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ARTICLE II

EXECUTIVE DEPARTMENT

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EXECUTIVE DEPARTMENT

ARTICLE II

SECTION 1. Clause 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:

NATURE AND SCOPE OF PRESIDENTIAL POWER

Creation of the Presidency

Of all the issues confronting the members of the Philadelphia Convention, the nature of the presidency ranks among the most important and the resolution of the question one of the most significant steps taken.[1] The immediate source of Article II was the New York constitution, in which the governor was elected by the people and was thus independent of the legislature, his term was three years and he was indefinitely re-eligible, his decisions except with regard to appointments and vetoes were unencumbered with a council, he was in charge of the militia, he possessed the pardoning power, and he was charged to take care that the laws were faithfully executed.[2] But, from when the Convention assembled and almost to its closing days, there was no assurance that the executive department would not be headed by plural administrators, would not be unalterably tied to the legislature, and would not be devoid of many of the powers normally associated with an executive.

Debate in the Convention proceeded against a background of many things, but most certainly uppermost in the delegates' minds was the experience of the states and of the national government under the Articles of Confederation. Reacting to the exercise of powers by the royal governors, the framers of the state constitutions had generally created weak executives and strong legislatures, though

[1] The background and the action of the Convention is comprehensively examined in C. THACH, THE CREATION OF THE PRESIDENCY 1775–1789 (1923). A review of the Constitution's provisions being put into operation is J. HART, THE AMERICAN PRESIDENCY IN ACTION 1789 (1948).

[2] Hamilton observed the similarities and differences between the President and the New York Governor in THE FEDERALIST, No. 69 (J. Cooke ed. 1961), 462–470. On the text, *see* New York Constitution of 1777, Articles XVII–XIX, in 5 F. Thorpe, *The Federal and State Constitutions*, H. DOC. NO. 357, 59th Congress, 2d sess. (1909), 2632–2633.

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not in all instances. The Articles of Confederation vested all powers in a unicameral congress. Experience had demonstrated that harm was to be feared as much from an unfettered legislature as from an uncurbed executive and that many advantages of a reasonably strong executive could not be conferred on the legislative body.[3]

Nevertheless, the Virginia Plan, which formed the basis of discussion, offered in somewhat vague language a weak executive. Selection was to be by the legislature, and that body was to determine the major part of executive competency. The executive's salary was, however, to be fixed and not subject to change by the legislative branch during the term of the executive, and he was ineligible for re-election so that he need not defer overly to the legislature. A council of revision was provided, of which the executive was a part, with power to negative national and state legislation. The executive power was said to be the power to "execute the national laws" and to "enjoy the Executive rights vested in Congress by the Confederation." The Plan did not provide for a single or plural executive, leaving that issue open.[4]

When the executive portion of the Plan was taken up on June 1, James Wilson immediately moved that the executive should consist of a single person.[5] In the course of his remarks, Wilson demonstrated his belief in a strong executive, advocating election by the people, which would free the executive of dependence on the national legislature and on the states, proposing indefinite reeligibility, and preferring an absolute negative though in concurrence with a council of revision.[6] The vote on Wilson's motion was put over until the questions of method of selection, term, mode of removal, and powers to be conferred had been considered; subsequently, the motion carried,[7] and the possibility of the development of a strong President was made real.

Only slightly less important was the decision finally arrived at not to provide for an executive council, which would participate not only in the executive's exercise of the veto power but also in the exercise of all his executive duties, notably appointments and treaty making. Despite strong support for such a council, the Convention

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[3] C. Thach, The Creation of the Presidency 1775–1789 chs. 1–3 (1923).

[4] The plans offered and the debate is reviewed in C. Thach, The Creation of the Presidency 1775–1789 ch. 4 (1923). The text of the Virginia Plan may be found in 1 M. Farrand, The Records of the Federal Convention of 1787 21 (rev. ed. 1937).

[5] Id. at 65.

[6] Id. at 65, 66, 68, 69, 70, 71, 73.

[7] Id. at 93.

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ultimately rejected the proposal and adopted language vesting in the Senate the power to "advise and consent" with regard to these matters.[8]

Finally, the designation of the executive as the "President of the United States" was made in a tentative draft reported by the Committee on Detail[9] and accepted by the Convention without discussion.[10] The same clause had provided that the President's title was to be "His Excellency,"[11] and, while this language was also accepted without discussion,[12] it was subsequently omitted by the Committee on Style and Arrangement[13] with no statement of the reason and no comment in the Convention.

Executive Power: Theory of the Presidential Office

The most obvious meaning of the language of Article II, § 1, is to confirm that the executive power is vested in a single person, but almost from the beginning it has been contended that the words mean much more than this simple designation of locus. Indeed, contention with regard to this language reflects the much larger debate about the nature of the Presidency. With Justice Jackson, we "may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other."[14] At the least, it is no doubt true that the "loose and general expressions" by which the powers and duties of the executive branch are denominated[15] place the President in a position in which he, as Professor Woodrow Wilson noted, "has the right, in law and conscience, to be as big a man as he can" and in which "only his capacity will set the limit."[16]

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[8] The last proposal for a council was voted down on September 7. 2 id. at 542.

[9] Id. at 185.

[10] Id. at 401.

[11] Id. at 185.

[12] Id. at 401.

[13] Id. at 597.

[14] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634–635 (1952) (concurring opinion).

[15] A. Upshur, A Brief Enquiry into the True Nature and Character of Our Federal Government 116 (1840).

[16] W. Wilson, Constitutional Government in the United States 202, 205 (1908).

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Hamilton and Madison.—Hamilton's defense of President Washington's issuance of a neutrality proclamation upon the outbreak of war between France and Great Britain contains not only the lines but most of the content of the argument that Article II vests significant powers in the President as possessor of executive powers not enumerated in subsequent sections of Article II.[17] Hamilton wrote: "The second article of the Constitution of the United States, section first, establishes this general proposition, that 'the Executive Power shall be vested in a President of the United States of America.' The same article, in a succeeding section, proceeds to delineate particular cases of executive power. It declares, among other things, that the president shall be commander in chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; that he shall have power, by and with the advice and consent of the senate, to make treaties; that it shall be his duty to receive ambassadors and other public ministers, *and to take care that the laws be faithfully executed*. It would not consist with the rules of sound construction, to consider this enumeration of particular authorities as derogating from the more comprehensive grant in the general clause, further than as it may be coupled with express restrictions or limitations; as in regard to the co-operation of the senate in the appointment of officers, and the making of treaties; which are plainly qualifications of the general executive powers of appointing officers and making treaties."

"The difficulty of a complete enumeration of all the cases of executive authority, would naturally dictate the use of general terms, and would render it improbable that a specification of certain particulars was designed as a substitute for those terms, when antecedently used. The different mode of expression employed in the constitution, in regard to the two powers, the legislative and the executive, serves to confirm this inference. In the article which gives the legislative powers of the government, the expressions are, 'All legislative powers herein granted shall be vested in a Congress of the United States.' In that which grants the executive power, the expressions are, 'The *executive power* shall be vested in a President of the United States.' The enumeration ought therefore to be considered, as intended merely to specify the principal articles implied in the definition of executive power; leaving the rest to flow from the general grant of that power, interpreted in conformity with other parts of the Constitution, and with the principles of free government. The general doctrine of our Constitution then is, that the *executive power*

[17] 32 Writings of George Washington 430 (J. Fitzpatrick ed., 1939). *See* C. Thomas, American Neutrality in 1793: A Study in Cabinet Government (1931).

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of the nation is vested in the President; subject only to the *exceptions* and *qualifications*, which are expressed in the instrument."[18]

Madison's reply to Hamilton, in five closely reasoned articles,[19] was almost exclusively directed to Hamilton's development of the contention from the quoted language that the conduct of foreign relations was in its nature an executive function and that the powers vested in Congress which bore on this function, such as the power to declare war, did not diminish the discretion of the President in the exercise of his powers. Madison's principal reliance was on the vesting of the power to declare war in Congress, thus making it a legislative function rather than an executive one, combined with the argument that possession of the exclusive power carried with it the exclusive right to judgment about the obligations to go to war or to stay at peace, negating the power of the President to proclaim the nation's neutrality. Implicit in the argument was the rejection of the view that the first section of Article II bestowed powers not vested in subsequent sections. "Were it once established that the powers of war and treaty are in their nature executive; that so far as they are not by strict construction transferred to the legislature, they actually belong to the executive; that of course all powers not less executive in their nature than those powers, if not granted to the legislature, may be claimed by the executive; if granted, are to be taken strictly, with a residuary right in the executive; or . . . perhaps claimed as a concurrent right by the executive; and no citizen could any longer guess at the character of the government under which he lives; the most penetrating jurist would be unable to scan the extent of constructive prerogative."[20] The arguments are today pursued with as great fervor, as great learning, and with two hundred years experience, but the constitutional part of the contentiousness still settles upon the reading of the vesting clauses of Articles I, II, and III.[21]

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[18] 7 Works of Alexander Hamilton 76, 80–81 (J. C. Hamilton ed., 1851) (emphasis in original).

[19] 1 Letters and Other Writings of James Madison 611–654 (1865).

[20] Id. at 621. In the congressional debates on the President's power to remove executive officeholders, *cf.* C. Thach, The Creation of the Presidency 1775–1789 ch. 6 (1923), Madison had urged contentions quite similar to Hamilton's, finding in the first section of Article II and in the obligation to execute the laws a vesting of executive powers sufficient to contain the power solely on his behalf to remove subordinates. 1 Annals of Congress 496–497. Madison's language here was to be heavily relied on by Chief Justice Taft on this point in Myers v. United States, 272 U.S. 52, 115–126 (1926), *but compare*, Corwin, *The President's Removal Power Under the Constitution*, in 4 Selected Essays on Constitutional Law 1467, 1474–1483, 1485–1486 (1938).

[21] *Compare* Calabresi & Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 Harv. L. Rev. 1155 (1992), *with* Froomkin, *The Imperial Presidency's New Vestments*, 88 Nw. U. L. Rev. 1346 (1994), and responses by Calabresi, Rhodes and Froomkin, id. at 1377, 1406, 1420.

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The Myers Case.—However much the two arguments are still subject to dispute, Chief Justice Taft, himself a former President, appears in *Myers v. United States*[22] to have carried a majority of the Court with him in establishing the Hamiltonian conception as official doctrine. That case confirmed one reading of the "Decision of 1789" in holding the removal power to be constitutionally vested in the President.[23] But its importance here lies in its interpretation of the first section of Article II. That language was read, with extensive quotation from Hamilton and from Madison on the removal power, as vesting all executive power in the President, the subsequent language was read as merely particularizing some of this power, and consequently the powers vested in Congress were read as exceptions which must be strictly construed in favor of powers retained by the President.[24] *Myers* remains the fountainhead of the latitudinarian constructionists of presidential power, but its *dicta*, with regard to the removal power, were first circumscribed in *Humphrey's Executor v. United States*,[25] and then considerably altered in *Morrison v. Olson*;[26] with regard to the President's "inherent" powers, the *Myers* dicta were called into considerable question by *Youngstown Sheet & Tube Co. v. Sawyer*.[27]

The Curtiss-Wright Case.—Further Court support of the Hamiltonian view was advanced in *United States v. Curtiss-Wright Export Corp.*,[28] in which Justice Sutherland posited the doctrine that the power of the National Government in foreign relations is not one of enumerated powers, but rather is inherent. The doctrine was then combined with Hamilton's contention that control of foreign relations is exclusively an executive function with obvious implications for the power of the President. The case arose as a challenge to the delegation of power from Congress to the President with regard to a foreign relations matter. Justice Sutherland denied that the limitations on delegation in the domestic field were at all relevant in foreign affairs:

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[22] 272 U.S. 52 (1926). *See* Corwin, *The President's Removal Power Under the Constitution*, in 4 Selected Essays on Constitutional Law 1467 (1938).

[23] C. Thach, The Creation of the Presidency, 1775–1789, ch. 6 (1923).

[24] Myers v. United States, 272 U.S. 52, 163–164 (1926). Professor Taft had held different views. "The true view of the executive functions is, as I conceive it, that the president can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary in its exercise. Such specific grant must be either in the federal constitution or in an act of Congress passed in pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest. . . ." W. Taft, Our Chief Magistrate and His Powers 139–140 (1916).

[25] 295 U.S. 602 (1935).

[26] 487 U.S. 654, 685–93 (1988).

[27] 343 U.S. 579 (1952).

[28] 299 U.S. 304 (1936).

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"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. . . . 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. . . ."

"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. . . ."

"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 been vested in the Federal Government as necessary concomitants of nationality. . . ."

"Not only . . . is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of 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." [29]

Scholarly criticism of Justice Sutherland's reasoning has demonstrated that his essential postulate, the passing of sovereignty in external affairs directly from the British Crown to the colonies as a collective unit, is in error.[30] Dicta in later cases controvert the conclusions drawn in *Curtiss-Wright* about the foreign relations power being inherent rather than subject to the limitations of the del-

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[29] 299 U.S. at 315–16, 318, 319.

[30] Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 Yale L. J. 467 (1946); Patterson, *In re United States v. Curtiss-Wright Corp.*, 22 Texas L. Rev. 286, 445 (1944); Lofgren, *United States v. Curtiss-Wright Corporation: An Historical Reassessment*, 83 Yale L. J. 1 (1973), reprinted in C. Lofgren, Government From Reflection and Choice: Constitutional Essays on War, Foreign Relations, and Federalism 167 (1986).

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

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

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

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

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

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

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

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is *Youngstown Sheet & Tube Co. v. Sawyer*,[36] and its multiple opinions make it difficult to evaluate the matter. During the Korean War, President Truman seized the steel industry, then in the throes of a strike. No statute authorized the seizure, and the Solicitor General defended the action as an exercise of the President's executive powers that were conveyed by the first section of Article II, by the obligation to enforce the laws, and by the vesting of the function of commander-in-chief. By vote of six-to-three, the Court rejected this argument and held the seizure void. But the doctrinal problem is complicated by the fact that Congress had expressly rejected seizure proposals in considering labor legislation and had authorized procedures not followed by the President that did not include seizure. Thus, four of the majority Justices[37] appear to have been decisively influenced by the fact that Congress had denied the power claimed and that this in an area in which the Constitution vested the power to decide at least concurrently if not exclusively in Congress. Three and perhaps four Justices[38] appear to have rejected the government's argument on the merits while three[39] accepted it in large measure. Despite the inconclusiveness of the opinions, it seems clear that the result was a substantial retreat from the proclamation of vast presidential powers made in *Myers* and *Curtiss-Wright*.[40]

The Practice in the Presidential Office.—However contested the theory of expansive presidential powers, the practice in fact has been one of expansion of those powers, an expansion that a number of "weak" Presidents and the temporary ascendancy of

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powers. *But see* Haig v. Agee, 453 U.S. 280 (1981), in which the statutory and congressional ratification analyses is informed with a view of a range of presidential foreign affairs discretion combined with judicial deference according the President *de facto* much of the theoretically-based authority spelled out in *Curtiss-Wright*.

[36] 343 U.S. 579 (1952). *See* Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 COLUM. L. REV. 53 (1953). A case similar to *Youngstown* is AFL–CIO v. Kahn, 618 F.2d 784 (D.C. Cir.) (en banc), *cert. denied*, 443 U.S. 915 (1979), which, on the basis of statutory interpretation of certain congressional delegations, sustained a presidential order denying government contracts to companies that failed to comply with certain voluntary wage and price guidelines.

[37] 343 U.S. 593, 597–602 (Justice Frankfurter concurring, though he also noted he expressly joined Justice Black's opinion as well), 634, 635–40 (Justice Jackson concurring), 655, 657 (Justice Burton concurring), 660 (Justice Clark concurring).

[38] 343 U.S. at 582 (Justice Black delivering the opinion of the Court), 629 (Justice Douglas concurring, but note his use of the Fifth Amendment just compensation argument), 634 (Justice Jackson concurring), 655 (Justice Burton concurring).

[39] 343 U.S. at 667 (Chief Justice Vinson and Justices Reed and Minton dissenting).

[40] Myers v. United States, 272 U.S. 52 (1926); United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936). In Dames & Moore v. Regan, 453 U.S. 654, 659–62, 668–69 (1981), the Court turned to *Youngstown* as embodying "much relevant analysis" on an issue of presidential power. And, in Hamdan v. Rumsfeld, 548 U.S. 557, 593 n.23 (2006), the Court cited *Youngstown* with approval, as did Justice Kennedy, in a concurring opinion joined by three other Justices, id. at 638.

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Congress in the wake of the Civil War has not stemmed. Perhaps the point of no return in this area was reached in 1801 when the Jefferson-Madison "strict constructionists" came to power and, instead of diminishing executive power and federal power in general, acted rather to enlarge both, notably by the latitudinarian construction of implied federal powers to justify the Louisiana Purchase.[41] After a brief lapse into Cabinet government, the executive in the hands of Andrew Jackson stamped upon the presidency the outstanding features of its final character, thereby reviving, in the opinion of Henry Jones Ford, "the oldest political institution of the race, the elective Kingship."[42] Although the modern theory of presidential power was conceived primarily by Alexander Hamilton, the modern conception of the presidential office was the contribution primarily of Andrew Jackson.[43]

Executive Power: Separation-of-Powers Judicial Protection

In recent cases, the Supreme Court has pronouncedly protected the Executive Branch, applying separation-of-powers principles to invalidate what it perceived to be congressional usurpation of executive power, but its mode of analysis has lately shifted to permit Congress a greater degree of discretion.[44]

Significant change in the position of the Executive Branch respecting its position on separation of powers may be discerned in two briefs of the Department of Justice's Office of Legal Counsel, which may spell some measure of judicial modification of the formalist doctrine of separation and adoption of the functionalist approach to the doctrine.[45] The two opinions withdraw from the De-

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[41] For the debates on the constitutionality of the Purchase, *see* E. Brown, The Constitutional History of the Louisiana Purchase, 1803–1812 (1920). The differences and similarities between the Jeffersonians and the Federalists can be seen by comparing L. White, The Jeffersonians: A Study in Administrative History 1801–1829 (1951), with L. White, The Federalists: A Study in Administrative History (1948). That the responsibilities of office did not turn the Jeffersonians into Hamiltonians may be gleaned from Madison's veto of an internal improvements bill. 2 Messages and Papers of the Presidents 569 (J. Richardson comp., 1897).

[42] H. Ford, The Rise and Growth of American Politics 293 (1898).

[43] E. Corwin, The President: Office and Powers 1787–1957, ch. 1 (4th ed. 1957).

[44] Some cases also did so prior to the present period. *See* Myers v. United States, 272 U.S. 52 (1926). But a hallmark of previous disputes between President and Congress has been the use of political combat to resolve them, rather than a resort to the courts. The beginning of the present period was Buckley v. Valeo, 424 U.S. 1, 109–43 (1976).

[45] Memorandum for John Schmidt, Associate Attorney General, from Assistant Attorney General Walter Dellinger, re: Constitutional Limitations on Federal Government Participation in Binding Arbitration (Sept. 7, 1995); *Memorandum for the General Counsels of the Federal Government*, from Assistant Attorney General Walter Dellinger, re: The Constitutional Separation of Powers Between the President and Congress (May 7, 1996). The principles laid down in the memoranda depart

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partment's earlier contention, following *Buckley v. Valeo*, that the execution of the laws is an executive function that may be carried out only by persons appointed pursuant to the Appointments Clause, thus precluding delegations to state and local officers and to private parties (as in *qui tam* actions), as well as providing glosses on the Take Care Clause (Article II, § 3) and other provisions of the Constitution. Whether these memoranda signal long-term change depends on several factors, including whether they are adhered to by subsequent administrations.

In striking down the congressional veto as circumventing Article I's bicameralism and presentment requirements attending the exercise of legislative power, the Court also suggested in *INS v. Chadha*[46] that the particular provision in question, involving veto of the Attorney General's decision to suspend deportation of an alien, in effect allowed Congress impermissible participation in execution of the laws.[47] And, in *Bowsher v. Synar*,[48] the Court held that Congress had invalidly vested executive functions in a legislative branch official. Underlying both decisions was the premise, stated in Chief Justice Burger's opinion of the Court in *Chadha*, that "the powers delegated to the three Branches are functionally identifiable," distinct, and definable.[49] In a standing-to-sue case, Justice Scalia for the Court denied that Congress could by statute confer standing on citizens not suffering particularized injuries to sue the Federal Government to compel it to carry out a duty imposed by Congress, arguing that to permit this course would be to allow Congress to divest the President of his obligation under the Take Care Clause and

significantly from previous positions of the Department of Justice. For conflicting versions of the two approaches, *see Constitutional Implications of the Chemical Weapons Convention: Hearings on the Constitution, Federalism, and Property Rights Before the Senate Judiciary Subcommittee*, 104th Cong., 2d Sess. (1996), 11–26, 107–10 (Professor John C. Woo), 80–106 (Deputy Assistant Attorney General Richard L. Shiffrin).

[46] 462 U.S. 919 (1983).

[47] Although Chief Justice Burger's opinion of the Court described the veto decision as legislative in character, it also seemingly alluded to the executive nature of the decision to countermand the Attorney General's application of delegated power to a particular individual. "Disagreement with the Attorney General's decision on Chadha's deportation . . . involves determinations of policy that Congress can implement in only one way . . . . Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked." 462 U.S. at 954–55. The Court's uncertainty is explicitly spelled out in Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252 (1991).

[48] 478 U.S. 714 (1986).

[49] 462 U.S. at 951.

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to delegate the power to the judiciary.[50] On the other hand, in the independent counsel case, although acknowledging that the contested statute restricted a constitutionally delegated function (law enforcement), the Court upheld the statute, using a flexible analysis that emphasized that neither the legislative nor the judicial branch had aggrandized its power and that the incursion into executive power did not impermissibly interfere with the President's constitutionally assigned functions.[51]

At issue in *Synar* were the responsibilities vested in the Comptroller General by the "Gramm-Rudman-Hollings" Deficit Control Act,[52] which set maximum deficit amounts for federal spending for fiscal years 1986 through 1991, and which directed across-the-board cuts in spending when projected deficits would exceed the target deficits. The Comptroller was to prepare a report for each fiscal year containing detailed estimates of projected federal revenues and expenditures, and specifying the reductions, if any, necessary to meet the statutory target. The President was required to implement the reductions specified in the Comptroller's report. The Court viewed these functions of the Comptroller "as plainly entailing execution of the law in constitutional terms. Interpreting a law . . . to implement the legislative mandate is the very essence of 'execution' of the law," especially where "exercise [of] judgment" is called for, and where the President is required to implement the interpretation.[53] Because Congress by earlier enactment had retained authority to remove the Comptroller General from office, the Court held, executive powers may not be delegated to him. "By placing the responsibility for execution of the [Act] in the hands of an officer who is

[50] Lujan v. Defenders of Wildlife, 504 U.S. 555, 576–78 (1992). Evidently, however, although Justices Kennedy and Souter joined this part of the opinion, id. at 579 (concurring in part and concurring in the judgment), they do not fully subscribe to the apparent full reach of Justice Scalia's doctrinal position, leaving the position, if that be true, supported in full only by a plurality.

[51] Morrison v. Olson, 487 U.S. 654 (1988). The opinion by Chief Justice Rehnquist was joined by seven of the eight participating Justices. Only Justice Scalia dissented. In Mistretta v. United States, 488 U.S. 361, 390–91 (1989), the Court, approving the placement of the Sentencing Commission in the judicial branch, denied that executive powers were diminished because of the historic judicial responsibility to determine what sentence to impose on a convicted offender. Earlier, in Young v. United States ex rel. Vuitton, 481 U.S. 787 (1987), the Court, in upholding the power of federal judges to appoint private counsel to prosecute contempt of court actions, rejected the assertion that the judiciary usurped executive power in appointing such counsel.

[52] The Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. 99–177, 99 Stat. 1038.

[53] 478 U.S. at 732–33.

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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."[54]

The Court in *Chadha* and *Synar* ignored or rejected assertions that its formalistic approach to separation of powers may bring into question the validity of delegations of legislative authority to the modern administrative state, sometimes called the "fourth branch." As Justice White asserted in dissent in *Chadha*, "by virtue of congressional delegation, legislative power can be exercised by independent agencies and Executive departments . . . . There is no question but that agency rulemaking is lawmaking in any functional or realistic sense of the term."[55] Moreover, Justice White noted, "rules and adjudications by the agencies meet the Court's own definition of legislative action . . . ."[56] Justice Stevens, concurring in *Synar*, sounded the same chord in suggesting that the Court's holding should not depend on classification of "chameleon-like" powers as executive, legislative, or judicial.[57] The Court answered these assertions on two levels: that the bicameral protection "is not necessary" when legislative power has been delegated to another branch confined to implementing statutory standards set by Congress, and that "the Constitution does not so require."[58] In the same context, the Court acknowledged without disapproval that it had described some agency action as resembling lawmaking.[59] Thus *Chadha* may not be read as requiring that all "legislative power" as the Court defined it must be exercised by Congress, and *Synar* may not be read as requiring that all "executive power" as the Court defined it must be exercised by the executive. A more limited reading is that when Congress elects to exercise legislative power itself rather than delegate it, it must follow the prescribed bicameralism and presentment procedures, and when Congress elects to delegate legislative power or assign executive functions to the executive branch, it may not control exercise of those functions by itself exercising removal (or appointment) powers.

A more flexible approach was followed in the independent counsel case. Here, there was no doubt that the statute limited the President's law enforcement powers. Upon a determination by the Attorney General that reasonable grounds exist for investigation or prosecution of certain high ranking government officials, he must notify a special, Article III court which appoints a special counsel.

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[54] 478 U.S. at 734.
[55] 462 U.S. at 985–86.
[56] 462 U.S. at 989.
[57] 478 U.S. at 736, 750.
[58] 462 U.S. at 953 n.16.
[59] 462 U.S. at 953 n.16.

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The counsel is assured full power and independent authority to investigate and, if warranted, to prosecute. Such counsel may be removed from office by the Attorney General only for cause as prescribed in the statute.[60] The independent counsel was assuredly more free from executive supervision than other federal prosecutors. Instead of striking down the law, however, the Court carefully assessed the degree to which executive power was invaded and the degree to which the President retained sufficient powers to carry out his constitutionally assigned duties. The Court also considered whether in enacting the statute Congress had attempted to aggrandize itself or had attempted to enlarge the judicial power at the expense of the executive.[61]

In the course of deciding that the President's action in approving the closure of a military base, pursuant to statutory authority, was not subject to judicial review, the Court enunciated a principle that may mean a great deal, constitutionally speaking, or that may not mean much of anything.[62] The lower court had held that, although review of presidential decisions on statutory grounds might be precluded, his decisions were reviewable for constitutionality; in that court's view, whenever the President acts in excess of his statutory authority, he also violates the Constitution's separation-of-powers doctrine. The Supreme Court found this analysis flawed. "Our cases do not support the proposition that every action by the President, or by another executive official, in excess of his statutory authority is *ipso facto* in violation of the Constitution. On the contrary, we have often distinguished between claims of constitutional violations and claims that an official has acted in excess of his statutory authority."[63] Thus, the Court distinguished between executive action undertaken without even the purported warrant of statutory authorization and executive action in excess of statutory authority. The former may violate separation of powers, but the latter will not.[64]

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[60] Pub. L. 95–521, title VI, 92 Stat. 1867, as amended by Pub. L. 97–409, 96 Stat. 2039, and Pub. L. 100–191, 101 Stat. 1293, 28 U.S.C. §§ 49, 591 et seq.

[61] Morrison v. Olson, 487 U.S. at 693–96. *See also* Mistretta v. United States, 488 U.S. 361, 380–84, 390–91, 408–11 (1989).

[62] Dalton v. Specter, 511 U.S. 462 (1994).

[63] 511 U.S. at 472.

[64] *See The Supreme Court, Leading Cases, 1993 Term*, 108 Harv. L. Rev. 139, 300–10 (1994).

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Doctrinally, the distinction is important and subject to unfortunate application.[65] Whether the brief, unilluminating discussion in *Dalton* will bear fruit in constitutional jurisprudence, however, is problematic.

TENURE

Formerly, the term of four years during which the President "shall hold office" was reckoned from March 4 of the alternate odd years beginning with 1789. This came about from the circumstance that under the act of September 13, 1788, of "the Old Congress," the first Wednesday in March, which was March 4, 1789, was fixed as the time for commencing proceedings under the Constitution. Although as a matter of fact Washington was not inaugurated until April 30 of that year, by an act approved March 1, 1792, it was provided that the presidential term should be reckoned from the fourth day of March next succeeding the date of election. And so things stood until the adoption of the Twentieth Amendment, by which the terms of President and Vice-President end at noon on the 20th of January.[66]

The prevailing sentiment of the Philadelphia Convention favored the indefinite eligibility of the President. It was Jefferson who raised the objection that indefinite eligibility would in fact be for life and degenerate into an inheritance. Prior to 1940, the idea that no President should hold office for more than two terms was generally thought to be a fixed tradition, although some quibbles had been raised as to the meaning of the word "term." The voters' departure from the tradition in electing President Franklin D. Roosevelt to third and fourth terms led to the proposal by Congress on March 24, 1947, of an amendment to the Constitution to embody the tradition in the Constitutional Document. The proposal became a part of the Constitution on February 27, 1951, in consequence of its adoption by the necessary thirty-sixth state, which was Minnesota.[67]

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[65] "As a matter of constitutional logic, the executive branch must have some warrant, either statutory or constitutional, for its actions. The source of all Federal Governmental authority is the Constitution and, because the Constitution contemplates that Congress may delegate a measure of its power to officials in the executive branch, statutes. The principle of separation of powers is a direct consequence of this scheme. Absent statutory authorization, it is unlawful for the President to exercise the powers of the other branches because the Constitution does not vest those powers in the President. The absence of statutory authorization is not merely a statutory defect; it is a constitutional defect as well." 108 Harv. L. Rev. at 305–06 (footnote citations omitted).

[66] As to the meaning of "the fourth day of March," *see* Warren, *Political Practice and the Constitution*, 89 U. Pa. L. Rev. 1003 (1941).

[67] E. Corwin, supra at 34–38, 331–339.

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Clause 2. 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.

Clause 3. 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 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 greatest 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 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. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the

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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.

Clause 4. 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.

ELECTORAL COLLEGE

The electoral college was one of the compromises by which the delegates were able to agree on the document finally produced. "This subject," said James Wilson, referring to the issue of the manner in which the President was to be selected, "has greatly divided the House, and will also divide people out of doors. It is in truth the most difficult of all on which we have had to decide."[68] Adoption of the electoral college plan came late in the Convention, which had previously adopted on four occasions provisions for election of the executive by the Congress and had twice defeated proposals for election by the people directly.[69] Itself the product of compromise, the electoral college probably did not work as any member of the Convention could have foreseen, because the development of political parties and nomination of presidential candidates through them and designation of electors by the parties soon reduced the concept of the elector as an independent force to the vanishing point in practice if not in theory.[70] But the college remains despite numerous efforts to adopt another method, a relic perhaps but still a significant one. Clause 3 has, of course, been superceded by the Twelfth Amendment.

"Appoint"

The word "appoint" as used in Clause 2 confers on state legislatures "the broadest power of determination."[71] Upholding a state law providing for selection of electors by popular vote from dis-

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[68] 2 M. Farrand, supra, p. 501.

[69] 1 id. at 21, 68–69, 80–81, 175–76, 230, 244; 2 id. at 29–32, 57–59, 63–64, 95, 99–106, 108–15, 118–21, 196–97, 401–04, 497, 499–502, 511–15, 522–29.

[70] *See* J. Ceaser, Presidential Selection: Theory and Development (1979); N. Pierce, The Peoples President: The Electoral College in American History and the Direct-Vote Alternative (1968). The second presidential election, in 1792, saw the first party influence on the electors, with the Federalists and the Jeffersonians organizing to control the selection of the Vice-President. Justice Jackson once noted: "As an institution the Electoral College suffered atrophy almost indistinguishable from *rigor mortis*." Ray v. Blair, 343 U.S. 214, 232 (1952). But, of course, the electors still do actually elect the President and Vice President.

[71] McPherson v. Blacker, 146 U.S. 1, 27 (1892).

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tricts rather than statewide, the Court described the variety of permissible methods. "Therefore, on reference to contemporaneous and subsequent action under the clause, we should expect to find, as we do, that various modes of choosing the electors were pursued, as, by the legislature itself on joint ballot; by the legislature through a concurrent vote of the two houses; by vote of the people for a general ticket; by vote of the people in districts; by choice partly by the people voting in districts and partly by the legislature; by choice by the legislature from candidates voted for by the people in districts; and in other ways, as, notably, by North Carolina in 1792, and Tennessee in 1796 and 1800. No question was raised as to the power of the State to appoint, in any mode its legislature saw fit to adopt, and none that a single method, applicable without exception, must be pursued in the absence of an amendment to the Constitution. The district system was largely considered the most equitable, and Madison wrote that it was that system which was contemplated by the framers of the Constitution, although it was soon seen that its adoption by some States might place them at a disadvantage by a division of their strength, and that a uniform rule was preferable." [72]

State Discretion in Choosing Electors

Although Clause 2 seemingly vests complete discretion in the states, certain older cases had recognized a federal interest in protecting the integrity of the process. Thus, the Court upheld the power of Congress to protect the right of all citizens who are entitled to vote to lend aid and support in any legal manner to the election of any legally qualified person as a presidential elector.[73] Its power to protect the choice of electors from fraud or corruption was sustained.[74] "If this government is anything more than a mere aggregation of delegated agents of other States and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends from violence and corruption. If it has not this power it is helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption." [75]

More recently, substantial curbs on state discretion have been instituted by both the Court and the Congress. In *Williams v. Rhodes*,[76] the Court struck down a complex state system that effectively lim-

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[72] 146 U.S. at 28–29.

[73] *Ex parte* Yarbrough, 110 U.S. 651 (1884).

[74] Burroughs & Cannon v. United States, 290 U.S. 534 (1934).

[75] *Ex parte* Yarbrough, 110 U.S. 651, 657–58 (1884) (quoted in Burroughs and Cannon v. United States, 290 U.S. 534, 546 (1934)).

[76] 393 U.S. 23 (1968).

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ited access to the ballot to the electors of the two major parties. In the Court's view, the system violated the Equal Protection Clause of the Fourteenth Amendment because it favored some and disfavored others and burdened both the right of individuals to associate together to advance political beliefs and the right of qualified voters to cast ballots for electors of their choice. For the Court, Justice Black denied that the language of Clause 2 immunized such state practices from judicial scrutiny.[77] Then, in *Oregon v. Mitchell*,[78] the Court upheld the power of Congress to reduce the voting age in presidential elections[79] and to set a thirty-day durational residency period as a qualification for voting in presidential elections.[80] Although the Justices were divided on the reasons, the rationale emerging from this case, considered with *Williams v. Rhodes*,[81] is that the Fourteenth Amendment limits state discretion in prescribing the manner of selecting electors and that Congress in enforcing the Fourteenth Amendment[82] may override state practices that violate that Amendment and may substitute standards of its own.

Whether state enactments implementing the authority to appoint electors are subject to the ordinary processes of judicial review within a state, or whether placement of the appointment authority in state legislatures somehow limits the role of state judicial review, became an issue during the controversy over the Florida recount and the outcome of the 2000 presidential election. The Supreme Court did not resolve this issue, but in a remand to the Florida Supreme Court, suggested that the role of state courts in applying

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[77] "There, of course, can be no question but that this section does grant extensive power to the States to pass laws regulating the selection of electors. But the Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution . . . . [It cannot be] thought that the power to select electors could be exercised in such a way as to violate express constitutional commands that specifically bar States from passing certain kinds of laws. [citing the Fifteenth, Nineteenth, and Twenty-fourth Amendments]. . . . Obviously we must reject the notion that Art. II, § 1, gives the States power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions." 393 U.S. at 29.

[78] 400 U.S. 112 (1970).

[79] The Court divided five-to-four on this issue. Of the majority, four relied on Congress's power under the Fourteenth Amendment, and Justice Black relied on implied and inherent congressional powers to create and maintain a national government. 400 U.S. at 119–24 (Justice Black announcing opinion of the Court).

[80] The Court divided eight-to-one on this issue. Of the majority, seven relied on Congress's power to enforce the Fourteenth Amendment, and Justice Black on implied and inherent powers.

[81] 393 U.S. 23 (1968).

[82] *Cf.* Fourteenth Amendment, § 5.

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state constitutions may be constrained by operation of Clause 2.[83] Three Justices elaborated on this view in *Bush v. Gore*,[84] but the Court ended the litigation—and the recount—on the basis of an equal protection interpretation, without ruling on the Article II argument.

Constitutional Status of Electors

Dealing with the question of the constitutional status of the electors, the Court said in 1890: "The sole function of the presidential electors is to cast, certify and transmit the vote of the State for President and Vice President of the nation. Although the electors are appointed and act under and pursuant to the Constitution of the United States, they are no more officers or agents of the United States than are the members of the state legislatures when acting as electors of federal senators, or the people of the States when acting as electors of representatives in Congress. . . . In accord with the provisions of the Constitution, Congress has determined the time as of which the number of electors shall be ascertained, and the days on which they shall be appointed and shall meet and vote in the States, and on which their votes shall be counted in Congress; has provided for the filling by each State, in such manner as its legislature may prescribe, of vacancies in its college of electors; and has regulated the manner of certifying and transmitting their votes to the seat of the national government, and the course of proceeding in their opening and counting them."[85] The truth of the matter is that the electors are not "officers" at all, by the usual tests of office.[86] They have neither tenure nor salary, and having performed their single function they cease to exist as electors.

This function is, moreover, "a federal function,"[87] because electors' capacity to perform results from no power which was originally resident in the states, but instead springs directly from the Constitution of the United States.[88]

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[83] Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70, 78 (2000) (per curiam) (remanding for clarification as to whether the Florida Supreme Court "saw the Florida Constitution as circumscribing the legislature's authority under Art. II, § 1, cl. 2").

[84] Bush v. Gore, 531 U.S. 98, 111 (2000) (opinion of Chief Justice Rehnquist, joined by Justices Scalia and Thomas). Relying in part on dictum in McPherson v. Blacker, 146 U.S. 1, 27 (1892), the three Justices reasoned that, because Article II confers the authority on a particular branch of state government (the legislature) rather than on a state generally, the customary rule requiring deference to state court interpretations of state law is not fully operative, and the Supreme Court "must ensure that postelection state-court actions do not frustrate" the legislature's policy as expressed in the applicable statute. 531 U.S. at 113.

[85] *In re* Green, 134 U.S. 377, 379–80 (1890).

[86] United States v. Hartwell, 73 U.S. (6 Wall.) 385, 393 (1868).

[87] Hawke v. Smith, 253 U.S. 221 (1920).

[88] Burroughs and Cannon v. United States, 290 U.S. 534, 535 (1934).

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In the face of the proposition that electors are state officers, the Court has upheld the power of Congress to act to protect the integrity of the process by which they are chosen.[89] But, in *Ray v. Blair*,[90] the Court reasserted the conception of electors as state officers, with some significant consequences.

Electors as Free Agents

"No one faithful to our history can deny that the plan originally contemplated, what is implicit in its text, that electors would be free agents, to exercise an independent and nonpartisan judgment as to the men best qualified for the Nation's highest offices."[91] Writing in 1826, Senator Thomas Hart Benton admitted that the framers had intended electors to be men of "superior discernment, virtue, and information," who would select the President "according to their own will" and without reference to the immediate wishes of the people. "That this invention has failed of its objective in every election is a fact of such universal notoriety, that no one can dispute it. That it ought to have failed is equally uncontestable; for such independence in the electors was wholly incompatible with the safety of the people. [It] was, in fact, a chimerical and impractical idea in any community."[92]

Electors constitutionally remain free to cast their ballots for any person they wish and occasionally they have done so.[93] In 1968, for example, a Republican elector in North Carolina chose to cast his vote not for Richard M. Nixon, who had won a plurality in the state, but for George Wallace, the independent candidate who had won the second greatest number of votes. Members of both the House of Representatives and of the Senate objected to counting that vote for Mr. Wallace and insisted that it should be counted for Mr. Nixon, but both bodies decided to count the vote as cast.[94]

The power either of Congress[95] or of the states to enact legislation binding electors to vote for the candidate of the party on the

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[89] *Ex parte* Yarbrough, 110 U.S. 651 (1884); Burroughs and Cannon v. United States, 290 U.S. 534 (1934).

[90] 343 U.S. 214 (1952).

[91] 343 U.S. at 232 (Justice Jackson dissenting). *See* THE FEDERALIST, No. 68 (J. Cooke ed. 1961), 458 (Hamilton); 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1457 (1833).

[92] S. REP. No. 22, 19th Cong., 1st Sess. 4 (1826).

[93] All but the most recent instances are summarized in N. Pierce, supra, 122–124.

[94] 115 CONG. REC. 9–11, 145–171, 197–246 (1969).

[95] Congress has so provided in the case of electors of the District of Columbia, 75 Stat. 818 (1961), D.C. Code § 1–1108(g), but the reference in the text is to the power of Congress to bind the electors of the states.

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ticket of which they run has been the subject of much debate.[96] It remains unsettled and the Supreme Court has touched on the issue only once and then tangentially. In *Ray v. Blair*,[97] the Court upheld, against a challenge of invalidity under the Twelfth Amendment, a rule of the Democratic Party of Alabama, acting under delegated power of the legislature, that required each candidate for the office of presidential elector to take a pledge to support the nominees of the party's convention for President and Vice President. The state court had determined that the Twelfth Amendment, following language of Clause 3, required that electors be absolutely free to vote for anyone of their choice. Justice Reed wrote for the Court:

"It is true that the Amendment says the electors shall vote by ballot. But it is also true that the Amendment does not prohibit an elector's announcing his choice beforehand, pledging himself. The suggestion that in the early elections candidates for electors—contemporaries of the Founders—would have hesitated, because of constitutional limitations, to pledge themselves to support party nominees in the event of their selection as electors is impossible to accept. History teaches that the electors were expected to support the party nominees. Experts in the history of government recognize the longstanding practice. Indeed, more than twenty states do not print the names of the candidates for electors on the general election ballot. Instead, in one form or another, they allow a vote for the presidential candidate of the national conventions to be counted as a vote for his party's nominees for the electoral college. This long-continued practical interpretation of the constitutional propriety of an implied or oral pledge of his ballot by a candidate for elector as to his vote in the electoral college weighs heavily in considering the constitutionality of a pledge, such as the one here required, in the primary."

"However, even if such promises of candidates for the electoral college are legally unenforceable because violative of an assumed constitutional freedom of the elector under the Constitution, Art. II, § 1, to vote as he may choose in the electoral college, it would not follow that the requirement of a pledge in the primary is unconstitutional. A candidacy in the primary is a voluntary act of the applicant. He is not barred, discriminatorily, from participating but must comply with the rules of the party. Surely one may voluntarily assume obligations to vote for a certain candidate. The state offers him opportunity to become a candidate for elector on his own terms, although he must file his declaration before the primary. Ala.

[96] At least thirteen states have statutes binding their electors, but none has been tested in the courts.

[97] 343 U.S. 214 (1952).

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Code, Tit. 17, § 145. Even though the victory of an independent candidate for elector in Alabama cannot be anticipated, the state does offer the opportunity for the development of other strong political organizations where the need is felt for them by a sizable block of voters. Such parties may leave their electors to their own choice."

"We conclude that the Twelfth Amendment does not bar a political party from requiring the pledge to support the nominees of the National Convention. Where a state authorizes a party to choose its nominees for elector in a party primary and to fix the qualifications for the candidates, we see no federal constitutional objection to the requirement of this pledge."[98] Justice Jackson, with Justice Douglas, dissented: "It may be admitted that this law does no more than to make a legal obligation of what has been a voluntary general practice. If custom were sufficient authority for amendment of the Constitution by Court decree, the decision in this matter would be warranted. Usage may sometimes impart changed content to constitutional generalities, such as 'due process of law,' 'equal protection,' or 'commerce among the states.' But I do not think powers or discretions granted to federal officials by the Federal Constitution can be forfeited by the Court for disuse. A political practice which has its origin in custom must rely upon custom for its sanctions."[99]

Clause 5. 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.

QUALIFICATIONS

All Presidents from Martin Van Buren on were born in the United States subsequent to the Declaration of Independence. The principal issue with regard to the qualifications set out in this clause is whether a child born abroad of American parents is "a natural born citizen" in the sense of the clause. Such a child is a citizen as a consequence of statute.[100] Whatever the term "natural born" means, it no doubt does not include a person who is "naturalized." Thus, the answer to the question might be seen to turn on the interpretation of the first sentence of the first section of the Fourteenth Amend-

[98] 343 U.S. at 228–31.
[99] 343 U.S. at 233.
[100] 8 U.S.C. § 1401.

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ment, providing that "[a]ll persons born or naturalized in the United States" are citizens.[101] Significantly, however, Congress, in which a number of Framers sat, provided in the Naturalization act of 1790 that "the children of citizens of the United States, that may be born beyond the sea, . . . shall be considered as *natural born citizens* . . . ."[102] This phrasing followed the literal terms of British statutes, beginning in 1350, under which persons born abroad, whose parents were both British subjects, would enjoy the same rights of inheritance as those born in England; beginning with laws in 1709 and 1731, these statutes expressly provided that such persons were natural-born subjects of the crown.[103] There is reason to believe, therefore, that the phrase includes persons who become citizens at birth by statute because of their status in being born abroad of American citizens.[104] Whether the Supreme Court would decide the issue should it ever arise in a "case or controversy"—as well as how it might decide it—can only be speculated about.

Clause 6. In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the 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

[101] Reliance on the provision of an Amendment adopted subsequent to the constitutional provision being interpreted is not precluded by but is strongly militated against by the language in Freytag v. Commissioner, 501 U.S. 868, 886–87 (1991), in which the Court declined to be bound by the language of the 25th Amendment in determining the meaning of "Heads of Departments" in the Appointments Clause. *See also* id. at 917 (Justice Scalia concurring). If the Fourteenth Amendment is relevant and the language is exclusive, that is, if it describes the only means by which persons can become citizens, then, anyone born outside the United States would have to be considered naturalized in order to be a citizen, and a child born abroad of American parents is to be considered "naturalized" by being statutorily made a citizen at birth. Although dictum in certain cases supports this exclusive interpretation of the Fourteenth Amendment, United States v. Wong Kim Ark, 169 U.S. 649, 702–03 (1898); *cf.* Montana v. Kennedy, 366 U.S. 308, 312 (1961), the most recent case in its holding and language rejects it. Rogers v. Bellei, 401 U.S. 815 (1971).

[102] Act of March 26, 1790, 1 Stat. 103, 104 (emphasis supplied). *See* Weedin v. Chin Bow, 274 U.S. 657, 661–666 (1927); United States v. Wong Kim Ark, 169 U.S. 649, 672–675 (1898). With minor variations, this language remained law in subsequent reenactments until an 1802 Act, which omitted the italicized words for reasons not discernable. *See* Act of Feb. 10, 1855, 10 Stat. 604 (enacting same provision, for offspring of American-citizen fathers, but omitting the italicized phrase).

[103] 25 Edw. 3, Stat. 2 (1350); 7 Anne, ch. 5, § 3 (1709); 4 Geo. 2, ch. 21 (1731).

[104] *See*, *e.g.*, Gordon, *Who Can Be President of the United States: The Unresolved Enigma*, 28 Md. L. Rev. 1 (1968).

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act as President, and such Officer shall act accordingly until the Disability be removed, or a President shall be elected.

PRESIDENTIAL SUCCESSION

When the President is disabled or is removed or has died, to what does the Vice President succeed: to the "powers and duties of the said office," or to the office itself? There is a reasonable amount of evidence from the proceedings of the convention from which to conclude that the Framers intended the Vice President to remain Vice President and to exercise the powers of the President until, in the words of the final clause, "a President shall be elected." Nonetheless, when President Harrison died in 1841, Vice President Tyler, after initial hesitation, took the position that he was automatically President,[105] a precedent which has been followed subsequently and which is now permanently settled by section 1 of the Twenty-fifth Amendment. That Amendment also settles a number of other pressing questions with regard to presidential inability and succession.

Clause 7. The President shall, at stated Times, receive for his Services, a Compensation which shall neither be encreased 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.

COMPENSATION AND EMOLUMENTS

Clause 7 may be advantageously considered in the light of the rulings and learning arising out of parallel provision regarding judicial salaries.[106]

Clause 8. Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemly 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."

[105] E. Corwin, supra at 53–59, 344 n.46.

[106] *Cf.* 13 Ops. Atty. Gen. 161 (1869), holding that a specific tax by the United States upon the salary of an officer, to be deducted from the amount which otherwise would by law be payable as such salary, is a diminution of the compensation to be paid to him which, in the case of the President, would be unconstitutional if the act of Congress levying the tax was passed during his official term.

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OATH OF OFFICE

What is the time relationship between a President's assumption of office and his taking the oath? Apparently, the former comes first, this answer appearing to be the assumption of the language of the clause. The Second Congress assumed that President Washington took office on March 4, 1789,[107] although he did not take the oath until the following April 30.

That the oath the President is required to take might be considered to add anything to the powers of the President, because of his obligation to "preserve, protect and defend the Constitution," might appear to be rather a fanciful idea. But in President Jackson's message announcing his veto of the act renewing the Bank of the United States there is language which suggests that the President has the right to refuse to enforce both statutes and judicial decisions based on his own independent decision that they were unwarranted by the Constitution.[108] The idea next turned up in a message by President Lincoln justifying his suspension of the writ of *habeas corpus* without obtaining congressional authorization.[109] And counsel to President Johnson during his impeachment trial adverted to the theory, but only in passing.[110] Beyond these isolated instances, it does not appear to be seriously contended that the oath adds anything to the President's powers.

SECTION 2. Clause 1. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Office, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

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[107] Act of March 1, 1792, 1 Stat. 239, § 12.

[108] 2 J. Richardson, *supra*, at 576. Chief Justice Taney, who as a member of Jackson's Cabinet had drafted the message, later repudiated this possible reading of the message. 2 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 223–224 (1926).

[109] 6 J. Richardson, *supra*, at 25.

[110] 2 TRIAL OF ANDREW JOHNSON 200, 293, 296 (1868).

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COMMANDER-IN-CHIEF

Development of the Concept

Surprisingly little discussion of the Commander-in-Chief Clause is found in the Convention or in the ratifying debates. From the evidence available, it appears that the Framers vested the duty in the President because experience in the Continental Congress had disclosed the inexpediency of vesting command in a group and because the lesson of English history was that danger lurked in vesting command in a person separate from the responsible political leaders.[111] But the principal concern here is the nature of the power granted by the clause.

The Limited View.—The purely military aspects of the Commander-in-Chiefship were those that were originally stressed. Hamilton said the office "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."[112] Story wrote in his Commentaries: "The propriety of admitting the president to be commander in chief, so far as to give orders, and have a general superintendency, was admitted. But it was urged, that it would be dangerous to let him command in person, without any restraint, as he might make a bad use of it. The consent of both houses of Congress ought, therefore, to be required, before he should take the actual command. The answer then given was, that though the president might, there was no necessity that he should, take the command in person; and there was no probability that he would do so, except in extraordinary emergencies, and when he was possessed of superior military talents."[113] In 1850, Chief Justice Taney, for the Court, wrote: "His duty and his power are purely military. As commander-in-chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country, and sub-

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[111] May, *The President Shall Be Commander in Chief*, in THE ULTIMATE DECISION: THE PRESIDENT AS COMMANDER IN CHIEF (E. May ed., 1960), 1. In the Virginia ratifying convention, Madison, replying to Patrick Henry's objection that danger lurked in giving the President control of the military, said: "Would the honorable member say that the sword ought to be put in the hands of the representatives of the people, or in other hands independent of the government altogether?" 3 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 393 (1836). In the North Carolina convention, Iredell said: "From the nature of the thing, the command of armies ought to be delegated to one person only. The secrecy, dispatch, and decision, which are necessary in military operations can only be expected from one person." 4 id. at 107.

[112] THE FEDERALIST, No. 69 (J. Cooke ed. 1961), 465.

[113] 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1486 (1833).

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ject it to the sovereignty and authority of the United States. But his conquests do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power. . . ."

"But in the distribution of political power between the great departments of government, there is such a wide difference between the power conferred on the President of the United States, and the authority and sovereignty which belong to the English crown, that it would be altogether unsafe to reason from any supposed resemblance between them, either as regards conquest in war, or any other subject where the rights and powers of the executive arm of the government are brought into question." [114] Even after the Civil War, a powerful minority of the Court described the role of President as Commander-in-Chief simply as "the command of the forces and the conduct of campaigns." [115]

The Prize Cases.—The basis for a broader conception was laid in certain early acts of Congress authorizing the President to employ military force in the execution of the laws.[116] In his famous message to Congress of July 4, 1861,[117] Lincoln advanced the claim that the "war power" was his for the purpose of suppressing rebellion, and in the *Prize Cases* [118] of 1863 a divided Court sustained this theory. The immediate issue was the validity of the blockade that the President, following the attack on Fort Sumter, had proclaimed of the Southern ports.[119] The argument was advanced that a blockade to be valid must be an incident of a "public war" validly declared, and that only Congress could, by virtue of its power "to declare war," constitutionally impart to a military situation this character and scope. Speaking for the majority of the Court, Justice Grier answered: "If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be '*unilateral*.' Lord Stowell (1 Dodson, 247) observes, 'It is not the less a war on *that account*, for war may exist without a declaration on

[114] Fleming v. Page, 50 U.S. (9 How.) 603, 615, 618 (1850).

[115] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 139 (1866).

[116] 1 Stat. 424 (1795): 2 Stat. 443 (1807), now 10 U.S.C. §§ 331–334. *See also* Martin v. Mott, 25 U.S. (12 Wheat.) 19, 32–33 (1827), asserting the finality of the President's judgment of the existence of a state of facts requiring his exercise of the powers conferred by the act of 1795.

[117] 7 J. Richardson, *supra*, at 3221, 3232.

[118] 67 U.S. (2 Bl.) 635 (1863).

[119] 7 J. Richardson, *supra*, at 3215, 3216, 3481.

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either side. It is so laid down by the best writers of the law of nations. A declaration of war by one country only, is not a mere challenge to be accepted or refused at pleasure by the other.' "

"The battles of Palo Alto and Resaca de la Palma had been fought before the passage of the act of Congress of May 13, 1846, which recognized '*a state of war as existing by the act of the Republic of Mexico*.' This act not only provided for the future prosecution of the war, but was itself a vindication and ratification of the Act of the President in accepting the challenge without a previous formal declaration of war by Congress."

"This greatest of civil wars was not gradually developed by popular commotion, tumultuous assemblies, or local unorganized insurrections. However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of *war*. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact. . . ."

"Whether the President in fulfilling his duties, as Commander in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the government to which this power was entrusted. 'He must determine what degree of force the crisis demands.' The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case." [120]

Impact of the Prize Cases on World Wars I and II.—In brief, the powers that may be claimed for the President under the Commander-in-Chief Clause at a time of widespread insurrection were equated with his powers under the clause at a time when the United States is engaged in a formally declared foreign war.[121] And, because, especially in the early months of the Civil War, Lincoln performed various acts, such as increasing the Army and Navy, that admittedly fell within Congress's constitutional province, it seems to have been assumed during World Wars I and II that the position of Commander-in-Chief carried with it the power to exercise like powers practically at discretion, not merely in wartime but even at a time when war became a strong possibility. No attention was given

[120] 67 U.S. (2 Bl.) at 668–70.
[121] *See generally*, E. Corwin, Total War and the Constitution (1946).

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the fact that Lincoln had asked Congress to ratify and confirm his acts, which Congress promptly had,[122] with the exception of his suspension of *habeas corpus*, a power that many attributed to the President in the situation then existing, by virtue of his duty to take care that the laws be faithfully executed.[123] Nor was this the only respect in which war or the approach of war was deemed to operate to enlarge the scope of power claimable by the President as Commander-in-Chief in wartime.[124]

Presidential Theory of the Commander-in-Chiefship in World War II—And Beyond

In his message to Congress of September 7, 1942, in which he demanded that Congress forthwith repeal certain provisions of the Emergency Price Control Act of the previous January 30th,[125] President Roosevelt formulated his conception of his powers as "Commander in Chief in wartime" as follows:

"I ask the Congress to take this action by the first of October. Inaction on your part by that date will leave me with an inescapable responsibility to the people of this country to see to it that the war effort is no longer imperiled by threat of economic chaos."

"In the event that the Congress should fail to act, and act adequately, I shall accept the responsibility, and I will act."

"At the same time that farm prices are stabilized, wages can and will be stabilized also. This I will do."

"The President has the powers, under the Constitution and under Congressional acts, to take measures necessary to avert a disaster which would interfere with the winning of the war."

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[122] 12 Stat. 326 (1861).

[123] J. Randall, Constitutional Problems Under Lincoln 118–139 (rev. ed. 1951).

[124] *E.g.*, Attorney General Biddle's justification of seizure of a plant during World War II: "As Chief Executive and as Commander-in-Chief of the Army and Navy, the President possesses an aggregate of powers that are derived from the Constitution and from various statutes enacted by the Congress for the purpose of carrying on the war. . . . In time of war when the existence of the nation is at stake, this aggregate of powers includes authority to take reasonable steps to prevent nation-wide labor disturbances that threaten to interfere seriously with the conduct of the war. The fact that the initial impact of these disturbances is on the production or distribution of essential civilian goods is not a reason for denying the Chief Executive and the Commander-in-Chief of the Army and Navy the power to take steps to protect the nation's war effort." 40 Ops. Atty. Gen. 312, 319–320 (1944). Prior to the actual beginning of hostilities, Attorney General Jackson asserted the same justification upon seizure of an aviation plant. E. Corwin, Total War and the Constitution 47–48 (1946).

[125] 56 Stat. 23 (1942).

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"I have given the most thoughtful consideration to meeting this issue without further reference to the Congress. I have determined, however, on this vital matter to consult with the Congress. . . ."

"The American people can be sure that I will use my powers with a full sense of my responsibility to the Constitution and to my country. The American people can also be sure that I shall not hesitate to use every power vested in me to accomplish the defeat of our enemies in any part of the world where our own safety demands such defeat."

"When the war is won, the powers under which I act automatically revert to the people—to whom they belong."[126]

Presidential War Agencies.—While congressional compliance with the President's demand rendered unnecessary an effort on his part to amend the Price Control Act, there were other matters as to which he repeatedly took action within the normal field of congressional powers, not only during the war, but in some instances prior to it. Thus, in exercising both the powers which he claimed as Commander-in-Chief and those which Congress conferred upon him to meet the emergency, Mr. Roosevelt employed new emergency agencies, created by himself and responsible directly to him, rather than the established departments or existing independent regulatory agencies.[127]

Constitutional Status of Presidential Agencies.—The question of the legal status of the presidential agencies was dealt with judicially but once. This was in the decision of the United States Court of Appeals for the District of Columbia in *Employers Group v. National War Labor Board*,[128] which was a suit to annul and enjoin a "directive order" of the War Labor Board. The Court refused the injunction on the ground that the time when the directive was issued any action of the Board was "informatory," "at most advisory." In support of this view the Court quoted approvingly a statement by the chairman of the Board itself: "These orders are in reality mere declarations of the equities of each industrial dispute, as determined by a tripartite body in which industry, labor, and the public share equal responsibility; and the appeal of the Board is to the moral obligation of employers and workers to abide by the

[126] 88 Cong. Rec. 7044 (1942). Congress promptly complied, 56 Stat. 765 (1942), so that the President was not required to act on his own. *But see* E. Corwin, supra, 65–66.

[127] For a listing of the agencies and an account of their creation to the close of 1942, *see* Vanderbilt, *War Powers and Their Administration*, in 1942 Annual Survey of American Law 106 (New York Univ.).

[128] 143 F.2d 145 (D.C. Cir. 1944).

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nonstrike, no-lock-out agreement and . . . to carry out the directives of the tribunal created under that agreement by the Commander in Chief."[129] Nor, the Court continued, had the later War Labor Disputes Act vested War Labor Board orders with any greater authority, with the result that they were still judicially unenforceable and unreviewable. Following this theory, the War Labor Board was not an office wielding power, but a purely advisory body, such as Presidents have frequently created in the past without the aid or consent of Congress. Congress itself, nevertheless, both in its appropriation acts and in other legislation, treated the presidential agencies as in all respects offices.[130]

Evacuation of the West Coast Japanese.—On February 19, 1942, President Roosevelt issued an executive order, "by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy," providing, as a safeguard against subversion and sabotage, power for his military commanders to designate areas from which "any person" could be excluded or removed and to set up facilities for such persons elsewhere.[131] Pursuant to this order, more than 112,000 residents of the Western states, all of Japanese descent and more than two out of every three of whom were natural-born citizens, were removed from their homes and herded into temporary camps and later into "relocation centers" in several states.

It was apparently the original intention of the Administration to rely on the general principle of military necessity and the power of the Commander-in-Chief in wartime as authority for the relocations. But before any action of importance was taken under the order, Congress ratified and adopted it by the Act of March 21, 1942,[132] by which it was made a misdemeanor to knowingly enter, remain in, or leave prescribed military areas contrary to the orders of the Secretary of War or of the commanding officer of the area. The cases which subsequently arose in consequence of the order were decided under the order plus the Act. The question at issue, said Chief Justice Stone for the Court, "is not one of Congressional power to delegate to the President the promulgation of the Executive Order, but whether, acting in cooperation, Congress and the Executive have constitutional . . . [power] to impose the curfew restriction here com-

[129] 143 F.2d at 149.
[130] E. Corwin, supra at 244, 245, 459.
[131] E.O. 9066, 7 Fed. Reg. 1407 (1942).
[132] 56 Stat. 173 (1942).

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plained of."[133] This question was answered in the affirmative, as was the similar question later raised by an exclusion order.[134]

Presidential Government of Labor Regulations.—The most important segment of the home front regulated by what were in effect presidential edicts was the field of labor relations. Exactly six months before Pearl Harbor, on June 7, 1941, Mr. Roosevelt, citing his proclamation thirteen days earlier of an unlimited national emergency, issued an Executive Order seizing the North American Aviation Plant at Inglewood, California, where, on account of a strike, production was at a standstill.[135] Attorney General Jackson justified the seizure as growing out of the "duty constitutionally and inherently rested upon the President to exert his civil and military as well as his moral authority to keep the defense efforts of the United States a going concern," as well as "to obtain supplies for which Congress has appropriated the money, and which it has directed the President to obtain."[136] Other seizures followed, and on January 12, 1942, Mr. Roosevelt, by Executive Order 9017, created the National War Labor Board. "Whereas," the order read in part, "by reason of the state of war declared to exist by joint resolutions of Congress, . . . the national interest demands that there shall be no interruption of any work which contributes to the effective prosecution of the war; and Whereas as a result of a conference of representatives of labor and industry which met at the call of the President on December 17, 1941, it has been agreed that for the duration of the war there shall be no strikes or lockouts, and that all labor disputes shall be settled by peaceful means, and that a National War Labor Board be established for a peaceful adjustment of such disputes. Now, therefore, by virtue of the authority vested in me by the Constitution and the statutes of the United States, it is hereby ordered: 1. There is hereby created in the Office for Emergency Management a National War Labor Board . . . ."[137] In this field, too,

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[133] Hirabayashi v. United States, 320 U.S. 81, 91–92 (1943).

[134] Korematsu v. United States, 323 U.S. 214 (1944). Long afterward, in 1984, a federal court granted a writ of *coram nobis* and overturned Korematsu's conviction, Korematsu v. United States, 584 F. Supp. 1406 (N.D.Cal. 1984), and in *1986*, a federal court vacated Hirabayashi's conviction for failing to register for evacuation but let stand the conviction for curfew violations. Hirabayashi v. United States, 627 F. Supp. 1445 (W.D.Wash. 1986). Other cases were pending, but Congress then implemented the recommendations of the Commission on Wartime Relocation and Internment of Civilians by acknowledging "the fundamental injustice of the evacuation, relocation and internment," and apologizing on behalf of the people of the United States. Pub. L. 100–383, 102 Stat. 903 (1988), 50 U.S.C. App. §§ 1989 *et seq*. Reparations were approved, and each living survivor of the internment was to be compensated in an amount roughly approximating $20,000.

[135] E.O. 8773, 6 Fed. Reg. 2777 (1941).

[136] E. Corwin, Total War and the Constitution 47–48 (1946).

[137] 7 Fed. Reg. 237 (1942).

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Congress intervened by means of the War Labor Disputes Act of June 25, 1943,[138] which, however, still left ample basis for presidential activity of a legislative character.[139]

Sanctions Implementing Presidential Directives.—To implement his directives as Commander-in-Chief in wartime, and especially those which he issued in governing labor disputes, President Roosevelt often resorted to "sanctions," which may be described as penalties lacking statutory authorization. Ultimately, the President sought to put sanctions in this field on a systematic basis. The order empowered the Director of Economic Stabilization, on receiving a report from the National War Labor Board that someone was not complying with its orders, to issue "directives" to the appropriate department or agency requiring that privileges, benefits, rights, or preferences enjoyed by the noncomplying party be withdrawn.[140]

Sanctions were also occasionally employed by statutory agencies, such as OPA, to supplement the penal provisions of the Emergency Price Control Act of January 30, 1942.[141] In *Steuart & Bro. v. Bowles*,[142] the Supreme Court had the opportunity to regularize this type of executive emergency legislation. Here, a retail dealer in fuel oil was charged with having violated a rationing order of OPA by obtaining large quantities of oil from its supplier without surrendering ration coupons, by delivering many thousands of gallons of fuel oil without requiring ration coupons, and so on, and was prohibited by the agency from receiving oil for resale or transfer for the ensuing year. The offender conceded the validity of the rationing order in support of which the suspension order was issued but challenged the validity of the latter as imposing a penalty that Congress had not enacted and asked the district court to enjoin it.

The court refused to do so and was sustained by the Supreme Court in its position. Justice Douglas wrote for the Court: "[W]ithout rationing, the fuel tanks of a few would be full; the fuel tanks of many would be empty. Some localities would have plenty; communities less favorably situated would suffer. Allocation or rationing is designed to eliminate such inequalities and to treat all alike who are similarly situated. . . . But middlemen—wholesalers and retailers—bent on defying the rationing system could raise havoc with it. . . . These middlemen are the chief if not the only conduits

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[138] 57 Stat. 163 (1943).

[139] *See* Vanderbilt, *War Powers and their Administration*, in 1945 ANNUAL SURVEY OF AMERICAN LAW 254, 271–273 (N.Y. Univ.).

[140] E.O. 9370, 8 Fed. Reg. 11463 (1943).

[141] 56 Stat. 23 (1942).

[142] 322 U.S. 398 (1944).

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between the source of limited supplies and the consumers. From the viewpoint of a rationing system a middleman who distributes the product in violation and disregard of the prescribed quotas is an inefficient and wasteful conduit. . . . Certainly we could not say that the President would lack the power under this Act to take away from a wasteful factory and route to an efficient one a precious supply of material needed for the manufacture of articles of war. . . . From the point of view of the factory owner from whom the materials were diverted the action would be harsh. . . . But in times of war the national interest cannot wait on individual claims to preference. . . . Yet if the President has the power to channel raw materials into the most efficient industrial units and thus save scarce materials from wastage it is difficult to see why the same principle is not applicable to the distribution of fuel oil." [143] Sanctions were, therefore, constitutional when the deprivations they wrought were a reasonably implied amplification of the substantive power which they supported and were directly conservative of the interests which this power was created to protect and advance. It is certain, however, that sanctions not uncommonly exceeded this pattern.[144]

The Postwar Period.—The end of active hostilities did not terminate either the emergency or the Federal Government's response to it. President Truman proclaimed the termination of hostilities on December 31, 1946,[145] and, in July 1947, Congress enacted a joint resolution that repealed a great variety of wartime statutes and set termination dates for others.[146] Signing the resolution, the President said that the emergencies declared in 1939 and 1940 continued to exist and that it was "not possible at this time to provide for terminating all war and emergency powers." [147] The hot war was giving way to the Cold War.

Congress thereafter enacted a new Housing and Rent Act to continue the controls begun in 1942 [148] and continued the military draft.[149] With the outbreak of the Korean War, legislation was enacted establishing general presidential control over the economy again,[150] and by executive order the President created agencies to exercise the power.[151] The Court continued to assume the existence of a state of wartime emergency prior to Korea, but with misgivings. In *Woods*

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[143] 322 U.S. at 405–06.
[144] E. Corwin, supra, at 249–250.
[145] Proc. 2714, 12 Fed. Reg. 1 (1947).
[146] S.J. Res. 123, 61 Stat. 449 (1947).
[147] Woods v. Cloyd W. Miller Co., 333 U.S. 138, 140 n.3 (1948).
[148] 61 Stat. 193 (1947).
[149] 62 Stat. 604 (1948).
[150] Defense Production Act of 1950, 64 Stat. 798.
[151] E.O. 10161, 15 Fed. Reg. 6105 (1950).

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v. Cloyd W. Miller Co.,[152] the Court held constitutional the new rent control law on the ground that cessation of hostilities did not end the government's war power, but that the power continued to remedy the evil arising out of the emergency. Yet, Justice Douglas noted for the Court, "We recognize the force of the argument that the effects of war under modern conditions may be felt in the economy for years and years, and that if the war power can be used in days of peace to treat all the wounds which war inflicts on our society, it may not only swallow up all other powers of Congress but largely obliterate the Ninth and Tenth Amendments as well. There are no such implications in today's decision."[153] Justice Jackson, though concurring, noted that he found the war power "the most dangerous one to free government in the whole catalogue of powers" and cautioned that its exercise "be scrutinized with care."[154] And, in *Ludecke v. Watkins*,[155] four dissenting Justices were prepared to hold that the presumption in the statute under review of continued war with Germany was "a pure fiction" and not to be used.

But the postwar period was a time of reaction against the wartime exercise of power by President Roosevelt, and President Truman was not permitted the same liberties. The Twenty-second Amendment, writing into permanent law the two-term custom, the "Great Debate" about our participation in NATO, the attempt to limit the treaty-making power, and other actions, bespoke the reaction.[156] The Supreme Court signalized this reaction when it struck down the President's action in seizing the steel industry while it was struck during the Korean War.[157]

Nonetheless, the long period of the Cold War and of active hostilities in Korea and Indochina, in addition to the issue of the use of troops in the absence of congressional authorization, further created conditions for consolidation of powers in the President. In particular, a string of declarations of national emergencies, most, in whole or part, under the Trading with the Enemy Act,[158] undergirded the exercise of much presidential power. In the storm of response to the Vietnamese conflict, here, too, Congress reasserted legislative power to curtail what it viewed as excessive executive power, repealing the Trading with the Enemy Act and enacting in its place

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[152] 333 U.S. 138 (1948).
[153] 333 U.S. at 143–44.
[154] 333 U.S. at 146–47.
[155] 335 U.S. 160, 175 (1948).
[156] *See* A. Kelly & W. Harbison, The American Constitution: Its Origins and Development, ch. 31 (4th ed. 1970).
[157] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
[158] § 301(1), 55 Stat. 838, 839–840 (1941).

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the International Emergency Economic Powers Act,[159] which did not alter most of the range of powers delegated to the President but which did change the scope of the power delegated to declare national emergencies.[160] Congress also passed the National Emergencies Act, prescribing procedures for the declaration of national emergencies, for their termination, and for presidential reporting to Congress in connection with national emergencies. To end the practice of declaring national emergencies for an indefinite duration, Congress provided that any emergency not otherwise terminated would expire one year after its declaration unless the President published in the Federal Register and transmitted to Congress a notice that the emergency would continue in effect.[161]

The Cold War and After: Presidential Power To Use Troops Overseas Without Congressional Authorization

Reaction after World War II did not persist, but soon ran its course, and the necessities, real and perceived, of the United States' role as world power and chief guarantor of the peace operated to expand the powers of the President and to diminish congressional powers in the foreign relations arena. President Truman did not seek congressional authorization before sending troops to Korea, and subsequent Presidents similarly acted on their own in putting troops into many foreign countries, including the Dominican Republic, Lebanon, Grenada, Panama, and the Persian Gulf, and most notably Indochina.[162] Eventually, public opposition precipitated another constitutional debate whether the President had the authority to commit troops to foreign combat without the approval of Congress, a debate that went on inconclusively between Congress and Executive[163] and one which the courts were content generally to consign to the exclusive consideration of those two bodies. The substance of the debate concerns many facets of the President's powers and responsibilities, including his obligations to protect the lives and property of United States citizens abroad, to execute the treaty obligations of the Nation, to further the national security interests of the Nation, and to deal with aggression and threats of aggression as

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[159] 91 Stat. 1626, 50 U.S.C. §§ 1701–1706.

[160] Congress authorized the declaration of a national emergency based only on "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or the economy of the United States . . . ." 50 U.S.C. § 1701.

[161] Pub. L. 94–412, 90 Stat. 1255 (1976).

[162] *See* the discussion in National Commitments Resolution, Report of the Senate Committee on Foreign Relations, S. Rep. No. 91–129, 91st Congress, 1st sess. (1969); *U.S. Commitments to Foreign Powers: Hearings Before the Senate Committee on Foreign Relations*, 90th Congress, 1st sess. (1967) at 16–19 (Professor Bartlett).

[163] *See* discussion under Article I, § 8, cls. 11–14.

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they confront him. Defying neat summarization, the considerations nevertheless merit at least an historical survey and an attempted categorization of the arguments.

The Historic Use of Force Abroad.—In 1912, the Department of State published a memorandum prepared by its Solicitor which set out to justify the *Right to Protect Citizens in Foreign Countries by Landing Forces*.[164] In addition to the justification, the memorandum summarized 47 instances in which force had been used, in most of them without any congressional authorization. Twice revised and reissued, the memorandum was joined by a 1928 independent study and a 1945 work by a former government official in supporting conclusions that drifted away from the original justification of the use of United States forces abroad to the use of such forces at the discretion of the President and free from control by Congress.[165]

New lists and revised arguments were published to support the actions of President Truman in sending troops to Korea and of Presidents Kennedy and Johnson in sending troops first to Vietnam and then to Indochina generally,[166] and new lists have been pro-

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[164] J. Clark, *Memorandum by the Solicitor for the Department of State*, in RIGHT TO PROTECT CITIZENS IN FOREIGN COUNTRIES BY LANDING FORCES (1912).

[165] Id. (Washington: 1929; 1934); M. OFFUTT, THE PROTECTION OF CITIZENS ABROAD BY THE ARMED FORCES OF THE UNITED STATES (1928); J. ROGERS, WORLD POLICING AND THE CONSTITUTION (1945). The burden of the last cited volume was to establish that the President was empowered to participate in United Nations peacekeeping actions without having to seek congressional authorization on each occasion; it may be said to be one of the earliest, if not the earliest, propoundings of the doctrine of inherent presidential powers to use troops abroad outside the narrow compass traditionally accorded those powers.

[166] *E.g.*, H. REP. NO. 127, 82d Congress, 1st Sess. (1951), 55–62; Corwin, *Who Has the Power to Make War?* NEW YORK TIMES MAGAZINE (July 31, 1949), 11; *Authority of the President to Repel the Attack in Korea*, 23 DEPT. STATE BULL. 173 (1950); Department of State, Historical Studies Division, *Armed Actions Taken by the United States Without a Declaration of War, 1789–1967* (Res. Proj. No. 806A (Washington: 1967)). That the compilation of such lists was more than a defense against public criticism can be gleaned from a revealing discussion in Secretary of State Acheson's memoirs detailing why the President did not seek congressional sanction for sending troops to Korea. "There has never, I believe, been any serious doubt—in the sense of non-politically inspired doubt—of the President's constitutional authority to do what he did. The basis for this conclusion in legal theory and historical precedent was fully set out in the State Department's memorandum of July 3, 1950, extensively published. But the wisdom of the decision not to ask for congressional approval has been doubted. . . ."

After discussing several reasons establishing the wisdom of the decision, the Secretary continued: "The President agreed, moved also, I think, by another passionately held conviction. His great office was to him a sacred and temporary trust, which he was determined to pass on unimpaired by the slightest loss of power or prestige. This attitude would incline him strongly against any attempt to divert criticism from himself by action that might establish a precedent in derogation of presidential power

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pounded.[167] The great majority of the instances cited involved fights with pirates, landings of small naval contingents on barbarous or semibarbarous coasts to protect commerce, the dispatch of small bodies of troops to chase bandits across the Mexican border, and the like, and some incidents supposedly without authorization from Congress did in fact have underlying statutory or other legislative authorization. Some instances, *e.g.*, President Polk's use of troops to precipitate war with Mexico in 1846, President Grant's attempt to annex the Dominican Republic, President McKinley's dispatch of troops into China during the Boxer Rebellion, involved considerable exercises of presidential power, but in general purposes were limited and congressional authority was sought for the use of troops against a sovereign state or in such a way as to constitute war. The early years of this century saw the expansion in the Caribbean and Latin America both of the use of troops for the furthering of what was perceived to be our national interests and of the power of the President to deploy the military force of the United States without congressional authorization.[168]

The pre-war actions of Presidents Wilson and Franklin Roosevelt advanced in substantial degrees the fact of presidential initiative, although the theory did not begin to catch up with the fact until the "Great Debate" over the commitment of troops by the United States to Europe under the Atlantic Pact. While congressional authorization was obtained, that debate, the debate over the United Nations charter, and the debate over Article 5 of the North Atlantic Treaty of 1949, declaring that "armed attack" against one signatory was to be considered as "an attack" against all signatories, provided the occasion for the formulation of a theory of independent presidential power to use the armed forces in the national interest

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to send our forces into battle. The memorandum that we prepared listed eighty-seven instances in the past century in which his predecessors had done this. And thus yet another decision was made." D. ACHESON, PRESENT AT THE CREATION 414, 415 (1969).

[167] *War Powers Legislation: Hearings Before the Senate Foreign Relations Committee*, 92d Congress, 1st Sess. (1971), 347, 354–355, 359–379 (Senator Goldwater); Emerson, *War Powers Legislation*, 74 W. VA. L. REV. 53 (1972). The most complete list as of the time prepared is Collier, *Instances of Use of United States Armed Forces Abroad, 1798–1989*, CONG. RES. SERV. (1989), which was cited for its numerical total in United States v. Verdugo-Urquidez, 494 U.S. 259, 273 (1990). For an effort to reconstruct the development and continuation of the listings, *see* F. WORMUTH & E. FIRMAGE, TO CHAIN THE DOG OF WAR 142–145 (2d ed. 1989).

[168] Of course, considerable debate continues with respect to the meaning of the historical record. For reflections of the narrow reading, *see* NATIONAL COMMITMENTS RESOLUTION, Report of the Senate Committee on Foreign Relations, S. REP. NO. 91–129, 1st Sess. (1969); J. ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1993). On the broader reading and finding great presidential power, *see* A. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS (1976); Emerson, *Making War Without a Declaration*, 17 J. LEGIS. 23 (1990).

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at his discretion.[169] Thus, Secretary of State Acheson told Congress: "Not only has the President the authority to use the armed forces in carrying out the broad foreign policy of the United States implementing treaties, but it is equally clear that this authority may not be interfered with by the Congress in the exercise of powers which it has under the Constitution."[170]

The Theory of Presidential Power.—The fullest expression of the presidential power proponents has been in defense of the course followed in Indochina. Thus, the Legal Adviser of the State Department, in a widely circulated document, contended: "Under the Constitution, the President, in addition to being Chief Executive, is Commander in Chief of the Army and Navy. He holds the prime responsibility for the conduct of United States foreign relations. These duties carry very broad powers, including the power to deploy American forces abroad and commit them to military operations when the President deems such action necessary to maintain the security and defense of the United States. . . ."

"In 1787 the world was a far larger place, and the framers probably had in mind attacks upon the United States. In the 20th century, the world has grown much smaller. An attack on a country far from our shores can impinge directly on the nation's security. In the SEATO treaty, for example, it is formally declared that an armed attack against Viet Nam would endanger the peace and security of the United States."

"Under our Constitution it is the President who must decide when an armed attack has occurred. He has also the constitutional responsibility for determining what measures of defense are required when the peace and safety of the United States are endangered. If he considers that deployment of U.S. forces to South Viet Nam is required, and that military measures against the source of Commu-

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[169] For some popular defenses of presidential power during the "Great Debate," *see* Corwin, *Who Has the Power to Make War?* New York Times Magazine (July 31, 1949), 11; Commager, *Presidential Power: The Issue Analyzed*, New York Times Magazine (January 14, 1951), 11. *Cf.* Douglas, *The Constitutional and Legal Basis for the President's Action in Using Armed Forces to Repel the Invasion of South Korea*, 96 Cong. Rec. 9647 (1950). President Truman and Secretary Acheson utilized the argument from the U.N. Charter in defending the United States actions in Korea, and the Charter defense has been made much of since. *See, e.g.*, Stromseth, *Rethinking War Powers: Congress, the President, and the United Nations*, 81 Geo. L. J. 597 (1993).

[170] *Assignment of Ground Forces of the United States to Duty in the European Area: Hearings Before the Senate Foreign Relations and Armed Services Committees*, 82d Congress, 1st Sess. (1951), 92.

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nist aggression in North Viet Nam are necessary, he is constitutionally empowered to take those measures."[171]

Opponents of such expanded presidential powers have contended, however, that the authority to initiate war was not divided between the Executive and Congress but was vested exclusively in Congress. The President had the duty and the power to repeal sudden attacks and act in other emergencies, and in his role as Commander in Chief he was empowered to direct the armed forces for any purpose specified by Congress.[172] Though Congress asserted itself in some respects, it never really managed to confront the President's power with any sort of effective limitation, until recently.

The Power of Congress to Control the President's Discretion.—Over the President's veto, Congress enacted the War Powers Resolution,[173] designed to redistribute the war powers between the President and Congress. Although ambiguous in some respects, the Resolution appears to define restrictively the President's powers, to require him to report fully to Congress upon the introduction of troops into foreign areas, to specify a maximum time limitation on the engagement of hostilities absent affirmative congressional action, and to provide a means for Congress to require cessation of hostilities in advance of the time set.

The Resolution states that the President's power to commit United States troops into hostilities, or into situations of imminent involve-

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[171] Meeker, *The Legality of United States Participation in the Defense of Viet Nam*, 54 Dept. State Bull. 474, 484–485 (1966). *See also* Moore, *The National Executive and the Use of the Armed Forces Abroad*, 21 Naval War College Rev. 28 (1969); Wright, *The Power of the Executive to Use Military Forces Abroad*, 10 Va. J. Int. L. 43 (1969); *Documents Relating to the War Powers of Congress, The President's Authority as Commander-in-Chief and the War in Indochina*, Senate Committee on Foreign Relations, 91st Congress, 2d sess. (Comm. Print) (1970), 1 (Under Secretary of State Katzenbach), 90 (J. Stevenson, Legal Adviser, Department of State), 120 (Professor Moore), 175 (Assistant Attorney General Rehnquist).

[172] *E.g.*, F. Wormuth & E. Firmage, To Chain the Dog of War (2d ed. 1989), F.; J. Ely, War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath (1993); *U.S. Commitments to Foreign Powers: Hearings Before the Senate Committee on Foreign Relations*, 90th Congress, 1st sess. (1967), 9 (Professor Bartlett); *War Powers Legislation: Hearings Before the Senate Committee on Foreign Relations*, 92d Cong., 1st sess. (1971), 7 (Professor Commager), 75 (Professor Morris), 251 (Professor Mason).

[173] Pub. L. 93–148, 87 Stat. 555, 50 U.S.C. §§ 1541–1548. For the congressional intent and explanation, *see* H. Rep. No. 93–287, S. Rep. No. 93–220, and H. Rep. No. 93–547 (Conference Report), all 93d Congress, 1st sess. (1973). The President's veto message is H. Doc. No. 93–171, 93d Congress. 1st Sess. (1973). All this material is collected in *The War Powers Resolution: Relevant Documents, Reports, Correspondence*, House Committee on Foreign Affairs, 103d Cong., 2d Sess. (Comm. Print) (GPO: 1994), 1–46. For a narrative account of passage and an assessment of the disputed compliance to date, from the congressional point of view, *see The War Powers Resolution*, A Special Study of the House Committee on Foreign Affairs, 102d Cong., 2d Sess. (Comm. Print) (GPO: 1982).

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ment in hostilities, is limited to instances of (1) a declaration of war, (2) a specific statutory authorization, or (3) a national emergency created by an attack on the United States, its territories or possessions, or its armed forces.[174] In the absence of a declaration of war, a President must within 48 hours report to Congress whenever he introduces troops (1) into hostilities or situations of imminent hostilities, (2) into a foreign nation while equipped for combat, except in certain nonhostile situations, or (3) in numbers which substantially enlarge United States troops equipped for combat already located in a foreign nation.[175] If the President introduces troops in the first of these three situations, then he must terminate the use of troops within 60 days after his report was submitted or was required to be submitted to Congress, unless Congress (1) has declared war, (2) has extended the period, or (3) is unable to meet as a result of an attack on the United States, but the period can be extended another 30 days by the President's certification to Congress of unavoidable military necessity respecting the safety of the troops.[176] Congress may through the passage of a concurrent resolution require the President to remove the troops sooner.[177] The Resolution further states that no legislation, whether enacted prior to or subsequent to passage of the Resolution will be taken to empower the President to use troops abroad unless the legislation specifically does so and that no treaty may so empower the President unless it is supplemented by implementing legislation specifically addressed to the issue.[178]

Aside from its use as a rhetorical device, the War Powers Resolution has been of little worth in reordering presidential-congressional relations in the years since its enactment. All Presidents operating under it have expressly or implicitly considered it to be an unconstitutional infringement on presidential powers, and on each occasion of use abroad of United States troops the President in reporting to Congress has done so "consistent[ly] with" the reporting section but not pursuant to the provision.[179] Upon the invasion of Kuwait by Iraqi troops in 1990, President Bush sought

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[174] 87 Stat. 554, 2(c), 50 U.S.C. § 1541(c).

[175] 50 U.S.C. § 1543(a).

[176] 50 U.S.C. § 1544(b).

[177] Id. at § 1544(c). It is the general consensus that, following INS v. Chadha, 462 U.S. 919 (1983), this provision of the Resolution is unconstitutional.

[178] 50 U.S.C. § 1547(a).

[179] *See* the text of the reports in *The War Powers Resolution: Relevant Documents, Reports, Correspondence*, supra at 47 (Pres. Ford on transport of refugees from Danang), 55 (Pres. Carter on attempted rescue of Iranian hostages), 73 (Pres. Reagan on use of troops in Lebanon), 113 (Pres. Reagan on Grenada), 144 (Pres. Bush on Panama), 147, 149 (Pres. Bush on Persian Gulf), 189 (Pres. Bush on Somalia), 262 (Pres. Clinton on Haiti).

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not congressional authorization but a United Nations Security Council resolution authorizing the use of force by member Nations. Only at the last moment did the President seek authorization from Congress, he and his officials contending that he had the power to act unilaterally.[180] After intensive debate, Congress voted, 250 to 183 in the House of Representatives and 53 to 46 in the Senate, to authorize the President to use United States troops pursuant to the U.N. resolution and purporting to bring the act within the context of the War Powers Resolution.[181]

By contrast, President George W. Bush sought a resolution from Congress in 2002 to approve the eventual invasion of Iraq before seeking a U.N. Security Council resolution, all the while denying that express authorization from Congress, or for that matter, the U.N. Security Council, was necessary to renew hostilities in Iraq. Prior to adjourning for its midterm elections, Congress passed the Authorization for Use of Military Force against Iraq Resolution of 2002,[182] which it styled as "specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution." On signing the measure, the President noted that he had sought "an additional resolution of support" from Congress, and expressed appreciation for receiving that support, but stated, "my request for it did not, and my signing this resolution does not, constitute any change in the long-standing positions of the executive branch on either the President's constitutional authority to use force to deter, prevent, or respond to aggression or other threats to U.S. interests or on the constitutionality of the War Powers Resolution."[183] In the Bush administration's view, the primary benefit of receiving authorization from Congress seems to have been the message of political unity it conveyed to the rest of the world rather than the fulfillment of any constitutional requirements.

Although there is recurrent talk within Congress and without as to amending the War Powers Resolution to strengthen it, no con-

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[180] *See Crisis in the Persian Gulf Region: U.S. Policy Options and Implications: Hearings Before the Senate Committee on Armed Services*, 101st Cong., 2d Sess. (1990), 701 (Secretary Cheney) (President did not require "any additional authorization from the Congress" before attacking Iraq). On the day following his request for supporting legislation from Congress, President Bush, in answer to a question about the requested action, stated: "I don't think I need it. . . . I feel that I have the authority to fully implement the United Nations resolutions." 27 WEEKLY COMP. PRES. DOC. 25 (Jan. 8, 1991).

[181] Pub. L. 102–1, 105 Stat. 3 (1991).

[182] Pub. L. 107–243; 116 Stat. 1498 (2002). The House approved the resolution by a vote of 296–133. The Senate passed the House version of H.J. Res. 114 by a vote of 77–23.

[183] *See* President's Statement on Signing H.J. Res. 114, Oct. 16, 2002, available at [http://usinfo.state.gov/dhr/Archive/2003/Oct/09–906028.html].

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sensus has emerged, and there is little evidence that there exists within Congress the resolve to exercise the responsibility concomitant with strengthening it.[184]

The President as Commander of the Armed Forces

While the President customarily delegates supreme command of the forces in active service, there is no constitutional reason why he should do so, and he has been known to resolve personally important questions of military policy. Lincoln early in 1862 issued orders for a general advance in the hopes of stimulating McClellan to action; Wilson in 1918 settled the question of an independent American command on the Western Front; Truman in 1945 ordered that the bomb be dropped on Hiroshima and Nagasaki.[185] As against an enemy in the field, the President possesses all the powers which are accorded by international law to any supreme commander. "He may invade the hostile country, and subject it to the sovereignty and authority of the United States."[186] In the absence of attempts by Congress to limit his power, he may establish and prescribe the jurisdiction and procedure of military commissions, and of tribunals in the nature of such commissions, in territory occupied by Armed Forces of the United States, and his authority to do this sometimes survives cessation of hostilities.[187] He may employ secret agents to enter the enemy's lines and obtain information as to its strength, resources, and movements.[188] He may, at least with the assent of Congress, authorize commercial intercourse with the enemy.[189] He may also requisition property and compel services from American citizens and friendly aliens who are situated within the theater of military operations when necessity requires, thereby incurring for the United States the obligation to render "just compensation."[190] By the same warrant, he may bring hostilities to a conclusion by arranging an armistice, stipulating conditions that may determine

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[184] *See*, on proposals to amend and on congressional responsibility, J. Ely, War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath (1993).

[185] For a review of how several wartime Presidents have operated in this sphere, *see* The Ultimate Decision: The President as Commander in Chief (E. May ed., 1960).

[186] Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850).

[187] Madsen v. Kinsella, 343 U.S. 341, 348 (1952). *See also* Johnson v. Eisentrager, 339 U.S. 763, 789 (1950).

[188] Totten v. United States, 92 U.S. 105 (1876).

[189] Hamilton v. Dillin, 88 U.S. (21 Wall.) 73 (1875); Haver v. Yaker, 76 U.S. (9 Wall.) 32 (1869).

[190] Mitchell v. Harmony, 54 U.S. (13 How.) 115 (1852); United States v. Russell, 80 U.S. (13 Wall.) 623 (1871); Totten v. United States, 92 U.S. 105 (1876); 40 Ops. Atty. Gen. 250, 253 (1942).

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to a great extent the ensuing peace.[191] He may not, however, effect a permanent acquisition of territory,[192] though he may govern recently acquired territory until Congress sets up a more permanent regime.[193]

The President is the ultimate tribunal for the enforcement of the rules and regulations that Congress adopts for the government of the forces, and that are enforced through courts-martial.[194] Indeed, until 1830, courts-martial were convened solely on the President's authority as Commander in Chief.[195] Such rules and regulations are, moreover, it seems, subject in wartime to his amendment at discretion.[196] Similarly, the power of Congress to "make rules for the government and regulation of the land and naval forces" (Art. I, § 8, cl. 14) did not prevent President Lincoln from promulgating, in April, 1863, a code of rules to govern the conduct in the field of the armies of the United States, which was prepared at his instance by a commission headed by Francis Lieber and which later became the basis of all similar codifications both here and abroad.[197] One important power that the President lacks is that of choosing his subordinates, whose grades and qualifications are determined by Congress and whose appointment is ordinarily made by and with the advice and consent of the Senate, though undoubtedly Congress could if it wished vest their appointment in "the President alone."[198] Also, the President's power to dismiss an officer from the service, once unlimited, is today confined by statute in time of peace to dismissal "in pursuance of the sentence of a general court-martial or in mitigation thereof."[199] But the provision is not regarded by the Court as preventing the President from displacing an officer of the Army or Navy by appointing with the advice and

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[191] *Cf.* the Protocol of August 12, 1898, which largely foreshadowed the Peace of Paris, 30 Stat. 1742 and President Wilson's Fourteen Points, which were incorporated in the Armistice of November 11, 1918.

[192] Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850).

[193] Santiago v. Nogueras, 214 U.S. 260 (1909). As to temporarily occupied territory, *see* Dooley v. United States, 182 U.S. 222, 230–31 (1901).

[194] Swaim v. United States, 165 U.S. 553 (1897); and cases there reviewed. *See also* Givens v. Zerbst, 255 U.S. 11 (1921).

[195] 15 Ops. Atty. Gen. 297, n; *cf.* 1 Ops. Atty. Gen. 233, 234, where the contrary view is stated by Attorney General Wirt.

[196] *Ex parte* Quirin, 317 U.S. 1, 28–29 (1942).

[197] General Orders, No. 100, Official Records, War Rebellion, ser. III, vol. III; April 24, 1863.

[198] *See*, *e.g.*, Mimmack v. United States, 97 U.S. 426, 437 (1878); United States v. Corson, 114 U.S. 619 (1885).

[199] 10 U.S.C. § 804.

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consent of the Senate another person in his place.[200] The President's power of dismissal in time of war Congress has never attempted to limit.

The Commander-in-Chief a Civilian Officer.—Is the Commander-in-Chiefship a military or a civilian office in the contemplation of the Constitution? Unquestionably the latter. An opinion by a New York surrogate deals adequately, though not authoritatively, with the subject: "The President receives his compensation for his services, rendered as Chief Executive of the Nation, not for the individual parts of his duties. No part of his compensation is paid from sums appropriated for the military or naval forces; and it is equally clear under the Constitution that the President's duties as Commander in Chief represent only a part of duties ex officio as Chief Executive [Article II, sections 2 and 3 of the Constitution] and that the latter's office is a civil office. [Article II, section 1 of the Constitution . . . .] The President does not enlist in, and he is not inducted or drafted into, the armed forces. Nor, is he subject to court-martial or other military discipline. On the contrary, Article II, section 4 of the Constitution provides that '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.' . . . The last two War Presidents, President Wilson and President Roosevelt, both clearly recognized the civilian nature of the President's position as Commander in Chief. President Roosevelt, in his Navy Day Campaign speech at Shibe Park, Philadelphia, on October 27, 1944, pronounced this principle as follows:–'It was due to no accident and no oversight that the framers of our Constitution put the command of our armed forces under civilian authority. It is the duty of the Commander in Chief to appoint the Secretaries of War and Navy and the Chiefs of Staff.' It is also to be noted that the Secretary of War, who is the regularly constituted organ of the President for the administration of the military establishment of the Nation, has been held by the Supreme Court of the United States to be merely a civilian officer, not in military service. (*United States v. Burns*, 79 U.S. (12 Wall.) 246 (1871)). On the general principle of civilian supremacy over the military, by virtue of the Constitution, it has re-

[200] Mullan v. United States, 140 U.S. 240 (1891); Wallace v. United States, 257 U.S. 541 (1922).

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cently been said: 'The supremacy of the civil over the military is one of our great heritages.' *Duncan v. Kahanamoku*, 327 U.S. 304, 325 (1945)."[201]

Martial Law and Constitutional Limitations

Two theories of martial law are reflected in decisions of the Supreme Court. The first, which stems from the Petition of Right, 1628, provides that the common law knows no such thing as martial law;[202] that is to say, martial law is not established by official authority of any sort, but arises from the nature of things, being the law of paramount necessity, leaving the civil courts to be the final judges of necessity.[203] By the second theory, martial law can be validly and constitutionally established by supreme political authority in wartime. In the early years of the Supreme Court, the American judiciary embraced the latter theory as it held in *Luther v. Borden*[204] that state declarations of martial law were conclusive and therefore not subject to judicial review.[205] In this case, the Court found that the Rhode Island legislature had been within its rights in resorting to the rights and usages of war in combating insurrection in that state. The decision in the *Prize Cases*,[206] although not dealing directly with the subject of martial law, gave national scope to the same general principle in 1863.

The Civil War being safely over, however, a divided Court, in the elaborately argued *Milligan* case,[207] reverting to the older doctrine, pronounced President Lincoln's action void, following his suspension of the writ of *habeas corpus* in September, 1863, in ordering the trial by military commission of persons held in custody as "spies" and "abettors of the enemy." The salient passage of the Court's opinion bearing on this point is the following: "If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theater of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus

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[201] Surrogate's Court, Duchess County, New York, ruling July 25, 1950, that the estate of Franklin D. Roosevelt was not entitled to tax benefits under sections 421 and 939 of the Internal Revenue Code, which extends certain tax benefits to persons dying in the military services of the United States. New York Times, July 26, 1950, p. 27, col. 1.

[202] C. Fairman, The Law of Martial Rule 20–22 (1930); A. Dicey, Introduction to the Study of the Law of the Constitution 283, 290 (5th ed. 1923).

[203] Id. at 539–44.

[204] 48 U.S. (7 How.) 1 (1849). *See also* Martin v. Mott, 25 U.S. (12 Wheat.) 19, 32–33 (1827).

[205] 48 U.S. (7 How.) at 45.

[206] 67 U.S. (2 Bl.) 635 (1863).

[207] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866).

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overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued *after* the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war."[208] Four Justices, speaking by Chief Justice Chase, while holding Milligan's trial to have been void because it violated the Act of March 3, 1863, governing the custody and trial of persons who had been deprived of the *habeas corpus* privilege, declared their belief that Congress could have authorized Milligan's trial. The Chief Justice wrote: "Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature, and by the principles of our institutions. . . ."

"We by no means assert that Congress can establish and apply the laws of war where no war has been declared or exists."

"Where peace exists the laws of peace must prevail. What we do maintain is, that when the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress to determine in what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offences against the discipline or security of the army or against the public safety."[209] In short, only Congress can authorize the substitution of military tribunals for civil tribunals for the trial of offenses; and Congress can do so only in wartime.

Early in the 20th century, however, the Court appeared to retreat from its stand in *Milligan* insofar as it held in *Moyer v. Peabody*[210] that "the Governor's declaration that a state of insurrection existed is conclusive of that fact. . . . [T]he plaintiff's position

[208] 71 U.S. at 127.

[209] 71 U.S. at 139–40. In *Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243 (1864), the Court had held, while war was still flagrant, that it had no power to review by *certiorari* the proceedings of a military commission ordered by a general officer of the Army, commanding a military department.

[210] 212 U.S. 78 (1909).

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is that he has been deprived of his liberty without due process of law. But it is familiar that what is due process of law depends on circumstances. . . . So long as such arrests are made in good faith and in honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief."[211] The "good faith" test of *Moyer*, however, was superseded by the "direct relation" test of *Sterling v. Constantin*,[212] where the Court made it very clear that "[i]t does not follow . . . that every sort of action the Governor may take, no matter how justified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat. . . . What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."[213]

Martial Law in Hawaii.—The question of the constitutional status of martial law was raised again in World War II by the proclamation of Governor Poindexter of Hawaii, on December 7, 1941, suspending the writ of *habeas corpus* and conferring on the local commanding General of the Army all his own powers as governor and also "all of the powers normally exercised by the judicial officers . . . of this territory . . . during the present emergency and until the danger of invasion is removed." Two days later the Governor's action was approved by President Roosevelt. The regime which the proclamation set up continued with certain abatements until October 24, 1944.

By section 67 of the Organic Act of April 30, 1900,[214] the Territorial Governor was authorized "in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, [to] suspend the privilege of the writ of *habeas corpus*, or place the Territory, or any part thereof, under martial law until communication can be had with the President and his decision thereon made known."

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[211] 212 U.S. at 83–85.

[212] 287 U.S. 378 (1932). "The nature of the power also necessarily implies that there is a permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order, for without such liberty to make immediate decision, the power itself would be useless. Such measures, conceived in good faith, in the face of the emergency and directly related to the quelling of the disorder or the prevention of its continuance, fall within the discretion of the Executive in the exercise of his authority to maintain peace." Id. at 399–400.

[213] 287 U.S. at 400–01. This holding has been ignored by states on numerous occasions. *E.g.*, Allen v. Oklahoma City, 175 Okla. 421, 52 P.2d 1054 (1935); Hearon v. Calus, 178 S.C. 381, 183 S.E. 13 (1935); and Joyner v. Browning, 30 F. Supp. 512 (W.D. Tenn. 1939).

[214] 31 Stat. 141, 153 (1900).

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By section 5 of the Organic Act, "the Constitution . . . shall have the same force and effect within the said Territory as elsewhere in the United States." In a brace of cases which reached it in February 1945, but which it contrived to postpone deciding till February 1946,[215] the Court, speaking by Justice Black, held that the term "martial law" as employed in the Organic Act, "while intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the Islands against actual or threatened rebellion or invasion, was not intended to authorize the supplanting of courts by military tribunals."[216]

The Court relied on the majority opinion in *Ex parte Milligan*. Chief Justice Stone concurred in the result. "I assume also," he said, "that there could be circumstances in which the public safety requires, and the Constitution permits, substitution of trials by military tribunals for trials in the civil courts,"[217] but added that the military authorities themselves had failed to show justifying facts in this instance. Justice Burton, speaking for himself and Justice Frankfurter, dissented. He stressed the importance of Hawaii as a military outpost and its constant exposure to the danger of fresh invasion. He warned that "courts must guard themselves with special care against judging past military action too closely by the inapplicable standards of judicial, or even military, hindsight."[218]

Articles of War: The Nazi Saboteurs.—In 1942 eight youths, seven Germans and one an American, all of whom had received training in sabotage in Berlin, were brought to this country aboard two German submarines and put ashore, one group on the Florida coast, the other on Long Island, with the idea that they would proceed forthwith to practice their art on American factories, military equipment, and installations. Making their way inland, the saboteurs were soon picked up by the FBI, some in New York, others in Chicago, and turned over to the Provost Marshal of the District of Columbia. On July 2, the President appointed a military commission to try them for violation of the laws of war, to wit: for not wearing fixed emblems to indicate their combatant status. In the midst of the trial, the accused petitioned the Supreme Court and the United States District Court for the District of Columbia for leave to bring *habeas corpus* proceedings. Their argument embraced the contentions: (1) that the offense charged against them was not known to the laws of the United States; (2) that it was not one arising in the

[215] Duncan v. Kahanamoku, 327 U.S. 304 (1946).
[216] 327 U.S. at 324.
[217] 327 U.S. at 336.
[218] 327 U.S. at 343.

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land and naval forces; and (3) that the tribunal trying them had not been constituted in accordance with the requirements of the Articles of War.

The first argument the Court met as follows: The act of Congress in providing for the trial before military tribunals of offenses against the law of war is sufficiently definite, although Congress has not undertaken to codify or mark the precise boundaries of the law of war, or to enumerate or define by statute all the acts which that law condemns. ". . . [T]hose who during time of war pass surreptitiously from enemy territory into . . . [that of the United States], 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."[219] The second argument it disposed of by showing that petitioners' case was of a kind that was never deemed to be within the terms of the Fifth and Sixth Amendments, citing in confirmation of this position the trial of Major Andre.[220] The third contention the Court overruled by declining to draw the line between the powers of Congress and the President in the premises,[221] thereby, in effect, attributing to the President the right to amend the Articles of War in a case of the kind before the Court *ad libitum*.

The decision might well have rested on the ground that the Constitution is without restrictive force in wartime in a situation of this sort. The saboteurs were invaders; their penetration of the boundary of the country, projected from units of a hostile fleet, was essentially a military operation, their capture was a continuation of that operation. Punishment of the saboteurs was therefore within the President's purely martial powers as Commander in Chief. Moreover, seven of the petitioners were enemy aliens, and so, strictly speaking, without constitutional status. Even had they been civilians properly domiciled in the United States at the outbreak of the war, they would have been subject under the statutes to restraint and other disciplinary action by the President without appeals to the courts. In any event, the Court rejected the jurisdictional challenge by one of the saboteurs on the basis of his claim to U.S. citizenship, finding U.S. citizenship wholly irrelevant to the determination of whether a wartime captive is an "enemy belligerent" within the meaning of the law of war.[222]

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[219] *Ex parte* Quirin, 317 U.S. 1, 29–30, 35 (1942).

[220] 317 U.S. at 41–42.

[221] 317 U.S. at 28–29.

[222] *Ex parte* Quirin, 317 U.S. 1, 37–38 (1942) ("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

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Articles of War: World War II Crimes.—As a matter of fact, in General Yamashita's case,[223] which was brought after the termination of hostilities for alleged "war crimes," the Court abandoned its restrictive conception altogether. In the words of Justice Rutledge's dissenting opinion in this case: "The difference between the Court's view of this proceeding and my own comes down in the end to the view, on the one hand, that there is no law restrictive upon these proceedings other than whatever rules and regulations may be prescribed for their government by the executive authority or the military and, on the other hand, that the provisions of the Articles of War, of the Geneva Convention and the Fifth Amendment apply."[224] And the adherence of the United States to the Charter of London in August 1945, under which the Nazi leaders were brought to trial, is explicable by the same theory. These individuals were charged with the crime of instigating aggressive war, which at the time of its commission was not a crime either under international law or under the laws of the prosecuting governments. It must be presumed that the President is not in his capacity as Supreme Commander bound by the prohibition in the Constitution of *ex post facto* laws, nor does international law forbid *ex post facto* laws.[225]

Articles of War: Response to the Attacks of September 11, 2001.—In response to the September 11, 2001, terrorist attacks on New York City's World Trade Center and the Pentagon in Washington, D.C., Congress passed the "Authorization for Use of Military Force,"[226] which provided that the President may use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks [or] harbored such organizations or persons." During a military action in Afghanistan pursuant to this authorization, a United States citizen, Yaser Hamdi, was taken prisoner. The Executive Branch argued that it had plenary authority under Article II to hold such an "enemy combatant" for the duration of hostilities, and to deny him meaningful recourse to the federal courts. In *Hamdi v. Rumsfeld*, the Court agreed that the President was authorized to detain a United States citizen seized in Afghanistan, although a majority of the Court appeared to reject the notion that such power was inherent in the Presidency, relying instead on statu-

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the meaning of the Hague Convention and the law of war."). *See also* Colepaugh v. Looney, 235 F.2d 429, 432 (10th Cir. 1956), *cert. denied*, 352 U.S. 1014 (1957) ("[T]he petitioner's citizenship in the United States does not . . . confer upon him any constitutional rights not accorded any other belligerent under the laws of war.").

[223] *In re* Yamashita, 327 U.S. 1 (1946).

[224] 327 U.S. at 81.

[225] *See* Gross, *The Criminality of Aggressive War*, 41 Am. Pol. Sci. Rev. 205 (1947).

[226] Pub. L. 107–40, 115 Stat. 224 (2001).

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tory grounds.[227] However, the Court did find that the government may not detain the petitioner indefinitely for purposes of interrogation, and must afford him the opportunity to offer evidence that he is not an enemy combatant.[228]

In *Rasul v. Bush*,[229] the Court rejected an Executive Branch argument that foreign prisoners being held at Guantanamo Bay were outside of federal court jurisdiction. The Court distinguished earlier case law arising during World War II that denied *habeas corpus* petitions from German citizens who had been captured and tried overseas by United States military tribunals.[230] In *Rasul*, the Court noted that the Guantanamo petitioners were not citizens of a country at war with the United States,[231] had not been afforded any form of tribunal, and were being held in a territory over which the United States exercised exclusive jurisdiction and control.[232] In addition, the Court found that statutory grounds existed for the extension of *habeas corpus* to these prisoners.[233]

In response to *Rasul*, Congress amended the *habeas* statute to eliminate all federal *habeas* jurisdiction over detainees, whether its

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[227] 542 U.S. 507 (2004). There was no opinion of the Court. Justice O'Connor, joined by Chief Justice Rehnquist, Justice Kennedy and Justice Breyer, avoided ruling on the Executive Branch argument that such detentions could be authorized by its Article II powers alone, and relied instead on the "Authorization for Use of Military Force" passed by Congress. Justice Thomas also found that the Executive Branch had the power to detain the petitioner, although his dissenting opinion found that such detentions were authorized by Article II. Justice Souter, joined by Justice Ginsberg, rejected the argument that the Congress had authorized such detentions, while Justice Scalia, joined with Justice Stevens, denied that such congressional authorization was possible without a suspension of the writ of *habeas corpus*.

[228] At a minimum, the petitioner must be given notice of the asserted factual basis for holding him, must be given a fair chance to rebut that evidence before a neutral decisionmaker, and must be allowed to consult an attorney. 542 U.S. at 533, 539.

[229] 542 U.S. 466 (2004).

[230] Johnson v. Eisentrager, 339 U.S. 763, 789 (1950).

[231] The petitioners were Australians and Kuwaitis.

[232] Rasul v. Bush, 542 U.S. at 467.

[233] The Court found that 28 U.S.C. § 2241, which had previously been construed to require the presence of a petitioner in a district court's jurisdiction, was now satisfied by the presence of a jailor-custodian. *See* Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973). Another "enemy combatant" case, this one involving an American citizen arrested on American soil, was remanded after the Court found that a federal court's *habeas* jurisdiction under 28 U.S.C. § 2241 was limited to jurisdiction over the immediate custodian of a petitioner. Rumsfeld v. Padilla, 542 U.S. 426 (2004) (federal court's jurisdiction over Secretary of Defense Rumsfeld not sufficient to satisfy presence requirement under 28 U.S.C. § 2241). In Munaf v. Geren, 128 S. Ct. 2207 (2008), the Court held that the federal *habeas* statute, 28 U.S.C. § 2241, applied to American citizens held by the Multinational Force—Iraq, an international coalition force operating in Iraq and composed of 26 different nations, including the United States. The Court concluded that the *habeas* statute extends to American citizens held overseas by American forces operating subject to an American chain of command, even when those forces are acting as part of a multinational coalition.

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basis was statutory or constitutional.[234] This amendment was challenged in *Boumediene v. Bush*,[235] as a violation of the Suspension Clause.[236] Although the historical record did not contain significant common-law applications of the writ to foreign nationals who were apprehended and detained overseas, the Court did not find this conclusive in evaluating whether *habeas* applied in this case.[237] Emphasizing a "functional" approach to the issue,[238] the Court considered (1) the citizenship and status of the detainee and the adequacy of the process through which the status determination was made; (2) the nature of the sites where apprehension and detention took place; and (3) any practical obstacles inherent in resolving the prisoner's entitlement to the writ. As in *Rasul*, the Court distinguished previous case law, noting that the instant detainees disputed their enemy status, that their ability to dispute their status had been limited, that they were held in a location (Guantanamo Bay, Cuba) under the *de facto* jurisdiction of the United States, and that complying with the demands of *habeas* petitions would not interfere with the government's military mission. Thus, the Court concluded that the Suspension Clause was in full effect regarding these detainees.

Martial Law and Domestic Disorder.—President Washington himself took command of state militia called into federal service to quell the Whiskey Rebellion, but there were not too many occasions subsequently in which federal troops or state militia called

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[234] Detainee Treatment Act of 2005, Pub. L. 109–148, § 1005(e)(1) (providing that "no court . . . shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by . . . an alien detained . . . at Guantanamo Bay"). After the Court decided, in Hamdan v. Rumsfeld, 548 U.S. 557 (2006), that this language of the Detainee Treatment Act did not apply to detainees whose cases were pending at the time of enactment, the language was amended by the Military Commissions Act of 2006, Pub. L. 109–366, to also apply to pending cases where a detainee had been determined to be an enemy combatant.

[235] 553 U.S. 723 (2008).

[236] U.S. Const. Art. I, § 9, cl. 2 provides: "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." In *Boumediene*, the government argued only that the Suspension Clause did not apply to the detainees; it did not argue that Congress had acted to suspend *habeas*.

[237] "[G]iven the unique status of Guantanamo Bay and the particular dangers of terrorism in the modern age, the common-law courts simply may not have confronted cases with close parallels to this one. We decline, therefore, to infer too much, one way or the other, from the lack of historical evidence on this point." 553 U.S. at 752.

[238] 553 U.S. at 764. "[Q]uestions of extraterritoriality turn on objective factors and practical concerns, not formalism." Id.

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into federal service were required.[239] Since World War II, however, the President, by virtue of his own powers and the authority vested in him by Congress,[240] has used federal troops on a number of occasions, five of them involving resistance to desegregation decrees in the South.[241] In 1957, Governor Faubus employed the Arkansas National Guard to resist court-ordered desegregation in Little Rock, and President Eisenhower dispatched federal soldiers and brought the Guard under federal authority.[242] In 1962, President Kennedy dispatched federal troops to Oxford, Mississippi, when federal marshals were unable to control with rioting that broke out upon the admission of an African American student to the University of Mississippi.[243] In June and September of 1964, President Johnson sent troops into Alabama to enforce court decrees opening schools to blacks.[244] And, in 1965, the President used federal troops and federalized local Guardsmen to protect participants in a civil rights march. The President justified his action on the ground that there was a substantial likelihood of domestic violence because state authorities were refusing to protect the marchers.[245]

PRESIDENTIAL ADVISERS

The Cabinet

The authority in Article II, § 2, cl. 1 to require the written opinion of the heads of executive departments is the meager residue from a persistent effort in the Federal Convention to impose a coun-

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[239] United States Adjutant-General, *Federal Aid in Domestic Disturbances 1787–1903*, S. Doc. No. 209, 57th Congress, 2d sess. (1903); Pollitt, *Presidential Use of Troops to Enforce Federal Laws: A Brief History*, 36 N.C. L. Rev. 117 (1958). United States Marshals were also used on approximately 30 occasions. United States Commission on Civil Rights, *Law Enforcement: A Report on Equal Protection in the South* (Washington: 1965), 155–159.

[240] 10 U.S.C. §§ 331–334, 3500, 8500, deriving from laws of 1795, 1 Stat. 424; 1861, 12 Stat. 281; and 1871, 17 Stat. 14.

[241] The other instances were in domestic disturbances at the request of state governors.

[242] Proc. No. 3204, 22 Fed. Reg. 7628 (1957); E.O. 10730, 22 Fed. Reg. 7628. *See* 41 Ops. Atty. Gen. 313 (1957); *see also*, Cooper v. Aaron, 358 U.S. 1 (1958); Aaron v. McKinley, 173 F. Supp. 944 (E.D. Ark. 1959), *aff'd sub nom* Faubus v. Aaron, 361 U.S. 197 (1959); Faubus v. United States, 254 F.2d 797 (8th Cir. 1958), *cert. denied*, 358 U.S. 829 (1958).

[243] Proc. No. 3497, 27 Fed. Reg. 9681 (1962); E.O. 11053, 27 Fed. Reg. 9693 (1962). *See* United States v. Barnett, 346 F.2d 99 (5th Cir. 1965).

[244] Proc. 3542, 28 Fed. Reg. 5707 (1963); E.O. 11111, 28 Fed. Reg. 5709 (1963); Proc. No. 3554, 28 Fed. Reg. 9861; E.O. 11118, 28 Fed. Reg. 9863 (1963). *See* Alabama v. United States, 373 U.S. 545 (1963).

[245] Proc. No. 3645, 30 Fed. Reg. 3739 (1965); E.O. 11207, 30 Fed. Reg. 2743 (1965). *See* Williams v. Wallace, 240 F. Supp. 100 (M.D. Ala. 1965).

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cil on the President.[246] The idea ultimately failed, partly because of the diversity of ideas concerning the council's make-up. One member wished it to consist of "members of the two houses," another wished it to comprise two representatives from each of three sections, "with a rotation and duration of office similar to those of the Senate." The proposal with the strongest backing was that it should consist of the heads of departments and the Chief Justice, who should preside when the President was absent. Of this proposal the only part to survive was the above cited provision. The consultative relation here contemplated is an entirely one-sided affair, is to be conducted with each principal officer separately and in writing, and is to relate only to the duties of their respective offices.[247] The *Cabinet*, as we know it today, that is to say, the Cabinet *meeting*, was brought about solely on the initiative of the first President,[248] and may be dispensed with on presidential initiative at any time, being totally unknown to the Constitution. Several Presidents have in fact reduced the Cabinet meeting to little more than a ceremony with social trimmings.[249]

PARDONS AND REPRIEVES

The Legal Nature of a Pardon

In the first case to be decided concerning the pardoning power, Chief Justice Marshall, speaking for the Court, said: "As this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institution ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it. A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the Court. . . . A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. It may then be rejected by the person to whom

[246] 1 M. Farrand, The Records of the Federal Convention of 1787 70, 97, 110 (rev. ed. 1937); 2 id. at 285, 328, 335–37, 367, 537–42. Debate on the issue in the Convention is reviewed in C. Thach, The Creation of the Presidency 1775–1789 82, 83, 84, 85, 109, 126 (1923).

[247] E. Corwin, supra at 82.

[248] L. White, The Federalists: A Study in Administrative History ch. 4 (1948).

[249] E. Corwin, supra at 19, 61, 79–85, 211, 295–99, 312, 320–23, 490–93.

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it is tendered; and if it be rejected, we have discovered no power in a court to force it on him." Marshall continued to hold that to be noticed judicially this deed must be pleaded, like any private instrument.[250]

In *Burdick v. United States*,[251] Marshall's doctrine was put to a test that seems to have overtaxed it, perhaps fatally. Burdick, having declined to testify before a federal grand jury on the ground that his testimony would tend to incriminate him, was proffered by President Wilson "a full and unconditional pardon for all offenses against the United States," which he might have committed or participated in in connection with the matter he had been questioned about. Burdick, nevertheless, refused to accept the pardon and persisted in his contumacy with the unanimous support of the Supreme Court. "The grace of a pardon," remarked Justice McKenna sententiously, "may be only a pretense . . . involving consequences of even greater disgrace than those from which it purports to relieve. Circumstances may be made to bring innocence under the penalties of the law. If so brought, escape by confession of guilt implied in the acceptance of a pardon may be rejected . . . ."[252] Nor did the Court give any attention to the fact that the President had accompanied his proffer to Burdick with a proclamation, although a similar procedure had been held to bring President Johnson's amnesties to the Court's notice.[253] In 1927, however, in sustaining the right of the President to commute a sentence of death to one of life imprisonment, against the will of the prisoner, the Court abandoned this view. "A pardon in our days," it said, "is not a private act of grace from an individual happening to possess power. It is a part of the constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed."[254] Whether these words sound the death knell of the acceptance doctrine is perhaps doubtful.[255] They seem clearly to indicate that by substituting a commutation order for a deed of pardon, a President can always

[250] United States v. Wilson, 32 U.S. (7 Pet.) 150, 160–61 (1833).

[251] 236 U.S. 79, 86 (1915).

[252] 236 U.S. at 90–91.

[253] Armstrong v. United States, 80 U.S. (13 Wall.) 154, 156 (1872). In Brown v. Walker, 161 U.S. 591 (1896), the Court had said: "It is almost a necessary corollary of the above propositions that, if the witness has already received a pardon, he cannot longer set up his privilege, since he stands with respect to such offence as if it had never been committed." Id. at 599, citing British cases.

[254] Biddle v. Perovich, 274 U.S. 480, 486 (1927).

[255] *Cf.* W. Humbert, The Pardoning Power of the President 73 (1941).

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have his way in such matters, provided the substituted penalty is authorized by law and does not in common understanding exceed the original penalty.[256]

Scope of the Power

The pardon power embraces all "offences against the United States," except cases of impeachment, and includes the power to remit fines, penalties, and forfeitures, except as to money covered into the Treasury or paid an informer,[257] the power to pardon absolutely or conditionally, and the power to commute sentences, which, as seen above, is effective without the convict's consent.[258] It has been held, moreover, in face of earlier English practice, that indefinite suspension of sentence by a court of the United States is an invasion of the presidential prerogative, amounting as it does to a condonation of the offense.[259] It was early assumed that the power included the power to pardon specified classes or communities wholesale, in short, the power to amnesty, which is usually exercised by proclamation. General amnesties were issued by Washington in 1795, by Adams in 1800, by Madison in 1815, by Lincoln in 1863, by Johnson in 1865, 1867, and 1868, and by Theodore Roosevelt—to Aguinaldo's followers—in 1902.[260] Not until after the Civil War, however, was the point adjudicated, when it was decided in favor of presidential prerogative.[261]

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[256] Biddle v. Perovich, 274 U.S. 480, 486 (1927). In Schick v. Reed, 419 U.S. 256 (1976), the Court upheld the presidential commutation of a death sentence to imprisonment for life with no possibility of parole, the foreclosure of parole being contrary to the scheme of the Code of Military Justice. "The conclusion is inescapable that the pardoning power was intended to include the power to commute sentences on conditions which do not in themselves offend the Constitution, but which are not specifically provided for by statute." Id. at 264.

[257] 23 Ops. Atty. Gen. 360, 363 (1901); Illinois Cent. R.R. v. Bosworth, 133 U.S. 92 (1890).

[258] *Ex parte* William Wells , 59 U.S. (18 How.) 307 (1856). For the contrary view, *see* some early opinions of the Attorney General, 1 Ops. Atty. Gen. 341 (1820); 2 Ops. Atty. Gen. 275 (1829); 5 Ops. Atty. Gen. 687 (1795); *cf.* 4 Ops. Atty. Gen. 458 (1845); United States v. Wilson, 32 U.S. (7 Pet.) 150, 161 (1833).

[259] *Ex parte* United States, 242 U.S. 27 (1916). Amendment of sentence, however, within the same term of court, by shortening the term of imprisonment, although defendant had already been committed, is a judicial act and no infringement of the pardoning power. United States v. Benz, 282 U.S. 304 (1931).

[260] *See* 1 J. Richardson, *supra*, at 173, 293; 2 id. at 543; 7 id. at 3414, 3508; 8 id. at 3853; 14 id. at 6690.

[261] United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1872). *See also* United States v. Padelford, 76 U.S. (9 Wall.) 531 (1870).

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The President cannot pardon by anticipation, or he would be invested with the power to dispense with the laws, King James II's claim to which was the principal cause of his forced abdication.[262]

Offenses Against the United States: Contempt of Court.—The President may pardon criminal but not civil contempts of court. The Court "point[ed] out that it is not the fact of punishment but rather its character and purpose that makes the difference between the two kinds of contempts. For civil contempts, the punishment is remedial and for the benefit of the complainant, and a pardon cannot stop it. For criminal contempts the sentence is punitive in the public interest to vindicate the authority of the court and to deter other like derelictions."[263] In upholding the President's power to pardon criminal contempt, Chief Justice Taft, speaking for the Court, resorted once more to English conceptions as being authoritative in construing this clause of the Constitution. He wrote: "The King of England before our Revolution, in the exercise of his prerogative, had always exercised the power to pardon contempts of court, just as he did ordinary crimes and misdemeanors and as he has done to the present day. In the mind of a common law lawyer of the eighteenth century the word pardon included within its scope the ending by the King's grace of the punishment of such derelictions, whether it was imposed by the court without a jury or upon indictment, for both forms of trial for contempts were had. [Citing cases.] These cases also show that, long before our Constitution, a distinction had been recognized at common law between the effect of the King's pardon to wipe out the effect of a sentence for contempt in so far as it had been imposed to punish the contemnor for violating the dignity of the court and the King, in the public interest, and its inefficacy to halt or interfere with the remedial part of the court's order necessary to secure the rights of the injured suitor. Blackstone IV, 285, 397, 398; Hawkins Pleas of the Crown, 6th Ed. (1787), Vol. 2, 553. The same distinction, nowadays referred to as the difference between civil and criminal contempts, is still maintained in English law."[264] Nor was any new or special danger to be apprehended from this view of the pardoning power. "If," the Chief

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[262] F. Maitland, Constitutional History of England 302–306 (W.S. Hein 2006) (1908); 1 Ops. Atty. Gen. 342 (1820). That is, the pardon may not be in anticipation of the commission of the offense. "A pardon may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment." *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380 (1867), as indeed President Ford's pardon of former President Nixon preceded institution of any action. On the Nixon pardon controversy, *see Pardon of Richard M. Nixon and Related Matters: Hearings Before the House Judiciary Subcommittee on Criminal Justice*, 93d Congress, 2d Sess. (1974).

[263] *Ex parte* Grossman, 267 U.S. 87, 113 (1925).

[264] 267 U.S. at 110–11.

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Justice asked, "we could conjure up in our minds a President willing to paralyze courts by pardoning all criminal contempts, why not a President ordering a general jail delivery?" Although, he added, "[t]he power of a court to protect itself and its usefulness by punishing contemnors is of course necessary," in light of the fact that a court exercises this power "without the restraining influence of a jury and without many of the guaranties [sic] which the bill of rights offers[,] . . . [m]ay it not be fairly said that in order to avoid possible mistake, undue prejudice or needless severity, the chance of pardon should exist at least as much in favor of a person convicted by a judge without a jury as in favor of one convicted in a jury trial?" [265]

Effects of a Pardon: Ex parte Garland.—The leading case on this subject is *Ex parte Garland*,[266] which was decided shortly after the Civil War. By an act passed in 1865, Congress had prescribed that, before any person should be permitted to practice in a federal court, he must take oath asserting that he had "never voluntarily borne arms against the United States," had never given aid or encouragement "to persons engaged in armed hostilities" against the United States, and so forth.[267] Garland, who had "taken part in the Rebellion against the United States, by being in the Congress of the so-called Confederate States," and so was unable to take the oath, had, however, received from President Johnson "a full pardon 'for all offences by him committed, arising from participation, direct or implied, in the Rebellion,'" [268] The question before the Court was whether, armed with this pardon, Garland was entitled to practice in the federal courts despite the act of Congress just mentioned. Justice Field wrote for a divided Court: "[T]he inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity." [269]

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[265] 267 U.S. at 121, 122.
[266] 71 U.S. (4 Wall.) 333 (1867).
[267] 71 U.S. (4 Wall.) at 334–35.
[268] 71 U.S. (4 Wall.) at 336, 375.
[269] 71 U.S. at 380–81.

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Justice Miller, speaking for the minority, protested that the act of Congress involved was not penal in character, but merely laid down an appropriate test of fitness to practice law. "The man who, by counterfeiting, by theft, by murder, or by treason, is rendered unfit to exercise the functions of an attorney or counselor-at-law, may be saved by the executive pardon from the penitentiary or the gallows, but he is not thereby restored to the qualifications which are essential to admission to the bar."[270] Justice Field's language must today be regarded as too sweeping in light of the 1914 decision in *Carlesi v. New York*.[271] Carlesi had been convicted several years before of committing a federal offense. In the instant case, he was being tried for a subsequent offense committed in New York. He was convicted as a second offender, although the President had pardoned him for the earlier federal offense. In other words, the fact of prior conviction by a federal court was considered in determining the punishment for a subsequent state offense. This conviction and sentence were upheld by the Supreme Court. Although this case involved offenses against different sovereignties, the Court declared in dictum that its decision "must not be understood as in the slightest degree intimating that a pardon would operate to limit the power of the United States in punishing crimes against its authority to provide for taking into consideration past offenses committed by the accused as a circumstance of aggravation even although for such past offenses there had been a pardon granted."[272]

Limits to the Efficacy of a Pardon.—But Justice Field's latitudinarian view of the effect of a pardon undoubtedly still applies ordinarily where the pardon is issued *before conviction*. He is also correct in saying that a full pardon restores a convict to his "civil rights," and this is so even though simple completion of the convict's sentence would not have had that effect. One such right is the right to testify in court, and in *Boyd v. United States*, the Court held that "[t]he disability to testify being a consequence, according to the principles of the common law, of the judgment of conviction, the pardon obliterated that effect."[273] But a pardon "does not make amends for the past. It affords no relief for what has been suffered by the offender in his person by imprisonment, forced labor, or otherwise; it does not give compensation for what has been done or suffered, nor does it impose upon the government any obligation to give it. The offence being established by judicial proceedings, that which has been done or suffered while they were in force is pre-

[270] 71 U.S. at 397.
[271] 233 U.S. 51 (1914).
[272] 233 U.S. at 59.
[273] 142 U.S. 450, 453–54 (1892).

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sumed to have been rightfully done and justly suffered, and no satisfaction for it can be required. Neither does the pardon affect any rights which have vested in others directly by the execution of the judgment for the offence, or which have been acquired by others whilst that judgment was in force. If, for example, by the judgment a sale of the offender's property has been had, the purchaser will hold the property notwithstanding the subsequent pardon. And if the proceeds of the sale have been paid to a party to whom the law has assigned them, they cannot be subsequently reached and recovered by the offender. The rights of the parties have become vested, and are as complete as if they were acquired in any other legal way. So, also, if the proceeds have been paid into the treasury, the right to them has so far become vested in the United States that they can only be secured to the former owner of the property through an act of Congress. Moneys once in the treasury can only be withdrawn by an appropriation by law."[274]

Congress and Amnesty

Congress cannot limit the effects of a presidential amnesty. Thus the act of July 12, 1870, making proof of loyalty necessary to recover property abandoned and sold by the government during the Civil War, notwithstanding any executive proclamation, pardon, amnesty, or other act of condonation or oblivion, was pronounced void. Chief Justice Chase wrote for the majority: "[T]he legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration. The Court is required to receive special pardons as evidence of guilt and to treat them as null and void. It is required to disregard pardons granted by proclamation on condition, though the condition has been fulfilled, and to deny them their legal effect. This certainly impairs the executive authority and directs the Court to be instrumental to that end."[275] On the other hand, Congress itself, under the Necessary and Proper Clause, may enact amnesty laws remitting penalties incurred under the national statutes.[276]

Clause 2. 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 su-

[274] Knote v. United States, 95 U.S. 149, 153–54 (1877).
[275] United States v. Klein, 80 U.S. (13 Wall.) 128, 143, 148 (1872).
[276] *The Laura*, 114 U.S. 411 (1885).

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preme 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 Court of Law, or in the Heads of Departments.

THE TREATY-MAKING POWER

President and Senate

The plan that the Committee of Detail reported to the Federal Convention on August 6, 1787 provided that "the Senate of the United States shall have power to make treaties, and to appoint Ambassadors, and Judges of the Supreme Court."[277] Not until September 7, ten days before the Convention's final adjournment, was the President made a participant in these powers.[278] The constitutional clause evidently assumes that the President and Senate will be associated throughout the entire process of making a treaty, although Jay, writing in *The Federalist*, foresaw that the initiative must often be seized by the President without benefit of senatorial counsel.[279] Yet, so late as 1818 Rufus King, Senator from New York, who had been a member of the Convention, declared on the floor of the Senate: "In these concerns the Senate are the Constitutional and the only responsible counselors of the President. And in this capacity the Senate may, and ought to, look into and watch over every branch of the foreign affairs of the nation; they may, therefore, at any time call for full and exact information respecting the foreign affairs, and express their opinion and advice to the President respecting the same, when, and under whatever other circumstances, they may think such advice expedient."[280]

Negotiation, a Presidential Monopoly.—Actually, the negotiation of treaties had long since been taken over by the President; the Senate's role in relation to treaties is today essentially legislative in character.[281] "He alone negotiates. Into the field of negotiation, the Senate cannot intrude; and Congress itself is powerless to

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[277] 2 M. Farrand, The Records of the Federal Convention of 1787 183 (rev. ed. 1937).

[278] Id. at 538–39.

[279] No. 64 (J. Cooke ed., 1961), 435–436.

[280] 31 Annals of Congress 106 (1818).

[281] Washington sought to use the Senate as a council, but the effort proved futile, principally because the Senate balked. For the details *see* E. Corwin, supra, at 207–217.

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invade it," declared Justice Sutherland for the Court in 1936.[282] The Senate must, moreover, content itself with such information as the President chooses to furnish it.[283] In performing the function that remains to it, however, it has several options. It may consent unconditionally to a proposed treaty, it may refuse its consent, or it may stipulate conditions in the form of amendments to the treaty, of reservations to the act of ratification, or of statements of understanding or other declarations, the formal difference between the first two and the third being that amendments and reservations, if accepted by the President must be communicated to the other parties to the treaty, and, at least with respect to amendments and often reservations as well, require reopening negotiations and changes, whereas the other actions may have more problematic results.[284] The act of ratification for the United States is the President's act, but it may not be forthcoming unless the Senate has consented to it by the required two-thirds of the Senators present, which signifies two-thirds of a quorum, otherwise the consent rendered would not be that of the Senate as organized under the Constitution to do business.[285] Conversely, the President may, if dissatisfied with amendments which have been affixed by the Senate to a proposed treaty or with the conditions stipulated by it to ratification, decide to abandon the negotiation, which he is entirely free to do.[286]

Treaties as Law of the Land

Treaty commitments of the United States are of two kinds. As Chief Justice Marshall wrote in 1829: "A treaty is, in its nature, a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished; especially, so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States, a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of

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[282] United States v. Curtiss-Wright Corp., 299 U.S. 304, 319 (1936).

[283] E. Corwin, supra, at 428–429.

[284] Treaties and Other International Agreements: The Role of the United States Senate, A Study Prepared for the Senate Committee on Foreign Relations by the Congressional Research Service, 103d Cong., 1st Sess. (Comm. Print) (1993), 96–98 (hereinafter CRS Study); *see also* American Law Institute, Restatement (Third) of the Law, The Foreign Relations Law of the United States § 314 (hereinafter Restatement, Foreign Relations) (1987). *See* Fourteen Diamond Rings v. United States, 183 U.S. 176, 183 (1901).

[285] *Cf.* Art. I, § 5, cl. 1; *see also* Missouri Pacific Ry. v. Kansas, 248 U.S. 276, 283–84 (1919).

[286] For instance, *see* S. Crandall, Treaties, Their Making and Enforcement 53 (2d ed. 1916); CRS Study, supra, 109–120.

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any legislative provision. But when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the court."[287]

To the same effect, but more accurate, is Justice Miller's language for the Court a half century later, in the *Head Money Cases*: "A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties of it. . . . But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country."[288]

The meaning of treaties, as of statutes, is determined by the courts. "If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department,' headed by the 'one supreme Court' established by the Constitution."[289] Yet, "[w]hile courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight."[290] Decisions of the International Court of Justice (ICJ) in-

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[287] Foster v. Neilson, 27 U.S. (2 Pet.) 253, 313–14 (1829). *See* THE FEDERALIST No. 75 (J. Cooke ed. 1961), 504–505.

[288] 112 U.S. 580, 598 (1884) (quoted with approval in Medellin v. Texas, 128 S. Ct. 1346, 1357, 1358–59 (2008)). For treaty provisions operative as "law of the land" (self-executing), *see* S. Crandall, supra, at 36–42, 49–62, 151, 153–163, 179, 238–239, 286, 321, 338, 345–346. For treaty provisions of an "executory" character, *see* id. at 162–63, 232, 236, 238, 493, 497, 532, 570, 589. *See also* CRS Study, supra, at 41–68; Restatement, Foreign Relations, supra, §§ 111–115.

[289] Sanchez-Llamas v. Oregon, 548 U.S. 331, 353–54 (2006), quoting Marbury v. Madison, 5 U.S. (1 Cr.) 137, 177 (1803). In *Sanchez-Llamas*, two foreign nationals were arrested in the United States, and, in violation of Article 36 of the Vienna Convention on Consular Relations, their nations' consuls were not notified that they had been detained by authorities in a foreign country (the U.S.). The foreign nationals were convicted in Oregon and Virginia state courts, respectively, and cited the violations of Article 36 in challenging their convictions. The Court did not decide whether Article 36 grants rights that may be invoked by individuals in a judicial proceeding (four justices would have held that it did grant such rights). The reason that the Court did not decide whether Article 36 grants rights to defendants was that it held, by a 6-to-3 vote, that, even if Article 36 does grant rights, the defendants in the two cases before it were not entitled to relief on their claims. It found, specifically, that "suppression of evidence is [not] a proper remedy for a violation of Article 36," and that "an Article 36 claim may be deemed forfeited under state procedural rules because a defendant failed to raise the claim at trial." Id. at 342.

[290] Sanchez-Llamas v. Oregon, 548 U.S. at 355, quoting Kolovrat v. Oregon, 366 U.S. 187, 194 (1961).

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terpreting treaties, however, have "*no binding force* except between the parties and in respect of that particular case."[291] ICJ decisions "are therefore entitled only to the 'respectful consideration' due an interpretation of an international agreement by an international court."[292]

Even when an ICJ decision has binding force as between the governments of two nations, it is not necessarily enforceable by the individuals affected. If, for example, the ICJ finds that the United States violated a particular defendant's rights under international law, and such a decision "constitutes an *international* law obligation on the part of the United States," it does not necessarily "constitute binding federal law enforceable in United States courts. . . . [W]hile treaties may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be self-executing and is ratified on these terms."[293] A memorandum from the President of the United States directing that the United States would "discharge its international obligations" under an ICJ decision interpreting a non-self-executing treaty, "by having State courts give effect to the decision," is not sufficient to make the decision binding on state courts, unless the President's action is authorized by Congress.[294]

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[291] Sanchez-Llamas v. Oregon, 548 U.S. at 354, quoting Statute of the International Court of Justice, Art. 59, 59 Stat. 1062, T.S. No. 933 (1945) (emphasis added by the Court).

[292] Sanchez-Llamas v. Oregon, 548 U.S. at 355, quoting Breard v. Greene, 523 U.S. 371, 375 (1998) (per curiam).

[293] Medellin v. Texas, 128 S. Ct. 1346, 1356 (2008) (emphasis in the original, internal quotation marks omitted). As in the case of the foreign nationals in *Sanchez-Llamas*, Medellin's nation's consul had not been notified that he had been detained in the United States. Unlike the foreign nationals in *Sanchez-Llamas*, however, Medellin was named in an ICJ decision that found a violation of Article 36 of the Vienna Convention.

[294] Medellin v. Texas, 128 S. Ct. 1346, 1353 (2008). "[T]he non-self-executing character of a treaty constrains the President's ability to comply with treaty commitments by unilaterally making the treaty binding on domestic courts." Id. at 1371. The majority opinion in *Medellin* was written by Chief Justice Roberts. Justice Stevens, concurring, noted that, even though the ICJ decision "is not 'the supreme Law of the Land,' U.S. Const., Art VI, cl. 2," it constitutes an international law obligation not only on the part of the United States, but on the part of the State of Texas. Id. at 1374. This, of course, does not make it enforceable against Texas, but Justice Stevens found that "[t]he cost to Texas of complying with [the ICJ decision] would be minimal." Id. at 1375. Justice Breyer, joined by Justices Souter and Ginsburg, dissented, writing that "the consent of the United States to the ICJ's jurisdiction[ ] bind[s] the courts no less than would 'an act of the [federal] legislature.'" Id. at 1376. The dissent believed that, to find treaties non-self-executing "can threaten the application of provisions in many existing commercial and other treaties and make it more difficult to negotiate new ones." Id. at 1381–82. Moreover, Justice Breyer wrote, the Court's decision "place[s] the fate of an international promise made by the United States in the hands of a single State. . . . And that is precisely the situation that

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Origin of the Conception.—How did this distinctive feature of the Constitution come about, by virtue of which the treaty-making authority is enabled to stamp upon its promises the quality of municipal law, thereby rendering them enforceable by the courts without further action? The short answer is that Article VI, paragraph 2, makes treaties the supreme law of the land on the same footing with acts of Congress. The clause was a direct result of one of the major weaknesses of the Articles of Confederation. Although the Articles entrusted the treaty-making power to Congress, fulfillment of Congress's promises was dependent on the state legislatures.[295] Particularly with regard to provisions of the Treaty of Peace of 1783,[296] in which Congress stipulated to protect the property rights of British creditors of American citizens and of the former Loyalists,[297] the promises were not only ignored but were deliberately flouted by many legislatures.[298] Upon repeated British protests, John Jay, the Secretary for Foreign Affairs, suggested to Congress that it request state legislatures to repeal all legislation repugnant to the Treaty of Peace and to authorize their courts to carry the treaty into effect.[299] Although seven states did comply to some extent, the impotency of Congress to effectuate its treaty guarantees was obvious to the Framers who devised Article VI, paragraph 2, to take care of the situation.[300]

Treaties and the States.—As it so happened, the first case in which the Supreme Court dealt with the question of the effect of treaties on state laws involved the same issue that had prompted the drafting of Article VI, paragraph 2. During the Revolutionary

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the Framers sought to prevent by enacting the Supremacy Clause." Id. at 1384. On August 5, 2008, the U.S. Supreme Court denied Medellin a stay of execution, Medellin v. Texas, 129 S. Ct. 360 (2008) (Justices Stevens, Souter, Ginsburg, and Breyer dissenting), and Texas executed him the same day.

[295] S. Crandall, Treaties, Their Making and Enforcement ch. 3 (2d ed. 1916).

[296] Id. at 30–32. For the text of the Treaty, *see* 1 *Treaties, Conventions, International Acts, Protocols and Agreements Between the United States of America and Other Powers (1776–1909)*, 586 S. Doc. No. 357, 61st Congress, 2d Sess. (W. Malloy ed., 1910).

[297] Id. at 588.

[298] R. Morris, John Jay, The Nation, and the Court 73–84 (1967).

[299] S. Crandall, supra, at 36–40.

[300] The Convention at first leaned toward giving Congress a negative over state laws which were contrary to federal statutes or treaties, 1 M. Farrand, supra, at 47, 54, and then adopted the Paterson Plan which made treaties the supreme law of the land, binding on state judges, and authorized the Executive to use force to compel observance when such treaties were resisted. Id. at 245, 316, 2 id. at 27–29. In the draft reported by the Committee on Detail, the language thus adopted was close to the present Supremacy Clause; the draft omitted the authorization of force from the clause, id. at 183, but in another clause the legislative branch was authorized to call out the militia to, inter alia, "enforce treaties". Id. at 182. The two words were struck subsequently "as being superfluous" in view of the Supremacy Clause. Id. at 389–90.

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War, the Virginia legislature provided that the Commonwealth's paper money, which was depreciating rapidly, was to be legal currency for the payment of debts and to confound creditors who would not accept the currency provided that Virginia citizens could pay into the state treasury debts owed by them to subjects of Great Britain, which money was to be used to prosecute the war, and that the auditor would give the debtor a certificate of payment which would discharge the debtor of all future obligations to the creditor.[301] The Virginia scheme directly contradicted the assurances in the peace treaty that no bars to collection by British creditors would be raised, and in *Ware v. Hylton*[302] the Court struck down the state law as violating the treaty that Article VI, paragraph 2, made superior. Justice Chase wrote: "A treaty cannot be the supreme law of the land, that is, of all the United States, if any act of a state legislature can stand in its way. If the constitution of a state . . . must give way to a treaty, and fall before it; can it be questioned, whether the less power, an act of the state legislature, must not be prostrate? It is the declared will of the people of the United States, that every treaty made by the authority of the United States, shall be superior to the constitution and laws of any individual state; and their will alone is to decide."[303]

In *Hopkirk v. Bell*,[304] the Court further held that this same treaty provision prevented the operation of a Virginia statute of limitations to bar collection of antecedent debts. In numerous subsequent cases, the Court invariably ruled that treaty provisions superseded inconsistent state laws governing the right of aliens to inherit real estate.[305] An example is *Hauenstein v. Lynham*,[306] in which the Court upheld the right of a citizen of the Swiss Republic, under

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[301] 9 W. Hening, Statutes of Virginia 377–380 (1821).

[302] 3 U.S. (3 Dall.) 199 (1796).

[303] 3 U.S. at 236–37.

[304] 7 U.S. (3 Cr.) 454 (1806).

[305] *See* the discussion and cases cited in Hauenstein v. Lynham, 100 U.S. 483, 489–90 (1880).

[306] 100 U.S. 483 (1880). In Kolovrat v. Oregon, 366 U.S. 187, 197–98 (1961), the International Monetary Fund (Bretton Woods) Agreement of 1945, to which the United States and Yugoslavia were parties, and an Agreement of 1948 between these two nations, coupled with continued American observance of an 1881 treaty granting reciprocal rights of inheritance to Yugoslavian and American nations, were held to preclude Oregon from denying Yugoslavian aliens their treaty rights because of a fear that Yugoslavian currency laws implementing such Agreements prevented American nationals from withdrawing the proceeds from the sale of property inherited in the latter country.

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the treaty of 1850 with that country, to recover the estate of a relative dying intestate in Virginia, to sell the same, and to export the proceeds of the sale.[307]

Certain more recent cases stem from California legislation, most of it directed against Japanese immigrants. A statute that excluded aliens ineligible for American citizenship from owning real estate was upheld in 1923 on the ground that the treaty in question did not secure the rights claimed.[308] But, in *Oyama v. California*,[309] a majority of the Court opined that this legislation conflicted with the Equal Protection Clause of the Fourteenth Amendment, a view that has since been endorsed by the California Supreme Court by a narrow majority.[310] Meantime, California was informed that the rights of German nationals, under the Treaty of December 8, 1923, between the United States and the Reich, to whom real property in the United States had descended or been devised, to dispose of it, had survived the recent war and certain war legislation, and accordingly prevailed over conflicting state legislation.[311]

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[307] *See also* Geofroy v. Riggs, 133 U.S. 258 (1890); Sullivan v. Kidd, 254 U.S. 433 (1921); Nielsen v. Johnson, 279 U.S. 47 (1929); Kolovrat v. Oregon, 366 U.S. 187 (1961). But a right under treaty to acquire and dispose of property does not except aliens from the operation of a state statute prohibiting conveyances of homestead property by any instrument not executed by both husband and wife. Todok v. Union State Bank, 281 U.S. 449 (1930). Nor was a treaty stipulation guaranteeing to the citizens of each country, in the territory of the other, equality with the natives of rights and privileges in respect to protection and security of person and property, violated by a state statute which denied to a non-resident alien wife of a person killed within the State, the right to sue for wrongful death. Such right was afforded to native resident relatives. Maiorano v. Baltimore & Ohio R.R., 213 U.S. 268 (1909). The treaty in question having been amended in view of this decision, the question arose whether the new provision covered the case of death without fault or negligence in which, by the Pennsylvania Workmen's Compensation Act, compensation was expressly limited to resident parents; the Supreme Court held that it did not. Liberato v. Royer, 270 U.S. 535 (1926).

[308] Terrace v. Thompson, 263 U.S. 197 (1923).

[309] 332 U.S. 633 (1948). *See also* Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948), in which a California statute prohibiting the issuance of fishing licenses to persons ineligible to citizenship was disallowed, both on the basis of the Fourteenth Amendment and on the ground that the statute invaded a field of power reserved to the National Government, namely, the determination of the conditions on which aliens may be admitted, naturalized, and permitted to reside in the United States. For the latter proposition, Hines v. Davidowitz, 312 U.S. 52, 66 (1941), was relied upon.

[310] This occurred in the much advertised case of Sei Fujii v. State, 38 Cal.2d 718, 242 P.2d 617 (1952). A lower California court had held that the legislation involved was void under the United Nations Charter, but the California Supreme Court was unanimous in rejecting this view. The Charter provisions invoked in this connection [Arts. 1, 55 and 56], said Chief Justice Gibson, "[w]e are satisfied . . . were not intended to supersede domestic legislation." That is, the Charter provisions were not self-executing. RESTATEMENT, FOREIGN RELATIONS, supra, § 701, Reporters' Note 5, pp. 155–56.

[311] Clark v. Allen, 331 U.S. 503 (1947). *See also* Kolovrat v. Oregon, 366 U.S. 187 (1961).

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Treaties and Congress.—In the Convention, a proposal to require the adoption of treaties through enactment of a law before they should be binding was rejected.[312] But the years since have seen numerous controversies with regard to the duties and obligations of Congress, the necessity for congressional action, and the effects of statutes, in connection with the treaty power. For purposes of this section, the question is whether entry into and ratification of a treaty is sufficient in all cases to make the treaty provisions the "law of the land" or whether there are some types of treaty provisions that only a subsequent act of Congress can put into effect. The language quoted above[313] from *Foster v. Neilson*[314] early established that not all treaties are self-executing, for, as Marshall said in that decision, a treaty is "to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision."[315]

Leaving aside the question of when a treaty is and is not self-executing,[316] the issue of the necessity of congressional implementation and the obligation to implement has frequently roiled congressional debates. The matter arose initially in 1796 in connection with the Jay Treaty,[317] certain provisions of which required appropriations to carry them into effect. In view of Article I, § 9, clause 7, which says that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ," it seems to have been universally conceded that Congress must be applied to if the treaty provisions were to be executed.[318] A bill was introduced in the House to appropriate the needed funds, and its supporters, within and without Congress, argued that, because the treaty was the law of the land, the legislative branch was bound to enact the bill without further ado; opponents led by Madison and Albert Gallatin contended that the House had complete discretion whether

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[312] 2 M. Farrand, The Records of the Federal Convention of 1787 392–394 (rev. ed. 1937).

[313] "Treaties as Law of the Land," supra.

[314] 27 U.S. (2 Pet.) 253, 314 (1829).

[315] *Cf.* Whitney v. Robertson, 124 U.S. 190, 194 (1888): "When the stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect . . . . If the treaty contains stipulations which are self-executing that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment." *See* S. Crandall, supra, chs. 11–15.

[316] *See* infra, "When Is a Treaty Self-Executing."

[317] 8 Stat. 116 (1794).

[318] The story is told in numerous sources, including S. Crandall, supra, at 165–171. For Washington's message refusing to submit papers relating to the treaty to the House, *see* J. Richardson, *supra*, at 123.

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or not to carry into effect treaty provisions.[319] At the conclusion of the debate, the House voted not only the money but a resolution offered by Madison stating that it did not claim any agency in the treaty-making process, "but that when a treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend for its execution as to such stipulations on a law or laws to be passed by Congress, and it is the constitutional right and duty of the House of Representatives in all such cases to deliberate on the expediency or inexpediency of carrying such treaty into effect, and to determine and act thereon as in their judgment may be most conducive to the public good."[320] This early precedent with regard to appropriations has apparently been uniformly adhered to.[321]

Similarly, with regard to treaties that modify commercial tariff arrangements, the practice has been that the House always insisted on and the Senate acquiesced in legislation to carry into effect the provisions of such treaties.[322] The earliest congressional dispute came over an 1815 Convention with Great Britain,[323] which provided for reciprocal reduction of duties. President Madison thereupon recommended to Congress such legislation as the convention might require for effectuation. The Senate and some members of the House believed that no implementing legislation was necessary because of a statute that already permitted the President to reduce duties on goods of nations that did not discriminate against United States goods; the House majority felt otherwise and compromise legislation was finally enacted acceptable to both points of view.[324] But subsequent cases have seen legislation enacted;[325] the Senate once refused to ratify a treaty

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[319] Debate in the House ran for more than a month. It was excerpted from the ANNALS separately published as DEBATES IN THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, DURING THE FIRST SESSION OF THE FOURTH CONGRESS UPON THE CONSTITUTIONAL POWERS OF THE HOUSE WITH RESPECT TO TREATIES (1796). A source of much valuable information on the views of the Framers and those who came after them on the treaty power, the debates are analyzed in detail in E. BYRD, TREATIES AND EXECUTIVE AGREEMENTS IN THE UNITED STATES 35–59 (1960). Gallatin served in the United States Senate for two months in 1793–1794, the House of Representatives from 1795–1801, and as Secretary of the Treasury from 1801–1814.

[320] 5 ANNALS OF CONGRESS 771, 782 (1796). The House adopted a similar resolution in 1871. CONG. GLOBE, 42d Congress, 1st sess. (1871), 835.

[321] S. Crandall, supra, at 171–182; 1 W. WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 549–552 (2d ed. 1929); *but see* RESTATEMENT, FOREIGN RELATIONS, supra, § 111, Reporters' Note 7, p. 57. *See also* H. REP. 4177, 49th Congress, 2d Sess. (1887). *Cf.* De Lima v. Bidwell, 182 U.S. 1, 198 (1901).

[322] S. Crandall, supra, at 183–199.

[323] 8 Stat. 228.

[324] 3 Stat. 255 (1816). *See* S. Crandall, supra, at 184–188.

[325] S. Crandall, supra, at 188–195; 1 W. Willoughby, supra, at 555–560.

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that purported to reduce statutorily determined duties,[326] and congressional enactment of authority for the President to negotiate reciprocal trade agreements all seem to point to the necessity of some form of congressional implementation.

What other treaty provisions need congressional implementation is debatable. A 1907 memorandum approved by the Secretary of State stated that the limitations on the treaty power that necessitate legislative implementation may "be found in the provisions of the Constitution which expressly confide in Congress or in other branches of the Federal Government the exercise of certain of the delegated powers. . . ."[327] The same thought has been expressed in Congress[328] and by commentators.[329] Resolution of the issue seems to be for legislative and executive branches rather than for the courts.

Congressional Repeal of Treaties.—Madison contended that, when Congress is asked to carry a treaty into effect, it has the constitutional right, and indeed the duty, to determine the matter according to its own ideas of what is expedient.[330] Developments have vindicated Madison in this regard. This is seen in the answer that the Court gave to the question: What happens when a treaty provision and an act of Congress conflict? The answer is that neither has any intrinsic superiority over the other and therefore the later one will prevail. In short, the treaty commitments of the United States do not diminish Congress's constitutional powers. To be sure, legislative repeal of a treaty as law of the land may amount to its violation as an international contract. In such case, as the Court said, "its infraction becomes the subject of international negotia-

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[326] S. Crandall, supra, at 189–190.

[327] Anderson, *The Extent and Limitations of the Treaty-Making Power*, 1 Am. J. Int'l L. 636, 641 (1907).

[328] At the conclusion of the 1815 debate, the Senate conferees noted in their report that some treaties might need legislative implementation, which Congress was bound to provide, but did not indicate what in their opinion made some treaties self-executing and others not. 29 Annals of Congress 160 (1816). The House conferees observed that they thought, and that in their opinion the Senate conferees agreed, that legislative implementation was necessary to carry into effect all treaties which contained "stipulations requiring appropriations, or which might bind the nation to lay taxes, to raise armies, to support navies, to grant subsidies, to create States, or to cede territory. . . ." Id. at 1019. Much the same language was included in a later report, H. Rep. No. 37, 40th Congress, 2d Sess. (1868). Controversy with respect to the sufficiency of Senate ratification of the Panama Canal treaties to dispose of United States property therein to Panama was extensive. A divided Court of Appeals for the District of Columbia reached the question and held that Senate approval of the treaty alone was sufficient. Edwards v. Carter, 580 F.2d 1055 (D.C. Cir.), *cert. denied*, 436 U.S. 907 (1978).

[329] T. Cooley, General Principles of Constitutional Law 175 (3d ed. 1898); Q. Wright, The Control of American Foreign Relations 353–356 (1922).

[330] *See*, *e.g.*, 5 Annals of Congress 493 (1796).

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tions and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress."[331]

Treaties Versus Prior Acts of Congress.—The Court has enforced numerous statutory provisions that it recognized as superseding prior treaty engagements. Chief Justice Marshall asserted that the converse would be true as well[332]—that a treaty that is self-executing is the law of the land and prevails over an earlier inconsistent statute—and this proposition has been repeated many times in dicta.[333] But there is dispute whether in fact a treaty has ever been held to have repealed or superseded an inconsistent statute. Willoughby, for example, writes: "In fact, however, there have been few (the writer is not certain that there has been any) instances in which a treaty inconsistent with a prior act of Congress has been given full force and effect as law in this country without the assent of Congress. There may indeed have been cases in which, by treaty, certain action has been taken without reference to existing Federal laws, as, for example, where by treaty certain populations have been collectively naturalized, but such treaty action has not operated to repeal or annul the existing law upon the subject."[334]

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[331] *Head Money Cases*, 112 U.S. 580, 598 (1884). The repealability of treaties by act of Congress was first asserted in an opinion of the Attorney General in 1854. 6 Ops. Atty. Gen. 291. The year following the doctrine was adopted judicially in a lengthy and cogently argued opinion of Justice Curtis, speaking for a United States circuit court in Taylor v. Morton, 23 Fed. Cas. 784 (No. 13,799) (C.C.D. Mass 1855). *See also The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616 (1871); United States v. Forty-Three Gallons of Whiskey, 108 U.S. 491, 496 (1883); Botiller v. Dominguez, 130 U.S. 238 (1889); *The Chinese Exclusion Case*, 130 U.S. 581, 600 (1889); Whitney v. Robertson, 124 U.S. 190, 194 (1888); Fong Yue Ting v. United States, 149 U.S. 698, 721 (1893). "Congress by legislation, and so far as the people and authorities of the United States are concerned, could abrogate a treaty made between this country and another country which had been negotiated by the President and approved by the Senate." La Abra Silver Mining Co. v. United States, 175 U.S. 423, 460 (1899). *Cf.* Reichart v. Felps, 73 U.S. (6 Wall.) 160, 165–66 (1868), which states in dictum that "Congress is bound to regard the public treaties, and it had no power . . . to nullify [Indian] titles confirmed many years before by the authorized agents of the government."

[332] Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314–15 (1829). In a later case, it was determined in a different situation that by its terms the treaty in issue, which had been assumed to be executory in the earlier case, was self-executing. United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833).

[333] *E.g.*, United States v. Lee Yen Tai, 185 U.S. 213, 220–21 (1902); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 621 (1871); Johnson v. Browne, 205 U.S. 309, 320–21 (1907); Whitney v. Roberston, 124 U.S. 190, 194 (1888).

[334] 1 W. Willoughby, supra, at 555.

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The one instance that may be an exception[335] is *Cook v. United States*,[336] in which a divided Court held that a 1924 treaty with Great Britain that allowed the inspection of British vessels for contraband liquor and seizure if any was found had superseded the authority conferred by a section of the Tariff Act of 1922[337] The difficulty with this case is that the Tariff Act provision had been reenacted in 1930,[338] so that a simple application of the rule that the later enactment governs should have caused a different result. It may be suspected that the low estate to which Prohibition had fallen and a desire to avoid a diplomatic controversy should the seizure at issue have been upheld influenced the Court's decision.

When Is a Treaty Self-Executing.—Several references have been made above to a distinction between treaties as self-executing and as merely executory, in which case they are enforceable only after the enactment of "legislation to carry them into effect."[339] But what is it about a treaty that makes it the law of the land and gives a private litigant the right to rely on it in a court of law? As early as 1801, the Supreme Court took notice of a treaty, and, finding it applicable to the situation before it, gave judgment for the petitioner based on it.[340] In *Foster v. Neilson*,[341] Chief Justice Marshall explained that a treaty is to be regarded "as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision." A treaty will not be self-executing, however, "when the terms of the [treaty] stipulation import a contract—when either of the parties engages to perform a particular act. . . ." When this is the case, "the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the court."[342]

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[335] Other cases, which are cited in some sources, appear distinguishable. United States v. Schooner Peggy, 5 U.S. (1 Cr.) 103 (1801), applied a treaty entered into subsequent to enactment of a statute abrogating all treaties then in effect between the United States and France, so that it is inaccurate to refer to the treaty as superseding a prior statute. In United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188 (1876), the treaty with an Indian tribe in which the tribe ceded certain territory, later included in a state, provided that a federal law restricting the sale of liquor on the reservation would continue in effect in the territory ceded; the Court found the stipulation an appropriate subject for settlement by treaty and the provision binding. *See also* Charlton v. Kelly, 229 U.S. 447 (1913).

[336] 288 U.S. 102 (1933).

[337] 42 Stat. 858, 979, § 581.

[338] 46 Stat. 590, 747, § 581.

[339] Medellin v. Texas, 128 S. Ct. 1346, 1356 (2008), quoting Whitney v. Robertson, 124 U.S. 190, 194 (1888).

[340] United States v. Schooner Peggy, 5 U.S. (1 Cr.) 103 (1801).

[341] 27 U.S. (2 Pet.) 253 (1829).

[342] 27 U.S. (2 Pet.) at 314. Generally, qualifications may have been inserted in treaties out of a belief in their constitutional necessity or because of some policy reason. In regard to the former, it has always apparently been the practice to insert

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Sometimes the nature of a treaty will determine whether it requires legislative execution or "conveys an intention that it be 'self-executing' and is ratified on these terms."[343] One authority states that whether a treaty is self-executing "depends upon whether the obligation is imposed on private individuals or on public authorities. . . ."

"Treaty provisions which define the rights and obligations of private individuals and lay down general principles for the guidance of military, naval or administrative officials in relation thereto are usually considered self-executing. Thus treaty provisions assuring aliens equal civil rights with citizens, defining the limits of national jurisdiction, and prescribing rules of prize, war and neutrality, have been so considered . . . ."

"On the other hand certain treaty obligations are addressed solely to public authorities, of which may be mentioned those requiring the payment of money, the cession of territory, the guarantee of territory or independence, the conclusion of subsequent treaties on described subjects, the participation in international organizations, the collection and supplying of information, and direction of postal, telegraphic or other services, the construction of buildings, bridges, lighthouses, etc."[344] It may well be that these two characteristics merge with each other at many points and the language of the Court is not always helpful in distinguishing them.[345]

Treaties and the Necessary and Proper Clause.—What power, or powers, does Congress exercise when it enacts legislation for the purpose of carrying treaties of the United States into effect? When the subject matter of the treaty falls within the ambit of Congress's enumerated powers, then it is these powers that it exercises in carrying the treaty into effect. But if the treaty deals with a subject that falls within the national jurisdiction because of its international character, then recourse is had to the Necessary and Proper

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in treaties affecting the revenue laws of the United States a proviso that they should not be deemed effective until the necessary laws to carry them into operation should be enacted by Congress. 1 W. Willoughby, supra, at 558. Perhaps of the same nature was a qualification that cession of certain property in the Canal Zone should be dependent upon action by Congress inserted in Article V of the 1955 Treaty with Panama. TIAS 3297, 6 U.S.T. 2273, 2278. In regard to the latter, it may be noted that Article V of the Webster-Ashburton Treaty, 8 Stat. 572, 575 (1842), providing for the transfer to Canada of land in Maine and Massachusetts was conditioned upon assent by the two states and payment to them of compensation. S. Crandall, *supra*, at 222–224.

[343] Medellin v. Texas, 128 S. Ct. 1346, 1356 (2008), quoting Ingartua-De La Rosa v. United States, 417 F.3d 145, 150 (1st Cir. 2005) (en banc).

[344] Q. Wright, supra, at 207–208. *See also* L. Henkin, Foreign Affairs and the Constitution 156–162 (1972).

[345] *Compare* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314–15 (1829), *with* Cook v. United States, 288 U.S. 102, 118–19 (1933).

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Clause. Thus, of itself, Congress would have had no power to confer judicial powers upon foreign consuls in the United States, but the treaty-power can do this and has done it repeatedly and Congress has supplemented these treaties by appropriate legislation.[346] Congress could not confer judicial power upon American consuls abroad to be exercised over American citizens abroad, but the treaty-power can and has, and Congress has passed legislation perfecting such agreements, and the Supreme Court has upheld such legislation.[347]

Again, Congress of itself could not provide for the extradition of fugitives from justice, but the treaty-power can and has done so scores of times, and Congress has passed legislation carrying our extradition treaties into effect.[348] And Congress could not ordinarily penalize private acts of violence within a state, but it can punish such acts if they deprive aliens of their rights under a treaty.[349] Referring to such legislation, the Court has said: "The power of Congress to make all laws necessary and proper for carrying into execution as well the powers enumerated in section 8 of Article I of the Constitution, as all others vested in the Government of the United States, or in any Department or the officers thereof, includes the power to enact such legislation as is appropriate to give efficacy to any stipulations which it is competent for the President by and with the advice and consent of the Senate to insert in a treaty with foreign power."[350] In a word, the treaty-power cannot purport to amend the Constitution by adding to the list of Congress's enumerated powers, but having acted, the consequence will often be that it has provided Congress with an opportunity to enact measures that inde-

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[346] Acts of March 2, 1829, 4 Stat. 359 and of February 24, 1855, 10 Stat. 614.

[347] *See In re* Ross, 140 U.S. 453 (1891), where the treaty provisions involved are given. The supplementary legislation, later reenacted at Rev. Stat. 4083–4091, was repealed by the Joint Res. of August 1, 1956, 70 Stat. 774. The validity of the *Ross* case was subsequently questioned. *See* Reid v. Covert, 354 U.S. 1, 12, 64, 75 (1957).

[348] 18 U.S.C. §§ 3181–3195.

[349] Baldwin v. Franks, 120 U.S. 678, 683 (1887).

[350] Neely v. Henkel, 180 U.S. 109, 121 (1901). A different theory is offered by Justice Story in his opinion for the court in Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842): "Treaties made between the United States and foreign powers, often contain special provisions, which do not execute themselves, but require the interposition of Congress to carry them into effect, and Congress has constantly, in such cases, legislated on the subject; yet, although the power is given to the executive, with the consent of the senate, to make treaties, the power is nowhere in positive terms conferred upon Congress to make laws to carry the stipulations of treaties into effect. It has been supposed to result from the duty of the national government to fulfill all the obligations of treaties." Id. at 619. Story was here in quest of arguments to prove that Congress had power to enact a fugitive slave law, which he based on its power "to carry into effect rights expressly given and duties expressly enjoined" by the Constitution. Id. at 618–19. However, the treaty-making power is neither a right nor a duty, but one of the powers "vested by this Constitution in the Government of the United States." Art. I, § 8, cl. 18.

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pendently of a treaty Congress could not enact; the only question that can be raised as to such measures is whether they are "necessary and proper" for the carrying of the treaty in question into operation.

The foremost example of this interpretation is *Missouri v. Holland*.[351] There, the United States and Great Britain had entered into a treaty for the protection of migratory birds,[352] and Congress had enacted legislation pursuant to the treaty to effectuate it.[353] Missouri objected that such regulation was reserved to the states by the Tenth Amendment and that the statute infringed on this reservation, pointing to lower court decisions voiding an earlier act not based on a treaty.[354] Noting that treaties "are declared the supreme law of the land," Justice Holmes for the Court said: "If the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government."[355] "It is obvious," he continued, "that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found."[356] Because the treaty and thus the statute dealt with a matter of national and international concern, the treaty was proper and the statute was "necessary and proper" to effectuate the treaty.

Constitutional Limitations on the Treaty Power

A question growing out of the discussion above is whether the treaty power is bounded by constitutional limitations. By the Supremacy Clause, both statutes and treaties "are declared . . . to be the supreme law of the land, and no superior efficacy is given to either over the other."[357] As statutes may be held void because they contravene the Constitution, it should follow that treaties may be

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[351] 252 U.S. 416 (1920).

[352] 39 Stat. 1702 (1916).

[353] 40 Stat. 755 (1918).

[354] United States v. Shauver, 214 F. 154 (E.D. Ark. 1914); United States v. McCullagh, 221 F. 288 (D. Kan. 1915). The Court did not purport to decide whether those cases were correctly decided. Missouri v. Holland, 252 U.S. 416, 433 (1920). Today, there seems no doubt that Congress's power under the commerce clause would be deemed more than adequate, but at that time a majority of the Court had a very restrictive view of the commerce power. *Cf.* Hammer v. Dagenhart, 247 U.S. 251 (1918).

[355] Missouri v. Holland, 252 U.S. 416, 432 (1920).

[356] 252 U.S. at 433. The internal quotation is from Andrews v. Andrews, 188 U.S. 14, 33 (1903).

[357] Whitney v. Robertson, 124 U.S. 190, 194 (1888).

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held void, the Constitution being superior to both. And indeed the Court has numerous times so stated.[358] It does not appear that the Court has ever held a treaty unconstitutional,[359] although there are cases in which the decision seemed to be compelled by constitutional considerations.[360] In fact, there would be little argument with regard to the general point were it not for dicta in Justice Holmes' opinion in *Missouri v. Holland*.[361] "Acts of Congress," he said, "are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention." Although he immediately followed this passage with a cautionary "[w]e do not mean to imply that there are no qualifications to the treaty-making power . . . ,"[362] the Justice's language and the holding by which it appeared that the reserved rights of the states could be invaded through the treaty power led in the 1950s to an abortive effort to amend the Constitution to restrict the treaty power.[363]

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[358] "The treaty is . . . a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States." Doe v. Braden, 57 U.S. (16 How.) 635, 656 (1853). "It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument." *The Cherokee Tobacco*, 78 U.S. (11 Wall.), 616, 620 (1871). *See also* Geofroy v. Riggs, 133 U.S. 258, 267 (1890); United States v. Wong Kim Ark, 169 U.S. 649, 700 (1898); Asakura v. City of Seattle, 265 U.S. 332, 341 (1924).

[359] 1 W. Willoughby, supra, at 561; L. Henkin, supra, at 137. In Power Authority of New York v. FPC, 247 F.2d 538 (2d Cir. 1957), a reservation attached by the Senate to a 1950 treaty with Canada was held invalid. The court observed that the reservation was properly not a part of the treaty but that if it were it would still be void as an attempt to circumvent constitutional procedures for enacting amendments to existing federal laws. The Supreme Court vacated the judgment on mootness grounds. 355 U.S. 64 (1957). In United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953), an executive agreement with Canada was held void as conflicting with existing legislation. The Supreme Court affirmed on nonconstitutional grounds. 348 U.S. 296 (1955).

[360] *Cf.* City of New Orleans v. United States, 35 U.S. (10 Pet.) 662 (1836); Rocca v. Thompson, 223 U.S. 317 (1912).

[361] 252 U.S. 416 (1920).

[362] 252 U.S. at 433. Subsequently, he also observed: "The treaty in question does not contravene any prohibitory words to be found in the Constitution." Id.

[363] The attempt, the so-called "Bricker Amendment," was aimed at the expansion into reserved state powers through treaties as well as executive agreements. The key provision read: "A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty." S.J. Res. 43, 82d Congress, 1st Sess. (1953), § 2. *See also* S.J. Res. 1, 84th Congress, 1st Sess. (1955), § 2. Extensive hearings developed the issues thoroughly but not always clearly. *Hearings on S.J. Res. 130: Before a Subcommittee of the Senate Judiciary Committee*, 82d Congress, 2d Sess. (1952). *Hearings on S.J. Res. 1 & 43: Before a Subcommittee of the Senate Judiciary Committee*, 83d Congress, 1st Sess. (1953).

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Controversy over Holmes' language apparently led Justice Black in *Reid v. Covert*[364] to deny that the difference in language of the Supremacy Clause with regard to statutes and with regard to treaties was relevant to the status of treaties as inferior to the Constitution. "There is nothing in this language which intimates that treaties do not have to comply with the provisions of the Constitution. Nor is there anything in the debates which accompanied the drafting and ratification of the Constitution which even suggests such a result. These debates as well as the history that surrounds the adoption of the treaty provision in Article VI make it clear that the reason treaties were not limited to those made in 'pursuance' of the Constitution was so that agreements made by the United States under the Articles of Confederation, including the important treaties which concluded the Revolutionary War, would remain in effect. It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V."[365]

Establishment of the general principle, however, is but the beginning; there is no readily agreed-upon standard for determining what the limitations are. The most persistently urged proposition in limitation has been that the treaty power must not invade the reserved powers of the states. In view of the sweeping language of the Supremacy Clause, it is hardly surprising that this argument has not prevailed.[366] Nevertheless, the issue, in the context of Congress's power under the Necessary and Proper Clause to effectuate a treaty dealing with a subject arguably within the domain of the

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[364] 354 U.S. 1 (1957) (plurality opinion).

[365] 354 U.S. at 16–17. For discussions of the issue, *see* Restatement, Foreign Relations, § 302; Nowak & Rotunda, *A Comment on the Creation and Resolution of a "Non-Problem": Dames & Moore v. Regan, the Foreign Affairs Power, and the Role of the Courts*, 29 UCLA L. Rev. 1129 (1982); L. Henkin, supra, at 137–156.

[366] Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796); Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cr.) 603 (1813); Chirac v. Chirac, 15 U.S. (2 Wheat.) 259 (1817); Hauenstein v. Lynham, 100 U.S. 483 (1880). Jefferson, in his list of exceptions to the treaty power, thought the Constitution "must have meant to except out of these the rights reserved to the States, for surely the President and Senate cannot do by treaty what the whole Government is interdicted from doing in any way." Jefferson's Manual of Parliamentary Practice, § 594, reprinted in The Rules and Manual of the House of Representatives, H. Doc. 102–405, 102d Congress, 2d Sess. (1993), 298–299. But this view has always been the minority one. Q. Wright, supra, at 92 n.97. The nearest the Court ever came to supporting this argument appears to be Frederickson v. Louisiana, 64 U.S. (23 How.) 445, 448 (1860).

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states, was presented as recently as 1920, when the Court upheld a treaty and implementing statute providing for the protection of migratory birds.[367] "The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment."[368] The gist of the holding followed. "Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject-matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed."[369]

The doctrine that seems to follow from this case and others is "that in all that properly relates to matters of international rights and obligations, whether these rights and obligations rest upon the general principles of international law or have been conventionally created by specific treaties, the United States possesses all the powers of a constitutionally centralized sovereign State; and, therefore, that when the necessity from the international standpoint arises the treaty power may be exercised, even though thereby the rights ordinarily reserved to the States are invaded."[370] It is not, in other words, the treaty power that enlarges either the federal power or the congressional power, but the international character of the interest concerned that might be acted upon.

Dicta in some of the cases lend support to the argument that the treaty power is limited by the delegation of powers among the branches of the National Government[371] and especially by the delegated powers of Congress, although it is not clear what the limitation means. If it is meant that no international agreement could be constitutionally entered into by the United States within the sphere of such powers, the practice from the beginning has been to the contrary;[372] if it is meant that treaty provisions dealing with matters delegated to Congress must, in order to become the law of the land,

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[367] Missouri v. Holland, 252 U.S. 416 (1920).

[368] 252 U.S. at 433–34.

[369] 252 U.S. at 435.

[370] 1 W. Willoughby, supra, at 569. *See also* L. Henkin, supra, at 143–148; Restatement, Foreign Relations, § 302, Comment d, & Reporters' Note 3, pp. 154–157.

[371] *E.g.*, Geofroy v. Riggs, 133 U.S. 258, 266–267 (1890); Holden v. Joy, 84 U.S. (17 Wall.) 211, 243 (1872). Jefferson listed as an exception from the treaty power "those subjects of legislation in which [the Constitution] gave a participation to the House of Representatives," although he admitted "that it would leave very little matter for the treaty power to work on." Jefferson's Manual, supra, at 299.

[372] Q. Wright, supra, at 101–103. *See also*, L. Henkin, supra, at 148–151.

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receive the assent of Congress through implementing legislation, it states not a limitation on the power of making treaties as international conventions but rather a necessary procedure before certain conventions are cognizable by the courts in the enforcement of rights under them.

It has also been suggested that the prohibitions against governmental action contained in the Constitution, and the Bill of Rights in particular, limit the exercise of the treaty power. No doubt this is true, though again there are no cases which so hold.[373]

One other limitation of sorts may be contained in the language of certain court decisions that seem to say that only matters of "international concern" may be the subject of treaty negotiations.[374] Although this may appear to be a limitation, it does not take account of the elasticity of the concept of "international concern" by which the subject matter of treaties has constantly expanded over the years.[375] At best, any attempted resolution of the issue of limitations must be an uneasy one.[376]

In brief, the fact that all the foreign relations power is vested in the National Government and that no formal restriction is imposed on the treaty-making power in the international context[377]

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[373] *Cf.* Reid v. Covert, 354 U.S. 1 (1957). *See also* Geofroy v. Riggs, 133 U.S. 258, 267 (1890).

[374] "[I]t must be assumed that the framers of the Constitution intended that [the treaty power] should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty. . . ." Holden v. Joy, 84 U.S. (17 Wall.) 211, 243 (1872). With the exceptions noted, "it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country." Geofroy v. Riggs, 133 U.S. 258, 267 (1890). "The treatymaking power of the United States . . . does extend to all proper subjects of negotiation between our government and other nations." Asakura v. City of Seattle, 265 U.S. 332, 341 (1924).

[375] *Cf.* L. Henkin, supra, at 151–56.

[376] Other reservations have been expressed. One contention has been that the territory of a state may not be ceded without such state's consent. Geofroy v. Riggs, 133 U.S. 258, 267 (1890), citing Fort Leavenworth R.R. v. Lowe, 114 U.S. 525, 541 (1885). *Cf.* the Webster-Ashburton Treaty, Article V, 8 Stat. 572, 575. *But see* S. Crandall, supra, at 220–229; 1 W. Willoughby, supra, at 572–576.

A further contention is that, although foreign territory may be annexed to the United States by the treaty power, it may not be incorporated with the United States except with the consent of Congress. Downes v. Bidwell, 182 U.S. 244, 310–344 (1901) (four Justices dissenting). This argument appears to be a variation of the one in regard to the correct procedure to give domestic effect to treaties.

Another argument grew out the XII Hague Convention of 1907, proposing an International Prize Court with appellate jurisdiction from national courts in prize cases. President Taft objected that no treaty could transfer to a tribunal not known to the Constitution any part of the judicial power of the United States, and a compromise was arranged. Q. Wright, supra, at 117–118; H. Rep. No. 1569, 68th Congress, 2d Sess. (1925).

[377] *Cf.* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936); Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 575–576 (1840).

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leaves little room for the notion of a limited treaty-making power with regard to the reserved rights of the states or in regard to the choice of matters concerning which the Federal Government may treat with other nations; protected individual rights appear to be sheltered by specific constitutional guarantees from the domestic effects of treaties, and the separation of powers at the federal level may require legislative action to give municipal effect to international agreements.

Interpretation and Termination of Treaties as International Compacts

The repeal by Congress of the "self-executing" clauses of a treaty as "law of the land" does not of itself terminate the treaty as an international contract, although it may very well provoke the other party to the treaty to do so. Hence, the questions arise where the Constitution lodges this power and where it lodges the power to interpret the contractual provisions of treaties. The first case of outright abrogation of a treaty by the United States occurred in 1798, when Congress by the Act of July 7 of that year, pronounced the United States freed and exonerated from the stipulations of the Treaties of 1778 with France.[378] This act was followed two days later by one authorizing limited hostilities against the same country; in *Bas v. Tingy*,[379] the Supreme Court treated the act of abrogation as simply one of a bundle of acts declaring "public war" upon the French Republic.

Termination of Treaties by Notice.—Typically, a treaty provides for its termination by notice of one of the parties, usually after a prescribed time from the date of notice. Of course, treaties may also be terminated by agreement of the parties, or by breach by one of the parties, or by some other means. But it is in the instance of termination by notice that the issue has frequently been raised: where in the Government of the United States does the Constitution lodge the power to unmake treaties?[380] Reasonable argu-

[378] 1 Stat. 578 (1798).

[379] 4 U.S. (4 Dall.) 37 (1800). *See also* Gray v. United States, 21 Ct. Cl. 340 (1886), with respect to claims arising out of this situation.

[380] The matter was most extensively canvassed in the debate with respect to President Carter's termination of the Mutual Defense Treaty of 1954 with the Republic of China (Taiwan). *See, e.g.*, the various views argued in *Treaty Termination: Hearings Before the Senate Committee on Foreign Relations*, 96th Congress, 1st Sess. (1979). On the issue generally, *see* Restatement, Foreign Relations, § 339; CRS Study, supra, 158–167; L. Henkin, supra, at 167–171; Bestor, *Respective Roles of Senate and President in the Making and Abrogation of Treaties: The Original Intent of the Framers of the Constitution Historically Examined*, 55 WASH. L. REV. 1 (1979); Berger, *The President's Unilateral Termination of the Taiwan Treaty*, 75 NW. U. L. REV. 577 (1980).

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ments may be made locating the power in the President alone, in the President and Senate, or in the Congress. Presidents generally have asserted the foreign relations power reposed in them under Article II and the inherent powers argument made in *Curtiss-Wright*. Because the Constitution requires the consent of the Senate for making a treaty, one can logically argue that its consent is also required for terminating it. Finally, because treaties are, like statutes, the supreme law of the land, it may well be argued that, again like statutes, they may be undone only through law-making by the entire Congress; additionally, since Congress may be required to implement treaties and may displace them through legislation, this argument is reenforced.

Definitive resolution of this argument appears only remotely possible. Historical practice provides support for all three arguments and the judicial branch seems unlikely to essay any answer.

Although abrogation of the French treaty, mentioned above, is apparently the only example of termination by Congress through a public law, many instances may be cited of congressional actions mandating terminations by notice of the President or changing the legal environment so that the President is required to terminate. The initial precedent in the instance of termination by notice pursuant to congressional action appears to have occurred in 1846,[381] when by joint resolution Congress authorized the President at his discretion to notify the British government of the abrogation of the Convention of August 6, 1827, relative to the joint occupation of the Oregon Territory. As the President himself had requested the resolution, the episode is often cited to support the theory that international conventions to which the United States is a party, even those terminable on notice, are terminable only through action of Congress.[382] Subsequently, Congress has often passed resolutions denouncing treaties or treaty provisions, which by their own terms were terminable on notice, and Presidents have usually, though not invariably, carried out such resolutions.[383] By the La Follette-Furuseth Seaman's Act,[384] President Wilson was directed, "within ninety days after the passage of the act, to give notice to foreign governments that so much of any treaties as might be in conflict with the provisions of the act would terminate on the expiration of

[381] *Compare* the different views of the 1846 action in *Treaty Termination: Hearings Before the Senate Committee on Foreign Relations*, 96th Congress, 1st Sess. (1979), 160–162 (memorandum of Hon. Herbert Hansell, Legal Advisor, Department of State), and in *Taiwan: Hearings Before the Senate Committee on Foreign Relations*, 96th Congress, 1st Sess. (1979), 300 (memorandum of Senator Goldwater).

[382] S. Crandall, supra, at 458–459.

[383] Id. at 459–62; Q. Wright, supra, at 258.

[384] 38 Stat. 1164 (1915).

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the periods of notice provided for in such treaties," and the required notice was given.[385] When, however, by section 34 of the Jones Merchant Marine Act of 1920, the same President was authorized and directed within ninety days to give notice to the other parties to certain treaties, with which the Act was not in conflict but which might restrict Congress in the future from enacting discriminatory tonnage duties, President Wilson refused to comply, asserting that he "did not deem the direction contained in section 34 . . . an exercise of any constitutional power possessed by Congress."[386] The same attitude toward section 34 was continued by Presidents Harding and Coolidge.[387]

Very few precedents exist in which the President terminated a treaty after obtaining the approval of the Senate alone. The first occurred in 1854–1855, when President Pierce requested and received Senate approval to terminate a treaty with Denmark.[388] When the validity of this action was questioned in the Senate, the Committee on Foreign Relations reported that the procedure was correct, that prior full-Congress actions were incorrect, and that the right to terminate resides in the treaty-making authorities, the President and the Senate.[389]

Examples of treaty terminations in which the President acted alone are much disputed with respect both to facts and to the un-

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[385] S. Crandall, supra, at 460. *See* Van der Weyde v. Ocean Transp. Co., 297 U.S. 114 (1936).

[386] 41 Stat. 1007. *See* Reeves, *The Jones Act and the Denunciation of Treaties*, 15 Am. J. Int'l. L. 33 (1921). In 1879, Congress passed a resolution requiring the President to abrogate a treaty with China, but President Hayes vetoed it, partly on the ground that Congress as an entity had no role to play in ending treaties, only the President with the advice and consent of the Senate. 9 J. Richardson, *supra*, at 4466, 4470–4471. For the views of President Taft on the matter, *see* W. Taft, The Presidency, Its Duties, Its Powers, Its Opportunities and Its Limitations 112–113 (1916).

[387] Since this time, very few instances appear in which Congress has requested or directed termination by notice, but they have resulted in compliance. *E.g.*, 65 Stat. 72 (1951) (directing termination of most-favored-nation provisions with certain Communist countries in commercial treaties); 70 Stat. 773 (1956) (requesting renunciation of treaty rights of extraterritoriality in Morroco). The most recent example appears to be § 313 of the Anti-Apartheid Act of 1986, which required the Secretary of State to terminate immediately, in accordance with its terms, the tax treaty and protocol with South Africa that had been concluded on December 13, 1946. Pub. L. 99–440, 100 Stat. 3515 (1986), 22 U.S.C. § 5063.

[388] 5 J. Richardson, *supra*, at 279, 334.

[389] S. Rep. No. 97, 34th Congress, 1st Sess. (1856), 6–7. The other instance was President Wilson's request, which the Senate endorsed, for termination of the International Sanitary Convention of 1903. *See* 61 Cong. Rec. 1793–1794 (1921). *See* CRS Study, supra at 161–62.

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derlying legal circumstances.[390] Apparently, President Lincoln was the first to give notice of termination in the absence of prior congressional authorization or direction, and Congress shortly thereafter by joint resolution ratified his action.[391] The first such action by the President, with no such subsequent congressional action, appears to be that of President McKinley in 1899, in terminating an 1850 treaty with Switzerland, but the action may be explainable as the treaty being inconsistent with a subsequently enacted law.[392] Other such renunciations by the President acting on his own have been similarly explained and similarly the explanations have been controverted. Although the Department of State, in setting forth legal justification for President Carter's notice of termination of the treaty with Taiwan, cited many examples of a President's acting alone, many of these are ambiguous and may be explained away by, for example, conflicts with later statutes, changed circumstances, or the like.[393]

No such ambiguity accompanied President Carter's action on the Taiwan treaty,[394] and a somewhat lengthy Senate debate was provoked. In the end, the Senate on a preliminary vote approved a "sense of the Senate" resolution claiming for itself a consenting role in the termination of treaties, but no final vote was ever taken and the Senate thus did not place itself in conflict with the President.[395] However, several Members of Congress went to court to contest the termination, apparently the first time a judicial resolution of the question had been sought. A divided Court of Appeals, on the merits, held that presidential action was sufficient by itself to termi-

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[390] *Compare, e.g.*, *Treaty Termination: Hearings Before the Senate Committee on Foreign Relations*, 96th Congress, 1st Sess. (1979), 156–191 (memorandum of Hon. Herbert Hansell, Legal Advisor, Department of State), *with Taiwan: Hearings Before the Senate Committee on Foreign Relations*, 96th Congress, 1st Sess. (1979), 300–307 (memorandum of Senator Goldwater). *See* CRS Study, supra at 164–66.

[391] 13 Stat. 568 (1865).

[392] The treaty, *see* 11 C. Bevans, Treaties and Other International Agreements of the United States of America 894 (1970), was probably at odds with the Tariff Act of 1897. 30 Stat. 151.

[393] *Compare* the views expressed in the Hansell and Goldwater memoranda, supra. For expressions of views preceding the immediate controversy, *see, e.g.*, Riesenfeld, *The Power of Congress and the President in International Relations*, 25 Calif. L. Rev. 643, 658–665 (1937); Nelson, *The Termination of Treaties and Executive Agreements by the United States*, 42 Minn. L. Rev. 879 (1958).

[394] Note that the President terminated the treaty in the face of an expression of the sense of Congress that prior consultation between President and Congress should occur. 92 Stat. 730, 746 (1978).

[395] Originally, S. Res. 15 had disapproved presidential action alone, but it was amended and reported by the Foreign Relations Committee to recognize at least 14 bases of presidential termination. S. Rep. No. 119, 96th Congress, 1st Sess. (1979). In turn, this resolution was amended to state the described sense of the Senate view, but the matter was never brought to final action. *See* 125 Cong. Rec. 13672, 13696, 13711, 15209, 15859 (1979).

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nate treaties, but the Supreme Court, no majority agreeing on a common ground, vacated that decision and instructed the trial court to dismiss the suit.[396] Although no Court opinion bars future litigation, it appears that the political question doctrine or some other rule of judicial restraint will leave such disputes to the contending forces of the political branches.[397]

Determination Whether a Treaty Has Lapsed.—There is clear judicial recognition that the President may without consulting Congress validly determine the question whether specific treaty provisions have lapsed. The following passage from Justice Lurton's opinion in *Charlton v. Kelly*[398] is pertinent: "If the attitude of Italy was, as contended, a violation of the obligation of the treaty, which, in international law, would have justified the United States in denouncing the treaty as no longer obligatory, it did not automatically have that effect. If the United States elected not to declare its abrogation, or come to a rupture, the treaty would remain in force. It was only voidable, not void; and if the United States should prefer, it might waive any breach which in its judgment had occurred and conform to its own obligation as if there had been no such breach. . . . That the political branch of the government recognizes the treaty obligation as still existing is evidenced by its action in this case. . . . The executive department having thus elected to waive any right to free itself from the obligation to deliver up its own citizens, it is the plain duty of this court to recognize the obligation to surrender the appellant as one imposed by the treaty as the supreme law of the land as affording authority for the warrant of extradition."[399] So also it is primarily for the political departments to determine whether certain provisions of a treaty have survived a war in which the other contracting state ceased to exist as a member of the international community.[400]

Status of a Treaty a Political Question.—It is clear that many questions which arise concerning a treaty are of a political nature and will not be decided by the courts. In the words of Justice Curtis in *Taylor v. Morton*:[401] It is not "a judicial question, whether a treaty with a foreign sovereign has been violated by him; whether

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[396] Goldwater v. Carter, 617 F.2d 697 (D.C. Cir. 1979) (en banc), *vacated and remanded*, 444 U.S. 996 (1979). Four Justices found the case nonjusticiable because of the political question doctrine, id. at 1002, but one other Justice in the majority and one in dissent rejected this analysis. Id. at 998 (Justice Powell), 1006 (Justice Brennan). The remaining three Justices were silent on the doctrine.

[397] *Cf.* Baker v. Carr, 369 U.S. 186, 211–13, 217 (1962).

[398] 229 U.S. 447 (1913).

[399] 229 U.S. at 473–76.

[400] Clark v. Allen, 331 U.S. 503 (1947).

[401] 23 Fed. Cas. 784 (No. 13,799) (C.C.D. Mass. 1855).

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the consideration of a particular stipulation in a treaty, has been voluntarily withdrawn by one party, so that it is no longer obligatory on the other; whether the views and acts of a foreign sovereign, manifested through his representative have given just occasion to the political departments of our government to withhold the execution of a promise contained in a treaty, or to act in direct contravention of such promise. . . . These powers have not been confided by the people to the judiciary, which has no suitable means to exercise them; but to the executive and the legislative departments of our government. They belong to diplomacy and legislation, and not to the administration of existing laws and it necessarily follows that if they are denied to Congress and the Executive, in the exercise of their legislative power, they can be found nowhere, in our system of government." Chief Justice Marshall's language in *Foster v. Neilson* [402] is to the same effect.

Indian Treaties

In the early cases of *Cherokee Nation v. Georgia*,[403] and *Worcester v. Georgia*,[404] the Court, speaking by Chief Justice Marshall, held, first, that the Cherokee Nation was not a sovereign state within the meaning of that clause of the Constitution that extends the judicial power of the United States to controversies "between a State or the citizens thereof and foreign states, citizens or subjects." Second, it held: "The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, had adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense." [405]

Later cases established that the power to make treaties with the Indian tribes was coextensive with the power to make treaties

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[402] 27 U.S. (2 Pet.) 253, 309 (1829). Baker v. Carr, 369 U.S. 186 (1962), qualifies this certainty considerably, and Goldwater v. Carter, 444 U.S. 996 (1979), prolongs the uncertainty. *See* L. Henkin, supra at 208–16; Restatement, Foreign Relations, § 326.

[403] 30 U.S. (5 Pet.) 1 (1831).

[404] 31 U.S. (6 Pet.) 515 (1832).

[405] 31 U.S. at 558.

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with foreign nations,[406] that the states were incompetent to interfere with rights created by such treaties,[407] that as long as the United States recognized the national character of a tribe, its members were under the protection of treaties and of the laws of Congress and their property immune from taxation by a state,[408] that a stipulation in an Indian treaty that laws forbidding the introduction, of liquors into Indian territory was operative without legislation, and binding on the courts although the territory was within an organized county of a state,[409] and that an act of Congress contrary to a prior Indian treaty repealed it.[410]

Present Status of Indian Treaties.—Today, the subject of Indian treaties is a closed account in the constitutional law ledger. By a rider inserted in the Indian Appropriation Act of March 3, 1871, it was provided "That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: Provided, further, that nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe."[411] Subsequently, the power of Congress to withdraw or modify tribal rights previously granted by treaty has been invariably upheld.[412] Statutes modifying rights of members in tribal lands,[413] granting a right of way for a railroad through lands ceded by treaty to an Indian tribe,[414] or extending the application of revenue laws respecting liquor and tobacco over Indian territories, despite an earlier treaty exemption,[415] have been sustained.

When, on the other hand, definite property rights have been conferred upon individual Native Americans, whether by treaty or under an act of Congress, they are protected by the Constitution to the same extent and in the same way as the private rights of other residents or citizens of the United States. Hence, the Court held that certain Indian allottees, under an agreement according to which, in part consideration of their relinquishment of all their claim to

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[406] Holden v. Joy, 84 U.S. (17 Wall.) 211, 242 (1872); United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188, 192 (1876); Dick v. United States, 208 U.S. 340, 355–56 (1908).

[407] The *New York Indians*, 72 U.S. (5 Wall.) 761 (1867).

[408] The *Kansas Indians*, 72 U.S. (5 Wall.) 737, 757 (1867).

[409] United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188, 196 (1876).

[410] *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616 (1871). *See also* Ward v. Race Horse, 163 U.S. 504, 511 (1896); Thomas v. Gay, 169 U.S. 264, 270 (1898).

[411] 16 Stat. 566; Rev. Stat. § 2079, now contained in 25 U.S.C. § 71.

[412] Ward v. Race Horse, 163 U.S. 504 (1896).

[413] Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

[414] Cherokee Nation v. Southern Kansas Ry., 135 U.S. 641 (1890).

[415] *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 621 (1871).

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tribal property, they were to receive in severalty allotments of lands that were to be nontaxable for a specified period, acquired vested rights of exemption from state taxation that were protected by the Fifth Amendment against abrogation by Congress.[416]

A regular staple of each Term's docket of the Court is one or two cases calling for an interpretation of the rights of Native Americans under some treaty arrangement vis-a-vis the Federal Government or the states. Thus, though no treaties have been negotiated for decades and none presumably ever will again, litigation concerning old treaties seemingly will go on.

INTERNATIONAL AGREEMENTS WITHOUT SENATE APPROVAL

The capacity of the United States to enter into agreements with other nations is not exhausted in the treaty-making power. The Constitution recognizes a distinction between "treaties" and "agreements" or "compacts" but does not indicate what the difference is.[417] The differences, which once may have been clearer, have been seriously blurred in practice within recent decades. Once a stepchild in the family in which treaties were the preferred offspring, the executive agreement has surpassed in number and perhaps in international influence the treaty formally signed, submitted for ratification to the Senate, and proclaimed upon ratification.

During the first half-century of its independence, the United States was party to sixty treaties but to only twenty-seven published executive agreements. By the beginning of World War II, there had been concluded approximately 800 treaties and 1,200 executive agreements. In the period 1940–1989, the Nation entered into 759 treaties and into 13,016 published executive agreements. Cumulatively, in 1989, the United States was a party to 890 treaties and 5,117 executive agreements. To phrase it comparatively, in the first 50 years of its history, the United States concluded twice as many treaties as executive agreements. In the 50-year period from 1839 to 1889, a few more executive agreements than treaties were entered into. From 1889 to 1939, almost twice as many executive agreements as

[416] Choate v. Trapp, 224 U.S. 665, 677–78 (1912); Jones v. Meehan, 175 U.S. 1 (1899). *See also* Hodel v. Irving, 481 U.S. 704 (1987) (section of law providing for escheat to tribe of fractionated interests in land representing less than 2% of a tract's total acreage violates Fifth Amendment's taking clause by completely abrogating rights of intestacy and devise).

[417] *Compare* Article II, § 2, cl. 2, and Article VI, cl. 2, *with* Article I, 10, cls. 1 and 3. *Cf.* Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 570–72 (1840). And note the discussion in Weinberger v. Rossi, 456 U.S. 25, 28–32 (1982).

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treaties were concluded. Between 1939 and 1993, executive agreements comprised more than 90% of the international agreements concluded.[418]

One must, of course, interpret the raw figures carefully. Only a very small minority of all the executive agreements entered into were based solely on the powers of the President as Commander in Chief and organ of foreign relations; the remainder were authorized in advance by Congress by statute or by treaty provisions ratified by the Senate.[419] Thus, consideration of the constitutional significance of executive agreements must begin with a differentiation among the kinds of agreements which are classed under this single heading.[420]

Executive Agreements by Authorization of Congress

Congress early authorized officers of the executive branch to enter into negotiations and to conclude agreements with foreign governments, authorizing the borrowing of money from foreign countries[421] and appropriating money to pay off the government of Algiers to prevent pirate attacks on United States shipping.[422] Perhaps the first formal authorization in advance of an executive agreement was enactment of a statute that permitted the Postmaster General to "make arrangements with the Postmasters in any foreign country for the reciprocal receipt and delivery of letters and packets, through

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[418] CRS Study, xxxiv-xxxv, supra, 13–16. Not all such agreements, of course, are published, either because of national-security/secrecy considerations or because the subject matter is trivial. In a 1953 hearing exchange, Secretary of State Dulles estimated that about 10,000 executive agreements had been entered into in connection with the NATO treaty. "Every time we open a new privy, we have to have an executive agreement." *Hearing on S.J. Res. 1 and S.J. Res. 43: Before a Subcommittee of the Senate Judiciary Committee*, 83d Congress, 1st Sess. (1953), 877.

[419] One authority concluded that of the executive agreements entered into between 1938 and 1957, only 5.9 percent were based exclusively on the President's constitutional authority. McLaughlin, *The Scope of the Treaty Power in the United States—II*, 43 Minn. L. Rev. 651, 721 (1959). Another, somewhat overlapping study found that in the period 1946–1972, 88.3% of executive agreements were based at least in part on statutory authority; 6.2% were based on treaties, and 5.5% were based solely on executive authority. *International Agreements: An Analysis of Executive Regulations and Practices*, Senate Committee on Foreign Relations, 95th Cong., 1st Sess. (Comm. Print) (1977), 22 (prepared by CRS).

[420] "[T]he distinction between so-called 'executive agreements' and 'treaties' is purely a constitutional one and has no international significance." Harvard Research in International Law, *Draft Convention on the Law of Treaties*, 29 Amer. J. Int. L. 697 (Supp.) (1935). *See* E. Byrd, supra at 148–151. Many scholars have aggressively promoted the use of executive agreements, in contrast to treaties, as a means of enhancing the role of the United States, especially the role of the President, in the international system. *See* McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy (Pts. I & II)*, 54 Yale L. J. 181, 534 (1945).

[421] 1 Stat. 138 (1790). *See* E. Byrd, supra at 53 n.146.

[422] W. McClure, International Executive Agreements 41 (1941).

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the post offices."[423] Congress has also approved, usually by resolution, other executive agreements, such as the annexing of Texas and Hawaii and the acquisition of Samoa.[424] A prolific source of executive agreements has been the authorization of reciprocal arrangements between the United States and other countries for the securing of protection for patents, copyrights, and trademarks.[425]

Reciprocal Trade Agreements.—The most copious source of executive agreements has been legislation which provided authority for entering into reciprocal trade agreements with other nations.[426] Such agreements in the form of treaties providing for the reciprocal reduction of duties subject to implementation by Congress were frequently entered into,[427] but beginning with the Tariff Act of 1890,[428] Congress began to insert provisions authorizing the Executive to bargain over reciprocity with no necessity of subsequent legislative action. The authority was widened in successive acts.[429] Then, in the Reciprocal Trade Agreements Act of 1934,[430] Congress authorized the President to enter into agreements with other nations for reductions of tariffs and other impediments to international trade and to put the reductions into effect through proclamation.[431]

The Constitutionality of Trade Agreements.—In *Field v. Clark*,[432] legislation conferring authority on the President to conclude trade agreements was sustained against the objection that it attempted an unconstitutional delegation "of both legislative and treaty-making powers." The Court met the first objection with an extensive review of similar legislation from the inauguration of government under the Constitution. The second objection it met with a curt rejection: "What has been said is equally applicable to the objection that the third section of the act invests the President with treaty-making power. The Court is of opinion that the third section of the act of October 1, 1890, is not liable to the objection that it

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[423] Id. at 38–40. The statute was 1 Stat. 232, 239, 26 (1792).

[424] McClure at 62–70.

[425] Id. at 78–81; S. Crandall, supra at 127–31; *see* CRS Study, supra at 52–55.

[426] Id. at 121–27; W. McClure, supra at 83–92, 173–89.

[427] Id. at 8, 59–60.

[428] § 3, 26 Stat. 567, 612.

[429] Tariff Act of 1897, § 3, 30 Stat. 15, 203; Tariff Act of 1909, 36 Stat. 11, 82.

[430] 48 Stat. 943, § 350(a), 19 U.S.C. §§ 1351–1354.

[431] *See* the continued expansion of the authority. Trade Expansion Act of 1962, 76 Stat. 872, § 201, 19 U.S.C. § 1821; Trade Act of 1974, 88 Stat. 1982, as amended, 19 U.S.C. §§ 2111, 2115, 2131(b), 2435. Congress has, with respect to the authorization to the President to negotiate multilateral trade agreements under the auspices of GATT, constrained itself in considering implementing legislation, creating a "fast-track" procedure under which legislation is brought up under a tight timetable and without the possibility of amendment. 19 U.S.C. §§ 2191–2194.

[432] 143 U.S. 649 (1892).

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transfers legislative and treaty-making power to the President."[433] Although two Justices disagreed, the question has never been revived. However, in *B. Altman & Co. v. United States*,[434] decided twenty years later, a collateral question was passed upon. This was whether an act of Congress that gave the federal circuit courts of appeal jurisdiction of cases in which "the validity or construction of any treaty . . . was drawn in question" embraced a case involving a trade agreement which had been made under the sanction of the Tariff Act of 1897. The Court answered: "While it may be true that this commercial agreement, made under authority of the Tariff Act of 1897, § 3, was not a treaty possessing the dignity of one requiring ratification by the Senate of the United States, it was an international compact, negotiated between the representatives of two sovereign nations and made in the name and on behalf of the contracting countries, and dealing with important commercial relations between the two countries, and was proclaimed by the President. If not technically a treaty requiring ratification, nevertheless, it was a compact authorized by the Congress of the United States, negotiated and proclaimed under the authority of its President. We think such a compact is a treaty under the Circuit Court of Appeals Act, and, where its construction is directly involved, as it is here, there is a right of review by direct appeal to this court."[435]

The Lend-Lease Act.—The most extensive delegation of authority ever made by Congress to the President to enter into executive agreements occurred within the field of the cognate powers of the two departments, the field of foreign relations, and took place at a time when war appeared to be in the offing and was in fact only a few months away. The legislation referred to is the Lend-Lease Act of March 11, 1941,[436] by which the President was empowered for over two years—and subsequently for additional periods whenever he deemed it in the interest of the national defense to do so—to authorize "the Secretary of War, the Secretary of the Navy, or the head of any other department or agency of the Government," to manufacture in the government arsenals, factories, and shipyards, or "otherwise procure," to the extent that available funds made possible, "defense articles"—later amended to include foodstuffs and indus-

[433] 143 U.S. at 694. *See also* Dames & Moore v. Regan, 453 U.S. 654 (1981), in which the Court sustained a series of implementing actions by the President pursuant to executive agreements with Iran in order to settle the hostage crisis. The Court found that Congress had delegated to the President certain economic powers underlying the agreements and that his suspension of claims powers had been implicitly ratified over time by Congress's failure to set aside the asserted power. *Also see* Weinberger v. Rossi, 456 U.S. 25, 29–30 n.6 (1982).

[434] 224 U.S. 583 (1912).

[435] 224 U.S. at 601.

[436] 55 Stat. 31.

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trial products—and "sell, transfer title to, exchange, lease, lend, or otherwise dispose of," the same to the "government of any country whose defense the President deems vital to the defense of the United States," and on any terms that he "deems satisfactory." Under this authorization the United States entered into Mutual Aid Agreements under which the government furnished its allies in World War II with 40 billion dollars' worth of munitions of war and other supplies.

International Organizations.—Overlapping of the treaty-making power through congressional-executive cooperation in international agreements is also demonstrated by the use of resolutions approving the United States joining of international organizations[437] and participating in international conventions.[438]

Executive Agreements Authorized by Treaties

Arbitration Agreements.—In 1904 and 1905, Secretary of State John Hay negotiated a series of treaties providing for the general arbitration of international disputes. Article II of the treaty with Great Britain, for example, provided as follows: "In each individual case the High Contracting Parties, before appealing to the Permanent Court of Arbitration, shall conclude a special Agreement defining clearly the matter in dispute and the scope of the powers of the Arbitrators, and fixing the periods for the formation of the Arbitral Tribunal and the several stages of the procedure."[439] The Senate approved the British treaty by the constitutional majority having, however, first amended it by substituting the word "treaty" for "agreement." President Theodore Roosevelt, characterizing the "ratification" as equivalent to rejection, sent the treaties to repose in the archives. "As a matter of historical practice," Dr. McClure comments, "the *compromise* under which disputes have been arbitrated include both treaties and executive agreements in goodly numbers,"[440] a statement supported by both Willoughby and Moore.[441]

Agreements Under the United Nations Charter.—Article 43 of the United Nations Charter provides: "1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace

[437] *E.g.*, 48 Stat. 1182 (1934), authorizing the President to accept membership for the United States in the International Labor Organization.

[438] *See* E. Corwin, supra at 216.

[439] W. McClure, supra at 13–14.

[440] Id. at 14.

[441] 1 W. Willoughby, supra at 543.

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and security. 2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided. 3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes."[442] This time the Senate did not boggle over the word "agreement."

The United Nations Participation Act of December 20, 1945, implements these provisions as follows: "The President is authorized to negotiate a special agreement or agreements with the Security Council which shall be subject to the approval of the Congress by appropriate Act or joint resolution, providing for the numbers and types of armed forces, their degree of readiness and general location, and the nature of facilities and assistance, including rights of passage, to be made available to the Security Council on its call for the purpose of maintaining international peace and security in accordance with article 43 of said Charter. The President shall not be deemed to require the authorization of the Congress to make available to the Security Council on its call in order to take action under article 42 of said Charter and pursuant to such special agreement or agreements the armed forces, facilities, or assistance provided for therein: Provided, That nothing herein contained shall be construed as an authorization to the President by the Congress to make available to the Security Council for such purpose armed forces, facilities, or assistance in addition to the forces, facilities, and assistance provided for in such special agreement or agreements."[443]

Status of Forces Agreements.—Status of Forces Agreements, negotiated pursuant to authorizations contained in treaties between the United States and foreign nations in the territory of which American troops and their dependents are stationed, afford the United States a qualified privilege, which may be waived, of trying by court martial soldiers and their dependents charged with commission of offenses normally within the exclusive criminal jurisdiction of the foreign signatory power. When the United States, in conformity with the waiver clause in such an Agreement, consented to the trial in a Japanese court of a soldier charged with causing the death of a Japanese woman on a firing range in that country, the Court could "find

[442] A Decade of American Foreign Policy, S. Doc. No. 123, 81st Cong., 1st Sess., 126 (1950).

[443] Id. at 158.

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no constitutional barrier" to such action.[444] However, at least five of the Supreme Court Justices were persuaded to reject at length the contention that such Agreements could sustain, as necessary and proper for their effectuation, implementing legislation subsequently found by the Court to contravene constitutional guaranties set forth in the Bill of Rights.[445]

Executive Agreements on the Sole Constitutional Authority of the President

Many types of executive agreements comprise the ordinary daily grist of the diplomatic mill. Among these are such as apply to minor territorial adjustments, boundary rectifications, the policing of boundaries, the regulation of fishing rights, private pecuniary claims against another government or its nationals, in Story's words, "the mere private rights of sovereignty."[446] Crandall lists scores of such agreements entered into with other governments by the authorization of the President.[447] Such agreements were ordinarily directed to particular and comparatively trivial disputes and by the settlement they effect of these cease *ipso facto* to be operative. Also, there are such time-honored diplomatic devices as the "protocol" which marks a stage in the negotiation of a treaty, and the *modus vivendi*, which is designed to serve as a temporary substitute for one. Executive agreements become of constitutional significance when they constitute a determinative factor of future foreign policy and hence of the country's destiny. In consequence particularly of our participation in World War II and our immersion in the conditions of international tension which prevailed both before and after the war, Presidents have entered into agreements with other governments some of which have approximated temporary alliances. It cannot be justly said, however, that in so doing they have acted without considerable support from precedent.

An early instance of executive treaty-making was the agreement by which President Monroe in 1817 defined the limits of armaments on the Great Lakes. The arrangement was effected by an exchange of notes, which nearly a year later were laid before the Senate with a query as to whether it was within the President's power, or whether advice and consent of the Senate was required. The Senate approved the agreement by the required two-thirds vote, and it was forthwith proclaimed by the President without there hav-

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[444] Wilson v. Girard, 354 U.S. 524 (1957).

[445] Reid v. Covert, 354 U.S. 1, 16–17 (1957) (plurality opinion); id. at 66 (Justice Harlan concurring).

[446] 3 J. Story, Commentaries on the Constitution of the United States 1397 (1833).

[447] S. Crandall, supra, ch. 8; *see also* W. McClure, supra, chs. 1, 2.

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ing been a formal exchange of ratifications.[448] Of a kindred type, and owing much to the President's capacity as Commander in Chief, was a series of agreements entered into with Mexico between 1882 and 1896 according each country the right to pursue marauding Indians across the common border.[449] Commenting on such an agreement, the Court remarked, a bit uncertainly: "While no act of Congress authorizes the executive department to permit the introduction of foreign troops, the power to give such permission without legislative assent was probably assumed to exist from the authority of the President as commander in chief of the military and naval forces of the United States. It may be doubted, however, whether such power could be extended to the apprehension of deserters [from foreign vessels] in the absence of positive legislation to that effect."[450] Justice Gray and three other Justices believed that such action by the President must rest upon express treaty or statute.[451]

Notable expansion of presidential power in this field first became manifest in the administration of President McKinley. At the outset of war with Spain, the President proclaimed that the United States would consider itself bound for the duration by the last three principles of the Declaration of Paris, a course which, as Professor Wright observes, "would doubtless go far toward establishing these three principles as international law obligatory upon the United States in future wars."[452] Hostilities with Spain were brought to an end in August, 1898, by an armistice the conditions of which largely determined the succeeding treaty of peace,[453] just as did the Armistice of November 11, 1918, determine in great measure the conditions of the final peace with Germany in 1918. It was also President McKinley who in 1900, relying on his own sole authority as Commander in Chief, contributed a land force of 5,000 men and a naval force to cooperate with similar contingents from other Powers to rescue the legations in Peking from the Boxers; a year later, again without consulting either Congress or the Senate, he accepted for the United States the Boxer Indemnity Protocol between China and the intervening Powers.[454] Commenting on the Peking protocol, Willoughby quotes with approval the following remark: "This case is interesting, because it shows how the force of circumstances com-

[448] Id. at 49–50.
[449] Id. at 81–82.
[450] Tucker v. Alexandroff, 183 U.S. 424, 435 (1902).
[451] Id. at 467. The first of these conventions, signed July 29, 1882, had asserted its constitutionality in very positive terms. Q. Wright, supra at 239 (quoting Watts v. United States, 1 Wash. Terr. 288, 294 (1870)).
[452] Id. at 245.
[453] S. Crandall, supra at 103–04.
[454] Id. at 104.

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pelled us to adopt the European practice with reference to an international agreement, which, aside from the indemnity question, was almost entirely political in character . . . purely political treaties are, under constitutional practice in Europe, usually made by the executive alone. The situation in China, however, abundantly justified President McKinley in not submitting the protocol to the Senate. The remoteness of Peking, the jealousies between the allies, and the shifting evasive tactics of the Chinese Government, would have made impossible anything but an agreement on the spot."[455]

It was also during this period that John Hay, as McKinley's Secretary of State, initiated his "Open Door" policy, by notes to Great Britain, Germany, and Russia, which were soon followed by similar notes to France, Italy and Japan. These in substance asked the recipients to declare formally that they would not seek to enlarge their respective interests in China at the expense of any of the others; and all responded favorably.[456] Then, in 1905, the first Roosevelt, seeking to arrive at a diplomatic understanding with Japan, instigated an exchange of opinions between Secretary of War Taft, then in the Far East, and Count Katsura, amounting to a secret treaty, by which the Roosevelt administration assented to the establishment by Japan of a military protectorate in Korea.[457] Three years later, Secretary of State Root and the Japanese ambassador at Washington entered into the Root-Takahira Agreement to uphold the *status quo* in the Pacific and maintain the principle of equal opportunity for commerce and industry in China.[458] Meantime, in 1907, by a "Gentleman's Agreement," the Mikado's government had agreed to curb the emigration of Japanese subjects to the United States, thereby relieving the Washington government from the necessity of taking action that would have cost Japan loss of face. The final result of this series of executive agreements touching American relations in and with the Far East was the product of President Wilson's diplomacy. This was the Lansing-Ishii Agreement, embodied in an exchange of letters dated November 2, 1917, by which the United States recognized Japan's "special interests" in China, and Japan assented to the principle of the Open Door in that country.[459]

The Litvinov Agreement.—The executive agreement attained its modern development as an instrument of foreign policy under President Franklin D. Roosevelt, at times threatening to replace the

[455] 1 W. Willoughby, supra at 539.
[456] W. McClure, supra at 98.
[457] Id. at 96–97.
[458] Id. at 98–99.
[459] Id. at 99–100.

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treaty-making power, not formally but in effect, as a determinative element in the field of foreign policy. The President's first important utilization of the executive agreement device took the form of an exchange of notes on November 16, 1933, with Maxim M. Litvinov, the USSR Commissar for Foreign Affairs, whereby American recognition was extended to the Soviet Union and certain pledges made by each official.[460]

The Hull-Lothian Agreement.—With the fall of France in June, 1940, President Roosevelt entered into two executive agreements the total effect of which was to transform the role of the United States from one of strict neutrality toward the European war to one of semi-belligerency. The first agreement was with Canada and provided for the creation of a Permanent Joint Board on Defense which would "consider in the broad sense the defense of the north half of the Western Hemisphere."[461] Second, and more important than the first, was the Hull-Lothian Agreement of September 2, 1940, under which, in return for the lease for ninety-nine years of certain sites for naval bases in the British West Atlantic, the United States handed over to the British Government fifty over-age destroyers which had been reconditioned and recommissioned.[462] And on April 9, 1941, the State Department, in consideration of the just-completed German occupation of Denmark, entered into an executive agreement with the Danish minister in Washington, whereby the United States acquired the right to occupy Greenland for purposes of defense.[463]

The Post-War Years.—Post-war diplomacy of the United States was greatly influenced by the executive agreements entered into at Cairo, Teheran, Yalta, and Potsdam.[464] For a period, the formal treaty—the signing of the United Nations Charter and the entry into the multinational defense pacts, like NATO, SEATO, CENTRO, and the like—re-established itself, but soon the executive agreement, as an adjunct of treaty arrangement or solely through presidential initiative, again became the principal instrument of United States foreign policy, so that it became apparent in the 1960s that the Nation was committed in one way or another to assisting over

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[460] Id. at 140–44.

[461] Id. at 391.

[462] Id. at 391–93. Attorney General Jackson's defense of the presidential power to enter into the arrangement placed great reliance on the President's "inherent" powers under the Commander-in-Chief clause and as sole organ of foreign relations but ultimately found adequate statutory authority to take the steps deemed desirable. 39 Ops. Atty. Gen. 484 (1940).

[463] 4 Dept. State Bull. 443 (1941).

[464] *See A Decade of American Foreign Policy, Basic Documents 1941–1949*, S. Doc. No. 123, 81st Congress, 1st Sess. (1950), pt. 1.

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half the countries of the world protect themselves.[465] Congressional disquietude did not result in anything more substantial than passage of a "sense of the Senate" resolution expressing a desire that "national commitments" be made more solemnly in the future than in the past.[466]

The Domestic Obligation of Executive Agreements

When the President enters into an executive agreement, what sort of obligation does it impose on the United States? That it may impose international obligations of potentially serious consequences is obvious and that such obligations may linger for long periods of time is equally obvious.[467] Not so obvious is the nature of the domestic obligations imposed by executive agreements. Do treaties and executive agreements have the same domestic effect?[468] Treaties preempt state law through operation of the Supremacy Clause. Although it may be that executive agreements entered into pursuant to congressional authorization or treaty obligation also derive preemptive force from the Supremacy Clause, that textual basis for preemption is arguably lacking for executive agreements resting solely on the President's constitutional powers.

Initially, it was the view of most judges and scholars that executive agreements based solely on presidential power did not become the "law of the land" pursuant to the Supremacy Clause because such agreements are not "treaties" ratified by the Senate.[469] The Supreme Court, however, found another basis for holding state laws to be preempted by executive agreements, ultimately relying on the Constitution's vesting of foreign relations power in the national government.

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[465] For a congressional attempt to evaluate the extent of such commitments, *see United States Security Agreements and Commitments Abroad: Hearings Before a Subcommittee of the Senate Foreign Relations Committee*, 91st Congress, 1st Sess. (1969), 10 pts.; *see also U.S. Commitments to Foreign Powers: Hearings on S. Res. 151 Before the Senate Foreign Relations Committee*, 90th Congress, 1st Sess. (1967).

[466] The "National Commitments Resolution," S. Res. 85, 91st Congress, 1st Sess., passed by the Senate June 25, 1969. *See also* S. Rep. No. 797, 90th Congress, 1st sess. (1967). *See* the discussion of these years in CRS study, supra at 169–202.

[467] In 1918, Secretary of State Lansing assured the Senate Foreign Relations Committee that the Lansing-Ishii Agreement had no binding force on the United States, that it was simply a declaration of American policy so long as the President and State Department might choose to continue it. 1 W. Willoughby, supra at 547. In fact, it took the Washington Conference of 1921, two formal treaties, and an exchange of notes to eradicate it, while the "Gentlemen's Agreement" was finally ended after 17 years only by an act of Congress. W. McClure, supra at 97, 100.

[468] *See* E. Byrd, supra at 151–57.

[469] *E.g.*, United States v. One Bag of Paradise Feathers, 256 F. 301, 306 (2d Cir. 1919); 1 W. Willoughby, supra at 589. The State Department held the same view. G. Hackworth, 5 Digest of International Law 426 (1944).

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A different view seemed to underlie the Supreme Court decision in *United States v. Belmont*,[470] giving domestic effect to the Litvinov Assignment. The Court's opinion by Justice Sutherland built on his *Curtiss-Wright*[471] opinion. A lower court had erred, the Court ruled, in dismissing an action by the United States, as assignee of the Soviet Union, for certain moneys which had once been the property of a Russian metal corporation the assets of which had been appropriated by the Soviet government. The President's act in recognizing the Soviet government, and the accompanying agreements, constituted, said the Justice, an international compact which the President, "as the sole organ" of international relations for the United States, was authorized to enter upon without consulting the Senate. Nor did state laws and policies make any difference in such a situation; while the supremacy of treaties is established by the Constitution in express terms, the same rule holds "in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the National Government and is not and cannot be subject to any curtailment or interference on the part of the several States."[472]

The Court elaborated on these principles five years later in *United States v. Pink*,[473] another case involving the Litvinov Assignment and recognition of the Soviet Government. The question presented was whether the United States was entitled to recover the assets of the New York branch of a Russian insurance company. The company argued that the Soviet Government's decrees of confiscation did not apply to its property in New York and could not apply consistently with the Constitution of the United States and that of New York. The Court, speaking by Justice Douglas, brushed these arguments aside. An official declaration of the Russian government itself settled the question of the extraterritorial operation of the Russian decree of nationalization and was binding on American courts. The power to remove such obstacles to full recognition as settlement of claims of our nationals was "a modest implied power of the President who is the 'sole organ of the Federal Government in the field of international relations'. . . . It was the judgment of the political department that full recognition of the Soviet Government required the settlement of outstanding problems including the claims of our nationals. . . . We would usurp the executive function if we held that the decision was not final and conclusive on the courts. . . ."

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[470] 301 U.S. 324 (1937). In B. Altman & Co. v. United States, 224 U.S. 583 (1912), the Court had recognized that a jurisdictional statute's reference to a "treaty" encompassed an executive agreement.

[471] United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

[472] 301 U.S. at 330–31.

[473] 315 U.S. 203 (1942).

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"It is, of course, true that even treaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy. . . . But state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement. . . . Then, the power of a State to refuse enforcement of rights based on foreign law which runs counter to the public policy of the forum . . . must give way before the superior Federal policy evidenced by a treaty or international compact or agreement. . . ."

"The action of New York in this case amounts in substance to a rejection of a part of the policy underlying recognition by this nation of Soviet Russia. Such power is not accorded a State in our constitutional system. To permit it would be to sanction a dangerous invasion of Federal authority. For it would 'imperil the amicable relations between governments and vex the peace of nations.' . . . It would tend to disturb that equilibrium in our foreign relations which the political departments of our national government has diligently endeavored to establish. . . ."

"No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively. It need not be so exercised as to conform to state laws or state policies, whether they be expressed in constitutions, statutes, or judicial decrees. And the policies of the States become wholly irrelevant to judicial inquiry when the United States, acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts."[474]

This recognition of the preemptive reach of executive agreements was an element in the movement for a constitutional amendment in the 1950s to limit the President's powers in this field, but that movement failed.[475]

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[474] 315 U.S. at 229–31, 233–34.

[475] There were numerous variations in language for the Bricker Amendment, but typical was § 3 of S.J. Res. 1, as reported by the Senate Judiciary Committee, 83d Congress, 1st Sess. (1953), which provided: "Congress shall have power to regulate all executive and other agreements with any foreign power or international organization. All such agreements shall be subject to the limitations imposed on treaties by this article." The limitation relevant on this point was in § 2, which provided: "A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty."

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Belmont and *Pink* were reinforced in *American Ins. Ass'n v. Garamendi*.[476] In holding that California's Holocaust Victim Insurance Relief Act was preempted as interfering with the Federal Government's conduct of foreign relations, as expressed in executive agreements, the Court reiterated that "valid executive agreements are fit to preempt state law, just as treaties are."[477] The preemptive reach of executive agreements stems from "the Constitution's allocation of the foreign relations power to the National Government."[478] Because there was a "clear conflict" between the California law and policies adopted through the valid exercise of federal executive authority (settlement of Holocaust-era insurance claims being "well within the Executive's responsibility for foreign affairs"), the state law was preempted.[479]

State Laws Affecting Foreign Relations—Dormant Federal Power and Preemption

If the foreign relations power is truly an exclusive federal power, with no role for the states, a logical consequence, the Supreme Court has held, is that some state laws impinging on foreign relations are invalid even in the absence of a relevant federal policy. There is, in effect, a "dormant" foreign relations power. The scope of this power remains undefined, however, and its constitutional basis is debated by scholars.

The exclusive nature of the federal foreign relations power has long been asserted by the Supreme Court. In 1840, for example, the Court declared that "it was one of the main objects of the constitution to make us, so far as regarded our foreign relations, one people, and one nation; and to cut off all communications between foreign governments, and the several state authorities."[480] A hundred years later the Court remained emphatic about federal exclu-

[476] 539 U.S. 396 (2003). The Court's opinion in Dames & Moore v. Regan, 453 U.S. 654 (1981), was rich in learning on many topics involving executive agreements, but the preemptive force of agreements resting solely on presidential power was not at issue, the Court concluding that Congress had either authorized various presidential actions or had long acquiesced in others.

[477] 539 U.S. at 416.

[478] 539 U.S. at 413.

[479] 539 U.S. at 420.

[480] Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 575–76 (1840). *See also* United States v. Belmont, 301 U.S. 324, 331 (1937) ("The external powers of the United States are to be exercised without regard to state laws or policies. . . . [I]n respect of our foreign relations generally, state lines disappear"); *The Chinese Exclusion Case*, 130 U.S. 581, 606 (1889) ("For local interests the several States of the Union exist; but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power"); Hines v. Davidowitz, 312 U.S. 52, 63 (1941) ("Our system of government . . . requires that federal power in the field affecting foreign relations be left entirely free from local interference").

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sivity. "No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively. It need not be so exercised as to conform to state laws or state policies, whether they be expressed in constitutions, statutes, or judicial decrees. And the policies of the States become wholly irrelevant to judicial inquiry when the United States, acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts."[481]

It was not until 1968, however, that the Court applied the general principle to invalidate a state law for impinging on the nation's foreign policy interests in the absence of an established federal policy. In *Zschernig v. Miller*[482] the Court invalidated an Oregon escheat law that operated to prevent inheritance by citizens of Communist countries. The law conditioned inheritance by nonresident aliens on a showing that U.S. citizens would be allowed to inherit estates in the alien's country, and that the alien heir would be allowed to receive payments from the Oregon estate "without confiscation."[483] Although a Justice Department *amicus* brief asserted that application of the Oregon law in this one case would not cause any "undu[e] interfer[ence] with the United States' conduct of foreign relations," the Court saw a "persistent and subtle" effect on international relations stemming from the "notorious" practice of state probate courts in denying payments to persons from Communist countries.[484] Regulation of descent and distribution of estates is an area traditionally regulated by states, but such "state regulations must give way if they impair the effective exercise of the Nation's foreign policy." If there are to be travel, probate, or other restraints on citizens of Communist countries, the Court concluded, such restraints "must be provided by the Federal Government."[485]

Zschernig lay dormant for some time, and, although it has been addressed recently by the Court, it remains the only holding in which the Court has applied a dormant foreign relations power to strike down state law. There was renewed academic interest in *Zschernig* in the 1990s, as some state and local governments sought ways to express dissatisfaction with human rights policies of foreign govern-

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[481] United States v. Pink, 315 U.S. 203, 233–34 (1942). Chief Justice Stone and Justice Roberts dissented.

[482] 389 U.S. 429 (1968).

[483] In Clark v. Allen, 331 U.S. 503 (1947), the Court had upheld a simple reciprocity requirement that did not have the additional requirement relating to confiscation.

[484] 389 U.S. at 440.

[485] 389 U.S. at 440, 441.

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ments or to curtail trade with out-of-favor countries.[486] In 1999, the Court struck down Massachusetts' Burma sanctions law on the basis of statutory preemption, and declined to address the appeals court's alternative holding applying *Zschernig*.[487] Similarly, in 2003, the Court held that California's Holocaust Victim Insurance Relief Act was preempted as interfering with federal foreign policy reflected in executive agreements, and, although the Court discussed *Zschernig* at some length, it saw no need to resolve issues relating to its scope.[488]

Dictum in *Garamendi* recognizes some of the questions that can be raised about *Zschernig*. The *Zschernig* Court did not identify what language in the Constitution mandates preemption, and commentators have observed that a respectable argument can be made that the Constitution does not require a general foreign affairs preemption not tied to the Supremacy Clause, and broader than and independent of the Constitution's specific prohibitions[489] and grants of power.[490] The *Garamendi* Court raised "a fair question whether respect for the executive foreign relations power requires a categorical choice between the contrasting theories of field and conflict preemption evident in the *Zschernig* opinions." Instead, Justice Souter suggested for the Court, field preemption may be appropriate if a state legislates "simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility," and conflict preemption may be appropriate if a state legislates within an area of traditional responsibility, "but in a way

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[486] *See*, *e.g.*, Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 Notre Dame L. Rev. 341 (1999); Carlos Manuel Vazquez, *Whither Zschernig?*, 46 Vill. L. Rev. 1259 (2001); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617 (1997); Peter J. Spiro, *Foreign Relations Federalism*, 70 U. Colo. L. Rev. 1223 (1999). *See also* Louis Henkin, Foreign Affairs and the Constitution 149–69 (2d ed. 1996).

[487] Crosby v. National Foreign Trade Council, 530 U.S. 363, 374 n.8 (2000). For the appeals court's application of *Zschernig*, see National Foreign Trade Council v. Natsios, 181 F.3d 38, 49–61 (1st Cir. 1999).

[488] American Ins. Ass'n v. Garamendi, 539 U.S. at 419 & n.11 (2003).

[489] It is contended, for example, that Article I, § 10's specific prohibitions against states engaging in war, making treaties, keeping troops in peacetime, and issuing letters of marque and reprisal would have been unnecessary if a more general, dormant foreign relations power had been intended. Similarly, there would have been no need to declare treaties to be the supreme law of the land if a more generalized foreign affairs preemptive power existed outside of the Supremacy Clause. *See* Ramsey, supra.

[490] Arguably, part of the "executive power" vested in the President by Art. II, § 1 is a power to conduct foreign relations.

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that affects foreign relations."[491] We must await further litigation to see whether the Court employs this distinction.[492]

THE EXECUTIVE ESTABLISHMENT

Office

"An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties."[493]

Ambassadors and Other Public Ministers.—The term "ambassadors and other public ministers," comprehends "all officers having diplomatic functions, whatever their title or designation."[494] It was originally assumed that such offices were established by the Constitution itself, by reference to the Law of Nations, with the consequence that appointments might be made to them whenever the appointing authority—the President and Senate—deemed desirable.[495] During the first sixty-five years of the Government, Congress passed no act purporting to create any diplomatic rank, the entire question of grades being left with the President. Indeed, during the administrations of Washington, Adams and Jefferson, and the first term of Madison, no mention occurs in any appropriation, even of ministers of a specified rank at this or that place, but the provision for the diplomatic corps consisted of so much money "for the expenses of foreign intercourse," to be expended at the discretion of the President. In Madison's second term, the practice was introduced of allocating special sums to the several foreign missions maintained by the Government, but even then the legislative provisions did not purport to curtail the discretion of the President in any way in the choice of diplomatic agents.

In 1814, however, when President Madison appointed, during a recess of the Senate, the Commissioners who negotiated the Treaty of Ghent, the theory on which the above legislation was based was drawn into question. Inasmuch, it was argued, as these offices had

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[491] 539 U.S. at 419 n.11.

[492] Justice Ginsburg's dissent in *Garamendi*, joined by the other three Justices, suggested limiting *Zschernig* in a manner generally consistent with Justice Souter's distinction. *Zschernig* preemption, Justice Ginsburg asserted, "resonates most audibly when a state action 'reflects a state policy critical of foreign governments and involve[s] sitting in judgment on them.'" 539 U.S. at 439 (quoting Henkin, supra, at 164). But Justice Ginsburg also voiced more general misgivings about judges' becoming "the expositors of the Nation's foreign policy." Id. at 442. In this context, see Goldsmith, supra, at 1631, describing *Zschernig* preemption as "a form of the federal common law of foreign relations."

[493] United States v. Hartwell, 73 U.S. (6 Wall.) 385, 393 (1868).

[494] 7 Ops. Atty. Gen. 168 (1855).

[495] It was so assumed by Senator William Maclay. THE JOURNAL OF WILLIAM MACLAY 109–10 (E. Maclay ed., 1890).

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never been established by law, no vacancy existed to which the President could constitutionally make a recess appointment. To this argument, it was answered that the Constitution recognizes "two descriptions of offices altogether different in their nature, authorized by the constitution—one to be created by law, and the other depending for their existence and continuance upon contingencies. Of the first kind, are judicial, revenue, and similar offices. Of the second, are Ambassadors, other public Ministers, and Consuls. The first descriptions organize the government and give it efficacy. They form the internal system, and are susceptible of precise enumeration. When and how they are created, and when and how they become vacant, may always be ascertained with perfect precision. Not so with the second description. They depend for their original existence upon the law, but are the offspring of the state of our relations with foreign nations, and must necessarily be governed by distinct rules. As an independent power, the United States have relations with all other independent powers; and the management of those relations is vested in the Executive."[496]

By the opening section of the act of March 1, 1855, it was provided that "from and after the thirtieth day of June next, the President of the United States shall, by and with the advice and consent of the Senate, appoint representatives of the grade of envoys extraordinary and ministers plenipotentiary," with a specified annual compensation for each, "to the following countries. . . ." In the body of the act was also this provision: "The President shall appoint no other than citizens of the United States, who are residents thereof, or who shall be abroad in the employment of the government at the time of their appointment. . . ."[497] The question of the interpretation of the act having been referred to Attorney General Cushing, he ruled that its total effect, aside from its salary provisions, was recommendatory only. It was "to say, that if, and whenever, the President shall, by and with the advice and consent of the Senate, appoint an envoy extraordinary and minister plenipotentiary to Great Britain, or to Sweden, the compensation of that minister shall be so much and no more."[498]

This line of reasoning is only partially descriptive of the facts. The Foreign Service Act of 1946,[499] pertaining to the organization of the foreign service, diplomatic as well as consular, contains detailed provisions as to grades, salaries, promotions, and, in part, as

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[496] 26 Annals of Congress 694–722 (1814) (quotation appearing at 699); 4 Letters and Other Writings of James Madison 350–353 (1865).

[497] 10 Stat. 619, 623.

[498] 7 Ops. Atty. Gen. 186, 220 (1855).

[499] 60 Stat. 999, superseded by the Foreign Service Act of 1980, Pub. L. 96–465, 94 Stat. 2071, 22 U.S.C. §§ 3901 *et seq*.

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to duties. Under the terms thereof the President, by and with the advice and consent of the Senate, appoints ambassadors, ministers, foreign service officers, and consuls, but in practice the vast proportion of the selections are made in conformance to recommendations of a Board of the Foreign Service.

Presidential Diplomatic Agents.—What the President may have lost in consequence of the intervention of Congress in this field of diplomatic appointments, he has made good through his early conceded right to employ, in the discharge of his diplomatic function, so-called "special," "personal," or "secret" agents without consulting the Senate. When President Jackson's right to resort to this practice was challenged in the Senate in 1831, it was defended by Edward Livingston, Senator from Louisiana, to such good purpose that Jackson made him Secretary of State. "The practice of appointing secret agents," said Livingston, "is coeval with our existence as a nation, and goes beyond our acknowledgment as such by other powers. All those great men who have figured in the history of our diplomacy, began their career, and performed some of their most important services in the capacity of secret agents, with full powers. Franklin, Adams, Lee, were only commissioners; and in negotiating a treaty with the Emperor of Morocco, the selection of the secret agent was left to the Ministers appointed to make the treaty; and, accordingly, in the year 1785, Mr. Adams and Mr. Jefferson appointed Thomas Barclay, who went to Morocco and made a treaty, which was ratified by the Ministers at Paris."

"These instances show that, even prior to the establishment of the Federal Government, secret plenipotentiaries were known, as well in the practice of our own country as in the general law of nations: and that these secret agents were not on a level with messengers, letter carriers, or spies, to whom it has been found necessary in argument to assimilate them. On the 30th March, 1795, in the recess of the Senate, by letters patent under the great broad seal of the United States, and the signature of their President, (that President being George Washington,) countersigned by the Secretary of State, David Humphreys was appointed commissioner plenipotentiary for negotiating a treaty of peace with Algiers. By instructions from the President, he was afterwards authorized to employ Joseph Donaldson as agent in that business. In May, of the same year, he did appoint Donaldson, who went to Algiers, and in September of the same year concluded a treaty with the Dey and Divan, which was confirmed by Humphreys, at Lisbon, on the 28th November in the same year, and afterwards ratified by the Senate,

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and an act passed both Houses on 6th May, 1796, appropriating a large sum, twenty-five thousand dollars annually, for carrying it into effect."[500]

The precedent afforded by Humphreys' appointment without reference to the Senate has since been multiplied many times,[501] as witness the mission of A. Dudley Mann to Hanover and other German states in 1846, of the same gentleman to Hungary in 1849, of Nicholas Trist to Mexico in 1848, of Commodore Perry to Japan in 1852, of J. H. Blount to Hawaii in 1893. The last named case is perhaps the most extreme of all. Blount, who was appointed while the Senate was in session but without its advice and consent, was given "paramount authority" over the American resident minister at Hawaii and was further empowered to employ the military and naval forces of the United States, if necessary to protect American lives and interests. His mission raised a vigorous storm of protest in the Senate, but the majority report of the committee which was created to investigate the constitutional question vindicated the President in the following terms: "A question has been made as to the right of the President of the United States to dispatch Mr. Blount to Hawaii as his personal representative for the purpose of seeking the further information which the President believed was necessary in order to arrive at a just conclusion regarding the state of affairs in Hawaii. Many precedents could be quoted to show that such power has been exercised by the President on various occasions, without dissent on the part of Congress or the people of the United States. . . . These precedents also show that the Senate of the United States, though in session, need not be consulted as to the appointment of such agents, ..."[502] The continued vitality of the practice is attested by such names as Colonel House, the late Norman H. Davis, who filled the role of "ambassador at large" for a succession of administrations of both parties, Professor Philip Jessup, Mr. Averell Harriman, and other "ambassadors at large" of the Truman Administration, and Professor Henry Kissinger of the Nixon Administration.

How is the practice to be squared with the express words of the Constitution? Apparently, by stressing the fact that such appointments or designations are ordinarily merely temporary and for special tasks, and hence do not fulfill the tests of "office" in the strict

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[500] 11 T. Benton, Abridgement of the Debates of Congress 221 (1860).

[501] S. Misc. Doc, 109, 50th Congress, 1st Sess. (1888), 104.

[502] S. Rep. No. 227, 53d Congress, 2d Sess. (1894), 25. At the outset of our entrance into World War I President Wilson dispatched a mission to "Petrograd," as it was then called, without nominating the Members of it to the Senate. It was headed by Mr. Elihu Root, with "the rank of ambassador," while some of his associates bore "the rank of envoy extraordinary."

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sense. In the same way the not infrequent practice of Presidents of appointing Members of Congress as commissioners to negotiate treaties and agreements with foreign governments may be regularized, notwithstanding the provision of Article I, § 6, clause 2 of the Constitution, which provides that "no Senator or Representative shall . . . be appointed to any civil Office under the Authority of the United States, which shall have been created," during his term; and no officer of the United States, "shall be a Member of either House during his Continuance in Office."[503] The Treaty of Peace with Spain, the treaty to settle the Bering Sea controversy, the treaty establishing the boundary line between Canada and Alaska, were negotiated by commissions containing Senators and Representatives.

Appointments and Congressional Regulation of Offices

It has never been questioned that the Constitution distinguishes between the creation of an office and appointment thereto. The former is *by law* and takes place by virtue of Congress's power to pass all laws necessary and proper for carrying into execution the powers which the Constitution confers upon the government of the United States and its departments and officers.[504] As an incident to the establishment of an office, Congress has also the power to determine the qualifications of the officer and in so doing necessarily limits the range of choice of the appointing power. First and last, it has laid down a great variety of qualifications, depending on citizenship, residence, professional attainments, occupational experience, age, race, property, sound habits, and so on. It has required that appointees be representative of a political party, of an industry, of a geographic region, or of a particular branch of the Government. It has confined the President's selection to a small number of persons to be named by others.[505] Indeed, it has contrived at

[503] *See* 2 G. Hoar, Autobiography of Seventy Years 48–51 (1903).

[504] However, "Congress's power . . . is inevitably bounded by the express language of Article II, cl. 2, and unless the method it provides comports with the latter, the holders of those offices will not be 'Officers of the United States.'" Buckley v. Valeo, 424 U.S. 1, 138–39 (1976) (quoted in Freytag v. Commissioner, 501 U.S. 868, 883 (1991)). The designation or appointment of military judges, who are "officers of the United States," does not violate the Appointments Clause. The judges are selected by the Judge Advocate General of their respective branch of the Armed Forces. These military judges, however, were already commissioned officers who had been appointed by the President with the advice and consent of the Senate, so that their designation simply and permissibly was an assignment to them of additional duties that did not need a second formal appointment. Weiss v. United States, 510 U.S. 163 (1994). However, the appointment of civilian judges to the Coast Guard Court of Military Review was impermissible and their actions were not salvageable under the *de facto* officer doctrine. Ryder v. United States, 515 U.S. 177 (1995).

[505] *See* Myers v. United States, 272 U.S. 52, 264–74 (1926) (Justice Brandeis dissenting). Chief Justice Taft in the opinion of the Court in *Myers* readily recognized the legislative power of Congress to establish offices, determine their func-

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times to designate a definite eligibility, thereby virtually usurping the appointing power.[506] Despite the record of the past, however, it is not at all clear that Congress may cabin the President's discretion, at least for offices that he considers important, by, for example, requiring him to choose from lists compiled by others. To be sure, there are examples, but they are not free of ambiguity.[507]

But when Congress contrived actually to participate in the appointment and administrative process and provided for selection of the members of the Federal Election Commission, two by the President, two by the Senate, and two by the House, with confirmation of all six members vested in both the House and the Senate, the Court unanimously held the scheme to violate the Appointments Clause and the principle of separation of powers. The term "officers of the United States" is a substantive one requiring that any appoin-

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tions and jurisdiction, fix the terms of office, and prescribe reasonable and relevant qualifications and rules of eligibility of appointees, always provided "that the qualifications do not so limit selection and so trench upon executive choice as to be in effect legislative designation." Id. at 128–29. For reiteration of Congress's general powers, *see* Buckley v. Valeo, 424 U.S. 1, 134–35 (1976); Morrison v. Olson, 487 U.S. 654, 673–77 (1988). *See also* United States v. Ferreira, 54 U.S. (13 How.) 40, 51 (1851).

[506] *See* data in E. Corwin, supra at 363–65. Congress has repeatedly designated individuals, sometimes by name, more frequently by reference to a particular office, for the performance of specified acts or for posts of a nongovernmental character; *e.g.*, to paint a picture (Johnathan Trumbull), to lay out a town, to act as Regents of Smithsonian Institution, to be managers of Howard Institute, to select a site for a post office or a prison, to restore the manuscript of the Declaration of Independence, to erect a monument at Yorktown, to erect a statue of Hamilton, and so on and so forth. Note, *Power of Appointment to Public Office under the Federal Constitution*, 42 HARV. L. REV. 426, 430–31 (1929). In his message of April 13, 1822, President Monroe stated that, "as a general principle, . . . Congress have [sic] no right under the Constitution to impose any restraint by law on the power granted to the President so as to prevent his making a free selection of proper persons for these [newly created] offices from the whole body of his fellow-citizens." 2 J. Richardson supra at 698, 701. The statement is ambiguous, but its apparent intention is to claim for the President unrestricted power in determining who are proper persons to fill newly created offices. *See* the distinction drawn in Myers v. United States, 272 U.S. 52, 128–29 (1926), quoted supra. And note that in Public Citizen v. U.S. Department of Justice, 491 U.S. 440, 482–89 (1989) (concurring), Justice Kennedy suggested the President has *sole* and unconfined discretion in appointing).

[507] The Sentencing Commission, upheld in Mistretta v. United States, 488 U.S. 361 (1989), numbered among its members three federal judges; the President was to select them "after considering a list of six judges recommended to the President by the Judicial Conference of the United States." Id. at 397 (quoting 28 U.S.C. § 991(a)). 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. Bowsher v. Synar, 478 U.S. 714, 727 (1986) (citing 31 U.S.C. § 703(a)(2)). In Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Airport Noise, 501 U.S. 252, 268–69 (1991), the Court carefully distinguished these examples from the particular situation before it that it condemned, *but see* id. at 288 (Justice White dissenting), and in any event it never actually passed on the list devices in *Mistretta* and *Synar*. The fault in *Airports Authority* was not the validity of lists generally, the Court condemning the device there as giving Congress control of the process, in violation of Buckley v. Valeo.

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tee exercising significant authority pursuant to the laws of the United States be appointed in the manner prescribed by the Appointments Clause.[508] The Court did hold, however, that the Commission so appointed and confirmed could be delegated the powers Congress itself could exercise, that is, those investigative and informative functions that congressional committees carry out were properly vested in this body.

Congress is authorized by the Appointments Clause to vest the appointment of "inferior Officers," at its discretion, "in the President alone, in the Courts of Law, or in the Heads of Departments." The principal questions arising under this portion of the clause are "Who are 'inferior officers,'" and "what are the 'Departments'" whose heads may be given appointing power?[509] "[A]ny appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of [Article II]."[510] "The Constitution for purposes of appointment very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But foreseeing that when offices became numerous, and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of departments. That all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt."[511]

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[508] Buckley v. Valeo, 424 U.S. 1, 109–143 (1976). The Court took pains to observe that the clause was violated not only by the appointing process but by the confirming process, inclusion of the House of Representatives, as well. Id. at 137. *See also* Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252 (1991).

[509] Concurrently, of course, although it may seem odd, the question of what is a "Court[] of Law" for purposes of the Appointments Clause is unsettled. *See* Freytag v. Commissioner, 501 U.S. 868 (1991) (Court divides 5-to-4 whether an Article I court is a court of law under the clause).

[510] Freytag v. Commissioner, 501 U.S.868, 881 (1991) (quoting Buckley v. Valeo, 424 U.S. 1, 126 (1976)).

[511] United States v. Germaine, 99 U.S. 508, 509–510 (1879) (quoted in Buckley v. Valeo, 424 U.S. 1, 125 (1976)). The constitutional definition of an "inferior" officer is wondrously imprecise. *See* Freytag v. Commissioner, 501 U.S. 868, 880–882 (1991); Morrison v. Olson, 487 U.S. 654, 670–73 (1988). *See also* United States v. Eaton, 169 U.S. 331 (1898). There is another category, of course, employees, but these are lesser functionaries subordinate to officers of the United States. Ordinarily, the term "employee" denotes one who stands in a contractual relationship to her employer, but here it signifies all subordinate officials of the Federal Government receiving their appointments at the hands of officials who are not specifically recognized by

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In *Edmond v. United States*,[512] the Court reviewed its pronouncements regarding the definition of "inferior officer" and, disregarding some implications of its prior decisions, seemingly settled, unanimously, on a pragmatic characterization. Thus, the importance of the responsibilities assigned an officer, the fact that duties were limited, that jurisdiction was narrow, and that tenure was limited, are only factors but are not definitive.[513] "Generally speaking, the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President: Whether one is an 'inferior' officer depends on whether he has a superior. It is not enough that other officers may be identified who formally maintain a higher rank, or possess responsibilities of a greater magnitude. If that were the intention, the Constitution might have used the phrase 'lesser officer.' Rather, in the context of a Clause designed to preserve political accountability relative to important Government assignments, we think it evident that 'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate."[514]

Thus, officers who are not "inferior Officers" are principal officers who must be appointed by the President with the advice and consent of the Senate in order to make sure that all the business of the Executive will be conducted under the supervision of officers appointed by the President with Senate approval.[515] Further, the Framers intended to limit the "diffusion" of the appointing power

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the Constitution as capable of being vested by Congress with the appointing power. Auffmordt v. Hedden, 137 U.S. 310, 327 (1890). *See* Go-Bart Importing Co. v. United States, 282 U.S. 344, 352–53 (1931); Burnap v. United States, 252 U.S. 512, 516–17 (1920); *Germaine*, 99 U.S. at 511–12.

[512] 520 U.S. 651 (1997).

[513] 520 U.S. at 661–62.

[514] 520 U.S. at 662–63. The case concerned whether the Secretary of Transportation, a presidential appointee with the advice and consent of the Senate, could appoint judges of the Coast Guard Court of Military Appeals; necessarily, the judges had to be "inferior" officers. In related cases, the Court held that designation or appointment of military judges, who are "officers of the United States," does not violate the Appointments Clause. The judges are selected by the Judge Advocate General of their respective branch of the Armed Forces. These military judges, however, were already commissioned officers who had been appointed by the President with the advice and consent of the Senate, so that their designation simply and permissibly was an assignment to them of additional duties that did not need a second formal appointment. Weiss v. United States, 510 U.S. 163 (1994). However, the appointment of civilian judges to the Coast Guard Court of Military Review by the same method was impermissible; they had either to be appointed by an officer who could exercise appointment-clause authority or by the President, and their actions were not salvageable under the de facto officer doctrine. Ryder v. United States, 515 U.S. 177 (1995).

[515] Freytag v. Commissioner, 501 U.S. 868, 919 (1991) (Justice Scalia concurring).

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with respect to inferior officers in order to promote accountability. "The Framers understood . . . that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people. . . . The Appointments Clause prevents Congress from distributing power too widely by limiting the actors in whom Congress may vest the power to appoint. The Clause reflects our Framers' conclusion that widely distributed appointment power subverts democratic government. Given the inexorable presence of the administrative state, a holding that every organ in the executive Branch is a department would multiply the number of actors eligible to appoint."[516]

Yet, even agreed on the principle, the *Freytag* Court split 5-to-4 on the reason for the permissibility of the Chief Judge of the Tax Court to appoint special trial judges. The entire Court agreed that the Tax Court had to be either a "department" or a "court of law" in order for the authority to be exercised by the Chief Judge, and it unanimously agreed that the statutory provision was constitutional. But there agreement ended. The majority was of the opinion that the Tax Court could not be a department, but it was unclear what those Justices thought a department comprehended. Seemingly, it started from the premise that departments were those parts of the executive establishment called departments and headed by a cabinet officer.[517] Yet, the Court continued immediately to say: "Confining the term 'Heads of Departments' in the Appointments Clause to executive divisions *like* the Cabinet-level departments constrains the distribution of the appointment power just as the [IRS] Commissioner's interpretation, in contrast, would diffuse it. The Cabinet-level departments are limited in number and easily identified. The heads are subject to the exercise of political oversight and share the President's accountability to the people."[518] The use of the word "like" in this passage suggests that it is not just Cabinet-headed departments that are departments but also entities that are similar to them in some way, and its reservation of the validity of investing appointing power in the heads of some unnamed entities, as well as its observation that the term "Heads of Departments" does not embrace "inferior commissioners and bureau officers" all contribute to an amorphous conception of the term.[519] In the end, the Court sustained the challenged provision by holding that the

[516] Freytag v. Commissioner, 501 U.S. 868, 884–85 (1991).

[517] 501 U.S. at 886 (citing *Germaine* and *Burnap*, the Opinion Clause (Article II, § 2), and the 25th Amendment, which, in its § 4, referred to "executive departments" in a manner that reached only cabinet-level entities). *But compare* id. at 915–22 (Justice Scalia concurring).

[518] 501 U.S. at 886 (emphasis added).

[519] 501 U.S. at 886–88. *Compare* id. at 915–19 (Justice Scalia concurring).

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Tax Court as an Article I court was a "Court of Law" within the meaning of the Appointments Clause.[520] The other four Justices concluded that the Tax Court, as an independent establishment in the executive branch, was a "department" for purposes of the Appointments Clause. In their view, in the context of text and practice, the term meant, not Cabinet-level departments, but "all independent executive establishments," so that "'Heads of Departments' includes the heads of all agencies immediately below the President in the organizational structure of the Executive Branch."[521]

The *Freytag* decision must be considered a tentative rather than a settled construction.[522]

As noted, the Appointments Clause also authorizes Congress to vest the power in "Courts of Law." Must the power to appoint when lodged in courts be limited to those officers acting in the judicial branch, as the Court first suggested?[523] No, the Court said subsequently. In *Ex parte Siebold*,[524] the Court sustained Congress's decision to vest in courts the appointment of federal election supervisors, charged with preventing fraud and rights violations in congressional elections in the South, and disavowed any thought that interbranch appointments could not be authorized under the clause. A special judicial division was authorized to appoint independent counsels to investigate and, if necessary, prosecute charges of corruption in the executive, and the Court, in near unanimity, sustained the law, denying that interbranch appointments, in and of themselves, and leaving aside more precise separation-of-powers claims, were improper under the clause.[525]

Congressional Regulation of Conduct in Office.—Congress has very broad powers in regulating the conduct in office of officers and employees of the United States, and this authority extends to regulation of political activities. By an act passed in 1876, it prohibited "all executive officers or employees of the United States not appointed by the President, with the advice and consent of the Sen-

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[520] 501 U.S. at 888–92. This holding was vigorously controverted by the other four Justices. Id. at 901–14 (Justice Scalia concurring).

[521] 501 U.S. at 918, 919 (Justice Scalia concurring).

[522] As the text suggested, *Freytag* seemed to be a tentative decision, and Edmond v. United States, 520 U.S. 651 (1997), a unanimous decision written by Justice Scalia, whose concurring opinion in *Freytag* challenged the Court's analysis, may easily be read as retreating considerably from it.

[523] *In re* Hennen, 38 U.S. (13 Pet.) 230 (1839). The suggestion was that inferior officers are intended to be subordinate to those in whom their appointment is vested. Id. at 257–58; United States v. Germaine, 99 U.S. 508, 509 (1879).

[524] 100 U.S. 371 (1880).

[525] Morrison v. Olson, 487 U.S. 654, 673–77 (1988). *See also* Young v. United States ex rel. Vuitton, 481 U.S. 787 (1987) (appointment of private attorneys to act as prosecutors for judicial contempt judgments); Freytag v. Commissioner, 501 U.S. 868, 888–92 (1991) (appointment of special judges by Chief Judge of Tax Court).

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ate, . . . from requesting, giving to, or receiving from, any other officer or employee of the Government, any money or property or other thing of value for political purposes."[526] The validity of this measure having been sustained,[527] the substance of it, with some elaborations, was incorporated in the Civil Service Act of 1883.[528] The Lloyd-La Follette Act in 1912 began the process of protecting civil servants from unwarranted or abusive removal by codifying "just cause" standards previously embodied in presidential orders, defining "just causes" as those that would promote the "efficiency of the service."[529] Substantial changes in the civil service system were instituted by the Civil Service Reform Act of 1978, which abolished the Civil Service Commission and delegated its responsibilities, its management, and its administrative duties to the Office of Personnel Management and its review and protective functions to the Merit Systems Protection Board.[530]

Until 1993, § 9(a) of the Hatch Act[531] prohibited any person in the executive branch, or any executive branch department or agency, except the President and the Vice President and certain "policy determining" officers, to "take an active part in political management or political campaigns," although employees had been permitted to "express their opinions on all political subjects and candidates." In *United Public Workers v. Mitchell*,[532] these provisions were upheld as "reasonable" against objections based on the First, Fifth, Ninth, and Tenth Amendments. The Hatch Act Reform Amendments of 1993,

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[526] 19 Stat. 143, 169 (1876).

[527] *Ex parte* Curtis, 106 U.S. 371 (1882). Chief Justice Waite's opinion extensively reviews early congressional legislation regulative of conduct in office. Id. at 372–73.

[528] 22 Stat. 403 (the Pendleton Act). On this law and subsequent enactments that created the civil service as a professional cadre of bureaucrats insulated from politics, *see Developments in the Law: Public Employment*, 97 HARV. L. REV. 1611, 1619–1676 (1984).

[529] Act of Aug. 24, 1912, § 6, 37 Stat. 539, 555, codified as amended at 5 U.S.C. § 7513. The protection was circumscribed by the limited enforcement mechanisms under the Civil Service Commission, which were gradually strengthened. *See Developments*, *supra*, 97 HARV. L. REV., 1630–31.

[530] 92 Stat. 1111 (codified in scattered sections of titles 5, 10, 15, 28, 31, 38, 39, and 42 U.S.C.). For the long development, *see*, *Developments*, *supra*, 97 HARV. L. REV. at 1632–1650.

[531] 53 Stat. 1147, 1148 (1939), then 5 U.S.C. § 7324(a). The 1940 law, § 12(a), 54 Stat. 767–768, applied the same broad ban to employees of federally funded state and local agencies, but this provision was amended in 1974 to restrict state and local government employees in only one respect: running for public office in partisan elections. Act of Oct. 15, 1974, Pub. L. 93–443, § 401(a), 88 Stat. 1290, 5 U.S.C. § 1502.

[532] 330 U.S. 75 (1947). *See also* Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973), in which the constitutional attack was renewed, in large part based on the Court's expanding free speech jurisprudence, but the act was again sustained. A "little Hatch Act" of a state, applying to its employees, was sustained in Broadrick v. Oklahoma, 413 U.S. 601 (1973).

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however, substantially liberalized the rules for political activities during off-duty hours for most executive branch employees, subject to certain limitations on off-duty hours activities and express prohibitions against on-the-job partisan political activities.[533]

The Loyalty Issue.—By section 9A of the Hatch Act of 1939, a federal employee was disqualified from accepting or holding any position in the Federal Government or the District of Columbia if he belonged to an organization that he knew advocated the overthrow of our constitutional form of government.[534] The 79th Congress followed up this provision with a rider to its appropriation acts forbidding the use of any appropriated funds to pay the salary of any person who advocated, or belonged to an organization which advocated the overthrow of the government by force, or of any person who engaged in a strike or who belonged to an organization which asserted the right to strike against the government.[535] These provisos ultimately wound up in permanent law requiring all government employees to take oaths disclaiming either disloyalty or strikes as a device for dealing with the government as an employer.[536] Along with the loyalty-security programs initiated by President Truman[537] and carried forward by President Eisenhower,[538] these measures reflected the Cold War era and the fear of subversion and espionage following the disclosures of several such instances here and abroad.[539]

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[533] Pub. L. 103–94, § 2(a), 107 Stat. 1001 (1993), 5 U.S.C. §§ 7321–7326. Executive branch employees (except those appointed by the President, by and with the advice and consent of the Senate) who are listed in § 7323(b)(2), which generally include those employed by agencies involved in law enforcement or national security, remain under restrictions similar to the those in the old Hatch Act on taking an active part in political management or political campaigns.

[534] 53 Stat. 1147, 5 U.S.C. § 7311.

[535] *See* Report of the Special Committee on The Federal Loyalty-Security Program, The Association of the Bar of the City of New York (New York: 1956), 60.

[536] 5 U.S.C. § 3333. The loyalty disclaimer oath was declared unconstitutional in Stewart v. Washington, 301 F. Supp. 610 (D.D.C. 1969), and the did not appeal. The strike disclaimer oath was voided in National Ass'n of Letter Carriers v. Blount, 305 F. Supp. 546 (D.D.C. 1969); after noting probable jurisdiction, 397 U.S. 1062 (1970), the Court dismissed the appeal on the government's motion. 400 U.S. 801 (1970). The actual prohibition on strikes, however, has been sustained. United Fed'n of Postal Clerks v. Blount, 325 F. Supp. 879 (D.D.C. 1971), aff'd per curiam, 404 U.S. 802 (1971).

[537] E.O. 9835, 12 Fed. Reg. 1935 (1947).

[538] E.O. 10450, 18 Fed. Reg. 2489 (1953).

[539] *See generally*, Report of the Special Committee on The Federal Loyalty-Security Program, The Association of the Bar of the City of New York (New York: 1956).

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Financial Disclosure and Limitations.—The Ethics in Government Act of 1978[540] requires high-level federal personnel to make detailed, annual disclosures of their personal financial affairs.[541] The aims of the legislation are to enhance public confidence in government, to demonstrate the high level of integrity of government employees, to deter and detect conflicts of interest, to discourage individuals with questionable sources of income from entering government, and to facilitate public appraisal of government employees' performance in light of their personal financial interests.[542] Despite assertions that employee privacy interests are needlessly invaded by the breadth of disclosures, to date judicial challenges have been unsuccessful, with one exception.[543] The one provision that was invalidated was section 501(b),[544] which prohibits Members of Congress and officers or employees of the government, regardless of salary level, from receiving any "honorarium," which the statute defines as "a payment of money or any thing of value for an appearance, speech or article (including a series of appearances, speeches, or articles if the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government) . . . ."[545] The Supreme Court held that this prohibition, even interpreted in accordance with the standards applicable to speech restrictions on government employees, was overbroad, as "[t]he speculative benefits the honoraria ban may provide the government are not sufficient to justify this crudely crafted burden of respondents' freedom to engage in expressive activities."[546]

Legislation Increasing Duties of an Officer.—Finally, "Congress may increase the powers and duties of an existing office without thereby rendering it necessary that the incumbent should be

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[540] Pub. L. 95–521, tits. I–III, 92 Stat. 1824–1861. The Act was originally codified in three different titles, 2, 5, and 28, corresponding to legislative, executive, and judicial branch personnel, but by Pub. L. 101–194, title II, 103 Stat. 1725 (1989), one comprehensive title, as amended, applying to all covered federal personnel was enacted. 5 U.S.C. App. §§ 101–111.

[541] *See Developments*, *supra*, 97 Harv. L. Rev. at 1660–1669.

[542] 97 Harv. L. Rev. at 1661 (citing S. Rep. 170, 95th Cong., 2d sess. (1978), 21–22).

[543] 97 Harv. L. Rev. at 1664–69. The Ethics in Government Act also expanded restrictions on post-employment by imposing bans on employment, varying from a brief period to an out-and-out lifetime ban in certain cases. Id. at 1669–76. The 1989 revision enlarged and expanded on these provisions. 103 Stat. 1716–1724, amending 18 U.S.C. § 207.

[544] 92 Stat. 1864 (1978), as amended, 103 Stat. 1760 (1989), as amended, 5 U.S.C. App. § 501(b).

[545] 5 U.S.C. App. § 505(3).

[546] United States v. NTEU, 513 U.S. 454, 477 (1995).

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again nominated and appointed."[547] Such legislation does not constitute an attempt by Congress to seize the appointing power.

Stages of Appointment Process

Nomination.—The Constitution appears to distinguish three stages in appointments by the President with the advice and consent of the Senate. The first is the "nomination" of the candidate by the President alone; the second is the assent of the Senate to the candidate's "appointment;" and the third is the final appointment and commissioning of the appointee, by the President.[548]

Senate Approval.—The fact that the power of nomination belongs to the President alone prevents the Senate from attaching conditions to its approval of an appointment, such as it may do to its approval of a treaty. In the words of an early opinion of the Attorney General: "The Senate cannot originate an appointment. Its constitutional action is confined to the simple affirmation or rejection of the President's nominations, and such nominations fail whenever it rejects them. The Senate may suggest conditions and limitations to the President, but it cannot vary those submitted by him, for no appointment can be made except on his nomination, agreed to without qualifications or alteration."[549] This view is borne out by early opinion,[550] as well as by the record of practice under the Constitution.

When Senate Consent Is Complete.—Early in January, 1931, the Senate requested President Hoover to return its resolution notifying him that it advised and consented to certain nominations to the Federal Power Commission. In support of its action the Senate invoked a long-standing rule permitting a motion to reconsider a resolution confirming a nomination within "the next two days of actual executive session of the Senate" and the recall of the notification to the President of the confirmation. The nominees involved having meantime taken the oath of office and entered upon the discharge of their duties, the President responded with a refusal, saying: "I cannot admit the power in the Senate to encroach upon the executive functions by removal of a duly appointed executive officer

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[547] Shoemaker v. United States, 147 U.S. 282, 301 (1893). The Court noted that the additional duties at issue were "germane to the offices." Id.

[548] Marbury v. Madison, 5 U.S. (1 Cr.) 137, 155–56 (1803) (Chief Justice Marshall). Marshall's statement that the appointment "is the act of the President," conflicts with the more generally held and sensible view that when an appointment is made with its consent, the Senate shares the appointing power. 3 J. Story, Commentaries on the Constitution of the United States 1525 (1833); *In re* Hennen, 38 U.S. (13 Pet.) 230, 259 (1839).

[549] 3 Ops. Atty. Gen. 188 (1837).

[550] 3 J. Story, supra at 1525–26; 5 Works of Thomas Jefferson 161–62 (P. Ford ed., 1904); 9 Writings of James Madison 111–13 (G. Hunt ed., 1910).

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under the guise of reconsideration of his nomination." The Senate thereupon voted to reconsider the nominations in question, again approving two of the nominees, but rejecting the third, against whom it instructed the District Attorney of the District of Columbia to institute *quo warranto* proceedings in the Supreme Court of the District. In *United States v. Smith*,[551] the Supreme Court overruled the proceedings on the ground that the Senate had never before attempted to apply its rule in the case of an appointee who had already been installed in office on the faith of the Senate's initial consent and notification to the President. In 1939, President Roosevelt rejected a similar demand by the Senate, an action that went unchallenged.[552]

The Removal Power

The Myers Case.—Save for the provision which it makes for a power of impeachment of "civil officers of the United States," the Constitution contains no reference to a power to remove from office, and until its decision in *Myers v. United States*,[553] on October 25, 1926, the Supreme Court had contrived to sidestep every occasion for a decisive pronouncement regarding the removal power, its extent, and location. The point immediately at issue in the *Myers* case was the effectiveness of an order of the Postmaster General, acting by direction of the President, to remove from office a first-class postmaster, in the face of the following provision of an act of Congress passed in 1876: "Postmasters of the first, second, and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law."[554]

A divided Court, speaking through Chief Justice Taft, held the order of removal valid and the statutory provision just quoted void. The Chief Justice's relied mainly on the so-called "decision of 1789," which referred to Congress's that year inserting in the act establishing the Department of State a proviso that was meant to imply recognition that the Secretary would be removable by the President at will. The proviso was especially urged by Madison, who invoked in support of it the opening words of Article II and the President's duty to "take Care that the Laws be faithfully executed."

Succeeding passages of the Chief Justice's opinion erected on this basis a highly selective account of doctrine and practice regard-

[551] 286 U.S. 6 (1932).
[552] E. Corwin, supra at 77.
[553] 272 U.S. 52 (1926).
[554] 19 Stat. 78, 80.

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ing the removal power down to the Civil War, which was held to yield the following results: "Article II grants to the President the executive power of the Government, i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed; that Article II excludes the exercise of legislative power by Congress to provide for appointments and removals, except only as granted therein to Congress in the matter of inferior offices; that Congress is only given power to provide for appointments and removals of inferior officers after it has vested, and on condition that it does vest, their appointment in other authority than the President with the Senate's consent; that the provisions of the second section of Article II, which blend action by the legislative branch, or by part of it, in the work of the executive, are limitations to be strictly construed and not to be extended by implication; that the President's power of removal is further established as an incident to his specifically enumerated function of appointment by and with the advice of the Senate, but that such incident does not by implication extend to removals the Senate's power of checking appointments; and finally that to hold otherwise would make it impossible for the President, in case of political or other differences with the Senate or Congress, to take care that the laws be faithfully executed." [555]

The holding in *Myers* boils down to the proposition that the Constitution endows the President with an illimitable power to remove all officers in whose appointment he has participated, with the exception of federal judges. The motivation of the holding was not, it may be assumed, any ambition on the Chief Justice's part to set history aright—or awry.[556] Rather, it was the concern that he voiced

[555] 272 U.S. at 163–64.

[556] The reticence of the Constitution respecting removal left room for four possibilities: first, the one suggested by the common law doctrine of "estate in office," from which the conclusion followed that the impeachment power was the only power of removal intended by the Constitution; second, that the power of removal was an incident of the power of appointment and hence belonged, at any rate in the absence of legal or other provision to the contrary, to the appointing authority; third, that Congress could, by virtue of its power "to make all laws which shall be necessary and proper," etc., determine the location of the removal power; fourth, that the President by virtue of his "executive power" and his duty "to take Care that the Laws be faithfully executed," possesses the power of removal over all officers of the United States except judges. In the course of the debate on the act to establish a Department of Foreign Affairs (later changed to Department of State) all of these views were put forward, with the final result that a clause was incorporated in the measure that implied, as pointed out above, that the head of the department would be removable by the President at his discretion. Contemporaneously, and indeed until after the Civil War, this action by Congress, in other words "the decision of 1789,"

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in the following passage in his opinion: "There is nothing in the Constitution which permits a distinction between the removal of the head of a department or a bureau, when he discharges a political duty of the President or exercises his discretion, and the removal of executive officers engaged in the discharge of their other normal duties. The imperative reasons requiring an unrestricted power to remove the most important of his subordinates in their most important duties must, therefore, control the interpretation of the Constitution as to all appointed by him." [557]

Thus spoke the former President Taft, and the result of his prepossession was a rule that, as was immediately pointed out, exposed the so-called "independent agencies"—the Interstate Commerce Commission, the Federal Trade Commission, and the like—to presidential domination. Unfortunately, the Chief Justice, while professing to follow Madison's leadership, had omitted to weigh properly the very important observation that the latter had made at the time regarding the office of Comptroller of the Treasury. "The Committee," said Madison, "has gone through the bill without making any provision respecting the tenure by which the comptroller is to hold his office. I think it is a point worthy of consideration, and shall, therefore, submit a few observations upon it. It will be necessary to consider the nature of this office, to enable us to come to a right decision on the subject; in analyzing its properties, we shall easily discover they are of a judiciary quality as well as the executive; perhaps the latter obtains in the greatest degree. The principal duty seems to be deciding upon the lawfulness and justice of the claims and accounts subsisting between the United States and particular citizens: this partakes strongly of the judicial character, and there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the executive branch of the gov-

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was interpreted as establishing "a practical construction of the Constitution" with respect to executive officers appointed without stated terms. However, in the dominant opinion of those best authorized to speak on the subject, the "correct interpretation" of the Constitution was that the power of removal was always an incident of the power of appointment, and that therefore in the case of officers appointed by the President with the advice and consent of the Senate the removal power was exercisable by the President only with the advice and consent of the Senate. For an extensive review of the issue at the time of *Myers*, *see* Corwin, *The President's Removal Power Under the Constitution*, in 4 SELECTED ESSAYS ON CONSTITUTIONAL LAW 1467 (1938).

[557] 272 U.S. at 134. Note the parallelism of the arguments from separation-of-powers and the President's ability to enforce the laws in the decision rendered on Congress's effort to obtain a role in the actual appointment of executive officers in Buckley v. Valeo, 424 U.S. 1, 109–43 (1976), and in many of the subsequent separation-of-powers decisions.

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ernment."[558] In *Humphrey's Executor v. United States*,[559] the Court seized upon "the nature of the office" concept and applied it as a corrective to the overbroad *Myers* holding.

The Humphrey Case.—The material element of *Humphrey's Executor* was that Humphrey, a member of the Federal Trade Commission, was on October 7, 1933, notified by President Roosevelt that he was "removed" from office, the reason being their divergent views of public policy. In due course, Humphrey sued for salary. Distinguishing the *Myers* case, Justice Sutherland, speaking for the unanimous Court, said: "A postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power. The actual decision in the *Myers* case finds support in the theory that such an office is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aide he is. . . . It goes no farther; much less does it include an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President."

"The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute. . . . Such a body cannot in any proper sense be characterized as an arm or eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control. . . . We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named, [the Interstate Commerce Commission, the Federal Trade Commission, the Court of Claims]. The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority 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. For it is quite evident that one who holds his office

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[558] ANNALS OF CONGRESS 611–612 (1789).

[559] 295 U.S. 602 (1935). The case is also styled *Rathbun, Executor v. United States*, Humphrey having, like Myers before him, died in the course of his suit for salary. Proponents of strong presidential powers long argued that *Humphrey's Executor*, like A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), both cases argued and decided contemporaneously, reflected the anti-New Deal views of a conservative Court and wrongfully departed from *Myers*. *See* Scalia, *Historical Anomalies in Administrative Law*, 1985 YEARBOOK OF THE SUPREME COURT HISTORICAL SOCIETY 103, 106–10. Now-Justice Scalia continues to adhere to his views and to *Myers*. Morrison v. Olson, 487 U.S. 654, 697, 707–11, 723–27 (1988) (dissenting).

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only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will. . . ."

"The result of what we now have said is this: Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause, will depend upon the character of the office; the *Myers* decision, affirming the power of the President alone to make the removal, is confined to purely executive officers; and as to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute."[560]

The Wiener Case.—Curtailment of the President's power of removal, so liberally delineated in the *Myers* decision, was not to end with the *Humphrey* case. Unresolved by the latter was the question whether the President, absent a provision expressly delimiting his authority in the statute creating an agency endowed with quasi-judicial functions, remained competent to remove members serving thereon. To this query the Court supplied a negative answer in *Wiener v. United States*.[561] Emphasizing that the duties of the War Claims Commission were wholly adjudicatory and its determinations, final and exempt from review by any other official or judicial body, the Court unanimously concluded that inasmuch as the President was unable to supervise its activities, he lacked the power, independently of statutory authorization, to remove a commissioner whose term expired with the life of that agency.

The Watergate Controversy.—A dispute arose regarding the discharge of the Special Prosecutor appointed to investigate and prosecute violations of law in the Watergate matter. Congress vested in the Attorney General the power to conduct the criminal litigation of the Federal Government,[562] and it further authorized him to appoint subordinate officers to assist him in the discharge of his duties.[563] Pursuant to presidential direction, the Attorney General designated a Watergate Special Prosecutor with broad power to investigate

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[560] 295 U.S. at 627–29, 631–32. Justice Sutherland's statement, quoted above, that a Federal Trade Commissioner "occupies no place in the executive department" was not necessary to the decision of the case, was altogether out of line with the same Justice's reasoning in Springer v. Philippine Islands, 277 U.S. 189, 201–202 (1928), and seems later to have caused the author of it much perplexity. *See* R. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSION 447–48 (1941). As Professor Cushman adds: "Every officer and agency created by Congress to carry laws into effect is an arm of Congress. . . . The term may be a synonym; it is not an argument." Id. at 451.

[561] 357 U.S. 349 (1958).

[562] 28 U.S.C. § 516.

[563] 28 U.S.C. §§ 509, 510, 515, 533.

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and prosecute offenses arising out of the Watergate break-in, the 1972 presidential election, and allegations involving the President, members of the White House staff, or presidential appointees. He was to remain in office until a date mutually agreed upon between the Attorney General and himself, and the regulations provided that the Special Prosecutor "will not be removed from his duties except for extraordinary improprieties on his part."[564] On October 20, following the resignations of the Attorney General and the Deputy Attorney General, the Solicitor General as Acting Attorney General formally dismissed the Special Prosecutor[565] and three days later rescinded the regulation establishing the office.[566] In subsequent litigation, a federal district court held that the firing by the Acting Attorney General had violated the regulations, which were in force at the time and which had to be followed until they were rescinded.[567] The Supreme Court in *United States v. Nixon*[568] seemed to confirm this analysis by the district court in upholding the authority of the new Special Prosecutor to take the President to court to obtain evidence in the President's possession. Left unsettled were two questions, the power of the President himself to go over the heads of his subordinates and to fire the Special Prosecutor himself, whatever the regulations said, and the power of Congress to enact legislation establishing an Office of Special Prosecutor free from direction and control of the President.[569] When Congress acted to create an office, first called the Special Prosecutor and then the Independent Counsel, resolution of the question became necessary.

The Removal Power Rationalized.—The tension that had long been noticed between *Myers* and *Humphrey's Executor*, at least in terms of the language used in those cases but also to some extent in their holdings, appears to have been ameliorated by two decisions, which purport to reconcile the cases but, more important, pur-

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[564] 38 Fed. Reg. 14688 (1973). The Special Prosecutor's status and duties were the subject of negotiation between the Administration and the Senate Judiciary Committee. *Nomination of Elliot L. Richardson to be Attorney General: Hearings Before the Senate Judiciary Committee*, 93d Congress, 1st Sess. (1973), 143 *passim*.

[565] The formal documents effectuating the result are set out in 9 Weekly Comp. Pres. Doc. 1271–1272 (1973).

[566] 38 Fed. Reg. 29466 (1973). The Office was shortly recreated and a new Special Prosecutor appointed. 38 Fed. Reg. 30739, as amended by 38 Fed. Reg. 32805. *See Nomination of William B. Saxbe to be Attorney General: Hearings Before the Senate Judiciary Committee*, 93d Congress, 1st Sess. (1973).

[567] Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973).

[568] 418 U.S. 683, 692–97 (1974).

[569] The first question remained unstated, but the second issue was extensively debated in *Special Prosecutor: Hearings Before the Senate Judiciary Committee*, 93d Congress, 1st Sess. (1973); *Special Prosecutor and Watergate Grand Jury Legislation: Hearings Before the House Judiciary Subcommittee on Criminal Justice*, 93d Congress, 1st Sess. (1973).

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port to establish, in the latter case, a mode of analysis for resolving separation-of-powers disputes respecting the removal of persons appointed under the Appointments Clause.[570] *Myers* actually struck down only a law involving the Senate in the removal of postmasters, but the broad-ranging opinion had long stood for the proposition that inherent in the President's obligation to see to the faithful execution of the laws was his right to remove any executive officer as a means of discipline. *Humphrey's Executor* had qualified this proposition by upholding "for cause" removal restrictions for members of independent regulatory agencies, at least in part on the assertion that they exercised "quasi-" legislative and adjudicative functions as well as some form of executive function. Maintaining the holding of the latter case was essential to retaining the independent agencies, but the emphasis upon the execution of the laws as a core executive function in recent cases had cast considerable doubt on the continuing validity of *Humphrey's Executor*.

In *Bowsher v. Synar*,[571] the Court held that when Congress itself retains the power to remove an official it could not vest him with the exercise of executive power. Invalidated in *Synar* were provisions of the 1985 "Gramm-Rudman-Hollings" Deficit Control Act[572] vesting in the Comptroller General authority to prepare a detailed report on projected federal revenue and expenditures and to determine mandatory across-the-board cuts in federal expenditures necessary to reduce the projected budget deficit by statutory targets. By a 1921 statute, the Comptroller General was removable by joint congressional resolution for, *inter alia*, "inefficiency," "neglect of duty," or "malfeasance." "These terms are very broad," the Court noted, and "could sustain removal of a Comptroller General for any number of actual or perceived transgressions of the legislative will." Consequently, the Court determined, "the removal powers over the Comptroller General's office dictate that he will be subservient to Congress."[573]

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[570] Bowsher v. Synar, 478 U.S. 714 (1986); Morrison v. Olson, 487 U.S. 654 (1988). This is not to say that the language and analytical approach of *Synar* are not in conflict with that of *Morrison*; it is to say that the results are consistent and the analytical basis of the latter case does resolve the ambiguity present in some of the reservations in *Synar*.

[571] 478 U.S. 714 (1986).

[572] The Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. 99–177, 99 Stat. 1038.

[573] 478 U.S. at 729, 730. "By placing the responsibility for execution of the . . . 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." Id. at 734. Because the Act contained contingency procedures for implementing the budget reductions in the event that the primary mechanism was invalidated, the Court rejected the suggestion that it should invalidate the 1921

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Relying expressly upon *Myers*, the Court concluded that "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment."[574] But *Humphrey's Executor* was also cited with approval, and to the contention that invalidation of this law would cast doubt on the status of the independent agencies the Court rejoined that the statutory measure of the independence of those agencies was the assurance of "for cause" removal by the President rather than congressional involvement as in the instance of the Comptroller General.[575] This reconciliation of *Myers* and *Humphrey's Executor* was made clear and express in *Morrison v. Olson*.[576]

That case sustained the independent counsel statute.[577] Under that law, the independent counsel, appointed by a special court upon application by the Attorney General, may be removed by the Attorney General "only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties." Because the counsel was clearly exercising "purely" executive duties, in the sense that term was used in *Myers*, it was urged that *Myers* governed and required the invalidation of the statute. The Court, however, said that *Myers* stood only for the proposition that Congress could not involve itself in the removal of executive officers. Its broad dicta that the President must be able to remove at will officers performing "purely" executive functions had not survived *Humphrey's Executor*.

It was true, the Court admitted, that, in the latter case, it had distinguished between "purely" executive officers and officers who exercise "quasi-legislative" and "quasi-judicial" powers in marking the line between officials who may be presidentially removed at will and officials who can be protected through some form of good cause removal limits. "[B]ut 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

removal provision rather than the Deficit Act's conferral of executive power in the Comptroller General. To do so would frustrate congressional intention and significantly alter the Comptroller General's office. Id. at 734–36.

[574] 478 U.S. at 726.

[575] 478 U.S. at 725 n.4.

[576] 487 U.S. 654 (1988).

[577] Pub. L. 95–521, title VI, 92 Stat. 1867, as amended by Pub. L. 97–409, 96 Stat. 2039, and Pub. L. 100–191, 101 Stat. 1293, 28 U.S.C. §§ 49, 591 *et seq*.

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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. . . . 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. We do not mean to suggest that an analysis of the functions served by the officials at issue is irrelevant. But the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light."[578]

The Court discerned no compelling reason to find the good cause limit to interfere with the President's performance of his duties. The independent counsel did exercise executive, law-enforcement functions, but the jurisdiction and tenure of each counsel were limited in scope and policymaking, or significant administrative authority was lacking. On the other hand, the removal authority did afford the President through the Attorney General power to ensure the "faithful execution" of the laws by assuring that the counsel is competently performing the statutory duties of the office.

It is now thus reaffirmed that Congress may not involve itself in the removal of officials performing executive functions. It is also established that, in creating offices in the executive branch and in creating independent agencies, Congress has considerable discretion in statutorily limiting the power to remove of the President or another appointing authority. It is evident on the face of the opinion that the discretion is not unbounded, that there are offices which may be essential to the President's performance of his constitutionally assigned powers and duties, so that limits on removal would be impermissible. There are no bright lines marking off one office from the other, but decision requires close analysis.[579]

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[578] 487 U.S. at 689–91.

[579] But notice the analysis followed by three Justices in Public Citizen v. Department of Justice, 491 U.S. 440, 467, 482–89 (1989) (concurring), and consider the possible meaning of the recurrence to formalist reasoning in Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, (1989). *See also* Justice Scalia's use of the Take Care Clause in pronouncing limits on Congress's constitutional power to confer citizen standing in Lujan v. Defenders of Wildlife, 505 U.S. 555, 576–78 (1992), although it is not clear that he had a majority of the Court with him.

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As a result of these cases, the long-running controversy with respect to the legitimacy of the independent agencies appears to have been settled,[580] although it appears likely that the controversies with respect to congressional-presidential assertions of power in executive agency matters are only beginning.

Inferior Officers.—In the case of inferior officers, Congress may "limit and restrict the power of removal as it deems best for the public interest,"[581] and when Congress has vested the power to appoint these officers in heads of departments, it is ordinarily the department head, rather than the President, who enjoys the power of removal. However, in the case of *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*,[582] the Court considered whether an inferior officer can be twice insulated from the President's removal authority—in other words, can a principal officer whom Congress has protected from at will removal by the President in turn have his or her power to remove an inferior officer restricted?[583] The Court held that such multilevel protection from removal is contrary to the President's executive authority. First, even if the President determines that the inferior officer is neglecting his duties or discharging them improperly, the President does not have the power to remove that officer. Then, if the President seeks to have the principal officer remove the inferior officer, the principal officer may not agree with the President's determination, and the President generally cannot remove the principal officer simply because of this disagreement.[584]

In the absence of specific legislative provision to the contrary, the President may at his discretion remove an inferior officer whose term is limited by statute,[585] or one appointed with the consent of

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[580] Indeed, the Court explicitly analogized the civil enforcement powers of the independent agencies to the prosecutorial powers wielded by the independent counsel. Morrison v. Olson, 487 U.S. 654, 692 n.31 (1988).

[581] United States v. Perkins, 116 U.S. 483 (1886), cited with approval in Myers v. United States, 272 U.S. 52, 161–163, 164 (1926), and Morrison v. Olson, 487 U.S. 654, 689 n.27 (1988).

[582] 561 U.S. ___, No. 08–861, slip op. (2010).

[583] The case involved the Public Company Accounting Oversight Board, a private non-profit entity with a five-member board, that has significant authority over accounting firms that participate in auditing public companies. The board members are appointed to staggered 5-year terms by the Securities and Exchange Commission, and can only be removed for "good cause shown," which requires a finding of either a violation of securities laws or board rules, willful abuse of power, or failure to enforce compliance with the rules governing registered public accounting firms. 15 U.S.C. § 7217(d)(3). The members of the Commission, in turn, can only be removed by the President for inefficiency, neglect of duty, or malfeasance in office.

[584] 561 U.S. ___, No. 08–861, slip op. at 14–15 (2010).

[585] Parsons v. United States, 167 U.S. 324 (1897).

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the Senate.[586] He may remove an officer of the army or navy at any time by nominating to the Senate the officer's successor, provided the Senate approves the nomination.[587] In 1940, the President was sustained in removing Dr. E. A. Morgan from the chairmanship of TVA for refusal to produce evidence in substantiation of charges which he had leveled at his fellow directors.[588] Although no such cause of removal by the President was stated in the act creating TVA, the President's action, being reasonably required to promote the smooth functioning of TVA, was held to be within his duty to "take Care that the Laws be faithfully executed." So interpreted, the removal did not violate the principle of administrative independence.

The Presidential Aegis: Demands for Papers

Presidents have more than once had occasion to stand in a protective relation to their subordinates, assuming their defense in litigation brought against them[589] or pressing litigation in their behalf,[590] refusing a congressional call for papers which might be used, in their absence from the seat of government, to their disadvantage,[591] challenging the constitutional validity of legislation deemed detrimental to their interests.[592] Presidents throughout our history have attempted to spread their own official immunity to their subordinates by resisting actions of the courts or of congressional committees to require subordinates to divulge communications from or to the President that Presidents choose to regard as confidential. Only recently, however, has the focus of the controversy shifted from protection of presidential or executive interests to protection of the President himself, and the locus of the dispute shifted to the courts.

Following years in which claims of executive privilege were resolved in primarily interbranch disputes on the basis of the political strengths of the parties, the issue finally became subject to judicial elaboration. The doctrine of executive privilege was at once recognized as existing and having a constitutional foundation while at the same time it was definitely bounded in its assertion by the principle of judicial review. Because of these cases, because of the intensified congressional-presidential dispute, and especially be-

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[586] Shurtleff v. United States, 189 U.S. 311 (1903).

[587] Blake v. United States, 103 U.S. 227 (1881); Quackenbush v. United States, 177 U.S. 20 (1900); Wallace v. United States, 257 U.S. 541 (1922).

[588] Morgan v. TVA, 28 F. Supp. 732 (E.D. Tenn. 1939), *aff'd*, 115 F.2d 990 (6th Cir. 1940), *cert. denied*, 312 U.S. 701 (1941).

[589] *E.g.*, 6 Ops. Atty. Gen. 220 (1853); *In re* Neagle, 135 U.S. 1 (1890).

[590] United States v. Lovett, 328 U.S. 303 (1946).

[591] *E.g.*, 2 J. Richardson, supra at 847.

[592] United States v. Lovett, 328 U.S. 303, 313 (1946).

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cause of the introduction of the issue into an impeachment proceeding, a somewhat lengthy treatment of the doctrine is called for.

Conceptually, the doctrine of executive privilege may well reflect different considerations in different factual situations. Congress may seek information within the possession of the President, either in effectuation of its investigatory powers to oversee the conduct of officials of the Executive Branch or in effectuation of its power to impeach the President, Vice President, or civil officers of the Government. Private parties may seek information in the possession of the President either in civil litigation with the Government or in a criminal proceeding brought by government prosecutors. Generally, the categories of executive privilege have been the same whether it is Congress or a private individual seeking the information, but it is possible that the congressional assertion of need may overbalance the presidential claim to a greater degree than that of a private individual. The judicial precedents are so meager that it is not yet possible so to state, however.

The doctrine of executive privilege defines the authority of the President to withhold documents or information in his possession or in the possession of the executive branch from compulsory process of the legislative or judicial branch of the government. The Constitution does not expressly confer upon the Executive Branch any such privilege, but it has been claimed that the privilege derives from the constitutional provision of separation of powers and from a necessary and proper concept respecting the carrying out of the duties of the presidency imposed by the Constitution. Historically, assertion of the doctrine has been largely confined to the areas of foreign relations, military affairs, pending investigations, and intragovernmental discussions.[593] During the Nixon Administra-

[593] For a good statement of the basis of the doctrine, the areas in which it is asserted, and historical examples, *see Executive Privilege: The Withholding of Information by the Executive: Hearings Before the Senate Judiciary Subcommittee on Separation of Powers*, 92d Congress, 1st Sess. (1971), 420–43, (then-Assistant Attorney General Rehnquist). Former Attorney General Rogers, in stating the position of the Eisenhower Administration, identified five categories of executive privilege: (1) military and diplomatic secrets and foreign affairs, (2) information made confidential by statute, (3) information relating to pending litigation, and investigative files and reports, (4) information relating to internal government affairs privileged from disclosure in the public interest, and (5) records incidental to the making of policy, including interdepartmental memoranda, advisory opinions, recommendations of subordinates, and informal working papers. *The Power of the President To Withhold Information from the Congress*, Memorandum of the Attorney General, Senate Judiciary Subcommittee on Constitutional Rights, 85th Congress, 2d Sess. (Comm. Print) (1958), reprinted as Rogers, *Constitutional Law: The Papers of the Executive Branch*, 44 A.B.A.J. 941 (1958). In the most expansive version of the doctrine, Attorney General Kleindienst argued that the President could assert the privilege as to any employee of the Federal Government to keep secret any information at all. *Executive Privilege, Secrecy*

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tion, the litigation involved, of course, the claim of confidentiality of conversations between the President and his aides.

Private Access to Government Information.—Private parties may seek to obtain information from the government either to assist in defense to criminal charges brought by the government or in civil cases to use in either a plaintiff's or defendant's capacity in suits with the government or between private parties.[594] In criminal cases, a defendant is guaranteed compulsory process to obtain witnesses by the Sixth Amendment and by the due process clause is guaranteed access to relevant exculpatory information in the possession of the prosecution.[595] Generally speaking, when the prosecution is confronted with a judicial order to turn over to a defendant information that it does not wish to make available, the prosecution has the option of dropping the prosecution and thus avoiding disclosure.[596] But that alternative may not always be available; in the Watergate prosecution, only by revoking the authority of the Special Prosecutor and bringing the cases back into the confines of the Department of Justice could this possibility have been realized.[597]

In civil cases the government may invoke the state secrets privilege against revealing military or other secrets. In *United States v. Reynolds*,[598] a tort claim brought against the United States for com-

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in Government, Freedom of Information: Hearings Before the Senate Government Operations Subcommittee on Intergovernmental Relations, 93d Congress, 1st Sess. (1973), I:18 passim. For a strong argument that the doctrine lacks any constitutional or other legal basis, *see* R. Berger, Executive Privilege: A Constitutional Myth (1974). The book, however, precedes the Court decision in *Nixon*.

[594] There are also, of course, instances of claimed access for other purposes, for which the Freedom of Information Act, 80 Stat. 383 (1966), 5 U.S.C. § 552, provides generally for public access to governmental documents. In 522(b), however, nine types of information are exempted from coverage, several of which relate to the types as to which executive privilege has been asserted, such as matter classified pursuant to executive order, interagency or intra-agency memoranda or letters, and law enforcement investigatory files. *See, e.g.*, EPA v. Mink, 410 U.S. 73 (1973); FTC v. Grolier, Inc., 462 U.S. 19 (1983); CIA v. Sims, 471 U.S. 159 (1985); John Doe Agency v. John Doe Corp., 493 U.S. 146 (1989); Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

[595] *See* Brady v. Maryland, 373 U.S. 83 (1963), and Rule 16, Federal Rules of Criminal Procedure. The earliest judicial dispute involving what later became known as executive privilege arose in United States v. Burr, 25 F. Cas. 30 and 187 (C.C.D. Va. 1807), in which defendant sought certain exculpatory material from President Jefferson. Dispute continues with regard to the extent of presidential compliance, but it appears that the President was in substantial compliance with outstanding orders if not in full compliance.

[596] *E.g.*, Alderman v. United States, 394 U.S. 165 (1968).

[597] Thus, defendant in United States v. Ehrlichman, 376 F. Supp. 29 (D.D.C. 1974), was held entitled to access to material in the custody of the President wherein the President's decision to dismiss the prosecution would probably have been unavailing.

[598] 345 U.S. 1 (1953).

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pensation for the deaths of civilians in the crash of an Air Force plane testing secret electronics equipment, plaintiffs sought discovery of the Air Force's investigation report on the accident, and the government resisted on a claim of privilege as to the nondisclosure of military secrets. The Court accepted the Government's claim, holding that courts must determine whether under the circumstances the claim of privilege was appropriate without going so far as to force disclosure of the thing the privilege is designed to protect. The private litigant's showing of necessity for the information should govern in each case how far the trial court should probe. Where the necessity is strong, the court should require a strong showing of the appropriateness of the privilege claim, but once the court is satisfied of the appropriateness the privilege must prevail no matter how compelling the need.[599]

Reynolds dealt with an evidentiary privilege. There are other circumstances, however, in which cases must be "dismissed on the pleadings without ever reaching the question of evidence."[600] In holding that federal courts should refuse to entertain a breach of contract action seeking enforcement of an agreement to compensate someone who performed espionage services during the Civil War, the Court in *Totten v. United States* declared that "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential."[601]

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[599] 345 U.S. at 7–8, 9–10, 11. Withholding of information relating to governmental employees' clearances, disciplines, or discharges often raises claims of such privilege. *E.g.*, Webster v. Doe, 486 U.S. 592 (1988); Department of the Navy v. Egan, 484 U.S. 518 (1988). After the Court approved a governmental secrecy agreement imposed on CIA employees, Snepp v. United States, 444 U.S. 507 (1980), the government expanded its secrecy program with respect to classified and "classifiable" information. When Congress sought to curb this policy, the Reagan Administration convinced a federal district judge to declare the restrictions void as invasive of the President's constitutional power to manage the executive. National Fed'n of Fed. Employees v. United States, 688 F. Supp. 671 (D.D.C. 1988), *vacated and remanded sub nom.* American Foreign Service Ass'n v. Garfinkel, 490 U.S. 153 (1989). For similar assertions in the context of plaintiffs suing the government for interference with their civil and political rights during the protests against the Vietnam War, in which the plaintiffs were generally denied the information in the possession of the government under the state-secrets privilege, *see* Halkin v. Helms, 598 F.2d 1 (D.C. Cir. 1978); Ellsberg v. Mitchell, 709 F.2d 51 (D.C. Cir. 1983). For review and analysis, *see* Quint, *The Separation of Powers Under Carter*, 62 Tex. L. Rev. 785, 875–80 (1984).

[600] *Reynolds*, 345 U.S. at 11, n.26.

[601] 92 U.S. 105, 107 (1875). *See also* Tenet v. Doe, 544 U.S. 1, 9 (2005) (reiterating and applying *Totten's* "broader holding that lawsuits premised on alleged espionage agreements are altogether forbidden"). The Court in *Tenet* distinguished Webster v. Doe on the basis of "an obvious difference . . . between a suit brought by an acknowledged (though covert) employee of the CIA and one filed by an alleged former spy." Id. at 10.

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Prosecutorial and Grand Jury Access to Presidential Documents.—Rarely will there be situations when federal prosecutors or grand juries seek information under the control of the President, since he has ultimate direction of federal prosecuting agencies, but the Watergate Special Prosecutor, being in a unique legal situation, was held able to take the President to court to enforce subpoenas for tape recordings of presidential conversations and other documents relating to the commission of criminal actions.[602] While holding that the subpoenas were valid and should be obeyed, the Supreme Court recognized the constitutional status of executive privilege, insofar as the assertion of that privilege relates to presidential conversations and indirectly to other areas as well.

Presidential communications, the Court said, have "a presumptive privilege." "The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution." The operation of government is furthered by the protection accorded communications between high government officials and those who advise and assist them in the performance of their duties. "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." The separation of powers basis derives from the conferral upon each of the branches of the Federal Government of powers to be exercised by each of them in great measure independent of the other branches. The confidentiality of presidential conversations flows then from the effectuation of enumerated powers.[603]

However, the Court continued, the privilege is not absolute. The federal courts have the power to construe and delineate claims arising under express and implied powers. Deference is owed the constitutional decisions of the other branches, but it is the function of the courts to exercise the judicial power, "to say what the law is." The Judicial Branch has the obligation to do justice in criminal prosecutions, which involves the employment of an adversary system of criminal justice in which all the probative facts, save those clearly

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[602] United States v. Nixon, 418 U.S. 683, 692–97 (1974).

[603] 418 U.S. at 707–08. Presumably, the opinion recognizes a similar power in the federal courts to preserve the confidentiality of judicial deliberations, *cf.* New York Times Co. v. United States, 403 U.S. 713, 752 n.3 (1971) (Chief Justice Burger dissenting), and in each house of Congress to treat many of its papers and documents as privileged. *Cf.* Soucie v. David, 448 F.2d 1067, 1080, 1081–1982 (C.A.D.C. 1971) (Judge Wilkey concurring); *Military Cold War Escalation and Speech Review Policies: Hearings Before the Senate Committee on Armed Services*, 87th Congress, 2d Sess. (1962), 512 (Senator Stennis). *See* Calley v. Callaway, 519 F.2d 184 (5th Cir. 1975) (en banc), *cert. denied*, 425 U.S. 911 (1976); United States v. Ehrlichman, 389 F. Supp. 95 (D.D.C. 1974).

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privileged, are to be made available. Thus, although the President's claim of privilege is entitled to deference, the courts must balance two sets of interests when the claim depends solely on a broad, undifferentiated claim of confidentiality.

"In this case we must weigh the importance of the general privilege of confidentiality of presidential communications in performance of his responsibilities against the inroads of such a privilege on the fair administration of criminal justice. 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."

"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. A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. . . ."

"We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice." [604]

Obviously, *United States v. Nixon* left much unresolved. It did recognize the constitutional status of executive privilege as a doctrine. It did affirm the power of the courts to resolve disputes over claims of the privilege. But it left unsettled just how much power the courts have to review claims of privilege to protect what are claimed to be military, diplomatic, or sensitive national security secrets. It did not indicate what the status of the claim of confidentiality of conversations is when it is raised in civil cases, nor did it touch upon denial of information to Congress, or public disclosure of information.

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[604] 418 U.S. 683, 711–13. Essentially the same decision had been arrived at in the context of subpoenas of tapes and documentary evidence for use before a grand jury in Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973).

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The Court's decision in *Nixon v. Administrator of General Services*[605] did not elucidate any of these questions to any great degree. In upholding the Presidential Recordings and Materials Preservation Act, which directed the government to take custody of former President Nixon's records so that they could be screened, catalogued, and processed by professional archivists in GSA, the Court viewed the assertion of privilege as directed only to the facial validity of the requirement of screening by executive branch professionals, and not at all related to the possible public disclosure of some of the records. The decision did recognize "adequate justifications" for enactment of the law, and termed them cumulatively "comparable" to those held to justify in camera inspection in *United States v. Nixon*.[606] Congress's purposes cited by the Court included the preservation of the materials for legitimate historical and governmental purposes, the rationalization of preservation and access to public needs as well as each President's wishes, the preservation of the materials as a source for facilitating a full airing of the events leading to the former President's resignation for public and congressional understanding, and preservation for the light shed upon issues in civil or criminal litigation. Although interestingly instructive, the decision may be so attuned to the narrow factual circumstances that led to the Act's passage as to leave the case of little precedential value.

Public disclosure was at issue in 2004 when the Court weighed a claim of executive privilege asserted as a bar to discovery orders for information disclosing the identities of individuals who served on an energy task force chaired by the Vice President.[607] Although the case was remanded on narrow technical grounds, the Court distinguished *United States v. Nixon*,[608] and, in instructing the ap-

[605] 433 U.S. 425, 446–55 (1977). *See* id. at 504, 545 (Chief Justice Burger and Justice Rehnquist dissenting). The decision does resolve one outstanding question: assertion of the privilege is not limited to incumbent Presidents. Id. at 447–49. Subsequently, a court held that former-President Nixon had had such a property expectancy in his papers that he was entitled to compensation for their seizure under the Act. Nixon v. United States, 978 F.2d 1269 (D.C. Cir. 1992).

[606] 433 U.S. at 452.

[607] Cheney v. United States District Court, 542 U.S. 367 (2004).

[608] Although the information sought in *Nixon* was important to "the constitutional need for production of relevant evidence in a criminal proceeding," the suit against the Vice President was civil, and withholding the information "does not hamper another branch's ability to perform its 'essential functions.'" 542 U.S. at 383, 384.

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peals court on how to proceed, emphasized the importance of confidentiality for advice tendered the President.[609]

Congressional Access to Executive Branch Information.—Presidents and Congresses have engaged in protracted disputes over provision of information from the former to the latter, but the basic thing to know is that most congressional requests for information are complied with. The disputes, however, have been colorful and varied.[610] The basic premise of the concept of executive privilege, as it is applied to resist requests for information from Congress as from private parties with or without the assistance of the courts, is found in the doctrine of separation of powers, the prerogative of each coequal branch to operate within its own sphere independent of control or direction of the other branches. In this context, the President then asserts that phase of the claim of privilege relevant to the moment, such as confidentiality of communications, protection of diplomatic and military secrets, or preservation of investigative records. Counterposed against this assertion of presidential privilege is the power of Congress to obtain information upon which to legislate, to oversee the carrying out of its legislation, to check and root out corruption and wrongdoing in the Executive Branch, involving both the legislating and appropriating function of Congress, and in the final analysis to impeach the President, the Vice President, and all civil officers of the Federal Government.

Until quite recently, all disputes between the President and Congress with regard to requests for information were settled in the political arena, with the result that few if any lasting precedents were created and only disputed claims were left to future argument. The Senate Select Committee on Presidential Campaign Activities, however, elected to seek a declaratory judgment in the courts with respect to the President's obligations to obey its subpoenas. The Committee lost its case, but the courts based their rulings upon prudential considerations rather than upon questions of basic power, inasmuch as by the time the case was considered impeachment proceedings were pending in the House of Representatives.[611] The House Judiciary Committee subpoenas were similarly rejected by the President, but instead of going to the courts for enforcement, the Com-

[609] The Court recognized "the paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties." 542 U.S. at 382. *But cf.* Clinton v. Jones, 520 U.S. 681, 702 (1997).

[610] *See* the extensive discussion in Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 Minn. L. Rev. 461 (1987).

[611] Senate Select Committee on Presidential Campaign Activities v. Nixon, 370 F. Supp. 521 (D.D.C.), *aff'd*, 498 F.2d 725 (D.C. Cir. 1974).

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mittee adopted as one of its Articles of Impeachment the refusal of the President to honor its subpoenas.[612] Congress has considered bills by which Congress would authorize congressional committees to go to court to enforce their subpoenas; the bills did not purport to define executive privilege, although some indicate a standard by which the federal court is to determine whether the material sought is lawfully being withheld from Congress.[613] The controversy gives little indication at the present time of abating, and it may be assumed that whenever the Executive and Congress are controlled by different political parties there will be persistent conflicts. One may similarly assume that the alteration of this situation would only reduce but not remove the disagreements.

Clause 3. 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.

RECESS APPOINTMENTS

The Recess Appointments Clause was adopted by the Constitutional Convention without dissent and without debate regarding the intent and scope of its terms. In Federalist No. 67, Alexander Hamilton refers to the recess appointment power as "nothing more than a supplement . . . for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate." It is generally accepted that the clause was designed to enable the President to ensure the unfettered operation of the government during periods when the Senate was not in session and therefore unable to perform its advice and consent function. In addition to fostering administrative continuity, Presidents have exercised authority under the Recess Appointments Clause for political purposes, appointing officials who might have difficulty securing Senate confirmation.

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[612] President Nixon's position was set out in a June 9, 1974, letter to the Chairman of the House Judiciary Committee. 10 Wkly. Comp. Pres. Docs. 592 (1974). The impeachment article and supporting material are set out in H. Rep. No. 93–1305, 93d Cong., 2d Sess. (1974).

[613] For consideration of various proposals by which Congress might proceed, *see* Hamilton & Grabow, *A Legislative Proposal for Resolving Executive Privilege Disputes Precipitated by Congressional Subpoenas*, 21 Harv. J. Legis. 145 (1984); Brand & Connelly, *Constitutional Confrontations: Preserving a Prompt and Orderly Means by Which Congress May Enforce Investigative Demands Against Executive Branch Officials*, 36 Cath. U. L. Rev. 71 (1986); Note, *The Conflict Between Executive Privilege and Congressional Oversight: The Gorsuch Controversy*, 1983 Duke L. J. 1333.

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Two fundamental textual issues adhere to any consideration of the Recess Appointments Clause. The first is what constitutes a vacancy "that may happen during the Recess of the Senate." If the word "happen" is interpreted to refer only to vacancies that occur during a recess, then the President would lack authority to make a recess appointment to a vacancy that existed prior to the recess. If, however, "happen" is construed more broadly to encompass all vacancies that exist during a recess, then the President would be empowered to make a recess appointment to any vacant position, irrespective of whether the position became vacant prior to or during a recess. Although this issue was a source of controversy in the late 18th and early 19th centuries, a long line of Attorney General opinions and judicial decisions have adopted the broader interpretation of the clause. Attorney General William Wirt, serving under President Monroe, concluded that the phrase encompassed all vacancies that happen to exist during a recess, declaring that "[t]his seems to me the only construction of the Constitution which is compatible with its spirit, reason, and purpose."[614] This interpretation was first adopted by a federal court in 1880 in *In re Farrow*,[615] and has been followed in judicial opinions on the issue ever since.[616]

The second fundamental textual issue that adheres to any consideration of the Recess Appointments Clause is the meaning of the phrase "the Recess of the Senate." An opinion issued by Attorney General Knox in 1901 concluded that the phrase applied only to adjournments between sessions of Congress (commonly referred to as "intersession" recesses). In reaching this determination, Knox placed

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[614] 1 Op. Att'y Gen. 631, 633–34 (1823). Subsequent Attorney General opinions that concurred include 2:525 (1832), 3:673 (1841), 4:523 (1846), 10:356 (1862), 11:179 (1865), 12:32 (1866), 12:455 (1868), 14:563 (1875), 15:207 (1877), 16:523 (1880), 18:28 (1884), 19:261 (1889), 26:234 (1907), 30:314 (1914), and 33:20 (1921). In 4 Ops. Atty. Gen. 361, 363 (1845), the general doctrine was held not to apply to a yet unfilled office that was created during the previous session of Congress, but this distinction was rejected in the following Attorney General opinions: 12:455 (1868), 18:28 (1884), and 19:261 (1889). For the early practice with reference to recess appointments, *see* 2 G. Haynes, The Senate of the United States 772–78 (1938).

[615] 3 Fed. 112 (C.C.N.D. Ga 1880).

[616] Subsequent cases concurring in this interpretation include United States v. Allocco, 305 F.2d 704, 712 (2d Cir. 1962), *cert. denied*, 371 U.S. 964 (1963) (a contrary interpretation "would create executive paralysis and do violence to the orderly functioning of our complex government"); United States v. Woodley, 751 F.2d 1008, 1012 (9th Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1048 (1986) (a contrary interpretation would "lead to the absurd result that all offices vacant on the day the Senate recesses would have to remain vacant at least until the Senate reconvenes"); Evans v. Stephens, 387 F.3d 1220, 1226–27 (11th Cir. 2004), *cert. denied*, 544 U.S. 942 (2005) ("interpreting the phrase to prohibit the President from filling a vacancy that comes into being on the last day of a Session but to empower the President to fill a vacancy that arises immediately thereafter (on the first day of a recess) contradicts what we understand to be the purpose of the Recess Appointments Clause: to keep important offices filled and the government functioning").

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significant weight on the use of the definite article "the" in the Recess Appointments Clause. He further concluded that, if recess appointments were allowed during periods other than an intersession recess, nothing would prevent an appointment from being made "during any adjournment, as from Thursday or Friday until the following Monday." This position was abandoned in 1921 in an opinion issued by Attorney General Daugherty that declared that an appointment made during a 29-day recess was constitutional. Daugherty's opinion focused on the practical aspects of the recess appointment dynamic, stating that, "[i]f the President's power of appointment is to be defeated because the Senate takes an adjournment to a specified date, the painful and inevitable result will be measurably to prevent the exercise of governmental functions."[617] Further emphasizing this functional approach, Daugherty's opinion rejected the notion that this broader interpretation would authorize intrasession appointments during brief adjournments, declaring that "an adjournment for 5 or even 10 days can [not] be said to constitute the recess intended by the Constitution."[618] The opinion concluded by emphasizing that, although "[e]very presumption is to be indulged in favor of the validity of whatever action [the President] may take . . . , there is a point, necessarily hard of definition, where palpable abuse of discretion might subject his appointment to review."[619] Subsequent Attorney General and Department of Justice Office of Legal Counsel opinions have continued to support the constitutionality of intrasession recess appointments, with more recent pronouncements on the issue asserting that the clause encompasses all recesses in excess of three days.[620]

Thus, a Senate "recess" does not include holidays, or very brief temporary adjournments,[621] while, by an act of Congress, if the vacancy existed when the Senate was in session, the *ad interim* appointee, subject to certain exceptions, may receive no salary until

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[617] 33 Op. Att'y Gen. 20, 23 (1921).

[618] 33 Op. Att'y Gen. at 25.

[619] 33 Op. Att'y Gen. at 25.

[620] *See* Evans v. Stephens, No. 04–828, Brief for the United States in Opposition to Petition for a Writ of Certiorari, at 11 (U.S. 2005); Mackie v. Clinton, Memorandum of Points and Authorities in support of Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment, at 24–26, Civ. Action No. 93–0032–LFO (D.D.C. 1993).

[621] 23 Op. Att'y Gen. 599 (1901); 22 Op. Att'y Gen. 82 (1898). How long a "recess" must be to be actually a recess, a question here as in the pocket veto area, is uncertain. 3 O. L. C. 311, 314 (1979). A "recess," however, may be merely "constructive," as when a regular session succeeds immediately upon a special session. It was this kind of situation that gave rise to the once famous *Crum* incident. *See* 3 W. Willoughby, *supra*, at 1508–1509.

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he has been confirmed by the Senate.[622] This and other provisions governing recess appointments are designed to protect the Senate's advice and consent function by confining the recess appointment power of the President. By targeting the compensation of appointees as opposed to the President's recess appointment power itself, these limitations act as indirect controls on recess appointments, and their constitutionality has not been adjudicated. A federal district court noted that "if any and all restrictions on the President's recess appointment power, however limited, are prohibited by the Constitution, 5 U.S.C. § 5503 . . . might . . . be invalid."[623] Additional constitutional concerns might arise from the application of these provisions to judicial recess appointees.[624]

Judicial Appointments

Federal judges clearly fall within the terms of the Recess Appointments Clause. But, unlike with other offices, a problem exists. Article III judges are appointed "during good behavior," subject only to removal through impeachment. A judge, however, who is given a recess appointment may be "removed" by the Senate's failure to advise and consent to his appointment; moreover, on the bench, prior to Senate confirmation, he or she may be subject to influence not felt by other judges. Nonetheless, a constitutional attack upon the status of a federal district judge, given a recess appointment and then withdrawn as a nominee, was rejected by a federal court.[625]

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[622] 5 U.S.C. § 5503. The provision has been on the books in some form since 12 Stat. 646 (1863).

[623] Staebler v. Carter, 464 F. Supp. 585, 596 n.24 (D.D.C. 1979).

[624] *See* Evans v. Stephens, 387 F.3d 1220, 1224 n.6 (11th Cir. 2004), *cert. denied*, 544 U.S. 942 (2005) ("To our knowledge, Congress has never attempted to diminish the pay of a recess-appointed judge while he was in office. Whether such an attempt would be constitutional is itself an open question.").

[625] United States v. Woodley, 751 F.2d 1008, 1012 (9th Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1048 (1986). The opinions in the court of appeals provide a wealth of data on the historical practice of giving recess appointments to judges, including the developments in the Eisenhower Administration, when three Justices, Warren, Brennan, and Stewart, were so appointed and later confirmed after participation on the Court. The Senate in 1960 adopted a "sense of the Senate" resolution suggesting that the practice was not a good idea. 106 Cong. Rec. 18130–18145 (1960). Other cases holding that the President's power under the Recess Appointments Clause extends to filling judicial vacancies in Article III courts include United States v. Allocco, 305 F.2d 704 (2d Cir. 1962), *cert. denied*, 371 U.S. 964 (1963), and Evans v. Stephens, 387 F.3d 1220 (11th Cir. 2004), *cert. denied*, 544 U.S. 942 (2005). In the latter case, however, Justice Stevens, although concurring in the denial of the petition of certiorari, wrote that "it would be a mistake to assume that our disposition of this petition constitutes a decision on the merits of whether the President has the constitutional authority to fill future Article III vacancies, such as vacancies on this Court, with appointments made absent consent of the Senate during short intrasession 'recesses.'" 544 U.S. at 943.

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Ad Interim Designations

To be distinguished from the power to make recess appointments is the power of the President to make temporary or *ad interim* designations of officials to perform the duties of other absent officials. Usually such a situation is provided for in advance by a statute that designates the inferior officer who is to act in place of his immediate superior. But, in the absence of such a provision, both theory and practice concede the President the power to make the designation.[626]

SECTION 3. He 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; 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.

LEGISLATIVE ROLE OF THE PRESIDENT

The clause directing the President to report to the Congress on the state of the union imposes a duty rather than confers a power, and is the formal basis of the President's legislative leadership. The President's legislative role has attained great proportions since 1900. This development, however, represents the play of political and social forces rather than any pronounced change in constitutional interpretation. Especially is it the result of the rise of parties and the accompanying recognition of the President as party leader, of the appearance of the National Nominating Convention and the Party Platform, and of the introduction of the Spoils System, an ever present help to Presidents in times of troubled relations with Congress.[627] It is true that certain pre-Civil War Presidents, mostly of Whig extraction, professed to entertain nice scruples on the score

[626] *See* the following Ops. Att'y Gen.: 6:358 (1854); 12:32, 41 (1866); 25:258 (1904); 28:95 (1909); 38:298 (1935).

[627] N. SMALL, SOME PRESIDENTIAL INTERPRETATIONS OF THE PRESIDENCY (1932); W. BINKLEY, THE PRESIDENT AND CONGRESS (2d ed. 1962); E. Corwin, supra, chs. 1, 7.

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of "usurping" legislative powers,[628] but still earlier ones, Washington, Jefferson, and Jackson among them, took a very different line, albeit less boldly and persistently than their later imitators.[629] Today, there is no subject on which the President may not appropriately communicate to Congress, in as precise terms as he chooses, his conception of its duty. Conversely, the President is not obliged by this clause to impart information which, in his judgment, should in the public interest be withheld.[630] The President has frequently summoned both Houses into "extra" or "special sessions" for legislative purposes, and the Senate alone for the consideration of nominations and treaties. His power to adjourn the Houses has never been exercised.

THE CONDUCT OF FOREIGN RELATIONS

The Right of Reception: Scope of the Power

"Ambassadors and other public ministers" embraces not only "all possible diplomatic agents which any foreign power may accredit to the United States,"[631] but also, as a practical construction of the Constitution, all foreign consular agents, who therefore may not exercise their functions in the United States without an *exequatur* from the President.[632] The power to "receive" ambassadors, *et cetera*, includes, moreover, the right to refuse to receive them, to request their recall, to dismiss them, and to determine their eligibility under our laws.[633] Furthermore, this power makes the President the sole mouthpiece of the nation in its dealing with other nations.

The Presidential Monopoly

Wrote Jefferson in 1790: "The transaction of business with foreign nations is executive altogether. It belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly."[634] So when Citizen Genet, envoy to the United States from the first French Republic, sought an *exequatur* for a consul whose commission was addressed to the Congress of the United States, Jefferson

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[628] The first Harrison, Polk, Taylor, and Fillmore all fathered sentiments to this general effect. *See* 4 J. Richardson, supra at 1860, 1864; 6 id. at 2513–19, 2561–62, 2608, 2615.

[629] *See* sources cited supra.

[630] Warren, *Presidential Declarations of Independence*, 10 B.U.L. Rev. 1 (1930); 3 W. Willoughby, supra at 1488–1492.

[631] 7 Ops. Atty. Gen. 186, 209 (1855).

[632] 5 J. Moore, International Law Digest 15–19 (1906).

[633] Id. at 4:473–548; 5:19–32.

[634] *Opinion on the Question Whether the Senate Has the Right to Negative the Grade of Persons Appointed by the Executive to Fill Foreign Missions*, April 24, 1790, 5 Writings of Thomas Jefferson 161, 162 (P. Ford ed., 1895).

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informed him that "as the President was the only channel of communication between the United States and foreign nations, it was from him alone 'that foreign nations or their agents are to learn what is or has been the will of the nation'; that whatever he communicated as such, they had a right and were bound to consider 'as the expression of the nation'; and that no foreign agent could be 'allowed to question it,' or 'to interpose between him and any other branch of government, under the pretext of either's transgressing their functions.' Mr. Jefferson therefore declined to enter into any discussion of the question as to whether it belonged to the President under the Constitution to admit or exclude foreign agents. 'I inform you of the fact,' he said, 'by authority from the President.' Mr. Jefferson returned the consul's commission and declared that the President would issue no *exequatur* to a consul except upon a commission correctly addressed."[635]

The Logan Act.—When in 1798 a Philadelphia Quaker named Logan went to Paris on his own to undertake a negotiation with the French Government with a view to averting war between France and the United States, his enterprise stimulated Congress to pass "An Act to Prevent Usurpation of Executive Functions,"[636] which, "more honored in the breach than the observance," still survives on the statute books.[637] The year following, John Marshall, then a Member of the House of Representatives, defended President John Adams for delivering a fugitive from justice to Great Britain under the 27th article of the Jay Treaty, instead of leaving the business to the courts. He said: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. Of consequence, the demand of a foreign nation can only be made on him. He possesses the whole Executive power. He holds and directs the force of the nation. Of consequence, any act to be performed by the force of the nation is to be performed through him."[638] Ninety-

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[635] 4 J. Moore, supra at 680–81.

[636] This measure is now contained in 18 U.S.C. § 953.

[637] *See Memorandum on the History and Scope of the Law Prohibiting Correspondence with a Foreign Government*, S. Doc. No. 696, 64th Congress, 2d Sess. (1917). The author was Mr. Charles Warren, then Assistant Attorney General. Further details concerning the observance of the "Logan Act" are given in E. Corwin, supra at 183–84, 430–31.

[638] 10 Annals of Congress 596, 613–14 (1800). Marshall's statement is often cited, *e.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318, 319 (1936), as if he were claiming sole or inherent executive power in foreign relations, but Marshall carefully propounded the view that Congress could provide the rules underlying the President's duty to extradite. When, in 1848, Congress did enact such a statute, the Court sustained it. Fong Yue Ting v. United States, 149 U.S. 698, 714 (1893).

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nine years later, a Senate Foreign Relations Committee took occasion to reiterate Marshall's doctrine with elaboration.[639]

A Formal or a Formative Power.—In his attack, instigated by Jefferson, upon Washington's Proclamation of Neutrality in 1793 at the outbreak of war between France and Great Britain, Madison advanced the argument that all large questions of foreign policy fell within the ambit of Congress, by virtue of its power "to declare war" In support of this proposition he disparaged the presidential function of reception: "I shall not undertake to examine, what would be the precise extent and effect of this function in various cases which fancy may suggest, or which time may produce. It will be more proper to observe, in general, and every candid reader will second the observation, that little, if anything, more was intended by the clause, than to provide for a particular mode of communication, almost grown into a right among modern nations; by pointing out the department of the government, most proper for the ceremony of admitting public ministers, of examining their credentials, and of authenticating their title to the privileges annexed to their character by the law of nations. This being the apparent design of the constitution, it would be highly improper to magnify the function into an important prerogative, even when no rights of other departments could be affected by it." [640]

The President's Diplomatic Role.—Hamilton, although he had expressed substantially the same view in *The Federalist* regarding the power of reception,[641] adopted a very different conception of it in defense of Washington's proclamation. Writing under the pseudonym, "Pacificus," he said: "The right of the executive to receive ambassadors and other public ministers, may serve to illustrate the relative duties of the executive and legislative departments. This right includes that 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 recognized, or not; which, where a treaty antecedently exists between the United States and such nation, involves the power of continuing or suspending its operation. For until the new government is acknowledged, the treaties between the nations, so far at least as regards public rights, are of course suspended. This power of determining virtually upon the operation of national treaties, as a consequence of the power to receive public ministers, is an important instance of the right of the executive, to decide upon the obligations of the country with regard to foreign nations. To apply it to the case of France, if there

[639] S. Doc. No. 56, 54th Congress, 2d Sess. (1897).
[640] 1 Letters and Other Writings of James Madison 611 (1865).
[641] No. 69 (J. Cooke ed. 1961), 468.

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had been a treaty of alliance, offensive and defensive, between the United States and that country, the unqualified acknowledgment of the new government would have put the United States in a condition to become as an associate in the war with France, and would have laid the legislature under an obligation, if required, and there was otherwise no valid excuse, of exercising its power of declaring war. This serves as an example of the right of the executive, in certain cases, to determine the condition of the nation, though it may, in its consequences, affect the exercise of the power of the legislature to declare war. Nevertheless, the executive cannot thereby control the exercise of that power. The legislature is still free to perform its duties, according to its own sense of them; though the executive, in the exercise of its constitutional powers, may establish an antecedent state of things, which ought to weigh in the legislative decision. The division of the executive power in the Constitution, creates a concurrent authority in the cases to which it relates."[642]

Jefferson's Real Position.—Nor did Jefferson himself officially support Madison's point of view, as the following extract from his "minutes of a Conversation," which took place July 10, 1793, between himself and Citizen Genet, show: "He asked if they [Congress] were not the sovereign. I told him no, they were sovereign in making laws only, the executive was sovereign in executing them, and the judiciary in construing them where they related to their department. 'But,' said he, 'at least, Congress are bound to see that the treaties are observed.' I told him no; there were very few cases indeed arising out of treaties, which they could take notice of; that the President is to see that treaties are observed. 'If he decides against the treaty, to whom is a nation to appeal?' I told him the Constitution had made the President the last appeal. He made me a bow, and said, that indeed he would not make me his compliments on such a Constitution, expressed the utmost astonishment at it, and seemed never before to have had such an idea."[643]

The Power of Recognition

In his endeavor in 1793 to minimize the importance of the President's power of reception, Madison denied that it involved cognizance of the question, whether those exercising the government of the accrediting state had the right along with the possession. He said: "This belongs to the nation, and to the nation alone, on whom the government operates. . . . It is evident, therefore, that if the

[642] Letter of Pacificus, No. 1, 7 Works of Alexander Hamilton 76, 82–83 (J. Hamilton ed., 1851).

[643] 4 J. Moore, supra at 680–81.

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executive has a right to reject a public minister, it must be founded on some other consideration than a change in the government, or the newness of the government; and consequently a right to refuse to acknowledge a new government cannot be implied by the right to refuse a public minister. It is not denied that there may be cases in which a respect to the general principles of liberty, the essential rights of the people, or the overruling sentiments of humanity, might require a government, whether new or old, to be treated as an illegitimate despotism. Such are in fact discussed and admitted by the most approved authorities. But they are great and extraordinary cases, by no means submitted to so limited an organ of the national will as the executive of the United States; and certainly not to be brought by any torture of words, within the right to receive ambassadors." [644]

Hamilton, with the case of Genet before him, had taken the contrary position, which history has ratified. In consequence of his power to receive and dispatch diplomatic agents, but more especially the former, the President possesses the power to recognize new states, communities claiming the status of belligerency, and changes of government in established states; also, by the same token, the power to decline recognition, and thereby decline diplomatic relations with such new states or governments. The affirmative precedents down to 1906 are succinctly summarized by John Bassett Moore in his famous Digest, as follows: "In the preceding review of the recognition, respectively, of the new states, new governments, and belligerency, there has been made in each case a precise statement of facts, showing how and by whom the recognition was accorded. In every case, as it appears, of a new government and of belligerency, the question of recognition was determined solely by the Executive. In the case of the Spanish-American republics, of Texas, of Hayti, and of Liberia, the President, before recognizing the new state, invoked the judgment and cooperation of Congress; and in each of these cases provision was made for the appointment of a minister, which, when made in due form, constitutes, as has been seen, according to the rules of international law, a formal recognition. In numerous other cases, the recognition was given by the Executive solely on his own responsibility." [645]

The Case of Cuba.—The question of Congress's right also to recognize new states was prominently raised in connection with Cuba's successful struggle for independence. Beset by numerous legislative proposals of a more or less mandatory character, urging recognition upon the President, the Senate Foreign Relations Committee,

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[644] Letters of Helvidius, 5 WRITINGS OF JAMES MADISON 133 (G. Hunt ed., 1905).

[645] 1 J. Moore, supra, 243–44. *See* Restatement, Foreign Relations §§ 204, 205.

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in 1897, made an elaborate investigation of the whole subject and came to the following conclusions as to this power: "The 'recognition' of independence or belligerency of a foreign power, technically speaking, is distinctly a diplomatic matter. It is properly evidenced either by sending a public minister to the government thus recognized, or by receiving a public minister therefrom. The latter is the usual and proper course. Diplomatic relations with a new power are properly, and customarily inaugurated at the request of that power, expressed through an envoy sent for the purpose. The reception of this envoy, as pointed out, is the act of the President alone. The next step, that of sending a public minister to the nation thus recognized, is primarily the act of the President. The Senate can take no part in it at all, until the President has sent in a nomination. Then it acts in its executive capacity, and, customarily, in 'executive session.' The legislative branch of the government can exercise no influence over this step except, very indirectly, by withholding appropriations. . . . Nor can the legislative branch of the government hold any communications with foreign nations. The executive branch is the sole mouthpiece of the nation in communication with foreign sovereignties."

"Foreign nations communicate only through their respective executive departments. Resolutions of their legislative departments upon diplomatic matters have no status in international law. In the department of international law, therefore, properly speaking, a Congressional recognition of belligerency or independence would be a nullity. . . . Congress can help the Cuban insurgents by legislation in many ways, but it cannot help them legitimately by mere declarations, or by attempts to engage in diplomatic negotiations, if our interpretation of the Constitution is correct. That it is correct . . . [is] shown by the opinions of jurists and statesmen of the past."[646] Congress was able ultimately to bundle a clause recognizing the independence of Cuba, as distinguished from its government, into the declaration of war of April 11, 1898, against Spain. For the most part, the sponsors of the clause defended it by the following line of reasoning. Diplomacy, they said, was now at an end, and the President himself had appealed to Congress to provide a solution for the Cuban situation. In response, Congress was about to exercise its constitutional power of declaring war, and it has consequently the right to state the purpose of the war which it was about to de-

[646] S. Doc. No. 56, 54th Congress, 2d Sess. (1897), 20–22.

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clare.[647] The recognition of the Union of Soviet Socialist Republics in 1933 was an exclusively presidential act.

The Power of Nonrecognition.—The potentialities of nonrecognition were conspicuously illustrated by President Woodrow Wilson when he refused, early in 1913, to recognize Provisional President Huerta as the *de facto* government of Mexico, thereby contributing materially to Huerta's downfall the year following. At the same time, Wilson announced a general policy of nonrecognition in the case of any government founded on acts of violence, and while he observed this rule with considerable discretion, he consistently refused to recognize the Union of Soviet Socialist Republics, and his successors prior to President Franklin D. Roosevelt did the same. The refusal of the Hoover administration to recognize the independence of the Japanese puppet state of Manchukuo early in 1932 was based on kindred grounds. Similarly, the nonrecognition of the Chinese Communist Government from the Truman Administration to President Nixon's *de facto* recognition through a visit in 1972—not long after the People's Republic of China was admitted to the United Nations and Taiwan excluded—proved to be an important part of American foreign policy during the Cold War.[648]

Congressional Implementation of Presidential Policies

No President was ever more jealous of his prerogative in the realm of foreign relations than Woodrow Wilson. When, however, strong pressure was brought to bear upon him by Great Britain respecting his Mexican Policy, he was constrained to go before Congress and ask for a modification of the Panama Tolls Act of 1911, which had also aroused British ire. Addressing Congress, he said, "I ask this of you in support of the foreign policy of the Administration. I shall not know how to deal with other matters of even greater delicacy and nearer consequence if you do not grant it to me in ungrudging measure."[649]

The fact is, of course, that Congress has enormous powers that are indispensable to any foreign policy. In the long run, Congress

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[647] Senator Nelson of Minnesota said: "The President has asked us to give him the right to make war to expel the Spaniards from Cuba. He has asked us to put that power in his hands; and when we are asked to grant that power—the highest power given under the Constitution—we have the right, the intrinsic right, vested in us by the Constitution, to say how and under what conditions and with what allies that war-making power shall be exercised." 31 Cong. Rec. 3984 (1898).

[648] President Carter's termination of the Mutual Defense Treaty with Taiwan, which precipitated a constitutional and political debate, was perhaps an example of nonrecognition or more appropriately derecognition. On recognition and nonrecognition policies in the post-World War II era, *see* Restatement, Foreign Relations, §§ 202, 203.

[649] 1 Messages and Papers of Woodrow Wilson 58 (A. Shaw ed., 1924).

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is the body that lays and collects taxes for the common defense, that creates armies and maintains navies, although it does not direct them, that pledges the public credit, that declares war, that defines offenses against the law of nations, that regulates foreign commerce; and it has the further power "to make all laws which shall be necessary and proper"—that is, which it deems to be such—for carrying into execution not only its own powers but all the powers "of the government of the United States and of any department or officer thereof." Moreover, its laws made "in pursuance" of these powers are "supreme law of the land," and the President is bound constitutionally to "take Care that" they "be faithfully executed." In point of fact, congressional legislation has operated to augment presidential powers in the foreign field much more frequently than it has to curtail them. The Lend-Lease Act of March 11, 1941[650] is the classic example, although it only brought to culmination a whole series of enactments with which Congress had aided and abetted the administration's foreign policy in the years between 1934 and 1941.[651] Disillusionment with presidential policies in the context of the Vietnamese conflict led Congress to legislate restrictions, not only with respect to the discretion of the President to use troops abroad in the absence of a declaration of war, but also limiting his economic and political powers through curbs on his authority to declare national emergencies.[652] The lesson of history, however, appears to be that congressional efforts to regain what is deemed to have been lost to the President are intermittent, whereas the presidential exercise of power in today's world is unremitting.[653]

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[650] 55 Stat. 31 (1941).

[651] E. Corwin, supra at 184–93, 423–25, 435–36.

[652] Legislation includes the War Powers Resolution, Pub. L. 93–148, 87 Stat. 555 (1953), 50 U.S.C. §§ 1541–1548; the National Emergencies Act, Pub. L. 94–412, 90 Stat. 1255 (1976), 50 U.S.C. §§ 1601–1651 (establishing procedures for presidential declaration and continuation of national emergencies and providing for a bicameral congressional veto); the International Emergency Economic Powers Act, Pub. L. 95–223, 91 Stat. 1626 (1977), 50 U.S.C. §§ 1701–1706 (limiting the great economic powers conferred on the President by the Trading with the Enemy Act of 1917, 40 Stat. 415, 50 U.S.C. App. § 5(b), to times of declared war, and providing new and more limited powers, with procedural restraints, for nonwartime emergencies); *see also* the Foreign Sovereign Immunities Act of 1976, Pub. L. 94–583, 90 Stat. 2891, 28 U.S.C. §§ 1330, 1602–1611 (removing from executive control decisions concerning the liability of foreign sovereigns to suit).

[653] "We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (1952) (Justice Jackson concurring). For an account of how the President usually prevails, *see* H. Koh, The National Security Constitution: Sharing Power After the Iran-Contra Affairs (1990).

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The Doctrine of Political Questions

It is not within the province of the courts to inquire into the policy underlying action taken by the "political departments"—Congress and the President—in the exercise of their conceded powers. This commonplace maxim is, however, sometimes given an enlarged application, so as to embrace questions as to the existence of facts and even questions of law, that the Court would normally regard as falling within its jurisdiction. Such questions are termed "political questions," and are especially common in the field of foreign relations. The leading case is *Foster v. Neilson*,[654] where the matter in dispute was the validity of a grant made by the Spanish Government in 1804 of land lying to the east of the Mississippi River, and in which there was also raised the question whether the region between the Perdido and Mississippi Rivers belonged in 1804 to Spain or the United States.

Chief Justice Marshall's opinion for the Court held that the Court was bound by the action of the political departments, the President and Congress, in claiming the land for the United States. He wrote: "If those departments which are intrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its right of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied. A question like this, respecting the boundaries of nations, is, as has been truly said, more a political than a legal question, and in its discussion, the courts of every country must respect the pronounced will of the legislature."[655]

The doctrine thus clearly stated is further exemplified, with particular reference to presidential action, by *Williams v. Suffolk Ins. Co.*[656] In this case the underwriters of a vessel which had been confiscated by the Argentine Government for catching seals off the Falkland Islands, contrary to that Government's orders, sought to escape liability by showing that the Argentinian Government was the sovereign over these islands and that, accordingly, the vessel had been condemned for willful disregard of legitimate authority. The Court decided against the company on the ground that the President had taken the position that the Falkland Islands were not a part of Argentina. "[C]an there be any doubt, that when the executive branch of the government, which is charged with our foreign

[654] 27 U.S. (2 Pet.) 253 (1829).
[655] 27 U.S. at 309.
[656] 38 U.S. (13 Pet.) 415 (1839).

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relations, shall, in its correspondence with a foreign nation, assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view, it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong. It is enough to know, that in the exercise of his constitutional functions, he had decided the question. Having done this, under the responsibilities which belong to him, it is obligatory on the people and government of the Union."

"If this were not the rule, cases might often arise, in which, on most important questions of foreign jurisdiction, there would be an irreconcilable difference between the executive and judicial departments. By one of these departments, a foreign island or country might be considered as at peace with the United States; whilst the other would consider it in a state of war. No well-regulated government has ever sanctioned a principle so unwise, and so destructive of national character."[657] Thus, the right to determine the boundaries of the country is a political function,[658] as is also the right to determine what country is sovereign of a particular region,[659] to determine whether a community is entitled under international law to be considered a belligerent or an independent state,[660] to determine whether the other party has duly ratified a treaty,[661] to determine who is the *de jure* or *de facto* ruler of a country,[662] to determine whether a particular person is a duly accredited diplomatic agent to the United States,[663] to determine how long a military occupation shall continue in fulfillment of the terms of a treaty,[664] to determine whether a treaty is in effect or not, although doubtless an extinguished treaty could be constitutionally renewed by tacit consent.[665]

Recent Statements of the Doctrine.—The assumption underlying the refusal of courts to intervene in cases involving conduct of foreign relations is well stated in *Chicago & S. Air Lines v. Waterman S.S. Corp.*[666] Here, the Court refused to review orders of the Civil Aeronautics Board granting or denying applications by citizen carriers to engage in overseas and foreign air transportation, which by the terms of the Civil Aeronautics Act were subject to ap-

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[657] 38 U.S. at 420.
[658] Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829).
[659] Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415 (1839).
[660] United States v. Palmer, 16 U.S. (3 Wheat.) 610 (1818).
[661] Doe v. Braden, 57 U.S. (16 How.) 635, 657 (1853).
[662] Jones v. United States, 137 U.S. 202 (1890); Oetjen v. Central Leather Co., 246 U.S. 297 (1918).
[663] *In re* Baiz, 135 U.S. 403 (1890).
[664] Neely v. Henkel, 180 U.S. 109 (1901).
[665] Terlinden v. Ames, 184 U.S. 270 (1902); Charlton v. Kelly, 229 U.S. 447 (1913).
[666] 333 U.S. 103 (1948).

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proval by the President and therefore impliedly beyond those provisions of the act authorizing judicial review of board orders. Elaborating on the necessity of judicial abstinence in the conduct of foreign relations, Justice Jackson declared for the Court: "The President, both as Commander in Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution on the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."[667]

To the same effect are the Court's holding and opinion in *Ludecke v. Watkins*,[668] where the question at issue was the power of the President to order the deportation under the Alien Enemy Act of 1798 of

[667] 333 U.S. at 111. *See also* Oetjen v. Central Leather Co., 246 U.S. 297 (1918); Ricaud v. American Metal Co., 246 U.S. 304 (1918). Analogous to and arising out of the same considerations as the political question doctrine is the "act of state" doctrine under which United States courts will not examine the validity of the public acts of foreign governments done within their own territory, typically, but not always, in disputes arising out of nationalizations. *E.g.*, Underhill v. Hernandez, 168 U.S. 250 (1897); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972); Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976). For succinct analysis of this amorphous doctrine, *see* Restatement, Foreign Relations, §§ 443–44. Congress has limited the reach of the doctrine in foreign expropriation cases by the Hickenlooper Amendments. 22 U.S.C. § 2370(e)(2). Consider, also, Dames & Moore v. Regan, 453 U.S. 654 (1981). Similar, also, is the doctrine of sovereign immunity of foreign states in United States courts, under which jurisdiction over the foreign state, at least after 1952, turned upon the suggestion of the Department of State as to the applicability of the doctrine. *See* Alfred Dunhill of London v. Republic of Cuba, 425 U.S. at 698–706 (plurality opinion), *but see* id. at 725–28 (Justice Marshall dissenting). For the period prior to 1952, *see* Z. & F. Assets Corp. v. Hull, 311 U.S. 470, 487 (1941). Congress in the Foreign Sovereign Immunities Act of 1976, Pub. L. 94–583, 90 Stat. 2891, 28 U.S.C. §§ 1330, 1332(a)(2)(3)(4), 1391(f), 1441(d), 1602–1611, provided for judicial determination of applicability of the doctrine but did adopt the executive position with respect to no applicability for commercial actions of a foreign state. *E.g.*, Verlinden B. V. v. Central Bank of Nigeria, 461 U.S. 480 (1983); Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989). *See* Restatement, Foreign Relations, §§ 451–63 (including Introductory Note, pp. 390–396).

[668] 335 U.S. 160 (1948).

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a German alien enemy after the cessation of hostilities with Germany. Said Justice Frankfurter for the Court: "War does not cease with a cease-fire order, and power to be exercised by the President such as that conferred by the Act of 1798 is a process which begins when war is declared but is not exhausted when the shooting stops. . . . The Court would be assuming the functions of the political agencies of the government to yield to the suggestion that the unconditional surrender of Germany and the disintegration of the Nazi Reich have left Germany without a government capable of negotiating a treaty of peace. It is not for us to question a belief by the President that enemy aliens who were justifiably deemed fit subject for internment during active hostilities do not lose their potency for mischief during the period of confusion and conflict which is characteristic of a state of war even when the guns are silent but the peace of Peace has not come. These are matters of political judgment for which judges have neither technical competence nor official responsibility." [669]

The Court reviewed the political question doctrine in *Baker v. Carr*.[670] There, Justice Brennan noted and elaborated the factors which go into making a question political and inappropriate for judicial decision.[671] On the matter at hand, he said: "There are sweeping statements to the effect that all questions touching foreign relations are political questions. Not only does resolution of such issues

[669] 335 U.S. at 167, 170. Four Justices dissented, by Justice Black, who said: "The Court . . . holds, as I understand its opinion, that the Attorney General can deport him whether he is dangerous or not. The effect of this holding is that any unnaturalized person, good or bad, loyal or disloyal to this country, if he was a citizen of Germany before coming here, can be summarily seized, interned and deported from the United States by the Attorney General, and that no court of the United States has any power whatever to review, modify, vacate, reverse, or in any manner affect the Attorney General's deportation order. . . . I think the idea that we are still at war with Germany in the sense contemplated by the statute controlling here is a pure fiction. Furthermore, I think there is no act of Congress which lends the slightest basis to the claim that after hostilities with a foreign country have ended the President or the Attorney General, one or both, can deport aliens without a fair hearing reviewable in the courts. On the contrary, when this very question came before Congress after World War I in the interval between the Armistice and the conclusion of formal peace with Germany, Congress unequivocally required that enemy aliens be given a fair hearing before they could be deported." Id. at 174–75. *See also* Woods v. Cloyd W. Miller Co., 333 U.S. 138 (1948), where the continuation of rent control under the Housing and Rent Act of 1947, enacted after the termination of hostilities, was unanimously held to be a valid exercise of the war power, but the constitutional question raised was asserted to be a proper one for the Court. Said Justice Jackson, in a concurring opinion: "Particularly when the war power is invoked to do things to the liberties of people, or to their property or economy that only indirectly affect conduct of the war and do not relate to the management of the war itself, the constitutional basis should be scrutinized with care." Id. at 146–47.

[670] 369 U.S. 186 (1962).

[671] 369 U.S. at 217.

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frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views. Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action."[672] However, the Court came within one vote of creating a broad application of the political question doctrine in foreign relations disputes, at least in the context of a dispute between Congress and the President with respect to a proper allocation of constitutional powers.[673] In any event, the Court, in adjudicating on the merits disputes in which the foreign relations powers are called into question, follows a policy of such deference to executive and congressional expertise that the result may not be dissimilar to a broad application of the political question doctrine.[674]

THE PRESIDENT AS LAW ENFORCER

Powers Derived From The "Take Care" Duty

The Constitution does not say that the President shall execute the laws, but that "he shall take Care that the Laws be faithfully executed," i.e., by others, who are commonly, but not always with

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[672] 369 U.S. at 211–12. A case involving "a purely legal question of statutory interpretation" is not a political question simply because the issues have significant political and foreign relations overtones. Japan Whaling Ass'n v. American Cetacean Society, 478 U.S. 221, 229–30 (1986) (Fisherman's Protective Act does not completely remove Secretary of Commerce's discretion in certifying that foreign nationals are "diminishing the effectiveness of" an international agreement by taking whales in violation of quotas set pursuant to the agreement).

[673] Goldwater v. Carter, 444 U.S. 996, 1002–06 (Justices Rehnquist, Stewart, and Stevens and Chief Justice Burger). The doctrine was applied in just such a dispute in Dole v. Carter, 569 F.2d 1109 (10th Cir. 1977).

[674] "Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." Haig v. Agee, 453 U.S. 280, 292 (1981). *See also* Dames & Moore v. Regan, 453 U.S. 654, 688 (1981); Rostker v. Goldberg, 453 U.S. 57, 64–68 (1981); Greer v. Spock, 424 U.S. 828, 837–838 (1976); Parker v. Levy, 417 U.S. 733, 756, 758 (1974); Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952). Neither may private claimants seek judicial review of executive actions denying constitutional rights "in such sensitive areas as national security and foreign policy" in suits for damages against offending officials, inasmuch as the President is absolutely immune, Nixon v. Fitzgerald, 457 U.S. 731 (1982), and the Court has strongly hinted that in these areas the immunity of presidential aides and other executive officials "entrusted with discretionary authority" will be held to be absolute rather than qualified. Harlow v. Fitzgerald, 457 U.S. 800, 812–13 (1982).

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strict accuracy, termed his subordinates. What powers are implied from this duty? In this connection, five categories of executive power should be distinguished: first, there is that executive power which the Constitution confers directly upon the President by the opening clause of article II and, in more specific terms, by succeeding clauses of the same article; secondly, there is the sum total of the powers which acts of Congress at any particular time confer upon the President; thirdly, there is the sum total of discretionary powers which acts of Congress at any particular time confer upon heads of departments and other executive ("administrative") agencies of the National Government; fourthly, there is the power which stems from the duty to enforce the criminal statutes of the United States; finally, there are so-called "ministerial duties" which admit of no discretion as to the occasion or the manner of their discharge. Three principal questions arise: first, how does the President exercise the powers which the Constitution or the statutes confer upon him; second, in what relation does he stand by virtue of the Take Care Clause to the powers of other executive or administrative agencies; third, in what relation does he stand to the enforcement of the criminal laws of the United States? [675]

Whereas the British monarch is constitutionally under the necessity of acting always through agents if his acts are to receive legal recognition, the President is presumed to exercise certain of his constitutional powers personally. In the words of an opinion by Attorney General Cushing in 1855: "It may be presumed that he, the man discharging the presidential office, and he alone, grants reprieves and pardons for offenses against the United States. . . . So he, and he alone, is the supreme 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. That is a power constitutionally inherent in the person of the President. No act of Congress, no act even of the President himself, can, by constitutional possibility, authorize or create any military officer not subordinate to the President." [676] Moreover, the obligation to act personally may be sometimes enlarged by statute, as, for example, by the act organizing the President with other designated officials into "an Establishment by name of the Smithsonian Institute." Here, says the Attorney General, "the President's name of office is *designatio*

[675] In Lujan v. Defenders of Wildlife, 504 U.S. 555, 576–78 (1992), the Court purported to draw from the Take Care Clause the principle that Congress could not authorize citizens with only generalized grievances to sue to compel governmental compliance with the law, inasmuch as permitting that would be "to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'" Id. at 577.

[676] 7 Ops. Atty. Gen. 453, 464–65 (1855).

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personae." He was also of opinion that expenditures from the "secret service" fund, in order to be valid, must be vouched for by the President personally.[677] On like grounds the Supreme Court once held void a decree of a court martial, because, though it has been confirmed by the Secretary of War, it was not specifically stated to have received the sanction of the President as required by the 65th Article of War.[678] This case has, however, been virtually overruled, and at any rate such cases are exceptional.[679]

The general rule, as stated by the Court, is that when any duty is cast by law upon the President, it may be exercised by him through the head of the appropriate department, whose acts, if performed within the law, thus become the President's acts.[680] *Williams v. United States*[681] involved an act of Congress that prohibited the advance of public money in any case whatever to disbursing officers of the United States, except under special direction by the President.[682] The Supreme Court held that the act did not require the personal performance by the President of this duty. Such a practice, said the Court, if it were possible, would absorb the duties of the various departments of the government in the personal acts of one chief executive officer, and be fraught with mischief to the public service. The President's duty in general requires his superintendence of the administration; yet he cannot be required to become the administrative officer of every department and bureau, or to perform in person the numerous details incident to services which, nevertheless, he is, in a correct sense, by the Constitution and laws required and expected to perform.[683] As a matter of administrative practice, in fact, most orders and instructions emanating from the heads of the

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[677] *Cf.* 2 Stat. 78. The provision has long since dropped out of the statute book.

[678] Runkle v. United States, 122 U.S. 543 (1887).

[679] *Cf. In re* Chapman, 166 U.S. 661, 670–671 (1897), where it was held that presumptions in favor of official action "preclude collateral attack on the sentences of courts-martial." *See also* United States v. Fletcher, 148 U.S. 84, 88–89 (1893); Bishop v. United States, 197 U.S. 334, 341–42 (1905), both of which in effect repudiate *Runkle*.

[680] The President, in the exercise of his executive power under the Constitution, "speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties." The heads of the departments are his authorized assistants in the performance of his executive duties, and their official acts, promulgated in the regular course of business, are presumptively his acts. Wilcox v. McConnel, 38 U.S. (13 Pet.) 498, 513 (1839). *See also* United States v. Eliason, 41 U.S. (16 Pet.) 291 (1842); Williams v. United States, 42 U.S. (1 How.) 290, 297 (1843); United States v. Jones, 59 U.S. (18 How.) 92, 95 (1856); *The Confiscation Cases*, 87 U.S. (20 Wall.) 92 (1874); United States v. Farden, 99 U.S. 10 (1879); Wolsey v. Chapman, 101 U.S. 755 (1880).

[681] 42 U.S. (1 How.) 290 (1843).

[682] 3 Stat. 723 (1823), now covered in 31 U.S.C. § 3324.

[683] 42 U.S. (1 How.) at 297–98.

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departments, even though in pursuance of powers conferred by statute on the President, do not even refer to the President.[684]

Impoundment of Appropriated Funds

In his Third Annual Message to Congress, President Jefferson established the first faint outline of what years later became a major controversy. Reporting that $50,000 in funds which Congress had appropriated for fifteen gunboats on the Mississippi remained unexpended, the President stated that a "favorable and peaceful turn of affairs on the Mississippi rendered an immediate execution of the law unnecessary. . . ." But he was not refusing to expend the money, only delaying action to obtain improved gunboats; a year later, he told Congress that the money was being spent and gunboats were being obtained.[685] A few other instances of deferrals or refusals to spend occurred in the Nineteenth and early Twentieth Centuries, but it was only with the Administration of President Franklin Roosevelt that a President refused to spend moneys for the purposes appropriated. Succeeding Presidents expanded upon these precedents, and in the Nixon Administration a well-formulated plan of impoundments was executed in order to reduce public spending and to negate programs established by congressional legislation.[686]

Impoundment[687] was defended by Administration spokesmen as being a power derived from the President's executive powers and particularly from his obligation to see to the faithful execution of

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[684] 38 Ops. Atty. Gen. 457, 458 (1936). And, of course, if the President exercises his duty through subordinates, he must appoint them or appoint the officers who appoint them, Buckley v. Valeo, 424 U.S. 1, 109–143 (1976), and he must have the power to discharge those officers in the Executive Branch, Myers v. United States, 272 U.S. 52 (1926), although the Court has now greatly qualified *Myers* to permit congressional limits on the removal of some officers. Morrison v. Olson, 487 U.S. 654 (1988).

[685] 1 J. Richardson, supra at 348, 360.

[686] History and law is much discussed in *Executive Impoundment of Appropriated Funds: Hearings Before the Senate Judiciary Subcommittee on Separation of Powers*, 92d Congress, 1st Sess. (1971); *Impoundment of Appropriated Funds by the President: Hearings Before the Senate Government Operations Ad Hoc Subcommittee on Impoundment of Funds*, 93d Congress, 1st Sess. (1973). The most thorough study of the legal and constitutional issues, informed through historical analysis, is Abascal & Kramer, *Presidential Impoundment Part I: Historical Genesis and Constitutional Framework*, 62 Geo. L. J. 1549 (1974); Abascal & Kramer, *Presidential Impoundment Part II: Judicial and Legislative Response*, 63, id. at 149 (1974). *See generally* L. Fisher, Presidential Spending Power (1975).

[687] There is no satisfactory definition of impoundment. Legislation enacted by Congress uses the phrase "deferral of budget authority" which is defined to include: "(A) withholding or delaying the obligation or expenditure of budget authority (whether by establishing reserves or otherwise) provided for projects or activities; or (B) any other type of Executive action or inaction which effectively precludes the obligation or expenditure of budget authority, including authority to obligate by contract in advance of appropriations as specifically authorized by law." 2 U.S.C. § 682(1).

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the laws, i.e., his discretion in the manner of execution. The President, the argument went, is responsible for deciding when two conflicting goals of Congress can be harmonized and when one must give way, when, for example, congressional desire to spend certain moneys must yield to congressional wishes to see price and wage stability. In some respects, impoundment was said or implied to flow from certain inherent executive powers that repose in any President. Finally, statutory support was sought; certain laws were said to confer discretion to withhold spending, and it was argued that congressional spending programs are discretionary rather than mandatory.[688]

On the other hand, it was argued that Congress's powers under Article I, § 8, were fully adequate to support its decision to authorize certain programs, to determine the amount of funds to be spent on them, and to mandate the Executive to execute the laws. Permitting the President to impound appropriated funds allowed him the power of item veto, which he does not have, and denied Congress the opportunity to override his veto of bills enacted by Congress. In particular, the power of Congress to compel the President to spend appropriated moneys was said to derive from Congress's power "to make all Laws which shall be necessary and proper for carrying into Execution" the enumerated powers of Congress and "all other Powers vested by this Constitution in the Government of the United States, or in any Department or officer thereof."[689]

The President's decision to impound large amounts of appropriated funds led to two approaches to curtail the power. First, many persons and organizations, with a reasonable expectation of receipt of the impounded funds upon their release, brought large numbers of suits; with a few exceptions, these suits resulted in decisions denying the President either constitutional or statutory power to decline to spend or obligate funds, and the Supreme Court, presented with only statutory arguments by the Administration, held that no discretion existed under the particular statute to withhold allotments of funds to the states.[690] Second, Congress in the course of revising its own manner of appropriating funds in accordance with

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[688] *Impoundment of Appropriated Funds by the President: Hearings Before the Senate Government Operations Ad Hoc Subcommittee on Impoundment of Funds*, 93d Congress, 1st Sess. (1973), 358 (then-Deputy Attorney General Sneed).

[689] Id. at 1–6 (Senator Ervin). Of course, it was long ago established that Congress could direct the expenditure of at least some moneys from the Treasury, even over the opposition of the President. Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524 (1838).

[690] Train v. City of New York, 420 U.S. 35 (1975); Train v. Campaign Clean Water, 420 U.S. 136 (1975). *See also* State Highway Comm'n of Missouri v. Volpe, 479 F.2d 1099 (8th Cir. 1973); Pennsylvania v. Lynn, 501 F.2d 848 (D.C. Cir. 1974) (the latter case finding statutory discretion not to spend).

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budgetary responsibility provided for mandatory reporting of impoundments to Congress, for congressional disapproval of impoundments, and for court actions by the Comptroller General to compel spending or obligation of funds.[691]

Generally speaking, the law recognized two types of impoundments: "routine" or "programmatic" reservations of budget authority to provide for the inevitable contingencies that arise in administering congressionally-funded programs and "policy" decisions that are ordinarily intended to advance the broader fiscal or other policy objectives of the executive branch contrary to congressional wishes in appropriating funds in the first place.

Routine reservations were to come under the terms of a revised Anti-Deficiency Act.[692] Prior to its amendment, this law had permitted the President to "apportion" funds "to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements, greater efficiency of operations, or other developments subsequent to the date on which such appropriation was made available." President Nixon had relied on this "other developments" language as authorization to impound, for what in essence were policy reasons.[693] Congress deleted the controverted clause and retained the other language to authorize reservations to maintain funds for contingencies and to effect savings made possible in carrying out the program; it added a clause permitting reserves "as specifically provided by law."[694]

"Policy" impoundments were to be reported to Congress by the President as permanent rescissions and, perhaps, as temporary deferrals.[695] Rescissions are merely recommendations or proposals of the President and must be authorized by a bill or joint resolution, or, after 45 days from the presidential message, the funds must be made available for obligation.[696] Temporary deferrals of budget authority for less than a full fiscal year, as provided in the 1974 law, were to be effective unless either the House of Representatives or

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[691] Congressional Budget and Impoundment Control Act, Pub. L. 93–344, title X, §§ 1001–1017, 88 Stat. 332 (1974), as amended, 2 U.S.C. §§ 681–88.

[692] Originally passed as the Act of Feb. 27, 1906, ch. 510, § 3, 34 Stat. 27, 48. The provisions as described in the text were added in the General Appropriations Act of 1951, ch. 896, § 1211(c)(2), 64 Stat. 595, 765. The amendments made by the Impoundment Control Act, were § 1002, 88 Stat. 332, 31 U.S.C. §§ 1341, 1512. On the Anti-Deficiency Act generally, *see* Stith, *Congress's Power of the Purse*, 97 Yale L. J. 1343, 1370–1377 (1988).

[693] L. Fisher, supra at 154–57.

[694] 31 U.S.C. § 1512(c)(1) (present version). Congressional intent was to prohibit the use of apportionment as an instrument of policymaking. 120 Cong. Rec. 7658 (1974) (Senator Muskie); id. at 20472–20473 (Senators Ervin and McClellan).

[695] §§ 1011(1), 1012, 1013, 88 Stat. 333–34, 2 U.S.C. §§ 628(1), 683, 684.

[696] 2 U.S.C. § 683.

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the Senate passed a resolution of disapproval.[697] With the decision in *INS v. Chadha*,[698] voiding as unconstitutional the one-House legislative veto, it was evident that the veto provision in the deferral section of the Impoundment Control Act was no longer viable. An Administration effort to utilize the section, minus the veto device, was thwarted by court action, in which, applying established severability analysis, the court held that Congress would not have enacted the deferral provision in the absence of power to police its exercise through the veto.[699] Thus, the entire deferral section was inoperative. Congress, in 1987, enacted a more restricted authority, limited to deferrals only for those purposes set out in the Anti-Deficiency Act.[700]

With passage of the Act, the constitutional issues faded into the background; Presidents regularly reported rescission proposals, and Congress responded by enacting its own rescissions, usually topping the Presidents'. The entire field was, of course, confounded by the application of the other part of the 1974 law, the Budget Act, which restructured how budgets were received and acted on in Congress, and by the Balanced Budget and Emergency Deficit Control Act of 1985.[701] This latter law was designed as a deficit-reduction forcing mechanism, so that unless President and Congress cooperate each year to reduce the deficit by prescribed amounts, a "sequestration" order would reduce funds down to a mandated figure.[702] Dissatisfaction with the amount of deficit reduction continues to stimulate discussion of other means, such as "expedited" rescission and the line-item veto, many of which may raise some constitutional issues.

Power and Duty of the President in Relation to Subordinate Executive Officers

If the law casts a duty upon a head of department *eo nomine*, does the President thereupon become entitled by virtue of his duty to "take Care that the Laws be faithfully executed," to substitute his own judgment for that of the principal officer regarding the dis-

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[697] § 1013, 88 Stat. 334. Because the Act was a compromise between the House of Representatives and the Senate, numerous questions were left unresolved; one important one was whether the President could use the deferral avenue as a means of effectuating policy impoundments or whether rescission proposals were the sole means. The subsequent events described in the text mooted that argument.

[698] 462 U.S. 919 (1983).

[699] City of New Haven v. United States, 809 F.2d 900 (D.C. Cir. 1987).

[700] Pub. L. 100–119, title II, § 206(a), 101 Stat. 785, 2 U.S.C. § 684.

[701] Pub. L. 99–177, 99 Stat. 1037, codified as amended in titles 2, 31, and 42 U.S.C., with the relevant portions to this discussion at 2 U.S.C. §§ 901 *et seq.*

[702] *See* Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 Calif. L. Rev. 593 (1988).

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charge of such duty? In the debate in the House in 1789 on the location of the removal power, Madison argued that it ought to be attributed to the President alone because it was "the intention of the Constitution, expressed especially in the faithful execution clause, that the first magistrate should be responsible for the executive department," and this responsibility, he held, carried with it the power to "inspect and control" the conduct of subordinate executive officers. "Vest," said he, "the power [of removal] in the Senate jointly with the President, and you abolish at once the great principle of unity and responsibility in the executive department, which was intended for the security of liberty and the public good." [703]

But this was said with respect to the office of the Secretary of State, and when shortly afterward the question arose as to the power of Congress to regulate the tenure of the Comptroller of the Treasury, Madison assumed a very different attitude, conceding in effect that this office was to be an arm of certain of Congress's own powers and should therefore be protected against the removal power.[704] And in *Marbury v. Madison*,[705] Chief Justice Marshall traced a parallel distinction between the duties of the Secretary of State under the original act which had created a "Department of Foreign Affairs" and those which had been added by the later act changing the designation of the department to its present one. The former were, he pointed out, entirely in the "political field," and hence for their discharge the Secretary was left responsible absolutely to the President. The latter, on the other hand, were exclusively of statutory origin and sprang from the powers of Congress. For these, therefore, the Secretary was "an officer of the law" and "amenable to the law for his conduct." [706]

Administrative Decentralization Versus Jacksonian Centralism.—An opinion rendered by Attorney General Wirt in 1823 asserted the proposition that the President's duty under the Take Care Clause required of him scarcely more than that he should bring a criminally negligent official to book for his derelictions, either by removing him or by setting in motion against him the processes of impeachment or of criminal prosecutions.[707] The opinion entirely overlooked the important question of the location of the power to interpret the law, which is inevitably involved in any effort to enforce it. The diametrically opposed theory that Congress is unable to vest any head of an executive department, even within the field of Con-

[703] 1 Annals of Cong. 495, 499 (1789).
[704] Id. at 611–612.
[705] 5 U.S. (1 Cr.) 137 (1803).
[706] 5 U.S. (1 Cr.) at 165–66.
[707] 1 Ops. Atty. Gen. 624 (1823).

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gress's specifically delegated powers, with any legal discretion which the President is not entitled to control was first asserted in unambiguous terms in President Jackson's Protest Message of April 15, 1834,[708] defending his removal of Duane as Secretary of the Treasury, because of the latter's refusal to remove the deposits from the Bank of the United States. Here it is asserted "that the entire executive power is vested in the President;" that the power to remove those officers who are to aid him in the execution of the laws is an incident of that power; that the Secretary of the Treasury was such an officer; that the custody of the public property and money was an executive function exercised through the Secretary of the Treasury and his subordinates; that in the performance of these duties the Secretary was subject to the supervision and control of the President; and finally that the act establishing the Bank of the United States "did not, as it could not change the relation between the President and Secretary—did not release the former from his obligation to see the law faithfully executed nor the latter from the President's supervision and control."[709] In short, the President's removal power, in this case unqualified, was the sanction provided by the Constitution for his power and duty to control his "subordinates" in all their official actions of public consequence.

Congressional Power Versus Presidential Duty to the Law.—The Court's 1838 decision in *Kendall v. United States ex rel. Stokes*,[710] shed more light on congressional power to mandate actions by executive branch officials. The United States owed Stokes money, and when Postmaster General Kendall, at Jackson's instigation, refused to pay it, Congress passed a special act ordering payment. Kendall, however, still proved noncompliant, whereupon Stokes sought and obtained a mandamus in the United States circuit court for the District of Columbia, and on appeal this decision was affirmed by the Supreme Court. Although *Kendall*, like *Marbury v. Madison*, involved the question of the responsibility of a head of a department for the performance of a ministerial duty, the discussion by counsel before the Court and the Court's own opinion covered the entire subject of the relation of the President to his subordinates in the performance by them of statutory duties. The lower court had asserted that the duty of the President under the faithful execution clause gave him no other control over the officer than to see that he acts honestly, with proper motives, but no power to construe the law and see that the executive action conforms to it. Counsel for Kendall attacked this position vigorously, relying largely upon

[708] 3 J. Richardson, supra at 1288.
[709] Id. at 1304.
[710] 37 U.S. (12 Pet.) 524 (1838).

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statements by Hamilton, Marshall, James Wilson, and Story having to do with the President's power in the field of foreign relations.

The Court rejected the implication with emphasis. There are, it pointed out, "certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine, that Congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution; and in such cases the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President. And this is emphatically the case, where the duty enjoined is of a mere ministerial character."[711] In short, the Court recognized the underlying question of the case to be whether the President's duty to "take Care that the Laws be faithfully executed" made it constitutionally impossible for Congress ever to entrust the construction of its statutes to anybody but the President, and it answered this in the negative.

Myers Versus Morrison.—How does this issue stand today? The answer to this question, so far as there is one, is to be sought in a comparison of the Court's decision in *Myers*, on the one hand, and its decision in *Morrison*, on the other.[712] The first decision is still valid to support the President's right to remove, and hence to control the decisions of, all officials through whom he exercises the great political powers which he derives from the Constitution, and also to remove many but not all officials—usually heads of departments—through whom he exercises powers conferred upon him by statute. *Morrison*, however, recasts *Myers* to be about the constitutional inability of Congress to participate in removal decisions. It permits Congress to limit the removal power of the President, and those acting for him, by imposition of a "good cause" standard, subject to a balancing test. That is, the Court now regards the critical issue not as what officials do, whether they perform "purely executive" functions or "quasi" legislative or judicial functions, though the duties and functions must be considered. Rather, the Courts must "ensure that Congress does not interfere with the President's exercise of the 'executive power'" and his constitutionally appointed duty under Article II to take care that the laws be faithfully executed.[713] Thus, the Court continued, *Myers* was correct in its holding and in its suggestion that there are some executive officials who must be

[711] 37 U.S. (12 Pet.) at 610.

[712] Myers v. United States, 272 U.S. 52 (1926); Morrison v. Olson, 487 U.S. 654 (1988).

[713] Morrison v. Olson, 487 U.S. at 689–90.

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removable by the President if he is to perform his duties.[714] On the other hand, Congress may believe that it is necessary to protect the tenure of some officials, and if it has good reasons not limited to invasion of presidential prerogatives, it will be sustained, provided the removal restrictions are not of such a nature as to impede the President's ability to perform his constitutional duties.[715] The officer in *Morrison*, the independent counsel, had investigative and prosecutorial functions, purely executive ones, but there were good reasons for Congress to secure her tenure and no showing that the restriction "unduly trammels" presidential powers.[716]

The "bright-line" rule previously observed no longer holds. Now, Congress has a great deal more leeway in regulating executive officials, but it must articulate its reasons carefully and observe the fuzzy lines set by the Court.

Power of the President to Guide Enforcement of the Penal Law.—This matter also came to a head in "the reign of Andrew Jackson," preceding, and indeed foreshadowing, the Duane episode by some months. "At that epoch," Wyman relates in his Principles of Administrative Law, "the first amendment of the doctrine of centralism in its entirety was set forth in an obscure opinion upon an unimportant matter—The Jewels of the Princess of Orange, 2 Opin. 482 (1831). These jewels . . . were stolen from the Princess by one Polari and were seized by the officers of the United States Customs in the hands of the thief. Representations were made to the President of the United States by the Minister of the Netherlands of the facts in the matter, which were followed by a request for return of the jewels. In the meantime the District Attorney was prosecuting condemnation proceedings in behalf of the United States which he showed no disposition to abandon. The President felt himself in a dilemma, whether if it was by statute the duty of the District Attorney to prosecute or not, the President could interfere and direct whether to proceed or not. The opinion was written by Taney, then Attorney General; it is full of pertinent illustrations as to the necessity in an administration of full power in the chief executive as the concomitant of his full responsibility. It concludes: If it should be said that, the District Attorney having the power to discontinue the prosecution, there is no necessity for inferring a right in the President to direct him to exercise it—I answer that the direction of the President is not required to communicate any new authority to the District Attorney, but to direct him in the execution of a power he is admitted to possess. The most valuable and proper measure may

[714] 487 U.S. at 690–91.
[715] 487 U.S. at 691.
[716] 487 U.S. at 691–92.

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often be for the President to order the District Attorney to discontinue prosecution. The District Attorney might refuse to obey the President's order; and if he did refuse, the prosecution, while he remained in office, would still go on; because the President himself could give no order to the court or to the clerk to make any particular entry. He could only act through his subordinate officer, the District Attorney, who is responsible to him and who holds his office at his pleasure. And if that officer still continues a prosecution which the President is satisfied ought not to continue, the removal of the disobedient officer and the substitution of one more worthy in his place would enable the President through him faithfully to execute the law. And it is for this among other reasons that the power of removing the District Attorney resides in the President."[717]

The President as Law Interpreter

The power accruing to the President from his function of law interpretation preparatory to law enforcement is daily illustrated in relation to such statutes as the Anti-Trust Acts, the Taft-Hartley Act, the Internal Security Act, and many lesser statutes. Nor is this the whole story. Not only do all presidential regulations and orders based on statutes that vest power in him or on his own constitutional powers have the force of law, provided they do not transgress the Court's reading of such statutes or of the Constitution,[718] but he sometimes makes law in a more special sense. In the famous *Neagle* case,[719] an order of the Attorney General to a United States marshal to protect a Justice of the Supreme Court whose life has been threatened by a suitor was attributed to the President and held to be "a law of the United States" in the sense of section 753 of the Revised Statutes, and as such to afford basis for a writ of *habeas corpus* transferring the marshal, who had killed the attacker, from state to national custody. Speaking for the Court, Justice Miller inquired: "Is this duty [the duty of the President to take care that the laws be faithfully executed] 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 gov-

[717] B. Wyman, The Principles of the Administrative Law Governing the Relations of Public Officers 231–32 (1903).

[718] United States v. Eliason, 41 U.S. (16 Pet.) 291, 301–02 (1842); Kurtz v. Moffitt, 115 U.S. 487, 503 (1885); Smith v. Whitney, 116 U.S. 167, 180–81 (1886). For an analysis of the approach to determining the validity of presidential, or other executive, regulations and orders under purported congressional delegations or implied executive power, *see* Chrysler Corp. v. Brown, 441 U.S. 281, 301–16 (1979).

[719] *In re* Neagle, 135 U.S. 1 (1890).

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ernment under the Constitution?"[720] Obviously, an affirmative answer is assumed to the second branch of this inquiry, an assumption that is borne out by numerous precedents. And, in *United States v. Midwest Oil Co.*,[721] the Court ruled that the President had, by dint of repeated assertion of it from an early date, acquired the right to withdraw, via the Land Department, public lands, both mineral and non-mineral, from private acquisition, Congress having never repudiated the practice.

Military Power in Law Enforcement: The Posse Comitatus

"Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion."

"The President, by using the militia or the armed forces, or both . . . shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law . . . ."[722]

These quoted provisions of the United States Code consolidate a course of legislation that began at the time of the Whiskey Rebel-

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[720] 135 U.S. at 64. The phrase, "a law of the United States," came from the Act of March 2, 1833 (4 Stat. 632). However, in the Act of June 25, 1948, 62 Stat. 965, 28 U.S.C. § 2241(c)(2), the phrase is replaced by the term, "an act of Congress," thereby eliminating the basis of the holding in *Neagle*.

[721] 236 U.S. 459 (1915). *See also* Mason v. United States, 260 U.S. 545 (1923).

[722] 10 U.S.C. §§ 332, 333. The provisions were invoked by President Eisenhower when he dispatched troops to Little Rock, Arkansas, in 1957 to counter resistance to Federal district court orders pertaining to desegregation of certain public schools in the Little Rock School District. Although the validity of his action was never expressly reviewed, the Court, in Cooper v. Aaron, 358 U.S. 1, 4, 18–19 (1958), rejected a contention advanced by critics of the legality of his conduct, namely, that the President's constitutional duty to see to the faithful execution of the laws, as implemented by the provisions quoted above, does not permit the use of troops to enforce decrees of federal courts, because the latter are not statutory enactments, which alone are comprehended within the phrase, "laws of the United States." According to the Court, a judicial decision interpreting a constitutional provision, specifically "the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case [Brown v. Board of Education, 347 U.S. 483 (1954)] is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States . . . ."

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lion of 1792.[723] In *Martin v. Mott*,[724] which arose out of the War of 1812, the Court held that the authority to decide whether the exigency had arisen belonged exclusively to the President.[725] Even before that time, Jefferson had, in 1808, in the course of his efforts to enforce the Embargo Acts, issued a proclamation ordering "all officers having authority, civil or military, who shall be found in the vicinity" of an unruly combination, to aid and assist "by all means in their power, by force of arms or otherwise" the suppression of such combination.[726] Forty-six years later, Attorney General Cushing advised President Pierce that in enforcing the Fugitive Slave Act of 1850, marshals of the United States had authority when opposed by unlawful combinations to summon to their aid not only bystanders and citizens generally, but armed forces within their precincts, both state militia and United States officers, soldiers, sailors, and marines,[727] a doctrine that Pierce himself improved upon two years later by asserting, with reference to the civil war then raging in Kansas, that it lay within his obligation to take care that the laws be faithfully executed to place the forces of the United States in Kansas at the disposal of the marshal there, to be used as a portion of the *posse comitatus*. Lincoln's call of April 15, 1861, for 75,000 volunteers was, on the other hand, a fresh invocation, though of course on a vastly magnified scale, of Jefferson's conception of a *posse comitatus* subject to presidential call.[728] The provisions above extracted from the United States Code ratified this conception with regard to the state militias and the national forces.

Suspension of Habeas Corpus by the President

See Article I, § 9.

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[723] 1 Stat. 264 (1792); 1 Stat. 424 (1794); 2 Stat. 443 (1807); 12 Stat. 281 (1861); now covered by 10 U.S.C. §§ 332–334.

[724] 25 U.S. (12 Wheat.) 19 (1827).

[725] 25 U.S. at 31–32.

[726] Wilson, *Federal Aid in Domestic Disturbances*, S. Doc. No. 209, 57th Congress, 2d Sess. (1907), 51.

[727] 6 Ops. Atty. Gen. 446 (1854). By the Posse Comitatus Act of 1878, 20 Stat. 152, 18 U.S.C. § 1385, it was provided that "it shall not be lawful to employ any part of the Army of the United States, as a posse comitatus, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress. . . ." The effect of this prohibition, however, was largely nullified by a ruling of the Attorney General "that by Revised Statutes 5298 and 5300 [10 U.S.C. §§ 332, 334] the military forces, under the direction of the President, could be used to assist a marshal. 16 Ops. Atty. Gen. 162." B. Rich, The Presidents and Civil Disorder 196 n.21 (1941).

[728] 12 Stat. (app.) 1258.

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Preventive Martial Law

The question of executive power in the presence of civil disorder is dealt with in modern terms in *Moyer v. Peabody*,[729] to which the *Debs* case[730] may be regarded as an addendum. Moyer, a labor leader, sued Peabody for having ordered his arrest during a labor dispute that had occurred while Peabody was governor of Colorado. Speaking for a unanimous Court (with one Justice absent), Justice Holmes said: "Of course the plaintiff's position is that he has been deprived of his liberty without due process of law. But it is familiar that what is due process of law depends on circumstances. It varies with the subject-matter and the necessities of the situation. . . . The facts that we are to assume are that a state of insurrection existed and that the Governor, without sufficient reason but in good faith, in the course of putting the insurrection down held the plaintiff until he thought that he safely could release him."

". . . In such a situation we must assume that he had a right under the state constitution and laws to call out troops, as was held by the Supreme Court of the State. . . . That means that he shall make the ordinary use of the soldiers to that end; that he may kill persons who resist and, of course, that he may use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power. So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief."

". . . When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process."[731]

The Debs Case.—The *Debs* case of 1895 arose out of a railway strike which had caused the President to dispatch troops to Chicago the previous year. Coincidentally with this move, the United States district attorney stationed there, acting upon orders from Washington, obtained an injunction from the United States circuit court forbidding the strike because of its interference with the mails and

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[729] 212 U.S. 78 (1909).

[730] *In re* Debs, 158 U.S. 564 (1895).

[731] 212 U.S. at 84–85. *See also* Sterling v. Constantin, 287 U.S. 378 (1932), which endorses Moyer v. Peabody, while emphasizing the fact that it applies only to a condition of disorder.

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with interstate commerce. The question before the Supreme Court was whether this injunction, for violation of which Debs had been jailed for contempt of court, had been granted with jurisdiction. Conceding, in effect, that there was no statutory warrant for the injunction, the Court nevertheless validated it on the ground that the government was entitled thus to protect its property in the mails, and on a much broader ground which is stated in the following passage of Justice Brewer's opinion for the Court: "Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other. . . . While it is not the province of the government to interfere in any mere matter of private controversy between individuals, or to use its granted powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the Nation and concerning which the Nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties." [732]

Present Status of the Debs Case.—Insofar as the use of injunctive relief in labor disputes is concerned, enactment of the Norris-LaGuardia Act [733] placed substantial restrictions on the power of federal courts to issue injunctions in such situations. Though, in *United States v. UMW*,[734] the Court held that the Norris-LaGuardia Act did not apply where the government brought suit as operator of mines, language in the opinion appeared to go a good way toward repudiating the present viability of *Debs*, though more in terms of congres-

[732] 158 U.S., 584, 586. Some years earlier, in United States v. San Jacinto Tin Co., 125 U.S. 273, 279 (1888), the Court sustained the right of the Attorney General and his assistants to institute suits simply by virtue of their general official powers. "If," the Court said, "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 . . . the question of appealing to them must primarily be decided by the Attorney General . . . and if restrictions are to be placed upon the exercise of this authority it is for Congress to enact them." *Cf. Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), in which the Court rejected Attorney General Randolph's contention that he had the right *ex officio* to move for a writ of mandamus ordering the United States circuit court for Pennsylvania to put the Invalid Pension Act into effect.

[733] 47 Stat. 170 (1932), 29 U.S.C. §§ 101–115.

[734] 330 U.S. 258 (1947). In reaching the result, Chief Justice Vinson invoked the "rule that statutes which in general terms divest preexisting rights or privileges will not be applied to the sovereign without express words to that effect." Id. at 272.

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sional limitations than of revised judicial opinion.[735] It should be noted that in 1947 Congress authorized the President to seek injunctive relief in "national emergency" labor disputes, which would seem to imply absence of authority to act in situations not meeting the statutory definition.[736]

With regard to the power of the President to seek injunctive relief in other situations without statutory authority, there is no clear precedent. In *New York Times Co. v. United States*,[737] the government sought to enjoin two newspapers from publishing classified material given to them by a dissident former governmental employee. Though the Supreme Court rejected the Government's claim, five of the six majority Justices relied on First Amendment grounds, apparently assuming basic power to bring the action in the first place, and three dissenters were willing to uphold the constitutionality of the Government's action and its basic power on the premise that the President was authorized to protect the secrecy of governmental documents. Only one Justice denied expressly that power was lacking altogether to sue.[738]

The President's Duty in Cases of Domestic Violence in the States

See Article IV, § 4, Guarantee of Republican Form of Government, and discussion of "Martial Law and Domestic Disorder" under Article II, § 2, cl. 1.

The President as Executor of the Law of Nations

Illustrative of the President's duty to discharge the responsibilities of the United States in international law with a view to avoiding difficulties with other governments was the action of President Wilson in closing the Marconi Wireless Station at Siasconset, Massachusetts, on the outbreak of the European War in 1914, the company having refused assurance that it would comply with naval censorship regulations. Justifying this drastic invasion of private rights, Attorney General Gregory said: "The President of the United States

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[735] Thus, the Chief Justice noted that "we agree" that the debates on Norris-LaGuardia "indicate that Congress, in passing the Act, did not intend to permit the United States to continue to intervene by injunction in purely private labor disputes." Of course, he continued, "whether Congress so intended or not is a question different from the one before us now." 330 U.S. at 278.

[736] 61 Stat. 136, 155 (1947), 29 U.S.C. §§ 176–180. *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), with regard to the exclusivity of proceeding.

[737] 403 U.S. 713 (1971).

[738] On Justice Marshall's view on the lack of authorization, *see* 403 U.S. at 740–48 (concurring opinion); for the dissenters on this issue, *see* id. at 752, 755–59 (Justice Harlan, with whom Chief Justice Burger and Justice Blackmun joined); *see also* id. at 727, 729–30 (Justice Stewart, joined by Justice White, concurring).

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is at the head of one of the three great coordinate departments of the Government. He is Commander in Chief of the Army and the Navy. . . . If the President is of the opinion that the relations of this country with foreign nations are, or are likely to be endangered, by action deemed by him inconsistent with a due neutrality, it is his right and duty to protect such relations; and in doing so, in the absence of any statutory restrictions, he may act through such executive office or department as appears best adapted to effectuate the desired end. . . . I do not hesitate, in view of the extraordinary conditions existing, to advise that the President, through the Secretary of the Navy or any appropriate department, close down, or take charge of and operate, the plant . . . should he deem it necessary in securing obedience to his proclamation of neutrality." [739]

PROTECTION OF AMERICAN RIGHTS OF PERSON AND PROPERTY ABROAD

In 1854, one Lieutenant Hollins, in command of a United States warship, bombarded the town of Greytown, Nicaragua because of the refusal of local authorities to pay reparations for an attack by a mob on the United States consul.[740] Upon his return to the United States, Hollins was sued in a federal court by Durand for the value of certain property which was alleged to have been destroyed in the bombardment. His defense was based upon the orders of the President and Secretary of the Navy and was sustained by Justice Nelson, on circuit.[741] "As the Executive head of the nation, the President is made the only legitimate organ of the General Government, to open and carry on correspondence or negotiations with foreign nations, in matters concerning the interests of the country or of its citizens. It is to him, also, the citizens abroad must look for protection of person and of property, and for the faithful execution of the laws existing and intended for their protection. For this purpose, the whole Executive power of the country is placed in his hands, under the Constitution, and the laws passed in pursuance thereof; and different Departments of government have been organized, through which this power may be most conveniently executed, whether by negotiation or by force—a Department of State and a Department of the Navy."

"Now, as it respects the interposition of the Executive abroad, for the protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the President. Acts of lawless violence, or of threatened violence to the citizen or his prop-

[739] 30 Ops. Atty. Gen. 291 (1914).
[740] 7 J. Moore, Digest of International Law 346–54 (1906).
[741] Durand v. Hollins, 8 Fed. Cas. 111 (No. 4186) (C.C.S.D.N.Y. 1860).

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erty, cannot be anticipated and provided for; and the protection, to be effectual or of any avail, may, not unfrequently, require the most prompt and decided action. Under our system of Government, the citizen abroad is as much entitled to protection as the citizen at home. The great object and duty of Government is the protection of the lives, liberty, and property of the people composing it, whether abroad or at home; and any Government failing in the accomplishment of the object, or the performance of the duty, is not worth preserving." [742]

This incident and this case were but two items in the 19th century advance of the concept that the President had the duty and the responsibility to protect American lives and property abroad through the use of armed forces if deemed necessary.[743] The duty could be said to grow out of the inherent powers of the Chief Executive [744] or perhaps out of his obligation to "take Care that the Laws be faithfully executed." [745] Although there were efforts made at times to limit this presidential power narrowly to the protection of persons and property rather than to the promotion of broader national interests,[746] no such distinction was observed in practice and so grew the concepts which have become the source of serious national controversy in the 1960s and 1970s, the power of the President to use troops abroad to observe national commitments and protect the national interest without seeking prior approval from Congress.

Congress and the President versus Foreign Expropriation

Congress has asserted itself in one area of protection of United States property abroad, making provision against uncompensated expropriation of property belonging to United States citizens and corporations. The problem of expropriation of foreign property and the compensation to be paid therefor remains an unsettled area of international law, of increasing importance because of the changes and unsettled conditions following World War II.[747] It has been the position of the Executive Branch that just compensation is owed all United States property owners dispossessed in foreign countries and the many pre-World War II disputes were carried on between the President and the Department of State and the nation in-

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[742] 8 Fed. Cas. at 112.

[743] *See* United States Solicitor of the Department of State, Right to Protect Citizens in Foreign Countries by Landing Forces (3d rev. ed. 1934); M. Offutt, The Protection of Citizens Abroad by the Armed Forces of the United States (1928).

[744] Durand v. Hollins, 8 Fed. Cas. 111 (No. 4186) (C.C.S.D.N.Y. 1860).

[745] M. Offutt, supra at 5.

[746] E. Corwin, supra at 198–201.

[747] *Cf.* Metzger, *Property in International Law*, 50 Va. L. Rev. 594 (1964); Vaughn, *Finding the Law of Expropriation: Traditional v. Quantitative Research*, 2 Texas Intl. L. Forum 189 (1966).

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volved. But commencing with the Marshall Plan in 1948, Congress has enacted programs of guaranties to American investors in specified foreign countries.[748] More relevant to discussion here is that Congress has attached to United States foreign assistance programs various amendments requiring the termination of assistance and imposing other economic inducements where uncompensated expropriations have been instituted.[749] And when the Supreme Court in 1964 applied the "act of state" doctrine so as not to examine the validity of a taking of property by a foreign government recognized by the United States but to defer to the decision of the foreign government,[750] Congress reacted by attaching another amendment to the foreign assistance act reversing the Court's application of the doctrine, except in certain circumstances, a reversal which was applied on remand of the case.[751]

PRESIDENTIAL ACTION IN THE DOMAIN OF CONGRESS: THE STEEL SEIZURE CASE

To avert a nationwide strike of steel workers that he believed would jeopardize the national defense, President Truman, on April 8, 1952, issued an executive order directing the Secretary of Commerce to seize and operate most of the steel industry of the country.[752] The order cited no specific statutory authorization but invoked generally the powers vested in the President by the Constitution and laws of the United States. The Secretary issued the appropriate orders to steel executives. The President promptly reported his action to Congress, conceding Congress's power to supersede his order, but Congress did not do so, either then or a few days later when the President sent up a special message.[753] The steel companies sued, a federal district court enjoined the seizure,[754] and the Supreme Court brought the case up prior to decision by the court of appeals.[755] Six-to-three, the Court affirmed the district court order, each member of the majority, however, contributing an individual opinion as well

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[748] 62 Stat. 143 (1948), as amended, 22 U.S.C. § 2191 et seq. *See also* 22 U.S.C. § 1621 et seq.

[749] 76 Stat. 260 (1962), 22 U.S.C. § 2370(e)(1).

[750] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

[751] 78 Stat. 1013 (1964), as amended, 22 U.S.C. § 2370(e)(2), applied on remand in Banco Nacional de Cuba v. Farr, 243 F. Supp. 957 (S.D.N.Y. 1965), *aff'd* 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968).

[752] E.O. 10340, 17 Fed. Reg. 3139 (1952).

[753] H. Doc. No. 422, 82d Congress, 2d sess. (1952), 98 Cong. Rec. 3912 (1952); H. Doc. No. 496, 82d Congress, 2d sess. (1952), 98 Cong. Rec. 6929 (1952).

[754] 103 F. Supp. 569 (D.D.C. 1952).

[755] The court of appeals had stayed the district court's injunction pending appeal. 197 F.2d 582 (D.C. Cir. 1952). The Supreme Court decision bringing the action up is at 343 U.S. 937 (1952). Justices Frankfurter and Burton dissented.

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as joining in some degree the opinion of the Court by Justice Black.[756] The holding and the multiple opinions represent a setback for the adherents of "inherent" executive powers,[757] but they raise difficult conceptual and practical problems with regard to presidential powers.

The Doctrine of the Opinion of the Court

The chief points urged in the Black opinion are the following: There was no statute that expressly or impliedly authorized the President to take possession of the property involved. On the contrary, in its consideration of the Taft-Hartley Act in 1947, Congress refused to authorize governmental seizures of property as a method of preventing work stoppages and settling labor disputes. Authority to issue such an order in the circumstances of the case was not deducible from the aggregate of the President's executive powers under Article II of the Constitution; nor was the order maintainable as an exercise of the President's powers as Commander in Chief of the Armed Forces. The power sought to be exercised was the lawmaking power, which the Constitution vests in the Congress alone. Even if it were true that other Presidents have taken possession of private business enterprises without congressional authority in order to settle labor disputes, Congress was not thereby divested of its exclusive constitutional authority to make the laws necessary and proper to carry out all powers vested by the Constitution "in the Government of the United States, or any Department or Officer thereof."[758]

The Doctrine Considered

The pivotal proposition of the opinion of the Court is that, inasmuch as Congress could have directed the seizure of the steel mills, the President had no power to do so without prior congressional authorization. To this reasoning, not only the dissenters but Justice Clark, in a concurring opinion, would not concur, and in fact they stated baldly that the reasoning was contradicted by prec-

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[756] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). In the majority with Justice Black were Justices Frankfurter, Douglas, Jackson, Burton, and Clark. Dissenting were Chief Justice Vinson and Justices Reed and Minton. For critical consideration of the case, *see* Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 COLUM. L. REV. 53 (1953); Roche, *Executive Power and Domestic Emergency: The Quest for Prerogative*, 5 WEST. POL. Q. 592 (1952). For a comprehensive account, *see* M. MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER (1977).

[757] Indeed, the breadth of the Government's arguments in the district court may well have contributed to the defeat, despite the much more measured contentions set out in the Supreme Court. *See* A. WESTIN, THE ANATOMY OF A CONSTITUTIONAL LAW CASE 56–65 (1958) (argument in district court).

[758] 343 U.S. at 585–89.

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edent, both judicial and presidential and congressional practice. One of the earliest pronouncements on presidential power in this area was that of Chief Justice Marshall in *Little v. Barreme*.[759] There, a United States vessel under orders from the President had seized a United States merchant ship bound *from* a French port allegedly carrying contraband material; Congress had, however, provided for seizure only of such vessels bound *to* French ports.[760] The Chief Justice wrote: "It is by no means clear, that the President of the United States, whose high duty it is to 'take care that the laws be faithfully executed,' and who is commander-in-chief of the armies and navies of the United States, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication, American vessels which were forfeited, by being engaged in this illicit commerce. But when it is observed, that [an act of Congress] . . . gives a special authority to seize on the high seas, and limits that authority to the seizure of vessels bound, or sailing *to*, a French port, the legislature seems to have prescribed that the manner in which this law shall be carried into execution, was to exclude a seizure of any vessel not bound *to* a French port."[761]

Other examples are at hand. In 1799, President Adams, in order to execute the extradition provisions of the Jay Treaty, issued a warrant for the arrest of one Robbins, and the action was challenged in Congress on the ground that no statutory authority existed by which the President could act; John Marshall defended the action in the House of Representatives, the practice continued, and it was not until 1848 that Congress enacted a statute governing this subject.[762] Again, in 1793, President Washington issued a neutrality proclamation; the following year, Congress enacted the first neutrality statute and since then proclamations of neutrality have been based on acts of Congress.[763] Repeatedly, acts of the President have been in areas in which Congress could act as well.[764]

Justice Frankfurter's concurring opinion[765] listed 18 statutory authorizations for seizures of industrial property, all but one of which

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[759] 6 U.S. (2 Cr.) 170 (1804).

[760] 1 Stat. 613 (1799).

[761] Little v. Barreme, 6 U.S. (2 Cr.) 170, 177–78 (1804).

[762] 10 Annals of Cong. 596, 613–14 (1800). The argument was endorsed in Fong Yue Ting v. United States, 149 U.S. 698, 714 (1893). The presence of a treaty, of which this provision was self-executing, is sufficient to distinguish this example from the steel seizure situation.

[763] *Cf.* E. Corwin, The President's Control of Foreign Relations ch. 1 (1916).

[764] E. Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 Colum. L. Rev. 53, 58–59 (1953).

[765] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 593 (1952).

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were enacted between 1916 and 1951, and summaries of seizures of industrial plants and facilities by Presidents without definite statutory warrant, eight of which occurred during World War I—justified in presidential orders as being done pursuant to "the Constitution and laws" generally—and eleven of which occurred in World War II.[766] The first such seizure in this period had been justified by then Attorney General Jackson as being based upon an "aggregate" of presidential powers stemming from his duty to see the laws faithfully executed, his commander-in-chiefship, and his general executive powers.[767] Chief Justice Vinson's dissent dwelt liberally upon this opinion,[768] which reliance drew a disclaimer from Justice Jackson, concurring.[769]

The dissent was also fortunate in that the steel companies' chief counsel, John W. Davis, a former Solicitor General of the United States, had filed a brief in 1914 in defense of Presidential action, which had taken precisely the view that the dissent now presented.[770] "Ours," the brief read, "is a self-sufficient Government within its sphere. (*Ex parte Siebold*, 100 U.S. 371, 395; *in re Debs*, 158 U.S. 564, 578.) 'Its means are adequate to its ends' (*McCulloch v. Maryland*, 4 Wheat., 316, 424), and it is rational to assume that its active forces will be found equal in most things to the emergencies that confront it. While perfect flexibility is not to be expected in a Government of divided powers, and while division of power is one of the principal features of the Constitution, it is the plain duty of those who are called upon to draw the dividing lines to ascertain the essential, recognize the practical, and avoid a slavish formalism which can only serve to ossify the government and reduce its efficiency without any compensating good. The function of making laws is peculiar to Congress, and the Executive can not exercise that function to any degree. But this is not to say that all of the *subjects* concerning which laws might be made are perforce removed from the possibility of Executive influence. The Executive may act upon things and upon men in many relations which have not, though they might have, been actually regulated by Congress. In

[766] 343 U.S. at 611–13, 620.

[767] 89 Cong. Rec. 3992 (1943).

[768] 343 U.S. at 695–96 (dissenting opinion).

[769] Thus, Justice Jackson noted of the earlier seizure, that "[i]ts superficial similarities with the present case, upon analysis, yield to distinctions so decisive that it cannot be regarded as even a precedent, much less an authority for the present seizure." 343 U.S. at 648–49 (concurring opinion). His opinion opens with the sentence: "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." Id. at 634.

[770] Brief for the United States at 11, 75–77, United States v. Midwest Oil Co., 236 U.S. 459 (1915).

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other words, just as there are fields which are peculiar to Congress and fields which are peculiar to the Executive, so there are fields which are common to both, in the sense that the Executive may move within them until they shall have been occupied by legislative action. These are not the fields of legislative prerogative, but fields within which the lawmaking power may enter and dominate whenever it chooses. This situation results from the fact that the President is the active agent, not of Congress, but of the Nation. As such he performs the duties which the Constitution lays upon him immediately, and as such, also, he executes the laws and regulations adopted by Congress. He is the agent of the people of the United States, deriving all his powers from them and responsible directly to them. In no sense is he the agent of Congress. He obeys and executes the laws of Congress, not because Congress is enthroned in authority over him, but because the Constitution directs him to do so."

"Therefore it follows that in ways short of making laws or disobeying them, the Executive may be under a grave constitutional duty to act for the national protection in situations not covered by the acts of Congress, and in which, even, it may not be said that his action is the direct expression of any particular one of the independent powers which are granted to him specifically by the Constitution. Instances wherein the President has felt and fulfilled such a duty have not been rare in our history, though, being for the public benefit and approved by all, his acts have seldom been challenged in the courts." [771]

Power Denied by Congress

Justice Black's opinion of the Court in *Youngstown Sheet and Tube Co. v. Sawyer* notes that Congress had refused to give the President seizure authority and had authorized other actions, which had not been taken.[772] This statement led him to conclude merely that, since the power claimed did not stem from Congress, it had to be found in the Constitution. But four of the concurring Justices made considerably more of the fact that Congress had considered seizure and had refused to authorize it. Justice Frankfurter stated: "We must . . . put to one side consideration of what powers the President would have had if there had been no legislation whatever bearing on the authority asserted by the seizure, or if the seizure had been only for a short, explicitly temporary period, to be terminated automati-

[771] Quoted in Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 689–91 (1952) (dissenting opinion).

[772] 343 U.S. at 585–87.

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cally unless Congressional approval were given."[773] He then reviewed the proceedings of Congress that attended the enactment of the Taft-Hartley Act and concluded that "Congress has expressed its will to withhold this power [of seizure] from the President as though it had said so in so many words."[774]

Justice Jackson attempted a schematic representation of presidential powers, which "are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." Thus, there are essentially three possibilities. "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 possess in his own right plus all that Congress can delegate. . . . 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. . . . 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 the Congress from acting upon the subject."[775] The seizure in question was placed in the third category "because Congress has not left seizure of private property an open field but has covered it by three statutory policies inconsistent with this seizure." Therefore, "we can sustain the President only by holding that seizure of such strike-bound industries is within his domain and beyond control by Congress."[776] That holding was not possible.

Justice Burton, referring to the Taft-Hartley Act, said that "the most significant feature of that Act is its omission of authority to seize," citing debate on the measure to show that the omission was a conscious decision.[777] Justice Clark relied on *Little v. Barreme*,[778]

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[773] 343 U.S. at 597.

[774] 343 U.S. at 602.

[775] 343 U.S. at 635–38. In Hamdan v. Rumsfeld, 548 U.S. 557, 638 (2006), Justice Kennedy, in a concurring opinion joined by three other Justices, endorsed "the three-part scheme used by Justice Jackson" as "[t]he proper framework for assessing whether Executive actions are authorized." The Court in this case found "that the military commission convened [by the President, in Guantanamo Bay, Cuba] to try Hamdan lacks power to proceed because its structure and procedures violate [the Uniform Code of Military Justice]." Id. at 567. Thus, as Justice Kennedy noted, "the President has acted in a field with a history of congressional participation and regulation." Id. at 638.

[776] 343 U.S. at 639, 640.

[777] 343 U.S. at 657.

[778] 6 U.S. (2 Cr.) 170 (1804).

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in that Congress had laid down specific procedures for the President to follow, which he had declined to follow.[779]

Despite the opinion of the Court, therefore, it seems clear that four of the six Justices in the majority were more moved by the fact that the President had acted in a manner considered and rejected by Congress in a field in which Congress was empowered to establish the rules—rules the President is to see faithfully executed—than with the fact that the President's action was a form of "lawmaking" in a field committed to the province of Congress. The opinion of the Court, therefore, and its doctrinal implications must be considered with care, as it is doubtful that the opinion lays down a constitutional rule. Whatever the implications of the opinions of the individual Justices for the doctrine of "inherent" presidential powers—and they are significant—the implications for the area here under consideration are cloudy and have remained so from the time of the decision.[780]

PRESIDENTIAL IMMUNITY FROM JUDICIAL DIRECTION

In *Mississippi v. Johnson*,[781] in 1867, the Court placed the President beyond the reach of judicial direction, either affirmative or restraining, in the exercise of his powers, whether constitutional or statutory, political or otherwise, save perhaps for what must be a small class of powers that are purely ministerial.[782] An application for an injunction to forbid President Johnson to enforce the Reconstruction Acts, on the ground of their unconstitutionality, was answered by Attorney General Stanberg, who argued, *inter alia*, the absolute immunity of the President from judicial process.[783] The Court refused to permit the filing, using language construable as mean-

[779] 343 U.S. at 662, 663.

[780] In Dames & Moore v. Regan, 453 U.S. 654, 668–69 (1981), the Court recurred to the *Youngstown* analysis for resolution of the presented questions, but one must observe that it did so saying that "the parties and the lower courts . . . have all agreed that much relevant analysis is contained in" *Youngstown*. *See also* id. at 661–62, quoting Justice Jackson's *Youngstown* concurrence, "which both parties agree brings together as much combination of analysis and common sense as there is in this area."

[781] 71 U.S. (4 Wall.) 475 (1867).

[782] The Court declined to express an opinion "whether, in any case, the President of the United States may be required, by the process of this court, to perform a purely ministerial act under a positive law, or may be held amenable, in any case, otherwise than by impeachment for crime." 71 U.S. at 498. *See* Franklin v. Massachusetts, 505 U.S. 788, 825–28 (1992) (Justice Scalia concurring). In NTEU v. Nixon, 492 F.2d 587 (D.C. Cir. 1974), the court held that a writ of mandamus could issue to compel the President to perform a ministerial act, although it said that if any other officer were available to whom the writ could run it should be applied to him.

[783] Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 484–85 (1867) (argument of counsel).

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ing that the President was not reachable by judicial process but which more fully paraded the horrible consequences were the Court to act. First noting the limited meaning of the term "ministerial," the Court observed that "[v]ery different is the duty of the President in the exercise of the power to see that the laws are faithfully executed, and among these laws the acts named in the bill. . . . The duty thus imposed on the President is in no just sense ministerial. It is purely executive and political."

"An attempt on the part of the judicial department of the government to enforce the performance of such duties by the President might be justly characterized, in the language of Chief Justice Marshall, as 'an absurd and excessive extravagance.'"

"It is true that in the instance before us the interposition of the court is not sought to enforce action by the Executive under constitutional legislation, but to restrain such action under legislation alleged to be unconstitutional. But we are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of Executive discretion." . . .

"The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance."

"The impropriety of such interference will be clearly seen upon consideration of its possible consequences."

"Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the government? May not the House of Representatives impeach the President for such refusal? And in that case could this court interfere, in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that court?" [784]

[784] 71 U.S. at 499, 500–01. One must be aware that the case was decided in the context of congressional predominance following the Civil War. The Court's restraint was pronounced when it denied an effort to file a bill of injunction to enjoin enforcement of the same acts directed to cabinet officers. Georgia v. Stanton, 73 U.S. (6

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Rare has been the opportunity for the Court to elucidate its opinion in *Mississippi v. Johnson*, and, in the Watergate tapes case,[785] it held the President amenable to subpoena to produce evidence for use in a criminal case without dealing, except obliquely, with its prior opinion. The President's counsel had argued the President was immune to judicial process, claiming "that the independence of the Executive Branch within its own sphere . . . insulates a President from a judicial subpoena in an ongoing criminal prosecution, and thereby protects confidential Presidential communications."[786] However, the Court held, "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."[787] The primary constitutional duty of the courts "to do justice in criminal prosecutions" was a critical counterbalance to the claim of presidential immunity, and to accept the President's argument would disturb the separation-of-powers function of achieving "a workable government" as well as "gravely impair the role of the courts under Art. III."[788]

Present throughout the Watergate crisis, and unresolved by it, was the question of the amenability of the President to criminal prosecution prior to conviction upon impeachment.[789] It was ar-

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Wall.) 50 (1867). Before and since, however, the device to obtain review of the President's actions has been to bring suit against the subordinate officer charged with carrying out the President's wishes. Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524 (1838); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). Congress has not provided process against the President. In Franklin v. Massachusetts, 505 U.S. 788 (1992), resolving a long-running dispute, the Court held that the President is not subject to the Administrative Procedure Act and his actions, therefore, are not reviewable in suits under the Act. Inasmuch as some agency action, the acts of the Secretary of Commerce in this case, is preliminary to presidential action, the agency action is not "final" for purposes of APA review. Constitutional claims would still be brought, however. *See also*, following *Franklin*, Dalton v. Specter, 511 U.S. 462 (1994).

[785] United States v. Nixon, 418 U.S. 683 (1974).

[786] 418 U.S. at 706.

[787] Id.

[788] 418 U.S. at 706–07. The issue was considered more fully by the lower courts. *In re* Grand Jury Subpoena to Richard M. Nixon, 360 F. Supp. 1, 6–10 (D.D.C. 1973) (Judge Sirica), *aff'd sub nom.*, Nixon v. Sirica, 487 F.2d 700, 708–712 (D.C. Cir. 1973) (en banc) (refusing to find President immune from process). Present throughout was the conflicting assessment of the result of the subpoena of President Jefferson in the *Burr* trial. United States v. Burr, 25 Fed. Cas. 187 (No. 14,694) (C.C.D.Va. 1807). For the history, *see* Freund, *Foreword: On Presidential Privilege, The Supreme Court, 1973 Term*, 88 Harv. L. Rev. 13, 23–30 (1974).

[789] The Impeachment Clause, Article I, § 3, cl. 7, provides that the party convicted upon impeachment shall nonetheless be liable to criminal proceedings. Morris in the Convention, 2 M. Farrand, The Records of the Federal Convention of 1787 500 (rev. ed. 1937), and Hamilton in The Federalist, Nos. 65, 69 (J. Cooke ed. 1961), 442, 463, asserted that criminal trial would follow a successful impeachment.

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gued that the Impeachment Clause necessarily required indictment and trial in a criminal proceeding to follow a successful impeachment and that a President in any event was uniquely immune from indictment, and these arguments were advanced as one ground to deny enforcement of the subpoenas running to the President.[790] Assertion of the same argument by Vice President Agnew was controverted by the government, through the Solicitor General, but, as to the President, it was argued that for a number of constitutional and practical reasons he was not subject to ordinary criminal process.[791]

Finally, most recently, the Court has definitively resolved one of the intertwined issues of presidential accountability. The President is absolutely immune in actions for civil damages for all acts within the "outer perimeter" of his official duties.[792] The Court's close decision was premised on the President's "unique position in the constitutional scheme," that is, it was derived from the Court's inquiry of a "kind of 'public policy' analysis" of the "policies and principles that may be considered implicit in the nature of the President's office in a system structured to achieve effective government under a constitutionally mandated separation of powers."[793] Although the Constitution expressly afforded Members of Congress immunity in matters arising from "speech or debate," and although it was silent with respect to presidential immunity, the Court nonetheless considered such immunity "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history."[794] Although the Court relied in part upon its previous practice of finding immunity for officers, such as judges, as to whom the Constitution is silent, although a long common-law history exists, and in part upon historical evidence, which it admitted was fragmentary and ambiguous,[795] the Court's principal focus was upon the fact that the President was distinguishable from all other executive officials. He is charged with a long list of "supervisory and policy responsi-

[790] Brief for the Respondent, United States v. Nixon, 418 U.S. 683 (1974), 95–122; Nixon v. Sirica, 487 F.2d 700, 756–58 (D.C. Cir. 1973) (en banc) (Judge MacKinnon dissenting). The Court had accepted the President's petition to review the propriety of the grand jury's naming him as an unindicted coconspirator, but it dismissed that petition without reaching the question. United States v. Nixon, 418 U.S. at 687 n.2.

[791] Memorandum for the United States, Application of Spiro T. Agnew, Civil No. 73–965 (D.Md., filed October 5, 1973).

[792] Nixon v. Fitzgerald, 457 U.S. 731 (1982).

[793] 457 U.S. at 748.

[794] 457 U.S. at 749.

[795] 457 U.S. at 750–52 n.31.

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bilities of utmost discretion and sensitivity,"[796] and diversion of his energies by concerns with private lawsuits would "raise unique risks to the effective functioning of government."[797] Moreover, the presidential privilege is rooted in the separation-of-powers doctrine, counseling courts to tread carefully before intruding. Some interests are important enough to require judicial action; "merely private suit[s] for damages based on a President's official acts" do not serve this "broad public interest" necessitating the courts to act.[798] Finally, qualified immunity would not adequately protect the President, because judicial inquiry into a functional analysis of his actions would bring with it the evil immunity was to prevent; absolute immunity was required.[799]

Unofficial Conduct

In *Clinton v. Jones*,[800] the Court, in a case of first impression, held that the President did not have qualified immunity from civil suit for conduct alleged to have taken place prior to his election, and therefore denied the President's request to delay both the trial and discovery. The Court held that its precedents affording the President immunity from suit for his official conduct—primarily on the basis that he should be enabled to perform his duties effectively without fear that a particular decision might give rise to personal liability—were inapplicable in this kind of case. Moreover, the separation-of-powers doctrine did not require a stay of all private actions against the President. Separation of powers is preserved by guarding against the encroachment or aggrandizement of one of the coequal branches of the government at the expense of another. However, a federal trial court tending to a civil suit in which the President is a party performs only its judicial function, not a function of another branch. No decision by a trial court could curtail the scope of the President's powers. The trial court, the Supreme Court observed, had sufficient powers to accommodate the President's schedule and his workload, so as not to impede the President's performance of his duties. Finally, the Court stated its belief that allowing such suits to proceed would not generate a large volume of politi-

[796] 457 U.S. at 750.

[797] 457 U.S. at 751.

[798] 457 U.S. at 754.

[799] 457 U.S. at 755–57. Justices White, Brennan, Marshall, and Blackmun dissented. The Court reserved decision whether Congress could expressly create a damages action against the President and abrogate the immunity, id. at 748–49 n.27, thus appearing to disclaim that the decision is mandated by the Constitution; Chief Justice Burger disagreed with the implication of this footnote, id. at 763–64 n.7 (concurring opinion), and the dissenters noted their agreement on this point with the Chief Justice. Id. at 770 & n.4.

[800] 520 U.S. 681 (1997).

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cally motivated harassing and frivolous litigation. Congress has the power, the Court advised, if it should think necessary to legislate, to afford the President protection.[801]

The President's Subordinates

While the courts may be unable to compel the President to act or to prevent him from acting, his acts, when performed, are in proper cases subject to judicial review and disallowance. Typically, the subordinates through whom he acts may be sued, in a form of legal fiction, to enjoin the commission of acts which might lead to irreparable damage[802] or to compel by writ of mandamus the performance of a duty definitely required by law.[803] Such suits are usually brought in the United States District Court for the District of Columbia.[804] In suits under the common law, a subordinate executive officer may be held personally liable in damages for any act done in excess of authority,[805] although immunity exists for anything, even malicious wrongdoing, done in the course of his duties.[806]

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[801] The Court observed at one point that it doubted that defending the suit would much preoccupy the President, that his time and energy would not be much taken up by it. "If the past is any indicator, it seems unlikely that a deluge of such litigation will ever engulf the Presidency." 520 U.S. at 702.

[802] *E.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (suit to enjoin Secretary of Commerce to return steel mills seized on President's order); Dames & Moore v. Regan, 453 U.S. 654 (1981) (suit against Secretary of Treasury to nullify presidential orders on Iranian assets). *See also* Noble v. Union River Logging Railroad, 147 U.S. 165 (1893); Philadelphia Co. v. Stimson, 223 U.S. 605 (1912).

[803] *E.g.*, Marbury v. Madison, 5 U.S. (1 Cr.) 137 (1803) (suit against Secretary of State to compel delivery of commissions of office); Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524 (1838) (suit against Postmaster General to compel payment of money owed under act of Congress); Decatur v. Paulding, 39 U.S. (14 Pet.) 497 (1840) (suit to compel Secretary of Navy to pay a pension).

[804] This was originally on the theory that the Supreme Court of the District of Columbia had inherited, via the common law of Maryland, the jurisdiction of the King's Bench "over inferior jurisdictions and officers." Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524, 614, 620–21 (1838). Congress has now authorized federal district courts outside the District of Columbia also to entertain such suits. 76 Stat. 744 (1962), 28 U.S.C. § 1361.

[805] *E.g.*, Little v. Barreme, 6 U.S. (2 Cr.) 170 (1804); Bates v. Clark, 95 U.S. 204 (1877); United States v. Lee, 106 U.S. 196 (1882); Virginia Coupon Cases (Poindexter v. Greenhow), 114 U.S. 269 (1885); Belknap v. Schild, 161 U.S. 10 (1896).

[806] Spalding v. Vilas, 161 U.S. 483 (1896); Barr v. Matteo, 360 U.S. 564 (1959). *See* Westfall v. Erwin, 484 U.S. 292 (1988) (action must be discretionary in nature as well as being within the scope of employment, before federal official is entitled to absolute immunity). Following the *Westfall* decision, Congress enacted the Federal Employees Liability Reform and Tort Compensation Act of 1988 (the Westfall Act), which authorized the Attorney General to certify that an employee was acting within the scope of his office or employment at the time of the incident out of which a suit arose; upon certification, the employee is dismissed from the action, and the United States is substituted, the Federal Tort Claims Act (FTCA) then governing the action, which means that sometimes the action must be dismissed against the govern-

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Different rules prevail when such an official is sued for a "constitutional tort" for wrongs allegedly in violation of our basic charter,[807] although the Court has hinted that in some "sensitive" areas officials acting in the "outer perimeter" of their duties may be accorded an absolute immunity from liability.[808] Jurisdiction to reach such officers for acts for which they can be held responsible must be under the general "federal question" jurisdictional statute, which, as recently amended, requires no jurisdictional amount.[809]

COMMISSIONING OFFICERS

The power to commission officers, as applied in practice, does not mean that the President is under constitutional obligation to commission those whose appointments have reached that stage, but merely that it is he and no one else who has the power to commission them, and that he may do so at his discretion. Under the doctrine of *Marbury v. Madison*, the sealing and delivery of the commission is a purely ministerial act which has been lodged by statute with the Secretary of State, and which may be compelled by mandamus unless the appointee has been in the meantime validly re-

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ment because the FTCA has not waived sovereign immunity. United States v. Smith, 499 U.S. 160 (1991) (Westfall Act bars suit against federal employee even when an exception in the FTCA bars suit against the government). Cognizant of the temptation of the government to immunize both itself and its employee, the Court in Gutierrez de Martinez v. Lamagno, 515 U.S. 417 (1995), held that the Attorney General's certification is subject to judicial review.

[807] An implied cause of action against officers accused of constitutional violations was recognized in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). In Butz v. Economou, 438 U.S. 478 (1978), a *Bivens* action, the Court distinguished between common-law torts and constitutional torts and denied high federal officials, including cabinet secretaries, absolute immunity, in favor of the qualified immunity previously accorded high state officials under 42 U.S.C. § 1983. In Harlow v. Fitzgerald, 457 U.S. 800 (1982), the Court denied presidential aides derivative absolute presidential immunity, but it modified the rules of qualified immunity, making it more difficult to hold such aides, other federal officials, and indeed state and local officials, liable for constitutional torts. In Mitchell v. Forsyth, 472 U.S. 511 (1985), the Court extended qualified immunity to the Attorney General for authorizing a warrantless wiretap in a case involving domestic national security. Although the Court later held such warrantless wiretaps violated the Fourth Amendment, at the time of the Attorney General's authorization this interpretation was not "clearly established," and the *Harlow* immunity protected officials exercising discretion on such open questions. *See also* Anderson v. Creighton, 483 U.S. 635 (1987) (in an exceedingly opaque opinion, the Court extended similar qualified immunity to FBI agents who conducted a warrantless search).

[808] Harlow v. Fitzgerald, 457 U.S. 800, 812 (1982).

[809] *See* 28 U.S.C. § 1331. On deleting the jurisdictional amount, *see* Pub. L. 94–574, 90 Stat. 2721 (1976), and Pub. L. 96–486, 94 Stat. 2369 (1980). If such suits are brought in state courts, they can be removed to federal district courts. 28 U.S.C. § 1442(a).

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moved.[810] By an opinion of the Attorney General many years later, however, the President, even after he has signed a commission, still has a *locus poenitentiae* and may withhold it; nor is the appointee in office till he has this commission.[811] This is probably the correct doctrine.[812]

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.

IMPEACHMENT

The impeachment provisions of the Constitution[813] were derived from English practice, but there are important differences. In England, impeachment had a far broader scope. While impeachment was a device to remove from office one who abused his office or misbehaved but who was protected by the Crown, it could be used against anyone—office holder or not—and was penal in nature, with possible penalties of fines, imprisonment, or even death.[814] By contrast, the American impeachment process is remedial, not pe-

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[810] Marbury v. Madison, 5 U.S. (1 Cr.) 137, 157–58, 173 (1803). The doctrine applies to presidential appointments regardless of whether Senate confirmation is required.

[811] 12 Ops. Atty. Gen. 306 (1867).

[812] For various reasons, Marbury got neither commission nor office. The case assumes, in fact, the necessity of possession of his commission by the appointee.

[813] Impeachment is the subject of several other provisions of the Constitution. Article I, § 2, cl. 5, gives to the House of Representatives "the sole power of impeachment." Article I, § 3, cl. 6, gives to the Senate "the sole power to try all impeachments," requires that Senators be under oath or affirmation when sitting for that purpose, stipulates that the Chief Justice of the United States is to preside when the President of the United States is tried, and provides for conviction on the vote of two-thirds of the members present. Article I, § 3, cl. 7, limits the judgment after impeachment to removal from office and disqualification from future federal office holding, but it allows criminal trial following conviction upon impeachment. Article II, § 2, cl. 1, deprives the President of the power to grant pardons or reprieves in cases of impeachment. Article III,§ 2, cl. 3, excepts impeachment cases from the jury trial requirement.

Although the word "impeachment" is sometimes used to refer to the process by which any member of the House may "impeach" an officer of the United States under a question of constitutional privilege (see 3 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §§ 2398 (impeachment of President John Tyler by a member) and 2469 (impeachment of Judge John Swayne by a member) (1907), the word as used in Article II, § 4 refers to impeachment by vote of the House, the consequence of which is that the Senate may then try the impeached officer.

[814] 1 W. HOLDSWORTH, HISTORY OF ENGLISH COURTS 379–85 (7th ed. 1956); Clarke, *The Origin of Impeachment*, in OXFORD ESSAYS IN MEDIEVAL HISTORY, PRESENTED TO HERBERT EDWARD SALTER 164 (1934); Alex Simpson, Jr., *Federal Impeachments*, 64 U. PA. L. REV. 651 (1916).

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nal: it is limited to office holders, and judgments are limited to no more than removal from office and disqualification to hold future office.

Impeachment was a device that figured from the first in the plans proposed to the Convention; discussion addressed such questions as what body was to try impeachments and what grounds were to be stated as warranting impeachment.[815] The attention of the Framers was for the most part fixed on the President and his removal, and the results of this narrow frame of reference are reflected in the questions unresolved by the language of the Constitution.

Persons Subject to Impeachment

During the debate in the First Congress on the "removal" controversy, it was contended by some members that impeachment was the exclusive way to remove any officer of the government from his post,[816] but Madison and others contended that this position was destructive of sound governmental practice,[817] and the view did not prevail. Impeachment, said Madison, was to be used to reach a bad officer sheltered by the President and to remove him "even against the will of the President; so that the declaration in the Constitution was intended as a supplementary security for the good behavior of the public officers."[818] While the language of section 4 covers any "civil officer" in the executive branch,[819] and covers judges as well,[820] it excludes military officers,[821] and the precedent was early established that it does not apply to members of Congress.[822]

Judges.—Article III, section 1 specifically provides judges with "good behavior" tenure, but the Constitution nowhere expressly vests the power to remove upon bad behavior, and it has been assumed that judges are made subject to the impeachment power through

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[815] Alex Simpson, Jr., *Federal Impeachments*, 64 U. Pa. L. Rev.at 653–67 (1916).

[816] 1 Annals of Cong. 457, 473, 536 (1789).

[817] Id. at 375, 480, 496–97, 562.

[818] Id. at 372.

[819] The term "civil officers of the United States" is not defined in the Constitution, although there may be a parallel with "officers of the United States" under the Appointments Clause, Art. II, § 2, cl. 2, and it may be assumed that not all executive branch employees are "officers." For precedents relating to the definition, see 3 Hinds' Precedents of the House of Representatives of the United States §§ 1785, 2022, 2486, 2493, and 2515 (1907). *See also* Ronald D. Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 Ky. L. Rev. 707, 715–18 (1988).

[820] See the following section on Judges.

[821] 3 W. Willoughby, supra at 1448.

[822] This point was established by a vote of the Senate holding a plea to this effect good in the impeachment trial of Senator William Blount in 1797. 3 Hinds' Precedents of the House of Representatives of the United States §§ 2294–2318 (1907); F. Wharton, State Trials of the United States During the Administrations of Washington and Adams 200–321 (1849); Buckner F. Melton, Jr., The First Impeachment: The Constitution's Framers and the Case of Senator William Blount (1998).

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being labeled "civil officers."[823] The records in the Convention make this a plausible though not necessary interpretation.[824] And, in fact, eleven of the fifteen impeachments reaching trial in the Senate have been directed at federal judges, and all seven of those convicted in impeachment trials have been judges.[825] So settled apparently is

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[823] *See* National Comm'n on Judicial Discipline & Removal, Report of the National Comm'n on Judicial Discipline & Removal 9–11 (1993). The Commission was charged by Congress with investigating and studying problems and issues relating to discipline and removal of federal judges, to evaluate the advisability of developing alternatives to impeachment, and to report to the three Government Branches. Pub. L. 101–650, 104 Stat. 5124. The report and the research papers produced for it contain a wealth of information on the subject.

[824] For practically the entire Convention, the plans presented and adopted provided that the Supreme Court was to try impeachments. 1 M. Farrand, *supra*, at 22, 244, 223–24, 231; 2 id. at 186. On August 27, it was successfully moved that the provision in the draft of the Committee on Detail giving the Supreme Court jurisdiction of trials of impeachment be postponed, id. at 430, 431, which was one of the issues committed to the Committee of Eleven. Id. at 481. That Committee reported the provision giving the Senate power to try all impeachments, id. at 497, which the Convention thereafter approved. Id. at 551. It may be assumed that so long as trial was in the Supreme Court, the Framers did not intend that the Justices, at least, were to be subject to the process.

The Committee of Five on August 20 was directed to report "a mode for trying the supreme Judges in cases of impeachment," id. at 337, and it returned a provision making Supreme Court Justices triable by the Senate on impeachment by the House. Id. at 367. Consideration of this report was postponed. On August 27, it was proposed that all federal judges should be removable by the executive upon the application of both houses of Congress, but the motion was rejected. Id. at 428–29. The matter was not resolved by the report of the Committee on Style, which left in the "good behavior" tenure but contained nothing about removal. Id. at 575. Therefore, unless judges were included in the term "civil officers," which had been added without comment on September 8 to the impeachment clause, id. at 552, they were not made removable.

[825] The following judges faced impeachment trials in the Senate: John Pickering, District Judge, 1803 (convicted), 3 Hinds' Precedents of the House of Representatives of the United States §§ 2319–2341 (1907); Justice Samuel Chase, 1804 (acquitted), id. at §§ 2342–2363; James H. Peck, District Judge, 1830 (acquitted), id. at 2364–2384; West H. Humphreys, District Judge, 1862 (convicted), id. at §§ 2385–2397; Charles Swayne, District Judge, 1904 (acquitted), id. at §§ 2469–2485; Robert W. Archbald, Judge of Commerce Court, 1912 (convicted), 6 Cannon's Precedents of the House of Representatives of the United States §§ 498–512 (1936); Harold Louderback, District Judge, 1932 (acquitted), id. at §§ 513–524; Halsted L. Ritter, District Judge, 1936 (convicted), *Proceedings of the United States Senate in the Trial of Impeachment of Halsted L. Ritter*, S. Doc. No. 200, 74th Congress, 2d Sess. (1936); Harry Claiborne, District Judge, 1986 (convicted), *Proceedings of the United States Senate in the Impeachment Trial of Harry E. Claiborne*, S. Doc. 99–48, 99th Cong., 2d Sess. (1986); Alcee Hastings, District Judge, 1989 (convicted), *Proceedings of the United States Senate in the Impeachment Trial of Alcee L. Hastings*, S. Doc. 101–18, 101st Cong., 1st Sess. (1989); Walter Nixon, District Judge, 1989 (convicted), *Proceedings of the United States Senate in the Impeachment Trial of Walter L. Nixon, Jr.*, S. Doc. 101–22, 101st Cong., 1st Sess. (1989). In addition, impeachment proceedings against district judge George W. English were dismissed in 1926 following his resignation six days prior to the scheduled start of his Senate trial. 68 Cong. Rec. 344, 348 (1926). *See also* ten Broek, *Partisan Politics and Federal Judgeship Impeachments Since 1903*, 23 Minn. L. Rev. 185, 194–96 (1939). The others who have faced impeachment trials in the Senate are Senator William Blount (acquitted); Secretary of War Wil-

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this interpretation that the major arguments, scholarly and political, have concerned the question of whether judges, as well as others, are subject to impeachment for conduct that does not constitute an indictable offense, and the question of whether impeachment is the exclusive removal device for judges.[826]

Judgment—Removal and Disqualification

Article II, section 4 provides that officers impeached and convicted "shall be removed from office"; Article I, section 3, clause 7 provides further that "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." These restrictions on judgment, both of which relate to capacity to hold public office, emphasize the non-penal nature of impeachment, and help to distinguish American impeachment from the open-ended English practice under which criminal penalties could be imposed.[827]

The plain language of section 4 seems to require removal from office upon conviction, and in fact the Senate has removed those

liam Belknap (acquitted); President Andrew Johnson (acquitted); and President William J. Clinton (acquitted). For summary and discussion of the earlier cases, *see* CONSTITUTIONAL ASPECTS OF WATERGATE: DOCUMENTS AND MATERIALS (A. Boyan ed., 1976); and Paul S. Fenton, *The Scope of the Impeachment Power*, 65 NW. U. L. REV. 719 (1970) (appendix), *reprinted in* Staff of the House Committee on the Judiciary, 105th Cong., Impeachment: Selected Materials 1818 (Comm. Print. 1998).

[826] It has been argued that the impeachment clause of Article II is a limitation on the power of Congress to remove judges and that Article III is a limitation on the executive power of removal, but that it is open to Congress to define "good behavior" and establish a mechanism by which judges may be judicially removed. Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 MICH. L. REV. 485, 723, 870 (1930). Proposals to this effect were considered in Congress in the 1930s and 1940s and revived in the late 1960s, stimulating much controversy in scholarly circles. *E.g.*, Kramer & Barron, *The Constitutionality of Removal and Mandatory Retirement Procedures for the Federal Judiciary: The Meaning of "During Good Behavior,"* 35 GEO. WASH. L. REV. 455 (1967); Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 SUP. CT. REV. 135; Berger, *Impeachment of Judges and "Good Behavior" Tenure*, 79 YALE L. J. 1475 (1970). Congress did in the Judicial Conduct and Disability Act of 1980, Pub. L. 96–458, 94 Stat. 2035, 28 U.S.C. § 1 note, 331, 332, 372, 604, provide for disciplinary powers over federal judges, but it specifically denied any removal power. The National Commission, supra at 17–26, found impeachment to be the exclusive means of removal and recommended against adoption of an alternative. Congress repealed 28 U.S.C. § 372 in the Judicial Improvements Act of 2002, Pub. L. 107–273 and created a new chapter (28 U.S.C. §§ 351–64) dealing with judicial discipline short of removal for Article III judges, and authorizing discipline including removal for magistrate judges. The issue was obliquely before the Court as a result of a judicial conference action disciplining a district judge, but it was not reached, Chandler v. Judicial Council, 382 U.S. 1003 (1966); 398 U.S. 74 (1970), except by Justices Black and Douglas in dissent, who argued that impeachment was the exclusive power.

[827] *See* discussion supra of the differences between English and American impeachment.

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persons whom it has convicted. In the 1936 trial of Judge Ritter, the Senate determined that removal is automatic upon conviction, and does not require a separate vote.[828] This practice has continued. Because conviction requires a two-thirds vote, this means that removal can occur only as a result of a two-thirds vote. Unlike removal, disqualification from office is a discretionary judgment, and there is no explicit constitutional linkage to the two-thirds vote on conviction. Although an argument can be made that disqualification should nonetheless require a two-thirds vote,[829] the Senate has determined that disqualification may be accomplished by a simple majority vote.[830]

Impeachable Offenses

The Convention came to its choice of words describing the grounds for impeachment after much deliberation, but the phrasing derived directly from the English practice. On June 2, 1787, the framers adopted a provision that the executive should "be removable on impeachment & conviction of mal-practice or neglect of duty."[831] The Committee of Detail reported as grounds "Treason (or) Bribery or Corruption."[832] And the Committee of Eleven reduced the phrase to "Treason, or bribery."[833] On September 8, Mason objected to this limitation, observing that the term did not encompass all the conduct that should be grounds for removal; he therefore proposed to add "or maladministration" following "bribery." Upon Madison's objection that "[s]o vague a term will be equivalent to a tenure during pleasure of the Senate," Mason suggested "other high crimes & misdemeanors," which was adopted without further recorded debate.[834]

The phrase "high crimes and misdemeanors" in the context of impeachments has an ancient English history, first turning up in

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[828] 3 Deschler's Precedents of the United States House of Representatives ch. 14, § 13.9.

[829] *See* Michael J. Gerhardt, The Federal Impeachment Process: A Constitutional and Historical Analysis 77–79 (2d ed. 2000).

[830] The Senate imposed disqualification twice, on Judges Humphreys and Archbald. In the Humphreys trial the Senate determined that the issues of removal and disqualification are divisible, 3 Hinds' Precedents of the House of Representatives § 2397 (1907), and in the Archbald trial the Senate imposed judgment of disqualification by vote of 39 to 35. 6 Cannon's Precedents of the House of Representatives § 512 (1936). During the 1936 trial of Judge Ritter, a parliamentary inquiry as to whether a two-thirds vote or a simple majority vote is required for disqualification was answered by reference to the simple majority vote in the Archbald trial. 3 Deschler's Precedents ch. 14, § 13.10. The Senate then rejected disqualification of Judge Ritter by vote of 76–0. 80 Cong. Rec. 5607 (1936).

[831] 1 M. Farrand, *supra*, at 88.

[832] 2 M. Farrand at 172, 186.

[833] Id. at 499.

[834] Id. at 550.

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the impeachment of the Earl of Suffolk in 1388.[835] Treason is defined in the Constitution.[836] Bribery is not, but it had a clear common law meaning and is now well covered by statute.[837] "High crimes and misdemeanors," however, is an undefined and indefinite phrase, which, in England, had comprehended conduct not constituting indictable offenses.[838] Use of the word "other" to link "high crimes and misdemeanors" with "treason" and "bribery" is arguably indicative of the types and seriousness of conduct encompassed by "high crimes and misdemeanors." Similarly, the word "high" apparently carried with it a restrictive meaning.[839]

Debate prior to adoption of the phrase[840] and comments thereafter in the ratifying conventions[841] were to the effect that the President (all the debate was in terms of the President) should be removable by impeachment for commissions or omissions in office which were not criminally cognizable. And in the First Congress's "removal" debate, Madison maintained that the wanton dismissal of meritorious officers would be an act of maladministration which would render the President subject to impeachment.[842] Other comments, especially in the ratifying conventions, tend toward a limitation of the term to criminal, perhaps gross criminal, behavior.[843] The scope of the power has been the subject of continuing debate.[844]

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[835] 1 T. Howell, State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Present Times 90, 91 (1809); A. Simpson, Treatise on Federal Impeachments 86 (1916).

[836] Article III, § 3.

[837] The use of a technical term known in the common law would require resort to the common law for its meaning, United States v. Palmer, 16 U.S. (3 Wheat.) 610, 630 (1818) (per Chief Justice Marshall); United States v. Jones, 26 Fed. Cas. 653, 655 (No. 15,494) (C.C.Pa. 1813) (per Justice Washington), leaving aside the issue of the cognizability of common law crimes in federal courts. *See* Act of April 30, 1790, § 21, 1 Stat. 117.

[838] Berger, *Impeachment for "High Crimes and Misdemeanors,"* 44 S. Cal. L. Rev. 395, 400–415 (1971).

[839] The extradition provision reported by the Committee on Detail had provided for the delivering up of persons charged with "Treason[,] Felony or high Misdemeanors." 2 M. Farrand, *supra*, at 174. But the phrase "high Misdemeanors" was replaced with "other crimes" "in order to comprehend all proper cases: it being doubtful whether 'high misdemeanor' had not a technical meaning too limited." Id. at 443.

[840] *See* id. at 64–69, 550–51.

[841] *E.g.*, 3 J. Elliot, Debates in the Several State Conventions on Adoption of the Constitution 341, 498, 500, 528 (1836) (Madison); 4 id. at 276, 281 ©. C. Pinckney: Rutledge): 3 id. at 516 (Corbin): 4 id. at 263 (Pendleton). *Cf.* The Federalist, No. 65 (J. Cooke ed. 1961), 439–45 (Hamilton).

[842] 1 Annals of Cong. 372–73 (1789).

[843] 4 J. Elliot, supra at 126 (Iredell); 2 id. at 478 (Wilson). For a good account of the debate at the Constitutional Convention and in the ratifying conventions, see Alex Simpson, Jr., *Federal Impeachments*, 64 U. Pa. L. Rev. 651, 676–95 (1916)

[844] *See generally* Charles L. Black, Impeachment: A Handbook (1974); Raoul Berger, Impeachment: The Constitutional Problems (1973); Michael J. Gerhardt, The Federal Impeachment Process: A Constitutional and Historical Analysis (2d ed. 2000); Peter Charles

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The Chase Impeachment

The issue of the scope of impeachable offenses was early joined as a consequence of the Jefferson Administration's efforts to rid itself of some of the Federalist judges who were propagandizing the country through grand jury charges and other means. The theory of extreme latitude was enunciated by Senator Giles of Virginia during the impeachment trial of Justice Chase. "The power of impeachment was given without limitation to the House of Representatives; and the power of trying impeachments was given equally without limitation to the Senate. . . . A trial and removal of a judge upon impeachment need not imply any criminality or corruption in him . . . [but] nothing more than a declaration of Congress to this effect: You hold dangerous opinions, and if you are suffered to carry them into effect you will work the destruction of the nation. We want your offices, for the purpose of giving them to men who will fill them better."[845] Chase's counsel responded that to be impeachable, conduct must constitute an indictable offense.[846] The issue was left unresolved, Chase's acquittal owing more to the political divisions in the Senate than to the merits of the arguments.[847]

Other Impeachments of Judges

The 1803 impeachment and conviction of Judge Pickering as well as several successful 20th century impeachments of judges appear to establish that judges may be removed for seriously questionable conduct that does not violate a criminal statute.[848] The articles on

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Hoffer and N.E.H. Hull, Impeachment in America, 1635–1805 (1984); John R. Labovitz, Presidential Impeachment (1978); 3 Deschler's Precedents of the House of Representatives, ch. 14, § 3 "Grounds for Impeachments," H.R. Doc. No. 661, 94th Cong. 2d Sess. (1977); Charles Doyle, Impeachment Grounds: A Collection of Selected Materials, CRS Report for Congress 98–882A (1998); and Elizabeth B. Bazan, Impeachment: An Overview of Constitutional Provisions, Procedure, and Practice, CRS Report for Congress 98–186A (1998).

[845] 1 J. Q. Adams, Memoirs 322 (1874). *See also* 3 Hinds' Precedents of the House of Representatives of the United States §§ 2356–2362 (1907).

[846] 3 Hinds' Precedents at § 2361.

[847] The full record is Trial of Samuel Chase, An Associate Justice of the Supreme Court of the United States (S. Smith & T. Lloyd eds., 1805). For analysis of the trial and acquittal, *see* Lillich, *The Chase Impeachment*, 4 Amer. J. Legal Hist. 49 (1960); and William H. Rehnquist, Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson (1992). The proceedings against Presidents Tyler and Johnson and the investigation of Justice Douglas are also generally viewed as precedents that restrict the use of impeachment as a political weapon.

[848] Some have argued that the constitutional requirement of "good behavior" and "high crimes and misdemeanors" conjoin to allow the removal of judges who have engaged in non-criminal conduct inconsistent with their responsibilities, or that the standard of "good behavior"—not that of "high crimes and misdemeanors"—should govern impeachment of judges. See 3 Deschler's Precedents of the House of Representatives, ch. 14, §§ 3.10 and 3.13, H.R. Doc. No. 661, 94th Cong. 2d Sess. (1977) (summarizing arguments made during the impeachment investigation of Justice William

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which Judge Pickering was impeached and convicted focused on allegations of mishandling a case before him and appearing on the bench in an intemperate and intoxicated state.[849] Both Judge Archbald and Judge Ritter were convicted on articles of impeachment that charged questionable conduct probably not amounting to indictable offenses.[850]

Of the three most recent judicial impeachments, Judges Claiborne and Nixon had previously been convicted of criminal offenses, and Judge Hastings had been acquitted of criminal charges after trial. The impeachment articles against Judge Hastings charged both the conduct for which he had been indicted and trial conduct. A separate question was what effect the court acquittal should have had.[851]

Although the language of the Constitution makes no such distinction, some argue that, because of the different nature of their responsibilities and because of different tenure, different standards should govern impeachment of judges and impeachment of executive officers.[852]

The Johnson Impeachment

President Andrew Johnson was impeached by the House on the ground that he had violated the "Tenure of Office" Act [853] by dismissing a Cabinet chief. The theory of the proponents of impeachment was succinctly put by Representative Butler, one of the managers of the impeachment in the Senate trial. "An impeachable high crime or misdemeanor is one in its nature or consequences subversive of

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O. Douglas in 1970). For a critique of these views, see Paul S. Fenton, *The Scope of the Impeachment Power*, 65 Nw. U. L. Rev.719 (1970), *reprinted in* Staff of the House Committee on the Judiciary, 105th Cong., Impeachment: Selected Materials 1801–03 (Comm. Print. 1998).

[849] *See* 3 Hinds' Precedents of the House of Representatives §§ 2319–2341 (1907)

[850] Ten Broek, *Partisan Politics and Federal Judgeship Impeachments Since 1903*, 23 Minn. L. Rev. 185 (1939). Judge Ritter was acquitted on six of the seven articles brought against him, but convicted on a seventh charge that summarized the first six articles and charged that the consequence of that conduct was "to bring his court into scandal and disrepute, to the prejudice of said court and public confidence in the Federal judiciary, and to render him unfit to continue to serve as such judge." This seventh charge was challenged unsuccessfully on a point of order, but was ruled to be a separate charge of "general misbehavior."

[851] Warren S. Grimes, *Hundred-Ton-Gun Control: Preserving Impeachment as the Exclusive Removal Mechanism for Federal Judges*, 38 UCLA L. Rev. 1209, 1229–1233 (1991).

[852] *See, e.g.*, Frank O. Bowman, III and Stephen L. Sepinuck, *"High Crimes and Misdemeanors": Defining the Constitutional Limits on Presidential Impeachment*, 72 S. Cal. L. Rev. 1517, 1534–38 (1999). Congressional practice may reflect this view. Judges Ritter and Claiborne were convicted on charges of income tax evasion, while the House Judiciary Committee voted not to press such charges against President Nixon. So too, the convictions of Judges Hastings and Nixon on perjury charges may be contrasted with President Clinton's acquittal on a perjury charge.

[853] Act of March 2, 1867, ch. 154, 14 Stat. 430.

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some fundamental or essential principle of government or highly prejudicial to the public interest, and this may consist of a violation of the Constitution, of law, of an official oath, or of duty, by an act committed or omitted, or, without violating a positive law, by the abuse of discretionary powers from improper motives or for an improper purpose."[854] Former Justice Benjamin Curtis controverted this argument, saying: "My first position is, that when the Constitution speaks of 'treason, bribery, and other high crimes and misdemeanors,' it refers to, and includes only, high criminal offences against the United States, made so by some law of the United States existing when the acts complained of were done, and I say that this is plainly to be inferred from each and every provision of the Constitution on the subject of impeachment."[855] The President's acquittal by a single vote was no doubt not the result of a choice between the two theories, but the result may be said to have placed a gloss on the impeachment language approximating the theory of the defense.[856]

The Nixon Impeachment Proceedings

For the first time in more than a hundred years,[857] Congress moved to impeach the President of the United States, a move forestalled only by the resignation of President Nixon on August 9, 1974.[858] Three articles of impeachment were approved by the House Judi-

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[854] 1 TRIAL OF ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES ON IMPEACHMENT 88, 147 (1868).

[855] Id. at 409.

[856] For an account of the Johnson proceedings, see WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON (1992).

[857] The only occasion before the Johnson impeachment when impeachment of a President had come to a House vote was the House's rejection in 1843 of an impeachment resolution against President John Tyler. The resolution, which listed nine separate counts and which was proposed by a member rather than by a committee, was defeated by vote of 127 to 84. *See* 3 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 2398 (1907); CONG. GLOBE, 27th Cong. 3d Sess. 144–46 (1843).

[858] The President's resignation did not necessarily require dismissal of the impeachment charges. Judgment upon conviction can include disqualification as well as removal. Art. I, § 3, cl. 7. Precedent from the 1876 impeachment of Secretary of War William Belknap, who had resigned prior to his impeachment by the House, suggests that impeachment can proceed even after a resignation. *See* 3 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES, § 2445 (1907). The Belknap precedent may be somewhat weakened, however, by the fact that his acquittal was based in part on the views of some Senators that impeachment should not be applied to someone no longer in office, id. at § 2467, although the Senate had earlier rejected (by majority vote of 37–29) a resolution disclaiming jurisdiction, and had adopted by vote of 35–22 a resolution affirming that result See id. at § 2007 for an extensive summary of the Senate's consideration of the issue. *See also* id, § 2317 (it had been conceded during the 1797 proceedings against Senator William Blount, who had been sequestered from his seat in the Senate, that an impeached officer could not escape punishment by resignation).

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ciary Committee, charging obstruction of the investigation of the "Watergate" burglary inquiry, misuse of law enforcement and intelligence agencies for political purposes, and refusal to comply with the Judiciary Committee's subpoenas.[859] Following President Nixon's resignation, the House adopted a resolution to "accept" the House Judiciary Committee's report recommending impeachment,[860] but there was no vote adopting the articles and thereby impeaching the former President, and consequently there was no Senate trial.

In the course of the proceedings, there was strenuous argument about the nature of an impeachable offense, whether only criminally-indictable actions qualify for that status or whether the definition is broader.[861] The three articles approved by the Judiciary Committee were all premised on abuse of power, although the first article, involving obstruction of justice, also involved a criminal violation.[862] A second issue arose that apparently had not been considered before: whether persons subject to impeachment could be indicted and tried prior to impeachment and conviction or whether indictment could occur only after removal from office. In fact, the argument was really directed only to the status of the President, as it was argued that he embodied the Executive Branch itself, while lesser executive officials and judges were not of that calibre.[863] That

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[859] H.R. Rep. No. 93–1305.

[860] 120 Cong. Rec. 29361–62 (1974).

[861] Analyses of the issue from different points of view are contained in Impeachment Inquiry Staff, House Judiciary Committee, 93d Cong., *Constitutional Grounds for Presidential Impeachments*, (Comm. Print 1974); J. St. Clair, et al., Legal Staff of the President, *Analysis of the Constitutional Standard for Presidential Impeachment* (Washington: 1974); Office of Legal Counsel, Department of Justice, *Legal Aspects of Impeachment: An Overview, and Appendix I* (Washington: 1974). *See also* Raoul Berger, Impeachment: The Constitutional Problems (1973), which preceded the instant controversy; and Michael J. Gerhardt, The Federal Impeachment Process: A Constitutional and Historical Analysis 103–06 (2d ed. 2000).

[862] Indeed, the Committee voted not to recommend impeachment for alleged income tax fraud, an essentially private crime not amounting to an abuse of power.

[863] The question first arose during the grand jury investigation of former Vice President Agnew, during which the United States, through the Solicitor General, argued that the Vice President and all civil officers were not immune from the judicial process and could be indicted prior to removal, but that the President for a number of constitutional and practical reasons was not subject to the ordinary criminal process. *Memorandum for the United States*, Application of Spiro T. Agnew, Civil No. 73–965 (D.Md., filed October 5, 1973). Courts have held that a federal judge was indictable and could be convicted prior to removal from office. United States v. Claiborne, 727 F.2d 842, 847–848 (9th Cir.), *cert. denied*, 469 U.S. 829 (1984); United States v. Hastings, 681 F.2d 706, 710–711 (11th Cir.), *cert. denied*, 459 U.S. 1203 (1983); United States v. Isaacs, 493 F.2d 1124 (7th Cir.), *cert. denied sub nom*. Kerner v. United States, 417 U.S. 976 (1974).

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issue also remained unsettled, the Supreme Court declining to provide guidance in the course of deciding a case on executive privilege.[864]

The Clinton Impeachment

President Clinton was impeached by the House, but acquitted by vote of the Senate. The House approved two articles of impeachment against the President stemming from the President's response to a sexual harassment civil lawsuit and to a subsequent grand jury investigation instigated by an Independent Counsel. The first article charged the President with committing perjury in testifying before the grand jury about his sexual relationship with a White House intern and his efforts to cover it up;[865] the second article charged the President with obstruction of justice relating both to the civil lawsuit and to the grand jury proceedings.[866] Two additional articles of impeachment had been approved by the House Judiciary Committee but were rejected by the full House.[867] The Senate trial resulted in acquittal on both articles.[868]

A number of legal issues surfaced during congressional consideration of the Clinton impeachment.[869] Although the congressional

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[864] The grand jury had named the President as an unindicted coconspirator in the case of United States v. Mitchell, *et al.*, No. 74–110 (D.D.C. 1974), apparently in the belief that he was not actually indictable while in office. The Supreme Court agreed to hear the President's claim that the grand jury acted outside its authority, but finding that resolution of the issue was unnecessary to decision of the executive privilege claim it dismissed as improvidently granted the President's petition for *certiorari*. United States v. Nixon, 418 U.S. 683, 687 n.2 (1974).

[865] Approved by a vote of 228–206. 144 Cong. Rec. H12,040 (daily ed. Dec. 19, 1998).

[866] Approved by a vote of 221–212. 144 Cong. Rec. H12,041 (daily ed. Dec. 19, 1998).

[867] An article charging the President with perjury in the civil sexual harassment suit brought against him was defeated by a vote of 229–205; another article charging him with abuse of office by false responses to the House Judiciary Committee's written request for factual admissions was defeated by vote of 285 to 148. 144 Cong. Rec. H12,042 (daily ed. Dec. 19, 1998).

[868] The vote for acquittal was 55 to 45 on the grand jury perjury charge, and 50 to 50 on the obstruction of justice charge. 145 Cong. Rec. S1458–59 (daily ed. Feb. 12, 1999).

[869] For analysis and different perspectives on the Clinton impeachment, see *Background and History of Impeachment: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong., 2d Sess. (1998); and Staff of the House Comm. on the Judiciary, 105th Cong., Impeachment: Selected Materials (Comm. Print 1998). *See also* Michael J. Gerhardt, The Federal Impeachment Process: A Constitutional and Historical Analysis (2d ed. 2000); Richard A. Posner, An Affair of State: The Investigation, Impeachment, and Trial of President Clinton (1999); Laurence H. Tribe, 1 American Constitutional Law 181–202 (3d ed. 2000); and Michael Stokes Paulsen, Impeachment (Update), 3 Encyclopedia of the American Constitution 1340–43 (2d ed. 2000). Much of the documentation can be found in Impeachment of William Jefferson Clinton, President of the United States, H.R. Rep. No. 105–380 (1998); Staff of the House Comm. on the Judiciary, 105th Cong., 2d Sess., Impeachment Inquiry:

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votes on the different impeachment articles were not neatly divided between legal and factual matters and therefore cannot be said to have resolved the legal issues,[870] several aspects of the proceedings merit consideration for possible precedential significance. The House's acceptance of the grand jury perjury charge and its rejection of the civil deposition perjury charge may reflect a belief among some members that perjury in the criminal context is more serious than perjury in the civil context. Acceptance of the obstruction of justice charge may also have been based in part on an assessment of the seriousness of the charge. On the other hand, the House's rejection of the article relating to President Clinton's alleged non-cooperation with the Judiciary Committee's interrogatories can be contrasted with the House's 1974 "acceptance" of the Judiciary Committee's report recommending[871] a similar type of charge against President Nixon, and raises the issue of whether the different circumstances (*e.g.*, the relative importance of the information sought, and the nature and extent of the responses) may account for the different approaches. So too, the acquittal of President Clinton on the perjury charge can be contrasted with convictions of Judges Hastings and Nixon on perjury charges, and presents the issue of whether different standards should govern Presidents and judges. The role of the Independent Counsel in complying with a statutory mandate to refer to the House "any substantial and credible information . . . that may constitute grounds for an impeachment" occasioned commentary.[872] The relationship of censure to impeachment was another issue that arose. Some members advocated censure of President Clinton as an alternative to impeachment, as an alternative to trial, or as a post-trial means for those Senators who voted to acquit to register their disapproval of the President's conduct, but there was no vote on censure.[873]

William Jefferson Clinton, President of the United States; Consideration of Articles of Impeachment (Comm. Print 1998); and Impeachment of President William Jefferson Clinton: The Evidentiary Record Pursuant to S. Res. 16, S. Doc. No. 106–3 (1999) (21-volume set).

[870] Following the trial, a number of Senators placed statements in the record explaining their votes. *See* 145 Cong. Rec. S1462–1637 (daily ed. Feb. 12, 1999).

[871] Note that the Judiciary Committee deleted from the article a charge based on President Clinton's allegedly frivolous assertions of executive privilege in response to subpoenas from the Office of Independent Counsel. Similarly, the Committee in 1974 distinguished between President Nixon's refusal to respond to congressional subpoenas and his refusal to respond to those of the special prosecutor; only the refusal to provide information to the impeachment inquiry was cited as an impeachable abuse of power.

[872] The requirement was contained in the Ethics in Government Act, since lapsed, and codified at 28 U.S.C. § 595(c). For commentary, see Ken Gormley, *Impeachment and the Independent Counsel: A Dysfunctional Union*, 51 Stan. L. Rev. 309 (1999).

[873] For analysis of the issue, see Jack Maskell, *Censure of the President by Congress*, CRS Report for Congress 98–843.

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Finally, the Clinton impeachment raised the issue of what the threshold is for "high crimes and misdemeanors." While the Nixon charges were premised on the assumption that an abuse of power need not be a criminal offense to be an impeachable offense,[874] the Clinton proceedings—or at least the perjury charge—raised the issue of whether criminal offenses that do not rise to the level of an abuse of power may nonetheless be impeachable offenses.[875] The House's vote to impeach President Clinton arguably amounted to an affirmative answer,[876] but the Senate's acquittal leaves the matter somewhat unsettled.[877] There appeared to be broad consensus in the Senate that some private crimes not involving an abuse of power (*e.g.*, murder for personal reasons) are so outrageous as to constitute grounds for removal,[878] but there was no consensus on where the threshold for outrageousness lies, and there was no consensus that the perjury and obstruction of justice with which Presi-

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[874] According to one scholar, the three articles of impeachment against President Nixon epitomized the "paradigm" for presidential impeachment—abuse of power in which there is "not only serious injury to the constitutional order but also a nexus between the misconduct of an impeachable official and the official's formal duties." Michael J. Gerhardt, *The Lessons of Impeachment History*, 67 GEO. WASH. L. REV. 603, 617 (1999).

[875] Although committing perjury in a judicial proceeding—regardless of purpose or subject matter—impedes the proper functioning of the judiciary both by frustrating the search for truth and by breeding disrespect for courts, and consequently may be viewed as an (impeachable) "offense against the state" (see 145 CONG. REC. S1556 (daily ed. Feb. 12, 1999) (statement of Sen. Thompson)), such perjury arguably constitutes an abuse of power only if the purpose or subject matter of the perjury relates to official duties or to aggrandizement of power. Note that one of the charges against President Clinton recommended by the House Judiciary Committee but rejected by the full House—providing false responses to the Committee's interrogatories—was squarely premised on an abuse of power.

[876] The House vote can be viewed as rejecting the views of a number of law professors, presented in a letter to the Speaker entered into the Congressional Record, arguing that high crimes and misdemeanors must involve "grossly derelict exercise of official power." 144 CONG. REC. H9649 (daily ed. Oct. 6, 1998).

[877] Some Senators who explained their acquittal votes rejected the idea that the particular crimes that President Clinton was alleged to have committed amounted to impeachable offenses (*see*, *e.g.*, 145 CONG. REC. S1560 (daily ed. Feb. 12, 1999) (statement of Sen. Moynihan); id. at 1601 (statement of Sen. Lieberman)), some alleged failure of proof (*see*, *e.g.*, id. at 1539 (statement of Sen. Specter); id. at 1581 (statement of Sen. Akaka)), and some cited both grounds (*see*, *e.g.*, id. at S1578–91 (statement of Sen. Leahy), and id. at S1627 (statement of Sen. Hollings)).

[878] *See*, *e.g.*, 145 CONG. REC. S1525 (daily ed. Feb. 12, 1999) (statement of Sen. Cleland) (accepting the proposition that murder and other crimes would qualify for impeachment and removal, but contending that "the current case does not reach the necessary high standard"); id. at S1533 (statement of Sen. Kyl) (impeachment cannot be limited to wrongful official conduct, but must include murder); and id. at S1592 (statement of Sen. Leahy) (acknowledging that "heinous" crimes such as murder would warrant removal). This idea, incidentally, was not new; one Senator in the First Congress apparently assumed that impeachment would be the first recourse if a President were to commit a murder. IX DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789–1790, THE DIARY OF WILLIAM MACLAY AND OTHER NOTES ON SENATE DEBATES 168 (Kenneth R. Bowling and Helen E. Veit, eds. 1988).

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dent Clinton was charged were so outrageous as to impair his ability to govern, and hence to justify removal.[879] Similarly, the almost evenly divided Senate vote to acquit meant that there was no consensus that removal was justified on the alternative theory that the alleged perjury and obstruction of justice so damaged the judiciary as to constitute an impeachable "offense against the state."[880]

Judicial Review of Impeachments

It was long assumed that no judicial review of the impeachment process was possible, that impeachment presents a true "political question" case, i.e., that the Constitution's conferral on the Senate of the "sole" power to try impeachments is a textually demonstrable constitutional commitment of trial procedures to the Senate to decide without court review. That assumption was not contested until very recently, when Judges Nixon and Hastings challenged their Senate convictions.[881]

In the Judge Nixon case, the Court held that a claim to judicial review of an issue arising in an impeachment trial in the Senate presents a nonjusticiable "political question."[882] Specifically, the Court rejected a claim that the Senate had departed from the meaning of the word "try" in the impeachment clause by relying on a special committee to take evidence, including testimony. But the Court's

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[879] One commentator, analogizing to the impeachment and conviction of Judge Claiborne for income tax evasion, viewed the basic issue in the Clinton case as whether his alleged misconduct was so outrageous as to "effectively rob[ ] him of the requisite moral authority to continue to function as President." Gerhardt, supra n.817, at 619. Under this view, the Claiborne conviction established that income tax evasion by a judge, although unrelated to official duties, reveals the judge as lacking the unquestioned integrity and moral authority necessary to preside over criminal trials, especially those involving tax evasion.

[880] Senator Thompson propounded this theory in arguing that "abuse of power" is too narrow a category to encompass all forms of subversion of government that should be grounds for removal. 145 Cong. Rec. S1556 (daily ed. Feb. 12, 1999).

[881] Both judges challenged the use under Rule XI of a trial committee to hear the evidence and report to the full Senate, which would then carry out the trial. The rule was adopted in the aftermath of an embarrassingly sparse attendance at the trial of Judge Louderback in 1935. National Comm. Report, *supra* at 50–53, 54–57; Grimes, *supra* at 1233–37. In the Nixon case, the lower courts held the issue to be non-justiciable (Nixon v. United States, 744 F. Supp. 9 (D.D.C. 1990), *aff'd*, 938 F.2d 239 (D.C. Cir. 1991), but a year later a district court initially ruled in Judge Hastings' favor. Hastings v. United States, 802 F. Supp. 490 (D.D.C. 1992), vacated, 988 F.2d 1280 (D.C. Cir. 1993).

[882] Nixon v. United States, 506 U.S. 224 (1993). Nixon at the time of his conviction and removal from office was a federal district judge in Mississippi.

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"political question" analysis has broader application, and appears to place the whole impeachment process off limits to judicial review.[883]

[883] The Court listed "reasons why the Judiciary, and the Supreme Court in particular, were not chosen to have any role in impeachments," and elsewhere agreed with the appeals court that "opening the door of judicial review to the procedures used by the Senate in trying impeachments would expose the political life of the country to months, or perhaps years, of chaos." 506 U.S. at 234, 236.