politics/transcript-abc-news-anchor-david-muir-interviews-president/story?id=45047602>. But that lone assertion hardly qualifies as a disavowal of the President’s comments about Islam—some of which were spoken after January 25, 2017. Moreover, it strains credulity to say that President Trump’s January 25th statement makes “crystal-clear” that he never intended to impose a Muslim ban given that, until May 2017, the President’s website displayed the statement regarding his campaign promise to ban Muslims from entering the country.

II

Rather than defend the President’s problematic statements, the Government urges this Court to set them aside and defer to the President on issues related to immigration and national security. The majority accepts that invitation and incorrectly applies a watered-down legal standard in an effort to short circuit plaintiffs’ Establishment Clause claim.

...

But even under rational-basis review, the Proclamation must fall. That is so because the Proclamation is “‘divorced from any factual context from which we could discern a relationship to legitimate state interests,’ and ‘its sheer breadth [is] so discontinuous with the reasons offered for it’” that the policy is “‘inexplicable by anything but animus.’” *Ante*, at 33 (quoting *Romer v. Evans*, 517 U. S. 620, 632, 635 (1996)); see also *Cleburne v. Cleburne Living Center, Inc.*, 473 U. S. 432, 448 (1985) (recognizing that classifications predicated on discriminatory animus can never be legitimate because the Government has no legitimate interest in exploiting “mere negative attitudes, or fear” toward a disfavored group). The President’s statements, which the majority utterly fails to address in its legal analysis, strongly support the conclusion that the Proclamation was issued to express hostility toward Muslims and exclude them from the country. Given the overwhelming record evidence of anti-Muslim animus, it simply cannot be said that the Proclamation has a legitimate basis. *IRAP II*, 883 F. 3d, at 352 (Harris, J., concurring) (explaining that the Proclamation contravenes the bedrock principle “that the government may not act on the basis of animus toward a disfavored religious minority” (emphasis in original)).

The majority insists that the Proclamation furthers two interrelated national-security interests: “preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices.” *Ante*, at 34. But the Court offers insufficient support for its view “that the entry suspension has a legitimate grounding in [those] national security concerns, quite apart from any religious hostility.” *Ibid.*; see also *ante*, at 33–38, and n. 7. Indeed, even a cursory review of the Government’s asserted national-security rationale reveals that the Proclamation is nothing more than a “ ‘religious gerrymander.’ ” *Lukumi*, 508 U. S., at 535.

The majority first emphasizes that the Proclamation “says nothing about religion.” *Ante*, at 34. Even so, the Proclamation, just like its predecessors, overwhelmingly targets Muslim-majority nations. Given the record here, including all the President’s statements linking the Proclamation to his apparent hostility toward Muslims, it is of no moment that the Proclamation also includes minor restrictions on two non-Muslim majority countries, North Korea and Venezuela, or that the Government has re- moved a few Muslim-majority countries from the list of covered countries since EO–1 was issued. Consideration of the entire record supports the conclusion that the inclusion of North Korea and Venezuela, and the removal of other countries, simply reflect subtle efforts to start “talking territory instead of Muslim,” *App.* 123, precisely so the Executive Branch could evade criticism or legal consequences for the Proclamation’s otherwise clear targeting of Muslims. The Proclamation’s effect on North Korea and Venezuela, for example, is insubstantial, if not entirely symbolic. A prior sanctions order already restricts

entry of North Korean nationals, see Exec. Order No. 13810, 82 Fed. Reg. 44705 (2017), and the Proclamation targets only a handful of Venezuelan government officials and their immediate family members, 82 Fed. Reg. 45166. As such, the President’s inclusion of North Korea and Venezuela does little to mitigate the anti-Muslim animus that permeates the Proclamation.

The majority next contends that the Proclamation “reflects the results of a worldwide review process undertaken by multiple Cabinet officials.” *Ante*, at 34. At the outset, there is some evidence that at least one of the individuals involved in that process may have exhibited bias against Muslims. As noted by one group of amici, the Trump administration appointed Frank Wuco to help enforce the President’s travel bans and lead the multi- agency review process. See Brief for Plaintiffs in *International Refugee Assistance Project v. Trump as Amici Curiae* 13–14, and n. 10. According to amici, Wuco has purportedly made several suspect public statements about Islam: He has “publicly declared that it was a ‘great idea’ to ‘stop the visa application process into this country from Muslim nations in a blanket type of policy,’” “that Muslim populations ‘living under other-than-Muslim rule’ will ‘necessarily’ turn to violence, that Islam prescribes ‘violence and warfare against unbelievers,’ and that Muslims ‘by-and-large . . . resist assimilation.’” *Id.*, at 14.

But, even setting aside those comments, the worldwide review does little to break the clear connection between the Proclamation and the President’s anti-Muslim statements. For “[n]o matter how many officials affix their names to it, the Proclamation rests on a rotten foundation.” Brief for Constitutional Law Scholars as Amici Curiae 7 (filed Apr. 2, 2018); see *supra*, at 4–10. The President campaigned on a promise to implement a “total and complete shutdown of Muslims” entering the country, translated that campaign promise into a concrete policy, and made several statements linking that policy (in its various forms) to anti-Muslim animus.

Ignoring all this, the majority empowers the President to hide behind an administrative review process that the Government refuses to disclose to the public. See *IRAP II*, 883 F. 3d, at 268 (“[T]he Government chose not to make the review publicly available” even in redacted form); *IRAP v. Trump*, No. 17–2231 (CA4), Doc. 126 (Letter from S. Swingle, Counsel for Defendants-Appellants, to P. Connor, Clerk of the United States Court of Appeals for the Fourth Circuit (Nov. 24, 2017)) (resisting Fourth Circuit’s request that the Government supplement the record with the reports referenced in the Proclamation). Furthermore, evidence of which we can take judicial notice indicates that the multiagency review process could not have been very thorough. Ongoing litigation under the Freedom of Information Act shows that the September 2017 report the Government produced after its review process was a mere 17 pages. See *Brennan Center for Justice v. United States Dept. of State*, No. 17–cv–7520 (SDNY), Doc. No. 31–1, pp. 2–3. That the Government’s analysis of the vetting practices of hundreds of countries boiled down to such a short document raises serious questions about the legitimacy of the President’s proclaimed national-security rationale.

...

Put simply, Congress has already erected a statutory scheme that fulfills the putative national-security interests the Government now puts forth to justify the Proclamation. Tellingly, the Government remains wholly unable to articulate any credible national-security interest that would go unaddressed by the current statutory scheme absent the Proclamation. The Government also offers no evidence that this current vetting scheme, which involves a highly searching consideration of individuals required to obtain visas for entry into the United States and a highly searching consideration of which countries are eligible for inclusion in the Visa Waiver Program, is inadequate to achieve the Proclamation's proclaimed objectives of "pre-venting entry of nationals who cannot be adequately vetted and inducing other nations to improve their [vetting and information-sharing] practices." *Ante*, at 34.

...

Moreover, the Proclamation purports to mitigate national-security risks by excluding nationals of countries that provide insufficient information to vet their nationals. 82 Fed. Reg. 45164. Yet, as plaintiffs explain, the Proclamation broadly denies immigrant visas to all nationals of those countries, including those whose admission would likely not implicate these information deficiencies (e.g., infants, or nationals of countries included in the Proclamation who are long-term residents of and traveling from a country not covered by the Proclamation). See Brief for Respondents 72. In addition, the Proclamation permits certain nationals from the countries named in the Proclamation to obtain nonimmigrant visas, which undermines the Government's assertion that it does not already have the capacity and sufficient information to vet these individuals adequately. See 82 Fed. Reg. 45165–45169.

Equally unavailing is the majority's reliance on the Proclamation's waiver program. *Ante*, at 37, and n. 7. As several amici thoroughly explain, there is reason to suspect that the Proclamation's waiver program is nothing more than a sham. See Brief for Pars Equality Center et al. as Amici Curiae 11, 13–28 (explaining that "waivers under the Proclamation are vanishingly rare" and reporting numerous stories of deserving applicants denied waivers). The remote possibility of obtaining a waiver pursuant to an ad hoc, discretionary, and seemingly arbitrary process scarcely demonstrates that the Proclamation is rooted in a genuine concern for national security. See *ante*, at 3–8 (BREYER, J., dissenting) (outlining evidence suggesting "that the Government is not applying the Proclamation as written," that "waivers are not being processed in an ordinary way," and that consular and other officials "do not, in fact, have discretion to grant waivers").

In sum, none of the features of the Proclamation highlighted by the majority supports the Government's claim that the Proclamation is genuinely and primarily rooted in a legitimate national-security interest. What the un rebutted evidence actually shows is that a reasonable observer would conclude, quite easily, that the primary purpose and function of the Proclamation is to disfavor Islam by banning Muslims from entering our country.

...

IV

The First Amendment stands as a bulwark against official religious prejudice and embodies our Nation’s deep commitment to religious plurality and tolerance. That constitutional promise is why, “[f]or centuries now, people have come to this country from every corner of the world to share in the blessing of religious freedom.” *Town of Greece v. Galloway*, 572 U. S., at ___ (KAGAN, J., dissenting) (slip op., at 1). Instead of vindicating those principles, today’s decision tosses them aside. In holding that the First Amendment gives way to an executive policy that a reasonable observer would view as motivated by animus against Muslims, the majority opinion upends this Court’s precedent, repeats tragic mistakes of the past, and denies countless individuals the fundamental right of religious liberty.

Just weeks ago, the Court rendered its decision in *Masterpiece Cakeshop*, 584 U. S. ___, which applied the bedrock principles of religious neutrality and tolerance in considering a First Amendment challenge to government action. See *id.*, at ___ (slip op., at 17) (“The Constitution ‘commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures’” (quoting *Lukumi*, 508 U. S., at 547)); *Masterpiece*, 584 U.S., at ___ (KAGAN, J., concurring) (slip op., at 1) (“[S]tate actors cannot show hostility to religious views; rather, they must give those views ‘neutral and respectful consideration’ ”). Those principles should apply equally here. In both instances, the question is whether a government actor exhibited tolerance and neutrality in reaching a decision that affects individuals’ fundamental religious freedom. But unlike in *Masterpiece*, where a state civil rights commission was found to have acted without “the neutrality that the Free Exercise Clause requires,” *id.*, at ___ (slip op., at 17), the government actors in this case will not be held accountable for breaching the First Amendment’s guarantee of religious neutrality and tolerance. Unlike in *Masterpiece*, where the majority considered the state commissioners’ statements about religion to be persuasive evidence of unconstitutional government action, *id.*, at ___–___ (slip op., at 12–14), the majority here completely sets aside the President’s charged statements about Muslims as irrelevant. That holding erodes the foundational principles of religious tolerance that the Court elsewhere has so emphatically protected, and it tells members of minority religions in our country “‘that they are outsiders, not full members of the political community.’ ” *Santa Fe*, 530 U. S., at 309.

Today’s holding is all the more troubling given the stark parallels between the reasoning of this case and that of *Korematsu v. United States*, 323 U. S. 214 (1944). See Brief for Japanese American Citizens League as Amicus Curiae. In *Korematsu*, the Court gave “a pass [to] an odious, gravely injurious racial classification” authorized by an executive order. *Adarand Constructors, Inc. v. Peña*, 515 U. S. 200, 275 (1995) (GINSBURG, J., dissenting). As here, the Government invoked an ill-defined national- security threat to justify an exclusionary policy of sweeping proportion. See Brief for Japanese American Citizens League as Amicus Curiae 12–14.

...

In the intervening years since *Korematsu*, our Nation has done much to leave its sordid legacy behind. See, e.g., Civil Liberties Act of 1988, 50 U. S. C. App. §4211 et seq. (setting forth remedies to individuals affected by the executive order at issue in *Korematsu*); Non-Detention Act of 1971, 18 U. S. C. §4001(a) (forbidding the imprisonment or detention by the United States of any citizen absent an Act of Congress). Today, the Court takes the important step of finally overruling *Korematsu*, denouncing it as “gravely wrong the day it was decided.” *Ante*, at 38 (citing *Korematsu*, 323 U. S., at 248 (Jackson, J., dissenting)). This formal repudiation of a shameful precedent is laudable and long overdue. But it does not make the majority’s decision here acceptable or right. By blindly accepting the Government’s misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying *Korematsu* and merely replaces one “gravely wrong” decision with another. *Ante*, at 38.

Our Constitution demands, and our country deserves, a Judiciary willing to hold the coordinate branches to account when they defy our most sacred legal commitments. Because the Court’s decision today has failed in that respect, with profound regret, I dissent.

JUSTICE BREYER, with whom JUSTICE KAGAN joins, dissenting.

The question before us is whether Proclamation No. 9645 is lawful. If its promulgation or content was significantly affected by religious animus against Muslims, it would violate the relevant statute or the First Amendment itself. See 8 U. S. C. §1182(f) (requiring “find[ings]” that persons denied entry “would be detrimental to the interests of the United States”); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520 (1993) (First Amendment); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 584 U.S. ____ (2018) (same); *post*, at 2–4 (SOTOMAYOR, J., dissenting). If, however, its sole *ratio decidendi* was one of national security, then it would be unlikely to violate either the statute or the Constitution. Which is it? Members of the Court principally disagree about the answer to this question, i.e., about whether or the extent to which religious animus played a significant role in the Proclamation’s promulgation or content.

In my view, the Proclamation’s elaborate system of exemptions and waivers can and should help us answer this question. That system provides for case-by-case consideration of persons who may qualify for visas despite the Proclamation’s general ban. Those persons include lawful permanent residents, asylum seekers, refugees, students, children, and numerous others. There are likely many such persons, perhaps in the thousands. And I believe it appropriate to take account of their Proclamation-granted status when considering the Proclamation’s lawfulness. The Solicitor General asked us to consider the Proclamation “as” it is “written” and

“as” it is “applied,” waivers and exemptions included. Tr. of Oral Arg. 38. He warned us against considering the Proclamation’s lawfulness “on the hypothetical situation that [the Proclamation] is what it isn’t,” *ibid.*, while telling us that its waiver and exemption provisions mean what they say: The Proclamation does not exclude individuals from the United States “if they meet the criteria” for a waiver or exemption. *Id.*, at 33.

On the one hand, if the Government is applying the exemption and waiver provisions as written, then its argument for the Proclamation’s lawfulness is strengthened. [...].

Further, since the case-by-case exemptions and waivers apply without regard to the individual’s religion, application of that system would help make clear that the Proclamation does not deny visas to numerous Muslim individuals (from those countries) who do not pose a security threat. And that fact would help to rebut the First Amendment claim that the Proclamation rests upon anti-Muslim bias rather than security need. Finally, of course, the very fact that Muslims from those countries would enter the United States (under Proclamation-provided exemptions and waivers) would help to show the same thing.

On the other hand, if the Government is not applying the system of exemptions and waivers that the Proclamation contains, then its argument for the Proclamation’s lawfulness becomes significantly weaker. For one thing, the relevant precedents—those of Presidents Carter and Reagan—would bear far less resemblance to the present Proclamation. Indeed, one might ask, if those two Presidents thought a case-by-case exemption system appropriate, what is different about present circumstances that would justify that system’s absence?

For another thing, the relevant statute requires that there be “find[ings]” that the grant of visas to excluded persons would be “detrimental to the interests of the United States.” §1182(f). Yet there would be no such findings in respect to those for whom the Proclamation itself provides case-by-case examination (followed by the grant of a visa in appropriate cases).

And, perhaps most importantly, if the Government is not applying the Proclamation’s exemption and waiver system, the claim that the Proclamation is a “Muslim ban,” rather than a “security-based” ban, becomes much stronger. How could the Government successfully claim that the Proclamation rests on security needs if it is excluding Muslims who satisfy the Proclamation’s own terms? At the same time, denying visas to Muslims who meet the Proclamation’s own security terms would support the view that the Government excludes them for reasons based upon their religion.

Unfortunately there is evidence that supports the second possibility, i.e., that the Government is not applying the Proclamation as written. The Proclamation provides that the Secretary of State and the Secretary of Homeland Security “shall coordinate to adopt guidance” for consular officers to follow when deciding whether to grant a waiver. §3(c)(ii). Yet, to my knowledge, no guidance has issued. The only potentially relevant document I have found consists of a set of State Department answers to certain Frequently Asked Questions, but this document simply restates the Proclamation in plain language for visa applicants. It does not

provide guidance for consular officers as to how they are to exercise their discretion. See Dept. of State, FAQs on the Presidential Proclamation, [https:// travel.state.gov/content/travel/en/us-visas/visa-information- resources/presidential-proclamation-archive/2017-12-04- Presidential-Proclamation.html](https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/presidential-proclamation-archive/2017-12-04-Presidential-Proclamation.html) (all Internet materials as last visited June 25, 2018).

An examination of publicly available statistics also provides cause for concern. The State Department reported that during the Proclamation’s first month, two waivers were approved out of 6,555 eligible applicants. Letter from M. Waters, Assistant Secretary Legislative Affairs, to Sen. Van Hollen (Feb. 22, 2018). In its reply brief, the Government claims that number increased from 2 to 430 during the first four months of implementation. Reply Brief 17. That number, 430, however, when compared with the number of pre-Proclamation visitors, accounts for a miniscule percentage of those likely eligible for visas, in such categories as persons requiring medical treatment, academic visitors, students, family members, and others belonging to groups that, when considered as a group (rather than case by case), would not seem to pose security threats. [...].

...

Other data suggest the same. The Proclamation does not apply to asylum seekers or refugees. §§3(b)(vi), 6(e). Yet few refugees have been admitted since the Proclamation took effect. While more than 15,000 Syrian refugees arrived in the United States in 2016, only 13 have arrived since January 2018. Dept. of State, Bureau of Population, Refugees, and Migration, Interactive Reporting, Refugee Processing Center, <http://ireports.wrapsnet.org>. Similarly few refugees have been admitted since January from Iran (3), Libya (1), Yemen (0), and Somalia (122). *Ibid.*

The Proclamation also exempts individuals applying for several types of nonimmigrant visas: lawful permanent residents, parolees, those with certain travel documents, dual nationals of noncovered countries, and representatives of governments or international organizations. §§3(b)(i)–(v). It places no restrictions on the vast majority of student and exchange visitors, covering only those from Syria, which provided 8 percent of student and exchange visitors from the five countries in 2016. §§2(b)–(h); see Dept. of State, Report of the Visa Office 2016, Table XVII Nonimmigrant Visas Issued Fiscal Year 2016 (Visa Report 2016 Table XVII). Visitors from Somalia are eligible for any type of nonimmigrant visa, subject to “additional scrutiny.” §2(h)(ii). If nonimmigrant visa applications under the Proclamation resemble those in 2016, 16 percent of visa applicants would be eligible for exemptions. See Visa Report 2016 Table XVII.

In practice, however, only 258 student visas were issued to applicants from Iran (189), Libya (29), Yemen (40), and Somalia (0) in the first three months of 2018. See Dept. of State, Nonimmigrant Visa Issuances by Nationality, Jan., Feb., and Mar. 2018. This is less than a quarter of the volume needed to be on track for 2016 student visa levels. And only 40 nonimmigrant visas have been issued to Somali nationals, a decrease of 65 percent from 2016. *Ibid.*; see Visa Report 2016 Table XVII. While this is but a piece of the picture, it does not provide grounds for confidence.

Anecdotal evidence further heightens these concerns. For example, one *amicus* identified a child with cerebral palsy in Yemen. The war had prevented her from receiving her medication, she could no longer move or speak, and her doctors said she would not survive in Yemen. Her visa application was denied. Her family received a form with a check mark in the box unambiguously confirming that “a waiver will not be granted in your case.” Letter from L. Blatt to S. Harris, Clerk of Court (May 1, 2018). But after the child’s case was highlighted in an *amicus* brief before this Court, the family received an update from the consular officer who had initially denied the waiver. It turns out, according to the officer, that she had all along determined that the waiver criteria were met. But, the officer explained, she could not relay that information at the time because the waiver required review from a supervisor, who had since approved it. The officer said that the family’s case was now in administrative processing and that she was attaching a “revised refusal letter indicating the approval of the waiver.” *Ibid.* The new form did not actually approve the waiver (in fact, the form contains no box saying “granted”). But a different box was now checked, reading: “The consular officer is reviewing your eligibility for a waiver under the Proclamation. . . . This can be a lengthy process, and until the consular officer can make an individualized determination of [the relevant] factors, your visa application will remain refused under Section 212(f) [of the Proclamation].” *Ibid.* One is left to wonder why this second box, indicating continuing review, had not been checked at the outset if in fact the child’s case had remained under consideration all along. Though this is but one incident and the child was admitted after considerable international attention in this case, it provides yet more reason to believe that waivers are not being processed in an ordinary way.

...

Declarations, anecdotal evidence, facts, and numbers taken from *amicus* briefs are not judicial fact findings. The Government has not had an opportunity to respond, and a court has not had an opportunity to decide. But, given the importance of the decision in this case, the need for assurance that the Proclamation does not rest upon a “Muslim ban,” and the assistance in deciding the issue that answers to the “exemption and waiver” questions may provide, I would send this case back to the District Court for further proceedings. And, I would leave the injunction in effect while the matter is litigated. Regardless, the Court’s decision today leaves the District Court free to explore these issues on remand.

If this Court must decide the question without this further litigation, I would, on balance, find the evidence of antireligious bias, including statements on a website taken down only after the President issued the two executive orders preceding the Proclamation, along with the other statements also set forth in JUSTICE SOTOMAYOR’s opinion, a sufficient basis to set the Proclamation aside.

And for these reasons, I respectfully dissent.

Trump v. Mazars (2020)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Over the course of five days in April 2019, three committees of the U. S. House of Representatives issued four subpoenas seeking information about the finances of President Donald J. Trump, his children, and affiliated businesses. We have held that the House has authority under the Constitution to issue subpoenas to assist it in carrying out its legislative responsibilities. The House asserts that the financial information sought here—encompassing a decade’s worth of transactions by the President and his family—will help guide legislative reform in areas ranging from money laundering and terrorism to foreign involvement in U. S. elections. The President contends that the House lacked a valid legislative aim and instead sought these records to harass him, expose personal matters, and conduct law enforcement activities beyond its authority. The question presented is whether the subpoenas exceed the authority of the House under the Constitution.

*4 We have never addressed a congressional subpoena for the President’s information. Two hundred years ago, it was established that Presidents may be subpoenaed during a federal criminal proceeding, *United States v. Burr*, 25 F.Cas. 30 (No. 14,692d) (CC Va. 1807) (Marshall, Cir. J.), and earlier today we extended that ruling to state criminal proceedings, *Trump v. Vance*, — U.S., p. —, — S.Ct. p., —, ante, p. —, 2020 WL 3848062. Nearly fifty years ago, we held that a federal prosecutor could obtain information from a President despite assertions of executive privilege, *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), and more recently we ruled that a private litigant could subject a President to a damages suit and appropriate discovery obligations in federal court, *Clinton v. Jones*, 520 U.S. 681, 117 S.Ct.1636, 137 L.Ed.2d 945 (1997).

This case is different. Here the President’s information is sought not by prosecutors or private parties in connection with a particular judicial proceeding, but by committees of Congress that have set forth broad legislative objectives. Congress and the President—the two political branches established by the Constitution—have an ongoing relationship that the Framers intended to feature both rivalry and reciprocity. See *The Federalist* No. 51, p. 349 (J. Cooke ed. 1961) (J. Madison); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (Jackson, J., concurring). That distinctive aspect necessarily informs our analysis of the question before us.

...

The question presented is whether the subpoenas exceed the authority of the House under the Constitution. Historically, disputes over congressional demands for presidential documents have not ended up in court. Instead, they have been hashed out in the “hurly-burly, the give-and-take of the political process between the legislative and the executive.” Hearings on S. 2170 et al. before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 94th Cong., 1st Sess., 87 (1975) (A. Scalia, Assistant Attorney General, Office of Legal Counsel).

That practice began with George Washington and the early Congress. In 1792, a House committee requested Executive Branch documents pertaining to General St. Clair’s campaign against the Indians in the Northwest Territory, which had concluded in an utter rout of federal forces when they were caught by surprise near the present-day border between Ohio and Indiana. See T. Taylor, *Grand Inquest: The Story of Congressional Investigations 19–23* (1955). Since this was the first such request from Congress, President Washington called a Cabinet meeting, wishing to take care that his response “be rightly conducted” because it could “become a precedent.” 1 Writings of Thomas Jefferson 189 (P. Ford ed. 1892).

The meeting, attended by the likes of Alexander Hamilton, Thomas Jefferson, Edmund Randolph, and Henry Knox, ended with the Cabinet of “one mind”: The House had authority to “institute inquiries” and “call for papers” but the President could “exercise a discretion” over disclosures, “communicat[ing] such papers as the public good would permit” and “refus[ing]” the rest. *Id.*, at 189–190. President Washington then dispatched Jefferson to speak to individual congressmen and “bring them by persuasion into the right channel.” *Id.*, at 190. The discussions were apparently fruitful, as the House later narrowed its request and the documents were supplied without recourse to the courts. See 3 *Annals of Cong.* 536 (1792); Taylor, *supra*, at 24.

*7 Jefferson, once he became President, followed Washington’s precedent. In early 1807, after Jefferson had disclosed that “sundry persons” were conspiring to invade Spanish territory in North America with a private army, 16 *Annals of Cong.* 686–687, the House requested that the President produce any information in his possession touching on the conspiracy (except for information that would harm the public interest), *id.*, at 336, 345, 359. Jefferson chose not to divulge the entire “voluminous” correspondence on the subject, explaining that much of it was “private” or mere “rumors” and “neither safety nor justice” permitted him to “expos[e] names”

apart from identifying the conspiracy’s “principal actor”: Aaron Burr. *Id.*, at 39–40. Instead of the entire correspondence, Jefferson sent Congress particular documents and a special message summarizing the conspiracy. *Id.*, at 39–43; *see generally Vance*, — U.S. at ——— – ———, — S.Ct. at ——— – ———, *ante*, at 3–4, 2020 WL 3848062. Neither Congress nor the President asked the Judiciary to intervene.

...

Congress and the President maintained this tradition of negotiation and compromise—without the involvement of this Court—until the present dispute. Indeed, from President Washington until now, we have never considered a dispute over a congressional subpoena for the President’s records. And, according to the parties, the appellate courts have addressed such a subpoena only once, when a Senate committee subpoenaed President Nixon during the Watergate scandal. See *infra*, at ——— (discussing *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (CA DC 1974) (en banc)). In that case, the court refused to enforce the subpoena, and the Senate did not seek review by this Court.

*8 This dispute therefore represents a significant departure from historical practice. Although the parties agree that this particular controversy is justiciable, we recognize that it is the first of its kind to reach this Court; that disputes of this sort can raise important issues concerning relations between the branches; that related disputes involving congressional efforts to seek official Executive Branch information recur on a regular basis, including in the context of deeply partisan controversy; and that Congress and the Executive have nonetheless managed for over two centuries to resolve such disputes among themselves without the benefit of guidance from us. Such longstanding practice “ ‘is a consideration of great weight’ ” in cases concerning “the allocation of power between [the] two elected branches of Government,” and it imposes on us a duty of care to ensure that we not needlessly disturb “the compromises and working arrangements that [those] branches ... themselves have reached.” *NLRB v. Noel Canning*, 573 U.S. 513, 524–526, 134 S.Ct. 2550, 189 L.Ed.2d 538 (2014) (quoting *The Pocket Veto Case*, 279 U.S. 655, 689, 49 S.Ct. 463, 73 L.Ed. 894 (1929)). With that in mind, we turn to the question presented.

...

Congress has no enumerated constitutional power to conduct investigations or issue subpoenas, but we have held that each House has power “to secure needed information” in order to legislate. *McGrain v. Daugherty*, 273 U.S. 135, 161, 47 S.Ct. 319, 71 L.Ed. 580 (1927). This “power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.” *Id.*, at 174, 47 S.Ct. 319. Without information, Congress would be shooting in the dark, unable to legislate “wisely or effectively.” *Id.*, at 175, 47 S.Ct. 319. The congressional power to obtain information is “broad” and “indispensable.” *Watkins v. United States*, 354 U.S. 178, 187, 215, 77 S.Ct. 1173, 1 L.Ed.2d 1273 (1957). It encompasses inquiries into the administration of existing laws, studies of proposed laws, and “surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them.” *Id.*, at 187, 77 S.Ct. 1173.

Because this power is “justified solely as an adjunct to the legislative process,” it is subject to several limitations. *Id.*, at 197, 77 S.Ct. 1173. Most importantly, a congressional subpoena is valid only if it is “related to, and in furtherance of, a legitimate task of the Congress.” *Id.*, at 187, 77 S.Ct. 1173. The subpoena must serve a “valid legislative purpose,” *Quinn v. United States*, 349 U.S. 155, 161, 75 S.Ct. 668, 99 L.Ed. 964 (1955); it must “concern[] a subject on which legislation ‘could be had,’” *Eastland v. United States Servicemen’s Fund*, 421 U.S. 491, 506, 95 S.Ct. 1813, 44 L.Ed.2d 324 (1975) (quoting *McGrain*, 273 U.S. at 177, 47 S.Ct. 319).

Furthermore, Congress may not issue a subpoena for the purpose of “law enforcement,” because “those powers are assigned under our Constitution to the Executive and the Judiciary.” *Quinn*, 349 U.S. at 161, 75 S.Ct. 668. Thus Congress may not use subpoenas to “try” someone “before [a] committee for any crime or wrongdoing.” *McGrain*, 273 U.S. at 179, 47 S.Ct. 319. Congress has no “‘general’ power to inquire into private affairs and compel disclosures,” *id.*, at 173–174, 47 S.Ct. 319, and “there is no congressional power to expose for the sake of exposure,” *Watkins*, 354 U.S. at 200, 77 S.Ct. 1173. “Investigations conducted solely for the personal aggrandizement of the investigators or to ‘punish’ those investigated are indefensible.” *Id.*, at 187, 77 S.Ct. 1173.

Finally, recipients of legislative subpoenas retain their constitutional rights throughout the course of an investigation. *See id.*, at 188, 198, 77 S.Ct. 1173. And recipients have long been understood to retain common law and constitutional privileges with respect to certain materials, such as attorney-client communications and governmental communications protected by executive privilege. *See, e.g.*, Congressional Research Service, *supra*, at 16–18 (attorney-client privilege); Senate Select Committee, 498 F.2d at 727, 730–731 (executive privilege).

...

The President contends, as does the Solicitor General appearing on behalf of the United States, that the usual rules for congressional subpoenas do not govern here because the President's papers are at issue. They argue for a more demanding standard based in large part on cases involving the Nixon tapes—recordings of conversations between President Nixon and close advisers discussing the break-in at the Democratic National Committee's headquarters at the Watergate complex. The tapes were subpoenaed by a Senate committee and the Special Prosecutor investigating the break-in, prompting President Nixon to invoke executive privilege and leading to two cases addressing the showing necessary to require the President to comply with the subpoenas. *See Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039; Senate Select Committee, 498 F.2d 725.

*9 Those cases, the President and the Solicitor General now contend, establish the standard that should govern the House subpoenas here. Quoting *Nixon*, the President asserts that the House must establish a "demonstrated, specific need" for the financial information, just as the Watergate special prosecutor was required to do in order to obtain the tapes. 418 U.S. at 713, 94 S.Ct. 3090. And drawing on Senate Select Committee—the D. C. Circuit case refusing to enforce the Senate subpoena for the tapes—the President and the Solicitor General argue that the House must show that the financial information is "demonstrably critical" to its legislative purpose. 498 F.2d at 731.

We disagree that these demanding standards apply here. Unlike the cases before us, *Nixon* and Senate Select Committee involved Oval Office communications over which the President asserted executive privilege. That privilege safeguards the public interest in candid, confidential deliberations within the Executive Branch; it is "fundamental to the operation of Government." *Nixon*, 418 U.S. at 708, 94 S.Ct. 3090. As a result, information subject to executive privilege deserves "the greatest protection consistent with the fair administration of justice." *Id.*, at 715, 94 S.Ct. 3090. We decline to transplant that protection root and branch to cases involving nonprivileged, private information, which by definition does not implicate sensitive Executive Branch deliberations.

The standards proposed by the President and the Solicitor General—if applied outside the context of privileged information—would risk seriously impeding Congress in carrying out its responsibilities. The President and the Solicitor General would apply the same exacting standards to *all* subpoenas for the President's information, without recognizing distinctions between privileged and nonprivileged information, between official and personal information, or between various legislative objectives. Such a categorical approach would represent a significant

departure from the longstanding way of doing business between the branches, giving short shrift to Congress's important interests in conducting inquiries to obtain the information it needs to legislate effectively. Confounding the legislature in that effort would be contrary to the principle that:

“It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served.” *United States v. Rumely*, 345 U.S. 41, 43, 73 S.Ct. 543, 97 L.Ed. 770 (1953) (internal quotation marks omitted).

Legislative inquiries might involve the President in appropriate cases; as noted, Congress's responsibilities extend to “every affair of government.” *Ibid.* (internal quotation marks omitted). Because the President's approach does not take adequate account of these significant congressional interests, we do not adopt it.

...

The House meanwhile would have us ignore that these suits involve the President. Invoking our precedents concerning investigations that did not target the President's papers, the House urges us to uphold its subpoenas because they “relate[] to a valid legislative purpose” or “concern[] a subject on which legislation could be had.” Brief for Respondent 46 (quoting *Barenblatt v. United States*, 360 U.S. 109, 127, 79 S.Ct. 1081, 3 L.Ed.2d 1115 (1959), and *Eastland*, 421 U.S. at 506, 95 S.Ct. 1813). That approach is appropriate, the House argues, because the cases before us are not “momentous separation-of-powers disputes.” Brief for Respondent 1.

*10 Largely following the House's lead, the courts below treated these cases much like any other, applying precedents that do not involve the President's papers. See 943 F.3d at 656–670; 940 F.3d at 724–742. The Second Circuit concluded that “this case does not concern separation of powers” because the House seeks personal documents and the President sued in his personal capacity. 943 F.3d at 669. The D. C. Circuit, for its part, recognized that “separation-of-powers concerns still linger in the air,” and therefore it did not afford deference to the House. 940 F.3d at

725–726. But, because the House sought only personal documents, the court concluded that the case “present[ed] no direct interbranch dispute.” *Ibid.*

The House’s approach fails to take adequate account of the significant separation of powers issues raised by congressional subpoenas for the President’s information. Congress and the President have an ongoing institutional relationship as the “opposite and rival” political branches established by the Constitution. The Federalist No. 51, at 349. As a result, congressional subpoenas directed at the President differ markedly from congressional subpoenas we have previously reviewed, e.g., *Barenblatt*, 360 U.S. at 127, 79 S.Ct. 1081; *Eastland*, 421 U.S. at 506, 95 S.Ct. 1813, and they bear little resemblance to criminal subpoenas issued to the President in the course of a specific investigation, see *Vance*, — U.S. p., —, — S.Ct., p. —, *ante*, p. —, 2020 WL 3848062; *Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039. Unlike those subpoenas, congressional subpoenas for the President’s information unavoidably pit the political branches against one another. *Cf. In re Sealed Case*, 121 F.3d 729, 753 (CADDC 1997) (“The President’s ability to withhold information from Congress implicates different constitutional considerations than the President’s ability to withhold evidence in judicial proceedings.”).

Far from accounting for separation of powers concerns, the House’s approach aggravates them by leaving essentially no limits on the congressional power to subpoena the President’s personal records. Any personal paper possessed by a President could potentially “relate to” a conceivable subject of legislation, for Congress has broad legislative powers that touch a vast number of subjects. Brief for Respondent 46. The President’s financial records could relate to economic reform, medical records to health reform, school transcripts to education reform, and so on. Indeed, at argument, the House was unable to identify *any* type of information that lacks some relation to potential legislation. See Tr. of Oral Arg. 52–53, 62–65.

Without limits on its subpoena powers, Congress could “exert an imperious controul” over the Executive Branch and aggrandize itself at the President’s expense, just as the Framers feared. The Federalist No. 71, at 484 (A. Hamilton); see *id.*, No. 48, at 332–333 (J. Madison); *Bowsher v. Synar*, 478 U.S. 714, 721–722, 727, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986). And a limitless subpoena power would transform the “established practice” of the political branches. *Noel Canning*, 573 U.S. at 524, 134 S.Ct. 2550 (internal quotation marks omitted). Instead of negotiating over information requests, Congress could simply walk away from the bargaining table and compel compliance in court.

The House and the courts below suggest that these separation of powers concerns are not fully implicated by the particular subpoenas here, but we disagree. We would have to be “blind” not to

see what “[a]ll others can see and understand”: that the subpoenas do not represent a run-of-the-mill legislative effort but rather a clash between rival branches of government over records of intense political interest for all involved. *Rumely*, 345 U.S. at 44, 73 S.Ct. 543 (quoting *Child Labor Tax Case*, 259 U.S. 20, 37, 42 S.Ct. 449, 66 L.Ed. 817 (1922) (Taft, C. J.)).

*11 The interbranch conflict here does not vanish simply because the subpoenas seek personal papers or because the President sued in his personal capacity. The President is the only person who alone composes a branch of government. As a result, there is not always a clear line between his personal and official affairs. “The interest of the man” is often “connected with the constitutional rights of the place.” *The Federalist* No. 51, at 349. Given the close connection between the Office of the President and its occupant, congressional demands for the President’s papers can implicate the relationship between the branches regardless whether those papers are personal or official. Either way, a demand may aim to harass the President or render him “complaisan[t] to the humors of the Legislature.” *Id.*, No. 71, at 483. In fact, a subpoena for personal papers may pose a heightened risk of such impermissible purposes, precisely because of the documents’ personal nature and their less evident connection to a legislative task. No one can say that the controversy here is less significant to the relationship between the branches simply because it involves personal papers. Quite the opposite. That appears to be what makes the matter of such great consequence to the President and Congress.

In addition, separation of powers concerns are no less palpable here simply because the subpoenas were issued to third parties. Congressional demands for the President’s information present an interbranch conflict no matter where the information is held—it is, after all, the President’s information. Were it otherwise, Congress could sidestep constitutional requirements any time a President’s information is entrusted to a third party—as occurs with rapidly increasing frequency. *Cf. Carpenter v. United States*, 585 U. S. —, —, —, 138 S.Ct.2206, 2219, 2220,201 L.Ed.2d 507(2018). Indeed, Congress could declare open season on the President’s information held by schools, archives, internet service providers, e-mail clients, and financial institutions. The Constitution does not tolerate such ready evasion; it “deals with substance, not shadows.” *Cummings v. Missouri*, 4 Wall. 277, 325, 18 L.Ed. 356 (1867).

...

Congressional subpoenas for the President’s personal information implicate weighty concerns regarding the separation of powers. Neither side, however, identifies an approach that accounts for these concerns. For more than two centuries, the political branches have resolved information disputes using the wide variety of means that the Constitution puts at their disposal. The nature

of such interactions would be transformed by judicial enforcement of either of the approaches suggested by the parties, eroding a “[d]eeply embedded traditional way[] of conducting government.” *Youngstown Sheet & Tube Co.*, 343 U.S. at 610, 72 S.Ct. 863 (Frankfurter, J., concurring).

A balanced approach is necessary, one that takes a “considerable impression” from “the practice of the government,” *McCulloch v. Maryland*, 4 Wheat. 316, 401, 4 L.Ed. 579 (1819); see Noel Canning, 573 U.S. at 524–526, 134 S.Ct. 2550, and “resist[s]” the “pressure inherent within each of the separate Branches to exceed the outer limits of its power,” *INS v. Chadha*, 462 U.S. 919, 951, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). We therefore conclude that, in assessing whether a subpoena directed at the President’s personal information is “related to, and in furtherance of, a legitimate task of the Congress,” *Watkins*, 354 U.S. at 187, 77 S.Ct. 1173, courts must perform a careful analysis that takes adequate account of the separation of powers principles at stake, including both the significant legislative interests of Congress and the “unique position” of the President, *Clinton*, 520 U.S. at 698, 117 S.Ct. 1636 (internal quotation marks omitted). Several special considerations inform this analysis.

First, courts should carefully assess whether the asserted legislative purpose warrants the significant step of involving the President and his papers. “‘[O]ccasion[s] for constitutional confrontation between the two branches’ should be avoided whenever possible.” *Cheney v. United States Dist. Court for D. C.*, 542 U.S. 367, 389–390, 124 S.Ct. 2576, 159 L.Ed.2d 459 (2004) (quoting *Nixon*, 418 U.S. at 692, 94 S.Ct. 3090). Congress may not rely on the President’s information if other sources could reasonably provide Congress the information it needs in light of its particular legislative objective. The President’s unique constitutional position means that Congress may not look to him as a “case study” for general legislation. *Cf.* 943 F.3d at 662–663, n. 67.

*12 Unlike in criminal proceedings, where “[t]he very integrity of the judicial system” would be undermined without “full disclosure of all the facts,” *Nixon*, 418 U.S. at 709, 94 S.Ct. 3090, efforts to craft legislation involve predictive policy judgments that are “not hamper[ed] ... in quite the same way” when every scrap of potentially relevant evidence is not available, *Cheney*, 542 U.S. at 384, 124 S.Ct. 2576; see Senate Select Committee, 498 F.2d at 732. While we certainly recognize Congress’s important interests in obtaining information through appropriate inquiries, those interests are not sufficiently powerful to justify access to the President’s personal papers when other sources could provide Congress the information it needs.

Second, to narrow the scope of possible conflict between the branches, courts should insist on a subpoena no broader than reasonably necessary to support Congress’s legislative objective. The specificity of the subpoena’s request “serves as an important safeguard against unnecessary intrusion into the operation of the Office of the President.” *Cheney*, 542 U.S. at 387, 124 S.Ct. 2576.

Third, courts should be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose. The more detailed and substantial the evidence of Congress’s legislative purpose, the better. *See Watkins*, 354 U.S. at 201, 205, 77 S.Ct. 1173 (preferring such evidence over “vague” and “loosely worded” evidence of Congress’s purpose). That is particularly true when Congress contemplates legislation that raises sensitive constitutional issues, such as legislation concerning the Presidency. In such cases, it is “impossible” to conclude that a subpoena is designed to advance a valid legislative purpose unless Congress adequately identifies its aims and explains why the President’s information will advance its consideration of the possible legislation. *Id.*, at 205–206, 214–215.

Fourth, courts should be careful to assess the burdens imposed on the President by a subpoena. We have held that burdens on the President’s time and attention stemming from judicial process and litigation, without more, generally do not cross constitutional lines. *See Vance*, — U.S. at — — —, — S.Ct. at — — —, ante, at 12–14, 2020 WL 3848062; *Clinton*, 520 U.S. at 704–705, 117 S.Ct. 1636. But burdens imposed by a congressional subpoena should be carefully scrutinized, for they stem from a rival political branch that has an ongoing relationship with the President and incentives to use subpoenas for institutional advantage.

Other considerations may be pertinent as well; one case every two centuries does not afford enough experience for an exhaustive list.

When Congress seeks information “needed for intelligent legislative action,” it “unquestionably” remains “the duty of all citizens to cooperate.” *Watkins*, 354 U.S. at 187, 77 S.Ct. 1173 (emphasis added). Congressional subpoenas for information from the President, however, implicate special concerns regarding the separation of powers. The courts below did not take adequate account of those concerns. The judgments of the Courts of Appeals for the D. C. Circuit and the Second Circuit are vacated, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice THOMAS, dissenting.

Three Committees of the U. S. House of Representatives issued subpoenas to several accounting and financial firms to obtain the personal financial records of the President, his family, and several of his business entities.

...

*13 Petitioners challenge the validity of these subpoenas. In doing so, they call into question our precedents to the extent that they allow Congress to issue legislative subpoenas for the President's private, nonofficial documents. I would hold that Congress has no power to issue a legislative subpoena for private, nonofficial documents—whether they belong to the President or not. Congress may be able to obtain these documents as part of an investigation of the President, but to do so, it must proceed under the impeachment power.

...

At the time of the founding, the power to subpoena private, nonofficial documents was not included by necessary implication in any of Congress' legislative powers. This understanding persisted for decades and is consistent with the Court's first decision addressing legislative subpoenas, *Kilbourn v. Thompson*, 103 U.S. 168, 26 L.Ed. 377 (1881). The test that this Court created in *McGrain v. Daugherty*, 273 U.S. 135, 47 S.Ct. 319, 71 L.Ed. 580 (1927), and the majority's variation on that standard today, are without support as applied to private, nonofficial documents.

...

Given that Congress has no exact precursor in England or colonial America, founding-era congressional practice is especially informative about the scope of implied legislative powers. Thus, it is highly probative that no founding-era Congress issued a subpoena for private, nonofficial documents. Although respondents could not identify the first such legislative subpoena at oral argument, Tr. of Oral Arg. 56, Congress began issuing them by the end of the 1830s. However, the practice remained controversial in Congress and this Court throughout the first century of the Republic.

...

When this Court first addressed a legislative subpoena, it refused to uphold it. After casting doubt on legislative subpoenas generally, the Court in *Kilbourn v. Thompson*, 103 U.S. 168, held that the subpoena at issue was unlawful because it sought to investigate private conduct.

...

Nearly half a century later, in *McGrain v. Daugherty*, the Court reached the question reserved in *Kilbourn*—whether Congress has the power to issue legislative subpoenas. It rejected *Kilbourn*'s reasoning and upheld the power to issue legislative subpoenas as long as they were relevant to a legislative power. Although *McGrain* involved oral testimony, the Court has since extended this test to subpoenas for private documents. The Committees rely on *McGrain*, but this line of cases misunderstands both the original meaning of Article I and the historical practice underlying it.

...

Since *McGrain*, the Court has pared back Congress' authority to compel testimony and documents. It has held that certain convictions of witnesses for contempt of Congress violated the Fifth Amendment. See *Watkins v. United States*, 354 U.S. 178, 77 S.Ct. 1173, 1 L.Ed.2d 1273 (1957) (Due Process Clause); *Quinn v. United States*, 349 U.S. 155, 75 S.Ct. 668, 99 L.Ed. 964 (1955) (Self-Incrimination Clause); see also *Barenblatt v. United States*, 360 U.S. 109, 153–154, 79 S.Ct. 1081, 3 L.Ed.2d 1115 (1959) (Black, J., dissenting). It has also affirmed the reversal of a conviction on the ground that the Committee lacked authority to issue the subpoena.

See *United States v. Rumely*, 345 U.S. 41, 73 S.Ct. 543, 97 L.Ed. 770 (1953). And today, it creates a new four-part, nonexhaustive test for cases involving the President. *Ante*, at ——— ——— ———. Rather than continue our trend of trying to compensate for *McGrain*, I would simply decline to apply it in these cases because it is readily apparent that the Committees have no constitutional authority to subpoena private, nonofficial documents...

If the Committees wish to investigate alleged wrongdoing by the President and obtain documents from him, the Constitution provides Congress with a special mechanism for doing so: impeachment.

...

I would reverse in full because the power to subpoena private, nonofficial documents is not a necessary implication of Congress' legislative powers. If Congress wishes to obtain these documents, it should proceed through the impeachment power. Accordingly, I respectfully dissent.

Justice ALITO, dissenting.

Justice THOMAS makes a valuable argument about the constitutionality of congressional subpoenas for a President's personal documents. In these cases, however, I would assume for the sake of argument that such subpoenas are not categorically barred. Nevertheless, legislative subpoenas for a President's personal documents are inherently suspicious. Such documents are seldom of any special value in considering potential legislation, and subpoenas for such documents can easily be used for improper non-legislative purposes. Accordingly, courts must be very sensitive to separation of powers issues when they are asked to approve the enforcement of such subpoenas.

*23 In many cases, disputes about subpoenas for Presidential documents are fought without judicial involvement. If Congress attempts to obtain such documents by subpoenaing a President directly, those two heavyweight institutions can use their considerable weapons to settle the matter. See *ante*, at ——— (opinion of the Court) ("Congress and the President maintained this tradition of negotiation and compromise—without the involvement of this Court—until the

present dispute”). But when Congress issues such a subpoena to a third party, Congress must surely appreciate that the Judiciary may be pulled into the dispute, and Congress should not expect that the courts will allow the subpoena to be enforced without seriously examining its legitimacy.

Whenever such a subpoena comes before a court, Congress should be required to make more than a perfunctory showing that it is seeking the documents for a legitimate legislative purpose and not for the purpose of exposing supposed Presidential wrongdoing. See *ante*, at ———. The House can inquire about possible Presidential wrongdoing pursuant to its impeachment power, see *ante*, at ——— – ——— (THOMAS, J., dissenting), but the Committees do not defend these subpoenas as ancillary to that power.

Instead, they claim that the subpoenas were issued to gather information that is relevant to legislative issues, but there is disturbing evidence of an improper law enforcement purpose. See 940 F.3d 710, 767–771 (CA DC 2019) (Rao, J., dissenting). In addition, the sheer volume of documents sought calls out for explanation. See 943 F.3d 627, 676–681 (CA2 2019) (Livingston, J., concurring in part and dissenting in part).

The Court recognizes that the decisions below did not give adequate consideration to separation of powers concerns. Therefore, after setting out a non-exhaustive list of considerations for the lower courts to take into account, *ante*, at ——— – ———, the Court vacates the judgments of the Courts of Appeals and sends the cases back for reconsideration. I agree that the lower courts erred and that these cases must be remanded, but I do not think that the considerations outlined by the Court can be properly satisfied unless the House is required to show more than it has put forward to date.

Specifically, the House should provide a description of the type of legislation being considered, and while great specificity is not necessary, the description should be sufficient to permit a court to assess whether the particular records sought are of any special importance. The House should also spell out its constitutional authority to enact the type of legislation that it is contemplating, and it should justify the scope of the subpoenas in relation to the articulated legislative needs. In addition, it should explain why the subpoenaed information, as opposed to information available from other sources, is needed. Unless the House is required to make a showing along these lines, I would hold that enforcement of the subpoenas cannot be ordered. Because I find the terms of the Court’s remand inadequate, I must respectfully dissent.

Trump v. Vance

Chief Justice ROBERTS delivered the opinion of the Court.

In our judicial system, “the public has a right to every man’s evidence.” Since the earliest days of the Republic, “every man” has included the President of the United States. Beginning with Jefferson and carrying on through Clinton, Presidents have uniformly testified or produced documents in criminal proceedings when called upon by federal courts. This case involves—so far as we and the parties can tell—the first state criminal subpoena directed to a President. The President contends that the subpoena is unenforceable. We granted certiorari to decide whether Article II and the Supremacy Clause categorically preclude, or require a heightened standard for, the issuance of a state criminal subpoena to a sitting President.

I.

In the summer of 2018, the New York County District Attorney’s Office opened an investigation into what it opaquely describes as “business transactions involving multiple individuals whose conduct may have violated state law.” Brief for Respondent Vance 2. A year later, the office—acting on behalf of a grand jury—served a subpoena *duces tecum* (essentially a request to produce evidence) on Mazars USA, LLP, the personal accounting firm of President Donald J. Trump. The subpoena directed Mazars to produce financial records relating to the President and business organizations affiliated with him, including “[t]ax returns and related schedules,” from “2011 to the present.” App. to Pet. for Cert. 119a.

The President, acting in his personal capacity, sued the district attorney and Mazars in Federal District Court to enjoin enforcement of the subpoena. He argued that, under Article II and the Supremacy Clause, a sitting President enjoys absolute immunity from state criminal process. He asked the court to issue a “declaratory judgment that the subpoena is invalid and unenforceable while the President is in office” and to permanently enjoin the district attorney “from taking any action to enforce the subpoena.” Amended Complaint in No. 1:19-cv-8694 (SDNY, Sept. 25, 2019), p. 19. Mazars, concluding that the dispute was between the President and the district attorney, took no position on the legal issues raised by the President.

The District Court abstained from exercising jurisdiction and dismissed the case based on *Younger v. Harris*, 401 U. S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), which generally precludes federal courts from intervening in ongoing state criminal prosecutions. 395 F.Supp.3d 283, 290 (SDNY 2019). In an alternative holding, the court ruled that the President was not entitled to injunctive relief. *Ibid*.

The Second Circuit met the District Court halfway. As to the dismissal, the Court of Appeals held that *Younger* abstention was inappropriate because that doctrine’s core justification—“preventing friction” between States and the Federal Government—is diminished when state and federal actors are already in conflict, as the district attorney and the President were. 941 F.3d 631, 637, 639 (2019).

On the merits, the Court of Appeals agreed with the District Court’s denial of a preliminary injunction. Drawing on the 200-year history of Presidents being subject to federal judicial process, the Court of Appeals concluded that “presidential immunity does not bar the enforcement of a state grand jury subpoena directing a third party to produce non-privileged material, even when the subject matter under investigation pertains to the President.” *Id.*, at 640. It also rejected the argument raised by the United States as *amicus curiae* that a state grand jury subpoena must satisfy a heightened showing of need. The court reasoned that the proposed test, derived from cases addressing privileged Executive Branch communications, “ha[d] little bearing on a subpoena” seeking “information relating solely to the President in his private capacity and disconnected from the discharge of his constitutional obligations.” *Id.*, at 645–646.

We granted certiorari. 589 U. S. —, 140 S.Ct. 659, 205 L.Ed.2d 418 (2019).

II.

In the summer of 1807, all eyes were on Richmond, Virginia. Aaron Burr, the former Vice President, was on trial for treason. Fallen from political grace after his fatal duel with Alexander Hamilton, and with a murder charge pending in New Jersey, Burr followed the path of many down-and-out Americans of his day—he headed West in search of new opportunity. But Burr was a man with outsized ambitions. Together with General James Wilkinson, the Governor of the Louisiana Territory, he hatched a plan to establish a new territory in Mexico, then controlled by Spain. Both men anticipated that war between the United States and Spain was imminent, and when it broke out they intended to invade Spanish territory at the head of a private army.

*5 But while Burr was rallying allies to his cause, tensions with Spain eased and rumors began to swirl that Burr was conspiring to detach States by the Allegheny Mountains from the Union. Wary of being exposed as the principal co-conspirator, Wilkinson took steps to ensure that any blame would fall on Burr. He sent a series of letters to President Jefferson accusing Burr of plotting to attack New Orleans and revolutionize the Louisiana Territory.

Jefferson, who despised his former running mate Burr for trying to steal the 1800 presidential election from him, was predisposed to credit Wilkinson's version of events. The President sent a special message to Congress identifying Burr as the "prime mover" in a plot "against the peace and safety of the Union." 16 Annals of Cong. 39–40 (1807).

...

In the lead-up to trial, Burr, taking aim at his accusers, moved for a subpoena *duces tecum* directed at Jefferson. The draft subpoena required the President to produce an October 21, 1806 letter from Wilkinson and accompanying documents, which Jefferson had referenced in his message to Congress. The prosecution opposed the request, arguing that a President could not be subjected to such a subpoena and that the letter might contain state secrets. Following four days of argument, Marshall announced his ruling to a packed chamber.

The President, Marshall declared, does not "stand exempt from the general provisions of the constitution" or, in particular, the Sixth Amendment's guarantee that those accused have compulsory process for obtaining witnesses for their defense. *United States v. Burr*, 25 F.Cas. 30, 33–34 (No. 14,692d) (CC Va. 1807). At common law the "single reservation" to the duty to testify in response to a subpoena was "the case of the king," whose "dignity" was seen as "incompatible" with appearing "under the process of the court." *Id.*, at 34. But, as Marshall explained, a king is born to power and can "do no wrong." *Ibid.* The President, by contrast, is "of the people" and subject to the law. *Ibid.* According to Marshall, the sole argument for exempting the President from testimonial obligations was that his "duties as chief magistrate demand his whole time for national objects." *Ibid.* But, in Marshall's assessment, those demands were "not unremitting." *Ibid.* And should the President's duties preclude his attendance at a particular time and place, a court could work that out upon return of the subpoena. *Ibid.*

*6 Marshall also rejected the prosecution's argument that the President was immune from a subpoena *duces tecum* because executive papers might contain state secrets. "A subpoena duces tecum," he said, "may issue to any person to whom an ordinary subpoena may issue." *Ibid.* As he explained, no "fair construction" of the Constitution supported the conclusion that the right "to compel the attendance of witnesses[] does not extend" to requiring those witnesses to "bring[] with them such papers as may be material in the defence." *Id.*, at 35. And, as a matter of basic fairness, permitting such information to be withheld would "tarnish the reputation of the court." *Id.*, at 37. As for "the propriety of introducing any papers," that would "depend on the character of the paper, not on the character of the person who holds it." *Id.*, at 34. Marshall acknowledged that the papers sought by Burr could contain information "the disclosure of which would endanger the public safety," but stated that, again, such concerns would have "due consideration" upon the return of the subpoena. *Id.*, at 37.

While the arguments unfolded, Jefferson, who had received word of the motion, wrote to the prosecutor indicating that he would—subject to the prerogative to decide which executive communications should be withheld—"furnish on all occasions, whatever the purposes of justice may require." Letter from T. Jefferson to G. Hay (June 12, 1807), in 10 Works of Thomas Jefferson 398, n. (P. Ford ed. 1905). His "personal attendance," however, was out of the question, for it "would leave the nation without" the "sole branch which the constitution requires to be always in function." Letter from T. Jefferson to G. Hay (June 17, 1807), *inid.*, at 400–401, n.

Before Burr received the subpoenaed documents, Marshall rejected the prosecution's core legal theory for treason and Burr was accordingly acquitted. Jefferson, however, was not done. Committed to salvaging a conviction, he directed the prosecutors to proceed with a misdemeanor (yes, misdemeanor) charge for inciting war against Spain. Burr then renewed his request for Wilkinson's October 21 letter, which he later received a copy of, and subpoenaed a second letter, dated November 12, 1806, which the prosecutor claimed was privileged. Acknowledging that the President may withhold information to protect public safety, Marshall instructed that Jefferson should "state the particular reasons" for withholding the letter. *United States v. Burr*, 25 F.Cas. 187, 192, (No. 14694) (CC Va. 1807). The court, paying "all proper respect" to those reasons, would then decide whether to compel disclosure. *Ibid.* But that decision was averted when the misdemeanor trial was cut short after it became clear that the prosecution lacked the evidence to convict.

In the two centuries since the Burr trial, successive Presidents have accepted Marshall's ruling that the Chief Executive is subject to subpoena.

...

*7 The bookend to Marshall's ruling came in 1974 when the question he never had to decide—whether to compel the disclosure of official communications over the objection of the President—came to a head. That spring, the Special Prosecutor appointed to investigate the break-in of the Democratic National Committee Headquarters at the Watergate complex filed an indictment charging seven defendants associated with President Nixon and naming Nixon as an unindicted co-conspirator. As the case moved toward trial, the Special Prosecutor secured a subpoena *duces tecum* directing Nixon to produce, among other things, tape recordings of Oval Office meetings. Nixon moved to quash the subpoena, claiming that the Constitution provides an absolute privilege of confidentiality to all presidential communications. This Court rejected that argument in *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), a decision we later described as “unequivocally and emphatically endors[ing] Marshall's” holding that Presidents are subject to subpoena. *Clinton v. Jones*, 520 U.S. 681, 704, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997).

The *Nixon* Court readily acknowledged the importance of preserving the confidentiality of communications “between high Government officials and those who advise and assist them.” 418 U.S. at 705, 94 S.Ct. 3090.

...

But, like Marshall two centuries prior, the Court recognized the countervailing interests at stake. Invoking the common law maxim that “the public has a right to every man's evidence,” the Court observed that the public interest in fair and accurate judicial proceedings is at its height in the criminal setting, where our common commitment to justice demands that “guilt shall not escape” nor “innocence suffer.” *Id.*, at 709, 94 S.Ct. 3090. Because these dual aims would be “defeated if judgments” were “founded on a partial or speculative presentation of the facts,” the *Nixon* Court recognized that it was “imperative” that “compulsory process be available for the production of evidence needed either by the prosecution or the defense.” *Ibid.*

The Court thus concluded that the President’s “generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.” *Id.*, at 713, 94 S.Ct. 3090. Two weeks later, President Nixon dutifully released the tapes.

III.

The history surveyed above all involved *federal* criminal proceedings. Here we are confronted for the first time with a subpoena issued to the President by a local grand jury operating under the supervision of a state court.

In the President’s view, that distinction makes all the difference. He argues that the Supremacy Clause gives a sitting President absolute immunity from state criminal subpoenas because compliance with those subpoenas would categorically impair a President’s performance of his Article II functions. The Solicitor General, arguing on behalf of the United States, agrees with much of the President’s reasoning but does not commit to his bottom line. Instead, the Solicitor General urges us to resolve this case by holding that a state grand jury subpoena for a sitting President’s personal records must, at the very least, “satisfy a heightened standard of need,” which the Solicitor General contends was not met here. Brief for United States as *Amicus Curiae* 26, 29.

A.

We begin with the question of absolute immunity. No one doubts that Article II guarantees the independence of the Executive Branch. As the head of that branch, the President “occupies a unique position in the constitutional scheme.” *Nixon v. Fitzgerald*, 457 U.S. 731, 749, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982). His duties, which range from faithfully executing the laws to commanding the Armed Forces, are of unrivaled gravity and breadth. Quite appropriately, those duties come with protections that safeguard the President’s ability to perform his vital functions. See, *e.g., ibid.* (concluding that the President enjoys “absolute immunity from damages liability predicated on his official acts”); *Nixon*, 418 U.S. at 708, 94 S.Ct. 3090 (recognizing that presidential communications are presumptively privileged).

*8 In addition, the Constitution guarantees “the entire independence of the General Government from any control by the respective States.” *Farmers and Mechanics Sav. Bank of Minneapolis v. Minnesota*, 232 U.S. 516, 521, 34 S.Ct. 354, 58 L.Ed. 706 (1914). As we have often repeated, “States have no power ... to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress.” *McCulloch v. Maryland*, 4 Wheat. 316, 436, 4 L.Ed. 579 (1819). It follows that States also lack the power to impede the President’s execution of those laws.

Marshall’s ruling in *Burr*, entrenched by 200 years of practice and our decision in *Nixon*, confirms that federal criminal subpoenas do not “rise to the level of constitutionally forbidden impairment of the Executive’s ability to perform its constitutionally mandated functions.” *Clinton*, 520 U.S. at 702–703, 117 S.Ct. 1636. But the President, joined in part by the Solicitor General, argues that state criminal subpoenas pose a unique threat of impairment and thus demand greater protection. To be clear, the President does not contend here that this subpoena, in particular, is impermissibly burdensome. Instead he makes a categorical argument about the burdens generally associated with state criminal subpoenas, focusing on three: diversion, stigma, and harassment. We address each in turn.

1.

The President’s primary contention, which the Solicitor General supports, is that complying with state criminal subpoenas would necessarily divert the Chief Executive from his duties. He grounds that concern in *Nixon v. Fitzgerald*, which recognized a President’s “absolute immunity from damages liability predicated on his official acts.” 457 U.S. at 749, 102 S.Ct. 2690. In explaining the basis for that immunity, this Court observed that the prospect of such liability could “distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve.” *Id.*, at 753, 102 S.Ct. 2690. The President contends that the diversion occasioned by a state criminal subpoena imposes an equally intolerable burden on a President’s ability to perform his Article II functions.

But *Fitzgerald* did not hold that distraction was sufficient to confer absolute immunity. We instead drew a careful analogy to the common law absolute immunity of judges and prosecutors, concluding that a President, like those officials, must “deal fearlessly and impartially with the duties of his office”—not be made “unduly cautious in the discharge of [those] duties” by the prospect of civil liability for official acts. *Id.*, at 751–752, 102 S.Ct. 2690 (internal quotation marks omitted). Indeed, we expressly rejected immunity based on distraction alone 15 years later in *Clinton v. Jones*. There, President Clinton argued that the risk of being “distracted by the need

to participate in litigation” entitled a sitting President to absolute immunity from civil liability, not just for official acts, as in *Fitzgerald*, but for private conduct as well. 520 U.S. at 694, n. 19, 117 S.Ct. 1636. We disagreed with that rationale, explaining that the “dominant concern” in *Fitzgerald* was not mere distraction but the distortion of the Executive’s “decisionmaking process” with respect to official acts that would stem from “worry as to the possibility of damages.” 520 U.S. at 694, n. 19, 117 S.Ct. 1636. The Court recognized that Presidents constantly face myriad demands on their attention, “some private, some political, and some as a result of official duty.” *Id.*, at 705, n. 40, 117 S.Ct. 1636. But, the Court concluded, “[w]hile such distractions may be vexing to those subjected to them, they do not ordinarily implicate constitutional ... concerns.” *Ibid.*

*9 The same is true of criminal subpoenas. Just as a “properly managed” civil suit is generally “unlikely to occupy any substantial amount of” a President’s time or attention, *id.*, at 702, 117 S.Ct. 1636, two centuries of experience confirm that a properly tailored criminal subpoena will not normally hamper the performance of the President’s constitutional duties. If anything, we expect that in the mine run of cases, where a President is subpoenaed during a proceeding targeting someone else, as Jefferson was, the burden on a President will ordinarily be lighter than the burden of defending against a civil suit.

The President, however, believes the district attorney is investigating him and his businesses. In such a situation, he contends, the “toll that criminal process ... exacts from the President is even heavier” than the distraction at issue in *Fitzgerald* and *Clinton*, because “criminal litigation” poses unique burdens on the President’s time and will generate a “considerable if not overwhelming degree of mental preoccupation.” Brief for Petitioner 16–18, 30 (internal quotation marks omitted).

But the President is not seeking immunity from the diversion occasioned by the prospect of future criminal *liability*. Instead he concedes—consistent with the position of the Department of Justice—that state grand juries are free to investigate a sitting President with an eye toward charging him after the completion of his term. See Reply Brief 19 (citing Memorandum from Randolph D. Moss, Assistant Atty. Gen., Office of Legal Counsel, to the Atty. Gen.: A Sitting President’s Amenability to Indictment and Criminal Prosecution, 24 Op. OLC 222, 257, n. 36 (Oct. 16, 2000)). The President’s objection therefore must be limited to the *additional* distraction caused by the subpoena itself. But that argument runs up against the 200 years of precedent establishing that Presidents, and their official communications, are subject to judicial process, see *Burr*, 25 F.Cas. at 34, even when the President is under investigation, see *Nixon*, 418 U.S. at 706, 94 S.Ct. 3090.

2.

The President next claims that the stigma of being subpoenaed will undermine his leadership at home and abroad. Notably, the Solicitor General does not endorse this argument, perhaps because we have twice denied absolute immunity claims by Presidents in cases involving allegations of serious misconduct. See *Clinton*, 520 U.S. at 685, 117 S.Ct. 1636; *Nixon*, 418 U.S. at 687, 94 S.Ct. 3090. But even if a tarnished reputation were a cognizable impairment, there is nothing inherently stigmatizing about a President performing “the citizen’s normal duty of ... furnishing information relevant” to a criminal investigation. *Branzburg v. Hayes*, 408 U.S. 665, 691, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972).

...

3.

***10** Finally, the President and the Solicitor General warn that subjecting Presidents to state criminal subpoenas will make them “easily identifiable target[s]” for harassment. *Fitzgerald*, 457 U.S. at 753, 102 S.Ct. 2690. But we rejected a nearly identical argument in *Clinton*, where then-President Clinton argued that permitting civil liability for unofficial acts would “generate a large volume of politically motivated harassing and frivolous litigation.” *Clinton*, 520 U.S. at 708, 117 S.Ct. 1636.

...

[I]n *Clinton* we found that the risk of harassment was not “serious” because federal courts have the tools to deter and, where necessary, dismiss vexatious civil suits. 520 U.S. at 708, 117 S.Ct. 1636. And, while we cannot ignore the possibility that state prosecutors may have political motivations, see *post*, at — (ALITO, J., dissenting), here again the law already seeks to protect against the predicted abuse.

...

Given these safeguards and the Court’s precedents, we cannot conclude that absolute immunity is necessary or appropriate under Article II or the Supremacy Clause. Our dissenting colleagues agree. Justice THOMAS reaches the same conclusion based on the original understanding of the Constitution reflected in Marshall’s decision in *Burr*. *Post*, at ———, ——— – ———. And Justice ALITO, also persuaded by *Burr*, “agree[s]” that “not all” state criminal subpoenas for a President’s records “should be barred.” *Post*, at ———. On that point the Court is unanimous.

B.

We next consider whether a state grand jury subpoena seeking a President’s private papers must satisfy a heightened need standard. The Solicitor General would require a threshold showing that the evidence sought is “critical” for “specific charging decisions” and that the subpoena is a “last resort,” meaning the evidence is “not available from any other source” and is needed “now, rather than at the end of the President’s term.” Brief for United States as *Amicus Curiae* 29, 32 (internal quotation marks and alteration omitted). Justice ALITO, largely embracing those criteria, agrees that a state criminal subpoena to a President “should not be allowed unless a heightened standard is met.” *Post*, at ——— – ——— (asking whether the information is “critical” and “necessary ... now”).

We disagree, for three reasons. First, such a heightened standard would extend protection designed for official documents to the President’s private papers. As the Solicitor General and Justice ALITO acknowledge, their proposed test is derived from executive privilege cases that trace back to *Burr*. Brief for United States as *Amicus Curiae* 26–28; *post*, at ———. There, Marshall explained that if Jefferson invoked presidential privilege over executive communications, the court would not “proceed against the president as against an ordinary individual” but would instead require an affidavit from the defense that “would clearly show the paper to be essential to the justice of the case.” *Burr*, 25 F.Cas. at 192. The Solicitor General and Justice ALITO would have us apply a similar standard to a President’s personal papers. But this argument does not account for the relevant passage from *Burr*: “If there be a paper in the possession of the executive, which is *not of an official nature*, he must stand, as respects that paper, in nearly the same situation with any other individual.” *Id.*, at 191 (emphasis added). And it is only “nearly”—and not “entirely”—because the President retains the right to assert privilege over documents that, while ostensibly private, “partake of the character of an official paper.” *Id.*, at 191–192.

Second, neither the Solicitor General nor Justice ALITO has established that heightened protection against state subpoenas is necessary for the Executive to fulfill his Article II functions.

Beyond the risk of harassment, which we addressed above, the only justification they offer for the heightened standard is protecting Presidents from “unwarranted burdens.” Brief for United States as *Amicus Curiae* 28; see post, at — (asking whether “there is an urgent and critical need for the subpoenaed information”). In effect, they argue that even if federal subpoenas to a President are warranted whenever evidence is material, state subpoenas are warranted “only when [the] evidence is essential.” Brief for United States as *Amicus Curiae* 28; see post, at —. But that double standard has no basis in law. For if the state subpoena is not issued to manipulate, *supra*, at — — —, the documents themselves are not protected, *supra*, at —, and the Executive is not impaired, *supra*, at — — —, then nothing in Article II or the Supremacy Clause supports holding state subpoenas to a higher standard than their federal counterparts.

*12 Finally, in the absence of a need to protect the Executive, the public interest in fair and effective law enforcement cuts in favor of comprehensive access to evidence. Requiring a state grand jury to meet a heightened standard of need would hobble the grand jury’s ability to acquire “all information that might possibly bear on its investigation.” *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 297 (1991). And, even assuming the evidence withheld under that standard were preserved until the conclusion of a President’s term, in the interim the State would be deprived of investigative leads that the evidence might yield, allowing memories to fade and documents to disappear. This could frustrate the identification, investigation, and indictment of third parties (for whom applicable statutes of limitations might lapse). More troubling, it could prejudice the innocent by depriving the grand jury of *exculpatory* evidence.

Rejecting a heightened need standard does not leave Presidents with “no real protection.” *Post*, at — (opinion of ALITO, J.). To start, a President may avail himself of the same protections available to every other citizen. These include the right to challenge the subpoena on any grounds permitted by state law, which usually include bad faith and undue burden or breadth. See, e.g., *Virag v. Hynes*, 54 N.Y.2d 437, 442–445, 446 N.Y.S.2d 196, 430 N.E.2d at 1252–1253 (1981); *In re Grand Jury Subpoenas*, 72 N.Y.2d 307, 315–316, 532 N.Y.S.2d 722, 528 N.E.2d 1195, 1200 (1988) (recognizing that grand jury subpoenas can be challenged as “overly broad” or “unreasonably burdensome” (internal quotation marks omitted)). And, as in federal court, “[t]he high respect that is owed to the office of the Chief Executive ... should inform the conduct of the entire proceeding, including the timing and scope of discovery.” *Clinton*, 520 U.S. at 707, 117 S.Ct. 1636. See *id.*, at 724, 117 S.Ct. 1636 (BREYER, J., concurring in judgment) (stressing the need for courts presiding over suits against the President to “schedule proceedings so as to avoid significant interference with the President’s ongoing discharge of his official responsibilities”); *Nixon*, 418 U.S. at 702, 94 S.Ct. 3090 (“[W]here a subpoena is directed to a President ... appellate review ... should be particularly meticulous.”).

Furthermore, although the Constitution does not entitle the Executive to absolute immunity or a heightened standard, he is not “relegate[d]” only to the challenges available to private citizens. *Post*, at — (opinion of ALITO, J.). A President can raise subpoena-specific constitutional challenges, in either a state or federal forum. As previously noted, he can challenge the subpoena as an attempt to influence the performance of his official duties, in violation of the Supremacy Clause. See *supra*, at —. This avenue protects against local political machinations “interposed as an obstacle to the effective operation of a federal constitutional power.” *United States v. Belmont*, 301 U.S. 324, 332, 57 S.Ct. 758, 81 L.Ed. 1134 (1937).

In addition, the Executive can—as the district attorney concedes—argue that compliance with a particular subpoena would impede his constitutional duties. Brief for Respondent Vance 42. Incidental to the functions confided in Article II is “the power to perform them, without obstruction or impediment.” 3 J. Story, *Commentaries on the Constitution of the United States* § 1563, pp. 418–419 (1833). As a result, “once the President sets forth and explains a conflict between judicial proceeding and public duties,” or shows that an order or subpoena would “significantly interfere with his efforts to carry out” those duties, “the matter changes.” *Clinton*, 520 U.S. at 710, 714, 117 S.Ct. 1636 (opinion of BREYER, J.). At that point, a court should use its inherent authority to quash or modify the subpoena, if necessary to ensure that such “interference with the President’s duties would not occur.” *Id.*, at 708, 117 S.Ct. 1636 (opinion of the Court).

* * *

Two hundred years ago, a great jurist of our Court established that no citizen, not even the President, is categorically above the common duty to produce evidence when called upon in a criminal proceeding. We reaffirm that principle today and hold that the President is neither absolutely immune from state criminal subpoenas seeking his private papers nor entitled to a heightened standard of need. The “guard[] furnished to this high officer” lies where it always has—in “the conduct of a court” applying established legal and constitutional principles to individual subpoenas in a manner that preserves both the independence of the Executive and the integrity of the criminal justice system. *Burr*, 25 F.Cas. at 34.

The arguments presented here and in the Court of Appeals were limited to absolute immunity and heightened need. The Court of Appeals, however, has directed that the case be returned to the District Court, where the President may raise further arguments as appropriate. 941 F.3d at 646, n. 19.6

We affirm the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered

Justice KAVANAUGH, with whom Justice GORSUCH joins, concurring in the judgment.

The Court today unanimously concludes that a President does not possess absolute immunity from a state criminal subpoena, but also unanimously agrees that this case should be remanded to the District Court, where the President may raise constitutional and legal objections to the subpoena as appropriate. See *ante*, at ——— – ———, and n. 6; *post*, at ——— – ——— (THOMAS, J., dissenting); *post*, at ——— – ——— (ALITO, J., dissenting). I agree with those two conclusions.

* * *

The dispute over this grand jury subpoena reflects a conflict between a State's interest in criminal investigation and a President's Article II interest in performing his or her duties without undue interference. Although this case involves personal information of the President and is therefore not an executive privilege case, the majority opinion correctly concludes based on precedent that Article II and the Supremacy Clause of the Constitution supply some protection for the Presidency against state criminal subpoenas of this sort.

In our system of government, as this Court has often stated, no one is above the law. That principle applies, of course, to a President. At the same time, in light of Article II of the Constitution, this Court has repeatedly declared—and the Court indicates again today—that a court may not proceed against a President as it would against an ordinary litigant.

...

The question here, then, is how to balance the State’s interests and the Article II interests. The longstanding precedent that has applied to federal criminal subpoenas for official, privileged Executive Branch information is *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). That landmark case requires that a prosecutor establish a “demonstrated, specific need” for the President’s information. *Id.*, at 713, 94 S.Ct. 3090; see also *In re Sealed Case*, 121 F.3d 729, 753–757 (CA DC 1997); cf. *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 730–731 (CA DC 1974) (en banc) (similar standard for congressional subpoenas to the Executive Branch).

***14** The *Nixon* “demonstrated, specific need” standard is a tried-and-true test that accommodates both the interests of the criminal process and the Article II interests of the Presidency. The *Nixon* standard ensures that a prosecutor’s interest in subpoenaed information is sufficiently important to justify an intrusion on the Article II interests of the Presidency. The *Nixon* standard also reduces the risk of subjecting a President to unwarranted burdens, because it provides that a prosecutor may obtain a President’s information only in certain defined circumstances.

...

Because this case again entails a clash between the interests of the criminal process and the Article II interests of the Presidency, I would apply the longstanding *Nixon* “demonstrated, specific need” standard to this case. The majority opinion does not apply the *Nixon* standard in this distinct Article II context, as I would have done. That said, the majority opinion appropriately takes account of some important concerns that also animate *Nixon* and the Constitution’s balance of powers. The majority opinion explains that a state prosecutor may not issue a subpoena for a President’s personal information out of bad faith, malice, or an intent to harass a President, *ante*, at —; as a result of prosecutorial impropriety, *ibid.*; to seek information that is not relevant to an investigation, *ante*, at — — —; that is overly broad or unduly burdensome, *ante*, at — — —; to manipulate, influence, or retaliate against a

President’s official acts or policy decisions, *ante*, at —, —; or in a way that would impede, conflict with, or interfere with a President’s official duties, *ante*, at — — —. All nine Members of the Court agree, moreover, that a President may raise objections to a state criminal subpoena not just in state court but also in federal court.¹ And the majority opinion indicates that, in light of the “high respect that is owed to the office of the Chief Executive,” courts “should be particularly meticulous” in assessing a subpoena for a President’s personal records. *Ante*, at — (quoting *Clinton*, 520 U.S. at 707, 117 S.Ct. 1636, and *Nixon*, 418 U.S. at 702, 94 S.Ct. 3090)

In the end, much may depend on how the majority opinion’s various standards are applied in future years and decades. It will take future cases to determine precisely how much difference exists between (i) the various standards articulated by the majority opinion, (ii) the overarching *Nixon* “demonstrated, specific need” standard that I would adopt, and (iii) Justice THOMAS’s and Justice ALITO’s other proposed standards. In any event, in my view, lower courts in cases of this sort involving a President will almost invariably have to begin by delving into why the State wants the information; why and how much the State needs the information, including whether the State could obtain the information elsewhere; and whether compliance with the subpoena would unduly burden or interfere with a President’s official duties.

* * *

I agree that the case should be remanded to the District Court for further proceedings, where the President may raise constitutional and legal objections to the state grand jury subpoena as appropriate.

Justice THOMAS, dissenting.

...

I agree with the majority that the President has no absolute immunity from the issuance of this subpoena. The President also sought relief from enforcement of the subpoena, however, and he asked this Court to allow further proceedings on that question if we rejected his claim of absolute immunity. The Court inexplicably fails to address this request, although its decision leaves the President free to renew his request for an injunction against enforcement immediately on remand.

***20** I would vacate and remand to allow the District Court to determine whether enforcement of this subpoena should be enjoined because the President’s “duties as chief magistrate demand his whole time for national objects.” *Id.*, at 34. Accordingly, I respectfully dissent.

Justice ALITO, dissenting.

This case is almost certain to be portrayed as a case about the current President and the current political situation, but the case has a much deeper significance. While the decision will of course have a direct effect on President Trump, what the Court holds today will also affect all future Presidents—which is to say, it will affect the Presidency, and that is a matter of great and lasting importance to the Nation.

The event that precipitated this case is unprecedented. Respondent Vance, an elected state prosecutor, launched a criminal investigation of a sitting President and obtained a grand jury subpoena for his records. The specific question before us—whether the subpoena may be enforced—cannot be answered adequately without considering the broader question that frames it: whether the Constitution imposes restrictions on a State’s deployment of its criminal law enforcement powers against a sitting President. If the Constitution sets no such limits, then a local prosecutor may prosecute a sitting President. And if that is allowed, it follows *a fortiori* that the subpoena at issue can be enforced. On the other hand, if the Constitution does not permit a State to prosecute a sitting President, the next logical question is whether the Constitution restrains any other prosecutorial or investigative weapons.

These are important questions that go to the very structure of the Government created by the Constitution. In evaluating these questions, two important structural features must be taken into account.

I

A

The first is the nature and role of the Presidency. The Presidency, like Congress and the Supreme Court, is a permanent institution created by the Constitution. All three of these institutions are distinct from the human beings who serve in them at any point in time. In the case of Congress or the Supreme Court, the distinction is easy to perceive, since they have multiple Members. But because “[t]he President is the only person who alone composes a branch of government ..., there is not always a clear line between his personal and official affairs.” *Trump v. Mazars USA, LLP*, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (2020) *post*, at 17, 2020 WL 3848061. As a result, the law’s treatment of the person who serves as President can have an important effect on the institution, and the institution of the Presidency plays an indispensable role in our constitutional system.

...

B

The second structural feature is the relationship between the Federal Government and the States. Just as our Constitution balances power against power among the branches of the Federal Government, it also divides power between the Federal Government and the States. The Constitution permitted the States to retain many of the sovereign powers that they previously possessed, see, *e.g.*, *Murphy v. National Collegiate Athletic Assn.*, 584 U. S. ___, 138 S.Ct. 1461, 200 L.Ed.2d 854 (2018), but it gave the Federal Government powers that were deemed essential for the Nation’s well-being and, indeed, its survival. And it provided for the Federal Government to be independent of and, within its allotted sphere, supreme over the States. Art. VI, cl. 2. Accordingly, a State may not block or interfere with the lawful work of the National Government.

...

II

A

***23** In *McCulloch [v. Maryland]*, Maryland’s sovereign taxing power had to yield, and in a similar way, a State’s sovereign power to enforce its criminal laws must accommodate the indispensable role that the Constitution assigns to the Presidency. This must be the rule with respect to a state prosecution of a sitting President. Both the structure of the Government established by the Constitution and the Constitution’s provisions on the impeachment and

removal of a President make it clear that the prosecution of a sitting President is out of the question. It has been aptly said that the President is the “sole indispensable man in government,” and subjecting a sitting President to criminal prosecution would severely hamper his ability to carry out the vital responsibilities that the Constitution puts in his hands.

...

The constitutional provisions on impeachment provide further support for the rule that a President may not be prosecuted while in office. The Framers foresaw the need to provide for the possibility that a President might be implicated in the commission of a serious offense, and they did not want the country to be forced to endure such a President for the remainder of his term in office. But when a President has been elected by the people pursuant to the procedures set out in the Constitution, it is no small thing to overturn that choice. The Framers therefore crafted a special set of procedures to deal with that contingency. They put the charging decision in the hands of a body that represents all the people (the House of Representatives), not a single prosecutor or the members of a local grand jury. And they entrusted the weighty decision whether to remove a President to a supermajority of Senators, who were expected to exercise reasoned judgment and not the political passions of the day or the sentiments of a particular region.

The Constitution not only sets out the procedures for dealing with a President who is suspected of committing a serious offense; it also specifies the consequences of a judgment adverse to the President. After providing that the judgment cannot impose any punishment beyond removal from the Presidency and disqualification from holding any other federal office, the Constitution states that “the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law.” Art. I, § 3, cl. 7. The plain implication is that criminal prosecution, like removal from the Presidency and disqualification from other offices, is a consequence that can come about only after the Senate’s judgment, not during or prior to the Senate trial.

...

D

In light of the above, a subpoena like the one now before us should not be enforced unless it meets a test that takes into account the need to prevent interference with a President's discharge of the responsibilities of the office. I agree with the Court that not all such subpoenas should be barred. There may be situations in which there is an urgent and critical need for the subpoenaed information. The situation in the Burr trial, where the documents at issue were sought by a criminal defendant to defend against a charge of treason, is a good example. But in a case like the one at hand, a subpoena should not be allowed unless a heightened standard is met.

...

The important point is not that the subpoena in this case should necessarily be governed by the particular tests used in these cases, most of which involved official records that were claimed to be privileged. Rather, the point is that we should not treat this subpoena like an ordinary grand jury subpoena and should not relegate a President to the meager defenses that are available when an ordinary grand jury subpoena is challenged. But that, at bottom, is the effect of the Court's decision.

***27** The Presidency deserves greater protection. Thus, in a case like this one, a prosecutor should be required (1) to provide at least a general description of the possible offenses that are under investigation, (2) to outline how the subpoenaed records relate to those offenses, and (3) to explain why it is important that the records be produced and why it is necessary for production to occur while the President is still in office.

...

The subpoena at issue here is unprecedented. Never before has a local prosecutor subpoenaed the records of a sitting President. The Court's decision threatens to impair the functioning of the Presidency and provides no real protection against the use of the subpoena power by the Nation's 2,300+ local prosecutors. Respect for the structure of Government created by the Constitution demands greater protection for an institution that is vital to the Nation's safety and well-being.

I therefore respectfully dissent.

Department of Homeland Security v. Regents of the University of California (2020)

Chief Justice ROBERTS delivered the opinion of the Court, except as to Part IV.

In the summer of 2012, the Department of Homeland Security (DHS) announced an immigration program known as Deferred Action for Childhood Arrivals, or DACA. That program allows certain unauthorized aliens who entered the United States as children to apply for a two-year forbearance of removal. Those granted such relief are also eligible for work authorization and various federal benefits. Some 700,000 aliens have availed themselves of this opportunity.

Five years later, the Attorney General advised DHS to rescind DACA, based on his conclusion that it was unlawful. The Department's Acting Secretary issued a memorandum terminating the program on that basis. The termination was challenged by affected individuals and third parties who alleged, among other things, that the Acting Secretary had violated the Administrative Procedure Act (APA) by failing to adequately address important factors bearing on her decision. For the reasons that follow, we conclude that the Acting Secretary did violate the APA, and that the rescission must be vacated.

I

[Section I lays out the detailed facts of the case, but we have omitted it here because there is too much detail to be useful.]

II

The dispute before the Court is not whether DHS may rescind DACA. All parties agree that it may. The dispute is instead primarily about the procedure the agency followed in doing so.

The [Administrative Procedure Act] “sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts.” Franklin v. Massachusetts, 505 U.S. 788, 796 (1992). It requires agencies to engage in “reasoned decisionmaking,” Michigan v. EPA, 576 U.S. 743, 750 (2015) and directs that agency actions be “set aside” if they are “arbitrary” or “capricious,” 5 U.S.C. § 706(2)(A). Under this “narrow standard of review, . . . a court is not to substitute its judgment for that of the agency,” FCC v. Fox Television Stations, Inc., 556 U.S. 502, 513 (2009), but instead to assess only whether the decision was “based on a consideration of the relevant factors and whether there has been a clear error of judgment,” Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). .

[Sections II.A and II.B the reviewability of the agency’s decisions. The Court decides that DHS’s decision is reviewable. We have omitted it because it is too technical to be useful.]

III

A

[III.A discussed a technicality about what agency documents may be judicially reviewed.]

B

We turn, finally, to whether DHS's decision to rescind DACA was arbitrary and capricious. As noted earlier, Acting Secretary Duke's justification for the rescission was succinct: “Taking into consideration” the Fifth Circuit's conclusion that DAPA was unlawful because it conferred benefits in violation of the INA, and the Attorney General's conclusion that DACA was unlawful for the same reason, she concluded—without elaboration—that the “DACA program should be terminated.” App. to Pet. for Cert. 117a.4. . . .

[W]e [will] focus our attention on [the Regents of the University of California’s] . . . argument . . . that Acting Secretary Duke “failed to consider ... important aspect[s] of the problem” before

her. Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 43 (1983).

Whether DACA is illegal is, of course, a legal determination, and therefore a question for the Attorney General. But deciding how best to address a finding of illegality moving forward can involve important policy choices, especially when the finding concerns a program with the breadth of DACA. Those policy choices are for DHS.

Acting Secretary Duke plainly exercised such discretionary authority in winding down the program. See App. to Pet. for Cert. 117a–118a (listing the Acting Secretary's decisions on eight transition issues). Among other things, she specified that those DACA recipients whose benefits were set to expire within six months were eligible for two-year renewals. *Ibid.* . . .

[T]he Attorney General neither addressed the forbearance policy at the heart of DACA nor compelled DHS to abandon that policy. Thus, removing benefits eligibility [for DACA recipients] while continuing forbearance remained squarely within the discretion of Acting Secretary Duke, who was responsible for “[e]stablishing national immigration enforcement policies and priorities.” 116 Stat. 2178, 6 U.S.C. § 202(5). But Duke's memo offers no reason for terminating forbearance. She instead treated the Attorney General's conclusion regarding the illegality of benefits as sufficient to rescind both benefits and forbearance, without explanation.

That reasoning repeated the error we identified in one of our leading modern administrative law cases, Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co. There, the National Highway Traffic Safety Administration (NHTSA) promulgated a requirement that motor vehicles produced after 1982 be equipped with one of two passive restraints: airbags or automatic seatbelts. 463 U.S. at 37–38. Four years later, before the requirement went into effect, NHTSA concluded that automatic seatbelts, the restraint of choice for most manufacturers, would not provide effective protection. Based on that premise, NHTSA rescinded the passive restraint requirement in full. *Id.*, at 38.

We concluded that the total rescission was arbitrary and capricious. As we explained, NHTSA's justification supported only “disallow[ing] compliance by means of” automatic seatbelts. *Id.*, at 47. It did “not cast doubt” on the “efficacy of airbag technology” or upon “the need for a passive restraint standard.” *Ibid.* Given NHTSA's prior judgment that “airbags are an effective and cost-

beneficial lifesaving technology,” we held that “the mandatory passive restraint rule [could] not be abandoned without any consideration whatsoever of an airbags-only requirement.” *Id.*, at 51.

While the factual setting is different here, the error is the same. Even if it is illegal for DHS to extend work authorization and other benefits to DACA recipients, that conclusion supported only “disallow[ing]” benefits. *Id.*, at 47. It did “not cast doubt” on the legality of forbearance or upon DHS's original reasons for extending forbearance to childhood arrivals. *Ibid.* Thus, given DHS's earlier judgment that forbearance is “especially justified” for “productive young people” who were brought here as children and “know only this country as home,” App. to Pet. for Cert. 98a–99a, the DACA Memorandum could not be rescinded in full “without any consideration whatsoever” of a forbearance-only policy, *State Farm*, 463 U.S. at 51

The Government acknowledges that “[d]eferred action coupled with the associated benefits are the two legs upon which the DACA policy stands.” Reply Brief 21. It insists, however, that “DHS was not required to consider whether DACA's illegality could be addressed by separating” the two. *Ibid.* According to the Government, “It was not arbitrary and capricious for DHS to view deferred action and its collateral benefits as importantly linked.” *Ibid.* Perhaps. But that response misses the point. The fact that there may be a valid reason not to separate deferred action from benefits does not establish that DHS considered that option or that such consideration was unnecessary.

The lead dissent acknowledges that forbearance and benefits are legally distinct and can be decoupled. Post, at 1929 – 1930, n. 14 (opinion of THOMAS, J). It contends, however, that we should not “dissect” agency action “piece by piece.” Post, at 1929. The dissent instead rests on the Attorney General's legal determination—which considered only benefits—“to supply the ‘reasoned analysis’ ” to support rescission of both benefits and forbearance. Post, at 1930 (quoting *State Farm*, 463 U.S. at 42, 103 S.Ct. 2856). But *State Farm* teaches that when an agency rescinds a prior policy its reasoned analysis must consider the “alternative[s]” that are “within the ambit of the existing [policy].” *Id.*, at 51, 103 S.Ct. 2856. Here forbearance was not simply “within the ambit of the existing [policy],” it was the centerpiece of the policy: DACA, after all, stands for “*Deferred* Action for Childhood Arrivals.” App. to Pet. for Cert. 111a (emphasis added). But the rescission memorandum contains no discussion of forbearance or the option of retaining forbearance without benefits. Duke “entirely failed to consider [that] important aspect of the problem.” *State Farm*, 463 U.S. at 43, 103 S.Ct. 2856.

That omission alone renders Acting Secretary Duke's decision arbitrary and capricious. But it is not the only defect. Duke also failed to address whether there was “legitimate reliance” on the

DACA Memorandum. Smiley v. Citibank (South Dakota), N. A., 517 U.S. 735, 742 (1996). When an agency changes course, as DHS did here, it must “be cognizant that longstanding policies may have ‘engendered serious reliance interests that must be taken into account.’” Encino Motorcars, LLC v. Navarro, 136 S.Ct. 2117, 2126 (2016) (quoting Fox Television, 556 U.S. at 515). “It would be arbitrary and capricious to ignore such matters.” Id., at 515, 129 S.Ct. 1800. Yet that is what the Duke Memorandum did.

For its part, the Government does not contend that Duke considered potential reliance interests; it counters that she did not need to. In the Government's view, shared by the lead dissent, DACA recipients have no “legally cognizable reliance interests” because the DACA Memorandum stated that the program “conferred no substantive rights” and provided benefits only in two-year increments. Reply Brief 16–17; App. to Pet. for Cert. 125a. See also post, at 1930 – 1931 (opinion of THOMAS, J). But neither the Government nor the lead dissent cites any legal authority establishing that such features automatically preclude reliance interests, and we are not aware of any. These disclaimers are surely pertinent in considering the strength of any reliance interests, but that consideration must be undertaken by the agency in the first instance, subject to normal APA review. There was no such consideration in the Duke Memorandum.

Respondents and their amici assert that there was much for DHS to consider. They stress that, since 2012, DACA recipients have “enrolled in degree programs, embarked on careers, started businesses, purchased homes, and even married and had children, all in reliance” on the DACA program. Brief for Respondent Regents of Univ. of California et al. in No. 18–587, p. 41 (Brief for Regents). The consequences of the rescission, respondents emphasize, would “radiate outward” to DACA recipients’ families, including their 200,000 U.S.-citizen children, to the schools where DACA recipients study and teach, and to the employers who have invested time and money in training them. See id., at 41–42; Brief for Respondent State of New York et al. in No. 18–589, p. 42 (Brief for New York). See also Brief for 143 Businesses as Amici Curiae 17 (estimating that hiring and training replacements would cost employers \$6.3 billion). In addition, excluding DACA recipients from the lawful labor force may, they tell us, result in the loss of \$215 billion in economic activity and an associated \$60 billion in federal tax revenue over the next ten years. Brief for Regents 6. Meanwhile, States and local governments could lose \$1.25 billion in tax revenue each year. Ibid.

These are certainly noteworthy concerns, but they are not necessarily dispositive. To the Government and lead dissent's point, DHS could respond that reliance on forbearance and benefits was unjustified in light of the express limitations in the DACA Memorandum. Or it might conclude that reliance interests in benefits that it views as unlawful are entitled to no or diminished weight. And, even if DHS ultimately concludes that the reliance interests rank as

serious, they are but one factor to consider. DHS may determine, in the particular context before it, that other interests and policy concerns outweigh any reliance interests. Making that difficult decision was the agency's job, but the agency failed to do it.

DHS has considerable flexibility in carrying out its responsibility. The wind-down here is a good example of the kind of options available. Acting Secretary Duke authorized DHS to process two-year renewals for those DACA recipients whose benefits were set to expire within six months. But Duke's consideration was solely for the purpose of assisting the agency in dealing with “administrative complexities.” App. to Pet. for Cert. 116a–118a. She should have considered whether she had similar flexibility in addressing any reliance interests of DACA recipients. The lead dissent contends that accommodating such interests would be “another exercise of unlawful power,” post, at 1930 (opinion of THOMAS, J.), but the Government does not make that argument and DHS has already extended benefits for purposes other than reliance, following consultation with the Office of the Attorney General. App. to Pet. for Cert. 116a.

Had Duke considered reliance interests, she might, for example, have considered a broader renewal period based on the need for DACA recipients to reorder their affairs. Alternatively, Duke might have considered more accommodating termination dates for recipients caught in the middle of a time-bounded commitment, to allow them to, say, graduate from their course of study, complete their military service, or finish a medical treatment regimen. Or she might have instructed immigration officials to give salient weight to any reliance interests engendered by DACA when exercising individualized enforcement discretion.

To be clear, DHS was not required to do any of this or to “consider all policy alternatives in reaching [its] decision.” State Farm, 463 U.S. at 51. Agencies are not compelled to explore “every alternative device and thought conceivable by the mind of man.” Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 551 (1978). But, because DHS was “not writing on a blank slate,” post, at 1929, n. 14 (opinion of THOMAS, J.), it was required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns.

The lead dissent sees all the foregoing differently. In its view, DACA is illegal, so any actions under DACA are themselves illegal. Such actions, it argues, must cease immediately and the APA should not be construed to impede that result. *See post*, at 1928 – 1930 (opinion of THOMAS, J.).

The dissent is correct that DACA was rescinded because of the Attorney General's illegality determination. See post, at 1928. But nothing about that determination foreclosed or even addressed the options of retaining forbearance or accommodating particular reliance interests. Acting Secretary Duke should have considered those matters but did not. That failure was arbitrary and capricious in violation of the APA.

IV

[Section IV concerns a constitutional claim that does not implicate presidential powers.]

It is so ordered.

Justice THOMAS, with whom Justice ALITO and Justice GORSUCH join, concurring in the judgment in part and dissenting in part.

DHS created DACA during the Obama administration without any statutory authorization and without going through the requisite rulemaking process. As a result, the program was unlawful from its inception. The majority does not even attempt to explain why a court has the authority to scrutinize an agency's policy reasons for rescinding an unlawful program under the arbitrary and capricious microscope. The decision to countermand an unlawful agency action is clearly reasonable. So long as the agency's determination of illegality is sound, our review should be at an end.

Today's decision must be recognized for what it is: an effort to avoid a politically controversial but legally correct decision. The Court could have made clear that the solution respondents seek must come from the Legislative Branch. Instead, the majority has decided to prolong DHS' initial overreach by providing a stopgap measure of its own. In doing so, it has given the green light for future political battles to be fought in this Court rather than where they rightfully belong—the political branches. Such timidity forsakes the Court's duty to apply the law according to neutral principles, and the ripple effects of the majority's error will be felt throughout our system of self-government.

Perhaps even more unfortunately, the majority's holding creates perverse incentives, particularly for outgoing administrations. Under the auspices of today's decision, administrations can bind their successors by unlawfully adopting significant legal changes through Executive Branch agency memoranda. Even if the agency lacked authority to effectuate the changes, the changes cannot be undone by the same agency in a successor administration unless the successor provides sufficient policy justifications to the satisfaction of this Court. In other words, the majority erroneously holds that the agency is not only permitted, but required, to continue administering unlawful programs that it inherited from a previous administration. I respectfully dissent in part.

...

To lawfully implement such changes, DHS needed a grant of authority from Congress to either reclassify removable DACA recipients as lawfully present, or to exempt the entire class of aliens covered by DACA from statutory removal procedures. No party disputes that the immigration statutes lack an express delegation to accomplish either result. And, an examination of the highly reticulated immigration regime makes clear that DHS has no implicit discretion to create new

classes of lawful presence or to grant relief from removal out of whole cloth. Accordingly, DACA is substantively unlawful.

This conclusion should begin and end our review. The decision to rescind an unlawful agency action is *per se* lawful. No additional policy justifications or considerations are necessary. And, the majority's contrary holding—that an agency is not only permitted, but required, to continue an *ultra vires* action—has no basis in law...

The majority...all but ignoring DACA's substantive legal defect.... on the majority's understanding of APA review, DHS was required to provide additional policy justifications in order to rescind an action that it had no authority to take. This rule “has no basis in our jurisprudence, and support for [it] is conspicuously absent from the Court's opinion.” Massachusetts v. EPA, 549 U.S. 497, 536 (2007) (ROBERTS, C.J., dissenting).

The lack of support for the majority's position is hardly surprising in light of our Constitution's separation of powers. No court can compel Executive Branch officials to exceed their congressionally delegated powers by continuing a program that was void *ab initio*. Cf. Clinton v. City of New York, 524 U.S. 417 (1998). . . . In reviewing agency action, our role is to ensure that Executive Branch officials do not transgress the proper bounds of their authority, Arlington, 569 U.S. at 327 (ROBERTS, C.J., dissenting), not to perpetuate a decision to unlawfully wield power in direct contravention of the enabling statute's clear limits, see UARG, 573 U.S. at 327–328; Barnhart v. Sigmon Coal Co., 534 U.S. 438, 462 (2002).

Under our precedents, DHS can only exercise the authority that Congress has chosen to delegate to it. See UARG, 573 U.S. at 327. In implementing DACA, DHS under the Obama administration arrogated to itself power it was not given by Congress. Thus, every action taken by DHS under DACA is the unlawful exercise of power. Now, under the Trump administration, DHS has provided the most compelling reason to rescind DACA: The program was unlawful and would force DHS to continue acting unlawfully if it carried the program forward. . . .

Because DACA has the force and effect of law, DHS was required to observe the *1928 procedures set out in the APA if it wanted to promulgate a legislative rule. It is undisputed, however, that DHS did not do so. It provided no opportunity for interested parties to submit comments regarding the effect that the program's dramatic and very significant change in immigration law would have on various aspects of society. It provided no discussion of

economic considerations or national security interests. Nor did it provide any substantial policy justifications for treating young people brought to this country differently from other classes of aliens who have lived in the country without incident for many years. And, it did not invoke any law authorizing DHS to create such a program beyond its inexplicable assertion that DACA was consistent with existing law. Because DHS failed to engage in the statutorily mandated process, DACA never gained status as a legally binding regulation that could impose duties or obligations on third parties. See id., at —, 139 S.Ct., at 2420 (plurality opinion); id., at —, 139 S.Ct., at 2434 (opinion of GORSUCH, J.).

Given this state of affairs, it is unclear to me why DHS needed to provide any explanation whatsoever when it decided to rescind DACA. Nothing in the APA suggests that DHS was required to spill any ink justifying the rescission of an invalid legislative rule, let alone that it was required to provide policy justifications beyond acknowledging that the program was simply unlawful from the beginning. And, it is well established that we do not remand for an agency to correct its reasoning when it was required by law to take or abstain from an action. See Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish Cty., 554 U.S. 527, 544–545 (2008). Here, remand would be futile, because no amount of policy explanation could cure the fact that DHS lacked statutory authority to enact DACA in the first place.

Instead of recognizing this, the majority now requires the rescinding Department to treat the invalid rule as though it were legitimate. As just explained, such a requirement is not supported by the APA. It is also absurd, as evidenced by its application to DACA in these cases. The majority insists that DHS was obligated to discuss its choices regarding benefits and forbearance in great detail, even though no such detailed discussion accompanied DACA's issuance. And, the majority also requires DHS to discuss reliance interests at length, even though deferred action traditionally does not take reliance interests into account and DHS was not forced to explain its treatment of reliance interests in the first instance by going through notice and comment. See infra, at 1930 – 1931. The majority's demand for such an explanation here simply makes little sense.

At bottom, of course, none of this matters, because DHS did provide a sufficient explanation for its action. DHS' statement that DACA was ultra vires was more than sufficient to justify its rescission.¹² By requiring more, the majority has distorted the APA review process beyond recognition, further burdening all future attempts to rescind unlawful programs. Plaintiffs frequently bring successful challenges to agency actions by arguing that the agency has impermissibly dressed up a legislative rule as a policy statement and must comply *1929 with the relevant procedures before functionally binding regulated parties. See, e.g., Mendoza v. Perez, 754 F.3d 1002 (CADC 2014). . . . But going forward, when a rescinding agency inherits

an invalid legislative rule that ignored virtually every rulemaking requirement of the APA, it will be obliged to overlook that reality. Instead of simply terminating the program because it did not go through the requisite process, the agency will be compelled to treat an invalid legislative rule as though it were legitimate. . . .

[T]he majority claims that DHS erred by failing to take into account the reliance interests of DACA recipients. *Ante*, at 1913 – 1915. But reliance interests are irrelevant when assessing whether to rescind an action that the agency lacked statutory authority to take. No amount of reliance could ever justify continuing a program that allows DHS to wield power that neither Congress nor the Constitution gave it. Any such decision would be “not in accordance with law” or “in excess of statutory ... authority.” 5 U.S.C. §§ 706(2)(A), (C). Accordingly, DHS would simply be engaging in yet another exercise of unlawful power if it used reliance interests to justify continuing the initially unlawful program, and a court would be obligated to set aside that action.

Even if reliance interests were sometimes relevant when rescinding an ultra vires action, the rescission still would not be arbitrary and capricious here. Rather, as the majority does not dispute, the rescission is consistent with how deferred action has always worked. As a general matter, deferred action creates no rights—it exists at the Government's discretion and can be revoked at any time. See *App. to Pet. for Cert. in No. 18–587*, at 104a (DACA and expanded DACA); 8 CFR § 214.11(j)(3) (T visas); § 214.14(d)(2) (U visas); 62 Fed. Reg. 63249, 63253 (1997) (discussing Exec. Order No. 12711 for certain citizens of the People's Republic of China). The Government has made clear time and again that, because “deferred action is not an immigration status, no alien has the right to deferred action. It is *1931 used solely in the discretion of the [Government] and confers no protection or benefit upon an alien.” DHS Immigration and Customs Enforcement Office of Detention and Removal, *Detention and Deportation Officers' Field Manual* § 20.8 (Mar. 27, 2006); see also Memorandum from D. Meissner, Comm'r, INS, to Regional Directors et al., pp. 11–12 (Nov. 17, 2000); Memorandum from W. Yates, Assoc. Director of Operations, DHS, Citizenship and Immigration Servs., to Director, Vt. Serv. Center, p. 5 (2003). Thus, contrary to the majority's unsupported assertion, *ante*, at 1913, this longstanding administrative treatment of deferred action provides strong evidence and authority for the proposition that an agency need not consider reliance interests in this context.

Finally, it is inconceivable to require DHS to study reliance interests before rescinding DACA considering how the program was previously defended. DHS has made clear since DACA's inception that it would not consider such reliance interests.

Contemporaneous with the DACA memo, DHS stated that “DHS can terminate or renew deferred action at any time at the agency's discretion.” Consideration of Deferred Action for Childhood Arrivals Process, 89 Interpreter Releases 1557, App. 4, p. 2 (Aug. 20, 2012). In fact, DHS repeatedly argued in court that the 2014 memorandum was a valid exercise of prosecutorial discretion in part because deferred action created no rights on which recipients could rely. Before the Fifth Circuit, DHS stated that “DHS may revoke or terminate deferred action and begin removal proceedings at any time at its discretion.” Brief for Appellants in *Texas v. United States*, No. 1540238, p. 7; see also *id.*, at 45–46. And before this Court, in that same litigation, DHS reiterated that “DHS has absolute discretion to revoke deferred action unilaterally, without notice or process.” Brief for United States in *United States v. Texas*, O.T. 2015, No. 15–674, p. 5; see also *id.*, at 37. If that treatment of reliance interests was incorrect, it provides yet one more example of a deficiency in DACA's issuance, not its rescission.

President Trump's Acting Secretary of Homeland Security inherited a program created by President Obama's Secretary that was implemented without statutory authority and without following the APA's required procedures. Then-Attorney General Sessions correctly concluded that this ultra vires program should be rescinded. These cases could—and should—have ended with a determination that his legal conclusion was correct.

Instead, the majority today concludes that DHS was required to do far more. Without grounding its position in either the APA or precedent, the majority declares that DHS was required to overlook DACA's obvious legal deficiencies and provide additional policy reasons and justifications before restoring the rule of law. This holding is incorrect, and it will hamstring all future agency attempts to undo actions that exceed statutory authority. I would therefore reverse the judgments below and remand with instructions to dissolve the nationwide injunctions.

Seila Law LLC v. Consumer Financial Protection Bureau

CHIEF JUSTICE ROBERTS delivered the opinion of the Court with respect to Parts I, II, and III.

In the wake of the 2008 financial crisis, Congress established the Consumer Financial Protection Bureau (CFPB), an independent regulatory agency tasked with ensuring that consumer debt products are safe and transparent. In organizing the CFPB, Congress deviated from the structure of nearly every other independent administrative agency in our history. Instead of placing the agency under the leadership of a board with multiple members, Congress provided that the CFPB would be led by a single Director, who serves for a longer term than the President and cannot be removed by the President except for inefficiency, neglect, or malfeasance. The CFPB Director has no boss, peers, or voters to report to. Yet the Director wields vast rulemaking, enforcement, and adjudicatory authority over a significant portion of the U. S. economy. The question before us is whether this arrangement violates the Constitution’s separation of powers.

...

The President’s power to remove—and thus supervise—those who wield executive power on his behalf follows from the text of Article II, was settled by the First Congress, and was confirmed in the landmark decision *Myers v. United States*, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160 (1926). Our precedents have recognized only two exceptions to the President’s unrestricted removal power. In *Humphrey’s Executor v. United States*, 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611 (1935), we held that Congress could create expert agencies led by a group of principal officers removable by the President only for good cause. And in *United States v. Perkins*, 116 U.S. 483, 6 S.Ct. 449, 29 L.Ed. 700 (1886), and *Morrison v. Olson*, 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988), we held that Congress could provide tenure protections to certain inferior officers with narrowly defined duties.

We are now asked to extend these precedents to a new configuration: an independent agency that wields significant executive power and is run by a single individual who cannot be removed by the President unless certain statutory criteria are met. We decline to take that step. While we need not and do not revisit our prior decisions allowing certain limitations on the President’s removal power, there are compelling reasons not to extend those precedents to the novel context of an independent agency led by a single Director. Such an agency lacks a foundation in historical practice and clashes with constitutional structure by concentrating power in a unilateral actor insulated from Presidential control.

We therefore hold that the structure of the CFPB violates the separation of powers. We go on to hold that the CFPB Director’s removal protection is severable from the other statutory provisions bearing on the CFPB’s authority. The agency may therefore continue to operate, but its Director, in light of our decision, must be removable by the President at will.

...

In 2010, Congress... created the Consumer Financial Protection Bureau (CFPB) as an independent financial regulator within the Federal Reserve System. Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), 124 Stat. 1376. Congress tasked the CFPB with “implement[ing]” and “enforc[ing]” a large body of financial consumer protection laws to “ensur[e] that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.” 12 U. S. C. § 5511(a). Congress transferred the administration of 18 existing federal statutes to the CFPB, including the Fair Credit Reporting Act, the Fair Debt Collection Practices Act, and the Truth in Lending Act. See §§ 5512(a), 5481(12), (14). In addition, Congress enacted a new prohibition on “any unfair, deceptive, or abusive act or practice” by certain participants in the consumer-finance sector. § 5536(a)(1)(B). Congress authorized the CFPB to implement that broad standard (and the 18 pre-existing statutes placed under the agency’s purview) through binding regulations. §§ 5531(a)–(b), 5581(a)(1)(A), (b).

Congress also vested the CFPB with potent enforcement powers. The agency has the authority to conduct investigations, issue subpoenas and civil investigative demands, initiate administrative adjudications, and prosecute civil actions in federal court. §§ 5562, 5564(a), (f). To remedy violations of federal consumer financial law, the CFPB may seek restitution, disgorgement, and injunctive relief, as well as civil penalties of up to \$1,000,000 (inflation adjusted) for each day that a violation occurs. §§ 5565(a), (c)(2); 12 CFR § 1083.1(a), Table (2019). Since its inception, the CFPB has obtained over \$11 billion in relief for over 25 million consumers, including a \$1 billion penalty against a single bank in 2018. See CFPB, Financial Report of the Consumer Financial Protection Bureau, Fiscal Year 2015, p. 3; CFPB, Bureau of Consumer Financial Protection Announces Settlement With Wells Fargo for Auto-Loan Administration and Mortgage Practices (Apr. 20, 2018).

The CFPB's rulemaking and enforcement powers are coupled with extensive adjudicatory authority. The agency may conduct administrative proceedings to "ensure or enforce compliance with" the statutes and regulations it administers. 12 U. S. C. § 5563(a). When the CFPB acts as an adjudicator, it has "jurisdiction to grant any appropriate legal or equitable relief." § 5565(a)(1). The "hearing officer" who presides over the proceedings may issue subpoenas, order depositions, and resolve any motions filed by the parties. 12 CFR § 1081.104(b). At the close of the proceedings, the hearing officer issues a "recommended decision," and the CFPB Director considers that recommendation and "issue[s] a final decision and order." §§ 1081.400(d), 1081.402(b); see also § 1081.405.

Congress's design for the CFPB differed from the proposals of Professor Warren and the Obama administration in one critical respect. Rather than create a traditional independent agency headed by a multimember board or commission, Congress elected to place the CFPB under the leadership of a single Director. 12 U. S. C. § 5491(b)(1). The CFPB Director is appointed by the President with the advice and consent of the Senate. § 5491(b)(2). The Director serves for a term of five years, during which the President may remove the Director from office only for "inefficiency, neglect of duty, or malfeasance in office." §§ 5491(c)(1), (3).

Unlike most other agencies, the CFPB does not rely on the annual appropriations process for funding. Instead, the CFPB receives funding directly from the Federal Reserve, which

is itself funded outside the appropriations process through bank assessments. Each year, the CFPB requests an amount that the Director deems “reasonably necessary to carry out” the agency’s duties, and the Federal Reserve grants that request so long as it does not exceed 12% of the total operating expenses of the Federal Reserve (inflation adjusted). §§ 5497(a)(1), (2)(A)(iii), 2(B). In recent years, the CFPB’s annual budget has exceeded half a billion dollars. See CFPB, Fiscal Year 2019: Ann. Performance Plan and Rep., p. 7.

Seila Law LLC is a California-based law firm that provides debt-related legal services to clients. In 2017, the CFPB issued a civil investigative demand to Seila Law to determine whether the firm had “engag[ed] in unlawful acts or practices in the advertising, marketing, or sale of debt relief services.” 2017 WL 6536586, *1 (C.D. Cal., Aug. 25, 2017). See also 12 U. S. C. § 5562(c)(1) (authorizing the agency to issue such demands to persons who “may have any information[] relevant to a violation” of one of the laws enforced by the CFPB). The demand (essentially a subpoena) directed Seila Law to produce information and documents related to its business practices.

Seila Law asked the CFPB to set aside the demand, objecting that the agency’s leadership by a single Director removable only for cause violated the separation of powers. The CFPB declined to address that claim and directed Seila Law to comply with the demand.

When Seila Law refused, the CFPB filed a petition to enforce the demand in the District Court. See § 5562(e)(1) (creating cause of action for that purpose). In response, Seila Law renewed its defense that the demand was invalid and must be set aside because the CFPB’s structure violated the Constitution. The District Court disagreed and ordered Seila Law to comply with the demand (with one modification not relevant here).

The Court of Appeals affirmed. 923 F.3d 680 (C.A.9 2019). The Court observed that the “arguments for and against” the constitutionality of the CFPB’s structure had already been “thoroughly canvassed” in majority, concurring, and dissenting opinions by the en banc Court of Appeals for the District of Columbia Circuit in *PHH Corp. v. CFPB*, 881 F.3d 75 (2018), which had rejected a challenge similar to the one presented here. 923 F.3d at 682. The Court saw “no need to re-plow the same ground.” *Ibid.* Instead, it

provided a brief explanation for why it agreed with the *PHH* Court’s core holding. The Court took as its starting point *Humphrey’s Executor*, which had approved for-cause removal protection for the Commissioners of the Federal Trade Commission (FTC). In applying that precedent, the Court recognized that the CFPB wields “substantially more executive power than the FTC did back in 1935” and that the CFPB’s leadership by a single Director (as opposed to a multimember commission) presented a “structural difference” that some jurists had found “dispositive.” 923 F.3d at 683–684. But the Court felt bound to disregard those differences in light of our decision in *Morrison*, which permitted a single individual (an independent counsel) to exercise a core executive power (prosecuting criminal offenses) despite being insulated from removal except for cause. Because the Court found *Humphrey’s Executor* and *Morrison* “controlling,” it affirmed the District Court’s order requiring compliance with the demand. 923 F.3d at 684.

We granted certiorari to address the constitutionality of the CFPB’s structure. 589 U. S. —, 140 S.Ct. 427, 205 L.Ed.2d 244 (2019). We also requested argument on an additional question: whether, if the CFPB’s structure violates the separation of powers, the CFPB Director’s removal protection can be severed from the rest of the Dodd-Frank Act.

Because the Government agrees with petitioner on the merits of the constitutional question, we appointed Paul Clement to defend the judgment below as *amicus curiae*. He has ably discharged his responsibilities.

...

We hold that the CFPB’s leadership by a single individual removable only for inefficiency, neglect, or malfeasance violates the separation of powers.

Article II provides that “[t]he executive Power shall be vested in a President,” who must “take Care that the Laws be faithfully executed.” Art. II, § 1, cl. 1; *id.*, § 3. The entire “executive Power” belongs to the President alone. But because it would be

“impossib[le]” for “one man” to “perform all the great business of the State,” the Constitution assumes that lesser executive officers will “assist the supreme Magistrate in discharging the duties of his trust.” 30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939).

These lesser officers must remain accountable to the President, whose authority they wield. As Madison explained, “[I]f any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.” 1 Annals of Cong. 463 (1789). That power, in turn, generally includes the ability to remove executive officials, for it is “only the authority that can remove” such officials that they “must fear and, in the performance of [their] functions, obey.” *Bowsher v. Synar*, 478 U.S. 714, 726, 106 S.Ct. 3181 (1986) (internal quotation marks omitted).

The President’s removal power has long been confirmed by history and precedent. It “was discussed extensively in Congress when the first executive departments were created” in 1789. *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010). “The view that ‘prevailed, as most consonant to the text of the Constitution’ and ‘to the requisite responsibility and harmony in the Executive Department,’ was that the executive power included a power to oversee executive officers through removal.” *Ibid.* (quoting Letter from James Madison to Thomas Jefferson (June 30, 1789), 16 Documentary History of the First Federal Congress 893 (2004)). The First Congress’s recognition of the President’s removal power in 1789 “provides contemporaneous and weighty evidence of the Constitution’s meaning,” *Bowsher*, 478 U.S. at 723, 106 S.Ct. 3181 (internal quotation marks omitted), and has long been the “settled and well understood construction of the Constitution,” *Ex parte Hennen*, 13 Pet. 230, 259, 10 L.Ed. 138 (1839).

The Court recognized the President’s prerogative to remove executive officials in *Myers v. United States*, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160. Chief Justice Taft, writing for the Court, conducted an exhaustive examination of the First Congress’s determination in 1789, the views of the Framers and their contemporaries, historical practice, and our precedents up until that point. He concluded that Article II “grants to the President” the “general administrative control of those executing the laws, including the power of appointment and *removal* of executive officers.” *Id.* at 163–164, 47 S.Ct. 21 (emphasis added). Just as the President’s “selection of administrative officers is essential to the

execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible.” *Id.*, at 117, 47 S.Ct. 21. “[T]o hold otherwise,” the Court reasoned, “would make it impossible for the President . . . to take care that the laws be faithfully executed.” *Id.*, at 164, 47 S.Ct. 21.

We recently reiterated the President’s general removal power in *Free Enterprise Fund*. “Since 1789,” we recapped, “the Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary.” 561 U.S., at 483, 130 S.Ct. 3138. Although we had previously sustained congressional limits on that power in certain circumstances, we declined to extend those limits to “a new situation not yet encountered by the Court”—an official insulated by two layers of for-cause removal protection. *Id.*, at 483, 514, 130 S.Ct. 3138. In the face of that novel impediment to the President’s oversight of the Executive Branch, we adhered to the general rule that the President possesses “the authority to remove those who assist him in carrying out his duties.” *Id.*, at 513–514, 130 S.Ct. 3138.

Free Enterprise Fund left in place two exceptions to the President’s unrestricted removal power. First, in *Humphrey’s Executor*, decided less than a decade after *Myers*, the Court upheld a statute that protected the Commissioners of the FTC from removal except for “inefficiency, neglect of duty, or malfeasance in office.” 295 U.S. at 620 (quoting 15 U.S.C. § 41). In reaching that conclusion, the Court stressed that Congress’s ability to impose such removal restrictions “will depend upon the character of the office.” 295 U.S. at 631, 55 S.Ct. 869.

Because the Court limited its holding “to officers of the kind here under consideration,” *id.*, at 632, 55 S.Ct. 869, the contours of the *Humphrey’s Executor* exception depend upon the characteristics of the agency before the Court. Rightly or wrongly, the Court viewed the FTC (as it existed in 1935) as exercising “no part of the executive power.” *Id.* at 628, 55 S.Ct. 869. Instead, it was “an administrative body” that performed “specified duties as a legislative or as a judicial aid.” *Ibid.* It acted “as a legislative agency” in “making investigations and reports” to Congress and “as an agency of the judiciary” in making recommendations to courts as a master in chancery. *Ibid.* “To the extent that [the FTC] exercise[d] any executive function[,] as distinguished from executive *power* in the constitutional sense,” it did so only in the discharge of its “quasi-legislative or quasi-judicial powers.” *Ibid.* (emphasis added).

The Court identified several organizational features that helped explain its characterization of the FTC as non-executive. Composed of five members—no more than three from the same political party—the Board was designed to be “non-partisan” and to “act with entire impartiality.” *Id.*, at 624, 55 S.Ct. 869; see *id.*, at 619–620, 55 S.Ct. 869.. The FTC’s duties were “neither political nor executive,” but instead called for “the trained judgment of a body of experts” “informed by experience.” *Id.*, at 624, 55 S.Ct. 869 (internal quotation marks omitted). And the Commissioners’ staggered, seven-year terms enabled the agency to accumulate technical expertise and avoid a “complete change” in leadership “at any one time.” *Ibid.*

In short, *Humphrey’s Executor* permitted Congress to give for-cause removal protections to a multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions and was said not to exercise any executive power. Consistent with that understanding, the Court later applied “[t]he philosophy of *Humphrey’s Executor*” to uphold for-cause removal protections for the members of the War Claims Commission—a three-member “adjudicatory body” tasked with resolving claims for compensation arising from World War II. *Wiener v. United States*, 357 U.S. 349, 356, 78 S.Ct. 1275, 2 L.Ed.2d 1377 (1958).

While recognizing an exception for multimember bodies with “quasi-judicial” or “quasi-legislative” functions, *Humphrey’s Executor* reaffirmed the core holding of *Myers* that the President has “unrestrictable power ... to remove purely executive officers.” 295 U.S. at 632, 55 S.Ct. 869. The Court acknowledged that between purely executive officers on the one hand, and officers that closely resembled the FTC Commissioners on the other, there existed “a field of doubt” that the Court left “for future consideration.” *Ibid.*

We have recognized a second exception for inferior officers in two cases, *United States v. Perkins* and *Morrison v. Olson*. In *Perkins*, we upheld tenure protections for a naval cadet-engineer. 116 U.S. at 485, 6 S.Ct. 449. And, in *Morrison*, we upheld a provision granting good-cause tenure protection to an independent counsel appointed to investigate and prosecute particular alleged crimes by high-ranking Government officials. 487 U.S. at 662–663, 696–697, 108 S.Ct. 2597. Backing away from the reliance in *Humphrey’s Executor* on the concepts of “quasi-legislative” and “quasi-judicial” power, we viewed the ultimate question as whether a removal restriction is of “such a nature that [it]

impede[s] the President’s ability to perform his constitutional duty.” 487 U.S. at 691,108 S.Ct. 2597. Although the independent counsel was a single person and performed “law enforcement functions that typically have been undertaken by officials within the Executive Branch,” we concluded that the removal protections did not unduly interfere with the functioning of the Executive Branch because “the independent counsel [was] an inferior officer under the Appointments Clause, with limited jurisdiction and tenure and lacking policymaking or significant administrative authority.” *Ibid.*

These two exceptions—one for multimember expert agencies that do not wield substantial executive power, and one for inferior officers with limited duties and no policymaking or administrative authority—“represent what up to now have been the outermost constitutional limits of permissible congressional restrictions on the President’s removal power.” *PHH*, 881 F.3d at 196 (Kavanaugh, J., dissenting) (internal quotation marks omitted).

Neither *Humphrey’s Executor* nor *Morrison* resolves whether the CFPB Director’s insulation from removal is constitutional. Start with *Humphrey’s Executor*. Unlike the New Deal-era FTC upheld there, the CFPB is led by a single Director who cannot be described as a “body of experts” and cannot be considered “non-partisan” in the same sense as a group of officials drawn from both sides of the aisle. 295 U.S. at 624, 55 S.Ct. 869. Moreover, while the staggered terms of the FTC Commissioners prevented complete turnovers in agency leadership and guaranteed that there would always be some Commissioners who had accrued significant expertise, the CFPB’s single-Director structure and five-year term guarantee abrupt shifts in agency leadership and with it the loss of accumulated expertise.

In addition, the CFPB Director is hardly a mere legislative or judicial aid. Instead of making reports and recommendations to Congress, as the 1935 FTC did, the Director possesses the authority to promulgate binding rules fleshing out 19 federal statutes, including a broad prohibition on unfair and deceptive practices in a major segment of the U. S. economy. And instead of submitting recommended dispositions to an Article III court, the Director may unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications. Finally, the Director’s enforcement authority includes the power to seek daunting monetary penalties against private parties on behalf

of the United States in federal court—a quintessentially executive power not considered in *Humphrey's Executor*.

The logic of *Morrison* also does not apply. Everyone agrees the CFPB Director is not an inferior officer, and her duties are far from limited. Unlike the independent counsel, who lacked policymaking or administrative authority, the Director has the sole responsibility to administer 19 separate consumer-protection statutes that cover everything from credit cards and car payments to mortgages and student loans. It is true that the independent counsel in *Morrison* was empowered to initiate criminal investigations and prosecutions, and in that respect wielded core executive power. But that power, while significant, was trained inward to high-ranking Governmental actors identified by others, and was confined to a specified matter in which the Department of Justice had a potential conflict of interest. By contrast, the CFPB Director has the authority to bring the coercive power of the state to bear on millions of private citizens and businesses, imposing even billion-dollar penalties through administrative adjudications and civil actions.

In light of these differences, the constitutionality of the CFPB Director's insulation from removal cannot be settled by *Humphrey's Executor* or *Morrison* alone.

The question instead is whether to extend those precedents to the “new situation” before us, namely an independent agency led by a single Director and vested with significant executive power. *Free Enterprise Fund*, 561 U.S., at 483, 130 S.Ct. 3138. We decline to do so. Such an agency has no basis in history and no place in our constitutional structure.

“Perhaps the most telling indication of [a] severe constitutional problem” with an executive entity “is [a] lack of historical precedent” to support it. *Id.*, at 505, 130 S.Ct. 3138 (internal quotation marks omitted). An agency with a structure like that of the CFPB is almost wholly unprecedented.

After years of litigating the agency's constitutionality, the Courts of Appeals, parties, and amici have identified “only a handful of isolated” incidents in which Congress has

provided good-cause tenure to principal officers who wield power alone rather than as members of a board or commission. *Ibid.* “[T]hese few scattered examples”—four to be exact—shed little light. *NLRB v. Noel Canning*, 573 U.S. 513, 538, 134 S.Ct. 2550, 189 L.Ed.2d 538 (2014).

First, the CFPB’s defenders point to the Comptroller of the Currency, who enjoyed removal protection for one year during the Civil War. That example has rightly been dismissed as an aberration. It was “adopted without discussion” during the heat of the Civil War and abandoned before it could be “tested by executive or judicial inquiry.” *Myers*, 272 U.S., at 165, 47 S.Ct. 21. (At the time, the Comptroller may also have been an inferior officer, given that he labored “under the general direction of the Secretary of the Treasury.” Ch. 58, 12 Stat. 665.

Second, the supporters of the CFPB point to the Office of the Special Counsel (OSC), which has been headed by a single officer since 1978. But this first enduring single-leader office, created nearly 200 years after the Constitution was ratified, drew a contemporaneous constitutional objection from the Office of Legal Counsel under President Carter and a subsequent veto on constitutional grounds by President Reagan. In any event, the OSC exercises only limited jurisdiction to enforce certain rules governing Federal Government employers and employees. See Memorandum Opinion for the General Counsel, Civil Service Commission, 2 Op. OLC 120, 122 (1978); *Public Papers of the Presidents, Ronald Reagan, Vol. II, Oct. 26, 1988*, pp. 1391–1392 (1991). It does not bind private parties at all or wield regulatory authority comparable to the CFPB.

Third, the CFPB’s defenders note that the Social Security Administration (SSA) has been run by a single Administrator since 1994. That example, too, is comparatively recent and controversial. President Clinton questioned the constitutionality of the SSA’s new single-Director structure upon signing it into law. See *Public Papers of the Presidents, William J. Clinton, Vol. II, Aug. 15, 1994*, pp. 1471–1472 (1995) (inviting a “corrective amendment” from Congress). In addition, unlike the CFPB, the SSA lacks the authority to bring enforcement actions against private parties. Its role is largely limited to adjudicating claims for Social Security benefits.

...

With the exception of the one-year blip for the Comptroller of the Currency, these isolated examples are modern and contested. And they do not involve regulatory or enforcement authority remotely comparable to that exercised by the CFPB. The CFPB's single-Director structure is an innovation with no foothold in history or tradition.

In addition to being a historical anomaly, the CFPB's single-Director configuration is incompatible with our constitutional structure. Aside from the sole exception of the Presidency, that structure scrupulously avoids concentrating power in the hands of any single individual.

“The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty.” *Bowsher*, 478 U.S., at 730, 106 S.Ct. 3181. Their solution to governmental power and its perils was simple: divide it. To prevent the “gradual concentration” of power in the same hands, they enabled “[a]mbition ... to counteract ambition” at every turn. The Federalist No. 51, p. 349 (J. Cooke ed. 1961) (J. Madison). At the highest level, they “split the atom of sovereignty” itself into one Federal Government and the States. *Gamble v. United States*, 587 U. S. —, —, 139 S.Ct. 1960, 1968, 204 L.Ed.2d 322 (2019) (internal quotation marks omitted). They then divided the “powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial.” *INS v. Chadha*, 462 U.S. 919, 951, 103 S.Ct. 2764 (1983).

They did not stop there. Most prominently, the Framers bifurcated the federal legislative power into two Chambers: the House of Representatives and the Senate, each composed of multiple Members and Senators. Art. I, §§ 2, 3.

The Executive Branch is a stark departure from all this division. The Framers viewed the legislative power as a special threat to individual liberty, so they divided that power to ensure that “differences of opinion” and the “jarrings of parties” would “promote deliberation and circumspection” and “check excesses in the majority.” See The

Federalist No. 70, at 475 (A. Hamilton); see also *id.*, No. 51, at 350. By contrast, the Framers thought it necessary to secure the authority of the Executive so that he could carry out his unique responsibilities. See *id.*, No. 70, at 475–478. As Madison put it, while “the weight of the legislative authority requires that it should be ... divided, the weakness of the executive may require, on the other hand, that it should be fortified.” *Id.*, No. 51, at 350.

The Framers deemed an energetic executive essential to “the protection of the community against foreign attacks,” “the steady administration of the laws,” “the protection of property,” and “the security of liberty.” *Id.*, No. 70, at 471. Accordingly, they chose not to bog the Executive down with the “habitual feebleness and dilatoriness” that comes with a “diversity of views and opinions.” *Id.*, at 476. Instead, they gave the Executive the “[d]ecision, activity, secrecy, and dispatch” that “characterise the proceedings of one man.” *Id.*, at 472.

To justify and check *that* authority—unique in our constitutional structure—the Framers made the President the most democratic and politically accountable official in Government. Only the President (along with the Vice President) is elected by the entire Nation. And the President’s political accountability is enhanced by the solitary nature of the Executive Branch, which provides “a single object for the jealousy and watchfulness of the people.” *Id.*, at 479. The President “cannot delegate ultimate responsibility or the active obligation to supervise that goes with it,” because Article II “makes a single President responsible for the actions of the Executive Branch.” *Free Enterprise Fund*, 561 U.S., at 496–497, 130 S.Ct. 3138 (quoting *Clinton v. Jones*, 520 U.S. 681, 712–713, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997) (BREYER, J., concurring in judgment)).

The resulting constitutional strategy is straightforward: divide power everywhere except for the Presidency, and render the President directly accountable to the people through regular elections. In that scheme, individual executive officials will still wield significant authority, but that authority remains subject to the ongoing supervision and control of the elected President. Through the President’s oversight, “the chain of dependence [is] preserved,” so that “the lowest officers, the middle grade, and the highest” all “depend, as they ought, on the President, and the President on the community.” 1 *Annals of Cong.* 499 (J. Madison).

The CFPB's single-Director structure contravenes this carefully calibrated system by vesting significant governmental power in the hands of a single individual accountable to no one. The Director is neither elected by the people nor meaningfully controlled (through the threat of removal) by someone who is. The Director does not even depend on Congress for annual appropriations. See *The Federalist* No. 58, at 394 (J. Madison) (describing the "power over the purse" as the "most compleat and effectual weapon" in representing the interests of the people). Yet the Director may unilaterally, without meaningful supervision, issue final regulations, oversee adjudications, set enforcement priorities, initiate prosecutions, and determine what penalties to impose on private parties. With no colleagues to persuade, and no boss or electorate looking over her shoulder, the Director may dictate and enforce policy for a vital segment of the economy affecting millions of Americans.

The CFPB Director's insulation from removal by an accountable President is enough to render the agency's structure unconstitutional. But several other features of the CFPB combine to make the Director's removal protection even more problematic. In addition to lacking the most direct method of presidential control—removal at will—the agency's unique structure also forecloses certain indirect methods of Presidential control.

Because the CFPB is headed by a single Director with a five-year term, some Presidents may not have any opportunity to shape its leadership and thereby influence its activities. A President elected in 2020 would likely not appoint a CFPB Director until 2023, and a President elected in 2028 may never appoint one. That means an unlucky President might get elected on a consumer-protection platform and enter office only to find herself saddled with a holdover Director from a competing political party who is dead set against that agenda. To make matters worse, the agency's single-Director structure means the President will not have the opportunity to appoint any other leaders—such as a chair or fellow members of a Commission or Board—who can serve as a check on the Director's authority and help bring the agency in line with the President's preferred policies.

The CFPB's receipt of funds outside the appropriations process further aggravates the agency's threat to Presidential control. The President normally has the opportunity to recommend or veto spending bills that affect the operation of administrative agencies. See Art. I, § 7, cl. 2; Art. II, § 3. And, for the past century, the President has annually submitted a proposed budget to Congress for approval. See Budget and Accounting Act,

1921, ch. 18, § 201, 42 Stat. 20. Presidents frequently use these budgetary tools “to influence the policies of independent agencies.” *PHH*, 881 F.3d at 147 (Henderson, J., dissenting) (citing Pasachoff, *The President’s Budget as a Source of Agency Policy Control*, 125 *Yale L. J.* 2182, 2191, 2203–2204 (2016)). But no similar opportunity exists for the President to influence the CFPB Director. Instead, the Director receives over \$500 million per year to fund the agency’s chosen priorities. And the Director receives that money from the Federal Reserve, which is itself funded outside of the annual appropriations process. This financial freedom makes it even more likely that the agency will “slip from the Executive’s control, and thus from that of the people.” *Free Enterprise Fund*, 561 U.S., at 499, 130 S.Ct. 3138.

...

Having concluded that the CFPB’s leadership by a single independent Director violates the separation of powers, we now turn to the appropriate remedy. We directed the parties to brief and argue whether the Director’s removal protection was severable from the other provisions of the Dodd-Frank Act that establish the CFPB. If so, then the CFPB may continue to exist and operate notwithstanding Congress’s unconstitutional attempt to insulate the agency’s Director from removal by the President . . .

...

Accordingly, there is a live controversy over the question of severability. And that controversy is essential to our ability to provide petitioner the relief it seeks: If the removal restriction is not severable, then we must grant the relief requested, promptly rejecting the demand outright. If, on the other hand, the removal restriction is severable, we must instead remand for the Government to press its ratification arguments in further proceedings. Unlike the lingering ratification issue, severability presents a pure question of law that has been fully briefed and argued by the parties. We therefore proceed to address it.

It has long been settled that “one section of a statute may be repugnant to the Constitution without rendering the whole act void.” *Loeb v. Columbia Township Trustees*, 179 U.S. 472, 490, 21 S.Ct. 174, 45 L.Ed. 280 (1900) (quoting *Treasurer of Fayette Cty. v. People’s & Drivers’ Bank*, 47 OhioSt. 503, 523, 25 N.E. 697, 702 (1890)). Because a “statute bad in part is not necessarily void in its entirety,” “[p]rovisions within the legislative power may stand if separable from the bad.” *Dorchy v. Kansas*, 264 U.S. 286, 289–290, 44 S.Ct. 323, 68 L.Ed. 686 (1924).

“Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem, severing any problematic portions while leaving the remainder intact.” *Free Enterprise Fund*, 561 U.S., at 508, 130 S.Ct. 3138 (internal quotation marks omitted). Even in the absence of a severability clause, the “traditional” rule is that “the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted.” *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685, 107 S.Ct. 1476, 94 L.Ed.2d 661 (1987). When Congress has expressly provided a severability clause, our task is simplified. We will presume “that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision ... unless there is strong evidence that Congress intended otherwise.” *Id.*, at 686, 107 S.Ct. 1476.

The only constitutional defect we have identified in the CFPB’s structure is the Director’s insulation from removal. If the Director were removable at will by the President, the constitutional violation would disappear. We must therefore decide whether the removal provision can be severed from the other statutory provisions relating to the CFPB’s powers and responsibilities.

In *Free Enterprise Fund*, we found a set of unconstitutional removal provisions severable even in the absence of an express severability clause because the surviving provisions were capable of “functioning independently” and “nothing in the statute’s text or historical context [made] it evident that Congress, faced with the limitations imposed by the Constitution, would have preferred no Board at all to a Board whose members are removable at will.” 561 U.S., at 509, 130 S.Ct. 3138 (internal quotation marks omitted).

So too here. The provisions of the Dodd-Frank Act bearing on the CFPB's structure and duties remain fully operative without the offending tenure restriction. Those provisions are capable of functioning independently, and there is nothing in the text or history of the Dodd-Frank Act that demonstrates Congress would have preferred no CFPB to a CFPB supervised by the President. Quite the opposite. Unlike the Sarbanes-Oxley Act at issue in *Free Enterprise Fund*, the Dodd-Frank Act contains an express severability clause. There is no need to wonder what Congress would have wanted if "any provision of this Act" is "held to be unconstitutional" because it has told us: "the remainder of this Act" should "not be affected." 12 U. S. C. § 5302.

...

Because we find the Director's removal protection severable from the other provisions of Dodd-Frank that establish the CFPB, we remand for the Court of Appeals to consider whether the civil investigative demand was validly ratified.

* * *

A decade ago, we declined to extend Congress's authority to limit the President's removal power to a new situation, never before confronted by the Court. We do the same today. In our constitutional system, the executive power belongs to the President, and that power generally includes the ability to supervise and remove the agents who wield executive power in his stead. While we have previously upheld limits on the President's removal authority in certain contexts, we decline to do so when it comes to principal officers who, acting alone, wield significant executive power. The Constitution requires that such officials remain dependent on the President, who in turn is accountable to the people.

The judgment of the United States Court of Appeals for the Ninth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice THOMAS, with whom Justice GORSUCH joins, concurring in part and dissenting in part.

...

Justice KAGAN, with whom Justice GINSBURG, Justice BREYER, and Justice SOTOMAYOR join, concurring in the judgment with respect to severability and dissenting in part.

Throughout the Nation’s history, this Court has left most decisions about how to structure the Executive Branch to Congress and the President, acting through legislation they both agree to. In particular, the Court has commonly allowed those two branches to create zones of administrative independence by limiting the President’s power to remove agency heads. The Federal Reserve Board. The Federal Trade Commission (FTC). The National Labor Relations Board. Statute after statute establishing such entities instructs the President that he may not discharge their directors except for cause—most often phrased as inefficiency, neglect of duty, or malfeasance in office. Those statutes, whose language the Court has repeatedly approved, provide the model for the removal restriction before us today. If precedent were any guide, that provision would have survived its encounter with this Court—and so would the intended independence of the Consumer Financial Protection Bureau (CFPB).

Our Constitution and history demand that result. The text of the Constitution allows these common for-cause removal limits. Nothing in it speaks of removal. And it grants Congress authority to organize all the institutions of American governance, provided only that those arrangements allow the President to perform his own constitutionally assigned duties. Still more, the Framers’ choice to give the political branches wide discretion over administrative offices has played out through American history in ways that have settled the constitutional meaning. From the first, Congress debated and enacted measures to create spheres of administration—especially of financial affairs—detached from direct

presidential control. As the years passed, and governance became ever more complicated, Congress continued to adopt and adapt such measures—confident it had latitude to do so under a Constitution meant to “endure for ages to come.” *McCulloch v. Maryland*, 4 Wheat. 316, 415, 4 L.Ed. 579 (1819) (approving the Second Bank of the United States). Not every innovation in governance—not every experiment in administrative independence—has proved successful. And debates about the prudence of limiting the President’s control over regulatory agencies, including through his removal power, have never abated. But the Constitution—both as originally drafted and as practiced—mostly leaves disagreements about administrative structure to Congress and the President, who have the knowledge and experience needed to address them. Within broad bounds, it keeps the courts—who do not—out of the picture.

The Court today fails to respect its proper role. It recognizes that this Court has approved limits on the President’s removal power over heads of agencies much like the CFPB. Agencies possessing similar powers, agencies charged with similar missions, agencies created for similar reasons. The majority’s explanation is that the heads of those agencies fall within an “exception”—one for multimember bodies and another for inferior officers—to a “general rule” of unrestricted presidential removal power. Ante, at ——. And the majority says the CFPB Director does not. That account, though, is wrong in every respect. The majority’s general rule does not exist. Its exceptions, likewise, are made up for the occasion—gerrymandered so the CFPB falls outside them. And the distinction doing most of the majority’s work—between multimember bodies and single directors—does not respond to the constitutional values at stake. If a removal provision violates the separation of powers, it is because the measure so deprives the President of control over an official as to impede his own constitutional functions. But with or without a for-cause removal provision, the President has at least as much control over an individual as over a commission—and possibly more. That means the constitutional concern is, if anything, ameliorated when the agency has a single head. Unwittingly, the majority shows why courts should stay their hand in these matters. “Compared to Congress and the President, the Judiciary possesses an inferior understanding of the realities of administration” and the way “political power[] operates.” *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 523, 130 S.Ct. 3138, 177 L.Ed.2d 706 (2010) (BREYER, J., dissenting).

In second-guessing the political branches, the majority second-guesses as well the wisdom of the Framers and the judgment of history. It writes in rules to the Constitution that the drafters knew well enough not to put there. It repudiates the lessons of American

experience, from the 18th century to the present day. And it commits the Nation to a static version of governance, incapable of responding to new conditions and challenges. Congress and the President established the CFPB to address financial practices that had brought on a devastating recession, and could do so again. Today's decision wipes out a feature of that agency its creators thought fundamental to its mission—a measure of independence from political pressure. I respectfully dissent.

...

Our history has stayed true to the Framers' vision. Congress has accepted their invitation to experiment with administrative forms—nowhere more so than in the field of financial regulation. And this Court has mostly allowed it to do so. The result is a broad array of independent agencies, no two exactly alike but all with a measure of insulation from the President's removal power. The Federal Reserve Board; the FTC; the SEC; maybe some you've never heard of. As to each, Congress thought that formal job protection for policymaking would produce regulatory outcomes in greater accord with the long-term public interest. Congress may have been right; or it may have been wrong; or maybe it was some of both. No matter—the branches accountable to the people have decided how the people should be governed.

The CFPB should have joined the ranks. Maybe it will still do so, even under today's opinion: The majority tells Congress that it may “pursu[e] alternative responses” to the identified constitutional defect—“for example, converting the CFPB into a multimember agency.” Ante, at 2211. But there was no need to send Congress back to the drawing board. The Constitution does not distinguish between single-director and multimember independent agencies. It instructs Congress, not this Court, to decide on agency design. Because this Court ignores that sensible—indeed, that obvious—division of tasks, I respectfully dissent.