

ARTICLE II
EXECUTIVE BRANCH

ARTICLE II
EXECUTIVE BRANCH

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ARTICLE II—EXECUTIVE BRANCH

ArtII.1 Overview of Article II, Executive Branch

Article II of the U.S. Constitution establishes the Executive Branch of the federal government. The Executive Vesting Clause, in Section 1, Clause 1, provides that the federal executive power is vested in the President. Section 3 of Article II further requires the President to “take Care that the Laws be faithfully executed.”¹ The executive power thus consists of the authority to enforce laws and to “appoint the agents charged with the duty of such enforcement.”² The President also has distinct authority over foreign affairs, and “alone has the power to speak or listen as a representative of the nation.”³ As a general matter, the Supreme Court has recognized that the Constitution vests the President not only with the authorities expressly delineated therein, but also with certain implied authorities,⁴ such as the ability to supervise (and generally to remove) executive officials⁵ and the power to recognize foreign governments.⁶ At the same time, the Court has said that by granting the President the power of faithfully *executing* the laws, the Constitution “refutes the idea” that the President was intended “to be a lawmaker.”⁷ Nonetheless, the Court has recognized that officials appointed by the President—even those located within the Executive Branch—may exercise regulatory or adjudicative powers that are quasi-legislative or quasi-judicial.⁸ Broadly, the Court has recognized that Executive Officers exercise authority to enforce and administer the laws, including rulemaking, administrative determinations, and the filing of lawsuits.⁹

The remaining provisions of Article II’s Section 1 primarily outline the election of the President, including the establishment of the electoral college. Relatedly, Section 1 sets out the qualifications of the President, the oath of office, and compensation. Section 1 also creates succession provisions in the event of a President’s removal or other inability to act, although the relatively sparse language in Clause 6 was later supplemented by the Twenty-Fifth Amendment and the Presidential Succession Act.¹⁰

Sections 2 and 3 define specific presidential powers and duties. Section 2, Clause 1 describes exclusive presidential powers: namely, the Commander in Chief authority, the power to require written opinions from the heads of executive departments, and the pardon power. Clause 2 defines the powers that the President shares with Congress, outlining the treaty-making power and the appointment power. Clause 3 expands on appointments by granting the President the power to unilaterally make temporary appointments during Senate recess. Section 3 requires the President to give Congress information on the state of the union. It also authorizes the President to recommend legislative measures and in extraordinary circumstances convene or adjourn Congress. Section 3 further grants the President the power

¹ U.S. CONST. art. II, § 3.

² *Springer v. Government of Philippine Islands*, 277 U.S. 189, 202 (1928).

³ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).

⁴ See generally ArtII.S1.C1.1 Overview of Executive Vesting Clause.

⁵ *Seila Law LLC v. Consumer Fin. Prot. Bureau*, No. 19-7, slip op. at 22 (U.S. June 29, 2020).

⁶ *Zivotofsky v. Kerry*, 576 U.S. 1, 17 (2015). *Cf., e.g., United States ex rel. Knauff v. Snaughnessy*, 338 U.S. 537, 543 (1950) (stating that the right to exclude aliens “is inherent in the executive power to control the foreign affairs of the nation,” and when Congress legislates in this area, it “is implementing an inherent executive power”).

⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

⁸ See *Buckley v. Valeo*, 424 U.S. 1, 132–33 (1976).

⁹ See *id.* at 138–41.

¹⁰ U.S. CONST. amend. XXV; 3 U.S.C. § 19.

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ArtII.1

Overview of Article II, Executive Branch

to receive ambassadors and other public ministers. And as previously mentioned, Section 3 contains the Take Care Clause, requiring the President to ensure that the laws are faithfully executed.

Section 4 provides that the President—and all other “civil Officers of the United States”—may be removed from office if impeached and convicted on charges of “Treason, Bribery, or other high Crimes and Misdemeanors.”¹¹ Article I contains further provisions bearing on impeachment procedures and judgments.¹²

As discussed elsewhere, Article I also contains some provisions bearing on presidential authority, perhaps most notably the President’s authority to approve or veto legislation.¹³

SECTION 1—FUNCTION AND SELECTION

CLAUSE 1—PRESIDENT’S ROLE

ArtII.S1.C1.1 Overview of Executive Vesting Clause

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

Under Article II, Section 1, Clause 1, the executive power is vested in a single person—the President of the United States. The nature and extent of the executive power is less clear.¹ Article II identifies exclusive powers of the President, including the President’s authority as Commander in Chief and the power to pardon;² powers the President shares with the Senate, including the appointments and treaty-making powers;³ and the President’s duties, the most important of which is the duty to “take Care that the Laws be faithfully executed.”⁴ Moreover, the Supreme Court has recognized that “[b]ecause no single person could fulfill that responsibility,” the Take Care Clause implicitly provides the President with authority to supervise subordinate officers assisting with this responsibility.⁵ Likewise, Article I provides the President a role in the legislative process, including authority to veto legislation, subject to potential override by a two-thirds vote of both Houses of Congress.⁶

It is less clear from the text of the Constitution whether the executive powers expressly identified in the Constitution are exclusive or illustrative. Whereas the Article I Legislative Vesting Clause provides that “All legislative Powers *herein granted* shall be vested in a Congress,”⁷ thereby distinguishing the powers granted by states from those they retained, the

¹¹ U.S. CONST. art. II, § 4.

¹² *Id.* art. I, § 2, cl. 5; *id.* art. I, § 3, cls. 6–7.

¹³ See ArtI.S7.C2.1 Overview of Presidential Approval or Veto of Bills; ArtI.S7.C3.1 Presentation of Senate or House Resolutions.

¹ U.S. CONST. art. II, § 1, cl. 1.

² *Id.* art. II, § 2, cl. 1. See ArtII.S2.C1.1.1 Historical Background on Commander in Chief Clause.

³ *Id.* art. II, § 2, cl. 2. See ArtII.S2.C1.3.1 Overview of Pardon Power.

⁴ *Id.* art. II, § 3. See ArtII.S3.3.1 Overview of Take Care Clause.

⁵ *Seila Law LLC v. Consumer Financial Protection Board*, No. 19-7, slip op. at 2 (U.S. June 29, 2020). See also *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492–93 (2010).

⁶ U.S. CONST. art. I, § 7, cl. 2. See ArtI.S7.C2.1 Overview of Presidential Approval or Veto of Bills.

⁷ *Id.* art. I, § 1, cl. 1 (emphasis added). See ArtI.S1.1 Overview of Legislative Vesting Clause.

ARTICLE II—EXECUTIVE BRANCH
Sec. 1, Cl. 1—Function and Selection, President’s Role

ArtII.S1.C1.2
Historical Background on Executive Vesting Clause

Article II Executive Vesting Clause does not limit the “executive Power” in any way.⁸ Consequently, since the earliest days of the Republic, the parameters of the executive power and, in particular, what implicit or residual powers such executive power encompasses have been the subject of debate.

ArtII.S1.C1.2 Historical Background on Executive Vesting Clause

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

The nature of the presidency ranked among the most important issues the Framers considered at the Constitutional Convention.¹ Reacting to how royal governors had exercised their powers, the framers of the state constitutions had generally created weak executives and strong legislatures. Likewise, the Articles of Confederation vested the national government’s powers in a unicameral congress.² Experience during the period during which the Articles of Confederation had been in effect, however, had demonstrated to the delegates that an unfettered legislature, like an uncurbed executive, posed disadvantages, and that a legislature could not confer many of the advantages of a reasonably strong executive.³ The Framers considered several ways to organize the Executive Branch, including plural executives, selection of the executive or executives by Congress, and whether the executive should be advised by a council.

The constitution of the State of New York, which provided for a Governor who was largely independent of the state legislature, offered one possible template for the Framers. Under New York’s constitution, the Governor was directly elected by the people for three-year terms and eligible for re-election indefinitely. Because the state legislature did not select the Governor, the Governor was less beholden to it. Except with regard to appointments and vetoes, the Governor’s decisions were unencumbered by a council. The Governor was also in charge of the militia, possessed the power to pardon, and was responsible for ensuring that the laws were faithfully executed.⁴

The Virginia Plan offered an alternative structure to that of the New York constitution. Under the Virginia Plan, the legislature would select the executive but would not be able to change the executive’s salary during the executive’s term in office. In addition, the executive would be ineligible for re-election, thereby reducing any incentive the executive might have to be overly deferential to the legislature. The Virginia Plan also provided for a council of revision, which included the executive, that could negate national and state legislation. The Virginia Plan provided that the executive power was the power to “execute the national laws” and to

⁸ *Id.* art. II, § 1, cl. 1.

¹ The background and the action of the Convention is comprehensively examined in CHARLES THACH, *THE CREATION OF THE PRESIDENCY 1775–1789* (1923). See also JOHN HART, *THE AMERICAN PRESIDENCY IN ACTION 1789* (1948).

² 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1407 (1833) (“Under the confederation there was no national executive. The whole powers of the national government were vested in a congress, consisting of a single body; and that body was authorized to appoint a committee of the states, composed of one delegate from every state, to sit in the recess, and to delegate to them such of their own powers, not requiring the consent of nine states, as nine states should consent to. This want of a national executive was deemed a fatal defect of the confederation.”).

³ CHARLES THACH, *THE CREATION OF THE PRESIDENCY 1775–1789*, at 1–64 (Amagi Books 2007) (1923).

⁴ Alexander Hamilton observed the similarities and differences between the President and the New York Governor. *THE FEDERALIST* No. 69 (Alexander Hamilton). See *New York Constitution of 1777, Articles XVII–XIX*, reprinted in 5 FRANCIS THORPE, *THE FEDERAL AND STATE CONSTITUTIONS* (1909).

ARTICLE II—EXECUTIVE BRANCH
Sec. 1, Cl. 1—Function and Selection, President’s Role

ArtII.S1.C1.2

Historical Background on Executive Vesting Clause

“enjoy the Executive rights vested in Congress by the Confederation,” but it left open whether the executive would be a single or plural position.⁵

When the executive portion of the Virginia Plan was considered on June 1, 1787, James Wilson of Pennsylvania moved that the executive should consist of a single person.⁶ In the course of his remarks, Wilson argued for a strong executive, directly elected by the people so that the executive would not be dependent on Congress or state legislatures. Wilson further proposed that the executive be eligible for reelection and granted power to negate legislation with the concurrence of a council of revision.⁷ The vote on Wilson’s motion was postponed until the method of selection, term, and mode of removal of, and powers to be conferred on the executive had been considered and subsequently approved.⁸

Ultimately, the Framers decided on a single executive and did not provide for an executive council, which would have participated in exercising the executive’s veto, appointments, and treaty-making powers.⁹ Instead, the Framers granted the Senate power to “advise and consent” on appointments and treaties¹⁰ and gave the President power to require the “principal Officer in each of the executive Departments” to provide their “Opinion, in writing” on “any Subject relating to the Duties of their respective Offices.”¹¹

The Committee of Detail reported draft language providing that the executive be designated the “President of the United States,”¹² which the Convention accepted without discussion.¹³ The same clause also provided that the President’s title be “His Excellency,”¹⁴ and, while this language was also accepted without discussion,¹⁵ the Committee of Style and Arrangement subsequently omitted it from the final text without providing any reason.¹⁶

ArtII.S1.C1.3 Early Perspectives on Executive Power

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

While the Article I Legislative Vesting Clause provides that “All legislative Powers *herein granted* shall be vested in a Congress,”¹ thereby distinguishing the legislative powers that the states had granted to the National Government from those the states retained, the Article II Executive Vesting Clause refers only to a general “executive Power,” which is vested in a single

⁵ For discussion of the plans offered at the Constitutional Convention and the resulting debate, see CHARLES THACH, *THE CREATION OF THE PRESIDENCY 1775–1789*, at 65–91 (Amagi Books 2007) (1923). For the Virginia Plan, see 1 *RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 20–23 (Max Farrand ed., 1911).

⁶ 1 *RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 65 (Max Farrand ed., 1911).

⁷ *Id.* at 65–73.

⁸ *Id.* at 93.

⁹ The last proposal for a council was voted down on September 7, 1787. 2 *id.* at 542.

¹⁰ See ArtII.S2.C2.1.1 Overview of President’s Treaty-Making Power; ArtII.S2.C2.3.1 Overview of Appointments Clause.

¹¹ See ArtII.S2.C1.2 Executive Departments.

¹² 1 *RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 185 (Max Farrand ed., 1911).

¹³ *Id.* at 401.

¹⁴ *Id.* at 185.

¹⁵ *Id.* at 401.

¹⁶ *Id.* at 597.

¹ U.S. CONST. art. I, § 1, cl. 1 (emphasis added).

ARTICLE II—EXECUTIVE BRANCH
Sec. 1, Cl. 1—Function and Selection, President’s Role

ArtII.S1.C1.3
Early Perspectives on Executive Power

person—the President.² While the Constitution expressly identifies specific powers and duties that belong to the President—for example, the power to pardon and the duty to take care that the laws be faithfully enforced—the Founders differed on whether those powers were exclusive or illustrative.

The First Congress considered the parameters of the executive power and, in particular, the President’s power to remove Executive Branch officers absent the consent of the Senate, the acquiescence of which is necessary for such Executive Branch officers’ appointment.³ Known as the Debate of 1789, the First Congress considered the President’s removal power while it was establishing the Department of State.⁴ As one commentator has noted: “Congress tacitly recognized the existence of an unrestrained presidential removal power from 1789 to 1867, and it developed into one of [the President’s] most effective instruments for control of the executive branch.”⁵ While Congress subsequently passed laws limiting the President’s ability to remove Executive Branch officers,⁶ the Supreme Court did not address such a law until 1926 in *Myers v. United States*.⁷

Similar questions arose with respect to the President’s authority over foreign affairs.⁸ After President George Washington issued a proclamation declaring the United States neutral when France and Great Britain went to war in 1793, Alexander Hamilton and James Madison took competing positions on whether President Washington had exceeded his constitutional authority. Arguing that Article II does not enumerate all executive powers,⁹ Hamilton wrote:

² *Id.* art. II, § 1, cl. 1.

³ See DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801*, at 36–41 (1997) (discussing James Madison’s proposal for a department of foreign affairs). In the *Federalist No. 77*, Alexander Hamilton commented that the Senate’s consent was necessary for the President to remove an Executive Officer, stating: “The consent of [the Senate] would be necessary to displace as well as to appoint. . . . Where a man in any station had given satisfactory evidence of his fitness for it, a new President would be restrained from attempting a change in favor of a person more agreeable to him, by the apprehension that a discountenance of the Senate might frustrate the attempt and bring some degree of discredit upon himself.” *THE FEDERALIST No. 77* (Alexander Hamilton). While Congress expressly referred to the President’s removal power in some legislation, e.g., Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 87; Act of May 15, 1820, ch. 102, 3 Stat. 582, the Supreme Court in *Myers v. United States* observed that Congress adopted these provisions “to show conformity to the legislative decision of 1789.” *Myers v. United States*, 272 U.S. 52, 146 (1926).

⁴ For discussion on the Debate of 1789, see ArtII.S2.C2.3.15.2 Decision of 1789 and Removals in Early Republic. See also CHARLES THACH, *THE CREATION OF THE PRESIDENCY 1775–1789*, at 124–49 (Amagi Books 2007) (1923).

⁵ C. HERMAN PRITCHETT, *CONSTITUTIONAL LAW OF THE FEDERAL SYSTEM* 293 (1984). See also Act of May 15, 1820 (providing for removal of officers “at pleasure” of the President).

⁶ Tenure of Office Act of 1867, ch. 154, 14 Stat. 430 (Mar. 2, 1867) (requiring, among other things, for the President to have the Senate’s consent to remove the Secretary of War and certain other department heads); Act of July 12, 1876, ch. 179, 19 Stat. 80, 81 (providing that “Postmasters of the first, second and third classes shall be appointed 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.”). See also *United States v. Perkins*, 116 U.S. 483 (1886). In *Perkins*, the Court addressed whether the Secretary of the Navy could discharge a naval cadet-engineer at will notwithstanding that the Act of August 5, 1882 provided that naval officers could not be discharged except pursuant to a court-martial. Ruling for the naval cadet-engineer, the Court stated: “The head of a Department has no constitutional prerogative of appointments to offices independently of the legislation of Congress, and by such legislation he must be governed, not only in making appointments but in all that is incident thereto.” *Id.* at 485. The Court, however, noted that it was not addressing a situation where an officer was appointed by the President with the advice and consent of the Senate. *Id.* (“Whether or not Congress can restrict the power of removal incident to the power of appointment of those officers who are appointed by the President by and with the advice of the Senate under the authority of the Constitution (article 2, section 2) does not arise in this case and need not be considered.”).

⁷ The Court discussed the President’s removal power in dicta in *Ex parte Hennen*, 38 U.S. (39 Pet.) 230 (1839) (recognizing authority of a District Judge to remove a clerk of the court). For further discussion of the removal power, see ArtII.S2.C2.3.15.1 Overview of Removal of Executive Branch Officers .

⁸ See DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801*, at 174–82 (1997).

⁹ *Id.* See also CHARLES THOMAS, *AMERICAN NEUTRALITY IN 1793: A STUDY IN CABINET GOVERNMENT* (1931).

ARTICLE II—EXECUTIVE BRANCH
Sec. 1, Cl. 1—Function and Selection, President’s Role

ArtII.S1.C1.3
Early Perspectives on Executive Power

The enumeration [of executive powers in the Constitution] 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.¹⁰

Hamilton continued: “The general doctrine of our Constitution then is, that the *executive power* of the nation is vested in the President; subject only to the *exceptions* and *qualifications*, which are expressed in the instrument.”¹¹ Rejecting Hamilton’s view that the Constitution granted the President such broad powers, James Madison argued that, if executive powers were unfettered, “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.”¹²

Unsurprisingly, Presidents have tended to interpret the Executive Vesting Clause’s provision of executive power expansively. For example, President Thomas Jefferson justified the Louisiana Purchase based on implied executive power.¹³

ArtII.S1.C1.4 The President’s Powers, Myers, and Seila

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

In 1926, Chief Justice and former President William Taft addressed the President’s removal power in *Myers v. United States*, holding that the executive power includes the power to remove Executive Branch officers.¹ *Myers* concerned a law that required the Senate’s advice and consent for the President to remove a Postmaster from office. In a 6-3 decision for the President, Chief Justice Taft reasoned that the removal power was necessary for the President to fulfill his constitutional duty to enforce the laws.² Absent power to hold subordinate Executive Branch officers accountable by removing them if necessary, the President would not be able to fulfill his obligation to “take Care that the Laws be faithfully executed.”³ Holding the removal power to be constitutionally vested in the President,⁴ the *Myers* Court observed that powers vested in Congress must be strictly construed in favor of powers retained by the President.⁵

¹⁰ 7 WORKS OF ALEXANDER HAMILTON 76, 80–81 (J. C. Hamilton ed., 1851).

¹¹ *Id.* (emphasis added).

¹² 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 621 (J.B. Lippincott & Co., 1865).

¹³ For discussion of the constitutionality of the Louisiana Purchase, see EVERETT BROWN, THE CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE, 1803–1812 (1920). For discussion of how the Jeffersonians and Federalists approached executive powers, see LEONARD WHITE, THE JEFFERSONIANS: A STUDY IN ADMINISTRATIVE HISTORY 1801–1829 (1951); LEONARD WHITE, THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY (1948).

¹ 272 U.S. 52 (1926). See EDWARD CORWIN, THE PRESIDENT’S REMOVAL POWER UNDER THE CONSTITUTION, in 4 SELECTED ESSAYS ON CONSTITUTIONAL LAW 1467 (1938).

² *Id.* art. II, § 3. See ArtII.S3.3.1 Overview of Take Care Clause.

³ *Id.* art. II, § 3. See ArtII.S3.3.1 Overview of Take Care Clause.

⁴ CHARLES THACH, THE CREATION OF THE PRESIDENCY, 1775–1789, at 92–123 (Amagi Books 2007) (1923).

⁵ *Myers v. United States*, 272 U.S. 52, 163–64 (1926).

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In the 1935 decision *Humphrey’s Executor v. United States*⁶ and the 1988 decision *Morrison v. Olson*, the Supreme Court⁷ upheld limits on the President’s removal power. However, the Court subsequently emphasized that those cases were limited to specific circumstances.⁸ In *Humphrey’s Executor*, the Court held that Congress could constitutionally provide that commissioners on the Federal Trade Commission (FTC) could only be removed for cause. The Court reasoned that “good-cause tenure” was permissible for the principal officers of independent agencies that performed a “quasi-legislative and quasi-judicial” role because “Congress could require [an agency] ‘to act . . . independently of executive control.’”⁹

In *Morrison*, the Court examined the Ethics in Government Act of 1978, which provided for independent counsels to investigate and prosecute certain high-ranking government officials.¹⁰ Under the independent counsel statute, the Attorney General notifies a special Article III court if he believes there are sufficient grounds to investigate a senior government official and the special court appoints a special counsel to investigate and, if warranted, prosecute. The Attorney General can only remove the special counsel for cause as prescribed in the statute.¹¹ Consequently, the independent counsel is generally free from Executive Branch supervision. After assessing how the law impacted executive power and whether Congress had attempted to aggrandize itself or enlarge judicial power at the executive’s expense, the Court upheld for-cause removal for independent counsels.¹²

Notwithstanding *Humphrey’s Executor* and *Morrison*, the Court later clarified that “the President’s removal power is the rule rather than the exception.”¹³ In its 2010 decision, *Free Enterprise Fund v. Public Accounting Oversight Board*, the Court held unconstitutional a statute that structured a government office to restrict the President’s ability to remove a principal officer and also restrict the principal officer’s ability to remove an inferior officer who “determines the policy and enforces the laws of the United States.”¹⁴ The Court explained: “The President cannot ‘take Care that the Laws be faithfully executed’ if he cannot oversee the faithfulness of the officers who execute them. Here the President cannot remove an officer who enjoys more than one level of good-cause protection, even if the President determines that the officer is neglecting his duties or discharging them improperly.”¹⁵

In its 2020 decision in *Seila Law LLC v. Consumer Financial Protection Board (CFPB)*, the Court rejected the proposition that *Humphrey’s Executor*¹⁶ and *Morrison*¹⁷ “establish a general

⁶ 295 U.S. 602 (1935). See also *Wiener v. United States*, 357 U.S. 349 (1958).

⁷ 487 U.S. 654, 685–93 (1988). *Morrison* concerned the Title VI of the Ethics of Government Act of 1978, which provided for the appointment of independent counsels who the Attorney General could only remove for “good cause.” See also *United States v. Perkins*, 116 U.S. 483 (1886).

⁸ *Seila Law LLC v. Consumer Financial Protection Bureau*, No. 19-7, slip op. at 7 (U.S. June 29, 2020).

⁹ *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 493 (2010) (quoting *Humphrey’s Executor*, 295 U.S. 602, 627–29 (1935)).

¹⁰ See 28 U.S.C. §§ 591–599.

¹¹ Pub. L. No. 95-521, title VI, 92 Stat. 1867, as amended by Pub. L. No. 97-409, 96 Stat. 2039, and Pub. L. No. 100-191, 101 Stat. 1293, 28 U.S.C. §§ 49, 591 et seq.

¹² *Morrison v. Olson*, 487 U.S. at 693–96.

¹³ *Seila Law LLC v. CFPB*, No. 19-7, slip op. at 27 (U.S. June 29, 2020). For discussion, on the President’s removal authority in the twenty-first century, see ArtII.S2.C2.3.15.7 Twenty-First Century Cases on Removal.

¹⁴ *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 484 (2010).

¹⁵ *Id.*

¹⁶ 295 U.S. 602 (1935).

¹⁷ 487 U.S. 654 (1988). While acknowledging that the independent counsel statute restricted a constitutionally delegated function (law enforcement), the *Morrison* Court upheld the statute, using a flexible analysis that

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rule that Congress may impose ‘modest’ restrictions on the President’s removal power.”¹⁸ Examining the CFPB, the Court noted that it had a single Director, who was insulated from the President’s removal power and “accountable to no one.”¹⁹ Describing the President’s role in the constitutional structure as the link that makes the administrative state answerable to the people, Chief Justice John Roberts, writing for the majority, stated:

The resulting constitutional strategy is straightforward: divide power everywhere except for the Presidency, and render the President directly accountable to the people through regular elections. In that scheme, individual executive officials will still wield significant authority, but that authority remains subject to the ongoing supervision and control of the elected President. Through the President’s oversight, “the chain of dependence [is] preserved,” so that “the lowest officers, the middle grade, and the highest” all “depend, as they ought, on the President, and the President on the community.”²⁰

Finding the CFPB Director’s protection from removal to be unconstitutional, the Court stated: “In our constitutional system, the executive power belongs to the President, and that power generally includes the ability to supervise and remove the agents who wield executive power in his stead.”²¹

ArtII.S1.C1.5 The President’s Powers and Youngstown Framework

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

In *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court considered the relationship between the President’s powers and the powers Congress can exercise.¹ In a concurring opinion, Justice Robert Jackson set forth a framework that the Court has subsequently adopted to assess claims of presidential power.

Youngstown concerned an executive order that President Harry S. Truman issued on April 8, 1952, directing the Secretary of Commerce to seize and operate the Nation’s steel industry in order to avert a nationwide strike that he believed would jeopardize national defense during the Korean War.² In the executive order, President Truman 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 order to steel executives and the President reported his action to Congress, conceding Congress’s power to supersede the order,

emphasized that neither the Legislative nor the Judicial Branch had aggrandized its power and that the statute, while infringing on executive power, did not impermissibly interfere with the President’s constitutionally assigned functions. *Id.*

¹⁸ *Seila Law LLC v. CFPB*, No. 19-7, slip op. at 26 (U.S. June 29, 2020).

¹⁹ *Id.* at 23.

²⁰ *Id.* (quoting 1 Annals of Cong. 499) (James Madison).

²¹ *Id.*

¹ 343 U.S. 579 (1952). For additional discussion on *Youngstown*, see MAEVA MARCUS, *TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER* (1977).

² E.O. 10340, 17 Fed. Reg. 3139 (1952).

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which Congress did not do.³ The steel companies sued, a federal district court enjoined the seizure,⁴ and the Supreme Court agreed to hear the case prior to a decision by the court of appeals.⁵

By a 6-3 vote, the Court held the seizure unconstitutional. In the controlling opinion, Justice Hugo Black rejected the Solicitor General’s argument that the President’s action was justified as an exercise of his executive power under Article II, Section 1; by his duty to enforce the laws; and by his power as Commander in Chief.⁶ Instead, Justice Black observed that not only was there no statute that expressly or impliedly authorized the President to take possession of the property, but also Congress had refused to authorize seizures of property to prevent work stoppages and settle labor disputes when it considered the Taft-Hartley Act in 1947.⁷ Because neither the aggregate of the President’s Article II executive powers nor his powers as Commander in Chief supported the action, Justice Black reasoned that the President had sought to exercise a lawmaking power, which the Constitution vests solely in Congress.⁸ Even if other Presidents had taken possession of private business enterprises without congressional authority to settle labor disputes, Congress retained its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested in it by the Constitution.⁹ Consequently, while Congress could have directed the President to seize the steel mills, the President could not seize them absent congressional authorization, even if he believed that such an action “was necessary to avert a national catastrophe.”¹⁰

In his concurring opinion, Justice Jackson outlined a framework for assessing the President’s powers depending on its “disjunction or conjunction with those of Congress.”¹¹ Justice Jackson divided presidential actions into three categories that looked at the extent to which the President was acting in concert with Congress. With regard to the first category, he stated:

When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances and in these only, may he be said . . . to personify the federal sovereignty. If his act is held unconstitutional under these circumstances it usually means that the Federal Government as an undivided whole lacks power.¹²

Describing the second category, Justice Jackson stated:

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

³ 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).

⁴ 103 F. Supp. 569 (D.D.C. 1952).

⁵ The court of appeals 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).

⁶ *Youngstown*, 343 U.S. at 587–88.

⁷ *Id.* at 586.

⁸ *Id.* at 588.

⁹ *Id.* 585–89.

¹⁰ *Id.* at 585–86.

¹¹ *Id.* at 635 (Jackson, J., concurring). *See also* Trump v Mazars USA, LLP, No. 19-715, slip op. at (U.S. July 9, 2020) (“Congress and the President—the two political branches established by the Constitution—have an ongoing relationship that the Framers intended to feature both rivalry and reciprocity.”). Justice Jackson’s concurrence has been described as having “canonical status.” *Georgia v. Public Resource Org, Inc.*, No. 18-1150, slip op. at 48, n.10 (U.S. Apr. 27, 2020) (Thomas, J., dissenting).

¹² *Youngstown*, 343 U.S. at 635–37 (Jackson, J., concurring).

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twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes at least as a practical matter, enable, if not invite, measure on independent responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.¹³

The third category addressed situations where the President’s actions were contrary to will of Congress. Justice Jackson observed:

When the President takes measures incompatible with the express 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. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution for what is at stake is the equilibrium established by our constitutional system.¹⁴

Justice Jackson viewed the steel seizure as falling into the third category because Congress had adopted statutory policies inconsistent with President Truman’s steel seizure. Accordingly, under Justice Jackson’s framework, the President’s action could only be sustained if the power to seize strike-bound industries was within the President’s domain and beyond Congress’s control.¹⁵

Since the decision in *Youngstown*, the Court has used Justice Jackson’s framework when assessing assertions of presidential power.¹⁶ For example in *Zivotofsky v. Kerry*, the Court applied Justice Jackson’s “tripartite framework” to find that because the challenged presidential action “falls into Justice Jackson’s third category, his claim must be ‘scrutinized with caution,’ and he may rely solely on powers the Constitution grants to him alone.”¹⁷

ArtII.S1.C1.6 Separation of Powers and Executive Branch Functions

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

In his *Commentaries on the Constitution of the United States*, Justice Joseph Story noted the importance of an independent executive department to the separation of powers. He observed: “All America have at length concurred in the propriety of establishing a distinct executive department. The principle is embraced in every state constitution; and it seems now

¹³ *Id.* at 637.

¹⁴ *Id.* at 637–38 (footnotes omitted).

¹⁵ *Id.* at 639, 640. *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. In *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006), the Court cited *Youngstown* with approval, as did Justice Anthony Kennedy, in a concurring opinion joined by three other Justices, *id.* at 638.

¹⁶ See *Zivotofsky v. Kerry*, 576 U.S. 1, 10 (2015).

¹⁷ *Id.*

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to be assumed among us, as a fundamental maxim of government, that the legislative, executive, and judicial departments are to be separate, and the powers of one ought not to be exercised by either of the others.”¹

The Supreme Court has referred to principles of separation of powers when examining congressional actions that may infringe the President’s exercise of executive power. For instance, in 1983, the Court in *INS v. Chadha*² struck down the congressional veto as circumventing Article I’s bicameralism and presentment requirements to exercise legislative power. In *Chadha*, the Court suggested that Congress, by providing itself with the ability to veto the Attorney General’s decision to suspend deportation of an alien, had enabled itself to participate impermissibly in executing the laws.³ Writing for the majority, Chief Justice Warren Burger observed that “the powers delegated to the three Branches are functionally identifiable.”⁴ Under *Chadha*, when Congress exercises legislative power rather than delegates it, it must follow the prescribed bicameralism and presentment procedures.

In *Bowsher v. Synar* three years later,⁵ the Court held that Congress had unconstitutionally vested executive functions in a Legislative Branch official through the Gramm-Rudman-Hollings Deficit Control Act. The Gramm-Rudman-Hollings Deficit Control Act set maximum deficit amounts for federal spending and directed across-the-board cuts in spending when projected deficits would exceed the target deficits.⁶ Each fiscal year, the Comptroller General, who only Congress could remove, had to prepare a report identifying the reductions necessary to meet the deficit target, which the President had to implement. The Court stated: “Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of ‘execution’ of the law.”⁷ Because Congress could remove the Comptroller General from office, it could not delegate executive powers to him. The Court stated: “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.”⁸

In *Lujan v. Defenders of Wildlife*, the Court held that Congress could not legislate to grant citizens not suffering particularized injuries standing to sue the federal government to compel its compliance with congressional mandates. Such a law, the Court reasoned, would allow Congress to transfer the President’s Take Care Clause duty to the Judiciary.⁹

The Court emphasized the importance of the separation of powers in *Seila Law LLC v. Consumer Financial Protection Board (CFPB)* in which the Court held that Congress encroached on Executive Branch powers when it limited the President’s ability to remove the head of an independent agency to “for cause” removal.¹⁰ In *Seila*, the Court noted that Congress had “vest[ed] significant governmental power in the hands of a single individual

¹ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1410 (1833).

² 462 U.S. 919 (1983).

³ The Court stated: “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. *See also* Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252 (1991).

⁴ *Chadha*, 462 U.S. at 951.

⁵ 478 U.S. 714 (1986)

⁶ The Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038.

⁷ 478 U.S. at 732–33.

⁸ *Id.* at 734.

⁹ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576–78 (1992).

¹⁰ *Seila Law LLC v. CFPB*, No. 19-7, slip op. at 26 (U.S. June 29, 2020).

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accountable to no one”¹¹ thereby violating the separation of powers.¹² Similarly, in *Collins v. Yellen*, the Court ruled that Congress could not restrict the President’s authority to remove the director of the Federal Housing Finance Agency, which had a structure similar to the CFPB.¹³

ArtII.S1.C1.7 Major Questions Doctrine and Administrative Agencies

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

In several twenty-first century decisions with significant implications for the administrative state, the Court held that under the “major questions doctrine,” the Executive Branch cannot interpret ambiguous legislation to effectuate sweeping changes of national consequence. Instead, Congress must, at a minimum, provide clear authorization that it intends to grant the Executive Branch such far-reaching powers.

In its 2014 decision in *Utility Air Regulatory Group v. Environmental Protection Agency (EPA)*, the Court found that EPA could not construe the Clean Air Act (CAA) to enable it to regulate millions of small sources of air pollution, including hotels and office buildings, when Congress had not sought to regulate these entities under the CAA in the past.¹ Although the Court did not explicitly refer to the major questions doctrine, it held that an agency exceeds its regulatory authority when (1) the agency’s action involves an issue of “vast ‘economic and political significance,’” and (2) Congress has not clearly granted the agency authority over the issue.² The Court noted that Congress must “speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.”³

The Court’s concern about the Executive Branch establishing law that exceeded the authority Congress had delegated was also evident during the coronavirus disease 2019 (COVID-19) pandemic. For example, in August 2021, the Court vacated a lower court’s stay, effectively halting an eviction moratorium issued by the Centers for Disease Control and Prevention (CDC).⁴ The Court noted that the CDC had no legal authority to mandate an eviction moratorium and that Congress itself had declined to extend the eviction moratorium.⁵ Likewise, in *National Federation of Independent Business v. Department of Labor*, the Court stayed the Occupational Safety and Health Administration’s (OSHA) COVID-19 vaccine mandate on the grounds that the plaintiffs were likely to succeed on the merits of their claim that OSHA did not have authority to require that “84 million Americans . . . either obtain a COVID-19 vaccine or undergo weekly medical testing at their own expense.”⁶ By comparison, on the same day, the Court vacated a stay of a more limited vaccine mandate from the Secretary of Health and Human Services requiring that facilities receiving Medicare and Medicaid funding “ensure that their staff—unless exempt for medical or religious

¹¹ *Id.* at 23.

¹² *Id.* at 27.

¹³ *Collins v. Yellen*, No. 19-422, slip op. (U.S. June 23, 2021).

¹ *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014).

² *Id.* at 324.

³ *Id.*

⁴ *Alabama Ass’n of Realtors v. Dep’t of Health and Human Servs.*, No. 21A23, slip op. at 3 (U.S. Aug. 26, 2021) (per curiam).

⁵ *Id.* at 6–8.

⁶ Nos. 21A244 and 21A247, slip op. at 8 (U.S. Jan. 13, 2022) (per curiam).

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reasons—are vaccinated against COVID-19.”⁷ In reaching this decision, the Court agreed that “the Secretary’s rule falls within the authorities that Congress has conferred upon him.”⁸

In its 2022 decision *West Virginia v. EPA*, the Court held that EPA exceeded its CAA Section 111(d) authority⁹ in the 2015 Clean Power Plan (CPP) by requiring “generation shifting” whereby coal-fired power plants would “reduce their own production of electricity or subsidize increased generation by natural gas, wind, or solar sources.”¹⁰ Stating that “[i]t is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme,”¹¹ the Court observed: “A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.”¹² Examining EPA’s assertion that Section 111(d) provided EPA authority to require generation shifting, the Court noted that Section 111(d) was a little-used statutory “gap-filler” that allowed EPA to regulate emissions not covered by the CAA National Ambient Air Quality Standards (NAAQS)¹³ or Hazardous Air Pollutants (HAP) programs.¹⁴ In light of this, the Court held, Section 111(d) could not be read as granting EPA power to transform the national economy by adopting a “regulatory program that Congress had conspicuously and repeatedly declined to enact itself.”¹⁵

ArtII.S1.C1.8 The President’s Foreign Affairs Power, Curtiss-Wright, and Zivotofsky

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

The extent of the President’s foreign affairs power has been subject to debate since the earliest days of the Republic.¹ The Constitution provides that the President “shall receive Ambassadors and other public Ministers.”² In his *Commentaries on the Constitution of the United States*, Justice Joseph Story noted, “If the executive receives an ambassador, or other minister, as the representative of a new nation . . . it is an acknowledgment of the sovereign authority *de facto* of such new nation or party.”³ In addition, Article II provides that the

⁷ Biden v. Missouri, Nos. 21A240 and 21A241, slip op. at 1 (U.S. Jan. 13, 2022) (per curiam).

⁸ *Id.* at 4.

⁹ Clean Air Act, 84 Stat. 1683, 42 U.S.C. § 7411(d)

¹⁰ *West Virginia v. EPA*, No. 20-1530, slip op. (U.S. June 30, 2022). Through the CPP, EPA sought to reduce carbon dioxide emissions that were contributing to global warming by shifting the Nation’s energy from coal-fired generation to natural gas and renewables. *Id.* at 10. According to EPA estimates at the time it issued the rule, such changes “would entail billions of dollars in compliance costs (to be paid in the form of higher energy prices), require the retirement of dozens of coal-fired plants, and eliminate tens of thousands of jobs across various sectors.” *Id.*

¹¹ *Id.* at 31.

¹² *Id.*

¹³ 42 U.S.C. §§ 7408-7410 (requiring states to adopt plans to comply with EPA standards for specified air pollutants).

¹⁴ *Id.* § 7412 (requiring EPA to set standards to achieve “the maximum degree of reduction of emissions” for new and existing major sources of non-NAAQS hazardous air pollution that can be achieved using the “best existing technologies and methods”).

¹⁵ *West Virginia v. EPA*, No. 20-1530, slip op. at 20 (U.S. June 30, 2022).

¹ See ArtII.S1.C1.2 Historical Background on Executive Vesting Clause.

² U.S. CONST. art. II, § 3, cl. 2. See ArtII.S3.2.1 Early Doctrine on Receiving Ambassadors and Public Ministers.

³ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1560 (1833).

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President, with the advice and consent of the Senate, shall “make Treaties” and “shall appoint Ambassadors” and “other public Ministers and consuls.”⁴

Writing for the Court in the 1936 *United States v. Curtiss-Wright Export Corp.* decision,⁵ Justice George Sutherland reasoned that the the President “has the sole power to negotiate treaties,”⁶ although the President requires the Senate’s advice and consent to complete them.⁷ In *Curtiss-Wright*, the Curtiss-Wright Export Corp. challenged an embargo President Franklin D. Roosevelt had imposed pursuant to a congressional delegation. Indicted for violating the embargo, Curtiss-Wright argued that Congress had impermissibly delegated a legislative power to the President when it granted the President power to impose the embargo. Writing for a 7-1 majority in favor of the government, Justice Sutherland posited that the National Government’s power in foreign relations is inherent. Consequently, the limits on Congress’s ability to delegate power relating to domestic areas, Justice Sutherland reasoned, did not apply in the area of foreign affairs. Justice Sutherland stated:

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. . . . As a result of the separation from Great Britain . . . the powers of external sovereignty passed from the Crown . . . to the colonies in their collective and corporate capacity as the United States of America 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. . . . 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.⁸

Notwithstanding *Curtiss-Wright*, the Court has recognized that the President may be subject to the delegated powers doctrine in matters implicating foreign relations.⁹ For instance, in *Kent v. Dulles*,¹⁰ the Court held that the standards that apply to congressional delegations to the President of domestic authorities likewise applied to a congressional delegation to the President of authority to issue passports.¹¹

⁴ U.S. CONST. art. II, § 2, cl. 2. See ArtII.S2.C2.1.1 Overview of President’s Treaty-Making Power.

⁵ 299 U.S. 304 (1936).

⁶ Zivotofsky v. Kerry, 576 U.S. 1, 13 (2014).

⁷ See ArtII.S2.C2.1.1 Overview of President’s Treaty-Making Power.

⁸ 299 U.S. at 315–16, 318, 319.

⁹ E.g., *Ex parte Quirin*, 317 U.S. 1, 25 (1942) (Chief Justice Harlan Stone); *Reid v. Covert*, 354 U.S. 1, 5–6 (1957) (plurality opinion, per Justice Black).

¹⁰ 357 U.S. 116, 129 (1958).

¹¹ *Id.* See also *Haig v. Agee*, 453 U.S. 280 (1981). For *Haig’s* 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). 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), 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 found that, although Congress had delegated authority over the death penalty provisions of military law to the President absent standards to guide the President’s exercise of the authority, standards were not required because the President, as Commander in Chief had responsibility to superintend the military and Congress and the President had interlinked authorities with respect to the military. Where the entity exercising delegated authority possesses independent authority over the subject matter, the Court noted, familiar limitations on delegation do not apply. *Id.* at 771–74.

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The President’s Foreign Affairs Power, Curtiss-Wright, and Zivotofsky

The Supreme Court’s decision in *Zivotofsky v. Kerry* appears to be the first instance in which the Court held that an act of Congress unconstitutionally infringed upon a foreign affairs power of the President.¹² The case concerned a legislative enactment requiring the Secretary of State to identify a Jerusalem-born U.S. citizen’s place of birth as “Israel” on his passport if requested by the citizen or his legal guardian.¹³ The State Department had declined to follow this statutory command, citing long-standing executive policy of declining to recognize any country’s sovereignty over the city of Jerusalem.¹⁴ It argued the statute impermissibly intruded upon the President’s constitutional authority over the recognition of foreign nations and their territorial bounds, and attempted to compel “the President to contradict his recognition position regarding Jerusalem in official communications with foreign sovereigns.”¹⁵

The *Zivotofsky* Court evaluated the State Department’s non-adherence to a statutory command using the framework established by Justice Robert Jackson’s concurring opinion in *Youngstown*, under which executive action taken in contravention of a legislative enactment will only be sustained if the President’s asserted power is both “exclusive” and “conclusive” on the matter.¹⁶ The Constitution does not specifically identify the recognition of foreign governments among either Congress’s or the President’s enumerated powers. But in an opinion that employed multiple modes of constitutional interpretation, the Court concluded that the Constitution not only conferred recognition power to the President, but also that this power was not shared with Congress.

In its analysis, the Court first examined “the text and structure of the Constitution,” which it construed as reflecting the Founders’ understanding that the President exercises the recognition power.¹⁷ In particular, the Court focused on the President’s responsibility under the Reception Clause to “receive Ambassadors and other public Ministers.”¹⁸ At the time of the founding, the Court reasoned, receiving ambassadors of a foreign government was tantamount to recognizing the foreign entity’s sovereign claims, and it was logical to infer “a Clause directing the President alone to receive ambassadors” as “being understood to acknowledge his power to recognize other nations.”¹⁹ In addition to the Reception Clause, *Zivotofsky* identified additional Article II provisions as providing support for the inference that the President

¹² *Zivotofsky v. Kerry*, 576 U.S. 1 (2015). It appears that in every prior instance where the Supreme Court considered executive action in the field of foreign affairs that conflicted with the requirements of a federal statute, the Court had ruled the executive action invalid. *See id.* at 62 (Roberts, C.J., dissenting) (“For our first 225 years, no President prevailed when contradicting a statute in the field of foreign affairs.”); *Medellin v. Texas*, 552 U.S. 491 (2008) (President could not direct state courts to reconsider cases barred from further review by state and federal procedural rules in order to implement requirements flowing from a ratified U.S. treaty that was not self-executing, as legislative authorization from Congress was required); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (military tribunals convened by presidential order did not comply with the Uniform Code of Military Justice); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Little v. Barreme*, 6 U.S. (2 Cr.) 170 (1804) (upholding damage award to owners of U.S. merchant ship seized during quasi-war with France, when Congress had not authorized such seizures).

¹³ Foreign Relations Authorization Act, Fiscal Year 2003, Pub L. No. 107-228, § 214(d), 116 Stat. 1350, 1366 (2002).

¹⁴ *Zivotofsky*, at 6–7. The State Department’s Foreign Affairs Manual generally provides that in issuing passports to U.S. citizens born abroad, the passport shall identify the country presently exercising sovereignty over the citizen’s birth location. 7 FOREIGN AFFAIRS MANUAL § 1330 Appendix D (2008). The Manual provides that employees should “write JERUSALEM as the place of birth in the passport. Do not write Israel, Jordan or West Bank for a person born within the current municipal borders of Jerusalem.” *Id.* at § 1360 Appendix D.

¹⁵ *Zivotofsky*, 576 U.S. at 11–12 (quoting Brief from Respondent at 48).

¹⁶ *Id.* at 10 (quoting *Youngstown Sheet & Tube Co.*, 343 U.S. at 637–38 (1952) (Jackson, J., concurring)).

¹⁷ *Id.* at 10–13

¹⁸ U.S. CONST. art. II, § 3. *Zivotofsky*, 576 U.S. at 12.

¹⁹ *Zivotofsky*, 576 U.S. at 12–13. The Court observed that records of the Constitutional Convention were largely silent on the recognition power, but that contemporary writings by prominent international legal scholars identified the act of receiving ambassadors as the virtual equivalent of recognizing the sovereignty of the sending state. *Id.* at 12.

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The President’s Foreign Affairs Power, Curtiss-Wright, and Zivotofsky

retains the recognition power,²⁰ including the President’s power to “make Treaties” with the advice and consent of the Senate,²¹ and to appoint ambassadors and other ministers and consuls with Senate approval.²²

The *Zivotofsky* Court emphasized “functional considerations” supporting the Executive’s claims of exclusive authority over recognition,²³ stating that recognition is a matter on which the United States must “speak with . . . one voice,”²⁴ and the Executive Branch is better suited than Congress to exercise this power for several reasons, including its “characteristic of unity at all times,” as well as its ability to engage in “delicate and often secret diplomatic contacts that may lead to a decision on recognition” and “take the decisive, unequivocal action necessary to recognize other states at international law.”²⁵

The Court also concluded that historical practice and prior jurisprudence gave credence to the President’s unilateral exercise of the recognition power. The Court acknowledged that the historical record did not provide unequivocal support for this view, but characterized “the weight” of historical evidence as reflecting an understanding that the President’s power over recognition is exclusive.²⁶ Although the Executive had consistently claimed unilateral recognition authority from the Washington Administration onward, and Congress had generally acquiesced to the President’s exercise of such authority, there were instances in which Congress also played a role in matters of recognition. But the *Zivotofsky* Court observed that in all earlier instances, congressional action was consistent with, and deferential to, the President’s recognition policy, and the Court characterized prior congressional involvement as indicating “no more than that some Presidents have chosen to cooperate with Congress, not that Congress itself has exercised the recognition power.”²⁷ The Court also stated that a “fair reading” of its prior jurisprudence demonstrated a long-standing understanding of the recognition power as an executive function, notwithstanding “some isolated statements” in those cases that might have suggested a congressional role.²⁸

Having determined that the Constitution assigns the President exclusive authority over recognition of foreign sovereigns, the *Zivotofsky* Court ruled that the statutory directive that the State Department honor requests of Jerusalem-born U.S. citizens to have their passports list their birthplace as “Israel” was an impermissible intrusion on the President’s recognition

²⁰ Justice Clarence Thomas, writing separately and concurring in part with the majority’s judgment, would have located the primary source of the President’s recognition power as the Vesting Clause. *Id.* at 31–32 (Thomas, J., concurring and dissenting in part with the Court’s judgment). The controlling five-Justice opinion declined to reach the issue of whether the Vesting Clause provided such support. *Id.* at 13–14 (majority opinion).

²¹ U.S. CONST. art. II, § 2, cl. 2.

²² *Id.*

²³ *Zivotofsky*, 576 U.S. at 13.

²⁴ *Id.* at 14 (quoting *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 424 (2003) and *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 381 (2000)).

²⁵ *Id.*

²⁶ *Id.* at 22–23.

²⁷ *Id.* The Court observed that in no prior instance had Congress enacted a statute “contrary to the President’s formal and considered statement concerning recognition.” *Id.* at 24 (citing *Zivotofsky v. Secretary of State*, 725 F.3d 197, 203, 221 (D.C. Cir. 2013) (Tatel, J., concurring)).

²⁸ *See id.* at 17. The Court observed that earlier rulings touching on the recognition power had dealt with the division of power between the judicial and political branches of the federal government, or between the federal government and the states. *Id.* at 17–18 (citing *Banco Nacional De Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964) (involving the application of the act of state doctrine to the government of Cuba and stating that “[p]olitical recognition is exclusively a function of the Executive”); *United States v. Pink*, 315 U.S. 203 (1942) (concerning effect of executive agreement involving the recognition of the Soviet Union and settlement of claims disputes upon state law); *United States v. Belmont*, 301 U.S. 324 (1937) (similar to *Pink*); *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415 (1839) (ruling that an executive determination concerning foreign sovereign claims to the Falkland Islands was conclusive upon the judiciary)).

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authority. According to the Court, Congress’s authority to regulate the issuance of passports, though wide in scope, may not be exercised in a manner intended to compel the Executive “to contradict an earlier recognition determination in an official document of the Executive Branch” that is addressed to foreign powers.²⁹

While the *Zivotofsky* decision establishes that the recognition power belongs exclusively to the President, its relevance to other foreign affairs issues remains unclear. The opinion applied a functionalist approach in assessing the exclusivity of executive power on the issue of recognition but did not opine on whether this approach was appropriate for resolving other inter-branch disputes concerning the allocation of constitutional authority in the field of foreign affairs. The *Zivotofsky* Court also declined to endorse the Executive’s broader claim of exclusive or preeminent presidential authority over foreign relations, and it appeared to minimize the reach of some of the Court’s earlier statements in *Curtiss-Wright*³⁰ regarding the expansive scope of the President’s foreign affairs power.³¹ The Court also repeatedly noted Congress’s ample power to legislate on foreign affairs, including on matters that precede and follow from the President’s act of foreign recognition and in ways that could render recognition a “hollow act.”³² For example, Congress could institute a trade embargo, declare war upon a foreign government that the President had recognized, or decline to appropriate funds for an embassy in that country. While all of these actions could potentially be employed by the Legislative Branch to express opposition to executive policy, they would not impermissibly interfere with the President’s recognition power.³³

ArtII.S1.C1.9 Term of the President

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.

Article II, Section 1, Clause 1, provides for the President and Vice President to serve four-year terms. The Framers generally appear to have contemplated that, under the Constitution, the President, like Representatives and Senators, would not be subject to term limits but could run for office “as often as the people of the United States shall think him worthy of their confidence.”¹ However, there was much debate and concern that the Constitution might grant the President too much power and that, as Thomas Jefferson observed, “the perpetual re-eligibility of the President” could produce “cruel distress to our country even in your day and mine.”² Following precedent established by George Washington, the idea that no President would hold office for more than two terms was generally regarded as a fixed tradition until President Franklin Delano Roosevelt sought and won reelection for a

²⁹ See *id.* at 31. The Court approvingly cited its description in *Urtetiqui v. D’Arcy*, 34 U.S. (9 Pet.) 692 (1835), of a passport as being, “from its nature and object . . . addressed to foreign powers.” See *Zivotofsky*, at 30.

³⁰ See *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304 (1936). For further discussion of this case, see ArtII.S1.C1.4 The President’s Powers, Myers, and Seila, and *Youngstown*.

³¹ The majority opinion observed that *Curtiss-Wright* had considered the constitutionality of a congressional delegation of power to the President, and that its description of the Executive as the sole organ of foreign affairs was not essential to its holding in the case. *Zivotofsky*, at 20–21.

³² *Id.* at 15–16.

³³ *Id.* at 15–16.

¹ THE FEDERALIST No. 69 (Alexander Hamilton).

² Letter from Thomas Jefferson to Alexander Donald (Feb. 7, 1788), reprinted in 3 THE FOUNDERS’ CONSTITUTION 505 (Philip B. Kurland & Ralph Lerner eds., 2000).

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third and fourth term in 1940 and 1944, respectively. In 1951, the states ratified the Twenty-Second Amendment limiting the President to two terms in office.³

When considering the term of the President during the Constitutional Convention, the Framers weighed how the President would be selected, whether a President should serve multiple times, and how to mitigate the danger that the Presidency might evolve into a “hereditary Monarchy”⁴ or become the “mere creature” of Congress.⁵ On June 1, 1787, James Wilson of Pennsylvania proposed to the Committee of the Whole that the term of the President be three years, “on the supposition that a re-eligibility would be provided for,”⁶ while Charles Pinckney of South Carolina proposed a term of seven years.⁷ George Mason of Virginia urged a term of “seven years at least, and for prohibiting a re-eligibility as the best expedient both for preventing the effect of a false complaisance on the side of the Legislature towards unfit characters; and a temptation on the side of the Executive to intrigue with the Legislature for a re-appointment.”⁸

Although the Committee of the Whole voted for a seven-year term,⁹ debate continued over how to select the President and whether he should be eligible for reelection. Efforts to offset the longer seven-year term with a bar on re-eligibility were met by concerns that prohibiting reelection would, among other things, “destroy the great motive to good behavior, the hope of being rewarded by a re-appointment.”¹⁰ Revisiting the appropriate term of office for the President in conjunction with whether the President should be eligible for reelection,¹¹ the Convention considered proposals for, among other things, fifteen-year, eleven-year, eight-year, six-year, and three-year terms,¹² as well as an indefinite term during Good Behavior.¹³ In late August 1787, the Convention referred the matter to the Committee of Eleven, which, in turn, proposed a term of four years without a bar to reelection.¹⁴

While the four-year term was shorter than the originally contemplated seven-year term, critics of the Constitution maintained that it would still allow the President to establish a

³ U.S. CONST. amend XXII. The Twenty-Second Amendment was adopted largely in response to President Franklin Delano Roosevelt seeking and winning reelection for an unprecedented third and fourth terms in 1940 and 1944, respectively. The Twenty-Second Amendment became a part of the Constitution on February 27, 1951, after it was adopted by Minnesota, which provided the thirty-sixth state that was necessary for adoption of the Amendment. 2 GROSSMAN, CONSTITUTIONAL AMENDMENTS 758–759 (2012). For additional discussion on the Twenty-Second Amendment, see Amdt22.1 Overview of Twenty-Second Amendment, Presidential Term Limits.

⁴ 2 THE RECORDS OF THE FEDERAL CONSTITUTION 35 (Max Farrand, ed. 1911) (statement of George Mason of Virginia).

⁵ *Id.* at 103 (statement of Gouverneur Morris of Pennsylvania); see also MAX FARRAND, THE FRAMING OF THE CONSTITUTION 117–118 (1913).

⁶ 1 THE RECORDS OF THE FEDERAL CONSTITUTION 68 (Max Farrand, ed. 1911)

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 69.

¹⁰ 2 THE RECORDS OF THE FEDERAL CONSTITUTION 33 (Max Farrand, ed. 1911) (statement of Gouverneur Morris of Pennsylvania in support of motion made by William Churchill Houston of New Jersey on July 17, 1787, to strike the bar to reelection).

¹¹ See *id.*

¹² See, e.g., 1 THE RECORDS OF THE FEDERAL CONSTITUTION 68 (Max Farrand, ed. 1911); 2 THE RECORDS OF THE FEDERAL CONSTITUTION 102 (Max Farrand, ed. 1911) (Rufus King of Massachusetts also suggested a twenty-year term. However, given that King’s proposal was “twenty years . . . [which is] the medium life of princes”, Max Farrand, the editor of the Records of the Constitution, observes that this was likely meant to be ironic, stating, “This might possibly be meant as a caricature of the previous motions in order to defeat the object of them.”). See also *id.* at 100, 112,

¹³ *Id.* at 33–35.

¹⁴ *Id.* at 497.

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dangerous influence over the United States.¹⁵ Responding to such concerns in the *Federalist Papers*, Alexander Hamilton explained the advantages of a four-year term as striking a balance between the “personal firmness of the executive magistrate, in the employment of his constitutional powers; and to the stability of the system of administration which may have been adopted under his auspices.”¹⁶ He stated:

Between the commencement and termination of such a [four-year] period, there would always be a considerable interval, in which the prospect of annihilation would be sufficiently remote, not to have an improper effect upon the conduct of a man endued with a tolerable portion of fortitude. . . . [A] duration of four years will contribute to the firmness of the Executive in a sufficient degree to render it a very valuable ingredient in the composition; so, on the other, it is not enough to justify any alarm for the public liberty.¹⁷

Hamilton also cited the three-year New York gubernatorial term to support that the President would be unlikely to acquire undue power across the entirety of the United States over four years when the Governor of New York had not done so over the much smaller state of New York over three years.¹⁸

In his *Commentaries of the Constitution of the United States*, Justice Joseph Story observed that the four-year term the Framers adopted for the President is “intermediate between the term of office of the senate, and that of the house of representatives” and, as a result, “[i]n the course of one presidential term, the house is, or may be twice recomposed; and two-thirds of the senate changed, or re-elected.”¹⁹ Because the President’s four-year term is between the two- and six-year terms of the House and Senate, the President is subject to pressures that drive the House’s need to respond to the people’s immediate demands, even though such demands may be short-lived, and those that facilitate the Senate’s greater focus on long-term objectives because its six-year term provides some insulation from political winds.²⁰

CLAUSE 2—ELECTORS

ArtII.S1.C2.1 Overview of Electors Appointment Clause

Article II, Section 1, 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

¹⁵ See, e.g., THE ANTI-FEDERALIST PAPERS, No. 67 (Cato/George Clinton), reprinted in THE COMPLETE FEDERALIST AND ANTI-FEDERALIST PAPERS 709 (2014) (“It is remarked by Montesquieu, in treating of republics, that in all magistracies, the greatness of the power must be compensated by the brevity of the duration, and that a longer time than a year would be dangerous. The deposit of vast trusts in the hands of a single magistrate enables him in their exercise to create a numerous train of dependents. This tempts his ambition, which in a republican magistrate is also remarked to be pernicious, and the duration of his office for any considerable time favors his views, gives him the means and time to perfect and execute his designs; he therefore fancies that he may be great and glorious by oppressing his fellow citizens, and raising himself to permanent grandeur on the ruins of his country.”).

¹⁶ THE FEDERALIST No. 71 (Alexander Hamilton).

¹⁷ *Id.*

¹⁸ THE FEDERALIST No. 69 (Alexander Hamilton). See also THE FEDERALIST No. 72 (Alexander Hamilton) (describing five “ill effect[s]” of excluding the President either temporarily or permanently from subsequent terms of office).

¹⁹ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1432 (1833).

²⁰ See generally *id.*

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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.

Article II, Section 1, Clause 2, also known as the Electors Appointment Clause, provides for states to select electors to vote for the President and establishes that the number of each state’s electors will equal the number of its Senators and Representatives.¹ The Framers adopted the Electors Appointment Clause as a compromise between the direct election of the President and his selection by Congress. Among the Framers’ objectives was to provide for the President’s selection by persons whose “sole purpose” would be choosing the best candidate for the President rather than by persons “selected for the general purposes of legislation.”² Notwithstanding this electoral system, divorcing selection of the President from partisan politics proved elusive.³

ArtII.S1.C2.2 Historical Background on Electors Appointments Clause

Article II, Section 1, 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.

One of the key compromises of the Constitutional Convention was the appointment of electors to elect the President and Vice President. The delegates adopted the plan late in the Convention, having voted on four previous occasions for Congress to select the Executive and twice defeating proposals for direct election by the people.¹ As such, the Electors Appointment clause effected a compromise between selecting the President pursuant to a popular election or leaving Congress to determine the President. In his *Commentaries on the Constitution of the United States*, Justice Joseph Story explained that the Framers viewed having an electoral college select the President rather than Congress would commit the decision “to persons, selected for that sole purpose . . . instead of persons, selected for the general purposes of legislation”² and would avoid “those intrigues and cabals, which would be promoted in the legislative body by artful and designing men, long before the period of the choice, with a view to accomplish their own selfish purposes.”³

While Justice Story noted that the Framers had viewed the electoral college as preserving the President from becoming “the mere tool of the dominant part in congress,”⁴ the development of political parties during the early years of the Republic and their role in nominating presidential candidates and designating electors meant that electors, as a practical matter, were subject to partisan politics.⁵ In 1826, Senator Thomas Hart Benton

¹ See *McPherson v. Blacker*, 146 U.S. 1, 35 (1892) (holding that this clause confers “plenary power to the state legislatures in the matter of the appointment of electors”); see also *Fitzgerald v. Green*, 134 U.S. 377, 379 (1890) (“By the constitution of the United States, the electors for president and vice president in each state are appointed by the state in such manner as its legislature may direct.”).

² 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1450 (1833).

³ See ArtII.S1.C2.2 Historical Background on Electors Appointments Clause.

¹ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21, 68–69, 80–81, 175–76, 230, 244 (Max Farrand ed., 1911); 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. See also 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1449 (1833).

² 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1450 (1833).

³ *Id.*

⁴ *Id.*

⁵ See JAMES CEASER, PRESIDENTIAL SELECTION: THEORY AND DEVELOPMENT (1979); NEAL PIERCE, THE PEOPLES PRESIDENT: THE ELECTORAL COLLEGE IN AMERICAN HISTORY AND THE DIRECT-VOTE ALTERNATIVE (1968).

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ArtII.S1.C2.3
State Discretion Over Selection of Electors

observed that, while the Framers had intended electors to be men of “superior discernment, virtue, and information,” who would select the President free from partisan influence, “this invention has failed of its objective in every election . . .” Senator Benton further explained: “That it ought to have failed is equally uncontested; 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.”⁶

By 1832, almost all states had adopted popular presidential elections, and “[b]y the early 20th century, citizens in most States voted for the presidential candidate himself; ballots increasingly did not even list the electors.”⁷ Instead, parties chose slates of electors, and states then appointed the electors proposed by the party whose presidential nominee won the popular vote statewide.⁸

ArtII.S1.C2.3 State Discretion Over Selection of Electors

Article II, Section 1, 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.

The Supreme Court has reasoned that the word “appoint” in Article II, Section 1, Clause 2, confers on state legislatures “the broadest power of determination.”¹ In *McPherson v. Blacker*, the Supreme Court upheld a state law providing for electors to be selected by popular vote from districts rather than statewide.² Noting that states could choose from among a variety of permissible methods in selecting electors, the Supreme Court stated:

[V]arious 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 . . .³

Although the Electoral College Clause seemingly vests complete discretion over how electors are appointed, the Court has recognized a federal interest in protecting the integrity of the electoral college process. Thus, in *Ex parte Yarbrough*, the Court upheld Congress’s power to protect the right of all citizens as to the selection of any legally qualified person as a presidential elector.⁴ In *Yarbrough*, the Court stated: “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

⁶ S. REP. NO. 22, 19th Cong., 1st Sess. 4 (1826).

⁷ *Chiafalo v. Washington*, No. 19-465, slip op. at 4 (U.S. July 6, 2020).

⁸ *Id.*

¹ *McPherson v. Blacker*, 146 U.S. 1, 27 (1892).

² *Id.*

³ *Id.* at 28–29.

⁴ *Ex parte Yarbrough*, 110 U.S. 651 (1884).

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corruption.”⁵ In *Burroughs & Cannon v. United States*, the Supreme Court sustained Congress’s power to protect the choice of electors from fraud or corruption.⁶

The Court and Congress have imposed limits on state discretion in appointing electors. In *Williams v. Rhodes*,⁷ the Court struck down a complex state system that effectively limited 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 certain individuals and burdened 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. The Court denied that the Electoral College Clause immunized such state practices from judicial scrutiny.⁸

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 state constitutions may be constrained under Article II, Section 1, Clause 2.⁹ Three Justices elaborated on this view in *Bush v. Gore*,¹⁰ but the Court ended the litigation—and the recount—on the basis of an equal protection interpretation, without ruling on the Article II argument.

ArtII.S1.C2.4 Legal Status of Electors

Article II, Section 1, 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.

Electors are not “officers” by the usual tests of office.¹ In 1890, the Supreme Court addressed the constitutional status of electors, stating:

⁵ *Ex parte Yarbrough*, 110 U.S. 651, 657–58 (1884) (quoted in *Burroughs and Cannon v. United States*, 290 U.S. 534, 546 (1934)).

⁶ *Burroughs & Cannon v. United States*, 290 U.S. 534 (1934).

⁷ 393 U.S. 23 (1968).

⁸ The Court stated: “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 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.

⁹ *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”).

¹⁰ *Bush v. Gore*, 531 U.S. 98, 111 (2000) (opinion of Chief Justice William Rehnquist, joined by Justices Antonin Scalia and Clarence 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.

¹ *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1868).

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ArtII.S1.C2.5
Discretion of Electors to Choose a President

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.²

Electors have neither tenure nor salary and having performed their single function they cease to exist as electors. This function is, moreover, “a federal function,”³ 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.⁴

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.⁵ But, in *Ray v. Blair*, the Court clarified that although electors “exercise a federal function[,] . . . they are not federal officers or agents.”⁶ Instead, the Constitution provides that they act under state authority.⁷

ArtII.S1.C2.5 Discretion of Electors to Choose a President

Article II, Section 1, 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.

The Constitution does not prohibit electors from casting their ballots as they wish and occasionally electors have done so.¹ In 1968, for example, a Republican elector in North Carolina chose to cast his vote for George Wallace, the independent candidate who had won the second greatest number of votes rather than for Richard M. Nixon, who had won a plurality in the state. Members of the House of Representatives and the Senate objected to counting that vote for Mr. Wallace, insisting that it should be counted for Mr. Nixon, but both bodies decided to count the vote as cast.² More recently, the 2016 election saw a historic number of faithless electors, with seven electors recorded voting for someone other than their party’s nominee.³

To prevent so-called “faithless electors” from departing from the preferences expressed by voters, most states require electors to pledge to support their parties’ nominees.⁴ In *Ray v. Blair*, the Supreme Court rejected a constitutional challenge to a party rule requiring elector candidates to pledge that they would support the nominees elected in the primary in the

² *In re Green*, 134 U.S. 377, 379–80 (1890).

³ *Hawke v. Smith*, 253 U.S. 221 (1920).

⁴ *Burroughs & Cannon v. United States*, 290 U.S. 534, 535 (1934).

⁵ *Ex parte Yarbrough*, 110 U.S. 651 (1884); *Burroughs and Cannon v. United States*, 290 U.S. 534 (1934).

⁶ 343 U.S. 214, 224 (1952).

⁷ *Id.* at 224–25.

¹ See NEAL PIERCE, *THE PEOPLES PRESIDENT: THE ELECTORAL COLLEGE IN AMERICAN HISTORY AND THE DIRECT-VOTE ALTERNATIVE* 122–24 (1968).

² 115 Cong. Rec. 9–11, 145–71, 197–246 (1969).

³ See, e.g., Alexander Gouzoules, *The “Faithless Elector” and 2016: Constitutional Uncertainty after the Election of Donald Trump*, 28 U. FLA. J.L. & PUS. POLY 215, 217 (2017).

⁴ *Chiafalo v. Washington*, No. 19-465, slip op. (U.S. July 6, 2020).

ARTICLE II—EXECUTIVE BRANCH
Sec. 1, Cl. 2—Function and Selection, Electors

ArtII.S1.C2.5

Discretion of Electors to Choose a President

general election.⁵ The Court first concluded that excluding electors who refuse to pledge their support for the party’s nominees was “an exercise of the state’s right to appoint electors in such manner, subject to possible constitutional limitations, as it may choose.”⁶

The Court also concluded that the pledge requirement did not violate the Twelfth Amendment, rejecting the argument that “the Twelfth Amendment demands absolute freedom for the elector to vote his own choice, uninhibited by a pledge.”⁷ Noting the long-standing practice supporting the expectation that electors will support party nominees, the Court said that “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, Article II, Section 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.”⁸

Ray left open the question of whether states could *enforce* these pledge requirements through sanctions—a question later considered in *Chiafalo v. Washington*.⁹ In *Chiafalo*, the Court considered a Washington law that provided that electors who failed to comply with a pledge to vote for their party nominees would face a civil fine.¹⁰ Three electors who were fined after breaking their pledge in the 2016 presidential election challenged the law.¹¹ The Supreme Court confirmed that a state’s power to appoint an elector includes the “power to condition his appointment,”¹² and further clarified that as long as no other constitutional provision prohibits it, the state’s appointment power also “enables the enforcement of a pledge” through a law such as Washington’s.¹³ The Court emphasized that the “barebones” text of Article II and the Twelfth Amendment provide only for “[a]ppointments and procedures” and do not “expressly prohibit[] States from taking away presidential electors’ voting discretion.”¹⁴ Finally, the Court recognized that historical practice supported Washington’s law, as electors “have only rarely exercised discretion in casting their ballots for President” and “[s]tate election laws evolved to reinforce” this practice.¹⁵

CLAUSE 3—ELECTORAL COLLEGE COUNT

ArtII.S1.C3.1 Electoral College Count Generally

Article II, Section 1, 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

⁵ *Ray v. Blair*, 343 U.S. 214, 222, 231 (1952). The party rule was adopted under the authority of an Alabama law authorizing parties to determine the qualifications of primary candidates and voters. *Id.* at 222.

⁶ *Id.* at 227.

⁷ *Id.* at 228.

⁸ *Id.* at 230.

⁹ *Chiafalo v. Washington*, No. 19-465, slip op. (U.S. July 6, 2020). In a companion case, the Supreme Court summarily reversed a Tenth Circuit decision ruling a Colorado faithless-electors law unconstitutional. *Colo. Dep’t of State v. Baca*, No. 19-518, slip op. (U.S. July 6, 2020) (per curiam). The penalties in the Colorado case were different from a fine: after failing to honor his pledge, an elector’s vote was vacated and he was removed as an elector. *Baca v. Colo. Dep’t of State*, 935 F.3d 887, 904 (10th Cir. 2019).

¹⁰ *Chiafalo*, slip op.

¹¹ *Id.*

¹² *See id.* at 9. *See also id.* at 9 n.4 (“A State, for example, cannot select its electors in a way that violates the Equal Protection Clause. And if a State adopts a condition on its appointments that effectively imposes new requirements on presidential candidates, the condition may conflict with the Presidential Qualifications Clause, *see* U.S. Const. art. II, § 1, cl. 5.”).

¹³ *Id.* at 10.

¹⁴ *Id.*

¹⁵ *Id.* at 13, 16.

ARTICLE II—EXECUTIVE BRANCH
Sec. 1, Cl. 3—Function and Selection, Electoral College Count

ArtII.S1.C3.1
Electoral College Count Generally

shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the 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 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.

Article II, Section 1, Clause 3 outlined the process for selecting the President and Vice President. The provision is no longer operative because the Twelfth Amendment, ratified in 1804, superseded it. This essay discusses the history of Article II, Section 1, Clause 3 from its drafting until the adoption of the Twelfth Amendment.

The procedure for electing the President was a topic of considerable interest at the Constitutional Convention. Both the Virginia and New Jersey Plans for the Constitution contemplated that Congress would select the President.¹ In this, they were consistent with current practices where state legislatures generally selected the Governor.² During the Convention, however, it became apparent that how the President was selected would shape his role and relationship with the Legislative Branch. Urging that Congress select the President, Roger Sherman of Connecticut stated that the Executive was “nothing more than an institution for carrying the will of the Legislature into effect, that the person or persons ought to be appointed by and accountable to the Legislature only, which was the depositary of the supreme will of Society.”³ However, other delegates argued that the President should not be beholden to Congress for his office and that the separation of powers could only be ensured if the people elected the President.⁴ Taking this position, James Madison stated:

¹ THE VIRGINIA PLAN, § 7, *reprinted in* MAX FARRAND, THE FRAMING OF THE CONSTITUTION 226–227 (1913) (“Resolved that a National Executive be instituted; to be chosen by the National Legislature for the term of ____ years . . . and to be ineligible a second time; and that besides a general authority to execute the National Laws, it ought to enjoy the Executive rights vested in Congress by the Confederation.”); THE NEW JERSEY PLAN, § 4, *reprinted in id.* at 230–231 (“Resolved that the United States in Congress be authorized to elect a federal Executive to consist of ____ persons, to continue in office for the term of ____ years, . . . to be incapable of holding any other office or appointment during their time of service and for ____ years thereafter; to be ineligible a second time, and removable by Congress on application by a majority of the Executives of the several States; that the Executives besides their general authority to execute the federal acts ought to appoint all federal officers not otherwise provided for, and to direct all military operations; provided that none of the persons composing the federal Executive shall on any occasion take command of any troops, so as personally to conduct any enterprise as General, or in other capacity.”).

² LOLABEL HOUSE, A STUDY OF THE TWELFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES 7 (1901). At the time of the Convention only Connecticut, Rhode Island, New Hampshire, New York, and Massachusetts selected their governors by a popular election; in all the other states, the state legislature selected the governor. *Id.*

³ 1 THE RECORDS OF THE FEDERAL CONSTITUTION 65 (Max Farrand ed., 1911). John Rutledge of South Carolina proposed that the Senate alone should elect the President. *Id.* at 69.

⁴ *Id.* at 69 (“Mr. Wilson renewed his declarations in favor of an appointment by the people.”); 2 THE RECORDS OF THE FEDERAL CONSTITUTION 29 (Max Farrand ed. 1911) (noting that Gouverneur Morris believed that the President “ought to be elected by the people at large, by the freeholders of the Country”).

ARTICLE II—EXECUTIVE BRANCH
Sec. 1, Cl. 3—Function and Selection, Electoral College Count

ArtII.S1.C3.1
Electoral College Count Generally

If it be a fundamental principle of free Govt. that the Legislative, Executive & Judiciary powers should be *separately* exercised; it is equally so that they be *independently* exercised. There is the same & perhaps greater reason why the Executive shd. be independent of the Legislature, than why the Judiciary should It is essential then that the appointment of the Executive should either be drawn from some source, or held by some tenure, that will give him a free agency with regard to the Legislature. . . . The people at large was in his opinion the fittest in itself.⁵

Debate over how the President should be selected also focused on which method would best ensure that the President represented the people's interests.⁶ On July 19, 1787, Rufus King of Massachusetts proposed that the President be appointed "by electors chosen by the people for the purpose."⁷ Madison, William Patterson of New Jersey, Elbridge Gerry of Massachusetts, and Oliver Ellsworth of Connecticut quickly voiced support for electors choosing the President, with Madison noting that using electors would account for differences among the states as to whom they granted suffrage.⁸ On September 4, 1797, the Committee of Eleven submitted a report that included a proposal on how to select the President which, after further debate and modification, the Convention ultimately adopted.⁹

The Framers' process for choosing the President blended federal and national aspects of the U.S. system of government. Reflecting that the United States was a federation of states, the election of the President was to be conducted on a state-by-state basis, and state legislatures would determine how their electors would be selected.¹⁰ Reflecting that the United States was a single nation, the states were allocated electoral votes based on their total number of representatives and senators, with the result that the number of each state's electoral votes was based on its relative population.¹¹ Combining both federal and national aspects, in the event of a tie or if no candidate received a majority of votes, the House of Representatives would select the President.

Under Article II, Section 1, Clause 3, each state's electors would meet in their state and vote for two persons to be President, one of whom could not be from their state. The electors would then send a list of the persons for whom they had voted and the number of votes each had received to the President of the Senate. In the presence of the Senate and House of Representatives, the President of the Senate would then count the votes. The candidate with the greatest number of votes would become President, provided he had received a majority of the votes. In the event of a tie, provided the tying candidates had each received a majority of the votes, the House of Representatives would select the President by vote, but each state would have only one vote. If no person had received a majority of the votes, the House would select the President by vote from the five candidates who had received the greatest number of votes. Each state would have only one vote, notwithstanding how many representatives they had, and the candidate with the greatest number of votes would have to receive a majority of

⁵ 2 THE RECORDS OF THE FEDERAL CONSTITUTION 56 (Max Farrand ed., 1911)

⁶ *E.g., id.* at 29 (Roger Sherman of Connecticut stating that "the Nation would be better expressed by the Legislature, than by the people at large."); *id.* at 31 (Gouverneur Morris of Pennsylvania stating, "If the Executive be chosen by the Natl. Legislature, he will not be independent on it; and if not independent, usurpation & tyranny on the part of the Legislature will be the consequence.").

⁷ *Id.* at 56.

⁸ *Id.* at 56–58. Supporters of electors disagreed on how states would select the electors. While Rufus King of Massachusetts and James Madison supported popular election of electors, Oliver Ellsworth proposed that state legislatures appoint the electors and Elbridge Gerry proposed that state governors choose the electors. *Id.*

⁹ *Id.* at 497–498, 517–531.

¹⁰ U.S. CONST. art. II, § 1, cl. 2.

¹¹ *Id.* See also FARRAND, *supra* note 1, at 166–67.

ARTICLE II—EXECUTIVE BRANCH
Sec. 1, Cl. 4—Function and Selection, Electoral Votes

ArtII.S1.C4.1
Timing of Electoral Votes Generally

the votes to win. Article II, Section 1, Clause 3 further provided that a quorum consisting of a Member or Members from two-thirds of the States would be necessary for a vote and a majority of all the States had to vote for the winner. Once the President was elected, the person with the second highest number of electoral votes would be the Vice President. In the event of a tie, the Senate would select the Vice President by vote.

The Article II, Section 1, Clause 3 process for choosing the President had unanticipated and unwelcome results. George Washington’s overwhelming popularity minimized the problems with the provision during the elections of 1788 and 1792.¹² In 1796, Federalist John Adams won the Presidency while Republican Thomas Jefferson became the Vice President. This proved unworkable as Jefferson was the leader of the opposition to Adams.¹³ In 1800, the Federalist candidates were John Adams and Thomas Pinckney, while the Republican-Democrat candidates were Thomas Jefferson and Aaron Burr. The Republican-Democrat electors gave both their votes to Jefferson and Burr, resulting in a tie between the two for the most votes.¹⁴ Consequently, the election went to the House of Representatives where the Federalists were in the majority. As Jefferson was the leader of the opponents to the Federalists, the Federalists were not inclined to vote for him.¹⁵ The result was a deadlock, which required thirty-six ballots to resolve.¹⁶ After seven days of voting, the House of Representatives elected Jefferson President and Burr Vice President.¹⁷

To address problems that arose during the 1796 and 1800 elections, the states ratified the Twelfth Amendment on June 15, 1804.¹⁸

CLAUSE 4—ELECTORAL VOTES

ArtII.S1.C4.1 Timing of Electoral Votes Generally

Article II, Section 1, 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.

In order to reduce the risk that cabals would manipulate selection of the President, the Framers provided for Congress to select a single day on which the electors would vote for the President.¹ Discussing the benefits of this provision at the Constitutional Convention, Gouverneur Morris of Pennsylvania stated: “As the Electors would vote at the same time throughout the U.S. and at so great a distance from each other, the great evil of cabal was avoided. It would be impossible to corrupt them.”² In his *Commentaries on the Constitution of the United States*, Justice Joseph Story further explained the reasoning behind this provision, stating:

Such a measure is calculated to repress political intrigues and speculations, by rendering a combination among the electoral colleges, as to their votes, if not utterly

¹² HOUSE, *supra* note 2, at 23–26.

¹³ *Id.* at 39.

¹⁴ ALAN P. GRIMES, DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION 21 (1987).

¹⁵ HOUSE, *supra* note 2, at 33.

¹⁶ GRIMES, DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION 21 (1987).

¹⁷ *Id.*

¹⁸ 1 MARK GROSSMAN, CONSTITUTIONAL AMENDMENTS 111 (2012). For discussion on the Twelfth Amendment, see Amdt12.1 Overview of Twelfth Amendment, Election of President.

¹ See, e.g., 2 RECORDS OF THE FEDERAL CONVENTION 500 (Max Farrand ed., 1911).

² *Id.*

ARTICLE II—EXECUTIVE BRANCH
Sec. 1, Cl. 4—Function and Selection, Electoral Votes

ArtII.S1.C4.1
Timing of Electoral Votes Generally

impracticable, at least very difficult; and thus secures the people against those ready expedients, which corruption never fails to employ to accomplish its designs. The arts of ambition are thus in some degree checked, and the independence of the electors against eternal influence in some degree secured.³

Supporters of the provision also noted that holding the vote on a single day would facilitate the election of the most highly respected and well-known persons, as only such persons would likely be familiar to an untainted pool of electors. For instance, during North Carolina’s debates on ratification, future Supreme Court Justice James Iredell noted that requiring the electors to vote on the same day would increase the likelihood that “the man who is the object of the choice of thirteen different states, the electors in each voting unconnectedly with the rest, must be a person who possesses in a high degree the confidence and respect of his country.”⁴

CLAUSE 5—QUALIFICATIONS

ArtII.S1.C5.1 Qualifications for the Presidency

Article II, Section 1, 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.

The Qualifications Clause set forth in Article II, Section 1, Clause 5 requires the President to be a natural-born citizen, at least thirty-five years of age, and a resident of the United States for at least fourteen years.¹

Like the age requirements for membership in the House of Representatives² and the Senate,³ the age requirement for the presidency set forth at Article II, Section 1, Clause 5 ensures that persons holding the office of President will have the necessary maturity for the position as well as sufficient time in a public role for the electorate to be able to assess the merits of a presidential candidate.⁴ In his *Commentaries on the Constitution of the United States*, Justice Joseph Story stated: “Considering the nature of the duties, the extent of the information, and the solid wisdom and experience required in the executive department, no one can reasonably doubt the propriety of some qualification of age.”⁵

The Framers appear to have adopted the requirement that citizens be natural born citizens to ensure that the President’s loyalties would lie strictly with the United States. By barring naturalized citizens from the presidency, the requirement of being a natural born citizen, as Justice Story explained, protects the United States from “ambitious foreigners, who might otherwise be intriguing for the office; and interposes a barrier against those corrupt interferences of foreign governments in executive elections, which have inflicted the most

³ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1469 (1833).

⁴ 3 THE DEBATES, RESOLUTIONS, AND OTHER PROCEEDINGS, IN CONVENTION, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 101 (Jonathan Elliot ed., 1830).

¹ U.S. CONST. art. II, § 1, cl. 5.

² See ArtI.S2.C2.1 Overview of House Qualifications Clause.

³ See ArtI.S3.C3.1 Overview of Senate Qualifications Clause.

⁴ THE FEDERALIST No. 64 (John Jay) (describing the age requirement as limiting presidential and senatorial candidates to “those who best understand our national interests . . . who are best able to promote those interests, and whose reputation for integrity inspires and merits confidence”).

⁵ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1472 (1833).

ARTICLE II—EXECUTIVE BRANCH
Sec. 1, Cl. 5—Function and Selection, Qualifications

ArtII.S1.C5.1
Qualifications for the Presidency

serious evils upon the elected monarchies of Europe.”⁶ Article II, however, provided an exception for foreign-born persons who had immigrated to the colonies prior to the adoption of the Constitution.⁷ Justice Story explained that this was done “out of respect to those distinguished revolutionary patriots, who were born in a foreign land, and yet had entitled themselves to high honors in their adopted country.”⁸

While the Constitution does not define “natural born Citizen,” commentators have opined that the Framers would have understood the term to mean “someone who was a U.S. citizen at birth with no need to go through a naturalization proceeding at some later time.”⁹ British statutes from 1709 and 1731 expressly described children of British subjects who were born outside of Great Britain as natural born citizens and provided that they enjoyed the same rights to inheritance as children born in Great Britain.¹⁰ In addition, in the Naturalization Act of 1790, the First Congress provided that “children of citizens of the United States, that may be born beyond the sea, . . . shall be considered as *natural born citizens* . . .”¹¹ Consequently, under the principle that “British common law and enactments of the First Congress” are “two particularly useful sources in understanding constitutional terms,”¹² it would appear likely that the Framers would have understood natural born citizen to encompass the children of United States citizens born overseas.¹³ Such an interpretation is further supported by the presidential candidacies of Senator John McCain of Arizona, who was born in the Panama Canal Zone; Governor George Romney of Massachusetts, who was born in Mexico, and Senator Barry Goldwater of Arizona, who was born in Arizona before it became a state.¹⁴

The Framers appear to have adopted the fourteen-year residency requirement to ensure that “the people may have a full opportunity to know [the candidate’s] character and merits, and that he may have mingled in the duties, and felt the interests, and understood the principles, and nourished the attachments, belonging to every citizen in a republican government.”¹⁵ Justice Story further explained that the fourteen-year residence requirement is “not an absolute inhabitancy within the United States during the whole period; but such an inhabitancy as includes a permanent domicile in the United States.”¹⁶

⁶ *Id.* § 1473.

⁷ U.S. CONST. art II, § 1, cl. 5 (“No person except a natural born Citizen, or a *Citizen of the United States, at the time of the Adoption of this Constitution* . . .”) (emphasis added).

⁸ *Id.* Justice Story continued: “A positive exclusion of them from the office would have been unjust to their merits, and painful to their sensibilities.” *Id.*

⁹ Neal Katyal & Paul Clement, *On the Meaning of “Natural Born Citizen,”* 128 HARV. L. REV. F. 161, 161 (2015). See also C. HERMAN PRITCHETT, CONSTITUTIONAL LAW OF THE FEDERAL SYSTEM 262 (1984) (“[P]ersons born abroad to American citizen parents are considered natural-born American citizens”); EDWARD S. CORWIN’S THE CONSTITUTION AND WHAT IT MEANS TODAY (Harold W. Chase & Craig R. Ducat, eds., 1973) (noting that, “[a]lthough the courts have never been called upon to decide the question [of whether a child born abroad of American parents is ‘a natural-born citizen’ in the sense of the Qualifications Clause], there is a substantial body of authoritative opinion supporting the position that they are”).

¹⁰ 7 Anne, ch. 5, § 3 (1709); 4 Geo. 2, ch. 21 (1731).

¹¹ Act of March 26, 1790, 1 Stat. 103, 104 (emphasis supplied). For additional discussion, see *Weedin v. Chin Bow*, 274 U.S. 657, 661–66 (1927) and *United States v. Wong Kim Ark*, 169 U.S. 649, 672–75 (1898). With minor variations, the “natural born citizen” language remained law in subsequent reenactments of the Naturalization Act until the 1802 Act, which omitted the italicized words. See Act of Feb. 10, 1855, 10 Stat. 604 (enacting same provision, for offspring of American-citizen fathers, but omitting the italicized phrase).

¹² Katyal & Clement, *supra* note 9, at 161 (citing *Smith v. Alabama*, 124 U.S. 465, 478 (1888) and *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888)).

¹³ *Id.*

¹⁴ See Katyal & Clement, *supra* note 9, at 164.

¹⁵ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1473 (1833).

¹⁶ *Id.* Justice Story notes that a stricter construction would have barred U.S. citizens serving in the Nation’s foreign embassies or military or civil officers “who should have been in Canada during the late war.” *Id.*

ARTICLE II—EXECUTIVE BRANCH
Sec. 1, Cl. 6—Function and Selection, Succession

ArtII.S1.C6.1
Succession Clause for the Presidency

CLAUSE 6—SUCCESSION

ArtII.S1.C6.1 Succession Clause for the Presidency

Article II, Section 1, 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 act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The ratification of the Twenty-Fifth Amendment¹ in 1967 superseded Article I, Section 1, Clause 6. Article I, Section 1, Clause 6 provides for the “Powers and Duties” of the President to “devolve” upon the Vice President if the President is no longer able “to discharge” them due to his removal from office, death, resignation, or inability.² Although it was unclear in the republic’s early years whether the Vice President became President or merely acted as President until a new presidential election was held, ratification of the Twenty-Fifth Amendment established incontrovertibly that the Vice President becomes President upon the President’s removal from office, death, resignation, or inability to perform the powers and duties of the office.³ In addition, Article I, Section 1, Clause 6 authorizes Congress to establish the line of succession to the presidency if both the President and Vice President are unable to discharge the “Powers and Duties” of the Presidency.⁴

Although the Twenty-Fifth Amendment was ratified in 1967, the succession of the Vice President to the office of President upon the President’s death or resignation has been the practice of the Republic since its earliest days. On April 4, 1841, President William Henry Harrison became the first president to die in office.⁵ His Vice President John Tyler, after initial hesitation, took the position that he had become the President automatically rather than “the Vice-President, now exercising the office of President,”⁶ and thereby established a precedent which was subsequently followed until the Twenty-Fifth Amendment conclusively established that the Vice-President succeeds to the Presidency under the Constitution.⁷

In 1792, the Second Congress used its authority under Article II, Section 1, Clause 6 to provide for the succession to the Presidency in the event neither the President nor Vice President were able to perform the duties and powers of the office. Under the Succession Act of 1792,⁸ the succession to the Presidency passed to the President Pro Tempore of the Senate and then to the Speaker of the House of Representatives. In 1886, Congress changed the presidential succession to the heads of the cabinet departments in the order in which the departments had been established.⁹ In 1947, Congress adopted the Presidential Succession

¹ See Amdt25.1 Overview of Twenty-Fifth Amendment, Presidential Vacancy.

² U.S. CONST. art. I, § 1, cl. 6.

³ U.S. CONST. amend. XXV, § 1 (“In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.”). See also U.S. CONST. amend. XX, § 3 (“If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice-President elect shall become President”).

⁴ U.S. CONST. art. I, § 1, cl. 6.

⁵ C. HERMAN PRITTCHETT, CONSTITUTIONAL LAW OF THE FEDERAL SYSTEM 274–75 (1984).

⁶ *Id.*

⁷ Amdt25.1 Overview of Twenty-Fifth Amendment, Presidential Vacancy.

⁸ Act of Mar. 1, 1792, ch. 8, § 9, 1 Stat. 239, 240 (Succession Act of 1792).

⁹ Act of Jan. 19, 1886, ch. 4, Pub. L. No. 49-4, 24 Stat. 1 (Succession Act of 1886).

ARTICLE II—EXECUTIVE BRANCH
Sec. 1, Cl. 7—Function and Selection, Compensation and Emoluments

ArtII.S1.C7.1
Emoluments Clause and Presidential Compensation

Act,¹⁰ which provided for the Speaker of the House to “act as President”¹¹ followed by the President Pro Tempore of the Senate, and then by the department heads in the order in which each department had been established.

CLAUSE 7—COMPENSATION AND EMOLUMENTS

ArtII.S1.C7.1 Emoluments Clause and Presidential Compensation

Article II, Section 1, 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.

To preserve the President’s independence from Congress and state governments, Article II, Section 1, Clause 7 provides that Congress may not increase or decrease the President’s compensation during his term in office and further bars the President from receiving “any other Emolument [beyond a fixed salary] from the United States, or any of them.”¹ Consequently, Congress cannot use its control over the President’s salary to influence him; the provision accordingly reinforces the separation of powers. As Justice Joseph Story observed in his *Commentaries on the Constitution of the United States*, “[a] control over a man’s living is in most cases a control over his actions.”² The Domestic Emoluments Clause—unlike the Foreign Emoluments Clause³—does not allow Congress to assent to the President receiving otherwise prohibited emoluments from the state or federal governments.

Modeled after similar provisions in state constitutions,⁴ the Domestic Emoluments Clause received little attention at the Constitutional Convention.⁵ In the *Federalist No. 73*, however, Alexander Hamilton explained that the Domestic Emoluments Clause was intended to isolate the President from potentially corrupting congressional influence. Because the President’s salary is fixed “once for all” each term, Hamilton commented, Congress “can neither weaken his fortitude by operating on his necessities, nor corrupt his integrity by appealing to his avarice.”⁶ Similarly, Hamilton explained that because “[n]either the Union, nor any of its members, will be at liberty to give . . . any other emolument,” the President will “have no

¹⁰ Presidential Succession Act of 1947, Pub. L. No. 80-199, 61 Stat. 380, *codified as amended at* 3 U.S.C. § 19.

¹¹ *Id.* § 19(1).

¹ U.S. CONST. art. II, § 1, cl. 7.

² 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1480 (1833).

³ See U.S. CONST. art. I, § 9, cl. 8; see ArtI.S9.C8.1 Overview of Titles of Nobility and Foreign Emoluments Clauses.

⁴ See, e.g., MASS CONST. of 1780, pt. II, ch. II, § 1, art. XIII (“As the public good requires that the governor should not be under the undue influence . . . it is necessary that he should have an honorable stated salary, of a fixed and permanent value”); MD. CONST. of 1776, art. XXXII (“That no person ought to hold, at the same time, more shall one office of profit, nor ought any person in public trust, to receive any present from any foreign prince or state, or from the United States, or any of them, without the approbation of this State.”).

⁵ Early in the Constitutional Convention, Benjamin Franklin proposed that the President should receive no compensation at all; this motion was politely postponed “with great respect, but rather for the author of it than from any apparent conviction of its expediency or practicability.” 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 81–85 (Max Farrand ed., 1911) (Madison’s notes). The Convention unanimously agreed to the fixed salary provision for the President on July 20, 1787. 2 *id.* at 69. On September 15, 1787, Franklin and John Rutledge moved to bar the President from receiving “any other emolument” from the federal or state governments, which the Convention approved by a 7-4 vote without noted debate. 2 *id.* at 626.

⁶ THE FEDERALIST NO. 73 (Alexander Hamilton).

ARTICLE II—EXECUTIVE BRANCH
Sec. 1, Cl. 7—Function and Selection, Compensation and Emoluments

ArtII.S1.C7.1

Emoluments Clause and Presidential Compensation

pecuniary inducement to renounce or desert the independence intended for him by the Constitution.”⁷ Other Framers echoed this sentiment during the ratification debates.⁸

The Domestic Emoluments Clause has been rarely analyzed or interpreted by courts during its history.⁹ During the administration of President Donald Trump, several litigants alleged that President Trump’s retention of certain business and financial interests violated the Foreign and Domestic Emoluments Clauses, but the Supreme Court ultimately found these cases moot without addressing their merits.¹⁰

CLAUSE 8—PRESIDENTIAL OATH OF OFFICE

ArtII.S1.C8.1 Oath of Office for the Presidency

Article II, Section 1, Clause 8:

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

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 George Washington took office on March 4, 1789,¹ 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 Andrew 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.² The idea next turned up in a message by President Abraham Lincoln justifying his suspension of the writ of habeas corpus without obtaining congressional authorization.³ And counsel to President Andrew Johnson during his impeachment trial adverted to the theory, but only in passing.⁴ Beyond these isolated instances, it does not appear to be seriously contended that the oath adds anything to the President’s powers.

⁷ *Id.*

⁸ *See, e.g.*, 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 446 (Jonathan Elliot ed., 1836) (statement of James Wilson) (“[The Domestic Emoluments Clause was designed] to secure the President from any dependence upon the legislature as to his salary.”).

⁹ *See generally* Michael A. Foster & Kevin J. Hickey, CONG. RSCH. SERV., R45992, THE EMOLUMENTS CLAUSES AND THE PRESIDENCY: BACKGROUND AND RECENT DEVELOPMENTS (2019), <https://crsreports.congress.gov/product/pdf/R/R45992>. The few judicial or executive decisions on the Domestic Emoluments Clause include *Griffin v. United States*, 935 F. Supp. 1, 3–6 (D.D.C. 1995), *Nixon v. Sampson*, 389 F. Supp. 107, 136–37 (D.D.C. 1975), and *President Reagan’s Ability to Receive Retirement Benefits from the State of California*, 5 Op. O.L.C. 187 (1981).

¹⁰ For an overview of that litigation, see ArtI.S9.C8.3 Foreign Emoluments Clause Generally.

¹ Act of March 1, 1792, 1 Stat. 239, § 12.

² 2 J. Richardson, *supra*, at 576. Chief Justice Roger 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).

³ 6 J. Richardson, *supra*, at 25.

⁴ 2 TRIAL OF ANDREW JOHNSON 200, 293, 296 (1868).

ARTICLE II—EXECUTIVE BRANCH

Sec. 2, Cl. 1—Powers, Military, Administrative, and Clemency: Commander in Chief

ArtII.S2.C1.1.1

Historical Background on Commander in Chief Clause

SECTION 2—POWERS

CLAUSE 1—MILITARY, ADMINISTRATIVE, AND CLEMENCY

ArtII.S2.C1.1 Commander in Chief

ArtII.S2.C1.1.1 Historical Background on Commander in Chief Clause

Article II, 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 Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

Surprisingly little discussion of the Commander in Chief Clause occurred in the Constitutional 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 expediency of vesting command in a single official¹ and because the lesson of English history was that danger lurked in vesting command in a person separate from the responsible political leaders.²

Early cases and commentary emphasized the purely military aspects of the Commander in Chiefship. Alexander 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.”³ In his *Commentaries on the Constitution of the United States*, Justice Joseph Story wrote of the debates accompanying the ratification of the Constitution, stating: “The propriety of admitting the president to be commander in chief, so far as to give orders, and have a general superintendency, was admitted.”⁴ Justice Story took note of the debate regarding the propriety of the President taking command of the armed forces in person, explaining the apparent consensus. He stated: “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.”⁵

The Supreme Court did not think it apparent that the Commander in Chief Power necessarily entailed all of the attributes available to a sovereign under the laws and usages of

¹ EARNEST R. MAY, *THE PRESIDENT SHALL BE COMMANDER IN CHIEF*, IN *THE ULTIMATE DECISION: THE PRESIDENT AS COMMANDER IN CHIEF* 3, 6–7 (E. May ed., 1960). During the North Carolina Ratifying Convention, James 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 JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 107 (2d ed.1836).

² MAY, *supra* note 1, at 18. 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 ELLIOT, *supra* note 1, at 393.

³ *THE FEDERALIST* No. 69 (Alexander Hamilton).

⁴ 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1492 (1833).

⁵ *Id.*

ARTICLE II—EXECUTIVE BRANCH

Sec. 2, Cl. 1—Powers, Military, Administrative, and Clemency: Commander in Chief

ArtII.S2.Cl.1.1.1

Historical Background on Commander in Chief Clause

war, even in cases of war declared by Congress.⁶ The Court held that a declaration of war, by itself, did not empower the President to confiscate enemy property.⁷

Chief Justice John Marshall, while suggesting that the President might, during the limited war authorized against France, have the authority as Commander in Chief to issue orders pertaining to the capture of certain vessels in the absence of legislation, denied the validity of such an order where Congress had enacted a contradictory statute.⁸ A U.S. commander had captured, pursuant to presidential instructions, what he believed was a U.S. merchant ship bound *from* a French port, allegedly carrying contraband material.⁹ Congress had, however, enacted the Non-Intercourse Act, which only provided for the seizure of such vessels bound *to* French ports.¹⁰ The Court held that the President's instructions exceeded the authority granted by Congress and were not to be given the force of law, and the captain could be held liable for damages.¹¹

In 1850, Chief Justice Roger Taney, writing for the Supreme Court, explained the President's power during wartime:

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 subject 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.¹²

Justice Taney continued and distinguished the role of the Commander in Chief and that of the British King:

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.¹³

⁶ *See, e.g.*, *The Thomas Gibbons*, 12 U.S. (8 Cranch) 421, 427–28 (1814) (“As to the authority of the president, we do not think it necessary to consider how far he would be entitled, in his character of commander in chief of the army and navy of the United States, independent of any statute provision, to issue instructions for the government and direction of privateers. That question would deserve grave consideration; and we should not be disposed to entertain the discussion of it, unless it become unavoidable.”).

⁷ *Brown v. United States*, 12 U.S. (8 Cranch) 110, 128–29 (1814) (“It appears to the Court, that the power of confiscating enemy property is in the legislature, and that the legislature has not yet declared its will to confiscate property which was within our territory at the declaration of war.”).

⁸ *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177–78 (1804).

⁹ *Id.* at 177 (with reference to the Law of February 9, 1799, 1 Stat. 613).

¹⁰ *Id.*

¹¹ *Id.* at 179. *See also* *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, (1801) (“The whole powers of war being by the constitution of the United States, vested in congress, the acts of that body can alone be restored to as our guides in this enquiry.”).

¹² *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850). The Court explained that acquisition of foreign territory could be accomplished “only by the treaty-making power or the legislative authority, and [it] is not a part of the power conferred upon the President by the declaration of war.” *Id.* Congress had declared war against Mexico in 1846. Act of May 13, 1846, ch. 16, 9 Stat. 9.

¹³ *Fleming*, 50 U.S. (9 How.) at 618.

ARTICLE II—EXECUTIVE BRANCH

Sec. 2, Cl. 1—Powers, Military, Administrative, and Clemency: Commander in Chief

ArtII.S2.C1.1.2

Prize Cases and Commander in Chief Clause

Even after the Civil War, a powerful minority of the Court, led by Chief Justice Salmon Chase, described the role of President as Commander in Chief simply as “the command of the forces and the conduct of campaigns.”¹⁴

ArtII.S2.C1.1.2 Prize Cases and Commander in Chief Clause

Article II, 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 Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

The basis for a broader conception of the role of Commander in Chief was laid in certain early acts of Congress authorizing the President to employ military force in the execution of the laws.¹ In his famous message to Congress on July 4, 1861,² Abraham Lincoln advanced the claim that the “war power” was his for the purpose of suppressing rebellion, and in the *Prize Cases*³ of 1863 a divided Court sustained this theory. The immediate issue was the validity of the blockade of the Southern ports that the President had established following the attack on Fort Sumter.⁴ The argument was advanced that, in order for a blockade to be valid, it must be established during 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.⁵ Speaking for the majority of the Court, Justice Robert 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*.’⁶

To support this principle with historical precedent, Justice Grier explained that the battles of Palo Alto and Resaca de la Palma had been fought before the enactment of the Act of Congress of May 13, 1846, “which recognized ‘a state of war as existing by the act of the

¹⁴ *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866).

¹ 1 Stat. 424 (1795); 2 Stat. 443 (1807) (codified at 10 U.S.C. §§ 251–254). 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).

² 7 MESSAGES AND PAPERS OF THE PRESIDENTS 3221, 3224 (1897) (“So viewing the issue, no choice was left but to call out the war power of the Government and so to resist force employed for its destruction by force for its preservation.”). Later in the address, President Lincoln submitted: “Recurring to the action of the Government, it may be stated that at first a call was made for 75,000 militia, and rapidly following this a proclamation was issued for closing the ports of the insurrectionary districts by proceedings in the nature of blockade. So far all was believed to be strictly legal. At this point the insurrectionists announced their purpose to enter upon the practice of privateering.”

“Other calls were made for volunteers to serve three years unless sooner discharged, and also for large additions to the Regular Army and Navy. These measures, whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity, trusting then, as now, that Congress would readily ratify them. It is believed that nothing has been done beyond the constitutional competency of Congress.” *Id.* at 3225.

³ 67 U.S. (2 Black) 635 (1863).

⁴ *Id.* at 665.

⁵ *Id.* at 644–45 (argument).

⁶ *Id.* at 668–70.

ARTICLE II—EXECUTIVE BRANCH

Sec. 2, Cl. 1—Powers, Military, Administrative, and Clemency: Commander in Chief

ArtII.S2.C1.1.2

Prize Cases and Commander in Chief Clause

Republic of Mexico.”⁷ Justice Grier stated, “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.”⁸

The Court might have rested its opinion wholly on the President’s authorities under statute to suppress insurrections and repel invasions,⁹ coupled with Congress’s ratification of the President’s actions,¹⁰ but it instead emphasized Executive power and duty:

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.¹¹

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.¹² No attention was given the fact that Lincoln had asked Congress to ratify and confirm his acts, which Congress promptly had,¹³ 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.¹⁴ On the other hand, where Lincoln’s proclamation suspending habeas corpus varied from legislation later enacted to ratify it, the Court looked to the statute¹⁵ rather than to the proclamation¹⁶ to determine the breadth of its application in the case of *Ex parte Milligan*.¹⁷

In a partial concurrence to the majority’s decision in *Milligan*, Chief Justice Chase described the allocation of war powers as follows:

The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes

⁷ *Id.* at 668.

⁸ *Id.*

⁹ *Id.* at 668.

¹⁰ 67 U.S. (2 Black) at 670–71 (taking note of various statutes and stating, “Without admitting that such an act was necessary under the circumstances, it is plain that if the President had in any manner assumed powers which it was necessary should have the authority or sanction of Congress, . . . this ratification has operated to perfectly cure the defect.”).

¹¹ *Id.* at 669–70.

¹² See generally, EDWARD CORWIN, TOTAL WAR AND THE CONSTITUTION (1946).

¹³ 12 Stat. 326 (1861).

¹⁴ J. G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 118–139 (rev. ed. 1951).

¹⁵ Act of Mar. 3, 1863, 12 Stat. 755 (authorizing the suspension of habeas corpus, but with limitations in Union states to those held as prisoners of war; all others were to be indicted or freed.)

¹⁶ Proclamation of Sept. 15, 1863, 13 Stat. 734 (suspending habeas corpus with respect to those in federal custody as military offenders or “as prisoners of war, spies, or aiders and abettors of the enemy”).

¹⁷ *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 115–16 (1866).

ARTICLE II—EXECUTIVE BRANCH

Sec. 2, Cl. 1—Powers, Military, Administrative, and Clemency: Commander in Chief

ArtII.S2.C1.1.3

Wartime Powers of President in World War II

all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President¹⁸

The Chief Justice described the Commander in Chief Power as entailing “the command of the forces and the conduct of campaigns,”¹⁹ but nevertheless agreed that military trials of civilians accused of violating the law of war in Union states were invalid without congressional approval, despite the government’s assertion that the “[Commander in Chief’s] power to make an effectual use of his forces [must include the] power to arrest and punish one who arms men to join the enemy in the field against him.”²⁰

ArtII.S2.C1.1.3 Wartime Powers of President in World War II

Article II, 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 Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

In his message to Congress of September 7, 1942, in which he demanded that Congress repeal certain provisions of the Emergency Price Control Act,¹ President Franklin Roosevelt formulated his conception of his powers as President in wartime to act inconsistently with congressional statute:

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.

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

¹⁸ *Id.* at 139 (Chase, C.J., concurring and dissenting in part).

¹⁹ *Id.* at 139–40 (“Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity . . .”).

²⁰ *Id.* at 17 (government argument).

¹ 56 Stat. 23 (1942).

ARTICLE II—EXECUTIVE BRANCH

Sec. 2, Cl. 1—Powers, Military, Administrative, and Clemency: Commander in Chief

ArtII.S2.C1.1.3

Wartime Powers of President in World War II

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.²

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. In exercising both the powers which he claimed as Commander in Chief and those which Congress conferred upon him to meet the emergency, President Roosevelt employed new emergency agencies, created by himself and responsible directly to him, rather than the established departments or existing independent regulatory agencies.³

ArtII.S2.C1.1.4 Evacuation of the West Coast Japanese

Article II, 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 Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

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.¹ Pursuant to this order, approximately 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 shipped to temporary camps and later into “relocation centers” in several states.²

It was apparently the Administration's original intention to rely on the general principle of military necessity and the power of the Commander in Chief in wartime as authority for the relocations.³ Before any action was taken under the order, Congress ratified and adopted it by the Act of March 21, 1942,⁴ 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

² 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* EDWARD CORWIN, *TOTAL WAR AND THE CONSTITUTION* 65–66 (1946) (listing examples to demonstrate an implied claim to “dispense with statutes”).

³ For a listing of the agencies and an account of their creation to the close of 1942, see Arthur T. Vanderbilt, *War Powers and Their Administration*, 1942 ANN. SURV. AM. L. 106–113 (1942).

¹ Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942).

² WAR RELOCATION AUTHORITY, *THE EVACUATED PEOPLE: A QUANTITATIVE DESCRIPTION* 67 (1946).

³ Exec. Order 9066 stated that “the successful prosecution of the war requires every possible protection against espionage and against sabotage” and cited as authority that vested “in the President of the United States, and Commander in Chief of the Army and Navy,” but did not claim statutory authority. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942).

⁴ 56 Stat. 173 (1942).

ARTICLE II—EXECUTIVE BRANCH

Sec. 2, Cl. 1—Powers, Military, Administrative, and Clemency: Commander in Chief

ArtII.S2.C1.1.5

The President and Labor Relations in World War II

order were decided under the order plus the Act. The question at issue, said Chief Justice Harlan 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 complained of.”⁵ This question was answered in the affirmative, as was the similar question later raised by an exclusion order.⁶ These two opinions, however, skirted the question of internment in relocation centers. On that question, the Court granted habeas relief to an “admittedly loyal citizen” of Japanese descent on the basis that internment was unsupported by the Executive Order or by statute.⁷ Ultimately, the Court abrogated the *Korematsu* decision, holding that “[t]he forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority.”⁸

ArtII.S2.C1.1.5 The President and Labor Relations in World War II

Article II, 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 Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

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, President Franklin 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.¹ Attorney General Robert 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.”² Other seizures followed, and on January 12, 1942, President Roosevelt, by Executive Order 9017, created the National War Labor Board. The order declared in part, “by reason of the state of war declared to exist by joint resolutions of Congress, . . . the

⁵ *Hirabayashi v. United States*, 320 U.S. 81, 91–92 (1943).

⁶ *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. §§ 4201–4251. Reparations were approved, and each living survivor of the internment was to be compensated in an amount roughly approximating \$20,000.

⁷ *Ex parte Endo*, 323 U.S. 283, 302 (1944).

⁸ *Trump v. Hawaii*, No. 17–965, slip op. at 38 (U.S. June 26, 2018).

¹ Exec. Order No. 8773, 6 Fed. Reg. 2777 (1941).

² EDWARD CORWIN, *TOTAL WAR AND THE CONSTITUTION* 47–48 (1946). As Supreme Court Justice, Jackson would later deny that the President as Commander in Chief had authority to seize steel manufacturing plants affected by labor strife. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring) (“What the power of command may include I do not try to envision, but I think it is not a military prerogative, without support of law, to seize persons or property because they are important or even essential for the military and naval establishment.”).

ARTICLE II—EXECUTIVE BRANCH

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ArtII.S2.C1.1.5

The President and Labor Relations in World War II

national interest demands that there shall be no interruption of any work which contributes to the effective prosecution of the war; and . . . 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.”³ In this field, too, Congress intervened by means of the War Labor Disputes Act of June 25, 1943,⁴ which authorized plant seizures in support of war efforts but which, however, still left ample basis for presidential activity of a legislative character.⁵

ArtII.S2.C1.1.6 Presidential Directives and Sanctions in World War II

Article II, 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 Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

To implement his directives as Commander in Chief in wartime, and especially those which he issued in governing labor disputes, President Franklin Roosevelt often resorted to “sanctions,” which may be described as penalties lacking statutory authorization. Ultimately, the President sought to put sanctions by the National War Labor Board on a systematic basis.¹ The order empowered the Director of Economic Stabilization, on receiving a report from the 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.²

Sanctions were also occasionally employed by statutory agencies, such as the Office of Price Administration (OPA), to supplement the penal provisions of the Emergency Price Control Act of January 30, 1942.³ In *Steuart & Bro. v. Bowles*,⁴ 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.

³ 7 Fed. Reg. 237 (1942).

⁴ 57 Stat. 163 (1943).

⁵ See Arthur T. Vanderbilt, *War Powers and Their Administration*, 1942 ANN. SURV. AM. L. 271–273 (1942) (listing various Executive Orders, proclamations, and orders of the National War Labor Board).

¹ Exec. Order No. 9370, 8 Fed. Reg. 11,463 (1943).

² *Id.*

³ 56 Stat. 23 (1942).

⁴ 322 U.S. 398 (1944).

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ArtII.S2.C1.1.7

Treatment of Enemy Combatants and Nazi Saboteurs

The court refused to do so⁵ and was sustained by the Supreme Court in its position. Justice William 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 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.”⁶

Sanctions not expressly supported by statute 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.⁷

ArtII.S2.C1.1.7 Treatment of Enemy Combatants and Nazi Saboteurs

Article II, 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 Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

In 1942 eight youths, seven Germans and one 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

⁵ *L.P. Steuart & Bro. v. Bowles*, 55 F. Supp. 336, 337 (D.D.C. 1944) (“I see no reason why the O.P.A. should not revoke the allocation to and the authority of the agency. If it can do this, it can do the lesser. If it can put an end to the allocation it can suspend it.”).

⁶ 322 U.S. at 405–06.

⁷ EDWARD CORWIN, *THE PRESIDENT, OFFICE AND POWERS* 284–85 (1984).

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of the laws of war, to wit: for not wearing fixed emblems to indicate their combatant status.¹ 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 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.”² 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.³ The third contention the Court overruled by declining to draw the line between the powers of Congress and the President in the premises,⁴ 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.⁵

The Court also 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.⁶

ArtII.S2.C1.1.8 World War II War Crimes Tribunals

Article II, 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

¹ Military Order of July 2, 1942, 7 Fed. Reg. 5103 (July 3, 1942). President Roosevelt by Proclamation established that “subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States or any territory or possession thereof, through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals; and that such persons shall not be privileged to seek any remedy or maintain any proceeding directly or indirectly, or to have any such remedy or proceeding sought on their behalf, in the courts of the United States.” Proclamation No. 2561, of July 2, 1942, 7 Fed. Reg. 5101, 56 Stat. 1964. The Supreme Court disregarded the President’s effort to deny the accused access to the court, stating “there is certainly nothing in the Proclamation to preclude access to the courts for determining its applicability to the particular case.” *Ex parte Quirin*, 317 U.S. 1, 25 (1942). Moreover, the Court observed, “neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners’ contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission.” *Id.*

² *Ex parte Quirin*, 317 U.S. at 29–30, 35.

³ *Id.* at 41–42.

⁴ *Id.* at 28–29.

⁵ The Court would later take more seriously Congress’s role in cabinining the President’s authority to establish military commissions. See ArtII.S2.C1.1.18 Detention Authority.

⁶ *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 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.”).

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ArtII.S2.C1.1.9

Postwar Period and Commander in Chief Clause

Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

As a matter of fact, in General Tomoyuki Yamashita's case,¹ which was brought after the termination of hostilities for alleged "war crimes," the Court abandoned its restrictive conception altogether. In the words of Justice John 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.²

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 did international law clearly forbid ex post facto laws.³

ArtII.S2.C1.1.9 Postwar Period and Commander in Chief Clause

Article II, 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 Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

The end of active hostilities did not terminate either the emergency or the Federal Government's response to it. President Harry Truman proclaimed the termination of hostilities on December 31, 1946,¹ and, in July 1947, Congress enacted a joint resolution that repealed a great variety of wartime statutes and set termination dates for others.² 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."³ The hot war was giving way to the Cold War.

The postwar period was a time of reaction against the wartime exercise of power by President Franklin Roosevelt, and President Truman was not permitted the same liberties.

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

² 327 U.S. at 81.

³ See Leo Gross, *The Criminality of Aggressive War*, 41 AM. POL. SCI. REV. 205 (1947).

¹ Proc. 2714, 12 Fed. Reg. 1 (1947).

² S.J. Res. 123, 61 Stat. 449 (1947).

³ *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 140 n.3 (1948).

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Postwar Period and Commander in Chief Clause

The Supreme Court signaled this reaction when it struck down the President's action in seizing the steel industry while it was struck during the Korean War.⁴

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,⁵ 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, limiting the Trading with the Enemy Act to wartime and enacting the International Emergency Economic Powers Act,⁶ which delegated most of the same range of powers to the President, but which changed the scope of the power delegated to declare national emergencies.⁷ Congress also passed the National Emergencies Act,⁸ 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.⁹

ArtII.S2.C1.1.10 Use of Troops Overseas and Congressional Authorization

Article II, 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 Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

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.¹ In addition to the justification, the memorandum summarized forty-seven instances in which force had been used, in most of them without any congressional authorization.² 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

⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). The majority stated, “Even though ‘theater of war’ be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production.” *Id.* at 587.

⁵ First War Powers Act § 301(1), 55 Stat. 838, 839–840 (1941) (amending § 5 of the Trading with the Enemy Act of 1917, 40 Stat. 411, now codified at 50 U.S.C. § 4305).

⁶ Pub. L. No. 95-223, 91 Stat. 1626, 50 U.S.C. §§ 1701–1706 (1977).

⁷ 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.

⁸ Pub. L. No. 94-412, 90 Stat. 1255, 50 U.S.C. §§ 1601–1651 (1976).

⁹ 50 U.S.C. § 1622.

¹ J. CLARK, MEMORANDUM BY THE SOLICITOR FOR THE DEPARTMENT OF STATE, RIGHT TO PROTECT CITIZENS IN FOREIGN COUNTRIES BY LANDING FORCES (1912).

² *Id.* appendix.

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Use of Troops Overseas and Congressional Authorization

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.³

New lists and revised arguments were published to support the actions of President Harry Truman in sending troops to Korea and of Presidents John Kennedy and Lyndon Johnson in sending troops first to Vietnam and then to Indochina generally,⁴ and new lists have since been propounded.⁵ 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.⁶ Some instances, e.g., President James Polk's use of troops to precipitate war with Mexico in 1846, President Ulysses Grant's attempt to annex the Dominican Republic, President William 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 the twentieth 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.⁷

The pre-war actions of Presidents Woodrow 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

³ *Id.* Milton Offutt, *The Protection of Citizens Abroad by the Armed Forces of the United States* (1928); James Grafton Rogers, *World Policing and the Constitution* app. (1945). The last volume examined whether the President was empowered to participate in United Nations peacekeeping actions absent congressional authorization.

⁴ *E.g.*, H. Rep. No. 127, 82d Congress, 1st Sess. (1951), 55–62; Edward Corwin, *Who Has the Power to Make War?*, *NEW YORK TIMES MAGAZINE* 11 (July 31, 1949); Authority of the President to Repel the Attack in Korea, 23 Dept. State Bull. 173 (1950); Dept. of State, Historical Studies Div., *Armed Actions Taken by the United States Without a Declaration of War, 1789–1967* (1967). One commentator stated:

"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 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."

DEAN ACHESON, *PRESENT AT THE CREATION* 414, 415 (1969).

⁵ War Powers Legislation: Hearings Before the Senate Foreign Relations Committee, 92d Congress, 1st Sess. (1971), 347, 354–355, 359–379 (Sen. Barry Goldwater); J. Terry Emerson, *War Powers Legislation*, 74 *W. Va. L. Rev.* 53 (1972). *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990) (citing *Instances of Use of United States Armed Forces Abroad, 1798–1989*, Cong. Rsch. Serv. (1989)). For an effort to reconstruct the development and continuation of the listings, see FRANCIS D. WORMUTH & EDWIN B. FIRMAIGE, *TO CHAIN THE DOG OF WAR* 142–145 (1989).

⁶ *See, e.g.*, Act of Mar. 3, 1819, ch. 77, §1, 3 Stat. 510; extended by Act of Jan. 30, 1823, ch. 7, 3 Stat. 721 (authorizing public armed vessels of the United States to suppress piracy), *codified at* 33 U.S.C. § 381.

⁷ Considerable debate continues with respect to the meaning of the historical record. For reflections of the narrow reading, see Nat'l Commitments Resolution, Rep. of the Sen. Committee on Foreign Relations, S. Rep. No. 91-129, 1st Sess. (1969); JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993). *See* ABRAHAM D. SOFAER, *WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS* (1976); J. Terry Emerson, *Making War Without a Declaration*, 17 *J. LEGIS.* 23 (1990).

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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 at his discretion.⁸ Thus, Secretary of State Dean 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.”⁹

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, and most notably Indochina.¹⁰ Eventually, public opposition precipitated another constitutional debate whether the President had the authority to commit troops to foreign combat without the approval of Congress, culminating in the enactment of the War Powers Resolution.¹¹ The Resolution did little to inhibit Presidents from sending troops abroad without prior congressional authorization, and the Supreme Court has not squarely addressed the issue.¹²

ArtII.S2.C1.1.11 Presidential Power and Commander in Chief Clause

Article II, 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

⁸ For some popular defenses of presidential power during the “Great Debate,” see Edward Corwin, *Who Has the Power to Make War?* NEW YORK TIMES MAGAZINE 11 (July 31, 1949); Henry Commager, *Presidential Power: The Issue Analyzed*, NEW YORK TIMES MAGAZINE 11 (January 14, 1951). 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. 9647–49 (1950). President Truman and Secretary Acheson used the argument from the U.N. Charter in defending the United States’ actions in Korea. See, e.g., Jane Stromseth, *Rethinking War Powers: Congress, the President, and the United Nations*, 81 GEO. L. J. 597 (1993).

⁹ Assignment of Ground Forces of the United States to Duty in the European Area: Hearings Before the Senate Foreign Relations and Armed Services Committees, 82 Cong., 1st Sess. (1951), 92.

¹⁰ See the discussion in National Commitments Resolution, Report of the Senate Committee on Foreign Relations, S. Rep. No. 91–129, 91st Cong., 1st Sess. (1969); U.S. Commitments to Foreign Powers: Hearings Before the Senate Committee on Foreign Relations, 90th Cong., 1st Sess. 16–19 (1967) (Professor Bartlett).

¹¹ Pub. L. No. 93-148, 87 Stat. 555, 50 U.S.C. §§ 1541–1548.

¹² Lower courts have largely avoided resolving challenges to presidential authority to insert U.S. forces into hostile situations without congressional authorization on grounds of non-justiciability, mootness, ripeness, or standing. See, e.g., *Kucinich v. Obama*, 821 F. Supp. 2d 110, 125 (D.D.C. 2011) (finding that Members of the House of Representatives and group of taxpayers lacked standing to challenge military operations in Libya); *Doe v. Bush*, 323 F.3d 133, 139 (1st Cir. 2003) (holding challenge to planned military action under the Authorization for Use of Military Force Against Iraq Resolution of 2002 Pub L. No. 107–243, 116 1498 not ripe for adjudication); *Campbell v. Clinton*, 52 F. Supp.2d 34 (D.D.C. 1999) (dismissing challenge to military air campaign in Kosovo for lack of standing), *aff’d*, 203 F.2d 19 (D.C. Cir.), *cert. den.*, 531 U.S. 815 (2000); *Dellums v. Bush*, 752 F.Supp. 1141 (D.D.C. 1990) (dismissing suit to enjoin military intervention in Iraq on ripeness grounds); *Lowry v. Reagan*, 676 F. Supp. 333 (D.D.C. 1987) (dismissing lawsuit to require reporting of Kuwaiti vessels on grounds of equitable discretion and political question doctrines), *aff’d*, No. 87–5426 (D.C. Cir. 1988); *Conyers v. Reagan*, 578 F. Supp. 324 (D.D.C. 1984), *aff’d*, 765 F.2d 1124 (D.C. Cir. 1985) (dismissing challenge by Members of Congress to military intervention in Grenada on the basis of the doctrine of equitable/remedial discretion); *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596 (D.D.C. 1983), *aff’d*, 770 F.2d 202 (D.C. Cir. 1985) (dismissing challenge to military support to paramilitary operations designed to overthrow the government of Nicaragua as a nonjusticiable political question); dismissing House Members’ challenge to military aid supplied to the government of El Salvador, including sending U.S. military advisers, on political question grounds; *Holtzman v. Schlesinger*, 484 F.2d 1307, 1309–11 (2d Cir. 1973) (rejecting challenge to hostilities in Cambodia as political question).

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ArtII.S2.C1.1.12

Congressional Control Over President's Discretion

Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

The President's power with regard to the armed forces has long been debated. In defense of executive action in Indochina, 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 Communist aggression in North Viet Nam are necessary, he is constitutionally empowered to take those measures.¹

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.² Though Congress asserted itself in some respects, it never really managed to confront the President's power with any sort of effective limitation, until the 1970s.

ArtII.S2.C1.1.12 Congressional Control Over President's Discretion

Article II, 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;

¹ Leonard C. Meeker, *The Legality of United States Participation in the Defense of Viet Nam*, 54 DEP'T STATE BULL. 474, 484–485 (1966). See also John N. Moore, *The National Executive and the Use of the Armed Forces Abroad*, 21 NAVAL WAR COLLEGE REV. 28 (1969); Quincy 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. (1970), 1 (Under Secretary of State Katzenbach), 90 (J. Stevenson, Legal Adviser, Department of State), 120 (Professor Moore), 175 (Assistant Attorney General Rehnquist).

² E.g., F. WORMUTH & E. FIRMAGE, *TO CHAIN THE DOG OF WAR* (1989), F.J. ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF THE VIETNAM WAR AND ITS AFTERMATH* (1993); U.S. Commitments to Foreign Powers: Hearings Before the Senate Committee on Foreign Relations, 90th Cong., 1st sess. 9 (1967) (Bartlett); War Powers Legislation: Hearings Before the Senate Committee on Foreign Relations, 92d Cong., 1st sess. 7 (1971).

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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 Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

Over the President's veto, Congress enacted in 1973 the War Powers Resolution,¹ 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 involvement 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.² 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.³ 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.⁴ Congress may through the passage of a concurrent resolution require the President to remove the troops sooner.⁵ 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.⁶

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. In general, Presidents operating under it have expressly or implicitly considered it to be at least in part an

¹ Pub. L. No. 93-148, 87 Stat. 555 (1973), *codified at* 50 U.S.C. §§ 1541–1548. For congressional intent and explanation, see H. Rep. No. 93-287, S. Rep. No. 9-220, and H. Rep. No. 93-547 (Conference Report), 93d Cong., 1st sess. (1973). The President's veto message is H. Doc. No. 93-171, 93d Cong. 1st Sess. (1973); The War Powers Resolution: Relevant Documents, Reports, Correspondence, House Committee on Foreign Affairs, 103d Cong., 2d Sess. 1–46 (1994) (Comm. Print). For an account of passage and assessment of the disputed compliance 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) (1982).

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

³ 50 U.S.C. § 1543(a).

⁴ 50 U.S.C. § 1544(b).

⁵ *Id.* at § 1544(c). Following *INS v. Chadha*, 462 U.S. 919 (1983), Congress subsequently enacted expedited procedures for considering joint resolutions or bills to require removing U.S. Armed Forces from situations of hostilities. Department of State Authorization Act, Fiscal Years 1984 and 1985, Pub. L. No. 98–164 § 1013, 97 Stat. 1062 (1983), *codified at* 50 U.S.C. § 1546(a).

⁶ 50 U.S.C. § 1547(a).

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unconstitutional infringement on presidential powers,⁷ 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.⁸ Upon the invasion of Kuwait by Iraqi troops in 1990, President George H.W. Bush sought 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.⁹ 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.¹⁰

Presidents have continued to claim independent authority to commit U.S. Armed Forces to involvements abroad absent any congressional participation other than consultation and after-the-fact financing. In 1994, for example, President Bill Clinton based his authority to order the participation of U.S. forces in NATO actions in Bosnia-Herzegovina on his “constitutional authority to conduct U.S. foreign relations” and as his role as Commander in Chief,¹¹ and protested efforts to restrict the use of military forces there and elsewhere as an improper and possibly unconstitutional limitation on his “command and control” of U.S. forces.¹² In March 2011, President Barack Obama ordered U.S. military forces to take action as part of an international coalition to enforce U.N. Security Council Resolution 1973, which authorized U.N. Member States to take all necessary measures (other than through military occupation) to protect civilians from attacks by the Libyan government and to establish a no-fly zone over the country. Although these operations had not been authorized by legislation, the Executive Branch submitted a report to Congress which claimed that the President has the “constitutional authority, as Commander in Chief and Chief Executive and pursuant to his foreign affairs powers, to direct such limited military operations abroad.”¹³

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

⁷ See generally Dept. of Justice, Office of Legal Counsel, *Authority of the President under Domestic and International Law to Use Military Force against Iraq*, 26 Op. O.L.C. 1, 39–45 (2002) (discussing presidential views and Dept. of Justice opinions concerning the constitutionality of the War Powers Resolution).

⁸ See *The War Powers Resolution: Relevant Documents, Reports, Correspondence*, footnote 91 at 47 (Pres. Ford on transport of refugees from Danang), 55 (Pres. Jimmy Carter on attempted rescue of Iranian hostages), 73 (Pres. Ronald Reagan on use of troops in Lebanon), 113 (Pres. Ronald Reagan on Grenada), 144 (Pres. George H.W. Bush on Panama), 147, 149 (Pres. George H.W. Bush on Persian Gulf), 189 (Pres. George H.W. Bush on Somalia), 262 (Pres. William J. Clinton on Haiti).

⁹ 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. 701 (1990)* (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 George H.W. Bush answered a question about the requested action, stating: “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).

¹⁰ Pub. L. No. 102-1, 105 Stat. 3 (1991).

¹¹ 30 Weekly Comp. Pres. Doc. 406 (March 2, 1994).

¹² See Interview with Radio Reporters, 1993 Pub. Papers 1763–64.

¹³ *Report to the House of Representatives on United States Activities in Libya*, submitted June 15, 2011. The Department of Justice’s Office of Legal Counsel issued a legal opinion which claimed that the President possessed independent constitutional authority to commence U.S. military operations in Libya without prior congressional authorization because these operations would be “limited” in scope and the President could “reasonably determine that such use of force was in the national interest.” Dept. of Justice, Office of Legal Counsel, *Authority to Use Military Force in Libya* (2011). The opinion stated that “prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period” may generally require prior congressional authorization, but claimed that “historical practice of presidential military action without congressional approval precludes any suggestion that Congress’s authority to declare war covers every military engagement, however limited, that the President initiates.” *Id.* at 8.

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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 2002,¹⁴ 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.”¹⁵ 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 consensus has emerged, and there is little evidence that there exists within Congress the resolve to exercise the responsibility concomitant with strengthening it.¹⁶

ArtII.S2.C1.1.13 President as Commander of Armed Forces

Article II, 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 Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

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. President Abraham Lincoln early in 1862 issued orders for a general advance in the hopes of stimulating General George McClellan to action; President Woodrow Wilson in 1918 settled the question of an independent American command on the Western Front; President Harry Truman in 1945 ordered that the bomb be dropped on Hiroshima and Nagasaki.¹ 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.”² In the absence of attempts by Congress to limit his or her power, the President 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

¹⁴ Pub. L. No. 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.

¹⁵ See President’s Statement on Signing H.J. Res. 114, Oct. 16, 2002, by Gerhard Peters and John T. Woolley, The American Presidency Project.

¹⁶ See, on proposals to amend and on congressional responsibility, JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 115–138 (1993).

¹ For a review of how several wartime Presidents have operated in this sphere, see *The Ultimate Decision: The President As Commander In Chief* (1960).

² *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850).

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United States, and his or her authority to do this sometimes survives cessation of hostilities.³ The President may employ secret agents to enter the enemy's lines and obtain information as to its strength, resources, and movements.⁴ He or she may, at least with the assent of Congress, authorize commercial intercourse with the enemy.⁵ The President 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."⁶ By the same warrant, a President may bring hostilities to a conclusion by arranging an armistice, stipulating conditions that may determine to a great extent the ensuing peace.⁷ The President may not, however, effect a permanent acquisition of territory,⁸ though he or she may govern recently acquired territory until Congress sets up a more permanent regime.⁹

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.¹⁰ Indeed, until 1830, courts-martial were convened solely on the President's authority as Commander in Chief.¹¹ Such rules and regulations are, moreover, it seems, subject in wartime to his or her amendment at discretion.¹² 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.¹³ One important power that the President lacks is that of choosing his or her 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."¹⁴ 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 pursuant to a sentence of a general court-martial or in commutation of a sentence of a court-martial.¹⁵ 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 consent of the Senate another person in his or her place.¹⁶ Congress has not limited the President's power of dismissal in time of war.

³ *Madsen v. Kinsella*, 343 U.S. 341, 348 (1952). *See also* *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950).

⁴ *Totten v. United States*, 92 U.S. 105 (1876).

⁵ *Hamilton v. Dillin*, 88 U.S. (21 Wall.) 73 (1875); *Haver v. Yaker*, 76 U.S. (9 Wall.) 32 (1869).

⁶ *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).

⁷ *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.

⁸ *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850).

⁹ *Santiago v. Noguerras*, 214 U.S. 260 (1909). As to temporarily occupied territory, see *Dooley v. United States*, 182 U.S. 222, 230–31 (1901).

¹⁰ 15 Ops. Atty. Gen. 297, n; cf. 1 Ops. Atty. Gen. 233, 234 (Attorney General Wirt stating the contrary view).

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

¹² *Ex parte Quirin*, 317 U.S. 1, 28–29 (1942).

¹³ 3 General Orders, No. 100, Official Records, War Rebellion (Apr. 24, 1863) (ser. III).

¹⁴ *See, e.g., Mimmack v. United States*, 97 U.S. 426, 437 (1878); *United States v. Corson*, 114 U.S. 619 (1885).

¹⁵ 10 U.S.C. § 1161. *See also* 10 U.S.C. § 804 (permitting officer dismissed by presidential order to demand court-martial).

¹⁶ *Mullan v. United States*, 140 U.S. 240 (1891); *Wallace v. United States*, 257 U.S. 541 (1922).

ARTICLE II—EXECUTIVE BRANCH

Sec. 2, Cl. 1—Powers, Military, Administrative, and Clemency: Commander in Chief

ArtII.S2.C1.1.14

Martial Law Generally

ArtII.S2.C1.1.14 Martial Law Generally

Article II, 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 Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

Martial law can be validly and constitutionally established by supreme political authority in wartime as held in *Luther v. Borden*.¹ In *Luther*, the Court held that state declarations of martial law were conclusive and therefore not subject to judicial review.² 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.³ The decision in the *Prize Cases*,⁴ although not dealing directly with the subject of martial law, gave national scope to the same general principle in 1863.

After the Civil War, a divided Court, in *Ex parte Milligan*,⁵ pronounced President Abraham Lincoln's suspension of the writ of habeas corpus in September 1863 void. 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 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.”⁶

Four Justices, speaking by Chief Justice Salmon 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 military 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

¹ 48 U.S. (7 How.) 1 (1849). *See also* *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 32–33 (1827) (“When the President exercises an authority confided to him by law, the presumption is, that it is exercised in pursuance of law.”).

² 48 U.S. (7 How.) at 45.

³ *Id.*

⁴ 67 U.S. (2 Bl.) 635 (1863).

⁵ *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

⁶ *Id.* at 127.

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ArtII.S2.C1.1.14
Martial Law Generally

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.⁷

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 twentieth century, however, the Court appeared to retreat from its stand in *Milligan* insofar as it held in *Moyer v. Peabody*⁸ that:

“[T]he Governor’s declaration that a state of insurrection existed is conclusive of that fact. . . . [T]he 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. . . . 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.”⁹

The “good faith” test of *Moyer*, however, was superseded by the “direct relation” test of *Sterling v. Constantin*,¹⁰ 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.”¹¹

⁷ *Id.* at 139–40 (Chase, C.J., concurring). 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.

⁸ 212 U.S. 78 (1909).

⁹ 212 U.S. at 83–85.

¹⁰ 287 U.S. 378, 400 (1932) (distinguishing *Moyer* because “[i]n that case it appeared that the action of the Governor had direct relation to the subduing of the insurrection by the temporary detention of one believed to be a participant, and the general language of the opinion must be taken in connection with the point actually decided”). The Court stated: “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.

¹¹ *Id.* at 400–401. State governors have ignored this holding on numerous occasions. *E.g.*, *Allen v. Oklahoma City*, 175 Okla. 421, 52 P.2d 1054 (1935) (“[T]he martial law decree afforded no justification whatever for the enactment of the [segregation] ordinance, nor did this instrument impart any validity to the ordinance.”); *Hearon v. Calus*, 178 S.C. 381, 183 S.E. 13, 21 (1935) (“In the case now before this court [involving the governor’s takeover of the state highway commission] there is no particle of evidence, nor even suggestion, that there existed a state of war, or anything approaching disorder”); and *Joyner v. Browning*, 30 F. Supp. 512 (W.D. Tenn. 1939) (enjoining governor from employing martial law to disenfranchise voters on the basis of sex and race).

ARTICLE II—EXECUTIVE BRANCH

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ArtII.S2.C1.1.15
Martial Law in Hawaii

ArtII.S2.C1.1.15 Martial Law in Hawaii

Article II, 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 Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

The question of the constitutional status of martial law was raised again in World War II by the proclamation of Governor Joseph 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 Franklin 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, 1900,¹ 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.” 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.”² In a brace of cases which reached it in February 1945, but which it contrived to postpone deciding until February 1946,³ the Court, speaking by Justice Hugo 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.”⁴

The Court relied on the majority opinion in *Ex parte Milligan*. Chief Justice Harlan 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,”⁵ but added that the military authorities themselves had failed to show justifying facts in this instance.⁶ Justice Harold Burton, speaking for himself and Justice Felix Frankfurter, dissented. He stressed the importance of Hawaii as a military outpost and its constant exposure to the danger of fresh invasion.⁷ 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.”⁸

¹ 31 Stat. 141, 153 (1900).

² 31 Stat. at 141–142.

³ *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

⁴ *Id.* at 324.

⁵ *Id.* at 336 (Stone, C.J., concurring in the result).

⁶ *Id.* at 337.

⁷ *Id.* at 344 (Burton, J., dissenting).

⁸ *Id.* at 343.

ARTICLE II—EXECUTIVE BRANCH

Sec. 2, Cl. 1—Powers, Military, Administrative, and Clemency: Commander in Chief

ArtII.S2.C1.1.16
Martial Law and Domestic Disorder

ArtII.S2.C1.1.16 Martial Law and Domestic Disorder

Article II, 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 Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

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 into federal service were required.¹ Since World War II, however, the President, by virtue of his own powers and the authority vested in him by Congress,² has used federal troops on a number of occasions, five of them involving resistance to desegregation decrees in the South.³ In 1957, Governor Orval Faubus employed the Arkansas National Guard to resist court-ordered desegregation in Little Rock, and President Dwight Eisenhower dispatched federal soldiers and brought the Guard under federal authority.⁴ In 1962, President John Kennedy dispatched federal troops to Oxford, Mississippi, when federal marshals were unable to control rioting that broke out upon the admission of an African American student to the University of Mississippi.⁵ In June and September of 1964, President Lyndon Johnson sent troops into Alabama to enforce court decrees opening schools to Black students.⁶ 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.⁷

¹ United States Adjutant-General, *Federal Aid in Domestic Disturbances 1787–1903*, S. Doc. No. 209, 57th Congress, 2d sess. (1903); D.H. 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 thirty occasions. United States Commission on Civil Rights, *Law Enforcement: A Report on Equal Protection in the South* 155–159 (1965).

² 10 U.S.C. §§ 251–255, 12406, deriving from laws of 1795, 1 Stat. 424; 1861, 12 Stat. 281; and 1871, 17 Stat. 14.

³ The other instances were in domestic disturbances at the request of state governors.

⁴ Proc. No. 3204, 22 Fed. Reg. 7628 (1957); Exec. Order 10730, 22 Fed. Reg. 7628. *See* 41 Op. Att’y Gen. 313 (1957); *see also* Cooper v. Aaron, 358 U.S. 1, 12 (1958) (reporting that federalized National Guard troops replaced regular troops to protect Black students from November 27, 1957, through the balance of the school year); Aaron v. McKinley, 173 F. Supp. 944 (E.D. Ark. 1959) (state law authorizing the governor to close schools to prevent desegregation held unconstitutional), *aff’d sub nom* Faubus v. Aaron, 361 U.S. 197 (1959); Faubus v. United States, 254 F.2d 797, 806 (8th Cir.) (“We think there is no merit in the appellants’ argument that the discretion of the Governor in using the National Guard in derogation of the judgment and orders of the federal District Court and in violation of the constitutional rights of the eligible Negro students could not be questioned.”), *cert. denied*, 358 U.S. 829 (1958).

⁵ Proc. No. 3497, 27 Fed. Reg. 9681 (1962); Exec. Order No. 11053, 27 Fed. Reg. 9693 (1962). *See* United States v. Barnett, 346 F.2d 99, 109 (5th Cir. 1965) (Wisdom, C.J., dissenting) (objecting to dismissal of civil contempt charges against the state governor and lieutenant governor for their role in preventing execution of federal court order and in the ensuing riot, commenting, “To win this battle, the United States Army had more soldiers under arms at Oxford, Mississippi, or held close by in reserve, than George Washington in the Revolutionary War ever commanded at one time”).

⁶ Proc. 3542, 28 Fed. Reg. 5707 (1963); Exec. Order No. 11111, 28 Fed. Reg. 5709 (1963); Proc. No. 3554, 28 Fed. Reg. 9861; Exec. Order No. 11118, 28 Fed. Reg. 9863 (1963). *See* Alabama v. United States, 373 U.S. 545 (1963) (per curiam) (denying Governor’s motion to file complaint on the basis that “[s]uch purely preparatory measures [of alerting and stationing military personnel in the Birmingham area] and their alleged adverse general effects upon the plaintiffs afford no basis for the granting of any relief”).

⁷ Proc. No. 3645, 30 Fed. Reg. 3739 (1965); Exec. Order No. 11207, 30 Fed. Reg. 2743 (1965).

ARTICLE II—EXECUTIVE BRANCH

Sec. 2, Cl. 1—Powers, Military, Administrative, and Clemency: Commander in Chief

ArtII.S2.C1.1.17

Response to Terrorist Attacks of September 11, 2001

ArtII.S2.C1.1.17 Response to Terrorist Attacks of September 11, 2001

Article II, 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 Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

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,"¹ 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." President George W. Bush issued a military authorizing the Department of Defense to detain and prosecute by military commission any non-U.S. citizen the President deemed to be a member of Al Qaeda or otherwise engaged in international terrorism.² The military order also purported to deny individuals subject to it access to U.S. courts or international tribunals.³ Judicial inquiry has mainly involved the President's authority to detain those deemed "enemy combatants" and to prosecute them for war crimes by military commission.

ArtII.S2.C1.1.18 Detention Authority

Article II, 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 Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

During a military action in Afghanistan pursuant to the congressional authorization for the use of force, 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 statutory

¹ Pub. L. No. 107-40, 115 Stat. 224 (2001).

² Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57831 (Nov. 13, 2001) (citing as authority the President's powers under the Constitution and laws of the United States, including the Authorization for Use of Military Force and 10 U.S.C. §§ 821 & 836).

³ *Id.* § 7(b)(2). The language denying those subject to the order access to judicial relief was strikingly similar to that in President Franklin D. Roosevelt's 1942 proclamation to the same effect with respect to Nazi saboteurs. *See* Enemies Denied Access to United States Courts, Proc. No. 2561, 7 Fed. Reg. 5101 (July 2, 1942). Roosevelt's proclamation was ineffective in persuading the Supreme Court to refuse to consider petitions for writs of habeas corpus. *Ex parte Quirin*, 317 U.S. 1, 25 (1942) ("But there is certainly nothing in the Proclamation to preclude access to the courts for determining its applicability to the particular case.").

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Detention Authority

grounds.¹ However, the Court did find that the government may not detain the petitioner indefinitely for purposes of interrogation,² and must afford him the opportunity to offer evidence that he is not an enemy combatant.³

In *Rasul v. Bush*,⁴ 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.⁵ In *Rasul*, the Court noted that the Guantanamo petitioners were not citizens of a country at war with the United States,⁶ 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.⁷ In addition, the Court found that statutory grounds existed for the extension of habeas corpus to these prisoners.⁸

In response to *Rasul*, Congress amended the habeas statute to eliminate all federal habeas jurisdiction over detainees, whether its basis was statutory or constitutional.⁹ This amendment was challenged in *Boumediene v. Bush*,¹⁰ as a violation of the Suspension

¹ 542 U.S. 507 (2004). There was no opinion of the Court. Justice Sandra Day O'Connor, joined by Chief Justice William Rehnquist, Justice Anthony Kennedy and Justice Stephen 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 Clarence 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 in addition to the authorization statute. *Id.* at 579, 587 (Thomas, J. dissenting). Justice David Souter, joined by Justice Ruth Bader Ginsburg, rejected the argument that the Congress had authorized such detention of American citizens in light of the requirement for express statutory authority found in the Non-Detention Act and the fact that the government was not treating the petitioner as a prisoner of war. *Id.* at 548–551 (Souter, J., concurring in part and dissenting in part) (referring to Pub. L. No. 92–128 (1971), 85 Stat. 347 (codified at 18 U.S.C. § 4001(a)) and Article 4 of the Third Geneva Convention, 6 U.S.T. 3316, 3320, T.I.A.S. No. 3364 (1949)). Justice Antonin Scalia, joined with Justice John Paul Stevens, denied that such congressional authorization was possible without a suspension of the writ of habeas corpus. *Id.* at 553 (Scalia, J. dissenting).

² *Id.* at 521.

³ 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. Justices Souter and Ginsburg, concurring in the result, agreed the case should be remanded for due process reasons. *Id.* at 553.

⁴ 542 U.S. 466 (2004).

⁵ *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950).

⁶ The petitioners were Australians and Kuwaitis.

⁷ *Rasul*, 542 U.S. at 467.

⁸ 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 Donald Rumsfeld not sufficient to satisfy presence requirement under 28 U.S.C. § 2241). In *Munaf v. Geren*, 553 U.S. 674 (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 twenty-six 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.

⁹ Detainee Treatment Act of 2005, Pub. L. No. 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. No. 109-366, to also apply to pending cases where a detainee had been determined to be an enemy combatant.

¹⁰ 553 U.S. 723 (2008).

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Clause.¹¹ 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.¹² Emphasizing a “functional” approach to the issue,¹³ 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.

ArtII.S2.C1.1.19 Military Commissions

Article II, 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 Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

In *Hamdan v. Rumsfeld*,¹ the Supreme Court reviewed the validity of military tribunals established pursuant to President George W. Bush’s military order² to try suspected terrorists for violations of the law of war. The petitioner Hamdan was charged with conspiracy to commit a violation of the law of war. The Supreme Court declined the government’s invitation to invoke the doctrine established in *Schlesinger v. Councilman*³ to abstain from reviewing the merits of the case until the military commission had issued a verdict.⁴ The Court found the military commissions unlawful, holding that the tribunals as convened did not comply with the Uniform Code of Military Justice (UCMJ)⁵ or the law of war, as incorporated in the UCMJ and embodied in the 1949 Geneva Conventions, which, despite a presidential determination to the

¹¹ 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.

¹² “[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.

¹³ 553 U.S. at 764. “[Q]uestions of extraterritoriality turn on objective factors and practical concerns, not formalism.” *Id.*

¹ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

² Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57831 (Nov. 13, 2001).

³ *Schlesinger v. Councilman*, 420 U.S. 738, 740 (1975), (“[T]he balance of factors governing exercise of equitable jurisdiction by federal courts normally weighs against intervention, by injunction or otherwise, in pending court-martial proceedings.”).

⁴ *Hamdan*, 548 U.S. at 587 (holding that comity considerations weighed against abstention where concerns about military discipline do not apply and the petitioner did not have the opportunity to appeal any verdict the military commission may render to an independent appellate body).

⁵ 10 U.S.C. §§ 801–946a.

contrary,⁶ the Court held applicable to the armed conflict with Al Qaeda. The Court concluded that, at a minimum, Common Article 3 of the Geneva Conventions applies to persons captured in the conflict with Al Qaeda, according to them a minimum baseline of protections, including protection from the “passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”⁷ The Court held that military commissions were not “regularly constituted” because they deviated too far from the rules that apply to courts-martial, without a satisfactory explanation of the need for departing from such rules.⁸ In particular, the Court noted that the commission rules allowing the exclusion of the defendant from attending portions of his trial or hearing some of the evidence against him deviated substantially from court-martial procedures.⁹

A four-Justice plurality of the Court also recognized that for an act to be triable under the common law of war, the precedent for it being treated as an offense must be “plain and unambiguous.”¹⁰ After examining the history of military commission practice in the United States and internationally, the plurality further concluded that conspiracy to violate the law of war was not in itself a crime under the common law of war or the UCMJ.

ArtII.S2.C1.2 Executive Departments

Article II, 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 Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

Article II, Section 2, Clause 1 authorizes the President to require the department heads of the Executive Branch to advise the President in writing on matters relating to their duties. The Framers adopted this provision when proposals to establish a Council of State to advise the President failed to win the necessary support at the Constitutional Convention.¹ In the *Federalist No. 74*, Alexander Hamilton credited Article II, Section 2, Clause 1 with little importance, stating that he considered the provision to be a “mere redundancy” because “the right for which it provides would result of itself from the office.”² Discussing the provision in his *Commentaries on the Constitution of the United States*, Justice Joseph Story opined that while the President’s right to require such opinion “would result from the very nature of the office,” the provision serves a purpose by “impos[ing] a more strict responsibility, and recognizes a public duty of high importance and value in critical times.”³

⁶ White House Memorandum, Humane Treatment of Taliban and al Qaeda Detainees ¶ 2 (Feb. 7, 2002), available at https://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf.

⁷ *Hamdan*, 548 U.S. at 629.

⁸ *Id.* at 632.

⁹ *Id.* at 634.

¹⁰ *Id.* at 602 (2006) (Stevens, J., plurality opinion, joined by Souter, J., Ginsburg, J., and Breyer, J.).

¹ 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 70, 97, 110 (Max Farrand ed., 1911); 2 *id.* at 285, 328, 335–37, 367, 537–42. Debate on the issue in the Convention is discussed in CHARLES THACH, THE CREATION OF THE PRESIDENCY 1775–1789 105–110, 116 (Amagi Books 2007) (1923).

² THE FEDERALIST NO. 74 (Alexander Hamilton).

³ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1487 (1837).

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ArtII.S2.C1.2
Executive Departments

President George Washington established the practice of the Executive Branch department heads meeting collectively to advise the President as a Cabinet.⁴ Consequently, Cabinet meetings are not required under the Constitution.⁵

ArtII.S2.C1.3 Pardons

ArtII.S2.C1.3.1 Overview of Pardon Power

Article II, 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 Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

The Constitution establishes the President’s authority to grant clemency, encompassing not only pardons of individuals but several other forms of relief from criminal punishment as well.¹ The power, which has historical roots in early English law,² has been recognized by the Supreme Court as quite broad. In the 1886 case *Ex parte Garland*, the Court referred to the President’s authority to pardon as “unlimited” except in cases of impeachment, extending to “every offence known to the law” and able to be exercised “either before legal proceedings are taken, or during their pendency, or after conviction and judgment.”³ Much later, the Court wrote that the “broad power conferred” in the Constitution gives the President “plenary authority” to “forgive [a] convicted person in part or entirely, to reduce a penalty in terms of a specified number of years, or to alter it” with certain conditions.⁴

Despite the breadth of the President’s authority under the Pardon Clause, the Constitution’s text provides for at least two limits on the power: first, clemency may only be granted for “Offenses against the United States,”⁵ meaning that state criminal offenses and federal or state civil claims are not covered.⁶ Second, the President’s clemency authority cannot be used “in Cases of impeachment.”⁷

Beyond textual limits, certain external constitutional and legal considerations may act as constraints on the power. For instance, the Court has indicated that the power may be

⁴ LEONARD WHITE, *THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY* ch. 4 (1948).

⁵ EDWARD S. CORWIN, *PRESIDENTIAL POWER AND THE CONSTITUTION* 89 (Richard Loss, ed., 1976)

¹ See *Clemency*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining clemency, in part, as “the power of the President . . . to pardon a criminal or commute a criminal sentence”).

² 1 BENJAMIN THORPE, *ANCIENT LAWS AND INSTITUTES OF ENGLAND* 46 (1840) (reflecting law “of fighting” in the Laws of King Ine: “If any one fight in the king’s house, let him be liable in all his property, and be it in the king’s doom whether he shall or shall not have life”).

³ 71 U.S. 333, 380 (1866); see also *United States v. Klein*, 80 U.S. 128, 147 (1871) (“To the executive alone is intrusted the power of pardon; and it is granted without limit.”).

⁴ *Schick v. Reed*, 419 U.S. 256, 266 (1974).

⁵ U.S. CONST. art. II, § 2, cl. 1.

⁶ *Ex parte Grossman*, 267 U.S. 87, 111, 115, 122 (1925) (acknowledging that phrase was included “presumably to make clear that the pardon of the President was to operate upon offenses against the United States as distinguished from offenses against the states” and distinguishing between civil and criminal contempt for purposes of pardon authority).

⁷ U.S. CONST. art. II, § 2, cl. 1; see *Garland*, 71 U.S. at 373 (acknowledging that the President’s authority to grant pardons is subject to the exception of “cases of impeachment” and that “[w]ith that exception the power is unlimited”).

ARTICLE II—EXECUTIVE BRANCH

Sec. 2, Cl. 1—Powers, Military, Administrative, and Clemency: Pardons

ArtII.S2.C1.3.1
Overview of Pardon Power

exercised “at any time after [an offense’s] commission,”⁸ reflecting that the President may not preemptively immunize future criminal conduct. In *Schick v. Reed*, the Court recognized that an exercise of clemency may include “any condition which does not otherwise offend the Constitution,”⁹ suggesting that the President may not make clemency subject to a condition that is prohibited by another constitutional provision.¹⁰ Other apparent limitations include not affecting vested rights of third parties, such as where forfeited property is sold,¹¹ or proceeds “paid into the treasury,” which “can only be secured to the former owner . . . through an act of [C]ongress.”¹² The Court in *The Laura* also alluded to an exception for “fines . . . imposed by a co-ordinate department of the government for contempt of its authority,”¹³ though a later case recognized that the President may pardon one who is subject to criminal punishment for contempt of court.¹⁴

Assuming the recognized limitations are not transgressed, a full pardon granted by the President and accepted by its subject¹⁵ prevents or removes “any of the penalties and disabilities consequent upon conviction . . .”¹⁶ In several nineteenth-century cases, the Supreme Court suggested that a pardon broadly obviates all legal guilt of the offender, effectively erasing the crime from existence.¹⁷ Subsequent cases appear to have backed away from this understanding,¹⁸ suggesting instead that, although a full pardon precludes punishment for the offense in question, a prior and pardoned offense may still be considered in subsequent proceedings.¹⁹

⁸ *Garland*, 71 U.S. at 380.

⁹ 419 U.S. at 267.

¹⁰ *See Id.* (“Of course, the President may not aggravate punishment.”).

¹¹ *Knote v. United States*, 95 U.S. 149, 154 (1877) (“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.”).

¹² *Ill. C.R. Co. v. Bosworth*, 133 U.S. 92, 104–05 (1890); *see also Ex parte Garland*, 71 U.S. 333, 381 (1866) (explaining that pardons do not “restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment”); *Semmes v. United States*, 91 U.S. 21, 27 (1875) (holding that a pardon did not interfere with the right of a purchaser of forfeited property).

¹³ 114 U.S. 411, 413 (1885).

¹⁴ *Ex parte Grossman*, 267 U.S. 87, 122 (1925). Other possible limitations—for instance, whether the President may issue a self-pardon or pardon contempt of Congress—have been the subject of debate but have not been addressed by the Supreme Court. *E.g.*, Paul F. Eckstein & Mikaela Colby, *Presidential Pardon Power: Are There Limits and, If Not, Should There Be?*, 51 *ARIZ. ST. L.J.* 71, 97–100 (2019) (surveying arguments regarding authority to self-pardon); Charles D. Berger, *The Effect of Presidential Pardons on Disclosure of Information: Is Our Cynicism Justified?*, 52 *OKLA. L. REV.* 163, 181 (1999) (describing pardon of Dr. Francis Townsend for contempt of Congress, without court challenge, during the presidency of Franklin D. Roosevelt).

¹⁵ *See Burdick v. United States*, 236 U.S. 79, 94 (1915) (“Granting, then, that the pardon was legally issued and was sufficient for immunity, it was Burdick’s right to refuse it[.]”); *but cf. Biddle v. Perovich*, 274 U.S. 480, 486–87 (1927) (indicating that consent is not required in the context of commutation or remission, and that “the public welfare, not [the individual’s] consent, determines what shall be done”).

¹⁶ *Ex parte Garland*, 71 U.S. 333, 381 (1866).

¹⁷ *See Id.* at 381–82 (“A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt[.]”); *Carlisle v. United States*, 83 U.S. 147, 151 (1872) (reflecting understanding that pardon “not merely releases the offender from the punishment prescribed for the offence, but . . . obliterates in legal contemplation the offence itself”).

¹⁸ *See Burdick*, 236 U.S. at 94 (“[A pardon] carries an imputation of guilt; acceptance a confession of it”).

¹⁹ *See Carlesi v. New York*, 233 U.S. 51, 59 (1914) (determining that pardoned offense could still be considered “as a circumstance of aggravation” under a state habitual-offender law); *Nixon v. United States*, 506 U.S. 224, 232 (1993) (stating in dicta that a pardon “is in no sense an overturning of a judgment of conviction by some other tribunal; it is [a]n executive action that mitigates or sets aside *punishment* for a crime”); *see also Angle v. Chicago, St. P., M. & O. Ry.*, 151 U.S. 1, 19 (1894) (“An executive may pardon and thus relieve a wrongdoer from the punishment the public exacts for the wrong, but neither executive nor legislature can pardon a private wrong, or relieve the wrongdoer from civil liability to the individual he has wronged.”).

ARTICLE II—EXECUTIVE BRANCH

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ArtII.S2.C1.3.1

Overview of Pardon Power

Congress generally cannot substantively constrain the President’s pardon authority through legislation, as the Court has held that the “power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.”²⁰ Nevertheless, there is historical precedent for legislation *facilitating* the exercise of the pardon power through funding of Executive Branch positions to review clemency petitions.²¹ Congress also has other constitutional tools that it may use in relation to the President’s pardon authority, provided the legal conditions associated with those tools are met, such as oversight,²² impeachment,²³ and constitutional amendment.²⁴

ArtII.S2.C1.3.2 Historical Background on Pardon Power

Article II, 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 Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

The presidential power to “grant [r]eprieves and [p]ardons” is, at its core, the authority to grant relief from the consequences of a criminal act.¹ The President’s authority under Article II, Section 2 encompasses several distinct forms of relief that may be temporary or permanent, partial or wholesale, and may be granted at any time after alleged commission of a federal crime.²

The broad concept of governmental authority to provide relief from criminal punishment has deep historical roots.³ The power vested in the President by the Constitution traces its origins to authority held by the English Crown,⁴ leading the Supreme Court to look to legal

²⁰ *Garland*, 71 U.S. at 380; *see also* *Schick v. Reed*, 419 U.S. 256, 266 (1974) (“[T]he power [of clemency] flows from the Constitution alone, not from any legislative enactments, and . . . it cannot be modified, abridged, or diminished by the Congress.”).

²¹ *E.g.*, An Act Amendatory of the Acts Relative to the Attorney-General’s Office, and to Fix the Compensation of his Assistant and Clerks, ch. 98, 13 Stat. 516 (1865) (authorizing Attorney General to employ and provide salary for “pardon clerk,” among others). Some early Supreme Court language also suggested Congress can itself grant pardons or amnesties through legislation, *see* *Brown v. Walker*, 161 U.S. 591, 601 (1896) (noting that pardon power of President “has never been held to take from congress the power to pass acts of general amnesty”), though the continued vitality of this ostensible authority is unclear.

²² *E.g.*, *Pardon of Richard M. Nixon, and Related Matters: Hearings Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 93RD CONG. 90–151 (1974) (testimony of President Gerald Ford).

²³ *See Ex parte Grossman*, 267 U.S. 87, 121 (1925) (indicating that hypothetical effort by President to “deprive a court of power to enforce its orders” through successive pardons “would suggest a resort to impeachment”).

²⁴ *E.g.*, S.J.Res. 241, 93RD Cong. (1974) (proposing constitutional amendment to provide mechanism for congressional disapproval of pardons).

¹ *See, e.g.*, *Biddle v. Perovich*, 274 U.S. 480, 486 (1927) (stating that a pardon “is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed”).

² *See* ArtII.S2.C1.3.5 Scope of Pardon Power.

³ *See* 3 Dep’t of Just., *The Attorney General’s Survey of Release Procedures 2–13* (1939) (discussing pardon principles under Mosaic, Greek, and Roman law).

⁴ *Schick v. Reed*, 419 U.S. 256, 260 (1974) (recognizing that the Framers “were well acquainted with the English Crown authority to alter and reduce punishments as it existed in 1787”).

ARTICLE II—EXECUTIVE BRANCH

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ArtII.S2.C1.3.2

Historical Background on Pardon Power

principles underlying the latter in interpreting the scope of the former.⁵ A “prerogative of mercy” held by the King appeared during the reign of King Ine of Wessex (688–725 A.D.)⁶ and by 1535 had been declared by Parliament, during the reign of King Henry VIII (1509–1547 A.D.), as a right exclusive to the Crown.⁷ Though broad in application, the power as it existed through the colonial period did have legal limits, which grew in number in response to perceived abuses of the King’s authority.⁸ For instance, a pardon could not impair certain rights of third parties⁹ and, by act of Parliament in 1701, pardons could not be pleaded to bar impeachment (though a pardon following sentence was still available).¹⁰

Prior to the American Revolution, the King’s pardon authority applied in the American colonies through delegation to colonial authorities.¹¹ The English legal tradition of pardon then directly influenced the framers of the U.S. Constitution following independence.¹² The two major plans offered at the Constitutional Convention—the Virginia and New Jersey Plans—did not address pardons.¹³ In suggested amendments to the Virginia Plan, however, Alexander Hamilton included a pardon power vested in an “Executive authority” that could be exercised over “all offences except Treason,” with a pardon for treason requiring Senate approval.¹⁴ The first report of the Committee of Detail included a proposed provision giving the President power to grant reprieves and pardons, with the only exception being that a pardon would “not be pleadable in bar of an impeachment.”¹⁵

There was little debate at the Constitutional Convention of the pardon power,¹⁶ though several exceptions and limitations were proposed. Edmund Randolph proposed reincorporating an exception for cases of treason, arguing that extending pardon authority to such cases “was too great a trust,” that the President “may himself be guilty,” and that the “Traitors may be his own instruments.”¹⁷ George Mason likewise argued that treason should be excepted for fear that the President could otherwise “frequently pardon crimes which were advised by himself” to “stop inquiry and prevent detection,” eventually “establish[ing] a

⁵ *United States v. Wilson*, 32 U.S. 150, 160 (1833) (“As this power has been exercised, from time immemorial, by the executive of that nation whose language is our language, and to whose judicial institutions 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.”).

⁶ 1 BENJAMIN THORPE, *ANCIENT LAWS AND INSTITUTES OF ENGLAND* 46 (1840) (reflecting law “of fighting” in the Laws of King Ine: “If any one fight in the king’s house, let him be liable in all his property, and be it in the king’s doom whether he shall or shall not have life”).

⁷ 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 397 (1765) (recognizing declaration in statute during reign of King Henry VIII that “the king hath the whole and sole” power to pardon).

⁸ *Schick*, 419 U.S. at 260–61 (referring to “gradual contraction” or English pardon power through “specifically defined” legal limits “as potential or actual abuses were perceived”).

⁹ *E.g.*, 4 BLACKSTONE, *supra* note 7, at 398 (“Neither . . . can the king pardon an offence against a popular or penal statute after information brought; for thereby the informer hath acquired a private property in his part of the penalty.”).

¹⁰ *Id.* at 399–400.

¹¹ See, e.g., 7 FRANCIS NEWTON THORPE, *AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS* 3800–01 (1909) (granting, in Second Charter of Virginia from 1609, “full and absolute Power and Authority to correct, punish, pardon, govern, and rule all” subjects).

¹² *E.g.*, 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1496 (1833) (noting that exception for impeachment “was probably borrowed” from England).

¹³ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 20–23 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS] (Virginia Plan, in Madison’s notes); *Id.* at 242–45 (New Jersey Plan, in Madison’s notes).

¹⁴ *Id.* at 292.

¹⁵ 2 FARRAND’S RECORDS, *supra* note 13, at 185.

¹⁶ *Schick v. Reed*, 419 U.S. 256, 262 (1974).

¹⁷ 2 FARRAND’S RECORDS, *supra* note 13, at 626 (Madison’s notes).

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Historical Background on Pardon Power

monarchy, and destroy[ing] the republic.”¹⁸ James Wilson responded to such arguments by pointing out that if the President were himself involved in treasonous conduct, he could be impeached.¹⁹ Randolph’s motion was defeated by an 8-2 vote, with one divided.²⁰ Another proposal would have made reprieves and pardons available only after conviction.²¹ However, when James Wilson pointed out that pre-conviction pardons might be needed to secure accomplice testimony, the motion to add the language was withdrawn.²²

Additional proposals and discussion at the Constitutional Convention centered on what role, if any, the legislature should play in the pardon power’s exercise. For instance, during debate of Edmund Randolph’s proposal to except treason, James Madison expressed a preference for Senate consultation in such cases.²³ Others, however, conveyed unease at the prospect of giving the legislature a role in the pardon process, arguing that a body “governed too much by the passions of the moment” was “utterly unfit for the purpose” and that such a role would be inconsistent with the constitutional separation of powers.²⁴ Separately, Roger Sherman proposed making reprieves applicable only until the ensuing Senate session and requiring Senate consent for all pardons.²⁵ Sherman’s motion was defeated by a vote of 8-1.²⁶

During the same session, the final language of the impeachment exception—“except in cases of impeachment”—was added without noted discussion, supplanting proposed language more closely mirroring the English limitation that a pardon should “not be pleadable in bar.”²⁷ It appears to have been understood that, in its final form, the impeachment exception did not permit pardon following conclusion of impeachment proceedings (as had been the case under English law)—in a pamphlet published during the ratification debates, James Iredell noted that the king “may pardon after conviction, even on an impeachment; which is an authority not given to our President, who in case of impeachments has no power either of pardoning or relieving.”²⁸

In the *Federalist No. 74*, Alexander Hamilton maintained that the broad, Executive-held pardon power encompassed in the Constitution was desirable, arguing such a power “should be as little as possible fettered or embarrassed” to ensure “easy access to exceptions in favour of unfortunate guilt.”²⁹ Hamilton also averred that locating the power solely with the President would lead to its most beneficial exercise, as a single person would be “a more eligible dispenser of the mercy of the government than a body of men” who “might often encourage each other in an act of obduracy, and might be less sensible to the apprehension of suspicion or censure for an injudicious or affected clemency.”³⁰ With respect to concerns that cases of treason should not be pardonable or should be dependent on legislative assent, Hamilton raised several points in response, including (1) treason might often be connected with sedition involving a broader portion of the community, in which case “the representation of the people

¹⁸ 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 497 (Jonathan Elliot ed., 1836).

¹⁹ 2 FARRAND’S RECORDS, *supra* note 13, at 626 (Madison’s notes).

²⁰ *Id.* at 627.

²¹ *Id.* at 426.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 626.

²⁵ *Id.* at 419.

²⁶ *Id.*

²⁷ *Id.*

²⁸ PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 351 n.* (P. Ford ed., 1888).

²⁹ THE FEDERALIST NO. 74 (Alexander Hamilton).

³⁰ *Id.*

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ArtII.S2.C1.3.4.1
Pardons Generally

[might be] tainted with the same spirit which had given birth to the offence”³¹; (2) during an insurrection or rebellion, a “well-timed” offer of pardon to insurgents might be necessary but could be stymied if it were necessary to convene the legislature and obtain its sanction;³² and (3) the exception for impeachment was sufficient to protect against abuses of the pardon power related to potentially treasonous conduct in which the President himself was implicated, as he “could shelter no offender, in any degree, from the effects of impeachment and conviction.”³³

ArtII.S2.C1.3.3 Pardon Power and Forms of Clemency Generally

Article II, 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 Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

Article II, Section 2 of the Constitution gives the President power to “grant Reprieves and Pardons.”¹ Encompassed in this provision is the authority to provide relief from the punishment that would otherwise follow from commission of an “Offence[] against the United States,” i.e., a federal crime.² The President’s power in this respect encompasses several related forms of relief, including not only a full, individual pardon and time-limited reprieve but also amnesty for groups of offenders, commutation of a criminal sentence, and remission of fines or penalties.³

ArtII.S2.C1.3.4 Types

ArtII.S2.C1.3.4.1 Pardons Generally

Article II, 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 Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

A full or absolute pardon obviates any punishment for the crime at issue and restores the offender’s civil rights, if applicable.¹ In the 1866 case *Ex parte Garland*, the Supreme Court recognized that a pardon granted before conviction “prevents any of the penalties and

³¹ *Id.*

³² *Id.*

³³ THE FEDERALIST No. 69 (Alexander Hamilton).

¹ U.S. CONST. art. II, § 2, cl. 1.

² *United States v. Klein*, 80 U.S. 128, 147 (1871) (stating that a pardon “blots out the offence pardoned and removes all its penal consequences”).

³ See *Ex parte Wells*, 59 U.S. 307, 309–10, 314 (1855) (indicating that the pardon power extends “to all kinds of pardons known in the law as such, whatever may be their denomination,” including not only “absolute pardon[s]” but also more limited forms of release, remission, and reprieve); *Klein*, 80 U.S. at 147 (“Pardon includes amnesty.”).

¹ The Supreme Court’s view of the legal effect of a pardon has changed somewhat over time and is discussed in more detail at ArtII.S2.C1.3.7 Legal Effect of a Pardon.

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disabilities consequent upon conviction from attaching,” and “if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights”²

A pardon may be made subject to conditions. In *Ex parte Wells*, the Court directly addressed the question of whether the pardon power included the power to pardon conditionally and concluded, in reliance on English precedent, that it does.³ Yet the scope of the President’s power to grant pardons has limits. With respect to conditions, the Court in the 1974 case *Schick v. Reed* stated that “considerations of public policy and humanitarian impulses support an interpretation of [the] power so as to permit the attachment of any condition which does not otherwise offend the Constitution,”⁴ though the Court has not addressed the scope of this limitation on conditional pardons in any subsequent case. Regardless, a pardon may only be granted after the commission of the eligible offense,⁵ though the clemency may precede any institution of formal proceedings.⁶ A pardon is also waivable. In *United States v. Wilson*, the defendant pled guilty to a federal offense and, upon inquiry by the lower court as to the effect of a pardon known to have been granted to him, “waived and declined any advantage or protection which might be supposed to arise from the pardon referred to.”⁷ The Supreme Court gave effect to the defendant’s wish, concluding that because the pardon was not “brought judicially before the court, by plea, motion or otherwise, ought not to be noticed by the judges, or in any manner to affect the judgment of the law.”⁸ As a corollary, a pardon must be accepted to be effective,⁹ though this principle appears to differ as between pardons on the one hand and commutation and remission on the other.¹⁰

ArtII.S2.C1.3.4.2 Amnesties

Article II, 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 Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

Amnesty is essentially identical to pardon in ultimate effect, with the principal distinction between the two being that amnesty typically “is extended to whole classes or communities,

² 71 U.S. 333, 380 (1866).

³ 59 U.S. at 315 (explaining that the “power to pardon conditionally is not one of inference at all, but one conferred in terms”); see also *Klein*, 80 U.S. at 147 (recognizing that pardon “may be granted on conditions”). Though referred to in places as a conditional pardon, the act of clemency in *Wells* was in practice a commutation, that is, substitution of a less severe punishment in place of a more severe one, which is discussed in more detail *infra*.

⁴ 419 U.S. 256, 266 (1974). The Court in *Schick* addressed a conditional commutation, and Justice Thurgood Marshall, writing in dissent and joined by Justices William O. Douglas and William Brennan, argued that the condition at issue could not be constitutionally imposed. See *id.* at 274 (Marshall, J., dissenting).

⁵ *Garland*, 71 U.S. at 380 (stating that a pardon “may be exercised at any time after [an offense’s] commission”).

⁶ *Id.* (recognizing that pardon may be granted “either before legal proceedings are taken, or during their pendency, or after conviction and judgment”). For instance, President Gerald Ford pardoned former President Richard Nixon for any federal crimes he may have committed in relation to the Watergate scandal, before any charges could be brought. See *Pardon of Richard M. Nixon and Related Matters: Hearings Before the House Judiciary Subcommittee on Criminal Justice*, 93d Cong. (1974).

⁷ *United States v. Wilson*, 32 U.S. 150, 158 (1833).

⁸ *Id.* at 163.

⁹ *Id.* at 161; *Burdick v. United States*, 236 U.S. 79, 94 (1915) (holding that “it was Burdick’s right to refuse [the pardon]” and his refusal allowed him to maintain “his right under the Constitution to decline to testify”).

¹⁰ See ArtII.S2.C1.3.6 Rejection of a Pardon.

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ArtII.S2.C1.3.4.3 Commutations, Remissions, and Reprieves

instead of individuals[.]”¹ As with other forms of clemency, amnesty may be partial or conditional.² Among others, prominent examples of amnesty occurred during and after the Civil War and the Vietnam War. For instance, Presidents Abraham Lincoln and Andrew Johnson issued a series of proclamations offering and ultimately granting amnesty to those who participated in the Civil War on the side of the Confederacy,³ and the Supreme Court decided several cases addressing the implications of such amnesty for property seized by statute.⁴ Beyond the Civil War, a more recent historical example of amnesty came in the 1970s, when President Jimmy Carter granted amnesty to many who violated the Selective Service Act by evading the draft during the Vietnam War.⁵

ArtII.S2.C1.3.4.3 Commutations, Remissions, and Reprieves

Article II, 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 Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

Rather than obviating punishment in its entirety, as pardon and amnesty may do, commutation substitutes the punishment imposed by a federal court for a less severe punishment, such as by reducing a sentence of imprisonment.¹ Similarly, remission operates to reduce or discharge criminal “fines, penalties, and forfeitures of every description arising

¹ *Knote v. United States*, 95 U.S. 149, 153 (1877); *see id.* (indicating that distinction between the two terms “is one rather of philological interest than of legal importance”); *Brown v. Walker*, 161 U.S. 591, 601–02 (1896) (dismissing any “distinction between amnesty and pardon” as “of no practical importance” and describing amnesty as “a general pardon for a past offense” that “is rarely, if ever, exercised in favor of single individuals, and is usually exerted in behalf of certain classes of persons, who are subject to trial, but have not yet been convicted”). In *Burdick v. United States*, the Court suggested that there are other “incidental differences of importance” between pardon and amnesty, including that amnesty “overlooks offense” rather than “remit[ting] punishment” and is “usually addressed to crimes against the sovereignty of the state, to political offenses, deemed more expedient for the public welfare than prosecution and punishment.” 236 U.S. at 95.

² *See Semmes v. United States*, 91 U.S. 21, 26 (1875) (describing proclamation of amnesty with certain exceptions and recognizing that property at issue fell “within [an] exception contained in that proclamation; which is all that need be said upon that subject”).

³ *See United States v. Klein*, 80 U.S. 128, 139–41 (1871) (tracing series of proclamations and ultimate grant of amnesty).

⁴ *See United States v. Padelford* 76 U.S. 531, 543 (1869) (holding that amnesty covering offenses connected with the rebellion operated as “a complete substitute for proof that [the recipient] gave no aid or comfort” to the same and that “he was purged of whatever offence against the laws of the United States he had committed . . . and relieved from any penalty which he might have incurred”); *see also* *Armstrong v. United States*, 80 U.S. 154, 155–56 (1871) (ruling amnesty for participation in rebellion entitled claimant to proceeds of property under Abandoned and Captured Property Act); *Pargoud v. United States*, 80 U.S. 156, 157 (1871) (same); *but cf. Knote*, 95 U.S. at 154 (holding that amnesty for participation on the side of the Confederacy did not entitle a recipient to claim monies from property seized and paid into the Treasury, as pardons and amnesties “cannot touch moneys in the treasury of the United States, except expressly authorized by act of Congress”); *Hart v. United States*, 118 U.S. 62, 67 (1886) (“[N]o pardon could have had the effect to authorize the payment out of a general appropriation of a debt which a law of congress had said should not be paid out of it.”). For the Court’s treatment of Congress’s subsequent effort to prevent pardon recipients from taking advantage of the restoration procedures under the Act, in *Klein*, *see* ArtII.S2.C1.3.8 Congress’s Role in Pardons.

⁵ *See* Exec. Order No. 11967, 42 Fed. Reg. 4393 (Jan. 21, 1977).

¹ *See Biddle v. Perovich*, 274 U.S. 480, 486–87 (1927) (approving commutation of death sentence to life imprisonment, writing, “No one doubts that a reduction of the term of an imprisonment or the amount of a fine would limit the sentence effectively on the one side and on the other would leave the reduced term or fine valid and to be enforced”); *Ex parte Wells*, 59 U.S. 307, 315 (1855) (affirming President’s power to conditionally pardon where clemency

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ArtII.S2.C1.3.4.3

Commutations, Remissions, and Reprieves

under the laws of [C]ongress.”² As discussed elsewhere, however, money paid into the treasury or property in which the rights of a third party have vested are beyond the reach of the President’s authority.³

As with other forms of clemency, commutation or remission may be conditional. In *Schick v. Reed*, the Court addressed a challenge to the validity of a condition attached to a commutation of the petitioner’s death sentence to life imprisonment that prohibited the petitioner from ever being eligible for parole.⁴ The petitioner argued that the condition exceeded the President’s authority because it was not authorized by statute and, had the commutation not been granted, the petitioner’s death sentence would have been set aside by an intervening Supreme Court decision regardless.⁵ The Court rejected these arguments, holding that the conditional commutation “was lawful,” as “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.”⁶

Despite the explicit inclusion of reprieve in the constitutional text, Supreme Court discussion of its contours is scant. In *Ex parte Wells*, the Court described reprieve in dicta as “delay [of] a judicial sentence when the President shall think the merits of the case, or some cause connected with the offender, may require it,” as well as cases of legal necessity (with the two examples given being pregnancy and the onset of “insan[ity]”).⁷ Historical practice has been consistent with the understanding that the President’s power includes authority to temporarily delay execution of a criminal sentence. For example, President Bill Clinton issued reprieves delaying twice the execution date of Juan Raul Garza, who had been convicted of capital homicide offenses, so that the Department of Justice could conduct a study of certain disparities in imposition of the federal death penalty.⁸

ArtII.S2.C1.3.5 Scope of Pardon Power

Article II, 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

granted was, in practice, a commutation of death sentence to life imprisonment, substituting “a lesser punishment than the law has imposed upon him”). For a discussion of *Biddle* in the context of acceptance of commutation or remission, see ArtII.S2.C1.3.6 Rejection of a Pardon.

² *The Laura*, 114 U.S. 411, 413–14 (1885); see *Osborn v. United States*, 91 U.S. 474, 478 (1875) (“[T]he constitutional grant to the President of the power to pardon offences must be held to carry with it, as an incident, the power to release penalties and forfeitures which accrue from the offences.”).

³ *Knote*, 95 U.S. at 154 (“Neither does the pardon affect any rights which have vested in others 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. . . . 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.”); *Illinois Cent. R.R. v. Bosworth*, 133 U.S. 92, 103 (1890) (quoting extensively from *Knote* and recognizing that “a pardon does not affect vested interests”).

⁴ 419 U.S. 256, 257 (1974).

⁵ *Id.* at 259–60.

⁶ *Id.* at 264, 268.

⁷ 59 U.S. 307, 314 (1855).

⁸ See *Commutations Granted by President William J. Clinton (1993–2001)*, U.S. Dep’t of Justice: Off. of the Pardon Att’y, <https://www.justice.gov/pardon/commutations-granted-president-william-j-clinton-1993-2001> (last updated Apr. 28, 2021).

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ArtII.S2.C1.3.5
Scope of Pardon Power

Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

Regardless of the type of clemency at issue, the President’s power extends only to “offences against the United States,” meaning federal crimes but not state or civil wrongs.¹ One question the Supreme Court has addressed concerns the extent to which the pardon power reaches contempt of another branch’s authority; specifically, contempt of court. In the 1885 case *The Laura*, the Court recognized that the pardon power includes the power to remit fines, penalties, and forfeitures but noted an exception for “fines . . . imposed by a co-ordinate department of the government for contempt of its authority.”² Forty years later, the Court in *Ex parte Grossman* held that the President may pardon criminal (but not civil) contempts of a federal court.³ The Court explained that the independence of each branch of the federal government was “qualified” by “co-ordinating checks and balances of the Constitution” and thus did not “constitute a broadly positive injunction or a necessarily controlling rule of construction” on the question of the scope of the President’s pardon authority.⁴

Whether the Court’s ruling in *Grossman* extends to contempt of Congress is an open question.⁵ Supreme Court Justice Joseph Story, in his famous 1833 treatise *Commentaries on the Constitution of the United States*, asserted that contempt of Congress is excluded from the scope of the pardon power “by implication,” as presidential authority to pardon congressional contemnors would result in Congress being “wholly dependent upon his good will and pleasure for the exercise of their own powers.”⁶ Nevertheless, in *Grossman*, the Court suggested that the remedy of impeachment would be sufficient to counter abuse of the pardon power.⁷ It appears that there is at least one historical example of a pardon of contempt of Congress, granted by President Franklin D. Roosevelt, which apparently went unchallenged in court.⁸

The textual exception to the pardon power, “in Cases of Impeachment,” likewise has not been the subject of sustained Supreme Court analysis. Historically, a similar exception under English law prevented a pardon from being *pleaded* to bar impeachment but still permitted pardon following conviction.⁹ The exception in the U.S. Constitution appears to have been

¹ *Ex parte Grossman*, 267 U.S. 87, 113 (1925) (stating that phrase was included “presumably to make clear that the pardon of the President was to operate upon offenses against the United States as distinguished from offenses against the states” and recognizing that criminal, but not civil, contempt is pardonable); *Young v. United States*, 97 U.S. 39, 66 (1877) (“But if there is no offence against the laws of the United States, there can be no pardon by the President.”).

² 114 U.S. 411, 413 (1885).

³ 267 U.S. at 122.

⁴ *Id.* at 120, 122. Although the Court in *Grossman* did not find that separation of powers concerns warranted an exclusion of contempt of court from clemency’s reach, the Court had previously suggested that permanent judicial suspension of a required and legally valid final sentence “based upon considerations extraneous to the legality of the conviction or the duty to enforce the sentence” is an incursion on the President’s pardon authority. *Ex parte United States*, 242 U.S. 27, 37(1916); *see id.* at 42 (referring to “disregard of the Constitution which would result” from contrary ruling, as, among other things, “the right to relieve from the punishment fixed by law and ascertained according to the methods by it provided, belongs to the executive department.”); *but cf.* *United States v. Benz*, 282 U.S. 304, 311 (1931) (concluding that judicial amendment of sentence during same court term to reduce length of imprisonment was judicial act “readily distinguishable” from act of clemency that “abridges the enforcement of the judgment”).

⁵ *See Grossman*, 267 U.S. at 118 (acknowledging view of former Attorney General that “the pardoning power did not include impeachments or contempts” but noting that “the author’s exception of contempts had reference only to contempts of a House of Congress”).

⁶ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 353 (1833).

⁷ *Grossman*, 267 U.S. at 121.

⁸ *See* TOWNSEND FREED, FEELS ‘VINDICATED,’ N.Y. TIMES (Apr. 19, 1938),

⁹ 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 399–400 (1765).

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ArtII.S2.C1.3.5

Scope of Pardon Power

understood to reach more broadly, however, with James Iredell remarking during the ratification debates that such “authority [is] not given to our President.”¹⁰ And in *Ex parte Wells*, the Supreme Court noted in passing the English provision and referred to the impeachment exception in the Constitution as “an improvement upon the same.”¹¹

ArtII.S2.C1.3.6 Rejection of a Pardon

Article II, 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 Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

In the 1833 case *United States v. Wilson*, Chief Justice John Marshall wrote for the Court that a pardon is a private “act of grace,” 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 it is tendered; and if it be rejected, we have discovered no power in a court to force it on him.”¹ Though the Court in *Wilson* doubted that a “being condemned to death would reject a pardon,” it recognized that a pardon might be rejected regardless of the gravity of the punishment, as, for instance, if the pardon were conditional “the condition may be more objectionable than the punishment inflicted by the judgment.”²

Almost a century later, in *Burdick v. United States*, the Court confirmed that a pardon may be refused, at least where other constitutional rights are at stake.³ *Burdick* involved a pardon issued by President Woodrow Wilson to George Burdick, an editor at the *New York Tribune*, for any federal offenses he “may have committed” in connection with the publication of an article regarding alleged customs fraud, despite the fact that Burdick had not been charged with any crime at the time of the pardon.⁴ The apparent motivation for the pardon was that Burdick had refused to testify before a grand jury investigating the involvement of Treasury Department officials in leaks concerning the wrongdoing, asserting his Fifth Amendment right not to provide testimony that would tend to incriminate him.⁵ Despite President Wilson’s issuance of the pardon, Burdick “refused to accept” it and continued to refuse to answer certain questions put to him before the grand jury.⁶ The Supreme Court in *Burdick* assumed that the pardon was within the President’s power to issue and concluded that “it was Burdick’s right to refuse it” and stand on his Fifth Amendment objection.⁷

¹⁰ PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 351 n.* (P. Ford ed., 1888); see also 3 STORY, *supra* note 6, at 352 (stating that the President “possesses no such power in any case of impeachment”).

¹¹ 59 U.S. 307, 312 (1855); see also *Nixon v. United States*, 506 U.S. 224, 232 (1993) (“The exception from the President’s pardon authority of cases of impeachment was a separate determination by the Framers that executive clemency should not be available in such cases.”); ArtII.S2.C1.3.2 Historical Background on Pardon Power.

¹ 32 U.S. 150, 160–61 (1833).

² *Id.*

³ 236 U.S. 79, 94 (1915).

⁴ *Id.* at 85–86.

⁵ *Id.*

⁶ *Id.* at 87.

⁷ *Id.* at 94. The Court relied on *Burdick* to decide a separate case the same day on “almost identical” facts. *Curtin v. United States*, 236 U.S. 96, 97 (1915).

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ArtII.S2.C1.3.7 Legal Effect of a Pardon

Burdick notwithstanding, if a pardon is accepted, it obviates a Fifth Amendment objection to providing testimony.⁸ Additionally, it appears that the *Wilson/Burdick* rule does not extend to commutations and remissions. In the later case *Biddle v. Perovich*, the Court considered a commutation of a death sentence to life imprisonment that the recipient argued was “without his consent and without legal authority.”⁹ The *Biddle* Court disagreed with this assessment, stating, contrary to the language of *Wilson*, that a pardon “is not a private act of grace” but is rather a determination of what the public welfare requires.¹⁰ As such, in the *Biddle* Court’s view, “the public welfare, not [a recipient’s] consent determines what shall be done.”¹¹ On this basis, the Court in *Biddle* concluded that *Burdick* should not “be extended to the present case,” indicating that no one doubted “a reduction of the term of an imprisonment or the amount of a fine would limit the sentence effectively on the one side and on the other would leave the reduced term or fine valid and to be enforced” with “the convict’s consent . . . not required.”¹²

ArtII.S2.C1.3.7 Legal Effect of a Pardon

Article II, 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 Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

The legal significance of a pardon has been a subject of shifting judicial views over time. In the 1866 case *Ex parte Garland*, the Court took a broad view of the nature and consequence of a pardon:

A pardon reaches both the punishment prescribed for the offense 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 civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.¹

Subsequent cases of the era maintained this view that pardon “blots out” both guilt and punishment—for instance, in *Carlisle v. United States*, the Court wrote that a pardon “not merely releases the offender from the punishment prescribed for the offence, but . . . obliterates in legal contemplation the offence itself.”² As such, the Court in *Carlisle* determined that a pardon entitled its recipient to obtain the proceeds of property previously abandoned or

⁸ *Brown v. Walker*, 161 U.S. 591, 599 (1896) (“[I]f 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.”).

⁹ 274 U.S. 480, 485 (1927).

¹⁰ *Id.* at 486.

¹¹ *Id.*

¹² *Id.* at 486–88. In the much earlier case *Ex parte Wells*, the Court appeared to assume that a pardon of a convict sentenced to death, conditioned on his imprisonment for life—effectively a commutation similar to the one at issue in *Biddle*—was based on consent of the recipient. 59 U.S. 307, 315 (1855) (rejecting argument that conditional pardon was not “voluntarily accepted,” as recipient was legally imprisoned).

¹ *Ex parte Garland*, 71 U.S. 333, 380–81 (1866).

² 83 U.S. 147, 151 (1872).

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ArtII.S2.C1.3.7

Legal Effect of a Pardon

captured without having to establish loyalty to the Union during the Civil War as would otherwise have been required by statute.³ More broadly, the Court ruled in several cases during this period that pardons entitled their recipients to recover property forfeited or seized on the basis of the underlying offenses, so long as vested third-party rights would not be affected and money had not already been paid into the Treasury (except as authorized by statute).⁴ In *Boyd v. United States*, the Court addressed one of the “disabilities” referred to in *Garland* that a pardon removes, recognizing that the ability of a man convicted of larceny to act as a witness in court was restored by President Benjamin Harrison’s pardon.⁵ According to the Court, because the “disability to testify” was “a consequence, according to the principles of the common law, of the judgment of conviction, the pardon obliterated that effect. The competency as a witness of the person so pardoned was therefore completely restored.”⁶

Cases following *Garland* and *Carlisle* also began to note limits to the Court’s broad framing of the effect of a pardon, however; in *Knote*, the Court wrote that although a pardon “blots out the offence” in a legal sense, “it does not make amends for the past. . . . The offence being established by judicial proceedings, that which has been done or suffered while they were in force is presumed to have been rightfully done and justly suffered, and no satisfaction for it can be required.”⁷ Later cases underscored the limits of the Court’s previous sweeping language. First, contrary to the suggestion of *Garland* that a pardon “blots out of existence the guilt” associated with the offense,⁸ the Court in *Burdick* stated that a pardon “carries an imputation of guilt; acceptance a confession of it.”⁹ Then, in *Carlesi v. New York*, the Court determined that a pardoned offense could still be considered “as a circumstance of aggravation” under a state habitual-offender law,¹⁰ reflecting that although a pardon may obviate the punishment for a federal crime, it does not erase the facts associated with the crime or preclude all collateral effects arising from those facts.¹¹

³ *Id.* at 153; see also *Armstrong v. United States*, 80 U.S. 154, 155–56 (1871) (stating that pardon “blots out the offence,” and “the person so pardoned is entitled to the restoration of the proceeds of captured and abandoned property, if suit be brought within ‘two years after the suppression of the rebellion’”).

⁴ See *Osborn v. United States*, 91 U.S. 474, 477 (1875) (“But, unless rights of others in the property condemned have accrued, the penalty of forfeiture annexed to the commission of the offence must fall with the pardon of the offence itself, provided the full operation of the pardon be not restrained by the conditions upon which it is granted.”); *Knote v. United States*, 95 U.S. 149, 154 (1877) (“Where, however, property condemned, or its proceeds, have not thus vested, but remain under control of the Executive, or of officers subject to his orders, or are in the custody of the judicial tribunals, the property will be restored or its proceeds delivered to the original owner, upon his full pardon. The property and the proceeds are not considered as so absolutely vesting in third parties or in the United States as to be unaffected by the pardon until they have passed out of the jurisdiction of the officer or tribunal. The proceeds have thus passed when paid over to the individual entitled to them, in the one case, or are covered into the treasury, in the other.”); see also *In re Armstrong’s Foundry*, 73 U.S. 766, 769 (1867) (“The general pardon of Armstrong, therefore, relieved him of so much of the penalty as accrued to the United States.”); *Illinois Cent. R.R. v. Bosworth*, 133 U.S. 92, 103–05 (1890) (pardon restored property rights but subject to interest of third party acquired in interim); *Jenkins v. Collard*, 145 U.S. 546, 560–61 (1892) (same).

⁵ 142 U.S. 450, 453–54 (1892).

⁶ *Id.* at 454.

⁷ *Knote*, 95 U.S. at 153–54.

⁸ *Garland*, 71 U.S. at 380.

⁹ *Burdick v. United States*, 236 U.S. 79, 94 (1915).

¹⁰ 233 U.S. 51, 59 (1914).

¹¹ See *Nixon v. United States*, 506 U.S. 224, 232 (1993) (“[T]he granting of a pardon is in no sense an overturning of a judgment of conviction by some other tribunal; it is an executive action that mitigates or sets aside *punishment* for a crime.” (citation, internal quotation marks, and alteration omitted)).

ArtII.S2.C1.3.8 Congress's Role in Pardons

Article II, 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 Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

The Supreme Court has recognized that Congress cannot substantively limit the effect of a pardon through legislation. In *Ex parte Garland*, the Court held that the power of the President to pardon “is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.”¹ In *United States v. Klein*, the Court voided a law that sought to bar the use of a pardon or amnesty as a substitute for proof of loyalty necessary to recover property abandoned and sold by the government during the Civil War.² The *Klein* Court held that the provision was an impermissible attempt to change the effect of pardons by requiring courts to “treat them as null and void,” i.e., to “disregard pardons . . . and to deny them their legal effect.”³ Over a century after *Klein*, in rejecting the proposition that a condition attached to clemency must be authorized by statute, the Court in *Schick v. Reed* reaffirmed that “the power [of clemency] flows from the Constitution alone, not from any legislative enactments, and . . . it cannot be modified, abridged, or diminished by the Congress.”⁴

Despite the Supreme Court’s rigid view of the limits of legislative authority over pardons, Congress may have a role to play in exercise of the pardon power through other legal and constitutional processes. For instance, there is historical precedent for Congress facilitating exercise of the power by funding positions in the Department of Justice to assist in considering clemency petitions.⁵ The Court in *The Laura* also upheld a statute vesting in a subordinate officer, the Secretary of the Treasury, the authority to remit fines or penalties provided for in laws related to steam-vessels, with exceptions, rejecting the argument that the law encroached on the President’s power to pardon based on precedent for the practice going back to England.⁶

¹ 71 U.S. 333, 380 (1866); see also *Ex parte Grossman*, 267 U.S. 87, 120 (1925) (“The executive can reprieve or pardon all offenses after their commission, either before trial, during trial or after trial, by individuals, or by classes, conditionally or absolutely, and this without modification or regulation by Congress.”).

² 80 U.S. 128, 143 (1871).

³ *Id.* at 148.

⁴ 419 U.S. 256, 266 (1974).

⁵ *E.g.*, An Act Amendatory of the Acts Relative to the Attorney-General’s Office, and to Fix the Compensation of his Assistant and Clerks, ch. 98, 13 Stat. 516 (1865) (authorizing Attorney General to employ and provide salary for “pardon clerk,” among others). In a concurring opinion in an otherwise-unrelated 1990 Supreme Court decision, Justice Byron White noted that statutory appropriations *restrictions* may fall if “they encroach on the powers reserved to another branch of the Federal Government,” using as an example a hypothetical effort by Congress to “impair the President’s pardon power by denying him appropriations for pen and paper.” *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 435 (1990) (White, J., concurring).

⁶ 114 U.S. 411, 412–414 (1885). In the later case of *Brown v. Walker*, the Court upheld what was essentially an immunity statute for testimony given to the Interstate Commerce Commission, but in doing so suggested that Congress has “the power to pass acts of general amnesty[.]” 161 U.S. 591, 601 (1896). The Court has not revisited its suggestion that Congress has some degree of clemency authority parallel to the President’s, though the validity of the suggestion has been disputed in other quarters. See *id.* at 609 (Field, J., dissenting) (“Congress cannot grant a pardon. That is an act of grace which can only be performed by the president.”); Legislative Proposal to Nullify Criminal Convictions Obtained Under the Ethics in Government Act, 10 Op. O.L.C. 93, 94 (1986) (“[T]he Constitution gives Congress no authority to legislate a pardon for any particular individual or class of individuals[.]”).

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ArtII.S2.C1.3.8 Congress's Role in Pardons

Beyond legislation, Congress has invoked its Article I authority to conduct oversight as a more indirect constraint on use of the pardon power,⁷ and the Supreme Court has alluded to the possibility of impeachment as a check on misuse of the power.⁸ Congress can also seek to amend the Constitution to clarify or constrain the President's clemency authority.⁹ These constitutional processes are subject to constraints, which are discussed in more detail in their respective annotations.¹⁰

CLAUSE 2—ADVICE AND CONSENT

ArtII.S2.C2.1 Treaty-Making Power

ArtII.S2.C2.1.1 Overview of President's Treaty-Making Power

Article II, Section 2, 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 supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

In the Treaty Clause, the Constitution returns to the realm of foreign affairs and vests the power to make treaties in the national government. Earlier in the Constitution, Article I prohibits the states from concluding treaties and limits the states' role in other forms of international relations.¹ Article I also assigns several foreign affairs-related powers to the Legislative Branch, including powers to regulate commerce with foreign nations, define and punish offenses against the Law of Nations and on the high seas, and regulate many aspects of the military.² In Article II's Treaty Clause, the Constitution, for the first time, addresses international affairs from the vantage of the President's powers. The clause vests the President, acting with the advice and consent of the Senate, with the authority to make treaties for the United States.

Treaties—which the Supreme Court traditionally defines as pacts among sovereign countries³—have been tools of international relations since antiquity.⁴ After the United States

⁷ See, e.g., *Pardon of Richard M. Nixon, and Related Matters: Hearings Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 93D CONG. 90–151 (1974) (testimony of President Gerald Ford). The Department of Justice has, in the past, taken the position that instances of Executive Branch compliance with congressional requests for information regarding pardon decisions have been purely voluntary and are not indicative of congressional authority to review clemency decisions. See Letter from Janet Reno, Att'y Gen., to President Bill Clinton (Sept. 16, 1999) (quoted in H.R. Rep. No. 106-488, at 119–20 (1999)).

⁸ *Ex parte Grossman*, 267 U.S. 87, 121 (1925) (indicating that if the President ever sought to “deprive a court of power to enforce its orders” by issuing “successive pardons of constantly recurring contempts in particular litigation,” such an “improbable” situation “would suggest a resort to impeachment, rather than a narrow and strained construction of the general powers of the President”).

⁹ U.S. CONST. art. V.

¹⁰ See ArtI.S2.C5.3 Impeachment Doctrine; ArtV.3.2 Congressional Proposals of Amendments.

¹ See ArtI.S10.C1.1 Foreign Policy by States.

² *Id.*

³ See, e.g., *Lozano v. Montoya Alvarez*, 572 U.S. 1, 11, (2014) (“[T]reaties . . . are primarily ‘compact[s] between independent nations[.]’” (first set of brackets in original) (quoting *Medellín v. Texas*, 552 U.S. 491, 505 (2008)); *Altman & Co. v. United States*, 224 U.S. 583, 600 (1912) (“Generally, a treaty is defined as ‘a compact made between two or more independent nations, with a view to the public welfare.’”) (citation omitted)); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (“A treaty is primarily a contract between two or more independent nations, and is so regarded by writers on

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ArtII.S2.C2.1.1
Overview of President's Treaty-Making Power

won its independence from Great Britain, many Americans viewed the Articles of Confederation as a form of a treaty among the individual states of the union.⁵ But the Framers criticized how the Articles of Confederation addressed the new union's treaty obligations to foreign countries.⁶ The Articles lacked a mechanism to ensure individual states complied with the United States' international obligations, particularly its obligations to England under the 1783 Treaty of Peace that ended the Revolutionary War.⁷ When drafting the Constitution, the Framers sought to remedy this problem by including treaties among the sources of the "supreme Law of the Land" in the Supremacy Clause.⁸ Because of this change, treaties occupy a unique place in the constitutional system: they can operate simultaneously as domestic law of the United States and as tools of foreign policy in the form of pacts between nations.⁹

Elements of the treaty-making process may vary depending on the treaty, but the standard process generally operates as follows:¹⁰ a member of the Executive Branch negotiates the terms of a treaty, and the President or another Executive Branch official signs the completed draft when negotiations conclude.¹¹ Next, the President submits the treaty to the Senate.¹² If "two thirds of the Senators present" pass a resolution of advice and consent, the process shifts

public law."); *Head Money Cases* (Edye v. Robertson), 112 U.S. 580, 598 (1884) ("A treaty is primarily a compact between independent nations."). Although sovereign nations are the primary subject of treaties, in modern practice, other entities, such as international organizations, occasionally have joined treaties. *See generally* JAMES CRAWFORD, *BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 115–16 (8th ed. 2012) [hereinafter *BROWNIE'S PRINCIPLES*].

⁴ *See generally* ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* (1954).

⁵ *See* Intro.6.1 Continental Congress and Adoption of the Articles of Confederation. *See also* David Golove, *The New Confederation: Treaty Delegations of Legislative, Executive, and Judicial Authority*, 55 *STAN. L. REV.* 1697, 1706–10 (2003) (discussing historical evidence for the conclusion that the predominant, but not universal, view at the time of the Framing was that the Articles of Confederation formed a treaty-based body); RICHARD BEEMAN, *PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION* 8 (2009) ("The Articles of Confederation, America's first 'constitution,' was not really a proper constitution, but rather a peace treaty among thirteen separate and sovereign states."); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 *CAL. L. REV.* 167, 237 (1996) ("[T]he [Confederation] Congress had judicial, legislative, and executive functions more typical of a treaty organization than a sovereign government.").

⁶ *See* ArtII.S2.C2.1.4 Self-Executing and Non-Self-Executing Treaties.

⁷ *See id.*

⁸ U.S. CONST. art. VI, cl. 2. For discussion of the relationship between treaties and the Supremacy Clause, *see* ArtII.S2.C2.1.4 Self-Executing and Non-Self-Executing Treaties, and for broader analysis of the Supremacy Clause, *see* ArtVI.C2.1 Overview of Supremacy Clause.

⁹ *See* *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) ("A treaty is in its nature a contract between two nations, not a legislative act. . . . 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 any legislative provision."); *The Head Money Cases*, 112 U.S. at 598 ("A treaty is primarily a compact between independent nations. . . . But a treaty may also . . . partake of the nature of municipal law[.]"); *Validity of Congressional-Executive Agreements That Substantially Modify the United States' Obligations Under an Existing Treaty*, 20 *Op. O.L.C.* 389, 390 (1996) (discussing the "dual nature of treaties, as instruments of both domestic and international law").

¹⁰ For analysis of the U.S. treaty-making process, *see* Cong. Research Serv., *Treaties and Other International Agreements: The Role of the United States Senate*, S. REP. NO. 106-71, at 107–56 (2001) [hereinafter *Treaties and Other International Agreements*].

¹¹ *Id.* at 96–97. *See also* *Zivotofsky v. Kerry*, 576 U.S. 1, 13 (2015) [hereinafter *Zivotofsky II*] ("The President has the sole power to negotiate treaties[.]"); *United States v. Curtiss–Wright Export Corp.*, 299 U.S. 304, 319 (1936) ("[T]he President . . . makes treaties with the advice and consent of the Senate; but he alone negotiates."); *Procedures for Exchanging Instruments of Ratification for Bilateral Law Enforcement Treaties*, 8 *Op. O.L.C.* 157, 157 (1984) (discussing the "President's negotiating authority with respect to bilateral treaties"). Although the Executive Branch generally is responsible for treaty negotiations, Congress occasionally plays a role by, among other things, enacting legislation encouraging the Executive Branch to pursue certain objectives in its international negotiations. *See* *Treaties and Other International Agreements*, *supra* note 10, at 100–02.

¹² *Id.* at 118 ("All treaties are transmitted to the Senate in the President's name").

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ArtII.S2.C2.1.1

Overview of President’s Treaty-Making Power

back to the Executive Branch.¹³ At this stage, the President decides whether to make the final decision to enter the treaty on behalf of the United States.¹⁴ It is thus the President, and not the Senate, who has final responsibility for completing the treaty-making process.¹⁵ However, the President has no obligation to ratify a Senate-approved treaty, and, in some cases, the President has declined to do so.¹⁶

Although many important events in U.S. foreign relations have culminated in treaties,¹⁷ the United States does not conclude all agreements with foreign nations through the process outlined in the Treaty Clause. The President regularly enters into executive agreements, which do not receive the Senate’s advice and consent, and “political commitments” and other nonlegal pacts that are not intended to be binding.¹⁸ Since the turn of the twentieth century, Presidents have increasingly used alternatives to treaties,¹⁹ which are examined in the discussion of the President’s inherent power over foreign affairs.²⁰ The following essay focuses

¹³ See *Zivotofsky II*, 576 U.S. at 13 (“[T]he Senate may not conclude or ratify a treaty without Presidential action.”); Procedures for Exchanging Instruments of Ratification for Bilateral Law Enforcement Treaties, 8 Op. O.L.C. 157, 158 (1984) (“Once the Senate gives its advice and consent, the treaty is returned to the President, who must ratify it by signing the instrument of ratification.”).

¹⁴ See *supra* note 13. See also RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 303(3) (2018) [hereinafter FOURTH RESTATEMENT] (“After the Senate provides its advice and consent, the President determines whether to ratify or otherwise make the treaty on behalf of the United States.”). While the Restatement of Foreign Relations Law of the United States is nonbinding and prepared by a private organization, the Supreme Court has cited it on several occasions, e.g., *United States v. Stuart*, 489 U.S. 353, 375 (1989) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 314 (1987)); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 259 (1984) (citing RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW § 147(1)(f) (1965)), and commentators often describe it as authoritative, e.g., ANTHONY S. WINER ET AL., INTERNATIONAL LAW LEGAL RESEARCH 242–43 (2013).

¹⁵ See, e.g., SAMUEL B. CRANDALL, TREATIES, THEIR MAKING AND ENFORCEMENT 81 (2d ed. 1916) (“[T]he approval, whether qualified or unqualified, of the treaty by the Senate is not to be confused with the act of ratification. The latter is performed by the President[.]”); FOURTH RESTATEMENT, *supra* note 14, § 303 reporters’ n.5 (“Properly speaking, the Senate does not ratify a treaty; the Senate gives its advice and consent to ratification. It is the President who then ‘ratifies,’ or makes, the treaty by signing an instrument of ratification and then arranging for the deposit or exchange of the instrument, as indicated by the treaty’s terms.”). Although the President is the final actor in expressing the United States’ assent to be bound to a treaty, additional action by Congress may be necessary to implement the treaty into domestic law. See ArtII.S2.C2.1.5 Congressional Implementation of Treaties. Once the parties to the treaty complete the processes necessary to express their final assent to be bound—often through an exchange of instruments of ratification—the President may “proclaim” the treaty, and declare it to be in force by Executive Order. See Procedures for Exchanging Instruments of Ratification for Bilateral Law Enforcement Treaties, 8 Op. O.L.C. 157, 158 (1984).

¹⁶ For examples when the President declined to ratify treaties that received the Senate’s advice and consent, see Crandall, *supra* note 15, at 97–99 and FOURTH RESTATEMENT, *supra* note 14, § 303 reporters’ n.5.

¹⁷ See, e.g., Treaty of Peace, U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat. 80 (peace treaty with Great Britain following the Revolutionary War); Cession of Louisiana: A Financial Arrangement—Convention Between the United States and the French Republic, U.S.-Fr., Apr. 30, 1803, 8 Stat. 206 (treaty defining the terms of the Louisiana Purchase); Peace, Friendship, Limits, and Settlement (Treaty of Guadalupe Hidalgo), U.S.-Mex., Feb. 2, 1848, 9 Stat. 922 (Treaty of Guadalupe Hidalgo ending the Mexican-American War and giving the United States control over what would become several southwestern U.S. states).

¹⁸ For discussion of international pacts that are not concluded through the process defined in the Treaty Clause, see ArtII.S2.C2.2.2 Legal Basis for Executive Agreements.

¹⁹ See *Treaties and Other International Agreements*, *supra* note 10, at 38–41; Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control Over International Law*, 131 HARV. L. REV. 1201, 1209–12 (2018).

²⁰ See ArtII.S2.C2.2.1 Overview of Alternatives to Treaties; ArtII.S2.C2.2.2 Legal Basis for Executive Agreements; ArtII.S2.C2.2.3 Legal Effect of Executive Agreements; ArtII.S2.C2.2.5 Congressional Executive Agreements.

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ArtII.S2.C2.1.2
Historical Background on Treaty-Making Power

on treaties in the constitutional sense, meaning international agreements²¹ that the President concludes after receiving the Senate’s advice and consent through the process defined in the Treaty Clause.²²

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Article II, Section 2, 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 supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Jurists, courts, and legal analysts have long viewed a country’s capacity to enter into international pacts as an essential element of national sovereignty.¹ Under the British system of treaty-making, the power to conclude and ratify treaties falls within the prerogative of the Crown.² After the United States achieved its independence from Great Britain, the treaty-making power was transferred to the newly established Congress under the Articles of Confederation.³ But the United States soon faced practical difficulties in attempting to negotiate treaties through a large legislative body.⁴ And even when the national government

²¹ As used in this essay, the term “international agreements” refers to agreements between two or more countries (or between one or more countries and an entity, such as a public international organization, with capacity to conclude an international agreement) that is intended to be legally binding and is governed by international law. See *FOURTH RESTATEMENT*, *supra* note 14, § 302 cmt. a.

²² The meaning of the term “treaty” differs in its constitutional usage when compared to international law. Under international law, the term “treaty” refers to an international agreement that is binding and governed by international law regardless of how the agreement is brought into force. See *Weinberger v. Rossi*, 456 U.S. 25, 31–32 (1982); *Validity of Congressional-Executive Agreements That Substantially Modify the United States’ Obligations Under an Existing Treaty*, *supra* note 9, at 389 n.2. Under U.S. law, “treaty” generally refers to a narrower subset of international agreements that receive senatorial advice and consent under the process defined in the Treaty Clause. See *Weinberger*, 456 U.S. at 30; *FOURTH RESTATEMENT*, *supra* note 14, § 302 cmt. a. But courts occasionally have interpreted the term “treaty” in U.S. statutes to encompass executive agreements. See *Weinberger*, 456 U.S. at 31–32 (interpreting statute barring discrimination except where permitted by “treaty” to refer to both treaties and executive agreements); *B. Altman & Co. v. United States*, 224 U.S. 583, 601 (1912) (construing “treaty,” as used in statute conferring appellate jurisdiction, to also refer to executive agreements).

¹ See, e.g., EMER DE Vattel, *THE LAW OF NATIONS, OR PRINCIPLES OF THE LAW OF NATIONS, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* 67 (Liberty Fund ed., 2008) (originally published 1758) (defining “what is meant by a nation or state” and including the ability to be “susceptible of obligations and rights”). See also *S.S. WIMBLEDON (U.K., Fr., Italy, Japan v. Germany)*, Judgment, 1923 P.C.I.J. (ser. A) No. 1, at 25 (Aug. 17) (“[T]he right of entering into international engagements is an attribute of State sovereignty.”); Anne Peters, *Treaty-Making Power*, in 10 *THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 57 (Rudiger Wolfrum ed., 2012) (“Treaty-making power is often considered as a corollary, or as a fundamental attribute, of the international legal personality understood as the ability to have rights and obligations under international law.”); ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 13 (1963) (describing the “capacity to enter into international relations with other states” as one of the traditional criteria necessary for independent statehood).

² See JAMES CRAWFORD, *BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 63 (8th ed. 2012). See also 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 257 (Lippincott ed., 1859) (“It is also the king’s prerogative to make treaties, leagues, and alliances with foreign states and princes.”). In modern usage, “the Crown” generally refers to the Executive Branch of the British government rather than an individual monarch. See Arthur 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, 75 & n.290 (1979) [hereinafter BESTOR, *RESPECTIVE ROLES*].

³ *ARTICLES OF CONFEDERATION OF 1781* art. IX, para. 1.

⁴ See BESTOR, *RESPECTIVE ROLES*, *supra* note 2, at 49–72.

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was able to conclude treaties, the new nation often found itself unable to perform its treaty obligations without the cooperation of the state governments.⁵

By the time of the Constitutional Convention, the delegates had largely come to agree that the national government required a stronger power to enforce treaties throughout the United States, but there were many differences of opinion as to where the newly enhanced treaty power should reside.⁶ In August 1787, the Committee of Detail proposed an early draft of the Constitution that would have provided the Senate alone with the power to make treaties.⁷ But the delegates raised widespread objections to the provision.⁸ Some delegates proposed that treaty-making include a role for the President or be granted to the President exclusively.⁹ Others argued that both chambers of Congress should be included in the process.¹⁰ Ultimately, the delegates decided that the Executive Branch was best equipped to act with the confidentiality and efficiency necessary for treaty negotiations.¹¹ In the *Federalist No. 64*, John Jay expanded on this rationale, arguing that individuals with useful information in treaty negotiations would “rely on the secrecy of the President, but . . . would not confide in that of the Senate, and still less in that of a large popular Assembly.”¹²

While the delegates to the Constitutional Convention concluded that the President should play a role in treaty-making, they also decided that no single component of the government should have the power to bind the United States to a treaty.¹³ Because of treaties’ dual nature as tools of foreign policy and part of the law of the land, the *Federalist Papers* describe treaty-making as a “peculiar” combination of two functions that did not fit neatly into the founding era understanding of separation of powers.¹⁴ In the *Federalist Papers*, Alexander Hamilton and John Jay argued that treaty-making contains elements of executive power

⁵ See ArtII.S2.C2.1.4 Self-Executing and Non-Self-Executing Treaties.

⁶ See, e.g., 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 297, 392–93, 495, 498–99, 438, 540–41, 538–50, 638 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS] (debate over treaty-making power during the Constitutional Convention); 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 263–65 (Jonathan Elliot ed., 1836) [hereinafter DEBATES IN THE SEVERAL STATE CONVENTIONS] (discussion of treaty-making power during the South Carolina ratifying convention); *id.* at 306 (statements concerning the treaty-making power by Alexander Hamilton to the New York ratifying convention); 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 563 (Merrill Jensen et al., eds.) (arguments concerning the Treaty Clause to the Pennsylvania ratifying convention).

⁷ See 2 FARRAND’S RECORDS, *supra* note 6, at 176, 183.

⁸ *Id.* at 393 (“Mr. [Edmund] Randolph observing that almost every Speaker had made objections to the clause as it stood, moved in order to a further consideration of the subject[.]”). See also BESTOR, RESPECTIVE ROLES, *supra* note 2, at 93–96 (discussing objections to the Senate the exclusive treaty-making authority).

⁹ For example, John Mercer of Maryland argued that the “Senate ought not to have the power of treaties” at all, contending that the power should reside in the Executive alone. 2 FARRAND’S RECORDS, *supra* note 6, at 297. And James Madison argued that “the President should be an agent in Treaties” because “the Senate represented the States alone” rather than the federal government. *Id.* at 392–93.

¹⁰ See *id.* at 538 (motion by James Wilson of Pennsylvania to require the advice and consent of both chambers of Congress before conclusion of a treaty).

¹¹ See *id.* at 499 (proposal by the Committee of Postponed Parts to allow presidential participation in treaty-making). See also THE FEDERALIST NO. 75 (ALEXANDER HAMILTON) (explaining the rationale for the “union of the Executive with the Senate” in treaty-making); THE FEDERALIST NO. 64 (John Jay) (“[W]e see that the Constitution provides that our negotiations for treaties shall have every advantage which can be derived from [the Senate’s] talents, information, integrity, and deliberate investigations, on the one hand, and from [the President’s] secrecy and despatch on the other.”).

¹² THE FEDERALIST NO. 64 (John Jay).

¹³ See, e.g., 2 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 6, at 507 (statement of James Wilson) (“Neither the President nor the Senate, solely, can complete a treaty; they are checks upon each other, and are so balanced as to produce security to the people.”).

¹⁴ See THE FEDERALIST NO. 75 (ALEXANDER HAMILTON) (“[T]he particular nature of the power of making treaties indicates a peculiar propriety in that union” of the Executive with the Senate in making treaties.).

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because it involves diplomacy and the management of foreign relations.¹⁵ Hamilton and Jay also believed treaty-making invokes the legislative power because treaties can have the force of domestic law.¹⁶ As Hamilton summarized in the *Federalist No. 75*, the power to make treaties belongs “neither to the legislative nor to the executive.”¹⁷ For that reason, the delegates to the Constitutional Convention saw fit to divide this dual natured power between dual branches.¹⁸

The delegates chose to include the Senate in the treaty-making process rather than the House of Representatives because they believed the House would be too large and that its membership would change too often to act with the secrecy and speed necessary for treaty-making.¹⁹ The delegates also believed the Senate would represent and protect the interests of the states,²⁰ which the Constitution denies the power to make treaties.²¹

The delegates viewed the requirement that a supermajority of two thirds of Senators present provide their advice and consent as a method to prevent the federal government from making treaties that would promote regional interests or discriminate against a minority of states.²² In particular, the Southern states were concerned that the federal government would give Spain navigation rights on the Mississippi River, which were essential to the Southern economy, in exchange for trade concessions that would benefit the Northern economy.²³ And

¹⁵ *Id.* (“The qualities elsewhere detailed as indispensable in the management of foreign negotiations, point out the Executive as the most fit agent in those transactions[.] . . . [T]he ministerial servant of the Senate could not be expected to enjoy the confidence and respect of foreign powers in the same degree with the constitutional representatives of the nation[.]”); THE FEDERALIST NO. 64 (John Jay) (discussing the benefits of authorizing the President to negotiate treaties).

¹⁶ See THE FEDERALIST NO. 75 (ALEXANDER HAMILTON) (“[T]he vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a portion of the legislative body in the office of making them.”).

¹⁷ *Id.*

¹⁸ *Id.* See also *supra* notes 6, 8.

¹⁹ See at 2 FARRAND’S RECORDS, *supra* note 6, at 534 (vote 475) (voting, ten states to one, against the motion to include the House of Representatives in the treaty-making process); *Id.* at 538 (“[Roger Sherman of Connecticut] thought . . . that the necessity of secrecy in the case of treaties forbade a reference of them to the whole Legislature.”); THE FEDERALIST NO. 75 (ALEXANDER HAMILTON) (“The fluctuating and, taking its future increase into the account, the multitudinous composition of [the House of Representatives], forbid us to expect in it those qualities which are essential to the proper execution of such a trust [necessary to conclude a treaty].”); THE FEDERALIST NO. 64 (John Jay) (“They who wish to commit the [treaty] power under consideration to a popular assembly, composed of members constantly coming and going in quick succession, seem not to recollect that such a body must necessarily be inadequate to the attainment of those great objects[.]”).

²⁰ See 3 FARRAND’S RECORDS, *supra* note 6, at 348 (statement of William Davie to the North Carolina Ratifying Convention) (“[T]he extreme jealousy of the little states, and between the commercial states and the non-importing states, produced the necessity of giving an equality of suffrage to the Senate. The same causes made it indispensable to give to the senators, as representatives of states, the power of making, or rather ratifying, treaties. Although it militates against every idea of just proportion that the little state of Rhode Island should have the same suffrage with Virginia, or the great commonwealth of Massachusetts, yet the small states would not consent to confederate without an equal voice in the formation of treaties. . . . It therefore became necessary to give them an absolute equality in making treaties.”); 2 FARRAND’S RECORDS, *supra* note 6, at 392 (James Madison advocating for the President to play a role in treaty-making because “the Senate represents the States alone.”).

²¹ See U.S. CONST. art. I, § 10, cl. 1. See also ArtI.S10.C1.1 Foreign Policy by States.

²² See *infra* notes 23–24; Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States* 117 YALE L.J. 1236, 1282 (2008) [hereinafter Hathaway, *Treaties’ End*] (stating that the focus of the supermajority requirement in the Senate “was not the result of general or theoretical concerns. It was, instead, formed in direct response to a recent controversy over treaty negotiations with Spain” implicating regional interests); BESTOR, RESPECTIVE ROLES, *supra* note 2, at 100 (discussing the role of sectional interests in the crafting of the treaty power at the constitutional convention); JACK N. RAKOVE, SOLVING A CONSTITUTIONAL PUZZLE: THE TREATYMAKING CLAUSE AS A CASE STUDY, in 1 PERSPECTIVES IN AMERICAN HISTORY 272–74 (1984) (analyzing historical events influencing the two-thirds requirement in the Treaty Cause).

²³ For analysis of the impact of negotiations with Spain over navigation rights to the Mississippi, see Charles Warren, *The Mississippi River and the Treaty Clause of the Constitution*, 2 GEO. WASH. L. REV. 271, 274 (1934).

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the Northern states feared they could lose access to fisheries in Newfoundland through a treaty.²⁴ The Treaty Clause’s supermajority requirement—one of several in the Constitution²⁵—was designed to alleviate these concerns by allowing a minority of states, through their representatives in the Senate, to block treaties that could disproportionately disadvantage segments of the nation.²⁶

The exact number of Senators required to approve a treaty under the Treaty Clause differs from its predecessor provision in the Articles of Confederation. Whereas the Articles of Confederation required nine of thirteen states to approve all treaties, the Framers deliberately changed the advice and consent threshold to “two thirds of the Senators present[.]”²⁷ Hamilton explained in the *Federalist No. 75* that the change from a fixed number to a percentage would account for the possibility that new states would join the union.²⁸ Hamilton also argued that it would limit individual Senators’ ability to block a treaty simply by declining to appear in the Senate for a vote.²⁹ And whereas each state voted as a unit under the Articles, the Treaty Clause permits Senators to vote individually, creating the possibility that one state’s Senator could vote for a treaty and the other against it.³⁰

Many scholars have concluded that the Framers intended “advice” and “consent” to be separate aspects of the treaty-making process, although there is still some debate on the issue.³¹ According to the prevailing interpretation, the “advice” element required the President

²⁴ See, e.g., 3 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 6, at 604 (statement of George Mason) (“The Newfoundland fisheries will require that kind of security which we are now in want of. The Eastern States therefore agreed, at length, that treaties should require the consent of two thirds of the members present in the Senate.”); R. Earl McClendon, *Origin of the Two-Thirds Rule in Senate Action Upon Treaties*, 36 AM. HIST. REV. 768, 768–69 (1931) (providing a historical analysis of the importance of Newfoundland fisheries and their role in leading to the two-thirds requirement in the Treaty Clause).

²⁵ See U.S. CONST. art. I, § 3, cl. 6 (convictions on impeachment); *Id.* § 5, cl. 2 (expulsion of a Member of Congress); *Id.* § 7, cl. 2 (overriding presidential veto); *Id.* art. V (proposing a constitutional amendment in Congress); *Id.* amend. XIV, § 3 (restoring the ability of those who “engaged in insurrection or rebellion against the [United States], or given aid or comfort to the enemies thereof” to serve in public office); *Id.* amend. XXV, § 4 (congressional approval of removal of the President for inability to discharge powers and duties of the office after the Vice President and the Cabinet approve such removal and after the President contests removal).

²⁶ See *supra* notes 22–24.

²⁷ Compare ARTICLES OF CONFEDERATION OF 1781 art. IX, with U.S. CONST. art. II, § 2, cl. 2.

²⁸ See THE FEDERALIST NO. 75 (ALEXANDER HAMILTON) (discussing the “probable augmentation of the Senate, by the erection of new States”).

²⁹ *Id.* (“[M]aking a determinate number at all times requisite to a resolution, diminishes the motives to punctual attendance. . . . [M]aking the capacity of the body to depend on a PROPORTION which may be varied by the absence or presence of a single member, has the contrary effect.”)

³⁰ For example, in voting on the first treaty that was to be ratified by the United States after the adoption of the Constitution—dubbed the Jay Treaty because it was negotiated by the first Chief Supreme Court Justice of the United States, John Jay, who was appointed a special envoy to Great Britain despite his role in the Judicial Branch—Senators from six states split their votes. See AMITY, COMMERCE, AND NAVIGATION (JAY TREATY): TREATY OF AMITY, COMMERCE AND NAVIGATION, BETWEEN HIS BRITANNICK MAJESTY;—AND THE UNITED STATES OF AMERICA, BY THEIR PRESIDENT, WITH THE ADVICE AND CONSENT OF THEIR SENATE, NOV. 19, 1794, U.S.-Gr. Brit., 8 Stat. 116; 4 ANNALS OF CONG. 862 (1795).

³¹ Compare, e.g., LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 177 (2d ed. 1996) (“As originally conceived, no doubt, the Senate was to be a kind of Presidential council, affording him advice throughout the treaty-making process and on all aspects of it[.]”); Arthur Bestor, “Advice” from the Very Beginning, “Consent” When the End Is Achieved, 83 AM. J. INT’L L. 718, 726 (1989) (“[T]he use of the phrase ‘advice and consent’ to describe the relationship between the two partners clearly indicated that the Framers’ conception was of a council-like body in direct and continuous consultation with the Executive on matters of foreign policy.”); RAKOVE, *supra* note 22, at 249 (“Advice . . . was to be given at every stage of diplomacy, from the framing of policy and instructions [to treaty negotiators] to the final bestowal of consent.”); RALSTON HAYDEN, THE SENATE AND TREATIES, 1789–1817, at 6 (1920) (“[T]he [Senate] really was a council of advice upon treaties and appointments—a council which expected to discuss these matters directly with the other branch of the government.”); HATHAWAY, TREATIES’ END, *supra* note 22, at 1278–81 (discussing the Senate’s role as a “Council of Advice” to the President), with MICHAEL D. RAMSEY, THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS 139 (2007) (“[A]dvice and consent’ . . . seems capable of . . . meaning[] an after-the-fact review of the President’s proposal, coupled with ‘advice’ that the President process or adopt an alternate course.”).

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to consult with the Senate during treaty negotiations before seeking the Senate’s final “consent.”³² President George Washington appears to have understood that the Senate had such a consultative role,³³ but he and other early Presidents soon declined to seek the Senate’s input during the negotiation process.³⁴ In modern treaty-making practice, the Executive Branch generally is responsible for negotiations, and the Supreme Court stated in dicta that the President’s power over treaty negotiations is exclusive.³⁵

Although Presidents since Washington have not formally consulted with the Senate as a body, the Senate maintains an aspect of its “advice” function through its conditional consent authority.³⁶ In considering when to provide its advice and consent to a treaty, the Senate may condition its approval on reservations,³⁷ declarations,³⁸ understandings,³⁹ and provisos⁴⁰ concerning the treaty’s application.⁴¹ Under established U.S. practice, the President cannot

³² See, e.g., HENKIN, *supra* note 31, at 177; BESTOR, *supra* note 31, at 726; RAKOVE, *supra* note 22, at 249; HATHAWAY, *TREATIES’ END*, *supra* note 22, at 1278–81; HAYDEN, *supra* note 31, at 6.

³³ On an occasion that has been described as the first and last time the President personally visited the Senate chamber to receive the Senate’s advice on a treaty, President Washington went to the Senate in August 1789 to consult about proposed treaties with the Southern Indians. See 1 ANNALS OF CONG. 65–71 (1789). But observers reported that he was so frustrated with the experience that he vowed never to appear in person to discuss a treaty again. See, e.g., WILLIAM MACLAY, SKETCHES OF DEBATE IN THE FIRST SENATE OF THE UNITED STATES 122–24 (George W. Harris ed., 1880) (record of the President’s visit by Senator William Maclay of Pennsylvania); HAYDEN, *supra* note 31, at 21–26 (providing a historical account of Washington’s visit to the Senate).

³⁴ See VI MEMOIRS OF JOHN QUINCY ADAMS 427 (Charles Francis Adams ed., 1875) (“[E]ver since [President Washington’s first visit to the Senate to seek its advice], treaties have been negotiated by the Executive *before* submitting them to the consideration of the Senate.”).

³⁵ See *Zivotofsky v. Kerry*, 576 U.S. 1, 13 (2015) (“The President has the sole power to negotiate treaties, . . . and the Senate may not conclude or ratify a treaty without Presidential action.”); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (“[T]he President . . . makes treaties with the advice and consent of the Senate; but he alone negotiates.”).

³⁶ See Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 405 (2000) (“The exercise of the conditional consent power has been in part a response by the Senate to its loss of any substantial ‘advice’ role in the treaty process.”); SAMUEL B. CRANDALL, *TREATIES, THEIR MAKING AND ENFORCEMENT* 81 (2d ed. 1916) (“Not usually consulted as to the conduct of negotiations, the Senate has freely exercised its co-ordinate power in treaty making by means of amendments.”). Not all legal scholars view the Senate’s conditional consent authority as an effective substitute for the role as a council of advice. See Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 905 (1995) (describing the Senate’s assertion of conditional consent power as a “dysfunctional” and counterproductive system generated after “the Senate lost its effective capacity to give advice”).

³⁷ As a general matter, “[r]eservations change U.S. obligations without necessarily changing the text, and they require the acceptance of the other party.” See Cong. Research Serv., *Treaties and Other International Agreements: The Role of the United States Senate*, S. REP. NO. 106-71, at 11 (2001) [hereinafter *Treaties and Other International Agreements*]. See also RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 305 reporters’ n.2 (2018) [hereinafter *FOURTH RESTATEMENT*] (“Although the Senate has not been entirely consistent in its use of the labels, in general the label . . . ‘reservation’ [has been used] when seeking to limit the effect of the existing text for the United States[.]”).

³⁸ Declarations are “statements expressing the Senate’s position or opinion on matters relating to issues raised by the treaty rather than to specific provisions.” *Treaties and Other International Agreements*, *supra* note 37, at 11. See also *FOURTH RESTATEMENT*, *supra* note 37, § 305 reporters’ n.2 (describing declarations as the Senate’s “policy statements about a treaty” or statements concerning the treaty’s domestic status).

³⁹ Understandings are “interpretive statements that clarify or elaborate provisions but do not alter them.” *Treaties and Other International Agreements*, *supra* note 37, at 11. See also *FOURTH RESTATEMENT*, *supra* note 37, § 305 reporters’ n.2 (“[I]n general [the Senate uses] the label . . . ‘understanding’ when seeking to set forth the U.S. interpretation of a treaty provision[.]”).

⁴⁰ Provisos concern “issues of U.S. law or procedure and are not intended to be included in the instruments of ratification to be deposited or exchanged with other countries.” *Treaties and Other International Agreements*, *supra* note 37, at 11. See also *FOURTH RESTATEMENT*, *supra* note 37, § 305 reporters’ n.2 (stating that the Senate uses the term “proviso” when “setting forth a condition relating to the process by which the President makes the treaty or the process by which it is implemented within the United States, or to impose reporting or other obligations on the President”).

⁴¹ *Haver v. Yaker*, 76 U.S. (9 Wall.) 32, 35 (1869) (stating that “the Senate are not required to adopt or reject [a treaty] as a whole, but may modify or amend it, as was done with the treaty under consideration”); *The Diamond Rings*, 183 U.S. 176, 183 (1901) (Brown, J., concurring) (noting that the Senate may “make . . . ratification conditional upon

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ratify a treaty unless the President accepts the Senate’s conditions.⁴² If accepted by the President, these conditions may modify or define U.S. rights and obligations under the treaty.⁴³ The Senate also may propose to amend the text of the treaty itself, after which other nations that are parties to the treaty must consent to the changes for them to take effect.⁴⁴

ArtII.S2.C2.1.3 Scope of Treaty-Making Power

Article II, Section 2, 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 supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The Articles of Confederation limited the scope of the treaty power by carving out two acts that the United States could not take in a treaty: limiting the states’ power to impose “imposts on duties on foreigners” and “prohibiting the exportation or importation of any species of goods or commodities whatsoever[.]”¹ The Constitution’s Treaty Clause, by contrast, contains no such restrictions.² During the Constitutional Convention and the ratification debates, some delegates expressed concern that the treaty power was too broad and subject to abuse.³ But James Madison and others defended the structure of the treaty power, arguing that it was not possible to enumerate all circumstances in which the government could misuse the treaty

the adoption of amendments to the treaty”); FOURTH RESTATEMENT, supra note 37, § 305 reporters’ n.3 (collecting lower court cases giving effect to the Senate’s conditions when interpreting or applying a treaty).

⁴² See *United States v. Stuart*, 489 U.S. 353, 374–75 (1989) (Scalia, J., concurring) (“[The Senate] may, in the form of a resolution, give its consent on the basis of conditions. If these are agreed to by the President and accepted by the other contracting parties, they become part of the treaty and of the law of the United States[.]”); Relevance of Senate Ratification History to Treaty Interpretation, 11 Op. O.L.C. 28, 32–33 (1987) (“[S]uch understandings or other conditions expressly imposed by the Senate are generally included by the President with the treaty documents deposited for ratification or communicated to the other parties at the same time the treaty is deposited for ratification. Because such conditions are considered to be part of the United States’s position in ratifying the treaty, they are generally binding on the President, both internationally and domestically, in his subsequent interpretation of the treaty.”) (citations and footnotes omitted).

⁴³ For discussion of historical examples of conditions attached by the Senate to treaties, see FOURTH RESTATEMENT, supra note 37, § 305 reporters’ n.5.

⁴⁴ For example, in giving its advice and consent to the Jay Treaty, the Senate insisted on suspending an article allowing Great Britain to restrict U.S. trade in the British West Indies. See AMITY, COMMERCE, AND NAVIGATION (JAY TREATY): TREATY OF AMITY, COMMERCE AND NAVIGATION, BETWEEN HIS BRITANNICK MAJESTY;—AND THE UNITED STATES OF AMERICAN, BY THEIR PRESIDENT, WITH THE ADVICE AND CONSENT OF THEIR SENATE, Nov. 19, 1794, U.S.-Gr. Brit., 8 Stat. 116; S. Exec. Journal, 4th Cong., 10th Sess. 186 (1795). Great Britain ratified the Jay Treaty without objection to the Senate’s changes. See HAYDEN, supra note 31, at 86–88.

¹ ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 1.

² See U.S. CONST. art II, § 2, cl. 2.

³ See, e.g., 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 509 (Jonathan Elliot ed., 1836) [hereinafter DEBATES IN THE SEVERAL STATE CONVENTIONS] (George Mason arguing for more stringent limits on the treaty power, stating “[t]he President and Senate can make any treaty whatsoever. We wish . . . to guard, this power[.]”); *id.* at 504 (Patrick Henry calling the treaty power so broad as to be “dangerous and destructive.”); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 393 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS] (statement of James Wilson) (“Under the clause, without the amendment, the Senate alone can make a Treaty, requiring all the Rice of S. Carolina to be sent to some one particular port.”).

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power,⁴ and that other checks and balances would provide appropriate limitations.⁵ In the end, the Framers did not include express limitations in the Treaty Clause on the types of subjects that may be addressed in a treaty.⁶

Despite the absence of subject matter limitations in the Treaty Clause’s text, there have been suggestions since the founding era that the treaty-making power is implicitly limited to matters that traditionally have been the subject of intercourse between sovereign nations.⁷ The status and scope of such a limitation, however, remains unclear. In several cases from the turn of the nineteenth century, the Supreme Court stated that the treaty power is not limited to a set of enumerated subjects in the way that Congress’s legislative powers are so constrained.⁸ Yet, in those same cases, the Court suggested that the treaty power might only extend to topics that “properly pertain” to foreign relations⁹ or are the “proper subjects”¹⁰ of negotiations between the United States and foreign nations.

Some jurists and commentators assert that the only proper subjects for treaties under the Constitution are “matters of international concern.”¹¹ Under this view, treaties must relate to “external concerns,” as distinguished from “purely internal” subjects.¹² In 2014, three Supreme Court Justices joined a concurring opinion arguing that the treaty power “can be used to

⁴ See, e.g., 3 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 3, at 514–15 (James Madison arguing that an attempt to “enumerate all the cases” in which treaty power should be restrained “might, and probably would be defective”); *id.* at 504 (statement of Edmund Randolph: “It is said there is no limitation of treaties. I defy the wisdom . . . to show how they ought to be limited.”).

⁵ See, e.g., *id.* at 516 (James Madison arguing that impeachment, criminal convictions, and regular elections in the Senate were checks on abuse of the treaty power.).

⁶ See U.S. CONST. art. II, § 2, cl. 2. See also ALEXANDER HAMILTON, THE DEFENCE No. XXXVI (Jan. 2, 1796), *reprinted in* 20 PAPERS OF ALEXANDER HAMILTON 6 (Harold C. Syrett ed., 1974) (“A power ‘to make treaties,’ granted in these indefinite terms, extends to all kinds of treaties and with all the latitude which such a power under any form of Government can possess.”).

⁷ See, e.g., 2 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 3, at 378 (statement of James Madison: “The object of treaties is the regulation of intercourse with foreign nations, and is external.”); THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE 310 (Samuel Harrison Smith ed., 1801) (“[T]he Constitution must have intended to comprehend only those subjects which are usually regulated by treaty, and cannot otherwise be regulated.”).

⁸ See *infra* note 10.

⁹ See *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931) (“There can be no question as to the power of the government of the United States to make the treaty with Persia or the Consular Convention with Italy. The treaty-making power is broad enough to cover all subjects that properly pertain to our foreign relations[.]”).

¹⁰ See *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924) (“The treaty-making power of the United States is not limited by any express provision of the Constitution, and, . . . it does extend to all proper subjects of negotiation between our government and other nations.”); *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 243 (1872) (“[T]he [treaty] power is given, in general terms, without any description of the objects intended to be embraced within its scope, it must be assumed that the framers of the Constitution intended that it should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty.”). See also *De Geofroy v. Riggs*, 133 U.S. 258, 267 (1890) (“[I]t 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.”); *Ross v. McIntyre*, 140 U.S. 453, 463 (1891) (“The treaty-making power vested in our government extends to all proper subjects of negotiation with foreign governments.”); *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 569 (1840) (Taney, C.J.) (“The power to make treaties is given by the Constitution in general terms, without any description of the objects intended to be embraced by it; and, consequently, it was designed to include all those subjects, which in the ordinary intercourse of nations had usually been made subjects of negotiation and treaty.”) (affirmed by equally divided court).

¹¹ The “international concern” requirement is most often associated with remarks by Charles Evans Hughes shortly before Hughes became Chief Justice of the Supreme Court, and after he served as an Associate Justice and as Secretary of State. See *Statement of Charles Evans Hughes*, 1929 AM. SOC. INT’L. L. PROC. 194, 194–96 (1929). See also *infra* notes 12–14, 20.

¹² See, e.g., *Power Auth. of N.Y. v. Fed. Power Comm’n*, 247 F.2d 538, 542–43 (D.C. Cir.1957) (“No court has ever said . . . that the treaty power can be exercised without limit to affect matters which are of purely domestic concern and do not pertain to our relations with other nations.”), *vacated as moot*, 355 U.S. 64, 78 (1957) (per curiam); HUGHES, *supra* note 11, at 194 (“[The treaty power] is not a power intended to be exercised . . . with respect to matters that have no relation to international concerns.”); *Treaties and Executive Agreements: Hearing on S.J. Res. 1 Before the*

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arrange intercourse with other nations, but not to regulate purely domestic affairs.”¹³ But the Court has not ruled on the issue, and there is no consensus on whether the Constitution contains such a limitation.¹⁴ Nor has the Supreme Court defined what, if any, matters are insufficiently international in nature to be an improper subject for a treaty.

To the extent there once was a common understanding of the line between internal and external matters, changes in international treaty practice have complicated this distinction.¹⁵ Early U.S. treaties often were bilateral and addressed matters such as relations with Indian tribes,¹⁶ military alliances, international trade, and military neutrality.¹⁷ But treaties have expanded greatly in number and in the scope of their subject matter since World War II.¹⁸ Treaties often now take the form of multilateral instruments that address matters that were not common subjects of international intercourse during the founding era, such as environmental protection and human rights.¹⁹ Scholars actively debate whether the Constitution limits the scope of modern treaties and multilateral instruments to “international” matters.²⁰

Subcomm. of the S. Comm. on the Judiciary, 84th Cong. 183 (1955) (statement of John Foster Dulles, Sec’y of State) (stating that a treaty cannot regulate issues that “do not essentially affect the actions of nations in relation to international affairs, but are purely internal”).

¹³ See *Bond v. United States*, 572 U.S. 844, 884 (2014) (Thomas, J., concurring in the judgment joined by Scalia & Alito, JJ.).

¹⁴ For example, the authors of the Restatement of Foreign Relations Law changed their view of the “international concern” requirement in each iteration of the Restatement. See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 117(1) (1965) (“The United States has the power under the Constitution to make an international agreement if . . . the matter is of international concern[.]”); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 302 cmt. c (1987) (“Contrary to what was once suggested, the Constitution does not require that an international agreement deal only with ‘matters of international concern.’”); RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 312 reporters’ n.8 (2018) [hereinafter *FOURTH RESTATEMENT*] (“Unlike in the prior two Restatements, this Section does not take a position on whether there is some sort of subject-matter limitation on the treaty power. . . . The Reporters for the present Restatement concluded that the issue had not been sufficiently addressed in judicial decisions and other relevant legal materials to warrant taking a definitive position.”).

¹⁵ Some scholars have argued that the divide between internal and external affairs was not well-defined even in the Founding era. See, e.g., David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 954, 989 (2010). Others contend the Framers had a clearer conception of the distinction. See, e.g., Duncan B. Hollis, *An Intersubjective Treaty Power*, 90 NOTRE DAME L. REV. 1415, 1420–25 (2015); Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 411–17 (1998) [hereinafter Bradley, *American Federalism Part I*].

¹⁶ For the first eighty years after the adoption of the Constitution, it was the United States’ practice to negotiate and conclude treaties with Indian tribes through the process outlined in the Treaty Clause. See 2 C. BUTLER, *THE TREATY MAKING POWER OF THE UNITED STATES* § 404, at 198–99 (1902). That practice ended when Congress passed the Indian Appropriations Act of March 3, 1871, which affirmed the continued validity of prior Indian treaties, but also declared that hereafter “[n]o 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.” Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 566, codified at 25 U.S.C. § 71. See also ArtI.S8.C3.9.1 Scope of Commerce Clause Authority and Indian Tribes (analyzing Congress’s power to regulate commerce with Indian tribes).

¹⁷ See, e.g., RALSTON HAYDEN, *THE SENATE AND TREATIES, 1789–1817*, at 1–168 (1920) (analyzing the development of the treaty-making power in the Washington, Adams, and Jefferson Administrations); WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES* 578–88 (1825) (stating that the treaty power was appropriate for those subjects “which properly arise from intercourse with foreign nations” and listing as subjects “peace, alliance, commerce, neutrality, and others of a similar nature”). See also THE FEDERALIST No. 64 (John Jay) (“The power of making treaties is an important one, especially as it relates to war, peace, and commerce[.]”).

¹⁸ See, e.g., David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1304 (2000) (“[I]nternational treaty practice has greatly expanded in the past half century and promises to expand further in the decades ahead as globalization proceeds.”); Bradley, *American Federalism Part I*, *supra* note 15, at 396 (“[A]t one time in American history . . . treaties were generally bilateral and regulated matters such as diplomatic immunity, military neutrality, and removal of trade barriers. The nature of treaty-making, however, has undergone a radical transformation, especially in the years since World War II.”).

¹⁹ See, e.g., United Nations Framework Convention on Climate Change art. 25, May 9, 1992, 1771 U.N.T.S. 107; United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or

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ArtII.S2.C2.1.4 Self-Executing and Non-Self-Executing Treaties

Article II, Section 2, 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 supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The Supremacy Clause of the Constitution, Article VI, Clause 2, states that treaties concluded in accordance with constitutional requirements have the status of the “supreme Law of the Land[.]”¹ The Founders included treaties in the Supremacy Clause in direct response to one of the major weaknesses of the Articles of Confederation: the national government’s inability to enforce the United States’ treaty obligations.² Although the Articles of Confederation gave exclusive treaty-making power to Congress,³ the United States depended on state legislatures to enact laws necessary to ensure compliance with the Nation’s treaty commitments.⁴ When states ignored or violated the United States’ obligations—most famously, by refusing to permit British citizens’ to collect pre-Revolutionary War debts⁵—some

Punishment, Dec. 10, 1984, 23 I.L.M. 1027, 1465 U.N.T.S. 85. Scholars debate the extent to which modern treaties are more likely to address matters that historically were regulated by domestic governments. Compare, e.g., Bradley, *American Federalism Part I*, *supra* note 15, at 396–97 (“While many treaties continue to concern matters traditionally viewed as *inter-national* in nature, numerous others concern matters that in the past countries would have addressed wholly domestically.”), with GOLOVE, *supra* note 18, at 1101 (“[F]rom the beginning, treaties have invaded the most sensitive spheres of state autonomy[.]”).

²⁰ See, e.g., Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1876 (2005) (describing the issue of whether the Constitution limits the subject matter of treaties as one of the “great academic debates about the treaty power”); Hollis, *supra* note 15, at 1415–34 (contending that the Constitution requires modern treaties to address matters of international concern, but suggesting a revision of the traditional understanding of the international concern requirement); Louis Henkin, “*International Concern and the Treaty Power of the United States*,” 63 AM. J. INT’L L. 272, 273 (1969) (“[T]he ‘international concern’ limitation may not in fact exist; . . . if there is some such limitation, it has been unduly and needlessly elevated to independent doctrine and its scope exaggerated[.]”). Much of the recent debate over the scope of the treaty power concerns whether the Constitution’s federalism limitations apply to treaty-making, which is discussed ArtII.S2.C2.1.5 Congressional Implementation of Treaties.

¹ U.S. CONST. art. VI, cl. 2. For analysis of the Supremacy Clause, see ArtVI.C2.1 Overview of Supremacy Clause.

² See Arthur 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, 49–72 (1979); Sarah H. Cleveland & William S. Dodge, *Defining and Punishing Offenses Under Treaties*, 124 YALE L. J. 2202, 2204 (2015) (“One of the principal aims of the U.S. Constitution was to give the federal government authority to comply with the United States’ international legal commitments.”); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1102 (2000) (“It was famously the difficulty of obtaining state compliance with treaties that was among the foremost reasons impelling the movement toward Philadelphia, and that experience left an unmistakable imprint on the text adopted.”).

³ ARTICLES OF CONFEDERATION of 1781, arts. VI, IX.

⁴ See *infra* notes 5–7. See also FREDERICK W. MARKS III, *INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION* 3 (1973) (“Among the most important defensive powers which the United States lacked in 1783 was the power to enforce treaties.”); David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 989–90 (2010) (“Because the foreign affairs powers were, for the most part, already nominally in the Confederation under the Articles, the main goal [of the Constitution] was to make those powers effective by eliminating the national government’s dependence on the states for carrying its powers into effect and by enabling it to discipline state obstructionism.”).

⁵ See *Report of Secretary of Foreign Affairs*, JOHN JAY (Oct. 13, 1786), reprinted in SECRET JOURNALS OF THE CONGRESS OF THE CONFEDERATION 185–287 (Boston, Thomas B. Wait 1820) (report of John Jay, then-Secretary of Foreign Affairs under the Articles of Confederation, regarding state laws that violated the United States’ treaty obligations to Great Britain); *Letter from John Jay to John Adams* (Nov. 1, 1786) in 2 THE DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES

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foreign nations considered the United States an unreliable treaty partner⁶ or cited U.S. noncompliance as grounds to disregard their own treaty commitments.⁷ The Framers sought to remedy this problem by making treaties part of the “supreme Law of the Land” to which “the Judges in every State shall be bound[.]”⁸ The Supremacy Clause marked a shift from the British system under which treaties generally have domestic effect only after being implemented by Parliament.⁹

Despite the Supremacy Clause’s seeming simplicity, not all treaties have the status of domestic law that is enforceable in U.S. courts.¹⁰ Some treaties or (provisions within treaties¹¹) are “self-executing,” meaning domestic courts can enforce them directly.¹² Other treaty provisions are “non-self-executing” and occupy a more complex status in the U.S. legal system.¹³ Non-self-executing treaty provisions are not directly enforceable in U.S. courts, and Congress generally must pass legislation implementing the provision in a domestic statute to make it judicially enforceable.¹⁴

FROM THE SIGNING OF THE DEFINITIVE TREATY OF PEACE, 10TH SEPTEMBER 1783, TO THE ADOPTION OF THE CONSTITUTION, MARCH 4, 1789, at 674 (Washington, D.C., Blair & Rives 1837) (“[T]here has not been a single day, since [the 1783 Treaty of Peace] took effect, on which it has not been violated in America, by one or other of the States.”).

⁶ See, e.g., 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 316 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS (records of James Madison)] (“The files of [Congress under the Articles of Confederation] contain complaints already, from almost every nation with which treaties have been formed.”); THE FEDERALIST No. 22 (Alexander Hamilton) (suggesting that, under the Articles of Confederation, foreign nations could not “respect or confide” in the United States because U.S. treaties were “liable to the infractions” by state governments).

⁷ For example, Great Britain cited U.S. state laws impeding British citizens’ debt-collection abilities as grounds for not complying with Britain’s treaty-based obligations to withdraw its forces from military forts in the northwestern United States. See MARKS, *supra* note 4, at 3–51.

⁸ U.S. CONST. art. VI, cl. 2. Early in the Constitutional Convention, the Framers considered giving Congress the power to “negative” (i.e., veto) state law that contravened any treaty, 1 FARRAND’S RECORDS, *supra* note 6, at 47, 54, but they later adopted language originating in the New Jersey plan making treaties part of the “supreme law” that is binding upon state courts, *id.* at 245; 2 FARRAND’S RECORDS, *supra* note 6, at 27–29, 182–83, 389–90, 603.

⁹ See JAMES CRAWFORD, BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 63 (8th ed. 2012) (quoting *Thomas v. Baptiste* [2000] 2 AC 1 PC, 23 (Lord Millett)).

¹⁰ See, e.g., *Bond v. United States*, 572 U.S. 844, 850–51 (2014) (recognizing that the Convention on Chemical Weapons “creates obligations only for State Parties and ‘does not by itself give rise to domestically enforceable federal law’”) (quoting *Medellin v. Texas*, 552 U.S. 491, 505 n.2 (2008)); *Cameron Septic Tank Co. v. City of Knoxville*, 227 U.S. 39, 50 (1913) (holding that a provision in an industrial property convention regulating patents was not self-executing and did not govern the date of expiration of a challenged patent).

¹¹ See, e.g., *United States v. Postal*, 589 F.2d 862, 884 n.35 (5th Cir. 1979) (“A treaty need not be wholly self-executing . . . [A] self-executing interpretation of [one article] would not necessarily call for a similar interpretation of [a different article in the same treaty].”), *cert. denied*, 44 U.S. 832 (1979); Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities, 13 Op. O.L.C. 163, 179 n.28 (1989) (“[T]he question should be whether individual provisions of the treaty are self-executing.”).

¹² See, e.g., *Medellin*, 552 U.S. at 505 n.2 (“What we mean by ‘self-executing’ is that the treaty has automatic domestic effect as federal law upon ratification.”); *Cook v. United States*, 288 U.S. 102, 119 (1933) (“For in a strict sense the [t]reaty was self-executing, in that no legislation was necessary to authorize executive action pursuant to its provisions.”); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (“When the [treaty] stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect.”).

¹³ See, e.g., *Medellin*, 552 U.S. at 516 (“The point of a non-self-executing treaty is that it ‘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.’”) (quoting *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 254 (1829), *overruled on other grounds by United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833)).

¹⁴ See *Medellin*, 552 U.S. at 525–26 (“The responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress.”); *id.* at 526 (“[T]he terms of a non-self-executing treaty can become domestic law only in the same way as any other law—through passage of legislation by both Houses of Congress, combined with either the President’s signature or a congressional override of a Presidential veto.”). Apart from implementing legislation, compliance with non-self-executing treaty provisions may be achieved through other avenues, including by judicial enforcement of legislation that pre-dates the treaty or through other executive or administrative action outside the judicial system. See RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 310(1) (2018) [hereinafter FOURTH RESTATEMENT]; Jean Galbraith, *Making Treaty Implementation More Like Statutory Implementation*, 115 MICH. L. REV. 1309, 1333–63 (2017).

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The Supreme Court first recognized the self-execution dichotomy in an 1829 decision, *Foster v. Neilson*.¹⁵ In his opinion for the Court, Chief Justice John Marshall explained: “[o]ur [C]onstitution 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[.]”¹⁶ But Chief Justice Marshall then immediately qualified this explanation, stating that a treaty is only the equivalent of a legislative act when the treaty “operates of itself without the aid of any legislative provision.”¹⁷ When the terms of treaty “import a contract” or suggest that some future legislative act is necessary, Marshall explained, “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.”¹⁸ Using this test, the *Foster* Court held that the treaty provision at issue—which stated that certain land grants from the King of Spain “shall be ratified and confirmed”—was non-self-executing because it suggested that Congress would ratify the land grants through a future legislative act.¹⁹

The Supreme Court revisited the self-execution doctrine in a 2008 decision, *Medellín v. Texas*.²⁰ In that case, the United Nation’s principal judicial body, the International Court of Justice (ICJ), had entered a judgment directing the United States to reconsider the criminal convictions and sentences of a group of Mexican nationals.²¹ The ICJ concluded that U.S. state and local authorities had not afforded the foreign nationals their rights to communicate with Mexican consular officials as required by the Vienna Convention on Consular Relations.²² One of the foreign nationals, Ernesto Medellín, argued that the ICJ’s judgment was directly enforceable in U.S. courts because of a provision in another treaty, Article 94 of the Charter of the United Nations. That article provides that the United States (and any member nation of the United Nations) “undertakes to comply with the decision of the [ICJ] in any case to which it is a party.”²³ Medellín argued that Article 94 required Texas state authorities to reevaluate his conviction and stay his upcoming execution, but the Supreme Court disagreed.²⁴ The Court held that Article 94 of the Charter of the United Nations was not self-executing, in part, because Article 94 states that a party to the Charter “undertakes to comply” with ICJ decisions, rather than stating that a country “shall” or “must” comply.²⁵ Article 94 was not

¹⁵ See *Foster*, 27 U.S. (2 Pet.) at 273–74. The Court’s *Percheman* decision is discussed *infra* note 19. While *Foster* first articulated the concept that some treaties require implementing legislation to be made judicially enforceable, the Supreme Court did not use the term “self-executing” when discussing treaties until 1887. See *Bartram v. Robertson*, 122 U.S. 116, 120 (1887). See also Galbraith, *supra* note 14, at 1341–42 (discussing development and usage of the term “self-executing” in the context of treaties, statutes, and constitutional law).

¹⁶ *Foster*, 27 U.S. (2 Pet.) at 314.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 315. Four years after *Foster*, the Supreme Court reviewed the Spanish language version of the same treaty, which was translated to state that the land grants “shall remain ratified and confirmed.” *Percheman*, 32 U.S. (7 Pet.) at 69 (emphasis added). Using the Spanish language version, the Court concluded that the same obligation was self-executing, explaining that the subtle difference in translations led to a different result in its holding: The difference between declaring that these grants shall be ratified and confirmed to the persons in possession of the lands, . . . and saying that all concessions of land shall remain confirmed and acknowledged to the persons in possession . . . is sufficiently obvious and important; the sense is materially different. The English side of the treaty leaves the ratification of the grants executory—they shall be ratified; the Spanish, executed. *Id.*

²⁰ 552 U.S. 491.

²¹ AVENA AND OTHER MEXICAN NATIONALS (MEX. V. U.S.), JUDGMENT, 2004 I.C.J. Rep. 12, ¶ 64 (Mar. 31).

²² *Id.* ¶ 128. See also VIENNA CONVENTION ON CONSULAR RELATIONS ART. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Consular Convention].

²³ Charter of the United Nations art. 94(1), 59 Stat. 1051 (June 26, 1945).

²⁴ See *Medellín*, 552 U.S. at 508–09.

²⁵ *Id.*

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self-executing because it was not “a directive to domestic courts” and could not be judicially enforced in the face of contrary state law, the Supreme Court concluded.²⁶

Determining whether a treaty provision is self-executing is not always a straightforward task.²⁷ In some cases, a treaty may specify whether it is intended to be given immediate domestic legal effect without further action.²⁸ However, the *Medellín* Court disapproved of the notion that certain special words or phrases are necessary to make a treaty self-executing.²⁹ *Medellín* also rejected a multi-factor analysis, advanced by three Justices in a dissent, which would look outside the treaty’s text and analyze a variety of “practical, context-specific criteria”³⁰ to determine self-execution.³¹ Instead, the *Medellín* Court explained that the primary question is whether the President and Senate intended the treaty to be self-executing.³² The Supreme Court has deemed a treaty non-self-executing when the text manifested an intent that the treaty would not be directly enforceable in U.S. courts,³³ or when the Senate conditioned its advice and consent on the understanding that the treaty was non-self-executing.³⁴ Other relevant factors include whether the treaty provisions are suitably precise or obligatory to be capable of judicial enforcement and whether the provision contemplates that implementing legislation or other legal measures, such as administrative action, will follow the treaty’s ratification.³⁵

Many courts and commentators agree that treaty provisions that would require the United States to exercise authority that the Constitution assigns to Congress exclusively must be deemed non-self-executing.³⁶ Although the Supreme Court has not addressed these constitutional limitations, lower courts have concluded that, because Congress controls the power of the purse,³⁷ a treaty provision that requires expenditure of funds must be treated as non-self-executing.³⁸ Other lower courts have suggested that treaty provisions that purport to create criminal liability³⁹ or raise revenue⁴⁰ must be non-self-executing because those powers are the exclusive prerogative of Congress.

²⁶ *Id.*

²⁷ See, e.g., Postal, 589 F.2d at 876 (“The self-execution question is perhaps one of the most confounding in treaty law.”); Oona A. Hathaway et al., *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT’L L. 51, 51–52 (2012) (describing the self-execution doctrine as “[o]ne of the great challenges for scholars, judges, and practitioners alike”); Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695, 722 (1995) (“The distinction between self-executing and non-self-executing treaties has particularly confounded the lower courts, whose decisions on the issue have produced a body of law that can only be described as being in a state of disarray.”).

²⁸ See, e.g., TRADEMARK AND COMMERCIAL PROTECTION; REGISTRATION OF TRADEMARKS (INTER-AMERICAN): GENERAL INTER-AMERICAN CONVENTION FOR TRADE MARK AND COMMERCIAL PROTECTION ART. 35, Feb. 20, 1929, 46 Stat. 2907 (“The provisions of this Convention shall have the force of law in those States in which international treaties possess that character, as soon as they are ratified by their constitutional organs.”).

²⁹ See *Medellín*, 552 U.S. at 521 (“[N]either our approach nor our cases require that a treaty provide for self-execution in so many talismanic words.”).

³⁰ *Id.* at 549 (Breyer, J., dissenting joined by Souter & Ginsberg, JJ.).

³¹ *Id.* at 514–16.

³² See *id.* at 509, 523.

³³ See *supra* note 10.

³⁴ See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004) (“[T]he United States ratified the [International Covenant on Civil and Political Rights] on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.”).

³⁵ See FOURTH RESTATEMENT, *supra* note 14, § 310(2) & reporters’ nn.5, 6.

³⁶ See, e.g., *id.* § 310(3) & reporters’ n.11. See also *infra* notes 37–38.

³⁷ For discussion of the Appropriations Clause and Congress’s power of the purse, see ArtI.S9.C7.1 Overview of Appropriations Clause.

³⁸ See *Edwards v. Carter*, 580 F.2d 1055, 1058 (D.C. Cir. 1978) (per curiam) (“[E]xpenditure of funds by the United States cannot be accomplished by self-executing treaty; implementing legislation appropriating such funds is

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ArtII.S2.C2.1.4

Self-Executing and Non-Self-Executing Treaties

The doctrine of non-self-execution appears to be in some tension with the Supremacy Clause's declaration that "all treaties" are part of the supreme law of the land.⁴¹ The Supreme Court has never fully explained the relationship between non-self-executing treaties and the Supremacy Clause.⁴² Opinions from some lower courts and the Office of Legal Counsel (OLC) in the Department of Justice⁴³ suggest non-self-executing treaties lack any domestic legal status.⁴⁴ However, other courts and scholars contend that, although non-self-executing treaties may not be enforced in courts, they may still form part of the supreme law of the land that is carried out and enforced outside the judicial system.⁴⁵

indispensable."), *cert. denied*, 436 U.S. 907 (1978); *The Over the Top* (Schroeder v. Bissell), 5 F.2d 838, 845 (D. Conn. 1925) ("All treaties requiring payments of money have been followed by acts of Congress appropriating the amount. The treaties were the supreme law of the land, but they were ineffective to draw a dollar from the treasury."); *Turner v. Am. Baptist Missionary Union*, 24 F. Cas. 344, 345 (C.C.D. Mich. 1852) (No. 14251) ("[M]oney cannot be appropriated by the treaty-making power. This results from the limitations of our government.").

³⁹ See *Hopson v. Kreps*, 622 F.2d 1375, 1380 (9th Cir. 1980) ("Treaty regulations that penalize individuals . . . require domestic legislation before they are given any effect."); *Postal*, 589 F.2d at 877 (noting that constitutional restrictions on the use of a self-executing treaty to withdraw money from the treasury would also "be the case with respect to criminal sanctions"), *cert. denied*, 444 U.S. 832 (1979).

⁴⁰ See *Edwards*, 580 F.2d at 1058 ("[T]he constitutional mandate that 'all Bills for raising Revenue shall originate in the House of Representatives,' . . . appears, by reason of the restrictive language used, to prohibit the use of the treaty power to impose taxes.") (quoting U.S. CONST. art. I, § 7, cl. 1); *Swearingen v. United States*, 565 F. Supp. 1019, 1022 (D. Colo. 1983) ("[A] treaty which created an exemption from the taxation of income of United States citizens . . . would be in contravention of the exclusive constitutional authority of the House of Representatives to originate all bills for raising revenues."). For analysis of the Origination Clause and Congress's power to raise revenue, see discussion *supra* ArtI.S7.C1.1 Origination Clause and Revenue Bills.

⁴¹ U.S. CONST. art. VI, cl. 2.

⁴² See, e.g., FOURTH RESTATEMENT, *supra* note 14, § 310 reporters' n.12. Some passages of *Medellín* suggest non-self-executing treaties have no status in domestic law. See, e.g., *Medellín*, 552 U.S. at 504 ("This Court has long recognized the distinction between treaties that automatically have effect as domestic law, and those that—while they constitute international law commitments—do not by themselves function as binding federal law."); *id.* at 526 ("[A] non-self-executing treaty can become domestic law only in the same way as any other law—through passage of legislation by both Houses of Congress, combined with either the President's signature or a congressional override of a Presidential veto."). Other passages suggest self-execution addresses whether the treaty is enforceable in U.S. courts rather than whether the treaty constitutes "law" in the constitutional sense. See, e.g., *id.* at 519 ("[W]hether the treaties underlying a judgment are self-executing so that the judgment is directly enforceable as domestic law in our courts is, of course, a matter for this Court to decide."); *id.* at 523 ("[T]he [ICJ's] judgment is not a rule of domestic law binding in state and federal courts.").

⁴³ OLC has stated that its opinions are "controlling" on questions of law within the Executive Branch, subject to the ultimate authority of the President. See Memorandum from David J. Barron, Acting Asst. Att'y Gen., Office of Legal Counsel to Att'ys of the Office, Re: Best Practices for OLC Legal Advice and Written Opinions 1 (July 16, 2010) ("OLC's core function . . . is to provide controlling advice to Executive Branch officials on questions of law."), <https://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf>; Memorandum from Steven G. Bradbury, Principal Deputy Asst. Att'y Gen., Office of Legal Counsel to Att'ys of the Office, Re: Best Practices for OLC Opinions 1 (May 16, 2005) ("[S]ubject to the President's authority under the Constitution, OLC opinions are controlling on questions of law within the Executive Branch."), <https://fas.org/irp/agency/doj/olc/best-practices.pdf>. See also Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1525 n.31 (2010) (collecting statements from OLC and its officials on the status of OLC opinions). However, OLC's opinions are not "law" that is binding outside of the Executive Branch. See, e.g., *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281, 285–86 (1960) (declining to follow an Attorney General opinion and noting that such opinions are "entitled to some weight," but "do not have the force of judicial decisions").

⁴⁴ See *ITC Ltd. v. Punchgini, Inc.*, 482 F.3d 135, 162 n.21 (2d Cir. 2007) ("Non-self-executing treaties do not become effective as domestic law until implementing legislation is enacted."), *certified question answered*, 880 N.E.2d 852 (2007); *Renkel v. United States*, 456 F.3d 640, 643 (6th Cir. 2006) ("[N]on-self-executing' treaties do require domestic legislation to have the force of law."); Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities, *supra* note 11, at 178–79 ("[T]he decision whether to act consistently with an unexecuted treaty is a political issue rather than a legal one, and unexecuted treaties . . . are not legally binding on the political branches.") (footnote omitted).

⁴⁵ See, e.g., *The Over the Top*, 5 F.2d at 845 ("The treaties were the supreme law of the land, but they were ineffective to draw a dollar from the treasury."); FOURTH RESTATEMENT, *supra* note 14, § 310 reporters' n.12 ("[T]here is no

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Self-Executing and Non-Self-Executing Treaties

Despite the importance of the self-execution doctrine in U.S. domestic law, self-execution does not impact treaties' status under international law.⁴⁶ Under international law, treaties create rights and obligations that nations owe to one another that are independent of each nation's domestic law.⁴⁷ International law generally allows each country to decide how to implement its treaty commitments into its own domestic legal system.⁴⁸ The self-execution doctrine concerns domestic enforcement of treaties, but it does not affect the United States' obligation to comply with the provision under international law.⁴⁹ Thus, even if courts cannot enforce a treaty provision in domestic courts because it is non-self-executing, that provision may still be binding under international law, and the United States may still have an international legal obligation to comply.

ArtII.S2.C2.1.5 Congressional Implementation of Treaties

Article II, Section 2, 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 supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

When a treaty provision requires implementing legislation or appropriation of funds to carry out the United States' obligations, the task of providing that legislation falls to Congress.¹ In the early years of constitutional practice, debate arose over whether Congress was obligated—rather than simply empowered—to enact legislation implementing non-self-executing treaty provisions into domestic law.² But the issue has not been resolved in any definitive way.³

clear reason at present to conclude that non-self-executing provisions are, as a general matter, less than supreme law.”); CURTIS BRADLEY, *INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM* 44 (2d ed. 2015) (summarizing the debate of the domestic status of non-self-executing treaties).

⁴⁶ See, e.g., *Medellín*, 552 U.S. at 504–06 (discussing the distinction between the binding effect of treaties under international law versus domestic law).

⁴⁷ See *id.*; FOURTH RESTATEMENT, *supra* note 14, § 301(3) & cmt. d. See also *Validity of Congressional-Executive Agreements That Substantially Modify the United States' Obligations Under an Existing Treaty*, 20 Op. O.L.C. 389, 391 (1996) (“A ‘treaty,’ . . . has two aspects: insofar as it is self-executing, it prescribes a rule of domestic or municipal law; and, as a compact or contract between nations, it gives rise to binding obligations in international law.”) (footnote omitted).

⁴⁸ See, e.g., *Head Money Cases* (*Edye v. Robertson*), 112 U.S. 580, 598 (1884) (“[A treaty] depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it.”); FOURTH RESTATEMENT, *supra* note 14, § 310 cmt. c (“It is ordinarily up to each nation to decide how to implement domestically its international obligations.”).

⁴⁹ See *Medellín*, 552 U.S. at 522–23 (explaining that, although the ICJ's judgment was non-self-executing and did “not of its own force constitute binding federal law[,]” the judgment “create[d] an international law obligation” for the United States); FOURTH RESTATEMENT, *supra* note 14, § 310(1) (“Whether a treaty provision is self-executing concerns how the provision is implemented domestically and does not affect the obligation of the United States to comply with it under international law.”).

¹ See *Medellín v. Texas*, 552 U.S. 491, 525–26 (2008). See also ArtII.S2.C2.1.4 Self-Executing and Non-Self-Executing Treaties (discussing Congress's role in implementing non-self-executing treaties).

² Whereas Alexander Hamilton argued that the House of Representatives was obligated to appropriate funds for the Jay Treaty, James Madison, then a Member of the House, and others disagreed. Compare ENCLOSURE TO LETTER FROM ALEXANDER HAMILTON TO GEORGE WASHINGTON (Mar. 29, 1796), in 20 PAPERS OF ALEXANDER HAMILTON 98 (Harold C. Syrett ed., 1974) (“[T]he [H]ouse of [R]epresentatives have no moral power to refuse the execution of a treaty, which is not contrary to the [C]onstitution, because it pledges the public faith, and have no legal power to refuse its execution

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Congressional Implementation of Treaties

By contrast, the Supreme Court did address the scope of Congress’s power to enact legislation implementing a treaty in a 1920 case. In *Missouri v. Holland*,⁴ the Supreme Court considered a constitutional challenge to a federal statute that implemented a treaty prohibiting the killing, capturing, or selling of certain birds that traveled between the United States and Canada.⁵ In the preceding decade, two federal district courts had held that similar statutes enacted prior to the treaty violated the Tenth Amendment because they infringed on the reserved powers of the states to control natural resources within their borders.⁶ But the *Holland* Court determined that, even if those district court decisions were correct, their reasoning no longer applied once the United States concluded a valid migratory bird treaty.⁷ In an opinion authored by Justice Oliver Wendell Holmes, the *Holland* Court concluded that the federal government can use the treaty power to regulate matters that the Tenth Amendment otherwise might reserve to the states.⁸ And if the treaty itself is constitutional, the *Holland* Court held, Congress has the power under the Necessary and Proper Clause⁹ to enact legislation implementing the treaty into domestic law of the United States without restraint by the Tenth Amendment.¹⁰

Some legal commentators and jurists have questioned aspects of the Justice Holmes’s reasoning in *Holland*.¹¹ Some of *Holland*’s critics contend that the decision gives the federal government too broad a power to legislate in areas reserved to the states, especially when

because it is a law—until at least it ceases to be a law by a regular act of revocation of the competent authority.”), with 5 ANNALS OF CONG. 493–94 (1796) (statement of Rep. Madison) (“[T]his House, in its Legislative capacity, must exercise its reason; it must deliberate; for deliberation is implied in legislation. If it must carry all Treaties into effect, . . . it would be the mere instrument of the will of another department, and would have no will of its own.”); 5 ANNALS OF CONG. 771 (1796) (proposed resolution of Rep. William Blount) (“[W]hen 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 in expediency of carrying such Treaty into effect, and to determine and act thereon, as, in their judgment, may be most conducive to the public good.”).

³ See LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 205 (2d ed. 1996).

⁴ 252 U.S. 416 (1920).

⁵ See Migratory Bird Treaty Act, ch. 128, 40 Stat. 755 (1918); Convention for the Protection of Migratory Birds art. VIII, Aug. 16, 1916, U.S.–Gr. Brit., 39 Stat. 1702.

⁶ *United States v. McCullagh*, 221 F. 288, 295–96 (D. Kan. 1915); *United States v. Shauver*, 214 F. 154, 160 (E.D. Ark. 1914).

⁷ See *Holland*, 252 U.S. at 433.

⁸ See *id.* at 433–34 (concluding that the “treaty in question does not contravene any prohibitory words to be found in the Constitution” and is not “forbidden by some invisible radiation from the general terms of the Tenth Amendment”).

⁹ See U.S. CONST. art. I, § 8. See also ArtI.S8.C18.1 Overview of Necessary and Proper Clause (analyzing the Necessary and Proper Clause).

¹⁰ See *Holland*, 252 U.S. at 432 (“If the treaty is valid there can be no dispute about the validity of the statute under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government.”). *Accord* Neely v. Henkel, 180 U.S. 109, 121 (1901) (“The power of Congress to make all laws necessary and proper . . . 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 a foreign power.”).

¹¹ See *Bond v. United States*, 572 U.S. 844, 873 (2014) (Scalia, J., concurring in the judgment joined by Thomas, J.) (describing *Holland*’s interpretation of the Necessary and Proper Clause as consisting of an “unreasoned and citation-less sentence” that is unsupported by the Constitution’s text or structure); Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1868 (2005) (arguing that *Holland*’s interpretation of the Necessary and Proper Clause “is wrong and the case should be overruled”). See also ArtII.S2.C2.1.9 Effect of Treaties on the Constitution, at n.1 (discussing subsequent Supreme Court decisions responding to questions raised in *Holland* concerning the Supremacy Clause). In the 1950s, there was an effort, led by Senator John Bricker of Ohio, to limit the scope of the treaty power as described in *Holland* through a constitutional amendment. One version of the proposed amendment, which became known as the “Bricker Amendment,” would have provided that a “treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of a treaty.” See S. COMM. ON THE JUDICIARY, 83D CONG., PROPOSALS TO AMEND THE TREATY-MAKING PROVISIONS OF THE CONSTITUTION: VIEWS OF DEANS AND PROFESSORS OF LAW 3 (COMM. PRINT 1953). No version of the Bricker Amendment was ever adopted.

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coupled with twentieth century changes in international lawmaking that have expanded the types of issues addressed in treaties.¹² Others argue that a combined reading of the Necessary and Proper Clause and the Treaty Clause only permits Congress to pass laws necessary to *make* treaties, not to *implement* them, as Justice Holmes reasoned.¹³ Under this view, Congress could use the Necessary and Proper Clause to, for example, appropriate funds for U.S. diplomats to engage in overseas treaty negotiations, but Congress must rely on its other Article I powers to implement treaties that have been signed and ratified.¹⁴ Other legal scholars respond to these critiques by contending that the power to make treaties is hollow without the power to implement them,¹⁵ that political and structural checks safeguard federalism,¹⁶ and that *Holland* comports with the Constitution’s text and historical practice.¹⁷

As the academic debate continues, the Supreme Court has not overturned *Holland*’s holding related to Congress’s power to implement treaties.¹⁸ Rather, the Court has sometimes discussed it favorably.¹⁹ Nevertheless, principles of federalism embodied in the Tenth Amendment continue to influence constitutional challenges to U.S. treaties and their implementing statutes, including in the 2014 Supreme Court decision, *Bond v. United States*.²⁰

Bond concerned a criminal prosecution arising from a case of “romantic jealousy” when a jilted spouse spread toxic chemicals on the mailbox of a woman with whom her husband had an affair.²¹ Although the victim only suffered a minor thumb burn, the United States brought criminal charges under the Chemical Weapons Convention Implementation Act of 1998—a

¹² See, e.g., Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 433 (1998); Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98, 98–99 (2000); John C. Eastman, *Will Mrs. Bond Topple Missouri v. Holland?*, CATO SUP. CT. REV. 185, 202 (2010–2011). For discussion of changes in international treaty practice, see ArtII.S2.C2.1.3 Scope of Treaty-Making Power.

¹³ See, e.g., *Bond v. United States*, 572 U.S. 844, 874–76 (2014) (Scalia, J., concurring in the judgment joined by Thomas, J.) (“[A] power to help the President *make* treaties is not a power to *implement* treaties already made.”); Rosenkranz, *supra* note 11, at 1882 (“The power granted to Congress is emphatically not the power to make laws for carrying into execution ‘the treaty power,’ let alone the power to make laws for carrying into execution ‘all treaties.’ Rather, on the face of the conjoined text, Congress has power ‘To make all Laws which shall be necessary and proper for carrying into Execution . . . [the] Power . . . to make Treaties.’”) (alterations in original).

¹⁴ See *Bond*, 572 U.S. at 876 (Scalia, J., concurring in the judgment joined by Thomas, J.) (“Once a treaty has been made, Congress’s power to do what is ‘necessary and proper’ to assist the making of treaties drops out of the picture. To legislate compliance with the United States’ treaty obligations, Congress must rely upon its independent (though quite robust) Article I, § 8, powers.”); Rosenkranz, *supra* note 11, at 1882–85 (discussing the scope of legislation Congress could pass under a more restrictive view of the Necessary and Proper Clause and its relationship to the Treaty Clause).

¹⁵ See, e.g., Edward T. Swaine, *Putting Missouri v. Holland on the Map*, 73 MO. L. REV. 1007, 1012–18 (2008) (critiquing the view that Congress has the power to pass legislation necessary to make treaties but not to enforce or implement them); Michael D. Ramsey, *Congress’s Limited Power to Enforce Treaties*, 90 NOTRE DAME L. REV. 1539, 1542–43 (2015) (contending that the power to make treaties includes the power to enforce them “because absent reliable methods of enforcement, the power to make treaties as a practical matter would be greatly impaired”).

¹⁶ See, e.g., David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 STAN. L. REV. 1963, 1964 (2003); Ona A. Hathaway et al., *The Treaty Power: Its History, Scope, and Limits*, 98 CORNELL L. REV. 239, 324–26 (2013).

¹⁷ See, e.g., David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1313–15 (2000).

¹⁸ See *Bond*, 572 U.S. at 855–56 (declining to revisit *Holland* or decide that a prosecution under legislation implementing a treaty was not “a necessary and proper means of executing the National Government’s power to make treaties”).

¹⁹ See *United States v. Lara*, 541 U.S. 193, 201 (2004) (“[A]s Justice Holmes pointed out, treaties made pursuant to [the treaty] power can authorize Congress to deal with ‘matters’ with which otherwise ‘Congress could not deal.’”) (quoting *Missouri v. Holland*, 252 U.S. 416, 433 (1920)); *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion) (“To the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier.”).

²⁰ 572 U.S. 844.

²¹ See *Id.* at 861.

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federal statute that implemented a multilateral treaty prohibiting the use of chemical weapons.²² The accused asserted that the Tenth Amendment reserved the power to prosecute her “purely local” crime to the states, and she asked the Court to overturn or limit *Holland’s* holding on the relationship between treaties and the Tenth Amendment.²³

A majority in *Bond* declined to revisit *Holland’s* interpretation of the Tenth Amendment,²⁴ but the *Bond* Court ruled in the accused’s favor based on principles of statutory interpretation.²⁵ When construing a statute interpreting a treaty, *Bond* explained, “it is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute”²⁶ Applying these principles through a presumption that Congress did not intend to intrude on areas of traditional state authority, the *Bond* Court held that the Chemical Weapons Convention Implementation Act did not apply to the jilted spouse’s actions.²⁷ In other words, the majority in *Bond* did not disturb *Holland’s* conclusion that the Tenth Amendment does not limit Congress’s power to enact legislation implementing treaties, but *Bond* did hold that principles of federalism reflected in the Tenth Amendment may dictate how courts interpret such implementing statutes.²⁸

ArtII.S2.C2.1.6 Interpreting Treaties

Article II, Section 2, 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 supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

All three branches of government play a part in treaty interpretation. When analyzing a treaty for purposes of applying it as domestic law of the United States, U.S. courts have final authority to interpret the treaty’s meaning.¹ The Supreme Court has stated that its goal in interpreting a treaty is to discern the intent of the nations that are parties to the treaty.² The interpretation process begins by examining “the text of the treaty and the context in which the

²² Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, div. I, tit. II, § 201(a), 112 Stat. 2681–856, 2681–866 (codified at 22 U.S.C. § 6701 et seq.); Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction art. 1, Jan. 13, 1993, S. TREATY DOC. NO. 103-21, 1974 U.N.T.S. 317.

²³ *Bond*, 572 U.S. at 848.

²⁴ *See id.* at 855–66. Justice Scalia and Justice Thomas criticized *Holland* and argued that the Supreme Court should depart from its interpretation of congressional power to enact legislation that is necessary and proper to implement treaties. *See Id.* at 873–81 (Scalia, J., concurring in the judgment joined by Thomas, J.).

²⁵ *See id.* at 859.

²⁶ *Id.* at 855–60.

²⁷ *See id.*

²⁸ Accord William S. Dodge, *Bond v. United States and Congress’s Role in Implementing Treaties*, 108 AJIL UNBOUND 86, 87 (2014) (“The central holding of *Bond* is that statutes implementing treaties are not exceptions to the rules of statutory interpretation that the Supreme Court has developed to protect federalism.”).

¹ *See Sanchez-Llamas v. Oregon*, 548 U.S. 331, 353–54 (2006) (“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.’”) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

² *See, e.g., BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 37 (2014); *Lozano v. Montoya Alvarez*, 572 U.S. 1, 11 (2014); *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 183 (1982); *Wright v. Henkel*, 190 U.S. 40, 57 (1903).

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written words are used.”³ When a treaty provides that it is to be concluded in multiple languages, the Supreme Court has analyzed foreign language versions to help understand the treaty’s terms.⁴ The Court also considers the broader “object and purpose” of a treaty.⁵ In some cases, the Supreme Court examines extratextual materials, such as drafting history,⁶ the views of other state parties,⁷ and the post-ratification practices of other nations.⁸ But the Court has cautioned that consulting sources outside the text may not be appropriate when the treaty is unambiguous.⁹

The Executive Branch also plays a role in interpreting treaties, especially outside the context of domestic litigation and when operating in the realm of international affairs. The Executive Branch generally is responsible for carrying out treaties’ requirements and determining whether other countries fulfill their obligations to the United States.¹⁰ In performing this role, the Executive Branch often must interpret treaties’ provisions and mandates.¹¹ In addition, some questions of treaty interpretation may involve presidential discretion or otherwise may present “political questions” that are more appropriately resolved in the political branches than in the courts.¹²

Within the Executive Branch, the Department of Justice participates in treaty interpretation as part of its statutory responsibilities to provide legal opinions within the Executive Branch¹³ and represent the United States in litigation.¹⁴ The Department of State, which oversees treaty negotiations,¹⁵ often is able to provide authoritative interpretations

³ See, e.g., *Monasky v. Taglieri*, No. 18-935, slip. op. 1, 7 (U.S. Feb. 25, 2020) (quoting *Air France v. Saks*, 470 U.S. 392, 397 (1985)); *Water Splash, Inc. v. Menon*, No. 16-254, slip. op. 1, 4 (U.S. May 22, 2017) (quoting *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988)); *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 534 (1987).

⁴ See, e.g., *Water Splash*, No. 18-935, slip. op. at 7–8; *Schlunk*, 486 U.S. at 699. In one case, the Supreme Court changed its conclusion about the self-executing effect of a provision in an 1819 treaty with Spain after analyzing an authenticated Spanish-language version of the text. See *supra* ArtII.S2.C2.1.9 Effect of Treaties on the Constitution, at n.19.

⁵ See, e.g., *Abbott v. Abbott*, 560 U.S. 1, 20 (2010); *Sanchez-Llamas*, 548 U.S. at 347; *Société Nationale Industrielle Aérospatiale*, 482 U.S. at 530; *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 552 (1991).

⁶ See, e.g., *Monasky*, No. 18-935, slip. op. at 8–9; *Water Splash*, No. 18-935, slip. op. at 7–8; *Medellín v. Texas*, 552 U.S. 491, 507 (2008); *Air France*, 470 U.S. at 400; *Schlunk*, 486 U.S. at 700.

⁷ See, e.g., *Water Splash*, No. 18-935, slip. op. at 7–9; *Abbott*, 560 U.S. at 16; *Lozano*, 572 U.S. at 12; *Air France*, 470 U.S. at 404.

⁸ See, e.g., *Medellín*, 552 U.S. at 507; *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 259 (1984).

⁹ See *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989) (“We must thus be governed by the text—solemnly adopted by the governments of many separate nations—whatever conclusions might be drawn from the intricate drafting history that petitioners and the United States have brought to our attention. The latter may of course be consulted to elucidate a text that is ambiguous But where the text is clear, as it is here, we have no power to insert an amendment.”).

¹⁰ See Cong. Research Serv., *Treaties and Other International Agreements: The Role of the United States Senate*, S. REP. NO. 106-71, at 12–13 (2001) [hereinafter *Treaties and Other International Agreements*] (“The executive branch has the primary responsibility for carrying out treaties and ascertaining that other parties fulfill their obligations after treaties and other international agreements enter into force The executive branch interprets the requirements of an agreement as it carries out its provisions.”); *Constitutionality of Legislative Provision Regarding ABM Treaty*, 20 Op. O.L.C. 246, 248–49 (1996) (discussing the Executive Branch’s view on the President’s power over treaty interpretation and execution); RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW §306 cmt. g (2018) (“Execution of a treaty requires interpretation, and the President often determines what a treaty means in the first instance.”).

¹¹ See *supra* note 10.

¹² In *Charlton v. Kelly*, for example, the Supreme Court declined to decide whether Italy violated its extradition treaty with the United States, reasoning that, even if a violation occurred, the President “elected to waive any right” to respond to the breach by voiding the treaty. See 229 U.S. 447, 475 (1913). For discussion of *Charlton* and the political question doctrine, see ArtIII.S2.C1.9.1 Overview of Political Question Doctrine.

¹³ See 28 U.S.C. § 512 (“The head of an executive department may require the opinion of the Attorney General on questions of law arising in the administration of his department.”). For background on the Department of Justice’s advice-giving function, see ArtII.S2.C2.1.4 Self-Executing and Non-Self-Executing Treaties, at n.43.

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Interpreting Treaties

based on its access to information about negotiating history and the views of treaty partners.¹⁶ Because the Executive Branch may have special insight into a treaty’s meaning, the Supreme Court has stated that the Executive Branch’s views are entitled to “great weight.”¹⁷ But the Court has not adopted the Executive Branch’s interpretation in every case.¹⁸ And interbranch disputes may arise if the Executive Branch changes its interpretation and departs from the shared understanding of the executive and the Senate at the time of ratification.¹⁹

The Legislative Branch also influences treaty interpretation. The Senate may directly shape interpretation during the advice-and-consent process by making its consent to ratification conditioned upon a particular understanding of a treaty’s terms.²⁰ The President may not ratify a treaty unless he accepts the Senate’s interpretation or the Senate agrees to withdraw it.²¹ After the advice-and-consent process, however, the Senate’s ability to influence treaty interpretation is more restrained. According to a 1901 Supreme Court decision, Senate resolutions that purport to interpret a treaty after ratification are “without legal significance” because the “meaning of the treaty cannot be controlled by subsequent explanations of some of

¹⁴ See 28 U.S.C. § 516 (“Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.”).

¹⁵ See U.S. DEP’T OF STATE, 11 FOREIGN AFFAIRS MANUAL § 724.1 (2006), <https://fam.state.gov/fam/11fam/11fam0720.html> (“Negotiations of treaties . . . are not to be undertaken, nor any exploratory discussions undertaken with representatives of another government or international organization, until authorized in writing by the Secretary [of State] or an officer specifically authorized by the Secretary for that purpose.”).

¹⁶ See, e.g., *Lozano*, 572 U.S. at 21–22 (accepting the State Department’s interpretation of the Hague International Child Abduction Convention); *Sumitomo Shoji Am.*, 457 U.S. at 184–85 (adopting the State Department’s interpretation of a Treaty of Friendship, Commerce and Navigation between Japan and the United States); *Kolovrat v. Oregon*, 366 U.S. 187, 194–95 (1961) (examining the State Department’s diplomatic notes and correspondence in examining an 1881 Treaty between the United States and Serbia for Developing Commercial Relations).

¹⁷ See *Water Splash*, No. 18-935, slip. op. at 7–8 (quoting *Abbott*, 560 U.S. at 15); *Medellin*, 552 U.S. at 513; *Sumitomo Shoji Am.*, 457 U.S. at 184–85; *Kolovrat*, 366 U.S. at 194.

¹⁸ See *BG Grp.*, 572 U.S. at 37 (construing a dispute resolution provision in an investment treaty between the United Kingdom and Argentina and concluding “[w]e do not accept the Solicitor General’s view as applied to the treaty before us”); *Hamdan v. Rumsfeld*, 548 U.S. 557, 629–30 (2006) (declining to adopt the Executive Branch’s interpretation of Common Article 3 of the 1949 Geneva Conventions).

¹⁹ For example, the Reagan Administration proposed to advance a new interpretation of the 1972 Treaty on the Limitation of Anti-Ballistic Missile Systems (AMB Treaty) with the Soviet Union that would have allowed the U.S. to test a space-based missile defense system. See generally ABM TREATY INTERPRETATION DISPUTE: HEARING BEFORE THE SUBCOMM. ON ARMS CONTROL, INT’L SEC. & SCI. OF THE H. COMM. ON FOREIGN AFFAIRS, 99th Cong. (1985); STRATEGIC DEFENSE INITIATIVE: HEARING BEFORE THE SUBCOMM. ON STRATEGIC & THEATER NUCLEAR FORCES OF THE S. COMM. ON ARMED SERVS., 99th Cong. (1985); ABM TREATY AND THE CONSTITUTION: JOINT HEARINGS BEFORE THE S. COMM. ON FOREIGN RELATIONS & THE S. COMM. ON THE JUDICIARY, 100th Cong. 81–105 (1987); Abraham D. Sofaer, *The ABM Treaty and the Strategic Defense Initiative*, 99 HARV. L. REV. 1972 (1986). Some in Congress argued that the new interpretation contradicted the shared understanding of the Executive Branch and the Senate when the ABM Treaty was ratified, and the Reagan Administration ultimately decided not to rely on its new interpretation. See *Treaties and Other International Agreements*, *supra* note 10, at 128–29; John Yoo, *Politics As Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CAL. L. REV. 851, 860 (2001). Since this controversy, the Senate at times has conditioned its advice and consent to treaties on what has become known as the “Biden Condition,” which provides that “the United States shall interpret the Treaty in accordance with the common understanding of the Treaty shared by the President and the Senate at the time the Senate gave its advice and consent to ratification.” See, e.g., 134 CONG. REC. 12849 (1988).

²⁰ See, e.g., 164 CONG. REC. S8052 (daily ed. Jan. 2, 2019) (providing the Senate’s advice and consent to ratification of the U.N. Convention on Assignment of Receivables in International Trade conditioned on, among other things, the understanding that the treaty would not regulate securities); 143 CONG. REC. 22795 (1997) (resolution of advice and consent to the Constitution and Convention of the International Telecommunications Union conditioned on, among other things, the understanding that the treaty’s reference to “geographical situation of particular countries” would not “imply a recognition of claim to any preferential rights to the geostationary-satellite orbit”). For discussion of the Senate’s conditional consent authority and its ability to issue reservations, understandings, and declarations, see ArtII.S2.C2.1.2 Historical Background on Treaty-Making Power

²¹ See ArtII.S2.C2.1.2 Historical Background on Treaty-Making Power.

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ArtII.S2.C2.1.6 Interpreting Treaties

those who may have voted to ratify it.”²² That said, the Legislative Branch may still play a role in treaty interpretation when it passes implementing legislation or other treaty-related laws.²³ For example, when treaties require countries to ensure certain actions are criminalized in domestic law, Congress might interpret the treaty during the legislative process when it defines the prohibited actions in U.S. law; determines appropriate punishments; and decides whether domestic law already prohibits the conduct.²⁴

ArtII.S2.C2.1.7 Legal Effect of Treaties on Prior Acts of Congress

Article II, Section 2, 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 supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The Constitution provides that both federal statutes and treaties are part of the supreme law of the land, but it does not define the relationship between federal legislation and treaties.¹ As a result, disputes have arisen over which law governs when there are differences between a self-executing treaty and a federal statute. The Supreme Court has resolved this issue through what has become known as the “last-in-time” or “later-in-time” rule: when there is a conflict between a self-executing treaty and a federal statute, U.S. courts must apply whichever of the two reflects the “latest expression of the sovereign will” of the United States.²

The Supreme Court has frequently applied the last-in-time rule to give effect to a statute that conflicts with an earlier ratified treaty.³ Although the situation has arisen less often, the Supreme Court has also held that a treaty can override an earlier-in-time federal statute.⁴ The last-in-time rule, however, only applies when the treaty at issue is self-executing.⁵ Because a

²² See *The Diamond Rings*, 183 U.S. 176, 180 (1901).

²³ Accord LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 206 (2d ed. 1996) (“Congress . . . has occasion to interpret a treaty when it considers enacting implementing legislation, or other legislation to which the treaty might be relevant.”).

²⁴ For example, the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention) requires countries to make torture and other defined offenses punishable by “appropriate” penalties in domestic law. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 4, Dec. 10, 1984, 23 I.L.M. 1027, 1465 U.N.T.S. 85 [hereinafter *Torture Convention*] (“Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.”). The legislation implementing the Torture Convention appears to interpret this provision by making torture resulting in death a capital offense and torture that does not result in death punishable by imprisonment up to 20 years. 18 U.S.C. § 2340A(a).

¹ U.S. CONST. art. VI, cl. 2.

² *Whitney v. Robertson*, 124 U.S. 190, 195 (1888). See also *Chinese Exclusion Case (Ping v. United States)*, 130 U.S. 581, 600 (1889) (“[T]he last expression of the sovereign will must control.”).

³ See, e.g., *Breard v. Greene*, 523 U.S. 371, 376 (1998) (per curiam on denial of certiorari); *Chinese Exclusion Case*, 130 U.S. at 600–01; *Whitney*, 124 U.S. at 194–95; *Head Money Cases (Edye v. Robertson)*, 112 U.S. 580, 596–99 (1884).

⁴ See *Cook v. United States*, 288 U.S. 102, 118–19 (1933) (holding that a 1924 treaty between the United States and Great Britain superseded the terms of the Tariff Act of 1922 and limited the authority of the Coast Guard to board a British vessel outside U.S. territorial waters). See also *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 621 (1870) (“A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty.”) (footnote omitted).

⁵ *Whitney*, 124 U.S. at 194 (“[I]f the [treaty and statute] are inconsistent, the one last in date will control the other: provided, always, the stipulation of the treaty on the subject is self-executing.”). See also *Medellín v. Texas*, 552 U.S. 491, 505–06 (2008) (“Only [i]f the treaty contains stipulations which are self-executing, that is, require no legislation

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non-self-executing treaty is not judicially enforceable,⁶ courts will apply a federal statute over a non-self-executing treaty regardless of the timing of the statute's enactment.⁷

ArtII.S2.C2.1.8 Preemptive Effect of Treaties

Article II, Section 2, 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 supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

One of the Framers' primary objectives in including treaties in the Supremacy Clause was to ensure that the United States' treaty obligations would prevail over inconsistent state legislation.¹ During the pre-constitutional period, some states resisted complying with the 1783 Treaty of Peace with Great Britain, which prohibited the United States from placing "legal impediments" on British citizens' attempts to collect pre-Revolutionary War debts.² Soon after the states adopted the Constitution, the Supreme Court addressed whether this treaty obligation would prevail over a state statute that allowed Virginians to satisfy debts to British creditors by making payment to a state loan office rather than to the creditors themselves.³ In *Ware v. Hylton*—the first Supreme Court case to address the legal effect of treaties—the Court struck down the Virginia law on the ground that it conflicted with the Treaty of Peace.⁴ "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[.]" Justice Samuel Chase explained.⁵

Since *Ware*, the Supreme Court has held that treaty provisions preempt contrary state or local laws on many occasions.⁶ But just as only self-executing treaty provisions can prevail over earlier-in-time federal statutes, a treaty provision must be self-executing to preempt inconsistent state law.⁷ Before the mid-twentieth century, courts routinely held that treaties displaced state or local law without examining closely whether the treaty provision was

to make them operative, [will] they have the force and effect of a legislative enactment." (quoting *Whitney*, 124 U.S. at 194); *Apparatus for Radio Communication on Steam Vessels*, 30 Op. Att'y Gen. 84, 86 (1913) ("[U]nless a treaty is self-executing, it will not necessarily repeal a prior and inconsistent statute on the same subject.").

⁶ See ArtII.S2.C2.1.4 Self-Executing and Non-Self-Executing Treaties.

⁷ See *supra* note 5. See also RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 109 cmt. c (2018); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1100–04 (2000).

¹ See ArtII.S2.C2.1.4 Self-Executing and Non-Self-Executing Treaties.

² Treaty of Peace art. 4, Sept. 3, 1783, U.S.-Gr. Brit., 8 Stat. 80.

³ See Act for Sequestering British Property, in 9 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA IN THE YEAR 1619, at 379 (William Waller Hening ed., 1821) (passed Oct. 20, 1777).

⁴ 3 U.S. (3 Dall.) 199 (1796).

⁵ *Id.* at 236–37 (Chase, J.).

⁶ See RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 108 reporters' n.1 (2018) [hereinafter FOURTH RESTATEMENT] (collecting Supreme Court cases).

⁷ See *Medellín*, 552 U.S. at 513. See also *Buell v. Mitchell*, 274 F.3d 337, 372 (6th Cir. 2001) (concluding that certain human rights treaties to which the United States is a party did not prevail over an Ohio death penalty statute because, *inter alia*, the treaties were non-self-executing).

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self-executing.⁸ But in more recent cases, courts have closely considered whether a treaty provision is self-executing before applying it to preempt state law.⁹

ArtII.S2.C2.1.9 Effect of Treaties on the Constitution

Article II, Section 2, 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 supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

While treaties may preempt contradictory state law and supplant earlier-in-time federal legislation, the treaty power is not so broad as to override the Constitution.¹ The Supreme Court stated in dicta in several cases that treaties may not alter the Constitution or authorize acts that the Constitution expressly prohibits.² Although the Court has never invalidated a treaty itself on constitutional grounds,³ it has held that courts may not give treaties domestic effect in a way that interferes with individual rights guaranteed in the Constitution.⁴ In *Boos v. Berry*, the Supreme Court held that a treaty-based obligation to protect foreign embassies did not authorize Congress to enact legislation that infringed on individuals' First Amendment

⁸ See, e.g., *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924); *Hauenstein v. Lynham*, 100 U.S. 483, 490 (1879). See also DAVID SLOSS, *THE DEATH OF TREATY SUPREMACY* 85–95 (2016) (finding no cases between 1800 and 1945 in which state or local law prevailed over an inconsistent treaty because the treaty was deemed non-self-executing); FOURTH RESTATEMENT, *supra* note 6, § 308 cmt. b (“Before the mid-20th century, courts routinely enforced treaty obligations to displace contrary State or local law, often without focusing on the question of self-execution. . . . In more recent cases, once courts have identified a conflict between a treaty and State or local law, they tend to consider whether a treaty provision is self-executing before applying it to preempt State or local law.”).

⁹ See *supra* note 7.

¹ In *Missouri v. Holland*, the Supreme Court noted that, whereas the Supremacy Clause gives acts of Congress the status of supreme law of the land only when “made in pursuance” of the Constitution, treaties are deemed supreme law of the land when made “under the authority of the United States.” See 252 U.S. 416, 432 (1920) (discussing U.S. CONST. art VI, cl. 2). *Holland* described it as “an open question” whether the “authority” underlying the treaty power could extend beyond what the Constitution permits. *Id.* But the Court clarified in subsequent decisions that the treaty power is subject to certain constitutional restraints, and the variation in language in the Supremacy Clause was intended to ensure that treaties made under the Articles of Confederation would remain in effect under the Constitution. See *Reid v. Covert*, 354 U.S. 1, 16–17 (1957) (plurality opinion). See also *infra* notes 4–7.

² See *Doe v. Braden*, 57 U.S. (16 How.) 635, 657 (1853) (“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.”); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 620 (1870) (“It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument.”); *De Geofroy v. Riggs*, 133 U.S. 258, 267 (1890) (“It would not be contended that [the treaty power] extends so far as to authorize what the constitution forbids.”); *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924) (“The treaty-making power of the United States . . . does not extend ‘so far as to authorize what the Constitution forbids.’”) (quoting *De Geofroy*, 133 U.S. at 267). See also *Reid*, 354 U.S. at 16 (“This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty.”).

³ See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 185 (2d ed. 1996); RESTATEMENT (FOURTH) OF FOREIGN RELATIONS § 307 cmt. a (2018).

⁴ See *Boos v. Barry*, 485 U.S. 312, 324 (1988) (“It is well established that ‘no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.’”) (quoting *Reid*, 354 U.S. at 16 (plurality opinion)). See also *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 416–17 & n.9 (2003) (stating that the power of a treaty to preempt state law is “[s]ubject . . . to the Constitution’s guarantees of individual rights”).

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right to freedom of speech.⁵ Similarly, in *Reid v. Covert*, a plurality of the Court determined that the United States could not rely on international agreements as authority to conduct criminal proceedings that did not comply with the grand-jury and jury-trial guarantees in the Fifth and Sixth Amendments.⁶ The Supreme Court has since cited the *Reid* plurality opinion and described its conclusions related to the constitutional constraints on the treaty power as “well established.”⁷

ArtII.S2.C2.1.10 Breach and Termination of Treaties

Article II, Section 2, 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 supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The Constitution sets forth a definite procedure by which the President has the power to make treaties with the advice and consent of the Senate, but it is silent on who has the power to terminate them and how this power should be exercised.¹ The United States terminated a treaty under the Constitution for the first time in 1798. On the eve of possible hostilities with France, Congress passed, and President John Adams signed, legislation stating that four U.S. treaties with France “shall not henceforth be regarded as legally obligatory on the government or citizens of the United States.”² When he was Vice-President, Thomas Jefferson referred to the episode as support for the notion that only an “act of the legislature” can terminate a treaty.³ But commentators have since come to view the 1798 statute as a historical anomaly because it is the only instance in which Congress purported to terminate a treaty directly through legislation without relying on the President to provide a notice of termination to the

⁵ See *Boos*, 484 U.S. at 324, 334. Although the Supreme Court has not addressed the issue, several lower courts and commentators have concluded that the United States cannot exercise powers that the Constitution assigns exclusively to Congress, such as the appropriations of funds, through a treaty. See ArtII.S2.C2.1.4 Self-Executing and Non-Self-Executing Treaties.

⁶ The plurality in *Reid* rejected the argument that an executive agreement between the United States and Great Britain and the North American Treaty Organization Status of Forces Agreement permitted military courts to try the dependents of U.S. military personnel living at overseas posts when the criminal process did not comport with constitutional guarantees of the Fifth and Sixth Amendments. See *Reid*, 354 U.S. at 15–19 & n.29. See also Amdt5.2.1 Historical Background on Grand Jury Clause and Amdt6.4.2 Historical Background on Right to Trial by Jury (discussing the constitutional guarantees of a grand jury and trial by jury). While only four Justices joined the *Reid* plurality opinion, none of the separately concurring or dissenting Justices questioned the plurality’s analysis of the treaty power. See *Reid*, 354 U.S. at 41–64 (1957) (Frankfurter, J., concurring in the judgment); *Id.* at 65–78 (Harlan, J., concurring in the judgment); *Id.* at 78–90 (Clark, J., dissenting joined by Burton, J.).

⁷ *Boos*, 484 U.S. at 324. See also *Garamendi*, 539 U.S. at 417 n.9 (citing plurality opinion in *Reid*).

¹ See, e.g., *Goldwater v. Carter*, 444 U.S. 996, 1003 (1979) (plurality opinion) (“[W]hile the Constitution is express as to the manner in which the Senate shall participate in the ratification of a treaty, it is silent as to that body’s participation in the abrogation of a treaty.”).

² Act of July 7, 1798, ch. 67, 1 Stat. 578 (An Act To Declare the Treaties Heretofore Concluded with France, No Longer Obligatory on the United States).

³ See THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE 52 (Samuel Harrison Smith ed., 1801) (“Treaties being declared, equally with the laws of the U[nited] States, to be the supreme law of the land, it is understood that an act of the legislature alone can declare them infringed and rescinded. This was accordingly the process adopted in the case of France in 1798.”).

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foreign government.⁴ Moreover, because the 1798 statute was part of a series of congressional measures authorizing limited hostilities against the French Republic, some view the statute as an exercise of Congress’s war powers rather than precedent for a permanent congressional power to terminate treaties.⁵

During the nineteenth century, government practice treated the power to terminate treaties as shared between the Legislative and Executive Branches.⁶ Congress often authorized⁷ or instructed⁸ the President to provide notice of treaty termination to foreign governments during this time. On rare occasions, the Senate alone passed a resolution authorizing the President to terminate a treaty.⁹ Presidents often complied with the Legislative Branch’s authorization or direction,¹⁰ although they sometimes resisted attempts to compel termination of specific articles in treaties when the treaties did not authorize partial termination.¹¹ On other occasions, Congress or the Senate approved the President’s termination after-the-fact, when the Executive Branch had already provided notice of termination to the foreign government.¹²

At the turn of the twentieth century, a new form of treaty termination emerged: unilateral termination by the President without approval by the Legislative Branch. This method first

⁴ See, e.g., Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773, 789 (2014) [hereinafter Bradley, *Historical Gloss*]; RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 313, reporters’ n.2 (2018) [hereinafter FOURTH RESTATEMENT]; Cong. Research Serv., *Treaties and Other International Agreements: The Role of the United States Senate*, S. REP. NO. 106-71, at 207 (2001).

⁵ See S. Rep. No. 34-97, at 5 (1856) (Senate Foreign Relations Committee describing the 1798 treaty abrogation statute as a “rightful exercise of the war power, without viewing it in any manner as a precedent establishing in Congress alone, and under any circumstances, the power to annul a treaty.”). Cf. *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 40 (1800) (opinion of Washington, J.) (treating the 1798 statute as one in a bundle of congressional acts declaring a limited “public war” on the French Republic).

⁶ For analysis of nineteenth century understanding and practice related to treaty termination, see Bradley, *Historical Gloss*, *supra* note 4, at 788–801; SAMUEL B. CRANDALL, *TREATIES, THEIR MAKING AND ENFORCEMENT* 423–66 (2d ed. 1916).

⁷ See, e.g., Joint Resolution of April 27, 1846 Concerning the Oregon Territory, 9 Stat. 109 (providing that the President “is hereby authorized, at his discretion, to give to the government of Great Britain the notice required by” a convention allowing for joint occupancy of parts of the Oregon Territory); Joint Resolution of June 17, 1874, 18 Stat. 287 (authorizing the President to give notice of termination of a Treaty of Commerce with Belgium).

⁸ See, e.g., Joint Resolution of January 18, 1865, 13 Stat. 566 (“Resolved . . . That notice be given of the termination of the Reciprocity Treaty . . . and the President of the United States is hereby charged with the communication of such notice to the government of the United Kingdom.”); Joint Resolution of March 3, 1883, 22 Stat. 641 (“[T]he President . . . hereby is directed to give notice to the Government of Her Britannic Majesty that the provisions of each and every of the articles aforesaid will terminate . . . on the expiration of two years next after the time of giving such notice.”).

⁹ In 1855, the Senate authorized President Franklin Pierce to terminate a Friendship, Commerce, and Navigation Treaty with Denmark, and the President subsequently relied on the Senate’s action in carrying out the termination. Franklin Pierce, Third Annual Message (Dec. 31, 1855) in 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 2860, 2867 (James D. Richardson ed., 1897) (“In pursuance of the authority conferred by a resolution of the Senate of the United States passed on the 3d of March last, notice was given to Denmark” that the United States would “terminate the [treaty] at the expiration of one year from the date of notice for that purpose.”).

¹⁰ For example, after Congress enacted a joint resolution calling for the termination of the Oregon Territory Treaty, *supra* note 7, the Secretary of State informed the U.S. Ambassador to Great Britain that “Congress have spoken their will upon the subject, in their joint resolution; and to this it is his (the President’s) and your duty to conform.” S. Doc. No. 29-489, at 15 (1846). As required by the Joint Resolution of January 18, 1865, see *supra* note 8, the Andrew Johnson Administration terminated an 1854 treaty with Great Britain concerning trade with Canada. Letter from William H. Seward, U.S. Sec’y of State to Charles Francis Adams, Minister to the U.K. (Jan. 18, 1865) in PAPERS RELATING TO FOREIGN AFFAIRS, pt. 1, at 93 (1866).

¹¹ See, e.g., Rutherford B. Hayes, Veto of the Chinese Immigration Bill, H.R. EXEC. DOC. NO. 45-102, at 5 (1879) (disputing that Congress can direct the abrogation of specific articles in a treaty, but accepting that the “authority of Congress to terminate a treaty with a foreign power, by expressing the will of the nation no longer to adhere to it, is . . . free from controversy under our Constitution”).

¹² See, e.g., JOINT RESOLUTION TO TERMINATE THE TREATY OF 1817 REGULATING THE NAVAL FORCE ON THE LAKES, 13 STAT. 568 (1865) (“[T]he notice given by the President of the United States to [the] government of Great Britain and Ireland to

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occurred in 1899, when the McKinley Administration terminated certain articles in a commercial treaty with Switzerland,¹³ and then again in 1927, when the Coolidge Administration withdrew the United States from a convention to prevent smuggling with Mexico.¹⁴ During the Franklin Roosevelt Administration and World War II, unilateral presidential termination increased markedly.¹⁵ Although Congress at times enacted legislation authorizing or instructing the President to terminate treaties during the twentieth century,¹⁶ unilateral presidential termination became the norm.¹⁷

Some scholars and Members of Congress have challenged the President's assertion of unilateral authority to terminate treaties under the rationale that treaty termination is analogous to the termination of federal statutes.¹⁸ Because domestic statutes may be terminated only through the same process in which they were enacted¹⁹—i.e., through a majority vote in both houses and with the signature of the President or a veto override—these observers contend that treaties likewise must be terminated through a procedure that resembles their making and that includes the Legislative Branch.²⁰ On the other hand, treaties do not share every feature of federal statutes. Whereas statutes can be enacted over the President's veto, treaties can never be concluded without the President's final act of ratification.²¹ Moreover, some argue that, just as the President has some unilateral authority to remove Executive Officers who were appointed with senatorial consent,²² the President may unilaterally terminate treaties made with the Senate's advice and consent.²³

The President's exercise of treaty termination authority has not generated opposition from the Legislative Branch in most cases, but there have been occasions in which Members of Congress sought to block unilateral presidential action. In 1978, a group of Members filed suit in *Goldwater v. Carter*²⁴ seeking to prevent President Jimmy Carter from terminating a

terminate the treaty . . . is hereby adopted and ratified as if the same had been authorized by Congress.”); Joint Resolution of Dec. 21, 1911, 37 Stat. 627 (1911) (stating that President Taft's notice of termination of a treaty with Russia was “adopted and ratified”).

¹³ See Letter from John Hay, U.S. Sec'y of State to Ambassador Leishman (Mar. 8, 1899) in PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 753–54 (1901).

¹⁴ See Letter from Frank B. Kellogg, U.S. Sec'y of State to Ambassador Sheffield (Mar. 21, 1927) in 3 PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1927, at 230, 230–31 (1942).

¹⁵ See Bradley, *Historical Gloss*, *supra* note 4, at 807–09; Authority to Withdraw from the North American Free Trade Agreement, 42 Op. O.L.C. slip op. at 11 (Oct. 17, 2018), <https://www.justice.gov/olc/opinion/authority-withdraw-north-american-free-trade-agreement>; FOURTH RESTATEMENT, *supra* note 4, § 303 reporters' n.3.

¹⁶ See, e.g., Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, § 313, 100 Stat. 1086, 1104 (mandating that “[t]he Secretary of State shall terminate immediately” a tax treaty and protocol with South Africa), *repealed by* South African Democratic Transition Support Act of 1993, Pub. L. No. 103-149, § 4, 107 Stat. 1503, 1505; Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, § 202(b), 90 Stat. 331, 340–41 (authorizing the Secretary of State to renegotiate certain fishing treaties and expressing the “sense of Congress that the United States shall withdraw from any such treaty, in accordance with its provisions, if such treaty is not so renegotiated within a reasonable period of time after such date of enactment”).

¹⁷ See Bradley, *Historical Gloss*, *supra* note 4, at 807–15.

¹⁸ See, e.g., Barry M. Goldwater, *Treaty Termination is a Shared Power*, 65 A.B.A. J. 198, 199–200 (1979).

¹⁹ See, e.g., *Clinton v. City of New York*, 524 U.S. 417, 438 (1998) (“There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes.”); *INS v. Chadha*, 462 U.S. 919, 954 (1983) (“[R]epeal of statutes, no less than enactment, must conform with Art. I.”).

²⁰ See, e.g., DAVID GRAY ADLER, *THE CONSTITUTION AND THE TERMINATION OF TREATIES* 89–110 (1986).

²¹ For discussion of the federal law-making process, see ArtI.S7.C2.1 Overview of Presidential Approval or Veto of Bills.

²² For further discussion of the presidential power to remove officers, see ArtII.S2.C2.3.15.1 Overview of Removal of Executive Branch Officers.

²³ See, e.g., ADLER, *supra* note 21, at 94; Kristen E. Eichensehr, *Treaty Termination and the Separation of Powers*, 53 VA. J. INT'L L. 247, 269 (2013).

²⁴ 444 U.S. 996.

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mutual defense treaty with the government of Taiwan²⁵ as part of the United States' recognition of the government of mainland China.²⁶ A divided Supreme Court ultimately ruled that the litigation should be dismissed, but it did so without reaching the merits of the constitutional question and with no majority opinion.²⁷ Citing a lack of clear guidance in the Constitution's text and a reluctance "to settle a dispute between coequal branches of our Government each of which has resources available to protect and assert its interests[,]," four Justices concluded that the case presented a nonjusticiable political question.²⁸ This four-Justice opinion, written by Justice William Rehnquist, has proven influential since *Goldwater*, and federal district courts have invoked the political question doctrine as a basis to dismiss challenges to unilateral treaty terminations by President Ronald Reagan²⁹ and President George W. Bush.³⁰

Regardless of whether constitutional disputes over treaty termination are resolved in federal courts or through the political process, the power of treaty termination may depend on the specific features of the treaty at issue.³¹ For example, if termination of a particular treaty implicates the exercise of independent executive powers—such as the power to recognize foreign governments³²—the President perhaps may have a stronger claim to unilateral authority.³³ On the other hand, if the Senate were to condition its advice and consent to a treaty on a requirement that termination only occur with the approval of the Legislative Branch, some commentators argue that the President would be bound by that condition.³⁴ Finally, when Congress has passed legislation implementing a treaty into domestic law of the

²⁵ Mutual Defense Treaty Between the United States of America and the Republic of China, Dec. 2, 1954, 6 U.S.T. 433.

²⁶ For background on *Goldwater*, see VICTORIA MARIE KRAFT, *THE U.S. CONSTITUTION AND FOREIGN POLICY: TERMINATING THE TAIWAN TREATY* 1–52 (1991).

²⁷ See *Goldwater*, 444 U.S. at 996 (vacating with instructions to dismiss with no majority opinion).

²⁸ See *id.* at 1002–05 (Rehnquist, J., concurring joined by Stewart & Stevens, JJ. & Burger, C.J.). Justice Lewis Powell also voted for dismissal, but did so based on the ground that the case was not ripe for judicial review until the Senate passed a resolution disapproving of the President's termination. See *id.* at 998 (Powell, J., concurring). Justice William Brennan would have held that President Carter possessed the power to terminate the Mutual Defense Treaty with Taiwan, but his opinion centered on the President's power over recognition of foreign governments, and not because he believed the President possessed a general, constitutional power to terminate treaties. See *id.* at 1006–07 (Brennan, J., dissenting). For discussion of *Goldwater* in the context of the political question doctrine, see ArtIII.S2.C1.9.6 Foreign Affairs as a Political Question.

²⁹ In 1986, a federal district court dismissed a group of private plaintiffs' suit seeking to prevent President Reagan from unilaterally terminating a Treaty of Friendship, Commerce, and Navigation with Nicaragua. See *Beacon Prods. Corp. v. Reagan*, 633 F. Supp. 1191, 1198–99 (D. Mass. 1986), *aff'd on other grounds*, 814 F.2d 1 (1st Cir. 1987).

³⁰ In 2002, the United States District Court for the District of Columbia dismissed as nonjusticiable a challenge brought by 32 Members of Congress to President George W. Bush's termination of the Anti-Ballistic Missile Treaty with Russia. See *Kucinich v. Bush*, 236 F. Supp. 2d 1, 14–17 (D.D.C. 2002).

³¹ See, e.g., *Goldwater*, 444 U.S. at 1003 (“[D]ifferent termination procedures may be appropriate for different treaties.”); CURTIS BRADLEY, *INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM* 71 (2d ed. 2015) [hereinafter BRADLEY, *U.S. LEGAL SYSTEM*] (“It is possible that the President has the authority to terminate treaties in some situations but not others.”).

³² See ArtII.S3.2.3 Modern Doctrine on Receiving Ambassadors and Public Ministers.

³³ Compare, e.g., BRADLEY, *U.S. LEGAL SYSTEM*, *supra* note 31, at 71 (“[E]ven if the President does not have the authority to terminate treaties in all instances, the president may be able to terminate a treaty when the termination is related to the exercise of some other presidential power, such as the recognition of a foreign government.”), with *Goldwater*, *supra* note 18, at 199 (arguing that separation of powers principles call for joint termination of treaties).

³⁴ See *FOURTH RESTATEMENT*, *supra* note 4, § 313, reporters' n.6 (“If treaty termination is a concurrent, rather than exclusive, power, it is possible that it could be limited by the Senate in its advice and consent to a particular treaty, and possibly also by Congress through statute.”); MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 156 (1990) (“Where the Senate specifies a procedure for termination, the President is compelled constitutionally to adhere to that procedure.”). *But see* *Congressionally Mandated Notice Period for Withdrawing from the Open Skies Treaty*, 44 Op. O.L.C. slip op. at 10 (Sept. 22, 2020) (contending that treaty withdrawal is an exclusive presidential power that cannot be regulated by the Legislative Branch), <https://www.justice.gov/olc/opinion/congressionally-mandated-notice-period-withdrawing-open-skies-treaty>.

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Overview of Alternatives to Treaties

United States, the President likely lacks the authority to terminate the domestic effect of that legislation without going through the full legislative process for repeal of the statute.³⁵

A party's breach of treaty obligations also can affect termination and withdrawal. Under international law, a party may suspend or terminate a treaty if another party materially breaches its obligations.³⁶ The Supreme Court has appeared to recognize that, at least in the absence of direction from Congress, the President has the power to deem a treaty that has been breached by a foreign nation void and therefore no longer binding.³⁷ The Court also has stated that Congress possesses the power to breach and abrogate a treaty by passing later-in-time legislation that conflicts with U.S. treaty obligations.³⁸

When considering all elements of the treaty-making process, the treaty power remains an area in which all three branches of government shape constitutional practice and influence foreign relations. The Judicial Branch determines treaties' effect on domestic law and enforces self-executing treaty provisions in U.S. courts.³⁹ Presidents claim authority to negotiate with foreign countries, ratify treaties approved by the Senate, interpret treaties' terms outside the context of domestic litigation, and terminate the United States' treaty commitments.⁴⁰ The Senate maintains its authority to provide (or withhold) consent to treaties proposed by the President, and it shapes treaties' scope and meaning through its power to condition consent on reservations, understandings, and declarations.⁴¹ Congress also plays a role when it enacts legislation implementing treaties' requirements into U.S. statutes.⁴² While unresolved questions about the treaty power have persisted since the Constitution was written, treaty-making remains a unique and dynamic part of American constitutional law and practice.

ArtII.S2.C2.2 Alternatives to Treaties

ArtII.S2.C2.2.1 Overview of Alternatives to Treaties

Article II, Section 2, 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

³⁵ See Julian Ku & John Yoo, *Bond, The Treaty Power, and the Overlooked Value of Non-Self-Executing Treaties*, 90 NOTRE DAME L. REV. 1607, 1628 (2015) ("A President's termination of a treaty will dissolve the formal legal obligation, but the policy of the United States will still continue because he cannot repeal the implementing legislation."); John Setear, *The President's Rational Choice of a Treaty's Preratification Pathway: Article II, Congressional-Executive Agreement, or Executive Agreement?*, 31 J. LEGAL STUD. S5, S15 n.20 (2002) ("If only legislation can repeal legislation, then the formal status of implementing legislation does not change merely because the president takes some action, namely, terminating the treaty that the legislation implements.")

³⁶ Vienna Convention on the Law of Treaties art. 2, Apr. 24, 1970, 1155 U.N.T.S. 331. Although the United States has not ratified the Vienna Convention on the Law of Treaties, U.S. officials have stated that its provisions concerning treaty termination and withdrawal reflect customary international law. See FOURTH RESTATEMENT, *supra* note 4, § 303 reporters' n.1 (collecting statements).

³⁷ See *Charlton v. Kelly*, 229 U.S. 447, 473–76 (1913) (concluding that, because the "Executive Department . . . elected to waive any right to free itself" from its obligations under an extradition treaty, the Supreme Court must enforce the treaty even if had been breached and made voidable.)

³⁸ See, e.g., *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 460 (1899) ("It has been adjudged that 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."). See also ArtII.S2.C2.1.7 Legal Effect of Treaties on Prior Acts of Congress (discussing the last-in-time rule).

³⁹ See ArtII.S2.C2.1.4 Self-Executing and Non-Self-Executing Treaties—ArtII.S2.C2.1.6 Interpreting Treaties.

⁴⁰ See ArtII.S2.C2.1.2 Historical Background on Treaty-Making Power—ArtII.S2.C2.1.6 Interpreting Treaties.

⁴¹ See ArtII.S2.C2.1.2 Historical Background on Treaty-Making Power—ArtII.S2.C2.1.6 Interpreting Treaties.

⁴² See ArtII.S2.C2.1.5 Congressional Implementation of Treaties.

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the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The 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.¹ 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 treaties were concluded. Between 1939 and 1993, executive agreements comprised more than 90% of the international agreements concluded.²

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.³ 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.⁴

¹ 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).

² CRS Study, xxxiv–xxxv, *supra*, 13–16. Not all such agreements, of course, are published, either because of national-security/secretcy considerations or because the subject matter is trivial. In a 1953 hearing exchange, Secretary of State John Foster 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.

³ One authority concluded that of the executive agreements entered into between 1938 and 1957, only 5.9% were based exclusively on the President’s constitutional authority. C.H. 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).

⁴ “[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 148–51. 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 Myers McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy (Pts. I & II)*, 54 YALE L. J. 181, 534 (1945).

ArtII.S2.C2.2.2 Legal Basis for Executive Agreements

Article II, Section 2, 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 supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

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 Justice Joseph Story's words, "the mere private rights of sovereignty."¹ Crandall lists scores of such agreements entered into with other governments by the authorization of the President.² 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—some of which have approximated temporary alliances—with other governments. 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 James 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 having been a formal exchange of ratifications.³ Commenting on a treaty with Russia providing that U.S. authorities would assist in arresting and returning Russian deserters, 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."⁴ Justice Horace Gray and three other Justices believed that such action by the President must rest upon express treaty or statute.⁵

Notable expansion of presidential power in this field first became manifest in the administration of President William McKinley. At the outset of war with Spain, the President

¹ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1397 (1833).

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

³ *Id.* at 49–50.

⁴ *Tucker v. Alexandroff*, 183 U.S. 424, 435 (1902).

⁵ *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)).

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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.”⁶ 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,⁷ 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.⁸ Commenting on the Peking protocol, Willoughby quotes with approval the following remark: “This case is interesting, because it shows how the force of circumstances compelled 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.”⁹

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.¹⁰ Then, in 1905, the first Roosevelt, seeking to arrive at a diplomatic understanding with Japan, instigated an exchange of opinions between Secretary of War William Howard 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.¹¹ Three years later, Secretary of State Elihu 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.¹² 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 Woodrow 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.¹³

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

⁶ *Id.* at 245.

⁷ S. Crandall, *supra* at 103–04.

⁸ *Id.* at 104.

⁹ 1 W. Willoughby, *supra* at 539.

¹⁰ W. McClure, *supra* at 98.

¹¹ *Id.* at 96–97.

¹² *Id.* at 98–99.

¹³ *Id.* at 99–100.

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.¹⁴

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."¹⁵ 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.¹⁶ 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.¹⁷

Post-war diplomacy of the United States was greatly influenced by the executive agreements entered into at Cairo, Teheran, Yalta, and Potsdam.¹⁸ 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 half the countries of the world protect themselves.¹⁹ 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.²⁰

ArtII.S2.C2.2.3 Legal Effect of Executive Agreements

Article II, Section 2, 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

¹⁴ *Id.* at 140–44.

¹⁵ *Id.* at 391.

¹⁶ *Id.* at 391–93. Attorney General Robert 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).

¹⁷ 4 Dept. State Bull. 443 (1941).

¹⁸ See *A Decade of American Foreign Policy, Basic Documents 1941–1949*, S. Doc. No. 123, 81st Congress, 1st Sess. (1950), pt. 1.

¹⁹ 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).

²⁰ 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.

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and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

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.¹ Not so obvious is the nature of the domestic obligations imposed by executive agreements. Do treaties and executive agreements have the same domestic effect?² 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.³ 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.

A different view seemed to underlie the Supreme Court decision in *United States v. Belmont*,⁴ giving domestic effect to the Litvinov Assignment. The Court's opinion by Justice George Sutherland built on his *Curtiss-Wright*⁵ 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.”⁶

The Court elaborated on these principles five years later in *United States v. Pink*,⁷ another case involving the Litvinov Assignment and recognition of the Soviet Government. The

¹ In 1918, Secretary of State Robert 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.

² See E. Byrd, *supra* at 151–57.

³ *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).

⁴ 301 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.

⁵ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

⁶ 301 U.S. at 330–31.

⁷ 315 U.S. 203 (1942).

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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 William O. 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. . . ."

"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 'imperial 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."⁸

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.⁹

Belmont and *Pink* were reinforced in *American Ins. Ass'n v. Garamendi*.¹⁰ 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

⁸ 315 U.S. at 229–31, 233–34.

⁹ 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."

¹⁰ 539 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.

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Court reiterated that “valid executive agreements are fit to preempt state law, just as treaties are.”¹¹ The preemptive reach of executive agreements stems from “the Constitution’s allocation of the foreign relations power to the National Government.”¹² 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.¹³

ArtII.S2.C2.2.4 State Laws Affecting Foreign Relations

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.”¹ A hundred years later the Court remained emphatic about federal exclusivity. “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.”²

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*³ 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.”⁴ Although a Justice Department amicus brief asserted that application of the Oregon law in this one case would not cause any “undul[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

¹¹ 539 U.S. at 416.

¹² 539 U.S. at 413.

¹³ 539 U.S. at 420.

¹ *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”).

² *United States v. Pink*, 315 U.S. 203, 233–34 (1942). Chief Justice Harlan Stone and Justice Owen Roberts dissented.

³ 389 U.S. 429 (1968).

⁴ 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.

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probate courts in denying payments to persons from Communist countries.⁵ 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.”⁶

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 governments or to curtail trade with out-of-favor countries.⁷ In 1999, the Court struck down Massachusetts’s Burma sanctions law on the basis of statutory preemption, and declined to address the appeals court’s alternative holding applying *Zschernig*.⁸ 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.⁹

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 prohibitions¹⁰ and grants of power.¹¹ 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 David 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 that affects foreign relations.”¹² We must await further litigation to see whether the Court employs this distinction.¹³

⁵ 389 U.S. at 440.

⁶ 389 U.S. at 440, 441.

⁷ 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).

⁸ *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).

⁹ *American Ins. Ass’n v. Garamendi*, 539 U.S. at 419 & n.11 (2003).

¹⁰ 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*.

¹¹ Arguably, part of the “executive power” vested in the President by Art. II, § 1 is a power to conduct foreign relations.

¹² 539 U.S. at 419 n.11.

¹³ Justice Ruth Bader Ginsburg’s dissent in *Garamendi*, joined by the other three Justices, suggested limiting *Zschernig* in a manner generally consistent with Justice David 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

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ArtII.S2.C2.2.5
Congressional Executive Agreements

ArtII.S2.C2.2.5 Congressional Executive Agreements

Article II, Section 2, 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 supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

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 countries¹ and appropriating money to pay off the government of Algiers to prevent pirate attacks on United States shipping.² 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 the post offices.”³ Congress has also approved, usually by resolution, other executive agreements, such as the annexing of Texas and Hawaii and the acquisition of Samoa.⁴ 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.⁵

The most copious source of executive agreements has been legislation which provided authority for entering into reciprocal trade agreements with other nations.⁶ Such agreements in the form of treaties providing for the reciprocal reduction of duties subject to implementation by Congress were frequently entered into,⁷ but beginning with the Tariff Act of 1890,⁸ 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.⁹ Then, in the Reciprocal Trade Agreements Act of 1934,¹⁰ 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.¹¹

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.”

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

² W. McClure, INTERNATIONAL EXECUTIVE AGREEMENTS 41 (1941).

³ *Id.* at 38–40. The statute was 1 Stat. 232, 239, 26 (1792).

⁴ McClure, *supra* note 2, at 62–70.

⁵ *Id.* at 78–81; S. Crandall, *supra* at 127–31; see CRS Study, *supra* at 52–55.

⁶ *Id.* at 121–27; McClure, *supra* note 2, at 83–92, 173–89.

⁷ *Id.* at 8, 59–60.

⁸ § 3, 26 Stat. 567, 612.

⁹ Tariff Act of 1897, § 3, 30 Stat. 15, 203; Tariff Act of 1909, 36 Stat. 11, 82.

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

¹¹ 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.

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In *Field v. Clark*,¹² 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 transfers legislative and treaty-making power to the President.”¹³ Although two Justices disagreed, the question has never been revived. However, in *B. Altman & Co. v. United States*,¹⁴ 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.”¹⁵

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, 1941,¹⁶ 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 industrial 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.

¹² 143 U.S. 649 (1892).

¹³ 143 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. *See also* *Weinberger v. Rossi*, 456 U.S. 25, 29–30 n.6 (1982).

¹⁴ 224 U.S. 583 (1912).

¹⁵ 224 U.S. at 601.

¹⁶ 55 Stat. 31.

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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 organizations¹⁷ and participating in international conventions.¹⁸

ArtII.S2.C2.3 Appointments

ArtII.S2.C2.3.1 Overview of Appointments Clause

Article II, Section 2, 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 supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The Appointments Clause requires that “Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States” be appointed by the President subject to the advice and consent of the Senate, although Congress may vest the appointment of “inferior” officers “in the President alone, in the Courts of Law, or in the Heads of Departments.”¹ The Supreme Court has interpreted these requirements as distinguishing between two types of officers: (1) “principal” officers who must be appointed by the President and confirmed by the Senate to their position, and (2) “inferior” officers, whose appointment Congress may place with the President, judiciary, or department heads.² These constitutional provisions are instrumental in ensuring the separation of powers, as the Framers of the Constitution deliberately separated Congress’s power to create offices in the federal government from the President’s authority to nominate officers to fill those positions.³ At the same time, placing the power to appoint principal officers with the President alone ensures a measure of accountability for his choices in staffing important government positions.⁴

While the Constitution specifies that certain persons, such as Supreme Court Justices, qualify as “Officers of the United States,” the Appointments Clause does not specify all persons who fall under its purview. Thus, the Appointments Clause’s reach and scope has been disputed. In the 1976 case of *Buckley v. Valeo*, the Supreme Court explained that whether an individual wields “significant authority” informs the assessment of whether that person is an officer, but the Court has not significantly elaborated on this test since that decision.⁵ Likewise, determining the difference between “principal” and “inferior” officers has generated

¹⁷ *E.g.*, 48 Stat. 1182 (1934), authorizing the President to accept membership for the United States in the International Labor Organization.

¹⁸ See Edward Corwin, *supra* at 216.

¹ U.S. CONST. art. II, § 2, cl. 2.

² *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (per curiam) (“Principal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary.”), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.

³ See ArtII.S2.C2.3.2 Historical Background on Appointments Clause.

⁴ See ArtII.S2.C2.3.2 Historical Background on Appointments Clause.

⁵ *Buckley*, 424 U.S. at 126.

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ArtII.S2.C2.3.2
Historical Background on Appointments Clause

controversy. Examining the history of the appointment power in the United States and the treatment of the Appointments Clause by the Supreme Court can shed light on the structural makeup of the federal government and the balancing of power between the branches.

ArtII.S2.C2.3.2 Historical Background on Appointments Clause

Article II, Section 2, 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 supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The deliberations at the Constitutional Convention in Philadelphia, major writings of the prominent supporters of ratification,¹ and the words and records of the state ratifiers of the federal Constitution reveal careful consideration about the proper method of appointment for federal offices. The delegates to the Constitutional Convention, in designing a system of appointments for federal government offices, drew on “their experiences with two flawed methods of appointment.”²

First, the colonists who lived during the American Revolution resented the often unilateral power of the English Crown and the royal governors in the colonies to create and fill government offices.³ The “manipulation of official appointments”—generally achieved by creating and filling the key offices of government with political favorites, who were in turn dependent on the entity who appointed them—was “one of the American revolutionary generation’s greatest grievances against executive power.”⁴

Second, many early state constitutions, adopted after the Declaration of Independence was written, reacted to the perceived abuses of the appointment power by the Crown and royal governors by lodging the power to appoint officials with the state legislature alone.⁵ But placing the appointment power with state representative assemblies also caused considerable turmoil.⁶ Those legislatures were seen as consolidating all governmental power—executive, judicial, and legislative—for themselves.⁷ This consolidation of power “had become the principal source of division and faction in the states.”⁸ At least in the views of many delegates to the Constitutional Convention, the failure to give governors a stronger role in the appointment process was damaging to many state governments whose legislatures “had fallen

¹ See THE FEDERALIST PAPERS.

² Weiss v. United States, 510 U.S. 163, 184 (1994) (Souter, J., concurring).

³ See GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 143–48 (1969); Freytag v. Comm’r, 501 U.S. 868, 883–84 (1991); EDWARD CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787–1957, at 69–70 (4th ed. 1957); SAIKRISHNA B. PRAKASH, IMPERIAL FROM THE BEGINNING 171 (2015).

⁴ Freytag, 501 U.S. at 883 (quoting WOOD, *supra* note 3, at 79).

⁵ WOOD, *supra* note 3, at 143–50; MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS 16–20 (2003). See, e.g., VA. CONST. (1776). Some state constitutions provided that the appointment power was shared between the governor and state assembly. WOOD, *supra* note 3, at 148–50; GERHARDT, *supra*, at 17–20.

⁶ See WOOD, *supra* note 3, at 407; Freytag, 501 U.S. at 903–07 (Scalia, J., concurring in part and concurring in the judgment); Weiss v. United States, 510 U.S. 163, 184 (1994) (Souter, J., concurring).

⁷ WOOD, *supra* note 3, at 407.

⁸ WOOD, *supra* note 3, at 407.

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Historical Background on Appointments Clause

easy prey to demagogues, provincialism, and factions” in their exercise of appointments.⁹ Likewise, the Articles of Confederation—which provided the governing framework for the young Republic before the adoption of the federal Constitution—authorized the Continental Congress to appoint officers.¹⁰

The delegates to the Constitutional Convention at Philadelphia were aware of the weaknesses of these models of appointment, and thus chose instead to separate “the power to create federal offices . . . from the power to fill them.”¹¹ They chose to vest Congress with the legislative power, including the authority to create federal offices, while the power “to appoint the most important officers” was placed with the single-person President, subject to confirmation by the Senate.¹² Separating the power to create offices from the authority to appoint officers would, in the words of James Madison, provide “[o]ne of the best securities against the creation of unnecessary offices or tyrannical powers.”¹³

At the Constitutional Convention, an early general consensus emerged among the delegates that the chief executive should play a more prominent role in the appointment of officers whose method of appointment was “not otherwise provided for” specifically in the Constitution.¹⁴ The delegates also debated where the power of appointment should be vested for a number of federal offices, including ambassadors, judges (including judges on the Supreme Court), as well as a treasurer.¹⁵ Some argued that placing the appointment power with the legislature would result in factional disputes and partisanship; others that granting such authority to the Executive would tend too much towards a monarchical system of government.¹⁶ The compromise that was eventually reached authorized the President to appoint high-level officers in the federal government, including certain positions named explicitly, as well as “all other officers” not mentioned, subject to Senate confirmation.¹⁷ This arrangement avoided the potential weaknesses of a legislative body making appointments, but preserved a check on the excesses of the Executive by preventing the President from making appointments unilaterally.¹⁸ Congress was also permitted to place the appointment of “inferior” officers with “the President alone, in the courts of law, or in the Heads of Departments.”¹⁹

⁹ See GERHARDT, *supra* note 5, at 18.

¹⁰ ARTICLES OF CONFEDERATION of 1781, art. IX, para. 5 (“The united states in congress assembled shall have authority . . . to appoint such . . . civil officers as may be necessary for managing the general affairs of the united states under their direction . . .”).

¹¹ *Weiss*, 510 U.S. at 184 (Souter, J., concurring); see *Myers v. United States*, 272 U.S. 52, 111 (1926).

¹² *Weiss*, 510 U.S. at 184 (Souter, J., concurring).

¹³ Madison’s Observations on Jefferson’s Draft of a Constitution for Virginia (1788), reprinted in 6 PAPERS OF THOMAS JEFFERSON 308, 311 (J. Boyd ed., 1952).

¹⁴ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 67 (Max Farrand ed., 1966). See JOSEPH P. HARRIS, THE ADVICE AND CONSENT OF THE SENATE 18 (1953). During the proceedings, the Convention adopted a motion to authorize judges to be appointed by the Senate, but ultimately rejected this framework in favor of Presidential appointment of all principal officers. *Id.* at 19.

¹⁵ See HARRIS, *supra* note 14, at 19–24; GERHARDT, *supra* note 5, at 16–23.

¹⁶ GERHARDT, *supra* note 5, at 16–23.

¹⁷ See *Weiss*, 510 U.S. at 184 (Souter, J., concurring) (“With error and overcorrection behind them, the Framers came to appreciate the necessity of separating at least to some degree the power to create federal offices (a power they assumed would belong to Congress) from the power to fill them, and they came to see good reason for placing the initiative to appoint the most important federal officers in the single-person presidency, not the multimember Legislature.”); see ArtII.S2.C2.3.6 Creation of Federal Offices to ArtII.S2.C2.3.9 Restrictions on Congress’s Authority.

¹⁸ See *Weiss*, 510 U.S. at 184–85 (Souter, J., concurring). See THE FEDERALIST No. 76 (Alexander Hamilton); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1522–1525 (1833).

¹⁹ U.S. CONST. art. II, § 2, cl. 2.

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ArtII.S2.C2.3.2
Historical Background on Appointments Clause

The Framers’ decision to place the power to appoint principal officers with the President ensures accountability for his choices.²⁰ Placing the power of nomination with the President alone guarantees that the public knows who to blame for poor (or corrupt) choices.²¹ Alexander Hamilton’s arguments in the *Federalist Papers*, which “contain the most thorough contemporary justification for the method of appointing principals officers that the Framers adopted,”²² stressed that placing the appointment power with a single individual, rather than a multi-member body, ensured a measure of accountability for those appointments.²³ Although the public can reasonably hold a single individual accountable for his appointment choices, doing so for a multi-member body is much more difficult as the individual ultimately responsible for an appointment is “impenetrable to the public eye.”²⁴ Granting the appointment power to a single President was preferable to “a body of men” because a single individual would have a “livelier sense of duty and a more exact regard to reputation” in making appointments. A single President would have “fewer personal attachments to gratify[] than a body of men,” and “cannot be distracted and warped by that diversity of views, feelings, and interests, which frequently distract and warp the resolutions of a collective body.”²⁵ Rather than selecting the best candidate for an office on the merits, a collective body could simply trade votes in order to select their personal favorites based on “friendship and of affection.”²⁶ On the other hand, requiring Senate concurrence with regard to major appointments served as “an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters.”²⁷

The Framers of the Constitution thus placed the power of appointment for principal officers with a single individual—the President—because a single actor would more likely be held accountable for his choices.²⁸ This principle of accountability extended to the Framers’ provision that inferior officers may be appointed by the heads of executive departments, as the latter “possess a reputational stake in the quality of the individuals they appoint [and] are directly answerable to the President, who is responsible to *his* constituency.”²⁹ Further, at the Constitutional Convention, the delegates were also careful to prevent the “diffusion” of the

²⁰ See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 70 (Max Farrand ed., 1911) (Mr. Wilson: “If appointments of Officers are made by a sing. Ex he is responsible for the propriety of the same. [N]ot so where the Executive is numerous.”); *Id.* at 42 (“As the Executive will be responsible in point of character at least, . . . he will be careful to look through all the States for proper characters.”) (statement of Mr. Ghorum); *Freytag v. Comm’r*, 501 U.S. 868, 884 (1991) (“The Framers understood, however, 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.”); see Jennifer L. Mascott, *Who Are ‘Officers of the United States’?*, 70 STAN. L. REV. 443, 456 (2018).

²¹ See Mascott, *supra* note 20, at 456.

²² See *Weiss*, 510 U.S. at 185 n.1 (Souter, J., concurring).

²³ See THE FEDERALIST NO. 76 (Alexander Hamilton) (“I proceed to lay it down as a rule, that one man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices, than a body of men of equal or perhaps even of superior discernment.”).

²⁴ *Id.* See *Freytag*, 501 U.S. at 884 (majority opinion); *id.* at 903–07 (Scalia, J., concurring in part and concurring in the judgment). See also 1 WORKS OF JAMES WILSON 359–360 (J. Andrews ed., 1896) (arguing that placing the appointment power in a multi-member executive would inhibit holding that body accountable for its appointments).

²⁵ See THE FEDERALIST NO. 76 (Alexander Hamilton).

²⁶ *Id.*

²⁷ *Id.*

²⁸ See, e.g., 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 42 (Max Farrand ed., 1911) (“As the Executive will be responsible in point of character at least, . . . he will be careful to look through all the States for proper characters.”) (statement of Mr. Ghorum). See Mascott, *supra* note 20, at 456.

²⁹ See *Freytag*, 501 U.S. at 907 (Scalia, J., concurring in part and concurring in the judgment). Inferior officers may also sometimes be appointed by the President alone or the courts of law. U.S. CONST. art. II, § 2, cl. 2. The appointment of Judicial Branch officials might raise distinct issues from the accountability demanded for Executive Branch officers. See ArtIII.S1.10.2.1 Overview of Good Behavior Clause to ArtIII.S1.10.2.3 Good Behavior Clause Doctrine; THE FEDERALIST NO. 78 (Alexander Hamilton).

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appointment power by strictly limiting who can make appointments.³⁰ The Framers’ careful “husbanding [of] the appointment power to limit its diffusion . . . ensure[d] that those who wielded it were accountable to political force and the will of the people.”³¹ The importance of accountability for federal appointments and the crucial check the Appointments Clause provides between the branches of government are principles that have informed subsequent Supreme Court jurisprudence concerning the appointment of federal officials.

ArtII.S2.C2.3.3 Process of Appointment for Principal Officers

Article II, Section 2, 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 supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The appointment of principal officers of the United States consists of three steps.¹ First, the President nominates an individual to an office; second, the Senate decides whether to confirm that person to the office;² and third, the President commissions the officer to the post.³ The Supreme Court has made clear that compliance with the procedures established in the Constitution for the appointment of officers, both principal and inferior, is not a mere formality. Indeed, the Court has sometimes invalidated actions taken by individuals whose selection conflicts with the requirements of the Appointments Clause and has severed provisions of statutes that violate those constraints.⁴

As an initial matter, Senate confirmation of an individual nominated to an office is insufficient to vest an individual with an appointment to that office absent a final act of

³⁰ See *Freytag*, 501 U.S. at 883 (majority opinion).

³¹ See *id.* at 883–84 (majority opinion); *Weiss v. United States*, 510 U.S. 163, 188 n.3 (1994) (Souter, J., concurring) (“And if Congress, with the President’s approval, authorizes a lower level Executive Branch official to appoint a principal officer, it again has adopted a more diffuse and less accountable mode of appointment than the Constitution requires; this time it has violated the bar on abdication.”); see, e.g., *Ryder v. United States*, 515 U.S. 177, 179 (1995) (holding invalid the affirmance of a conviction by a military court whose members, though appointed by Executive Branch officials, were not appointed in accordance with the Appointments Clause).

¹ *United States v. Le Baron*, 60 U.S. 73, 78 (1856) (“When a person has been nominated to an office by the President, confirmed by the Senate, and his commission has been signed by the President, and the seal of the United States affixed thereto, his appointment to that office is complete.”). The appointment of inferior officers, by contrast, may be vested in the President alone, the courts of law, or the heads of departments. U.S. CONST. art. II, § 2, cl. 2.

² U.S. CONST. art. II, § 2, cl. 2. See also *United States v. Smith*, 286 U.S. 6, 30–49 (1932) (concluding that the Senate’s rules did not authorize that body to revoke a previously-given confirmation).

³ U.S. CONST. art. II, § 3. See *Quackenbush v. United States*, 177 U.S. 20, 27 (1900) (“The appointment and the commission are distinct acts”); *Appointment of a Senate-Confirmed Nominee*, 23 Op. O.L.C. 232, 232 (1999).

⁴ See *Ryder v. United States*, 515 U.S. 177, 182–83 (1995) (“We think that one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred.”); *Buckley v. Valeo*, 424 U.S. 1, 140 (1976) (per curiam) (invalidating sections of the Federal Election Campaign Act that violated the Appointments Clause), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81. *But see* *United States v. Arthrex, Inc.*, No. 19-1434, slip op. at 23 (U.S. June 21, 2021) (plurality opinion) (“Because the source of the constitutional violation is the restraint on the review authority of the Director, rather than the appointment of APJs by the Secretary, Arthrex is not entitled to a hearing before a new panel of APJs.”).

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Ambassadors, Ministers, and Consuls Appointments

appointment by the President.⁵ In other words, the President retains discretion not to appoint an individual even after Senate confirmation.⁶ In the seminal Supreme Court case of *Marbury v. Madison*, the Supreme Court held that the relevant final act of appointment for principal officers is the signing of a commission by the President, which is expressly required by Article II, Section 3 of the Constitution.⁷

The controversy in *Marbury* arose when President Thomas Jefferson ordered his Secretary of State, James Madison, not to deliver a commission to William Marbury, even though his predecessor, President John Adams, had already signed the commission.⁸ Marbury filed suit seeking a writ of mandamus to compel Madison to deliver the commission.⁹ The Court, in an opinion by Chief Justice John Marshall, ultimately held that it lacked jurisdiction to issue mandamus because the statute authorizing the Court to do so violated Article III by improperly expanding the original jurisdiction of the Supreme Court.¹⁰ Before reaching this conclusion, however, the Court ruled that Marbury did have a right to the commission because it had been signed by the President, thereby becoming “conclusive evidence” of Marbury’s appointment.¹¹ Justice John Marshall reasoned that an appointment is complete once the “last act” required of the appointing authority is completed.¹² Because the last act required of the President, as the relevant appointing authority, was the signing of the commission, Marbury’s appointment was completed when the President signed the commission.¹³

ArtII.S2.C2.3.4 Ambassadors, Ministers, and Consuls Appointments

Article II, Section 2, 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 supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The appointment of foreign diplomats stands in some contrast to the appointment of most domestic officers. Given the lack of Supreme Court precedent on the appointment of foreign diplomats, it appears that the appointment of such positions is primarily informed by the

⁵ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 157 (1803) (“The last act to be done by the President, is the signature of the commission. He has then acted on the advice and consent of the senate to his own nomination. The time for deliberation has then passed. He has decided. His judgment, on the advice and consent of the senate concurring with his nomination, has been made, and the officer is appointed.”); *D’Arco v. United States*, 441 F.2d 1173, 1175 (Ct. Cl. 1971) (“Chief Justice Marshall’s reasoning teaches that, even if the office had been for a term of years, like Marbury’s, the executive could still refuse to complete the appointment, after Senate confirmation, by failing to prepare or sign the commission.”); *Appointment of a Senate-Confirmed Nominee*, 23 Op. O.L.C. 232, 232–34 (1999).

⁶ *D’Arco*, 441 F.2d at 1175; *Appointment of a Senate-Confirmed Nominee*, 23 Op. O.L.C. 232, 232–34 (1999).

⁷ *Marbury*, 5 U.S. (1 Cranch) at 162. *See also* U.S. CONST. art. II, § 3 (stating that the President “shall Commission all the Officers of the United States”).

⁸ *See Marbury*, 5 U.S. (1 Cranch) at 153–55.

⁹ *Id.* at 153–54.

¹⁰ *Id.* at 176–80.

¹¹ *Id.* at 158, 162.

¹² *Id.* at 157.

¹³ *See United States v. Le Baron*, 60 U.S. 73, 78 (1856) (“The transmission of the commission to the officer is not essential to his investiture of the office. If, by any inadvertence or accident, it should fail to reach him, his possession of the office is as lawful as if it were in his custody.”).

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historical practice of the political branches. As discussed later, while positions in the federal government occupied by “officers of the United States” are typically established through statute by Congress or via authority delegated by Congress,¹ the Executive Branch has generally taken the view that the President enjoys an independent, inherent authority to create diplomatic offices.² The Executive Branch has espoused this view for most of the Republic’s history,³ and it appears to find support in the earliest governmental practices.⁴ The first Congresses appropriated money for conducting foreign relations but did not create any diplomatic posts; instead, Presidents simply appointed diplomats, subject to Senate confirmation.⁵ Generally speaking, it seems that Congress has acceded to this practice.⁶ In other words, the President has often appointed ambassadors to foreign countries even though no congressional statute explicitly created a particular diplomatic office to fill. At the same time, Congress has exercised some control over the creation and operation of foreign diplomatic posts, including by appropriating specific sums of money for salaries, creating particular offices which are then filled by the President, and imposing requirements for the selection of foreign officers via statute.⁷

Notwithstanding the practice of presidential appointment of diplomats to posts not necessarily created by statute, those diplomatic offices are generally considered to possess “the delegated sovereign authority to speak and act on behalf of the United States” and their selection must comply with the requirements of the Appointments Clause.⁸ Writing in the *Federalist Papers*, Alexander Hamilton noted that ambassadors and other public ministers are

¹ See ArtII.S2.C2.3.6 Creation of Federal Offices to ArtII.S2.C2.3.9 Restrictions on Congress’s Authority.

² See *Nomination of Sitting Member of Cong. to Be Ambassador to Vietnam*, 20 Op. O.L.C. 284, 286 (1996).

³ See *Ambassadors and Other Pub. Ministers*, 7 Op. Att’y Gen. 186, 189, 193 (1855) (“Hence, the President has power by the Constitution to appoint diplomatic agents of the United States of any rank, at any place, and at any time, in his discretion, subject always to the constitutional conditions of relation to the Senate. The power to make such appointments is not derived from, and cannot be limited by, any act of Congress, except in so far as appropriations of money are necessary to provide means for defraying the expense of this as of any other business of the Government.”).

⁴ See 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 58 (James D. Richardson ed., 1896) (letter from President George Washington to the Senate (June 15, 1789)); see Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 304–10 (2001) (“Washington went beyond merely instructing and firing diplomats, however. He also effectively created them.”); SAIKRISHNA B. PRAKASH, *IMPERIAL FROM THE BEGINNING* 172–73 (2015).

⁵ See *Byers v. United States*, 22 Ct. Cl. 59, 63–64 (1887) (“During the whole of the administration of President Jefferson, and part of the terms of other early Presidents, Congress annually appropriated a sum in gross for the expenses of intercourse with foreign nations, leaving it to the Executive to fix the salaries of its several appointees. In some cases appropriations have been made for particular officers not to exceed the sums named, still leaving to the Executive a discretion to determine the amounts to be paid.”) (quoting 7 Op. Att’y Gen. 186 (1855); DAVID CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801*, at 44 (1997); *Ambassadors and Other Pub. Ministers*, 7 Op. Att’y Gen. 186, 189, 193 (1855); *Nomination of Sitting Member of Cong. to Be Ambassador to Vietnam*, 20 Op. O.L.C. 284, 286–92 (1996).

⁶ See *Francis v. United States*, 22 Ct. Cl. 403, 405 (1887) (“In the diplomatic service, Congress seems to have practically conceded, whether on constitutional grounds rightly or wrongly taken or otherwise, the duty, power, or right of the Executive to appoint diplomatic agents, of any rank or title, at any time and at any place, subject to such compensation, or none at all, as the legislative branch of the Government should in its wisdom see fit to provide”); *Byers*, 22 Ct. Cl. at 63–64.

⁷ See *Byers*, 22 Ct. Cl. at 63–67 (“The Executive, again conforming to the wishes of Congress, duly appointed a secretary of legation to Italy and a consul-general at Rome, superseding the combined office, which thereupon ceased to exist.”); Foreign Service Act of 1980, 22 U.S.C. § 3942. Congress has sometimes asserted authority in the past to control the creation of diplomatic offices. See Act of Mar. 2, 1909, ch. 235, 35 Stat. 672 (“[H]ereafter no new ambassadorship shall be created unless the same shall be provided for by an Act of Congress.”) (repealed 1946). But the Executive Branch has not complied. GRAHAM H. STUART, *AMERICAN DIPLOMATIC AND CONSULAR PRACTICE* 137 (1952). *Nomination of Sitting Member of Cong. to Be Ambassador to Vietnam*, 20 Op. O.L.C. 284, 286 (1996).

⁸ See *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 91–93 (2007); *Nomination of Sitting Member of Cong. to Be Ambassador to Vietnam*, 20 Op. O.L.C. 284, 286 (1996); *Ambassadors and Other Pub. Ministers of the United States*, 7 Op. Att’y Gen. 186, 190 (1855).

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Appointments of Justices to the Supreme Court

“the immediate representatives of their sovereigns” and consuls are the “public agents” of the nation.⁹ The view that such foreign diplomats constitute officers whose appointment must comply with the Appointments Clause is confirmed by the earliest historical practices of the Republic. For instance, President George Washington nominated William Short to be “chargé d’affaires”¹⁰ for France in 1789, and nominated ministers to London, Paris, and the Hague in 1791.¹¹ All were confirmed by the Senate.¹² The Executive Branch has consistently expressed its view that ambassadors, ministers, and consuls constitute officers of the United States whose appointments must conform to the Appointments Clause.¹³

In contrast, Presidents have routinely dispatched envoys, emissaries, and secret (sometimes known as special) agents on limited diplomatic missions without nominating them to the Senate.¹⁴ In one of his first acts as President, George Washington unilaterally appointed Gouverneur Morris as a “special agent” to England to consider the possibility of a commercial treaty.¹⁵ Additionally, President Thomas Jefferson unilaterally appointed Senator Daniel Smith to negotiate treaties with the Cherokee Indians.¹⁶ The justification for this historical practice appears to be that such agents are not officers of the United States under the Appointments Clause because their duties are limited in duration and exist only for a temporary purpose.¹⁷

ArtII.S2.C2.3.5 Appointments of Justices to the Supreme Court

Article II, Section 2, 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

⁹ See THE FEDERALIST No. 81 (Alexander Hamilton). See Appointment of Consuls, 7 Op. Att’y’s Gen. 242, 248 (1855) (“We may conveniently regard the word of the Constitution, ‘consuls,’ as the generic designation of a class of public officers existing by public law, and recognised by numerous treaties, who are appointed by their government to reside in foreign countries, and especially in seaports, and other convenient points, to discharge administrative, and sometimes judicial, functions in regard to their fellow-citizens, merchants, mariners, travellers, and others, who dwell or happen to be in such places; to aid, by the authentication of documents abroad, in the collection of the public revenue; and, generally, to perform such other duties as may be assigned to them by the laws and orders of their government. Congress cannot, by legislative act, appoint or remove consuls any more than ministers; but it may increase at will the descriptions of consular officers; it may enlarge or diminish their functions; it may regulate their compensation; it may distinguish between some officers appointable with advice of the Senate, and others appointable by the President alone, or by a Head of Department.”).

¹⁰ A chargé d’affaires refers to a “person accredited by letter to the secretary of state or minister for foreign affairs of one country by the secretary of state or minister for foreign affairs of another country, in place of a duly accredited ambassador or minister.” U.S. Dep’t, Foreign Affairs Manual and Handbook, 5 FAH-1 Exhibit H-611, <https://fam.state.gov/fam/05fah01/05fah010610.html#X611> (last visited June 22, 2022).

¹¹ JOSEPH P. HARRIS, THE ADVICE AND CONSENT OF THE SENATE 36–40 (1953).

¹² *Id.*

¹³ Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 91–93 (2007); Appointment of Consuls, 7 Op. Att’y’s Gen. 242, 248 (1855).

¹⁴ See Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 102 (2007). But see 22 U.S.C. § 7817 (establishing a “special envoy for North Korean human rights issues” who shall be appointed by the President and confirmed by the Senate).

¹⁵ CURRIE, *supra* note 5, at 44.

¹⁶ See 7 AMERICAN STATE PAPERS: INDIAN AFFAIRS 697–98 (1805).

¹⁷ See Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 102–05 (2007); EDWARD CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787–1957, at 71 (4th ed. 1957); see 39 ANNALS OF CONG. 1407, 1409–10 (1822) (finding by a House Select Committee that Senator Smith’s position negotiating the treaty did not constitute an office); S. REP. No. 53-227 at 25 (1894) (finding of a Senate Committee that the appointment of J.H. Blount to Hawaii did not require Senate confirmation).

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and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The Appointments Clause provides that the President shall appoint, subject to Senate confirmation, “Judges of the supreme Court, and all other officers of the United States.”¹ Thus Supreme Court Justices are officers of the United States whose appointment must comply with the requirements of the Appointments Clause. Importantly, the Constitution provides that presidential nominees are subject to the “advice and consent” of the Senate. A range of matters are potentially relevant when the Senate considers whether to give its consent for nominations to the Nation’s highest court, including political considerations, a nominee’s judicial philosophy, fitness for the bench, past statements on issues relevant to the Court, and the overall balance of power between political factions.

Since the beginning of the Nation’s history, just as the confirmation of Executive Branch officers has included political considerations, so to have nominees to the Supreme Court been accepted or rejected on political grounds.² For instance, the Senate rejected President George Washington’s choice to replace the first Chief Justice of the Supreme Court on largely political considerations.³ In 1795, President Washington chose John Rutledge, who had previously served on the Supreme Court as an Associate Justice from 1789 to 1791, to replace John Jay, who had been elected Governor of New York.⁴ After serving on the Court from 1789 to 1791, Rutledge had resigned his seat in order to serve as the chief justice of South Carolina’s Supreme Court.⁵ Prior to receiving a nomination to serve as Chief Justice on the U.S. Supreme Court, however, Rutledge gave a speech critical of the Jay Treaty reached with Great Britain, which had recently been approved for ratification by the Senate on June 24, 1795.⁶ The Federalists strongly supported the treaty, and their opposition in the Senate to Rutledge’s views ultimately sunk his nomination.⁷ The Senate voted to reject the nomination in December 1795.⁸ Of course, the Senate is not unique in considering politics and partisan considerations in this arena—every one of the twelve appointments President Washington made to the Supreme Court came from the Federalist Party,⁹ and subsequent Presidents have considered politics in making their own appointments.¹⁰

Indeed, the political landscape profoundly informs and shapes the Supreme Court nomination and confirmation process. For instance, the timing of a Supreme Court vacancy can be crucially important: a vacancy occurring shortly before an election can alter the type of candidate that can realistically be confirmed; and prominent legal issues facing the country

¹ U.S. CONST. art. II, § 2, cl. 2.

² See generally JOSEPH P. HARRIS, *THE ADVICE AND CONSENT OF THE SENATE* 303 (1953).

³ 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY 1789–1835*, at 124–27 (1926).

⁴ HARRIS, *supra* note 2, at 43; Supreme Court of the United States, *About the Court*, https://www.supremecourt.gov/about/members_text.aspx (last visited June 22, 2022). Rutledge served as Chief Justice on a recess appointment during the Court’s 1795 August term. MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS* 51 (2003).

⁵ HARRIS, *supra* note 2, at 42.

⁶ HARRIS, *supra* note 2, at 43.

⁷ GERHARDT, *supra* note 4, at 51–52; HARRIS, *supra* note 2, at 43; WARREN, *supra* note 3, at 128–37.

⁸ United States Senate, *Chief Justice Nomination Rejected*, <https://www.senate.gov/about/powers-procedures/nominations/a-chief-justice-rejected.htm> (last visited June 22, 2022).

⁹ GERHARDT, *supra* note 4, at 51–52.

¹⁰ HARRIS, *supra* note 2, at 302–03. See generally HENRY ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II* (2007).

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can affect the scope of appropriate views that a nominee must have.¹¹ The Senate’s composition can also restrict a President’s choices of who to nominate. A shift in party control of the Senate can dramatically alter the type of nominees a President can expect to be confirmed.¹² Likewise, public opinion of the President can shape the type of nominee a President can expect the Senate to support: a President with strong approval ratings, for instance, might face an easier task in achieving confirmation for a Justice, or might enjoy broader leeway in the type of Justice he could nominate in the first place.¹³ An outgoing Justice’s attributes can narrow the options available to a President. The President might find himself limited to moderate nominees when replacing a Justice seen as a swing vote on the Court. He might also find replacing a pillar of the right or left to require a nominee that appeals to one political side more strongly.¹⁴ Finally, traditional norms of professional expectations play a role in circumscribing the eligible range of potential Supreme Court nominees—every single Justice has been a lawyer (though this is not required by the Constitution); since 1943, all Justices have graduated from accredited law schools; and most modern Justices graduated from top-ranked law schools and served on federal courts or in academia before confirmation.¹⁵

The rise of interest groups influencing the selection of Supreme Court Justices also reflects the increasing role of issue partisanship in the process. The nomination of Louis Brandeis to the Court in 1916 sparked a four month struggle with opposition from big business and past presidents of the American Bar Association.¹⁶ Objections to his nomination included his judicial temperament and character, the alleged radicalism of his views, and also arguably reflected an anti-Semitic character.¹⁷ He was eventually confirmed with the support of labor, consumer, and some religious groups.¹⁸ Opposition to President Ronald Reagan’s nomination of Robert Bork to the Supreme Court is a particularly prominent example of the role interest groups may play.¹⁹ Both labor and civil rights groups mounted significant opposition to the nomination. In the wake of that opposition’s success, conservative groups were organized to counteract the perceived role of liberal interest organizations in influencing judicial nominations.²⁰

Another important development regarding the selection of Supreme Court nominees is the increasingly public nature of the process. It was not until the twentieth century that open hearings were held over a Supreme Court nomination.²¹ In 1916, the Senate did so for the

¹¹ See DAVID ALISTAIR YALOF, *PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES* 4 (1999). More recently, following the death of Associate Justice Antonin Scalia, President Barack Obama’s nomination of Merrick Garland in 2016 to the High Court did not receive a hearing or a vote in the Republican-controlled Senate. That body refused to consider a Supreme Court nomination until after the fall’s election. In 2017, President Donald Trump nominated and the Senate confirmed Neil Gorsuch to the Court. Sarah Lyall, *Liberals Are Still Angry, but Merrick Garland Has Reached Acceptance*, N.Y. TIMES (Feb. 19, 2017), <https://www.nytimes.com/2017/02/19/us/politics/merrick-garland-supreme-court-obama-nominee.html>; Audrey Carlsen & Wilson Andrews, *How Senators Voted on the Gorsuch Nomination*, N.Y. TIMES (Apr. 7, 2017), <https://www.nytimes.com/interactive/2017/04/07/us/politics/gorsuch-confirmation-vote.html>

¹² YALOF, *supra* note 11, at 5.

¹³ YALOF, *supra* note 11, at 5.

¹⁴ YALOF, *supra* note 11, at 5.

¹⁵ YALOF, *supra* note 11, at 6, 170; Adrian Vermeule, *Should We Have Lay Justices?*, 59 STAN. L. REV. 1569, 1574 (2007); LEE EPSTEIN, ET. AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS* 321–85 (6th ed. 2015).

¹⁶ GERHARDT, *supra* note 4, at 69.

¹⁷ GERHARDT, *supra* note 4, at 69.

¹⁸ GERHARDT, *supra* note 4, at 69–70.

¹⁹ GERHARDT, *supra* note 4, at 71–72.

²⁰ GERHARDT, *supra* note 4, at 71–72.

²¹ YALOF, *supra* note 11, at 14–15.

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nomination of Louis Brandeis.²² Nine years later, Harlan Fiske Stone was the first nominee to appear personally before the Senate Judiciary Committee.²³ Stone’s testimony was limited to the Teapot Dome Scandal. In 1939, Felix Frankfurter appeared before the Senate Judiciary Committee and was “the first nominee to take unrestricted questions in an open, transcribed, public hearing.”²⁴ Almost all nominees since 1955 have testified formally before the Senate Judiciary Committee.²⁵ Those hearings have been televised since 1981.²⁶ Finally, the particular procedures used by the Senate in considering nominations can affect the likelihood of confirmation for a Supreme Court Justice. In cases where the Senate has eliminated the sixty vote threshold necessary for confirmation, it may be easier to confirm a nominee to the bench (notwithstanding accompanying political ramifications).²⁷

ArtII.S2.C2.3.6 Creation of Federal Offices

Article II, Section 2, 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 supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The Constitution gives Congress substantial power to establish federal government offices. As an initial matter, the Constitution vests the legislative power in Congress.¹ Article I bestows on Congress certain specified, or enumerated, powers.² The Court has recognized that these powers are supplemented by the Necessary and Proper Clause, which provides Congress with “broad power to enact laws that are ‘convenient, or useful’ or ‘conductive’ to [the] beneficial exercise” of its more specific authorities.³ The Supreme Court has observed that the Necessary and Proper Clause authorizes Congress to establish federal offices.⁴ Congress accordingly enjoys broad authority to create government offices to carry out various statutory functions

²² YALOF, *supra* note 11, at 14–15. Brandeis did not testify in the hearings, which were quite contentious and lasted months. See HARRIS, *supra* note 2, at 99–114.

²³ YALOF, *supra* note 11, at 14–15.

²⁴ PAUL M. COLLINS, JR. & LORI A. RINGHAND, SUPREME COURT CONFIRMATION HEARINGS AND CONSTITUTIONAL CHANGE 35 (2013).

²⁵ YALOF, *supra* note 11, at 14–15. In 1987, Douglas Ginsburg withdrew his nomination before a formal hearing was conducted. In 2016, Merrick Garland was nominated but was not given a hearing in the Senate.

²⁶ YALOF, *supra* note 11, at 14–15.

²⁷ 163 CONG. REC. S2390 (daily ed. Apr. 6, 2017).

¹ U.S. CONST. art. I, § 1.

² *Id.* art. I; *United States v. Morrison*, 529 U.S. 598, 607 (2000).

³ *United States v. Comstock*, 560 U.S. 126, 134 (2010) (quoting *McCulloch v. Maryland*, 17 U.S. (Wheat.) 316, 413, 418 (1819)). See ArtI.S8.C18.1 Overview of Necessary and Proper Clause.

⁴ See *Freytag v. Comm’r*, 501 U.S. 868, 883 (1991) (noting “Congress’s authority to create offices and to provide for the method of appointment to those offices”); *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (per curiam) (“Congress may undoubtedly under the Necessary and Proper Clause create ‘offices’ in the generic sense and provide such method of appointment to those ‘offices’ as it chooses.”), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.

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and directives.⁵ The legislature may establish government offices not expressly mentioned in the Constitution in order to carry out its enumerated powers.⁶

The Appointments Clause supplies the method of appointment for certain specified officials, but also for “other [o]fficers” whose positions are “established by [l]aw.” Although principal officers must be nominated by the President and confirmed by the Senate, Congress “may by [l]aw” place the appointing power for inferior officers with the President alone, a department head, or a court.⁷ As this section will explain, the Supreme Court has recognized Congress’s discretion to establish a wide variety of governmental entities in the Executive, Legislative, and Judicial Branches.

Congress’s authority to establish offices is limited by the terms of the Appointments Clause. The structure of federal agencies must comply with the requirement that the President appoint officers, subject to Senate confirmation, although the appointment of “inferior officers” may rest with the President alone, department heads, or the courts.⁸ More broadly, the Supreme Court has made clear that the Constitution imposes important limits on Congress’s ability to influence or control the actions of officers once they are appointed. Likewise, it is widely believed that the President must retain a certain amount of independent discretion in selecting officers that Congress may not impede. These principles ensure that the President may fulfill his constitutional duty under Article II to “take [c]are” that the laws are faithfully executed.⁹

ArtII.S2.C2.3.7 Creation of Federal Offices with Blended Features

Article II, Section 2, 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 supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The Supreme Court has recognized that the Constitution grants broad discretion to Congress to establish various offices across the federal government. Aside from Congress’s clear authority to create Executive Branch offices to be filled by officers that execute the law,¹ as well as federal courts filled with judicial officers to adjudicate cases and controversies,² Congress may sometimes merge features of various federal entities and establish unique agencies within the federal government. For instance, in the 1989 case of *Mistretta v. United States*, the Court ruled that the structure of the United States Sentencing Commission, an entity placed by Congress in the Judicial Branch and charged with promulgating sentencing

⁵ See *Myers v. United States*, 272 U.S. 52, 129 (1926) (“To Congress under its legislative power is given the establishment of offices, the determination of their functions and jurisdiction, the prescribing of reasonable and relevant qualifications and rules of eligibility of appointees, and the fixing of the term for which they are to be appointed and their compensation—all except as otherwise provided by the Constitution.”).

⁶ See *Freytag*, 501 U.S. at 883; *Buckley*, 424 U.S. at 138.

⁷ U.S. CONST. art. II, § 2, cl. 2.

⁸ U.S. CONST. art. II, § 2, cl. 2.

⁹ U.S. CONST. art. II, § 3.

¹ See *Myers*, 272 U.S. 52, 129 (1926).

² U.S. CONST. art. III, § 1; Judiciary Act of 1789, 1 Stat. 73 (codified as amended at 28 U.S.C. § 1350).

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guidelines for the federal courts, did not violate the separation of powers.³ The Commission was composed of seven voting members appointed by the President with Senate confirmation.⁴ The law required at least three members to be federal judges, and the President could remove Commission members for cause.⁵ The challenger in that case argued, among other things,⁶ that Congress’s delegation of power to the Judiciary, and individual Article III judges, to promulgate sentencing guidelines was unconstitutional as it enlisted the Judiciary in exercising legislative authority.⁷ In addition, the challenger argued that Congress had “eroded the integrity and independence of the Judiciary” by forcing Article III judges to share their power with non-judges and engage in the political work of promulgating sentencing guidelines. Further, while Article III judges enjoy constitutional protection from removal except for impeachment, here the statute required Article III judges to serve on the Commission subject to removal by the President.⁸

Acknowledging that the Commission constituted “an unusual hybrid in structure and authority” within the federal government, the Supreme Court upheld, in a vote of 8-1, the constitutionality of the Commission’s design and duties.⁹ In an opinion by Justice Harry Blackmun, the Court first examined whether creating an independent body, placed in the Judicial Branch, with the power to issue sentencing guidelines “vested in the Commission powers that are more appropriately performed by the other Branches or . . . undermine[d] the integrity of the judiciary.”¹⁰ The Court noted that “Congress may delegate to the Judicial Branch nonadjudicatory functions that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary.”¹¹ Because judges have historically exercised discretion in sentencing decisions and the Judiciary has long exercised authority to issue rules “for carrying into execution [its] judgments,” the Court reasoned that Congress could combine these features in the Commission and entrust it with the power to promulgate sentencing guidelines.¹² Although technically located in the Judicial Branch, the Commission’s powers, the Court observed, were not unconstitutionally “united with the powers of the Judiciary.”¹³ The Commission was not a court, did not exercise judicial power, and was not controlled by the Judicial Branch; instead, the Commission was an independent agency accountable to Congress and its members were removable by the President.¹⁴ In addition, placement of the Commission in the Judicial Branch did not increase that branch’s authority.¹⁵ Judges had historically decided sentencing questions in individual cases; the Commission simply did this via the promulgation of sentencing guidelines.¹⁶

³ 488 U.S. 361, 412 (1989).

⁴ 28 U.S.C. § 991(a).

⁵ *Id.*

⁶ The Court also rejected the argument that the Commission’s structure violated the “nondelegation” doctrine. See ArtI.S1.5.2 Historical Background on Nondelegation Doctrine.

⁷ *Mistretta*, 488 U.S. at 383.

⁸ *Id.* at 384.

⁹ *Id.* at 412. The Court also held that Congress’s grant of authority to the Commission did not violate the nondelegation doctrine. *Id.* at 379.

¹⁰ *Id.* at 385.

¹¹ *Id.* at 388.

¹² *Id.* at 384–97.

¹³ *Id.* at 393.

¹⁴ *Id.* at 393–94.

¹⁵ *Id.* at 395.

¹⁶ *Id.*

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The Court next turned to the composition of the Commission and concluded that its design did not undermine the integrity of the Judicial Branch.¹⁷ The service of three federal judges on the Commission, though “somewhat troublesome” in the eyes of the Court, did not on balance interfere with the integrity of the federal Judiciary as a whole.¹⁸ The Court looked to the early historical practices of the country and determined that Article III of the Constitution did not bar judges from undertaking certain extrajudicial duties.¹⁹ The judges on the Commission did not serve “pursuant to their status and authority as Article III judges, but solely because of their appointment by the President as the Act directs.”²⁰ The power wielded by the judges as Commissioners thus was not judicial in nature, but administrative, pursuant to the legislation creating the commission.²¹ The judges’ service did not ultimately undermine the impartiality of the Judiciary because the Commission’s task did “not enlist the resources or reputation of the Judicial Branch in either the legislative business of determining what conduct should be criminalized or the executive business of enforcing the law.”²² Instead, the Commission was dedicated to promulgating rules for sentencing, a topic traditionally within the province of the Judiciary.²³

Finally, the Court examined the extent of the President’s control over the Commission’s functioning.²⁴ The Court determined that the President’s power to remove the Commissioners for cause did not “compromise the impartiality” of the Judiciary or prevent that branch from performing its constitutional function because, even if removed as a Commissioner, a judge retained the status of an Article III judge.²⁵

ArtII.S2.C2.3.8 Federal Versus Territorial Officers

Article II, Section 2, 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 supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Not every office created by Congress is a federal office subject to the Appointments Clause.¹ In *Financial Oversight & Management Board for Puerto Rico v. Aurelius Investment*,

¹⁷ *Id.* at 397–408.

¹⁸ *Id.* at 397.

¹⁹ *Id.* at 398–99 (“The first Chief Justice, John Jay, served simultaneously as Chief Justice and as Ambassador to England, where he negotiated the treaty that bears his name. Oliver Ellsworth served simultaneously as Chief Justice and as Minister to France. While he was Chief Justice, John Marshall served briefly as Secretary of State and was a member of the Sinking Fund Commission with responsibility for refunding the Revolutionary War debt.”).

²⁰ *Id.* at 404.

²¹ *Id.*

²² *Id.* at 407–08.

²³ *Id.*

²⁴ *Id.* at 408–11.

²⁵ *Id.* at 409–11.

¹ See generally *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 526, 543–44 (1987) (reasoning that the congressional grant of a corporate charter, as well as “the right to prohibit certain commercial and promotional uses of the word ‘Olympic,’” did not render the Olympic Committee a government actor subject to constitutional challenge).

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LLC, the Court considered the constitutionality of an oversight board (the Board) that Congress created in 2016 to manage financial issues of the Commonwealth of Puerto Rico, a U.S. territory.² Writing for the Court, Justice Stephen Breyer explained that provisions in Articles I and IV of the Constitution “empower Congress to create local offices for the District of Columbia and for Puerto Rico and the Territories.”³ Based on the Constitution’s text, structure, and history, the Court reasoned that creating a local office “does not automatically make its holder an ‘Officer of the United States’” within the meaning of Article II’s Appointments Clause.⁴ At the same time, an official’s location in a territory does not, standing alone, exempt that office from the Appointment Clause’s reach.⁵ Instead, when Congress exercises its Article I or IV powers to create a local or territorial office, the Court examines whether Congress vested that official with “primarily local powers and duties.”⁶ If so, the official is not an “Officer of the United States” subject to the Appointments Clause.⁷

Based on the text of the 2016 law, the *Aurelius* Court concluded that when Congress created the Board, it exercised its Article IV powers under the Territories Clause.⁸ And the Court concluded that the powers and duties that Congress assigned to the Board were “primarily local in nature.”⁹ Justice Breyer cited several factors that “taken together” demonstrated the Board’s local nature: (1) the government of Puerto Rico paid the Board’s expenses; (2) the Board developed fiscal plans with the elected government of Puerto Rico and could initiate bankruptcy proceedings for Puerto Rico; and (3) the Board’s “broad investigatory powers”—akin to what federal officers exercise—were “backed by Puerto Rican, not federal, law.”¹⁰ Accordingly, the Court held that Board members were territorial officers, not federal “Officers,” and thus their selection need not comply with the Appointments Clause.¹¹

ArtII.S2.C2.3.9 Restrictions on Congress’s Authority

Article II, Section 2, 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 supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

While Congress enjoys a certain amount of discretion when designing federal agencies, the Supreme Court has regularly invalidated congressional attempts to “aggrandiz[e] its own

² No. 18-1334, slip op. at 2–6 (U.S. June 1, 2020). Congress created the Board as part of the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), Pub. L. No. 114-187, 130 Stat. 549 (2016) (codified at 48 U.S.C. § 2101 et seq.).

³ *Aurelius Inv., LLC*, slip op. at 2.

⁴ *Id.* at 10.

⁵ *Id.* at 6–9.

⁶ *Id.* at 14.

⁷ *Id.* at 14–17.

⁸ *Id.* at 4–8; see also U.S. CONST. art. IV, § 3, cl. 2.

⁹ *Aurelius Inv., LLC*, slip op. at 16.

¹⁰ *Id.* at 15, 17.

¹¹ *Id.* at 15–17.

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power at the expense of another branch.”¹ For instance, while Congress may undoubtedly establish a wide variety of federal offices to carry out statutory duties, it may not appoint its own Members to carry out executive functions or reserve for itself the power of appointment.² In the 1991 case of *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise*, the Supreme Court examined the constitutionality of legislation that authorized a review board composed of Members of Congress to review and reverse decisions of the Metropolitan Washington Airports Authority (MWAA).³ The MWAA is a regional body established to oversee the management and operations of Ronald Reagan Washington National Airport and Dulles International Airport.

The Court first ruled that Members of Congress on the Board exercised federal authority, even though the law specified that they would serve “in their individual capacities”⁴ as opposed to serving in their official role as legislators.⁵ In support of this conclusion, the Court noted that control over the airports in question was originally placed with the federal government and was transferred to the MWAA on condition that the States create the Board; the federal government has a significant interest in the operation of airports, which are crucial to government operations; and membership on the Board was limited to federal officials.⁶

Moreover, Congress exercised significant power over the appointment and removal of the Board members. The law required that the Board consist of nine members of Congress, eight of whom had to sit on specific congressional committees, chosen from a list provided by congressional leadership.⁷ There was no requirement that the lists contain more recommendations than openings on the Board.⁸ The Court concluded that this structure ensured congressional control of appointments.⁹ Further, by controlling committee assignments, Congress had removal power over the Board “because depriving a Board member of membership in the relevant committees deprives the member of authority to sit on the Board.”¹⁰

The Court ruled that the statute’s provision requiring Members of Congress to sit on the Board violated the separation of powers.¹¹ The Court did not expressly decide whether the Board’s power was executive or legislative in nature, but reasoned that, no matter how it was characterized, the statute’s grant of authority to the Board was not constitutional.¹² If the Board’s power was executive in nature, the Court explained, the Constitution barred an agent

¹ *Ryder v. United States*, 515 U.S. 177, 182 (1995); *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (per curiam), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81; *INS v. Chadha*, 462 U.S. 919, 951 (1983); *Bowsher v. Synar*, 478 U.S. 714, 735–36 (1986).

² In *Buckley v. Valeo*, discussed in more detail at ArtII.S2.C2.3.10 Officer and Non-Officer Appointments, the Court ruled that statutory provisions authorizing members of Congress to appoint Commissioners to the Federal Elections Commission were unconstitutional. 424 U.S. at 143 (per curiam).

³ 501 U.S. 252, 255–61 (1991). See Metropolitan Washington Airports Act of 1986, Pub. L. No. 99-591, 100 Stat. 3341. The legislation authorized the transfer of Dulles International Airport and Washington National Airport from federal control to the MWAA conditioned on the creation of a Board of Review created by the MWAA. *Wash. Airports*, 501 U.S. at 255–61. Virginia and the District of Columbia passed legislation authorizing the MWAA to create the Review Board. *Id.* at 261.

⁴ Metropolitan Washington Airports Act of 1986, Pub. L. No. 99-500, 100 Stat. 3341, § 6007(f)(1).

⁵ *Wash. Airports*, 501 U.S. at 265–71.

⁶ *Id.* at 266–69.

⁷ One member was “chosen alternately . . . from a list provided by the Speaker of the House or the President pro tempore of the Senate, respectively.” *Id.* at 268.

⁸ *Id.*

⁹ *Id.* at 268–69.

¹⁰ *Id.* at 268–70.

¹¹ *Id.* at 274–76.

¹² *Id.* at 275–76.

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of Congress from exercising it; and if the Board's power was legislative, then the Board could not operate without following the constitutional requirements of bicameralism and presentment for legislative action.¹³

Congress's control over appointments is further limited on the question of who can remove an incumbent officer.¹⁴ In the 1986 case of *Bowsher v. Synar*, the Supreme Court invalidated a statute that gave an official controlled by Congress the power to order a decrease in federal spending.¹⁵ A 1985 act¹⁶ gave the Comptroller General authority, in the event of a budget shortfall, to issue a report detailing federal revenue and expenditure estimates, along with the specific reductions needed to cut the deficit to meet a statutory target.¹⁷ The President was then required to order the "sequestration" of those funds pursuant to the Comptroller General's report.¹⁸ The Court held that the Comptroller's power to trigger sequestration violated the separation of powers because a preexisting provision authorized Congress to remove the Comptroller General, who Congress viewed as an officer of the legislature,¹⁹ through a joint resolution.²⁰ The High Court explained that the Constitution's division of power among the three branches of government barred "an active role for Congress in the supervision of officers charged with the execution of the laws it enacts."²¹ The Court rejected the argument that the Comptroller General was sufficiently independent from Congress such that there was no constitutional violation. The power of removal, for the Court, is a crucial tool of control; Congress's ability to remove the Comptroller General "dictate[s] that he will be subservient to Congress."²² As a remedy for this constitutional defect, the Court left Congress's removal power in place, but invalidated the executive functions given to the Comptroller General.²³

Just as Congress may not appoint Members to wield executive power or exercise direct control over Executive Branch officers, its authority to impose procedural restrictions on the President's nomination of an officer may also be limited. This issue arose in the 1989 Supreme Court case of *Public Citizen v. Department of Justice*, which examined whether the Federal Advisory Committee Act (FACA) applied to consultations between the Department of Justice (DOJ) and the American Bar Association's Standing Committee on Federal Judiciary (ABA Committee).²⁴ The FACA required committees that advise the President, or other officers and agencies in the federal government, to follow a number of procedural requirements, such as filing a charter; keeping detailed minutes of meetings; and having meetings chaired by a federal government employee or officer authorized to adjourn any meeting.²⁵ The Court

¹³ *Id.*

¹⁴ *Springer v. Gov't of Philippine Islands*, 277 U.S. 189, 202 (1928) ("Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions.")

¹⁵ 478 U.S. 714, 735–36 (1986). For more on the Court's decision in *Bowsher v. Synar*, see ArtII.S2.C2.3.15.6 Later Twentieth Century Cases on Removal.

¹⁶ Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. 99-177, 99 Stat. 1038.

¹⁷ *Bowsher*, 478 U.S. at 718, 732.

¹⁸ *Id.* at 718.

¹⁹ *Id.* at 731.

²⁰ *Id.* at 736.

²¹ *Id.* at 722.

²² *Id.* at 730.

²³ *Id.* at 734–36.

²⁴ 491 U.S. 440, 443 (1989).

²⁵ See 5 U.S.C. App. § 1 et seq. 5 U.S.C. App. § 3(2) ("The term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof (hereafter in this paragraph referred to as "committee"), which is—(A) established by statute or reorganization

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considered whether the Act covered consultations between DOJ and the ABA Committee regarding presidential nominations of federal judges. It noted that a strictly literal interpretation of the statute would conceivably reach every instance in which the President or an agency sought advice from “any group of two or more persons, or at least any formal organization,” including private entities.²⁶ The Court concluded that Congress did not intend that result, as it would mean the procedural requirements of FACA applied every time the President sought the views of a group of two or more people, “or at least any formal organization.”²⁷

Accordingly, the Court examined Congress’s intention in passing the FACA, including that Act’s legislative history as well as the history of other efforts “to regulate the Federal Government’s use of advisory committees.”²⁸ The Court reasoned that it ultimately was a “close question whether FACA should be construed to apply to the ABA Committee,” but constitutional considerations “tip[ped] the balance decisively against FACA’s application.”²⁹ The Court invoked the concept of constitutional avoidance, which essentially teaches that when faced with statutory ambiguity, if one interpretation of a statute would raise constitutional problems, but another, fairly possible interpretation does not, courts should adopt the latter construction.³⁰ The Court concluded that applying FACA to DOJ’s consultations with the ABA Committee “would present formidable constitutional difficulties,” namely, potentially infringing on the President’s constitutional duty under Article II to nominate federal judges.³¹ The Court accordingly concluded that FACA did not apply to DOJ’s confidential consultations with the ABA Committee.³²

ArtII.S2.C2.3.10 Officer and Non-Officer Appointments

Article II, Section 2, 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 supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Supreme Court case law concerning which individuals in the federal government constitute “Officers of the United States”—and thus must be appointed pursuant to the requirements of the Appointments Clause—has been relatively sparse over the course of the

plan, or (B) established or utilized by the President, or (C) established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government.”).

²⁶ *Pub. Citizen*, 491 U.S. at 452, 455–64.

²⁷ *Id.* at 452–53.

²⁸ *Id.* at 452–64.

²⁹ *Id.* at 465.

³⁰ *Id.* at 465–66 (citing *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

³¹ *Id.* at 466–67.

³² *Id.* at 467; *id.* at 467–88 (1989) (Kennedy, J., concurring) (concluding that the statute did apply to the ABA’s consultations with DOJ but that this was an unconstitutional interference with the President’s power to nominate judges).

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Nation's history,¹ with many of the key Supreme Court decisions occurring in the late twentieth and early twenty-first centuries.² In one of the earliest cases addressing the issue, Chief Justice John Marshall, riding circuit in the 1823 case of *United States v. Maurice*, defined an officer as one entrusted with a duty that is “a continuing one, which is defined by rules prescribed by the government, and not by contract, which an individual is appointed by government to perform.”³ A similar principle was espoused in an opinion issued by Attorney General Hugh Legare in 1843, wherein he contrasted the appointment of “permanent” customs inspectors who qualify as officers of the United States, with the appointment by customs collectors of “occasional inspectors” who do not.⁴ In 1878, the Supreme Court held in *United States v. Germaine* that federal civil surgeons were *employees* not subject to the constitutional requirements of the Appointments Clause, rather than officers, because their positions were “occasional and intermittent,” rather than “continuing and permanent.”⁵ However, some of the Court's early decisions addressing which individuals constitute officers tended not to examine closely the substantive differences between officers and non-officers, and instead simply relied on an individual's method of appointment.⁶ In other words, according to some of these early cases, no matter the duties assigned to a position, if an individual was not appointed according to the strictures of the Appointments Clause, then by definition he or she could not constitute an officer; but if an individual was appointed pursuant to the Appointments Clause, then he or she did qualify as an officer.⁷

¹ Stacy M. Lindstedt, *Developing the Duffy Defect: Identifying Which Government Workers Are Constitutionally Required to Be Appointed*, 76 Mo. L. REV. 1143, 1151 (2011). The Executive Branch has taken the position, which does not appear to contradict Supreme Court case law, that temporary designations to offices are permissible without complying with the Appointments Clause. Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 106 (2007); Designation of Acting Dir. of the Off. of Mgmt. & Budget, 27 Op. O.L.C. 121, 123–25 (2003); Auth. of Lieutenant Colonel Commandant of Marine Corps, 2 Op. Att'ys Gen. 77, 78–79 (1828). Appointment & Removal of Inspectors of Customs, 4 Op. Att'ys Gen. 162, 163 (1843); The Reconstruction Acts, 12 Op. Att'ys Gen. 141, 155–56 (1867). *But see* NLRB v. SW Gen., Inc., No. 15-1251, slip op. at 1–2 (U.S. Mar. 21, 2017) (Thomas, J., concurring) (arguing that a temporary designation under the Federal Vacancies Reform Act was unconstitutional because the procedures of the Appointments Clause were not followed).

² See GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 190 (7th ed. 2016).

³ 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823).

⁴ Appointment & Removal of Inspectors of Customs, 4 Op. Att'ys Gen. 162, 163 (1843); *see also* Tenure of Off. of Inspectors of Customs, 1 Op. Att'ys Gen. 459, 459 (1821); Tenure of Off. of Inspectors of Customs, 2 Op. Att'ys Gen. 410, 412 (1831). In 1865, Attorney General James Speed reasoned that a statute which vested in assessors the power to appoint assistant assessors of the internal revenue service was unconstitutional because the former were not Heads of Departments. Appointment of Assistant Assessors of Internal Revenue, 11 Op. Att'ys Gen. 209, 209–12 (1865); *see* Act of Mar. 3, 1865, § 1, 13 Stat. 469. He concluded that assistant assessors constituted officers because Congress has created their office and they exercised independent authority. Appointment of Assistant Assessors of Internal Revenue, 11 Op. Att'ys Gen. 209, 211 (1865). The following year, Congress amended the statute to authorize the Treasury Secretary to appoint assistant assessors. Act of Jan. 15, 1866, 14 Stat. 2. For more on early Attorney General opinions regarding the Appointments Clause, *see* Aditya Bamzai, *The Attorney General and Early Appointments Clause Practice*, 93 NOTRE DAME L. REV. 1501, 1504–14 (2018).

⁵ 99 U.S. 508, 511–12 (1878) (noting that the term officer “embraces the ideas of tenure, duration, emolument, and duties”) (citing *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 393–94 (1867)); *see* *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890) (“His position is without tenure, duration, continuing emolument, or continuous duties, and he acts only occasionally and temporarily. Therefore, he is not an ‘officer,’ within the meaning of the clause of the constitution referred to.”); Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 100–11 (2007).

⁶ *See* *Landry v. FDIC*, 204 F.3d 1125, 1132–33 (D.C. Cir. 2000) (“In fact, the earliest Appointments Clause cases often employed circular logic, granting officer status to an official based in part upon his appointment by the head of a department.”) (citing *United States v. Mouat*, 124 U.S. 303, 307 (1888); *Germaine*, 99 U.S. at 510; *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1867)); *Wise v. Withers*, 7 U.S. (3 Cranch) 331 (1806); John M. Burkoff, *Appointment and Removal Under the Federal Constitution: The Impact of Buckley v. Valeo*, 22 WAYNE L. REV. 1335, 1347 (1976).

⁷ *See, e.g.,* *United States v. Smith*, 124 U.S. 525, 531–32 (1888); *Mouat*, 124 U.S. at 307; *Burnap v. United States*, 252 U.S. 512, 516 (1920).

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ArtII.S2.C2.3.10
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In the 1976 case of *Buckley v. Valeo*, the Court established that “Officers of the United States” are those persons “exercising *significant authority* pursuant to the laws of the United States.”⁸ In that case, the Court examined the appointment of members of the Federal Election Commission (FEC) charged with regulating federal elections by enforcing the Federal Election Campaign Act.⁹ The FEC was composed of six members: four nominated by congressional leadership and two by the President, all of whom were subject to confirmation by both the Senate and House.¹⁰ In examining whether the FEC members wielded significant authority, the *Buckley* Court distinguished among three types of powers the members exercised: functions concerning (1) the flow of information—“receipt, dissemination, and investigation”; (2) the implementation of the statute—“rulemaking and advisory opinions”; and (3) the enforcement of the statute—“informal procedures, administrative determinations and hearings, and civil suits.”¹¹

The *Buckley* Court held that the first category of FEC duties could be performed by non-officers because they were “investigative and informative,” essentially “in aid of the legislative function of Congress.”¹² Such functions could therefore be exercised by individuals not appointed in conformity with the Appointments Clause.¹³ The latter two categories of functions, however, were executive in nature and constituted “significant authority.” The duties regarding implementation of the statute—including rulemaking, disbursal of funds, and decisions about who may run for a federal office—constituted significant authority that could be executed only by “Officers of the United States.”¹⁴ Likewise, the power to enforce the underlying statute, “exemplified by [the Commissioner’s] discretionary power to seek judicial relief” by instituting civil litigation to vindicate public rights, amounted to authority that, according to the Court, must be exercised by an officer appointed pursuant to the Appointments Clause.¹⁵ In a footnote, the Court contrasted the duties of officers with “employees of the United States,” who are “lesser functionaries subordinate to officers” and may be selected outside of the requirements of the Appointments Clause.¹⁶ The Court thus concluded that most of the powers granted to the FEC could only be wielded by officers of the United States, and therefore could not be exercised by the FEC because the selection of its members did not comply with the Appointments Clause.¹⁷

⁸ 424 U.S. 1, 126 (1976) (per curiam) (emphasis added), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81. Subsequent cases have followed the Court’s analysis of “significant authority.” See, e.g., *Edmond v. United States*, 520 U.S. 651, 662 (1997) (acknowledging that military appellate judges exercise “significant authority”); *Freytag v. Comm’r*, 501 U.S. 868, 881–82 (1991) (holding that special trial judges of Article I tax courts are “Officers of the United States” based on the degree of authority they exercise).

⁹ *Buckley*, 424 U.S. at 126. Congress had provided that the FEC be composed of eight members, which included six voting members and two nonvoting ex officio members. *Id.* at 113.

¹⁰ *Id.*

¹¹ *Id.* at 137.

¹² *Id.* at 138.

¹³ *Id.*

¹⁴ *Id.* at 140–41. The Court also noted with approval that prior decisions had found that a postmaster first class and the clerk of a district court qualified as officers. *Id.* at 126 (citing *Myers v. United States*, 272 U.S. 52 (1926) (postmaster) and *Ex parte Hennen*, 38 U.S. (13 Pet.) 225 (1839) (clerk)).

¹⁵ *Buckley*, 424 U.S. at 138, 140–41.

¹⁶ *Id.* at 126 n.162.

¹⁷ *Id.* at 143; see *id.* at 267–82 (White, J., concurring in part and dissenting in part) (confirming the majority opinion’s analysis on this point). While *Buckley*’s “significant authority” definition of an officer went beyond the Court’s prior jurisprudence on the matter, it arguably did not establish a *conclusive* test for what precisely constitutes significant authority. It bears mention in this vein that a Department of Justice Office of Legal Counsel (OLC) opinion, issued after *Buckley*, argued that two characteristics define an office of the United States. See *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 73 (2007). According to the OLC, the position must first be endowed with delegated sovereign authority, such as the power to “bind third parties, or the Government

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Nearly fifteen years after *Buckley*, the Supreme Court’s opinion in *Freytag v. Commissioner of Internal Revenue* again examined what responsibilities make an individual an officer of the United States, concluding that a special trial judge of the U.S. Tax Court qualified as such an officer.¹⁸ The Court ruled that special trial judges were officers because of the “significance of the duties and discretion” they possessed.¹⁹ First, the Court noted that the office of special trial judge was “established by Law”²⁰ and its “duties, salary, and means of appointment” were specified in statute.²¹ The Court contrasted the special trial judges with the position of special masters, who temporarily assisted Article III judges on an “episodic” basis, and whose positions, duties, and functions were not “delineated in a statute.”²² Second, special trial judges were entrusted with duties beyond “ministerial tasks,” exercising significant discretion in taking testimony, conducting trials, ruling on evidence, and enforcing compliance with discovery orders.²³ In addition, the Court noted that, even leaving aside these duties, special trial judges qualified as officers because the underlying statute authorized special trial judges, in certain circumstances, to render independently binding decisions.²⁴ The Commissioner conceded that for these purposes, special trial judges acted as officers, but argued that the petitioners lacked standing to challenge those aspects of the judges’ power.²⁵ The Court rejected this contention, concluding that it made no sense to consider special trial judges to operate as officers for some purposes, but not others.²⁶

In the 2018 case of *Lucia v. SEC*, the Supreme Court reaffirmed its analysis in *Freytag* and concluded that administrative law judges (ALJs) within the Securities and Exchange Commission (SEC) qualified as officers of the United States.²⁷ The Court reasoned that because the duties of SEC ALJs essentially mirrored those of the special trial judges in *Freytag*, the SEC ALJs also constituted officers.²⁸ As an initial matter, both held “a continuing office established by law.”²⁹ Further, special trial judges and SEC ALJs “exercise[d] the same ‘significant discretion’ when carrying out the same ‘important functions.’”³⁰ Both types of

itself, for the public benefit.” *Id.* at 87. In addition, the position must be “continuing.” *Id.* at 74. The OLC opinion offers two indicia of a continuing position. A position is continuing if it is “permanent, meaning that it is not limited by time or by being of such a nature that it will terminate by the very act of performance.” *Id.* at 111 (internal quotations omitted). Alternatively, even if a position is temporary (because of an expiration date, or due to the nature of its duties), the presence of three factors can nevertheless indicate a “continuing” position: (1) the existence of the position is not personal, meaning that the duties continue even if the person changes; (2) it is not a “transient” position, meaning that the more enduring the position is the more likely it constitutes an office; and (3) the duties of the position are more than “incidental” to the government’s operations. *Id.* at 100, 112.

¹⁸ The Court held that the special trial judge was an inferior officer, rather than an employee. *Freytag v. Comm’r*, 501 U.S. 868, 881–82 (1991). The Court subsequently made clear that the exercise of significant authority establishes the line not between inferior and principal officers, but between “officer and non-officer.” *Edmond v. United States*, 520 U.S. 651, 662 (1997). In other words, whether a position qualifies as an “inferior officer” under *Freytag* concerns the difference between employees and officers and is conceptually distinct from whether an officer is properly viewed as a principal or inferior officer. See ArtII.S2.C2.3.11.1 Overview of Principal and Inferior Officers.

¹⁹ *Freytag*, 501 U.S. at 881.

²⁰ *Id.* (quoting U.S. CONST. art. II, § 2, cl. 2.).

²¹ *Freytag*, 501 U.S. at 881.

²² *Id.*

²³ *Id.* at 881–82.

²⁴ *Id.* at 882.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Lucia v. SEC*, No. 17-130, slip op. at 1–4 (U.S. June 21, 2018).

²⁸ *Id.* at 6–8.

²⁹ *Id.* at 8.

³⁰ *Id.* (quoting *Freytag*, 501 U.S. at 878).

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officials were authorized to (1) “take testimony,”³¹ (2) “conduct trials,”³² (3) “rule on the admissibility of evidence,”³³ and (4) were entrusted with “the power to enforce compliance with discovery orders.”³⁴ Moreover, the Court observed, SEC ALJs actually had somewhat more independent authority to render decisions than did the special trial judges in *Freytag*: while a major decision made by the special trial judges had no force unless a Tax Court judge adopted it as his own, the SEC could decline to review an ALJ’s decision, in which case the decision became final and was “deemed the action of the Commission.”³⁵ Accordingly, because SEC ALJs were “near-carbon-copies” of the special trial judges in *Freytag*, they were officers who must be appointed pursuant to the Appointments Clause.³⁶ Importantly, the Court declined to elaborate on the significant authority test for determining whether an individual is an officer, reasoning that its analysis in *Freytag* resolved the case before it.³⁷ Because the petitioner had raised a “timely” Appointments Clause challenge, the Court remanded the case for a new hearing before a properly appointed ALJ or the Commission itself.³⁸

In addition, while not directly applying the significant authority test to determine whether an individual counts as an officer, at least one other case discussed previously may at least shed some light on what types of duties might be relevant in determining if an individual qualifies as an officer, at least in the Executive Branch. In the 1986 case of *Bowsher v. Synar*,³⁹ the Court held that a statute authorizing an official controlled by Congress to carry out duties that were executive in nature violated the separation of powers.⁴⁰ The statute entrusted the Comptroller General with preparing a report detailing estimates of projected federal revenues and outlays as well as any necessary reductions to reduce the projected deficit to a specified target.⁴¹ The Court reasoned that this required the Comptroller to “exercise judgment

³¹ *Id.* at 9 (quoting *Freytag*, 501 U.S. at 881) (quotation marks omitted). The Court noted that this included the authority to “receive evidence,” “examine witnesses,” and conduct pre-hearing depositions. *Id.* (quoting 17 C.F.R. §§ 201.111(c), 200.14(a)(4)) (quotation marks omitted).

³² *Id.* at 9 (quoting *Freytag*, 501 U.S. at 882) (quotation marks omitted). This power includes the ability to administer oaths, rule on motions, and determine the course of the hearing. *Id.*

³³ *Id.* (quoting *Freytag*, 501 U.S. at 882) (quotation marks omitted).

³⁴ *Id.* (quoting *Freytag*, 501 U.S. at 882) (quotation marks omitted). In arguing that SEC ALJs are not officers under *Freytag*, the amicus appointed by the Court to argue that SEC ALJs were employees (the Solicitor General agreed with the challengers in the case) proffered two distinctions between the power of Tax Court special trial judges and SEC ALJs. First, the amicus noted that the Tax Court special trial judges have more expansive power to compel compliance with discovery orders—including ordering fines and imprisonment—than do SEC ALJs. Writing for the Court, Justice Elena Kagan rejected this argument, noting that *Freytag* did not reference any particular method of compelling compliance with discovery, and observing that the less stringent power wielded by SEC ALJs, including the power to exclude parties and attorneys from the proceedings, was sufficient under the reasoning of *Freytag*. *Id.* at 9–11. Second, the amicus noted that the Tax Court’s rules provide that a special trial judge’s factual finding “shall be presumed” correct, Tax Court Rule 183(d), whereas the SEC regulations do not contain a similar deferential standard. Justice Kagan rejected this argument as well, noting that the level of deference given to factual findings was not relevant to the *Freytag* Court’s analysis. Further, Justice Kagan noted, the SEC frequently does afford a similar deference to its ALJs as a matter of practice. *Id.* at 9–13.

³⁵ *Id.* at 10 (quoting 15 U.S.C. § 78d–1(c)). See 17 C.F.R. §§ 201.360(d)(2).

³⁶ *Id.* at 6.

³⁷ *Id.*

³⁸ *Id.* at 12; see also *Ryder v. United States*, 515 U.S. 177, 182 (1995) (holding that “one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred”). Cf. *Carr v. Saul*, Nos. 19-1442, 20-105, slip op. at 2 (U.S. Apr. 22, 2021) (holding that petitioners, Social Security claimants, did not forfeit their Appointments Clause challenges by raising them for the first time in federal court and not before the administrative law judges who presided over their agency hearings).

³⁹ See ArtII.S2.C2.3.15.6 Later Twentieth Century Cases on Removal for additional discussion of the *Bowsher* decision.

⁴⁰ 478 U.S. 714, 717 (1986).

⁴¹ *Id.* at 732.

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concerning facts that affect the application of the Act [and] interpret the provisions of the Act to determine precisely what budgetary calculations are required.”⁴² The Comptroller enjoyed the final authority to determine budgetary cuts; and the President himself had to carry out the official’s directives.⁴³ The Court concluded that these duties were executive in nature.⁴⁴ However, under a statute passed years before, only Congress could remove the Comptroller through a joint resolution.⁴⁵ The Court ruled that, by placing executive power in an officer that Congress itself controlled, the legislature had “intruded into the executive function” and violated the Constitution’s separation of powers.⁴⁶

ArtII.S2.C2.3.11 Principal and Inferior Officers

ArtII.S2.C2.3.11.1 Overview of Principal and Inferior Officers

Article II, Section 2, 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 supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The Appointments Clause¹ establishes two tiers of officers:² (1) *principal* (or superior) officers, who must be appointed by the President with the Senate’s advice and consent,³ and (2)

⁴² *Id.* at 733.

⁴³ *Id.*

⁴⁴ *Id.* at 732–33.

⁴⁵ The Comptroller could also have been removed through impeachment. *Id.* at 728.

⁴⁶ *Id.* at 734.

¹ U.S. CONST. art. II, § 2, cl. 2.

² See *United States v. Germaine*, 99 U.S. 508, 509 (1878) (“The Constitution for purposes of appointment very clearly divides all its officers into two classes.”).

³ See *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (per curiam) (“Principal officers are selected by the President with the advice and consent of the Senate.”), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81. Although the Supreme Court has long used the term “principal officer” to describe the first category of officers subject to the Appointments Clause, the term itself derives, not from the Appointments Clause, but from the first clause of article II, section 2, which allows the President to require the written opinion of “the principal Officer in each of the executive Departments,” on subjects relating to the duties of their respective offices. See U.S. CONST. art. II, § 2, cl. 1; *NLRB v. SW Gen., Inc.*, No. 15-1251, slip op. at 1–2 (U.S. Mar. 21, 2017) (Thomas, J., concurring) (noting that the Court has “long denominated” the noninferior officers referenced in the Appointments Clause “principal” officers (citing *Germaine*, 99 U.S. at 509, 511)); *Germaine*, 99 U.S. at 511 (noting that in the same section of the Constitution that contains the Appointments Clause, “the President may require the opinion in writing of the principal officer in each of the executive departments, relating to the duties of their respective offices”); *Tucker v. Comm’r*, 135 T.C. 114, 122 (2010) (stating that “[t]he term ‘principal officer’ is not in the Appointments Clause but is borrowed from the immediately preceding clause (i.e., U.S. Const. art. II, sec. 2, cl. 1)”). Similarly, the Twenty-Fifth Amendment mentions the “principal officers of the executive departments. However, while the term “departments” is found in both clauses, it is unclear precisely how much relevance either provision has for interpreting the Appointments Clause.” *Compare Freytag v. Comm’r*, 501 U.S. 868, 886 (1991) (concluding that the Court should interpret the meaning of “Heads of Departments” “consistently with its interpretation in other constitutional provisions” and ruling that the Tax Court was not a department), *with id.* at 915 (Scalia, J., concurring in part and concurring in judgment) (arguing that the Tax Court is a Department because it is a “free-standing, self-contained entity in the Executive Branch”); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 511 (2010) (adopting the reasoning of Justice Antonin Scalia’s concurrence in *Freytag* and concluding that because the Securities and Exchange Commission “is a freestanding component of the Executive Branch, not subordinate to or contained within any other such component, it constitutes a ‘Departmen[t]’ for the purposes of the Appointments Clause”). Likewise,

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inferior officers, who must be appointed in the same manner unless Congress, by law, has vested their appointment in the President alone, in a court, or in a department head.⁴ Both types of “officers” are those individuals who occupy positions that wield “significant authority.”⁵ The difference between the two is nevertheless important as the Constitution provides different requirements for their appointment. The Supreme Court has observed that the Framers provided “little guidance” into where the line between principal and inferior officers “should be drawn.”⁶ Accordingly, the Court has fashioned its own standards for distinguishing these officers which have evolved over time.

The focus of the Court’s analysis in cases addressing the difference between principal and inferior officers has varied over time. The Court’s early Appointments Clause cases did not present a clear picture of the differences between principal and inferior officers, often focusing on the method Congress prescribed for a given officer’s appointment or the duration of an officer’s tenure.⁷ When questions concerning the principal-inferior officer distinction surfaced again in the second half of the twentieth century, the Court applied a functional, multi-factor analysis, which emphasized that inferior officers, relative to principal officers, had more constrained duties and less discretion.⁸ In 1997, the Court took a more formalist approach in defining the line between principal and inferior officers, holding that an inferior officer is one “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.”⁹

while the Opinions Clause includes the term “principal officer” and the Twenty-Fifth Amendment includes “principal officers,” whether the substantive construction of either term is relevant to the Appointments Clause is unclear. *See Morrison v. Olson*, 487 U.S. 654, 722 (Scalia, J., dissenting) (“Even an officer who is subordinate to a department head can be a principal officer.”); *Edmond v. United States*, 520 U.S. 651, 667 (1997) (Souter, J., concurring in part and concurring in the judgment) (reasoning that an individual may be a principal officer even if he has a superior); *NLRB v. SW Gen., Inc.*, slip op. at 1–2 (Thomas, J., concurring) (arguing that the general counsel of the NLRB may be a principal officer).

⁴ U.S. CONST. art. II, § 2, cl. 2; *see also Edmond*, 520 U.S. at 660 (“The prescribed manner of appointment for principal officers is also the default manner of appointment for inferior officers.”). By default all “Officers of the United States”—both those specifically enumerated in the Clause (e.g., ambassadors) and “all other Officers . . . whose Appointments are not . . . otherwise provided for”—must be appointed by the President with the Senate’s advice and consent, subject to Congress’s power to vest the appointment of “such inferior Officers, as they think proper” in the President alone, the courts of law, or department heads. U.S. CONST. art. II, § 2, cl. 2; *see also Myers v. United States*, 272 U.S. 52, 126–27 (1926) (“[T]he appointment of all officers, whether superior or inferior, by the President is declared to be subject to the advice and consent of the Senate. . . . [T]he legislative power of Congress . . . is excluded save by the specific exception as to inferior offices in the clause that follows, viz, ‘but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.’”).

⁵ *See* ArtII.S2.C2.3.10 Officer and Non-Officer Appointments. *See also Freytag*, 501 U.S. at 880–81 (examining the division between inferior officers and employees and analyzing the duties of particular inferior officers).

⁶ *Morrison*, 487 U.S. at 671.

⁷ The Court’s early focus on who appointed an individual has led some courts and commentators to describe the Court’s early Appointments Clause decisions as “circular.” *See Landry v. FDIC*, 204 F.3d 1125, 1132–33 (D.C. Cir. 2000) (stating that “the earliest Appointments Clause cases often employed circular logic, granting officer status to an official based in part upon his appointment by the head of a department”); John M. Burkoff, *Appointment and Removal Under the Federal Constitution: The Impact of Buckley v. Valeo*, 22 WAYNE L. REV. 1335, 1347 (1976) (arguing that the Court’s reasoning in its 1878 decision in *United States v. Germaine* “like much of the early law in this area, is entirely circular” because the *Germaine* Court had reasoned that a civil surgeon was an employee, not an inferior officer, because “none of the prescribed modes of appointment was used” in the surgeon’s hiring). *See United States v. Germaine*, 99 U.S. 508, 509 (1878).

⁸ The Supreme Court’s shift in focus to an official’s duties and discretion is also reflected in the test the Court announced in *Buckley* for who constitutes an officer (rather than a mere employee) under the Appointments Clause: an officer is “any appointee exercising significant authority pursuant to the laws of the United States.” *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81; *see also* ArtII.S2.C2.3.10 Officer and Non-Officer Appointments.

⁹ *Edmond v. United States*, 520 U.S. 651, 662–63 (1997). For more on the difference between functional and formalist approaches in separation of powers cases, *see* Intro.7.2 Separation of Powers Under the Constitution.

ARTICLE II—EXECUTIVE BRANCH

Sec. 2, Cl. 2—Powers, Advice and Consent: Appointments, Principal and Inferior Officers

ArtII.S2.C2.3.11.2

Early Doctrine on Principal and Inferior Officers

ArtII.S2.C2.3.11.2 Early Doctrine on Principal and Inferior Officers

Article II, Section 2, 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 supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

In cases arising in the nineteenth century and the early twentieth century, the Supreme Court—when it analyzed the issue at all—considered a range of factors in determining whether an official was a principal or an inferior officer, including who appointed the individual, the nature and purpose of the position established by Congress, the historical practice surrounding the appointment of such officials, and the practical consequences of requiring a particular method of appointment.¹ The following cases illustrate the Court's varied approaches to the question.

In *Ex parte Hennen*, the Supreme Court considered the authority of the U.S. District Court for the Eastern District of Louisiana (Louisiana district court) to appoint, and later to remove, the clerk of that court.² The Court held that without question, “a clerk is one of the inferior officers contemplated by [the] provision” in the Appointments Clause allowing Congress to vest the appointment of inferior officers in the courts of law.³ The Court appeared to base its holding on the fact that Congress, through a series of statutes, established the Louisiana district court and directed the judge of that court to appoint a clerk.⁴ In other words, Congress may have thought that clerks did not need to be appointed by the President because they did not constitute principal officers.

In *Ex parte Siebold*, the Supreme Court considered, among other issues, whether Congress had the authority to enact a law that required federal circuit courts to appoint election supervisors, who would monitor voting precincts within states where elections for congressional office were held. The challengers alleged that the election supervisors' duties were “entirely executive” (rather than judicial) in nature, so courts should not be permitted to appoint such officers.⁵ The Court analyzed the constitutionality of the allegedly interbranch

¹ See, e.g., *United States v. Germaine*, 99 U.S. 508, 510 (1878) (considering whether a civil surgeon appointed by the Commissioner of Pensions was an “Officer of the United States” by examining who appointed him and the nature of his employment); *Rice v. Ames*, 180 U.S. 371, 378 (1901) (holding that Congress had the authority to invest federal courts with the power to appoint “commissioners,” whose position Congress created and “who are not judges in the constitutional sense”); see generally John M. Burkoff, *Appointment and Removal Under the Federal Constitution: The Impact of Buckley v. Valeo*, 22 WAYNE L. REV. 1335, 1349 n.61 (1976) (positing that “[a]t this point in our constitutional history, the Supreme Court was rather clearly deferring to established appointment practice rather than leading the way in defining on its own who were officers and who were not through the exercise of certain substantive duties”).

² 38 U.S. (13 Pet.) 230, 256–61 (1839).

³ *Id.* at 258.

⁴ *Id.* The Court noted that Louisiana was not a state when Congress first established federal district courts and authorized them to appoint clerks who would serve in both the district courts and the circuit courts located in those districts. *Id.* However, through subsequent laws concerning Louisiana (i.e., providing for a temporary government, admitting Louisiana into the Union, and including it in the circuit court system), Congress established the Louisiana district court and gave the judge of that court the authority to appoint a clerk for the district who would also serve as the circuit court clerk. *Id.* The Court ultimately held that although the Louisiana district court had appointed the petitioner as its clerk, the court's subsequent appointment of a different clerk and notice to the petitioner effected his removal from that office. *Id.* at 258–61.

⁵ 100 U.S. 371, 397 (1879).

ARTICLE II—EXECUTIVE BRANCH

Sec. 2, Cl. 2—Powers, Advice and Consent: Appointments, Principal and Inferior Officers

ArtII.S2.C2.3.11.2

Early Doctrine on Principal and Inferior Officers

appointments on the apparent assumption that election supervisors were inferior officers.⁶ The Court reasoned that although “[i]t is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain,” the Constitution does not contain an “absolute requirement to this effect.”⁷

Just before the turn of the century, in *United States v. Eaton*, the Supreme Court considered the constitutionality of a statute allowing the President to “provide for the appointment of vice-consuls . . . in such manner and under such regulations as he shall deem proper,” in view of the Appointments Clause’s requirement of presidential nomination and Senate confirmation for the appointment of “consuls.”⁸ The Court held that vice-consuls, as defined in the statute, were inferior officers.⁹ The Court looked to the nature of the office and noted that it was temporary and subordinate to other offices. In particular, the President could only appoint vice-consuls in temporary situations, when there was an absence or vacancy. Even though vice-consuls assumed the duties of their superior officers in those circumstances,¹⁰ the Court reasoned that the delegation was “for a limited time and under special and temporary conditions,” and thus did not “transform[]” the vice-consuls into principal officers.¹¹

The Court also examined historical practices concerning the vice-consul position. The Court noted that while vice-consuls were nominated by the President and confirmed by the Senate in “the earlier periods of the Government,” those vice-consuls served as “permanent and in reality principal officers.”¹² The Executive’s prevailing practice in the case of consular office vacancies was to pay the acting officials as “de facto officers” for their temporary service, without requiring an appointment.¹³ Finally, the Court expressed concern that “the discharge of administrative duties would be seriously hindered” if the Court invalidated “any and every delegation of power to an inferior to perform under any circumstances or exigency the duties of a superior officer.”¹⁴

The Court thus concluded that the Appointments Clause’s reference to “consuls” (who appear to qualify as principal officers) “does not embrace a subordinate and temporary office like that of vice-consul as defined in the statute.”¹⁵ Because vice-consuls qualified as inferior officers, Congress could place the power to appoint them with the President alone as provided in the Appointments Clause.

In its 1931 decision in *Go-Bart Importing Co. v. United States*, the Court determined that a United States commissioner was an inferior officer based on his relationship with the federal

⁶ See *id.* (citing the portion of the Appointments Clause allowing Congress to vest the appointment of inferior officers in the President, the courts, or department heads).

⁷ *Id.*; see also *id.* at 398 (“The observation in the case of *Hennen* . . . that the appointing power in the clause referred to ‘was no doubt intended to be exercised by the department of the government to which the official to be appointed most appropriately belonged,’ was not intended to define the constitutional power of Congress in this regard, but rather to express the law or rule by which it should be governed.”).

⁸ 169 U.S. 331, 336 (1898) (internal quotation marks and citation omitted); U.S. CONST. art. II, § 2, cl. 2; see also *Eaton*, 169 U.S. at 339, 343–44.

⁹ *Eaton*, 169 U.S. at 343. The President subsequently delegated the appointment of vice-consuls, through regulations, to the Secretary of State. *Id.* at 337. The *Eaton* Court did not question the constitutionality of this delegation or the resulting method of appointment. See *id.* at 339, 343–44.

¹⁰ *Id.* at 336–37, 339.

¹¹ *Id.* at 343.

¹² *Id.* at 343–44.

¹³ *Id.* at 344.

¹⁴ *Id.* at 343.

¹⁵ *Id.*

ARTICLE II—EXECUTIVE BRANCH

Sec. 2, Cl. 2—Powers, Advice and Consent: Appointments, Principal and Inferior Officers

ArtII.S2.C2.3.11.2

Early Doctrine on Principal and Inferior Officers

district court that appointed him.¹⁶ At that time, a federal statute authorized federal district courts to appoint commissioners, and authorized the commissioners to perform numerous functions, including making arrests, imposing pretrial imprisonment or bail, issuing warrants, and enforcing the arbitration awards of foreign consuls in certain disputes.¹⁷ The Court held that, at least on the facts of the *Go-Bart* case, in considering the commissioner’s ability to issue an arrest warrant and conducted an arraignment, the commissioner was an inferior officer.¹⁸ The Court reasoned that all of the commissioner’s acts “were preparatory and preliminary to a consideration of the charge by a grand jury and . . . [upon indictment,] the final disposition of the case in the district court.”¹⁹ In this regard, the Court reasoned, the commissioner “acted not as a court, or as a judge of any court, but as a mere officer of the district court in proceedings of which that court had authority to take control at any time.”²⁰

As the foregoing cases demonstrate, no clear line separated principal from inferior officers during this time.

ArtII.S2.C2.3.11.3 Modern Doctrine on Principal and Inferior Officers

Article II, Section 2, 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 supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

In the late twentieth century, in cases addressing the difference between principal and inferior officers, the Court began to emphasize the duties and discretion accompanying each office in a multi-factor analysis.¹

In the 1988 case of *Morrison v. Olson*, the Court considered the constitutionality of the “independent counsel” provisions of the Ethics in Government Act.² The Act required the Attorney General to conduct a preliminary investigation into potential violations of certain federal criminal laws by certain high-ranking federal officials and to report his findings to a special court created by the act called the Special Division.³ It also authorized the Special Division to appoint an independent counsel upon the Attorney General’s application.⁴

In considering whether this independent counsel was a principal or an inferior officer, the Court declined to decide “exactly where the line falls” between the two types of officers.⁵

¹⁶ 282 U.S. 344, 352–53 (1931).

¹⁷ *Id.* at 353 n.2.

¹⁸ *Id.* at 352 (“United States commissioners are inferior officers.”); *see also id.* at 353–54 (declining to consider the relationship between the district court and its commissioners in “matters unlike that now before us”).

¹⁹ *Id.* at 354.

²⁰ *Id.*

¹ *See, e.g.,* Weiss v. United States, 510 U.S. 163, 194 (1994) (Souter, J., concurring) (concluding that military judges were inferior officers under the functional reasoning of *Morrison*). *See supra* Intro.7.2 Separation of Powers Under the Constitution.

² 487 U.S. 654, 659 (1988).

³ *Id.* at 660–61.

⁴ *Id.* at 661.

⁵ *Id.* at 671.

ARTICLE II—EXECUTIVE BRANCH

Sec. 2, Cl. 2—Powers, Advice and Consent: Appointments, Principal and Inferior Officers

ArtII.S2.C2.3.11.3

Modern Doctrine on Principal and Inferior Officers

However, in the Court’s view, “several factors” placed the independent counsel squarely on the “inferior officer’ side of that line.”⁶ First, the Attorney General had the authority to remove the independent counsel, which suggested that the latter was “to some degree ‘inferior’ in rank and authority.”⁷ Second, Congress, through the Ethics in Government Act, limited the independent counsel’s role to investigating and prosecuting specific federal crimes, granting him or her no authority to formulate federal policy or to exercise administrative duties apart from those necessary to operate this office.⁸ Third, the Special Division defined and thereby circumscribed the independent counsel’s prosecutorial jurisdiction to a “limited” sphere.⁹ And fourth, the independent counsel’s office was temporary in that it terminated upon the conclusion of the investigation.¹⁰ The Court held that “these factors relating to the ‘ideas of tenure, duration . . . and duties’ of the independent counsel are sufficient to establish that appellant is an ‘inferior’ officer in the constitutional sense.”¹¹

In *Edmond v. United States*, the Supreme Court considered whether judges of the Coast Guard Court of Criminal Appeals (Coast Guard Court) were principal or inferior officers in order to determine the constitutionality of the Secretary of Transportation’s appointments of civilian judges to that court.¹² The Supreme Court began by observing that its cases up to that point had “not set forth an exclusive criterion for distinguishing between principal and inferior officers”¹³ and that Coast Guard Court judges did not share all of the characteristics of officials previously held to be inferior officers.¹⁴ For instance, the position of Coast Guard Court judge was not limited in tenure or jurisdiction in the same way as the independent counsel position deemed to be an inferior office in *Morrison*.¹⁵ Although the Supreme Court acknowledged that the Coast Guard Court judges exercised “significant authority on behalf of the United States” (and were therefore officers), it held that such authority is a shared feature of inferior and principal officers and “marks, not the line between principal and inferior officer[s] . . . [but] the line between officer and non-officer.”¹⁶ Departing from its functional analysis in *Morrison*, the Court applied a more formal test—inferior officers are those “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.”¹⁷

The Supreme Court proceeded to identify two entities that directed and supervised the Coast Guard Court judges’ work.¹⁸ The first, the Judge Advocate General, exercised

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 671–72.

⁹ *Id.* at 661, 672.

¹⁰ *Id.* at 672.

¹¹ *Id.* (internal citation omitted) (quoting *United States v. Germaine*, 99 U.S. 508, 511 (1878)). The Court went on to hold that Congress had the authority to vest the power to appoint the independent counsel in the Special Division, a “specially created federal court,” because the Appointments Clause allows Congress to vest the appointment of inferior officers in, among other entities, the “Courts of Law.” *Id.* at 673–76.

¹² 520 U.S. 651, 658 (1997). At the time, the Coast Guard was situated within the Department of Transportation during times of peace. In 2002, Congress transferred the Coast Guard to the Department of Homeland Security for peacetime operations. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2249 (codified at 6 U.S.C. § 468(b)).

¹³ *Edmond*, 520 U.S. at 661.

¹⁴ *See id.*

¹⁵ *Id.*

¹⁶ *Id.* at 662 (citing *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81).

¹⁷ *Id.* at 662–63. *See* Intro.7.2 Separation of Powers Under the Constitution.

¹⁸ *Edmond*, 520 U.S. at 664.

ARTICLE II—EXECUTIVE BRANCH

Sec. 2, Cl. 2—Powers, Advice and Consent: Appointments, Principal and Inferior Officers

ArtII.S2.C2.3.11.3

Modern Doctrine on Principal and Inferior Officers

“administrative oversight” over the court by prescribing procedural rules for the court and formulating policies applicable to appeals of court-martial cases.¹⁹ The Judge Advocate General also had authority to remove Coast Guard Court judges from their judicial assignments at will.²⁰ The Supreme Court observed that the second entity exercising supervisory authority—the Court of Appeals for the Armed Forces (Appeals Court)—reviewed decisions of the Coast Guard Court in certain circumstances. In such cases, the Appeals Court deferred to the factual findings of the Coast Guard Court when there was “some competent evidence in the record to establish each element of the offense beyond a reasonable doubt” but ultimately had the power to reverse the Coast Guard Court’s decisions.²¹ The Supreme Court held that in view of the supervisory roles of the Judge Advocate General and the Appeals Court, and notwithstanding the limitations on the latter’s scope of review, the Coast Guard Court judges had “no power to render a final decision on behalf of the United States unless permitted to do so by other executive officers,” and thus were inferior, not principal, officers.²² Accordingly, the Court affirmed the validity of the Secretary of Transportation’s civilian appointments to the Coast Guard Court.²³

In 2010, the Supreme Court decided *Free Enterprise Fund v. Public Company Accounting Oversight Board (PCAOB or Board)*, a case centrally concerned with the constitutionality of limitations on the removal of members of the PCAOB, a board overseen by the Securities and Exchange Commission (SEC) and charged with, among other things, enforcing federal securities laws and promulgating professional accounting standards.²⁴ The Court first invalidated a statutory restriction on removing the PCAOB members, concluding that this good-cause removal protection violated Article II when combined with a second good-cause restriction on removing SEC members.²⁵ With this provision severed from the statute, the Court then rejected an additional constitutional challenge to the method of appointment of PCAOB members: the plaintiffs argued that, due to the significance of the duties the PCAOB members had, they were principal officers who must be appointed by the President and confirmed by the Senate.²⁶ The Court held, however, that the Board members were inferior, rather than principal, officers based on its reasoning in *Edmond*.²⁷ Specifically, the Court held that “[g]iven that the Commission is properly viewed, under the Constitution, as possessing the power to remove Board members at will, and given the Commission’s other oversight authority, we have no hesitation in concluding that under *Edmond* the Board members are inferior officers.”²⁸

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 654–55.

²² *Id.* at 655.

²³ *Id.* at 666.

²⁴ 561 U.S. 477, 485–86 (2010).

²⁵ The Court held that Congress could constitutionally limit the President’s power to remove a principal officer at will in certain circumstances, and it could likewise limit a principal officer’s power to remove an inferior officer at will, but it could not do both. *Id.* at 484, 495–96. Such “dual” limitations on removal were unconstitutional. *Id.* at 484, 492. For additional discussion of the *Free Enterprise Fund* decision as it relates to the removal of officers, see ArtII.S2.C2.3.15.7 Twenty-First Century Cases on Removal.

²⁶ *Free Enter. Fund*, 561 U.S. at 510. The Court held that the multi-member Commission is a department head for purposes of the Appointments Clause. *Id.* at 510–13.

²⁷ *Id.* at 510.

²⁸ *Id.* at 503–04 (“The Commission may, for example, approve the Board’s budget, § 7219(b), issue binding regulations, §§ 7202(a), 7217(b)(5), relieve the Board of authority, § 7217(d)(1), amend Board sanctions, § 7217(c), or enforce Board rules on its own, §§ 7202(b)(1), (c).”).

ARTICLE II—EXECUTIVE BRANCH
Sec. 2, Cl. 2—Powers, Advice and Consent: Appointments

ArtII.S2.C2.3.12
Departments Heads and Courts of Law

The Court considered the potential for review by a superior, Executive Branch official to be similarly critical in its 2021 decision in *United States v. Arthrex, Inc.*²⁹ *Arthrex* held that administrative patent judges’ ability to render unreviewable decisions in certain proceedings, combined with protections against at-will removal, was “incompatible” with their appointment as inferior officers.³⁰ To remedy the constitutional defect, the Court ruled that the Director of the Patent and Trademark Office could review administrative patent judges’ decisions unilaterally in the proceedings at issue, rendering “unenforceable” a particular statutory provision limiting the Director’s review.³¹

ArtII.S2.C2.3.12 Departments Heads and Courts of Law

Article II, Section 2, 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 supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

A related, recurring issue in the Court’s Appointments Clause jurisprudence is the meaning of the terms “Heads of Departments” and “Courts of Law.” For example, the Court in *Freytag v. Commissioner* analyzed whether the United States Tax Court was a “department” (headed by the Chief Judge) or a “court of law” in discussing the appointing authority for special trial judges of that court.¹ All nine Justices agreed that the Chief Judge could constitutionally appoint special trial judges, but they disagreed on the rationale. The five Justices in the majority opined that the Tax Court could not be a department because “departments” usually were denominated as such and headed by a cabinet officer.² The Court also observed that “[c]onfining the term ‘Heads of Departments’ . . . to executive divisions like the Cabinet-level departments constrains the distribution of the appointment power” because “Cabinet-level departments are limited in number and easily identified” and their heads “are subject to the exercise of political oversight and share the President’s accountability to the people.”³ In the end, the Court sustained the challenged provision by holding that the Tax Court, as an Article I court, was a “Court of Law” within the meaning of the Appointments Clause.⁴ The other four Justices would have held that the Tax Court, as an independent establishment in the Executive Branch, was a “Department” for purposes of the Appointments Clause.⁵

The Court has also indicated that for purposes of the Appointments Clause, “Heads of Departments” can be understood more broadly than simply applying to the head of a traditional Cabinet-level agency. In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Court invalidated as unconstitutional the combination of two layers of

²⁹ No. 19-1434 (U.S. June 21, 2021).

³⁰ *Id.* at 14.

³¹ *Id.* at 22.

¹ *Freytag v. Comm’r*, 501 U.S. 868, 884 (1991).

² *Id.*

³ *Id.* at 886

⁴ *Id.* at 890–92.

⁵ *Id.* at 901 (Scalia, J., concurring in part and concurring in the judgment).

ARTICLE II—EXECUTIVE BRANCH
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ArtII.S2.C2.3.12
Departments Heads and Courts of Law

removal protection for members of the PCAOB.⁶ The underlying statute provided that PCAOB members could only be removed for cause by the Securities and Exchange Commission (SEC). But the SEC members themselves could not be removed by the President except for cause. After invalidating the statutory removal protection for the PCAOB members, the Court ruled that appointment by the SEC of the PCAOB members was permissible under the Constitution.⁷

Because the Court had invalidated the removal protections for the PCAOB members, they were now removable at will by the SEC. And combined with the other oversight authority the SEC had over the PCAOB, according to its reasoning in *Edmond v. United States*, discussed earlier,⁸ the Court concluded that the Board members were inferior officers eligible to be appointed by head of a department under the Appointments Clause.⁹ Finally, the Court ruled that because the SEC “is a freestanding component of the Executive Branch, not subordinate to or contained within any other such component,” the SEC members qualified as a “Head” of a “Department” under the Appointments Clause.¹⁰

ArtII.S2.C2.3.13 Changing the Duties of an Existing Officer

Article II, Section 2, 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 supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Once an individual has been appointed to an office pursuant to the Appointments Clause, questions can arise concerning the circumstances in which an officer’s duties may be altered after the officer’s appointment. In the 1893 case of *Shoemaker v. United States*, the Court examined a statute that established a commission to oversee development of Rock Creek Park in the District of Columbia.¹ The Commission included two government officials who had already been appointed by the President and confirmed by the Senate to other positions, but the plaintiffs argued that they needed to be separately appointed and confirmed in order to serve on the Commission.² They argued that while Congress may create offices, it may not circumvent the Appointments Clause by vesting additional powers in an existing officer. The Court ruled that because the officers in question had already been appointed through advice and consent, new duties “germane” to their offices could be assigned to them without a subsequent appointment and confirmation.³ The Court rejected the appointments challenge because the new duties assigned to the officers were not “dissimilar to, or outside of the sphere

⁶ See *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 484 (2010).

⁷ *Id.* at 510–13.

⁸ See ArtII.S2.C2.3.11.3 Modern Doctrine on Principal and Inferior Officers.

⁹ *Free Enter. Fund*, 561 U.S. at 510.

¹⁰ *Id.* at 511.

¹ 147 U.S. 282, 298–99 (1893).

² *Id.* at 300–01.

³ *Id.*

ARTICLE II—EXECUTIVE BRANCH
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ArtII.S2.C2.3.13
Changing the Duties of an Existing Officer

of, their official duties.”⁴ Congress thus enjoys some discretion to “increase the power and duties of an existing office” without the necessity of a new appointment.⁵

Similarly, in the 1994 case of *Weiss v. United States*, the Court considered whether the selection of military judges to try criminal cases in the military justice system violated the Appointments Clause.⁶ Like the commissioners in *Shoemaker*, the military judges were already appointed by the President and confirmed by the Senate when they received their commissions as military officers.⁷ Selection for the role of military judges was made by the Judge Advocate General for each of the military service branches.⁸ The question in *Weiss* was whether serving as a military judge necessitated another appointment consistent with the Appointments Clause.⁹ The Court distinguished the situation in *Shoemaker*. *Shoemaker*’s germaneness test, the Court explained, helped to “ensure that Congress was not circumventing the Appointments Clause by unilaterally appointing an incumbent to a new and distinct office.”¹⁰ Unlike in *Shoemaker* where Congress had assigned specific, incumbent officers to new roles, here Congress had authorized the selection of an “indefinite number” of military judges “from among hundreds or perhaps thousands” of qualified commissioned officers.¹¹ Thus, in *Weiss*, the Court found “no ground for suspicion” that “Congress was trying to both create an office and also select a particular individual to fill” that office.¹²

Further, even if *Shoemaker*’s germaneness standard applied, the Court concluded that the test was nevertheless satisfied in *Weiss*.¹³ All military officers, the Court reasoned, “play a role in the operation of the military justice system,” as they are authorized to impose punishments and act as a summary court-martial or president of a court-martial without a judge.¹⁴ In the Court’s view, the military judge position is less distinct from other positions in the military than a judge in civilian society is from other civilian offices. Unless detailed to a court-martial, military judges have no more authority than another commissioned military officer.¹⁵ The Court concluded that the Appointments Clause did not require a separate appointment for military officers to the position of military judge.¹⁶

The Constitution thus does not give Congress unfettered discretion to augment the powers of existing offices. However, it may permit Congress to add duties that are germane to an office or to make an existing category of officers eligible for a new assignment akin to their existing duties, without requiring a new appointment. Given the paucity of case law on these issues, there may be limits that have not received extensive treatment by the Supreme Court. For instance, the Court has not had occasion to squarely address the hypothetical situation where

⁴ *Id.* at 301.

⁵ *Id.*

⁶ 510 U.S. 163, 165–69 (1994).

⁷ *Id.* at 170.

⁸ *Id.* at 168–69. The Court declined to rule on the constitutionality of a statutory provision authorizing the selection of civilians as military judges as that issue was not presented here, as the relevant military judges were military officers. *Id.* at 170 n.4. See 10 U.S.C. § 866(a)(1).

⁹ *Weiss*, 510 U.S. at 165.

¹⁰ *Id.* at 174.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 175–76.

¹⁵ *Id.*

¹⁶ *Id.* at 176. See also *Ortiz v. United States*, No. 16-1423 (U.S. June 22, 2018) (rejecting the argument that a military judge’s dual service on the military Court of Criminal Appeals (CCA) and the Court of Military Commission Review (CMCR) violated the Appointments Clause).

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ArtII.S2.C2.3.13
Changing the Duties of an Existing Officer

Congress grants additional duties to an inferior officer (who was not subject to Senate advice and consent) such that the new duties transform the position to that of a principal officer.¹⁷

ArtII.S2.C2.3.14 Interbranch Appointments

Article II, Section 2, 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 supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The Appointments Clause provides that Congress may vest the appointment of inferior officers with the President alone, department heads, or the courts of law.¹ Both the Executive and Judicial Branches may thus be vested with authority to appoint inferior officers, as that term has been understood by the Supreme Court.² One recurring issue in litigation in this area has been whether Congress may authorize one branch of government to appoint inferior officers in another branch. For instance, may Congress entrust the courts of law with the power to appoint officers in the Executive Branch? The Supreme Court first squarely addressed the issue in the 1879 case of *Ex parte Siebold*, which examined the constitutionality of placing the power to appoint election supervisors—officers whose duties were allegedly “entirely executive in character”—with the Circuit Courts.³ At issue was whether the Constitution permits “the courts of the United States to appoint officers whose duties are not connected with the judicial department.”⁴ The Supreme Court noted that the Constitution included no “absolute requirement” that Congress vest the “appointment of inferior officers in that department of the government . . . to which the duties of such officers pertain.”⁵ The Court reasoned that there was no “incongruity” between the judicial function and the appointment of election supervisors.⁶ Therefore, the Court ruled, the interbranch appointment by the Judiciary of election supervisors did not violate the Constitution.

Likewise, the 1987 Supreme Court case of *Young v. United States ex rel. Vuitton et Fils S.A.* affirmed the inherent power of the Judiciary to appoint individuals to prosecute certain

¹⁷ See generally *Weiss*, 510 U.S. at 182–83 (Souter, J., concurring) (explaining that such a situation, though not presented in the case, would violate the Constitution).

¹ U.S. CONST. art. II, § 2, cl. 2.

² See ArtII.S2.C2.3.11.1 Overview of Principal and Inferior Officers to ArtII.S2.C2.3.11.3 Modern Doctrine on Principal and Inferior Officers.

³ 100 U.S. 371, 397–99 (1879).

⁴ *Id.* at 397. The Court distinguished a prior case, *Ex parte Hennen*, which stated that the appointment power “was no doubt intended to be exercised by the department of the government to which the official to be appointed most appropriately belonged,” 38 U.S. (13 Pet.) 230, 258 (1839), as “not intended to define the constitutional power of Congress in this regard, but rather to express the law or rule by which it should be governed.” *Ex parte Siebold*, 100 U.S. at 398.

⁵ *Ex parte Siebold*, 100 U.S. at 397.

⁶ *Id.* at 398. The Court also appeared to approve of the judicial appointment of United States commissioners, who were granted certain executive powers by Congress, in *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 353–54, 353 n.2 (1931). See *Morrison v. Olson*, 487 U.S. 654, 676 (1988) (describing the Court’s decision in *Go-Bart* as “approv[ing] [the] court appointment of United States commissioners, who exercised certain limited prosecutorial powers”).

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crimes—namely, contempt proceedings.⁷ In that case, a federal district court appointed private attorneys to prosecute the defendants in a criminal contempt proceeding for violating a judicial injunction.⁸ The Court ultimately reversed the convictions because those private attorneys represented the beneficiary of the injunction and were thus unable to function as disinterested prosecutors on behalf of the government.⁹ However, it first expounded on the inherent power of the Judiciary to appoint private attorneys to prosecute criminal contempt proceedings.¹⁰ Although the power of prosecution is traditionally an executive function, the Judiciary nevertheless retains the inherent power to appoint attorneys to prosecute a contempt action in order to “vindicate” the Judiciary’s authority to “enforce orders and to punish acts of disobedience.”¹¹ The Court reasoned that a court’s power to initiate prosecutions for contempt was not limited to punishing “in-court contempts that interfere with the judicial process,” but included “out-of-court contempt[s], which require prosecution by a party other than the court.”¹²

One year later in 1988, the Supreme Court also upheld Congress’s power to vest the appointment of an independent prosecutor with the Judiciary. In *Morrison v. Olson*,¹³ the Court considered the constitutionality of the independent counsel statute,¹⁴ which required the Attorney General to apply in certain circumstances to a Special Division of the U.S. Court of Appeals for the D.C. Circuit for the appointment of an independent counsel.¹⁵ The Special Division was composed of three federal judges¹⁶ and enjoyed final authority to appoint and define the jurisdiction of an independent counsel, who would investigate and prosecute crimes committed by certain Executive Branch officials as well as individuals connected to presidential campaign committees.¹⁷ In considering a challenge to Congress’s authority to vest the appointment of the independent counsel outside the Executive Branch, the Court observed that the text of the Constitution appeared to give Congress broad discretion in choosing whether to place the appointment of inferior officers with the Judiciary, department heads, or the President.¹⁸ Further, the Court noted that its prior decision in *Siebold* rejected a requirement that the appointment of inferior officers be vested in the specific branch of government to which the duties of those officers relate.¹⁹ The Court explained that its prior decision in *Vuitton* had recognized a court’s inherent power to appoint private attorneys to prosecute criminal contempt proceedings. The Court also noted with approval Congress’s vestment of power with district courts to make interim appointments of United States Attorneys.²⁰ In light of these considerations, combined with the fact that the independent counsel statute barred judges of the Special Division from participating in any judicial

⁷ 481 U.S. 787, 793–801 (1987). *See also* 28 U.S.C. § 546(d) (authorizing district courts to appoint United States attorneys to fill vacancies in certain situations).

⁸ 481 U.S. at 789–92.

⁹ *Id.* at 803–14.

¹⁰ *Id.* at 793–801.

¹¹ *Id.* at 796 (quoting *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911)).

¹² *Id.* at 797.

¹³ 487 U.S. 654 (1988).

¹⁴ 28 U.S.C. §§ 591–599.

¹⁵ *Id.* §§ 591–593. For more on *Morrison v. Olson*, see ArtII.S2.C2.3.15.6 Later Twentieth Century Cases on Removal.

¹⁶ 28 U.S.C. §§ 49, 593.

¹⁷ *Id.* § 593.

¹⁸ *Morrison*, 487 U.S. at 673–74.

¹⁹ *Id.*

²⁰ *Id.* at 676–77; *see* 28 U.S.C. § 546.

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proceeding concerning matters that involve an independent counsel they appointed, the appointment of the independent counsel by the Judiciary did not infringe upon “the constitutional limitation on ‘incongruous’ interbranch appointments.”²¹

ArtII.S2.C2.3.15 Removals

ArtII.S2.C2.3.15.1 Overview of Removal of Executive Branch Officers

Article II, Section 2, 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 supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The Appointments Clause delineates the method of appointment for “Officers of the United States.” Other provisions of the Constitution indicate that both judges and Executive Officers may be removed through impeachment;¹ and both may also voluntarily retire from their positions.² However, while the Constitution elsewhere provides that judicial officers maintain their office for life,³ it is silent as to the tenure for Executive Branch officers.⁴ Historical practice and judicial decisions acknowledge that the President is empowered to remove those officers he appoints without assent from Congress.⁵ Congress has, however, historically enacted legislation that shields certain Executive Branch officials from removal except for cause, although exactly which types of officials may be protected is not settled definitively. Even for those officers who may be protected from at-will removal, Congress’s ability to insulate them from presidential control is not unlimited; for instance, Congress generally may not impose two layers of removal protection on a specific office (i.e., Congress may not provide that an inferior officer may only be removed for cause if his superior officer is also protected by a for-cause removal provision).⁶ As explained *infra*, in examining statutory protections from removal for Executive Branch officers, the Court has sometimes applied a formalist approach to interpreting the Constitution, stressing the importance of the text’s division of powers

²¹ *Morrison*, 487 U.S. at 677.

¹ See ArtII.S4.1 Overview of Impeachment Clause.

² See *Mimmack v. United States*, 97 U.S. 426, 436–37 (1878).

³ U.S. CONST. art. III, § 1.

⁴ *Id.* art. II, § 2, cl. 2.

⁵ The assent of the Senate is required when an individual’s appointment to an office serves to replace an existing principal officer. In that case, the prior officer is removed through the new appointment. *Blake v. United States*, 103 U.S. 227, 230, 237 (1880) (“It results that the appointment of Gilmore, with the advice and consent of the Senate, to the office held by Blake, operated in law to supersede the latter, who thereby, in virtue of the new appointment, ceased to be an officer in the army from and after, at least, the date at which that appointment took effect”); *Keyes v. United States*, 109 U.S. 336, 339 (1883); *Mullan v. United States*, 140 U.S. 240, 246–247 (1891); *Wallace v. United States*, 257 U.S. 541, 545 (1922). This principle does not extend to Article III judges, who enjoy life tenure. See *Auth. of the President to Prospectively Appoint a Sup. Ct. Justice*, 46 Op. O.L.C. 1, 1–2 (2022). In addition, the lawful appointment of a new inferior officer by the proper appointing authority can serve to remove the prior inferior officer from his position. *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 261 (1839) (“The power vested in the Court was a continuing power; and the mere appointment of a successor would, per se, be a removal of the prior incumbent, so far at least as his rights were concerned.”).

⁶ See ArtII.S2.C2.3.15.7 Twenty-First Century Cases on Removal.

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among the three branches.⁷ At other times it has applied a more functional analysis, giving Congress more room to design agencies as long as the broad background principle of a balance of power between the branches is respected.⁸

ArtII.S2.C2.3.15.2 Decision of 1789 and Removals in Early Republic

Article II, Section 2, 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 supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

While the Constitution provides that federal judges shall retain their “offices during good behavior,” which the Court has interpreted to mean that judges are entitled to life tenure absent resignation or impeachment,¹ it does not expressly specify how long Executive Branch officers may remain in office (although they may retire and are subject to impeachment).² The Framers’ understanding of the removal power—regarding both who wields the power to remove Executive Branch officers as well as the circumstances in which they may be removed—is not clear from the records of the Constitutional Convention or other contemporaneous documents.³ However, a major debate and decision of the First Congress on the matter, commonly known as the “Decision of 1789,” has informed the Nation’s understanding of where the removal power is placed,⁴ although scholars and judges disagree

⁷ See, e.g., *Seila Law LLC v. Consumer Fin. Prot. Bureau*, No. 19-7, slip op. at 11 (U.S. June 29, 2020) (“The entire ‘executive Power’ belongs to the President alone.”). For more on the difference between functional and formalist approaches in separation of powers cases, see Intro.7.2 Separation of Powers Under the Constitution.

⁸ See, e.g., *Morrison v. Olson*, 487 U.S. 654, 689–90 (1988) (“The analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President’s exercise of the “executive power” and his constitutionally appointed duty to “take care that the laws be faithfully executed” under Article II.”); see John F. Manning, *Separation of Powers As Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1952 (2011).

¹ See *Wellness Int’l Network, Ltd. v. Sharif*, 575 U.S. 665, 668 (2015) (describing “the protections of Article III” enjoyed by federal judges as including “life tenure and pay that cannot be diminished”).

² Compare U.S. CONST. art. III, § 1 (federal judges) with *id.* art. II, § 2, cl. 2 (officers generally).

³ For instance, courts and scholars have debated the significance of Alexander Hamilton’s understanding, expressed in the *Federalist Papers*, of the scope of the President’s removal power and the role of the Senate in removal decisions. See THE FEDERALIST NO. 77 (Alexander Hamilton) (appearing to argue that the President would require Senate consent under the Constitution to remove Executive Branch officers); ALEXANDER HAMILTON, PACIFICUS NO. I (June 29, 1793), in 4 THE WORKS OF ALEXANDER HAMILTON 432, 439 (Henry C. Lodge ed., 1971); *Myers v. United States*, 272 U.S. 52, 136–37 (1926) (majority opinion) (arguing that Hamilton originally believed that Senate consent was required to remove Executive Branch officers, but that he later changed his mind); *id.* at 293 & n.86 (Brandeis, J., dissenting) (noting Hamilton’s position in the *Federalist No. 77*); Seth Barrett Tillman, *The Puzzle of Hamilton’s Federalist No. 77*, 33 HARV. J.L. & PUB. POL’Y 149, 151 (2010) (arguing against the “standard or consensus view . . . that Hamilton was speaking to removal, [which] has been adopted by Supreme Court majorities and dissents, lower federal courts, and by academics in law and in other fields”); Jeremy D. Bailey, *The New Unitary Executive and Democratic Theory: The Problem of Alexander Hamilton*, 102 AM. POL. SCI. REV. 453, 458 (2008) (“If Hamilton is the father of the unitary executive, why did he write in *The Federalist* that the president would share the removal power with the Senate?”).

⁴ Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1022 (2006) (“One of the most significant yet less-well-known constitutional law decisions is the ‘Decision of 1789.’”); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 23 (1994) (noting the “great debate about the President’s removal powers that occurred when the first Congress created the first departments in the new government—a debate known as the Decision of 1789”).

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about the best understanding of that decision.⁵ The implications of the Decision of 1789 are particularly important because the Supreme Court has made clear that the views of the First Congress are “weighty evidence” of the Constitution’s meaning since many of the Framers were elected to that body.⁶

The Decision of 1789 concerns the debate in the First Congress over whether the Constitution authorizes the President to remove Executive Branch officers unilaterally.⁷ On May 19, 1789, Representative Elias Boudinot proposed establishing the executive departments of the Treasury, War, and Foreign Affairs;⁸ Representative James Madison subsequently proposed that the Secretaries of these Departments be removable by the President alone.⁹ The House debated the issue for over a month,¹⁰ focusing in particular on whether the President enjoyed power under the Constitution to remove government officers absent legislation specifically authorizing him to do so.¹¹ Congress eventually passed bills for each department that removed any explicit mention of removal authority, but provided that a lower-level department official would take custody of the department’s records whenever the department head “shall be removed from office by the President of the United States” or in any other case of a vacancy.¹²

The Supreme Court has cited the Decision of 1789 a number of times as congressional acknowledgment that Congress does not possess a direct role in the removal process.¹³ There is some dispute over whether a majority of legislators affirmed that the Constitution vests the President with removal authority, or whether no majority actually supported a specific position on the issue.¹⁴ Still, early historical practice confirms that the President’s power to appoint Executive Branch officers includes authority to remove them. In the 1926 case of *Myers v. United States*, the Supreme Court opined that the Decision of 1789 affirmed that the President is entrusted with power to remove those officers he appoints, a proposition that “was soon accepted as a final decision of the question by all branches of the government.”¹⁵

The Nation’s first two Presidents, George Washington and John Adams, each unilaterally removed Executive Branch officers, although neither of them removed a large number of

⁵ See Prakash, *supra* note 4, at 1023–25 (describing different understandings of the debate espoused by scholars and judges). Compare *Myers v. United States*, 272 U.S. 52, 114 (1926) (Taft, J.) (“[T]here is not the slightest doubt, after an examination of the record, that the vote was, and was intended to be, a legislative declaration that the power to remove officers appointed by the President and the Senate vested in the President alone, and until the Johnson impeachment trial in 1868 its meaning was not doubted, even by those who questioned its soundness.”), and 5 JOHN MARSHALL, *THE LIFE OF GEORGE WASHINGTON* 200 (1807), with DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801*, at 41 (1997) (arguing that “there was no consensus” in the House regarding whether the President received the removal power from “Congress or the Constitution itself”), and 1 CORWIN ON THE CONSTITUTION 332 (Richard Loss ed., 1981).

⁶ *Bowsher v. Synar*, 478 U.S. 714, 723 (1986) (quoting *Marsh v. Chambers*, 463 U.S. 783, 790 (1983)); *Myers v. United States*, 272 U.S. 52, 146 (1926).

⁷ See JOSH CHAFETZ, *CONGRESS’S CONSTITUTION, LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS* 100 (2017); Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 *YALE L.J.* 1256, 1282–89 (2006). For a record of the debate in Congress, see 1 *ANNALS OF CONG.* 384–412, 473–608, 614–31, 635–39 (1789).

⁸ 1 *ANNALS OF CONG.* 368–69 (1789).

⁹ 1 *ANNALS OF CONG.* 371 (1789).

¹⁰ CURRIE, *supra* note 5, at 36.

¹¹ CURRIE, *supra* note 5, at 36–41.

¹² See Act of Jul. 27, 1789, ch. 4, § 2, 1 Stat. 28, 29; Act of Sept. 2, 1789, ch. 12, § 7, 1 Stat. 65, 67; Act of Aug. 7, 1789, ch. 7, § 2, 1 Stat. 49, 50.

¹³ See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 723 (1986); *Myers v. United States*, 272 U.S. 52, 146 (1926); *Parsons v. United States*, 167 U.S. 324, 338–43 (1897).

¹⁴ CHAFETZ, *supra* note 7, at 100–01; PRAKASH, *supra* note 4, at 1023–25.

¹⁵ 272 U.S. 52, 136 (1926).

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officials.¹⁶ President Thomas Jefferson, although initially considered an opponent of a powerful Executive, likewise exercised this power, removing more officials than either Washington or Adams.¹⁷ Presidents James Madison, James Monroe, and John Quincy Adams also exercised the power of removal over Executive Branch officers, although they appear to have each removed a smaller number than Jefferson.¹⁸ This historical practice of presidential removal of Executive Branch officers was reinforced by Attorney General opinions affirming the President's constitutional power to do so.¹⁹ Congress, however, asserted some control over the tenure of certain Executive Branch positions. During the Administration of President Monroe, Congress passed the Tenure of Office Act of 1820, which provided that certain Executive Officers be appointed for a term of four years, "but shall be removable from office at pleasure."²⁰

ArtII.S2.C2.3.15.3 Removals in Jacksonian America Through the Nineteenth Century

Article II, Section 2, 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 supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

While the first six Presidents of the young Republic exercised the power of removal over Executive Branch officers on a somewhat limited basis, President Andrew Jackson replaced more officials than all Presidents before him combined.¹ He instituted what was commonly known as the "spoils system," wherein a new presidential administration would remove a large number of federal officials and replace them with supporters.² Jackson embraced the Tenure of Office Act of 1820³ and argued that "rotation in office" would improve government operations and serve a democratizing function that would curb the importance of privilege in

¹⁶ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1537 (1833).

¹⁷ STORY, *supra* note 16, § 1537; Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451, 1478–95, 1499–1501 (1997); LEONARD D. WHITE, THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY 285–88 (1948).

¹⁸ STORY, *supra* note 16, § 1537; CALABRESI & YOO, *supra* note 17, at 1507–26; LEONARD D. WHITE, THE JEFFERSONIANS: A STUDY IN ADMINISTRATIVE HISTORY 1801–1829, at 379–80 (1951).

¹⁹ See, e.g., Dismissal of a Paymaster Under Act of 1823, 2 Op. Att'ys Gen. 67 (1828) ("Mr. Clark held his commission as paymaster during the pleasure of the President; and the power of the President to dismiss him, at pleasure, is not disputed.").

²⁰ Act of May 15, 1820, ch. 102, § 1, 3 Stat. 582, 582.

¹ DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848 at 331–34 (2007); MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS 52–53 (2003) [hereinafter GERHARDT, APPOINTMENTS]; CARL R. FISH, THE CIVIL SERVICE AND THE PATRONAGE 74 (1905). It appears that although President Jackson removed more officers than all his predecessors had combined, due to the smaller size of government at the time, President Jefferson removed a larger percentage of federal officers. PAUL P. VAN RIPER, HISTORY OF THE UNITED STATES CIVIL SERVICE 30, 34–36 (1958); Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451, 1533 (1997).

² HOWE, *supra* note 1, at 333–34; ARTHUR SCHLESINGER, JR., THE AGE OF JACKSON 46–47 (1945).

³ GERHARDT, APPOINTMENTS, *supra* note 1, at 52–53.

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governmental offices.⁴ Perhaps most famously, amidst conflict with Congress over the status of the Second Bank of the United States, Jackson dismissed Treasury Secretary William Duane.⁵ Duane had effectively refused to withdraw federal monies from the Bank as instructed by President Jackson, so he was replaced by Roger Taney, who did.⁶ A major fight with Congress ensued, and the Senate eventually passed a resolution in 1834 condemning Jackson's actions.⁷ Congress did not, however, reverse Jackson's decision or pass legislation preventing such action in the future. Following a change in party control, the Senate expunged the prior censure in 1837.⁸

Presidents that followed Jackson largely continued the practice of removing Executive Branch officers, although their stated reasons for doing so varied. For example, President Martin Van Buren, who succeeded Jackson in office, continued the spoils system, removing Executive Branch officers at will and replacing them with party loyalists.⁹ In contrast, the Nation's ninth president, William Henry Harrison, who had defeated Van Buren in 1841 and became the first Whig elected president, pledged not to replace Executive Branch officers for political reasons. Though Harrison died within a month after his inauguration, his brief record is somewhat mixed on the matter.¹⁰ Harrison was succeeded by his Vice President John Tyler.¹¹ Although Tyler initially vowed, consistent with Harrison's Whig principles, not to remove Executive Branch officials for partisan reasons, he quickly did exactly that during his nearly four full years in office.¹² Opinions from his Attorney General issued during Tyler's time in office affirmed presidential removal authority in opinions that have informed subsequent practice and consideration of the removal power.¹³ Attorney General Hugh S. Legare argued that, following the Decision of 1789, the whole country had acquiesced to the power of the President to remove Executive Branch officers.¹⁴ One year later, he reaffirmed this conviction, noting that "Whatever I might have thought of the power of removal from office, if the subject were *res integra*, it is now too late to dispute the settled construction of 1789."¹⁵ Likewise, President Zachary Taylor, also a member of the Whig party, removed nearly two-thirds of the prior President James Polk's appointees in his first year in office.¹⁶

The scope of the President's removal authority was at the center of the first impeachment of a United States President.¹⁷ Congress on March 2, 1867 reauthorized (and amended), over

⁴ ANDREW JACKSON, FIRST ANNUAL MESSAGE (Dec. 8, 1829), in 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 309, 310 (James D. Richardson ed., 1897); Calabresi & Yoo, *supra* note 1, at 1478–95, 1531–32; HOWE, *supra* note 1, at 333–34. It appears that Presidents Jefferson and Monroe also embraced rotation in office. MICHAEL J. GERHARDT, FORGOTTEN PRESIDENTS 32 (2013) [hereinafter GERHARDT, FORGOTTEN].

⁵ HOWE, *supra* note 1, at 373–92; Calabresi & Yoo, *supra* note 1, at 1538–59.

⁶ HOWE, *supra* note 1, at 388.

⁷ 10 REG. DEB. 58 (1833); 10 REG. DEB. 1187 (1834). See CLAUDE G. BOWERS, THE PARTY BATTLES OF THE JACKSON PERIOD 330 (1965).

⁸ 13 REG. DEB. 504–05 (1837); Calabresi & Yoo, *supra* note 1, at 1558–59; see United States Senate, Party Division, <https://www.senate.gov/history/partydiv.htm> (last visited June 27, 2022).

⁹ GERHARDT, FORGOTTEN, *supra* note 4, at 18–19; LEONARD D. WHITE, THE JACKSONIANS: A STUDY IN ADMINISTRATIVE HISTORY, 1829–1861, at 309 (1954).

¹⁰ GERHARDT, FORGOTTEN, *supra* note 4, at 31–33; WHITE, *supra* note 9, at 311.

¹¹ GERHARDT, FORGOTTEN, *supra* note 4, at 37–45. Tyler was initially a member of the Democratic party, but left and was elected on the newly-formed Whig ticket. He was expelled from the Whigs after vetoing a legislative bill. *Id.*

¹² GERHARDT, FORGOTTEN, *supra* note 4, at 50–51.

¹³ GERHARDT, FORGOTTEN, *supra* note 4, at 50–51.

¹⁴ Power of President to Fill Vacancies, 3 Op. Att'ys Gen. 673, 673–76 (1841).

¹⁵ Military Power of the President to Dismiss From Serv., 4 Op. Att'ys Gen. 1, 1–2 (1842).

¹⁶ GERHARDT, FORGOTTEN, *supra* note 4, at 74; GERHARDT, APPOINTMENTS, *supra* note 1, at 52–55.

¹⁷ See ArtII.S4.4.4 President Andrew Johnson and Impeachable Offenses.

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the veto of President Andrew Johnson, the Tenure of Office Act.¹⁸ That law provided that Executive Branch officers who had been Senate-confirmed (as well as future such officers) were entitled to remain in their position until a replacement was confirmed.¹⁹ The law also provided that certain positions would retain their offices for the full term of the President who appointed them, plus one month thereafter, unless the Senate consented to their removal.²⁰ Johnson subsequently fired his Secretary of War Edwin Stanton without Senate approval. On February 24, 1868, the House voted to impeach President Johnson.²¹ An important point of contention at the trial in the Senate was whether the Tenure of Office Act protected Stanton at all due to his appointment by President Abraham Lincoln, rather than President Johnson.²² The Senate ultimately failed to convict President Johnson by one vote on three different articles, and it failed to vote on the remaining eight.²³ The Tenure of Office Act of 1867 was amended in 1869²⁴ and requirements concerning Senate approval for removal were repealed in 1887.²⁵

By the end of the nineteenth century, the Supreme Court affirmed that the President enjoyed the sole power of removal over Executive Branch officers.²⁶ In the 1897 case of *Parsons v. United States*, the Court concluded that the President was authorized to remove a U.S. attorney, even though the Tenure of Office Act of 1820 provided that the term of appointment was four years.²⁷ The Court reasoned that the Decision of 1789 and consistent government practice since indicated that the President enjoys the power of removal.²⁸ It thus interpreted the statute to establish that a term of office expired after four years, but did not bar the President from removing a U.S. attorney before that time.²⁹ Likewise, in 1903, the Court in *Shurtleff v. United States* reaffirmed this understanding of the President's power.³⁰ That case concerned a suit for back pay by a Senate-confirmed Executive Branch official who was removed without notice or a hearing. The statute establishing the officer's position provided that the President could remove him "for inefficiency, neglect of duty, or malfeasance in office."³¹ The Court concluded that while notice and a hearing might be required when an officer is removed for the reasons specified in the statute, the President also had authority to remove the officer for other reasons entirely and, in those circumstances, was not required to

¹⁸ Tenure of Office Act, ch. 154, 14 Stat. 430 (1867).

¹⁹ *Id.*

²⁰ *Id.*

²¹ CONG. GLOBE, 40th Cong. 2d Sess., 1400 (1868).

²² WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 221 (1992).

²³ 3 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 2443 (1907); see REHNQUIST, *supra* note 22, at 234–35.

²⁴ See Act of Apr. 5, 1869, ch. 10, §§ 1–2, 16 Stat. 6, 6–7. See Rev. Stat. 1767 (1875) ("Every person holding any civil office . . . by and with the advice and consent of the Senate . . . shall be entitled to hold such office during the term for which he was appointed, unless" removed with Senate consent or replaced with Senate consent).

²⁵ Act of Mar. 3, 1887, ch. 353, 24 Stat. 500.

²⁶ *Parsons v. United States*, 167 U.S. 324, 338–43 (1897). The Court in 1886 affirmed the authority of Congress to restrict the removal of inferior officers by the head of a department for cause. *United States v. Perkins*, 116 U.S. 483, 485 (1886).

²⁷ *Parsons*, 167 U.S. at 338–43.

²⁸ *Id.* at 338–39.

²⁹ *Id.*

³⁰ 189 U.S. 311 (1903).

³¹ *Id.* at 313.

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provide such procedural protection.³² The Court thus rejected the suit because the President removed the officer for reasons other than those mentioned in the statute.³³

ArtII.S2.C2.3.15.4 Removals in the 1920s

Article II, Section 2, 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 supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Congress's authority to restrict the President's power to remove Executive Branch officers was squarely addressed by the Supreme Court in the 1926 case of *Myers v. United States*.¹ *Myers* concerned a postmaster who was removed from office in violation of a statute providing that postmasters could only be removed with the Senate's consent.² Chief Justice William Taft, a former President, writing for the Court in an opinion that took a formalist approach to the separation of powers, espoused a broad view of the President's authority under Article II.³ His opinion examined the history of removals of Executive Branch officials as well as the constitutional text, and concluded that Article II's vestment of executive power in the President bestowed on him "the general administrative control of those executing the laws,"⁴ including the "exclusive power of removal."⁵ The Chief Justice described the Decision of 1789 at length, concluding that the First Congress had determined that "the power of appointment carried with it the power of removal," a rule that was "acquiesce[d] [to] for nearly three-quarters of a century by all branches of the government."⁶ Congress had, Chief Justice Taft noted, disrupted this understanding by passing the Tenure of Office Act in 1867—which required Senate approval to remove Executive Branch officials and resulted in the impeachment of President Andrew Johnson—but, in the view of the Court, the Executive Branch never acquiesced to this assertion of power.⁷

The Court in *Myers* reasoned that Article II's vestment of executive power in the President authorized him to select subordinate officers and direct them in executing the law; and just as it was "essential" to select officers to execute the law, "so must be his power of removing those for whom he cannot continue to be responsible."⁸ In the Court's reading of the Constitution, the grant of the executive power to the President, supplemented by the duty to take care that the law is faithfully executed, meant that executive power includes "the exclusive power of

³² *Id.* at 315–19.

³³ *Id.*

¹ 272 U.S. 52 (1926). See *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 261 (1839) (concluding that courts authorized to appoint their own clerks also were empowered to remove them).

² *Myers*, 272 U.S. at 106–07. The case was brought by the postmaster's intestate and sought backpay. *Id.*

³ *Id.* at 131–77.

⁴ *Id.* at 163–64 ("[T]o 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.").

⁵ *Id.* at 122.

⁶ *Id.* at 119, 148.

⁷ *Id.* at 166–71.

⁸ *Id.* at 117.

removal.”⁹ The Court thus invalidated the statute before it insofar as the law denied to the President “the unrestricted power of removal” of Executive Branch officers.¹⁰

ArtII.S2.C2.3.15.5 Removals in the 1930s

Article II, Section 2, 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 supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Nine years after its decision in *Myers v. United States*, in which the Court invalidated a statute that prohibited the President from removing an executive official absent Senate approval,¹ the Supreme Court applied a much more functionalist approach in its analysis in another case addressing Congress’s authority to restrict the President’s removal authority.² In the 1935 case of *Humphrey’s Executor v. United States*, the Court upheld a statute that limited the President’s power to remove a Commissioner of the Federal Trade Commission (FTC).³ The statute in question provided that a Commissioner could be removed for “inefficiency, neglect of duty, or malfeasance in office.”⁴ The Commissioner’s estate brought suit seeking backpay after President Franklin Roosevelt dismissed him.⁵ In an opinion by Justice George Sutherland, the Court ruled that the President violated the statute because the law’s specification of reasons for removal was meant to be exclusive and he did not base his removal of the Commissioner on any of the grounds listed in the statute.⁶ The Court distinguished its prior decision in *Shurtleff*

⁹ *Id.* at 122.

¹⁰ *Id.* at 176.

¹ 272 U.S. 52 (1926).

² John F. Manning, *Separation of Powers As Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1952 (2011) (describing the Court in *Humphrey’s Executor* as “using functionalist reasoning to sustain independent regulatory agencies”).

³ 295 U.S. 602 (1935). It appears that the only instances of a President expressly removing an officer with for-cause protection after notice, a hearing, and finding that the statutory reasons for removal were met occurred in late 1912 and early 1913 when President Taft removed two members of the Board of General Appraisers. See Aditya Bamzai, *Taft, Frankfurter, and the First Presidential For-Cause Removal*, 52 U. RICH. L. REV. 691, 691–737 (2018). President Richard Nixon removed Raymond Lapin from his position as President of the Federal National Mortgage Association for “good cause,” but without conducting a hearing for articulating what behavior constituted that cause. *Id.* at 746–47. Lapin brought suit challenging the action but eventually dropped his challenge. *Id.* Following the Supreme Court’s 2021 decision in *Collins v. Yellen*, in which the Court ruled that a statutory removal protection for an agency with a single director was unconstitutional, President Biden removed the heads of two other agencies that had similar structural features and protection. See Matthew Goldstein et al., *Biden Removes Chief of Housing Agency After Supreme Court Ruling*, N.Y. TIMES (June 23, 2021), <https://www.nytimes.com/2021/06/23/us/biden-housing-agency-supreme-court.html>; Andrew Ackerman & Brent Kendall, *Biden Administration Removes Fannie, Freddie Overseer After Court Ruling*, WALL ST. J. (June 23, 2021), <https://www.wsj.com/articles/supreme-court-issues-mixed-ruling-on-government-seizure-of-fannie-freddie-profits-11624459222>. Jim Tankersley, *Biden Fires Trump Appointee as Head of Social Security Administration*, N.Y. TIMES (July 9, 2021), <https://www.nytimes.com/2021/07/09/business/biden-social-security-administration.html>; Andrew Restuccia & Richard Rubin, *Biden Ousts Social Security Chief*, WALL ST. J. (July 9, 2021), <https://www.wsj.com/articles/biden-ousts-social-security-chief-11625871710>.

⁴ See 15 U.S.C. § 41.

⁵ *Humphrey’s Ex’r*, 295 U.S. at 618–19.

⁶ *Id.* at 625–26.

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v. United States, which interpreted a statutory list of grounds for removal not to be exclusive,⁷ noting that while FTC Commissioners in *Humphrey’s Executor* were appointed to a specific term of office, the officer in *Shurtleff* had no such restriction on his tenure.⁸ In addition, the Court observed that Congress intended the Commission to be nonpartisan and not subject to the direction of the President.⁹

Turning to the constitutionality of limiting the President’s power of removal, the Court read its recent decision in *Myers* narrowly to establish only that Congress could not condition the President’s power to remove an Executive Branch officer on Senate approval.¹⁰ Because the statute before it did not do that, it did not run afoul of *Myers*. The Court determined that the officer in that case, a postmaster, was charged solely with executive functions, whereas the office of an FTC Commissioner was tasked with “quasi-legislative” and “quasi-judicial” functions. The Commission was not “an arm or an eye of the executive” and it “must be free from executive control” “in the exercise of its duties.”¹¹ The Court ruled that the Constitution permitted Congress, with respect to officers charged with quasi-legislative and quasi-judicial functions, to “fix the period during which they shall continue in office, and to forbid their removal except for cause . . .”; and that the President’s removal of a FTC Commissioner for reasons not listed in the statute thus violated the law.¹²

The Court’s approval in *Humphrey’s Executor* of restrictions on the President’s power of removal over the heads of certain federal agencies has influenced the structure of the modern administrative state.¹³ Congress has established a number of “independent” agencies that are headed by multi-member bodies whose officers may only be removed by the President for cause.¹⁴ These independent agencies stand in contrast to what may be considered traditional Executive Branch agencies, with a single head who is removable at will by the President.¹⁵ Because Congress has created a variety of agencies with various structural features,¹⁶ certain

⁷ See 189 U.S. 311 (1903).

⁸ *Humphrey’s Ex’r*, 295 U.S. at 622–24. The Court indicated that for the *Shurtleff* Court to interpret the removal provision as ensuring the life tenure of the appraiser “was so extreme as to forbid, in the opinion of the court, any ruling which would produce that result if it reasonably could be avoided.” *Id.* at 23.

⁹ *Id.* at 624–25.

¹⁰ *Id.* at 626.

¹¹ *Id.* at 628.

¹² *Id.* at 629–32.

¹³ The Court’s view in *Humphrey’s Executor* that the FTC did not wield executive power is no longer shared by the modern Court. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, No. 19-7, slip op. at 14 n.2 (U.S. June 29, 2020) (“The Court’s conclusion that the FTC did not exercise executive power has not withstood the test of time.”); *City of Arlington v. FCC*, No. 11-1545, slip op. at 13 n.4 (U.S. May 20, 2013) (noting that agency “activities take ‘legislative’ and ‘judicial’ forms, but they are exercises of—indeed, under our constitutional structure they must be exercises of—the ‘executive Power’”); *id.* at 4 (Roberts, C. J. dissenting, joined by Kennedy & Alito, JJ.) (“What the Court says in footnote 4 of its opinion is good, and true . . . The Framers did divide governmental power in the manner the Court describes, for the purpose of safeguarding liberty.”).

¹⁴ There are other indicia of independence for federal agencies, although for cause removal protection is likely the most prominent indicator. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2376 (2001) (describing the “core legal difference” between independent and Executive Branch agencies as “the strength of the President’s removal power”); Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 775–76 (2013) (“[T]he conventional wisdom is that there are two types of agencies: executive and independent. Each type of agency comes with a set of rules that govern how the President can interact with them. The consensus view is that the dividing line is the presence of a for-cause removal protection clause.”). *But see* Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1166 (2011) (“Legally enforceable for-cause tenure protection is neither necessary nor sufficient for operational independence.”).

¹⁵ Kagan, *supra* note 14, at 2376–77.

¹⁶ Anne Joseph O’Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 846 (2014) (“And there are organizations entirely within the federal government that do not fit squarely within the Executive Branch, including but encompassing far more than independent regulatory commissions and boards.”).

functions of a particular agency may (at least for constitutional purposes) be considered “executive” while others in the same agency may not.¹⁷

In the years following *Humphrey’s Executor*, scholars have debated the constitutionality of independent agencies whose heads are insulated from presidential control, as well as what limits the Constitution may place on Congress’s power to shield Executive Branch officers from removal.¹⁸ As discussed *infra*, Congress in the twentieth century has also enacted legislation insulating agency officials other than the heads of multimember boards from removal.¹⁹ However, Supreme Court decisions in the twenty-first century appear to reflect an increasing skepticism of such congressional limits on the President’s power to remove agency officials.²⁰

ArtII.S2.C2.3.15.6 Later Twentieth Century Cases on Removal

Article II, Section 2, 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 supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Although the number of cases squarely presenting the validity of for-cause removal protections is limited, the Court applied a functional analysis similar to *Humphrey’s Executor* in a number of twentieth-century cases that affirmed the constitutionality of statutory independence from the President for certain Executive Branch officers.¹ For instance, in the 1958 case of *Wiener v. United States*,² the Court ruled that even in the absence of an express statutory restriction on removal, the President acted illegally by removing a member of the War Claims Commission on the grounds that the President simply wanted a member of his own choosing.³ The Court read *Humphrey’s Executor* as limiting the scope of *Myers* to “purely executive officers” and approving for-cause protections for “quasi-judicial” officers.⁴ Examining the scope of the President’s power to remove members of the Commission, the Court focused on the “nature of the function[s] Congress vested” in the Commission and concluded that its purpose was judicial—adjudicating claims free from presidential or congressional influence.⁵

¹⁷ See, e.g., *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1341–42 (D.C. Cir. 2012) (concluding that “the powers in the Library [of Congress] and the [Copyright Royalty] Board to promulgate copyright regulations, to apply the statute to affected parties, and to set rates and terms case by case are ones generally associated in modern times with executive agencies rather than legislators. In this role the Library is undoubtedly a ‘component of the Executive Branch’” (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 511 (2010))).

¹⁸ Compare Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2–4 (1994) (asserting that the Framers did not envision a unitary Executive), with Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 547–50 (1994) (arguing that the theory of a unitary Executive flows from an originalist interpretation of the Constitution’s meaning). See also Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1276 (2014).

¹⁹ See ArtII.S2.C2.3.15.6 Later Twentieth Century Cases on Removal.

²⁰ See ArtII.S2.C2.3.15.6 Later Twentieth Century Cases on Removal.

¹ See, e.g., *Morrison v. Olson*, 487 U.S. 654, 659–60 (1988).

² The case presented another suit for backpay premised on an allegedly illegal removal.

³ 357 U.S. 349 (1958).

⁴ *Id.* at 352 (quoting *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 628 (1935)).

⁵ *Id.* at 353–56.

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Even though the statute was silent as to removal, the Court reasoned that because, “as one must take for granted,” the President was precluded from influencing the Commission with regard to adjudicating claims, Congress must not have intended “to have hang over the Commission the Damocles’ sword of removal” at will.⁶ The Court thus concluded that, due to its judicial character, the President lacked an inherent power of removal at will over the Commission.

The Court also took a functional approach in upholding the constitutionality of a statute insulating a federal prosecutor from executive control. Following the scandal of Watergate and resignation of President Richard Nixon, Congress passed the Ethics of Government Act of 1978.⁷ Title VI of that Act, the independent counsel statute, established a statutory mechanism for the appointment of a prosecutor by a Special Division of the U.S. Court of Appeals for the D.C. Circuit vested with a measure of independence from the Executive Branch.⁸ The Special Division enjoyed authority to appoint and define the jurisdiction of the prosecutor, who could only be removed “by the personal action of the Attorney General and only for good cause, physical or mental disability . . . , or any other condition that substantially impairs the performance of such independent counsel’s duties.”⁹

In the 1988 case of *Morrison v. Olson*, the Supreme Court upheld the independent counsel statute against a constitutional challenge.¹⁰ Writing for the Court, Chief Justice William Rehnquist concluded that the independent counsel was an inferior, rather than a principal, officer, whose appointment was not required to be made by the President subject to Senate confirmation.¹¹

The Court also held that the Independent Counsel Act’s provision limiting the authority of the Attorney General to remove the independent counsel for good cause did not impermissibly intrude on the President’s power under Article II.¹² The Court rejected a formalist rule that would bar statutory for-cause removal protections for any individual tasked with “purely executive” functions; instead, it applied a functional test and asked whether Congress has “interfere[d] with the President’s” executive power and his “duty to ‘take care that the laws be faithfully executed.’”¹³ The Court recognized that the independent counsel exercised “law enforcement functions that typically have been undertaken by officials within the Executive Branch,”¹⁴ but noted that the position nevertheless has a “limited jurisdiction and tenure and lack[ed] policymaking or significant administrative authority.”¹⁵ The Court reasoned that it did “not see how the President’s need to control” the independent counsel’s discretion “is so central to the functioning of the Executive Branch” as to demand a constitutional rule

⁶ *Id.* at 356.

⁷ See Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824.

⁸ *Id.* §§ 601–04, 92 Stat. at 1867–75 (codified at 28 U.S.C. §§ 591–99). The independent counsel provisions have since expired. 28 U.S.C. § 599. The statute required the Attorney General to apply in certain circumstances to a Special Division of the U.S. Court of Appeals for the D.C. Circuit for the appointment of an independent prosecutor. *Id.* § 593(a).

⁹ *Id.* § 596(a)(1).

¹⁰ 487 U.S. 654, 659–60 (1988). This issue was foreshadowed in the experiences of the special prosecutor charged with investigating events connected to the break-in at the Watergate Hotel and Office Building. See ArtII.S4.4.7 President Richard Nixon and Impeachable Offenses.

¹¹ *Morrison*, 487 U.S. at 671. The Court concluded that the independent counsel was an inferior officer because the independent counsel (1) was removable by the Attorney General for cause; (2) had a limited scope of duties; (3) possessed limited jurisdiction; and (4) was limited in tenure. *Id.* at 671–72. For more on the distinction between principal and inferior officers, see ArtII.S2.C2.3.11.3 Modern Doctrine on Principal and Inferior Officers.

¹² *Morrison*, 487 U.S. at 686–93.

¹³ *Id.* at 690 (quoting U.S. CONST. art. II, § 3, cl. 5).

¹⁴ *Id.* at 691.

¹⁵ *Id.*

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mandating removal at will.¹⁶ The Court also concluded that the removal provision did not “impermissibly burden[]” the President’s ability to control the independent counsel because the position could still be eliminated for cause.¹⁷

In addition, the Court concluded that the statute did not violate the separation of powers by undermining the Executive Branch’s powers or prohibiting that branch from carrying out its constitutional duties.¹⁸ The majority opinion reasoned that the statute ultimately gave “the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties.”¹⁹ This control, the Court concluded, arose from the ability of the Attorney General to remove the independent counsel for good cause.²⁰

While the Court’s functional analyses in *Humphrey’s Executor*, *Wiener*, and *Morrison* effectively allow removal protections for a range of federal entities, Congress’s power to create agencies independent from executive control is far from absolute. For instance, in the 1986 case of *Bowsher v. Synar*, the Supreme Court applied a much more formalist approach to a separation of powers dispute and invalidated a statute that gave an official controlled by Congress power to order decreases in federal spending.²¹ The Balanced Budget and Emergency Deficit Control Act of 1985²² gave the Comptroller General authority, in the event of a budget shortfall, to issue a report detailing federal revenue and expenditure estimates and the specific reductions needed to reduce the deficit to a statutory target.²³ The President was then required to order the “sequestration” of those funds pursuant to the Comptroller General’s report.²⁴

The Court held that vesting the Comptroller General with these authorities violated the separation of powers in light of Congress’s removal authority; a prior law had authorized Congress to remove the Comptroller General through a joint resolution.²⁵ The High Court explained that the Constitution’s division of power among the three branches of government barred “an active role for Congress in the supervision of officers charged with the execution of the laws it enacts.”²⁶ The Constitution explicitly provides no role for Congress in the removal of officers beyond impeachment.²⁷ Allowing Congress to exercise removal power over an officer engaged in executive functions “would, in practical terms, reserve in Congress control over the execution of the laws.”²⁸ Just as Congress may not itself execute the law, the Court said that it may not indirectly do so by “grant[ing] to an officer under its control what it does not

¹⁶ *Id.* at 691–92.

¹⁷ *Id.* at 692–93.

¹⁸ *Id.* at 695.

¹⁹ *Id.* at 693–96.

²⁰ *Id.* at 695–96; *cf. Id.* at 706 (Scalia, J., dissenting) (characterizing the Court’s assertion as “somewhat like referring to shackles as an effective means of locomotion”).

²¹ 478 U.S. 714, 735–36 (1986). *See* ArtII.S2.C2.3.6 Creation of Federal Offices to ArtII.S2.C2.3.9 Restrictions on Congress’s Authority.

²² Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038 (codified at 2 U.S.C. § 901 et seq.).

²³ *Bowsher*, 478 U.S. at 718, 732.

²⁴ *Id.* at 718.

²⁵ *Id.* at 736.

²⁶ *Id.* at 722.

²⁷ *Id.*

²⁸ *Id.* at 726. *Cf. Id.* at 740 (Stevens, J., concurring in the judgment) (“The fact that Congress retained for itself the power to remove the Comptroller General thus is not necessarily an adequate reason for concluding that his role in the Gramm-Rudman-Hollings budget reduction process is unconstitutional. It is, however, a fact that lends support to my ultimate conclusion that, in exercising his functions under this Act, he serves as an agent of the Congress.”); *Id.* at 765 (White, J., dissenting) (“I cannot accept, however, that the exercise of authority by an officer removable for cause by a

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possess.”²⁹ The Court reasoned that the Comptroller General’s duties under the statute amounted to “execution of the law” because he was charged with interpreting statutory provisions and exercising independent judgment in preparing budget estimates and reductions. Additionally, the Comptroller General had “the ultimate authority to determine the budget cuts to be made,” given that the President was required to carry out the Comptroller General’s report through a sequestration order.³⁰ The Court concluded that by entrusting an officer “subject to removal only by itself” with execution of the law, “Congress in effect has retained control over the execution of the Act and has intruded into the executive function.”³¹

ArtII.S2.C2.3.15.7 Twenty-First Century Cases on Removal

Article II, Section 2, 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 supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

In the twenty-first century, the Court has applied a somewhat formalist approach to removal cases, invalidating removal protections for Executive Branch officials in three different decisions. In the 2010 case of *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Court ruled that two layers of removal protection for an Executive Branch official impermissibly interfered with the President’s powers under Article II of the Constitution.¹ In that case, the Court examined the Public Company Accounting Oversight Board (PCAOB or Board), an entity created by the Sarbanes-Oxley Act of 2002 to oversee aspects of the accounting industry.² The Board’s members were appointed by the Securities and Exchange Commission (SEC) and were subject to the Commission’s oversight when issuing rules and sanctions.³ But the members of the PCAOB could not be removed from office except for good cause shown by the SEC in a formal proceeding.⁴ Because the President could not remove the SEC Commissioners themselves without cause,⁵ the Board members were thus insulated by two layers of removal protection.⁶

The Court’s opinion stressed the importance of accountability for government officers that the Appointments Clause and its concomitant power of removal ensure. The Court

joint resolution of Congress is analogous to the impermissible execution of the law by Congress itself, nor would I hold that the congressional role in the removal process renders the Comptroller an ‘agent’ of the Congress, incapable of receiving ‘executive’ power.”)

²⁹ *Id.* at 726.

³⁰ *Id.* at 732–33.

³¹ *Id.* at 734.

¹ See 561 U.S. 477, 484 (2010).

² 15 U.S.C. §§ 7211–20.

³ *Id.* § 7217.

⁴ *Free Enter. Fund*, 561 U.S. at 486.

⁵ SEC Commissioners do not actually have an explicit statutory removal protection, but both parties agreed and the Court decided the case with the understanding that the Commissioners nonetheless may not be removed by the President except for the standard enunciated in *Humphrey’s Executor*, 295 U.S. 602 (1935). *Id.* at 487.

⁶ *Id.* at 495–98.

acknowledged that it had upheld removal restrictions for the principal officers of independent agencies in *Humphrey’s Executor* and for certain inferior officers in *Morrison*, but concluded that the “novel” combination of dual for-cause removal restrictions “transform[ed]” the independence of the Board in a manner that impaired the President’s duty to execute the law.⁷ A second layer of removal protection meant that “[n]either the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control of the Board.”⁸ Dual for-cause removal protections inhibit the principle of accountability for Executive Branch officers because they infringe on the President’s “ability to execute the laws,” by preventing him from “holding his subordinates accountable for their conduct.”⁹ The Court emphasized that the public does not vote for agency officials, but “look[s] to the President to guide the ‘assistants or deputies . . . subject to his superintendence.’”¹⁰ In other words, the President must be able to hold agency officers accountable for their actions, because it is ultimately the President who is accountable to the people for actions of the Executive Branch, rather than Executive Branch officers.¹¹ Because the statute “grant[ed] the Board executive power without the Executive’s oversight,” Congress had “subvert[ed] the President’s ability to ensure that the laws are faithfully executed” in violation of Article II’s vestment of executive power in the President.¹²

The Court’s turn in the modern era toward a more formalist approach to interpreting the strictures of the Appointments Clause has been applied in two recent cases that further limit Congress’s ability to shape the administrative state. These decisions concluded that an independent agency with a single director insulated from presidential control violated the separation of powers.

In *Seila Law LLC v. Consumer Financial Protection Bureau (CFPB)*, the Supreme Court concluded that Congress could not provide for-cause removal protections for the head of the CFPB, an independent financial regulatory agency led by a single Director.¹³ The Court described the President’s removal power as “unrestricted,”¹⁴ rejecting the view that *Humphrey’s Executor* and *Morrison* “establish a general rule that Congress may impose ‘modest’ restrictions on the President’s removal power.”¹⁵ Instead, “the President’s removal power is the rule, not the exception.”¹⁶ The Court explained that after *Free Enterprise Fund*, only “two exceptions” to the rule requiring removability remained.¹⁷ First, under *Humphrey’s Executor*, Congress may sometimes “create expert agencies led by a *group* of principal officers

⁷ *Id.* at 496.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 497–98 (quoting THE FEDERALIST No. 72 (Alexander Hamilton)).

¹¹ *Id.* at 499 (“The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive’s control, and thus from that of the people.”).

¹² *Id.* at 498.

¹³ No. 19-7, slip op. at 2–3 (U.S. June 29, 2020). This case also involved questions of standing. *Id.* at 9. Among other arguments, a court-appointed amicus curiae claimed that “a litigant wishing to challenge an executive act on the basis of the President’s removal power must show that the challenged act would not have been taken if the responsible official had been subject to the President’s control.” *Id.* The Court rejected the idea that such a challenger has to prove this type of counterfactual, finding it sufficient to demonstrate an injury “from an executive act that allegedly exceeds the official’s authority.” *Id.* at 10.

¹⁴ *Id.* at 2.

¹⁵ *Id.* at 26. The court-appointed amicus curiae argued that the Court’s precedent established that Congress may generally limit the President’s removal power, with two exceptions: (1) “Congress may not reserve a role for *itself* in individual removal decisions”; and (2) Congress may not completely eliminate the President’s removal power. *Id.* at 26–27.

¹⁶ *Id.* at 27.

¹⁷ *Id.* at 13.

ARTICLE II—EXECUTIVE BRANCH

Sec. 2, Cl. 2—Powers, Advice and Consent: Appointments, Removals

ArtII.S2.C2.3.15.7

Twenty-First Century Cases on Removal

removable by the President only for good cause” if the agency does not exercise substantial executive power.¹⁸ In interpreting this 1935 case, the *Seila Law* Court interpreted *Humphrey’s Executor* narrowly, saying that this exception permitted for-cause removal protections for “a multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions *and* was said not to exercise any executive power.”¹⁹ The Court said that the second exception to the President’s removal power allowed at least some removal protections for inferior officers, as in *Morrison*, if those officers have “limited duties and no policymaking or administrative authority.”²⁰

The Court concluded in *Seila Law* that the CFPB Director did not fall within either of these two exceptions.²¹ The single Director was not a multimember expert body, and, in the view of the Court, could not be considered “a mere legislative or judicial aid.”²² Rather than performing merely reporting and advisory functions, the CFPB Director exercised executive power, possessing the authority “to promulgate binding rules fleshing out 19 federal statutes, [to] issue final decisions awarding legal and equitable relief in administrative adjudications,” and to seek “daunting monetary penalties” in enforcement actions in federal court.²³ Neither could the CFPB Director be considered an inferior officer with limited duties.²⁴ And the Court ruled that it would not recognize a new exception to the President’s removal authority for “an independent agency led by a single Director and vested with significant executive power.”²⁵ The Court described the CFPB’s structure as “unprecedented”²⁶ and “incompatible with our constitutional structure,”²⁷ saying that the agency’s structure violated the Constitution “by vesting significant governmental power in the hands of a single individual accountable to no one.”²⁸ Consequently, the Court concluded that the provision insulating the Director from removal was unconstitutional, severing the for-cause removal provision from the governing statute.²⁹

Shortly thereafter, in *Collins v. Yellen*, the Supreme Court ruled that the structure of the Federal Housing Finance Agency (FHFA) violated the Constitution’s separation of powers.³⁰

¹⁸ *Id.* at 2, 15–16. The Court said its decision in *Wiener* also fell within this exception. *Id.* at 15 (discussing *Wiener v. United States*, 357 U.S. 349 (1958)).

¹⁹ *Id.* at 15 (emphasis added). The Court stressed that “[r]ightly or wrongly, the Court viewed the [Federal Trade Commission (‘FTC’)] (as it existed in 1935) as exercising ‘no part of the executive power.’” *Id.* at 14 (quoting *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 628 (1935)). However, the Court also said that this conclusion has not withstood the test of time, and that the powers of the FTC—even as they existed in 1935—are now considered executive. *Id.* at 14 n.2.

²⁰ *Id.* at 16. This principle also extended to *Perkins*. *Id.* at 15 (discussing *United States v. Perkins*, 116 U.S. 483 (1886)).

²¹ *Id.* at 16–18.

²² *Id.*

²³ *Id.* at 17.

²⁴ *Id.*

²⁵ *Id.* at 18.

²⁶ *Id.* The Court acknowledged that there were four other relatively recent historical examples of Congress providing good-cause tenure to principal officers leading an agency, but dismissed these examples as also being controversial. *Id.* at 18–21 (discussing the Comptroller of the Currency, Office of the Special Counsel, Social Security Administration, and Federal Housing Finance Agency).

²⁷ *Id.* at 21.

²⁸ *Id.* at 23. The Court noted that the Executive Branch is the only branch led by a unitary head, and that the President’s power is checked through democratic and political accountability. *Id.* at 22–23. Individual Executive Branch officials may still wield significant authority, but that authority remains subject to the ongoing supervision and control of the elected President. *Id.* at 23.

²⁹ *Id.* at 30–33 (plurality opinion); *id.* at 1 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).

³⁰ No. 19-422, slip op. at 26–32 (U.S. June 23, 2021).

ARTICLE II—EXECUTIVE BRANCH

Sec. 2, Cl. 3—Powers, Senate Recess

ArtII.S2.C3.1

Overview of Recess Appointments Clause

Like the CFPB, the FHFA is headed by a single Director whom, under the statute establishing the agency, the President could remove only for cause.³¹ The *Collins* Court considered *Seila Law* to be “all but dispositive” of the constitutional question, reasoning that differences in the “nature and breadth” of the agencies’ respective regulatory authorities did not justify the constraint on the President’s removal power.³² The Court remanded the case for the lower courts to decide whether the challengers—shareholders of FHFA-regulated entities—were actually harmed by the existence of the statutory removal protection.³³

CLAUSE 3—SENATE RECESS

ArtII.S2.C3.1 Overview of Recess Appointments Clause

Article II, Section 2, 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.

The Recess Appointments Clause, authorizing the President to make temporary appointments when the Senate is not in session, was adopted by the Constitutional Convention without dissent and without debate regarding the intent and scope of its terms. In the *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.

Two fundamental textual issues arise when interpreting the Recess Appointments Clause. The first is the meaning of the phrase “the Recess of the Senate.” The Senate may recess both between and during its annual sessions,¹ but the time period during which the President may make a recess appointment is not clearly answered by the text of the Constitution. The second fundamental textual issue is what constitutes a vacancy that “may happen” during the recess of the Senate. If the words “may happen” are interpreted to refer only to vacancies that arise during a recess, then the President would lack authority to make a recess appointment to a vacancy that existed before the recess began. For over two centuries the Supreme Court did not address either of these issues,² leaving it to the lower courts and other branches of government to interpret the scope of the Recess Appointments Clause.³

³¹ 12 U.S.C. § 4512(b)(2).

³² *Collins*, slip op. at 26–29.

³³ *Id.* at 36.

¹ For a discussion of the procedural requirements that apply to “adjourn[ments],” see ArtI.S5.C4.1 Adjournment of Congress.

² See *NLRB v. Noel Canning*, 573 U.S. 513, 526 (2014).

³ For lower court decisions on the Recess Appointments Clause, see, e.g., *Evans v. Stephens*, 387 F.3d 1220, 122627 (11th Cir. 2004), *cert. denied*, 544 U.S. 942 (2005); *United States v. Woodley*, 751 F.2d 1008, 1012 (9th Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1048 (1986); *United States v. Allocco*, 305 F.2d 704, 712 (2d Cir. 1962), *cert. denied*, 371 U.S. 964 (1963); *In re Farrow*, 3 Fed. 112 (C.C.N.D. Ga. 1880). For prior Executive Branch interpretations of the Recess Appointments Clause, see 25 Op. OLC 182 (2001); 20 Op. OLC 124, 161 (1996); 16 Op. OLC 15 (1992); 13 Op. OLC 271 (1989); 6 Op. OLC 585, 586 (1982); 3 Op. OLC 314, 316 (1979); 41 Op. Att’y Gen. 463 (1960); 33 Op. Att’y Gen. 20 (1921); 30 Op. Att’y Gen. 314 (1914); 26 Op. Att’y Gen. 234 (1907); 23 Op. Att’y Gen. 599 (1901); 22 Op. Att’y Gen. 82 (1898); 19 Op. Att’y Gen. 261 (1889); 18 Op. Att’y Gen. 28 (1884); 16 Op. Att’y Gen. 523 (1880); 15 Op. Att’y Gen. 207 (1877); 14 Op. Att’y Gen. 563 (1875); 12 Op. Att’y Gen. 455 (1868); 12 Op. Att’y Gen. 32 (1866); 11 Op. Att’y Gen. 179 (1865); 10 Op.

ARTICLE II—EXECUTIVE BRANCH
Sec. 2, Cl. 3—Powers, Senate Recess

ArtII.S2.C3.1

Overview of Recess Appointments Clause

The Supreme Court ultimately adopted a relatively broad interpretation of the Clause in *National Labor Relations Board v. Noel Canning*.⁴ With respect to the meaning of the phrase “Recess of the Senate,” the Court concluded that the phrase applied to both inter-session recesses and intra-session recesses. In so holding, the Court, finding the text of the Constitution ambiguous,⁵ relied on (1) a pragmatic interpretation of the Clause that would allow the President to ensure the “continued functioning” of the federal government when the Senate is away,⁶ and (2) “long settled and established [historical] practice” of the President making intra-session recess appointments.⁷ The Court declined, however, to say how long a recess must be to fall within the Clause, instead holding that historical practice counseled that a recess of more than three days but less than ten days is “presumptively too short” to trigger the President’s appointment power under the Clause.⁸ With respect to the phrase “may happen,” the majority, again finding ambiguity in the text of the Clause,⁹ held that the Clause applied both to vacancies that first come into existence during a recess and to vacancies that initially occur before a recess but continue to exist during the recess.¹⁰ In so holding, the Court again relied on both pragmatic concerns¹¹ and historical practice.¹²

Even under a broad interpretation of the Recess Appointments Clause, the Senate may limit the ability to make recess appointments by exercising its procedural prerogatives. The Court in *Noel Canning* held that, for the purposes of the Recess Appointments Clause, the Senate is in session when the Senate says it is, provided that, under its own rules, it retains the capacity to transact Senate business.¹³ In this vein, *Noel Canning* provides the Senate with the means to prevent recess appointments by a President who attempts to employ the “subsidiary

Att’y Gen. 356 (1862); 4 Op. Att’y Gen. 523 (1846); 4 Op. Att’y Gen. 361 (1845); 3 Op. Att’y Gen. 673 (1841); 2 Op. Att’y Gen. 525 (1832); 1 Op. Att’y Gen. 631, 63334 (1823). For the early practice on recess appointments, see GEORGE HAYNES, *THE SENATE OF THE UNITED STATES* 77278 (1938).

⁴ *Noel Canning*, at 522–50 (2014).

⁵ *Id.* at 526–29. More specifically, the Court found nothing in dictionary definitions or common usage contemporaneous to the Constitution that would suggest that an intra-session recess was not a recess. The Court noted that, while the phrase “the Recess” might suggest limiting recess appointments to the single break between sessions of Congress, the word “the” can also be used “generically or universally,” see, e.g., U.S. CONST. art. I, § 3, cl. 5 (directing the Senate to choose a President pro tempore “in the Absence of the Vice-President”), and that there were examples of “the Recess” being used in the broader manner at the time of the founding. *Noel Canning*, at 526–29.

⁶ *Noel Canning*, at 528. (“The Senate is equally away during both an inter-session and an intra-session recess, and its capacity to participate in the appointments process has nothing to do with the words it uses to signal its departure.”).

⁷ The Court noted that Presidents have made “thousands” of intra-session recess appointments and that presidential legal advisors had been nearly unanimous in determining that the clause allowed these appointments. *Id.* at 529.

⁸ *Id.* at 538. The Court left open the possibility that some very unusual circumstance, such as a national catastrophe that renders the Senate unavailable, could require the exercise of the recess appointment power during a shorter break. *Id.*

⁹ The Court noted, for instance, that Thomas Jefferson thought the phrase in question could point to both vacancies that “*may happen to be*” during a recess as well as those that “*may happen to fall*” during a recess. *Id.* at 539 (emphasis added).

¹⁰ *Id.* at 518–20.

¹¹ *Id.* at 542–43 (“[W]e believe the narrower interpretation risks undermining constitutionally conferred powers [in that] . . . [i]t would prevent the President from making any recess appointment that arose before a recess, no matter who the official, no matter how dire the need, no matter how uncontroversial the appointment, and no matter how late in the session the office fell vacant.”).

¹² *Id.* at 543 (“Historical practice over the past 200 years strongly favors the broader interpretation. The tradition of applying the Clause to pre-recess vacancies dates at least to President James Madison.”).

¹³ *Id.* In the context of *Noel Canning*, the Court held that the Senate was in session even during a pro forma session, a brief meeting of the Senate, often lasting minutes, in which no legislative business is conducted. *Id.* at 554–56. Because the Journal of the Senate (and the Congressional Record) declared the Senate in session during those periods, and because the Senate could, under its rules, have conducted business under unanimous consent (a quorum being presumed), the Court concluded that the Senate was indeed in session. In so holding, the Court deferred to the

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method” for appointing officers of the United States (i.e., recess appointments) to avoid the “norm”¹⁴ for appointment (i.e., appointment pursuant to the Article II, Section 2, Clause 2).¹⁵

ArtII.S2.C3.2 Recess Appointments of Article III Judges

Article II, Section 2, 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.

Federal judges clearly fall within the terms of the Recess Appointments Clause, in the sense that the Clause broadly authorizes temporary appointments for “all Vacancies.” Nonetheless, other constitutional provisions could suggest hesitation before applying the Clause to Article III judges—although historically, Presidents have in fact made recess appointments to Article III courts.¹ The constitutional concern stems from the fact that Article III judges are appointed “during good behavior,” subject only to removal through impeachment.² 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. Although the Supreme Court has not considered this issue, some federal appeals courts have rejected constitutional attacks upon the status of federal judges given recess appointments.³

SECTION 3—DUTIES

ArtII.S3.1 The President's Legislative Role

Article II, Section 3:

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

authority of Congress to “determine the Rules of its Proceedings,” see U.S. CONST. art. I, § 5, cl. 2, relying on previous case law in which the Court refused to question the validity of a congressional record. *Noel Canning*, at 555 (citing *United States v. Ballin*, 144 U.S. 1, 5 (1892)).

¹⁴ *Noel Canning*, at 556–57.

¹⁵ It should be noted that, by an act of Congress, if a vacancy existed when the Senate was in session, the ad interim appointee, subject to certain exceptions, may receive no salary until he has been confirmed by the Senate. 5 U.S.C. § 5503 (2012). By targeting the compensation of appointees, as opposed to the President’s recess appointment power itself, this limitation acts as an indirect control on recess appointments, but its 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,” restricting payment to recess appointees might be invalid. *Staebler v. Carter*, 464 F. Supp. 585, 596 n.24 (D.D.C. 1979).

¹ See generally, e.g., Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 CARDOZO L. REV. 377 (2005).

² See ArtIII.S1.10.2.1 Overview of Good Behavior Clause.

³ *United States v. Woodley*, 751 F.2d 1008, 1012 (9th Cir. 1985) (en banc), cert. denied, 475 U.S. 1048 (1986). 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). The opinions in the courts 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, Earl Warren, William Brennan, and Potter 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).

ARTICLE II—EXECUTIVE BRANCH
Sec. 3—Duties

ArtII.S3.1
The President's Legislative Role

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

The first two clauses of Article II, Section 3 relate to the President's legislative role. The first clause, directing the President to report to the Congress on the state of the union, imposes a duty rather than confers a power and serves as the formal basis of the President's legislative leadership. The President's legislative role has grown substantially since 1900. This development, however, reflects changes in political and social forces rather than any pronounced change in constitutional interpretation. The rise of parties and the accompanying recognition of the President as party leader, the appearance of the National Nominating Convention and the Party Platform, and the introduction of the Spoils System all contributed to the growth of the President's legislative role.¹ While certain pre-Civil War Presidents, mostly of Whig extraction, professed hesitation regarding "usurping" legislative powers,² still earlier Presidents—including George Washington, Thomas Jefferson, and Andrew Jackson—took a very different line, albeit less boldly and persistently than their later successors.³ 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.⁴

The second clause of Article II, Section 3 authorizes the President to convene or adjourn the Houses of Congress in certain circumstances. 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.

ArtII.S3.2 Head of State

ArtII.S3.2.1 Early Doctrine on Receiving Ambassadors and Public Ministers

Article II, Section 3:

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

The third clause of Article II, Section 2 directs the President to "receive Ambassadors and other public ministers." An early opinion from Attorney General Caleb Cushing interpreted "Ambassadors and other public ministers" to encompass "all possible diplomatic agents which any foreign power may accredit to the United States."¹ According to John Bassett Moore in his famous International Law Digest, the term, as a practical construction of the Constitution, also

¹ N. SMALL, SOME PRESIDENTIAL INTERPRETATIONS OF THE PRESIDENCY (1932); W. BINKLEY, THE PRESIDENT AND CONGRESS (2d ed. 1962); EDWARD CORWIN, TOTAL WAR AND THE CONSTITUTION CHS. 1, 7 (1946).

² Presidents William Harrison, James Polk, Zackary Taylor, and Millard Fillmore all fathered sentiments to this general effect. See 4 MESSAGES AND PAPERS OF THE PRESIDENTS 1860, 1864 (J. Richardson ed. 1896); 6 *id.* at 2513–19, 2561–62, 2608, 2615.

³ See sources cited *supra*.

⁴ Warren, *Presidential Declarations of Independence*, 10 B.U. L. REV. 1 (1930).

¹ 7 Ops. Atty. Gen. 186, 209 (1855).

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Early Doctrine on Receiving Ambassadors and Public Ministers

encompasses all foreign consular agents who may not exercise their functions in the United States without an exequatur from the President.² The power to “receive” ambassadors and other foreign diplomatic and consular agents includes the right to refuse to receive them, to request their recall, to dismiss them, and to determine their eligibility under our laws.³

During the United States’ formative years, the Founders expressed differing views regarding the scope of the President’s reception power. Writing in 1790, Thomas Jefferson stated that “[t]he transaction of business with foreign nations is executive altogether.”⁴ The function “belongs . . . to the head of that department, except as to such portions of it as are specially submitted to the Senate.”⁵ Thus, when Edmond-Charles 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, then-Secretary of State Jefferson informed Genet 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.”⁶ Secretary Jefferson accordingly returned the consul’s commission and declared that the President would issue no exequatur to a consul except upon a commission correctly addressed.

Consistent with Jefferson’s view, Congress later in 1798 passed An Act to Prevent Usurpation of Executive Functions, or the Logan Act, which prohibits U.S. citizens from engaging in unauthorized negotiations with foreign governments having a dispute with the United States.⁷ Congress enacted the law in response to the actions of a Philadelphia Quaker named George Logan, who went to Paris on his own to negotiate with the French Government in an effort to avert war between France and the United States.⁸ The next year, 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 twenty-seventh article of the Jay Treaty rather than leaving the matter to the courts. In Marshall’s view, “[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.” Thus, according to Marshall, “the demand of a foreign nation can only be made on [the President],” and “any act to be performed by the force of the nation is to be performed through him.”⁹ Ninety-nine years later, a Senate Foreign Relations Committee took occasion to reiterate Marshall’s doctrine with elaboration.¹⁰

In contrast, James Madison expressed a more limited view of the President’s reception power. In his attack upon President George Washington’s Proclamation of Neutrality in 1793 at the outbreak of war between France and Great Britain, Madison argued that all large

² 5 JOHN BASSETT MOORE, INTERNATIONAL LAW DIGEST 15–19 (1906).

³ *Id.* at 4:473–548; 5:19–32.

⁴ *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) in 5 WRITINGS OF THOMAS JEFFERSON 161, 162 (P. Ford ed., 1895).

⁵ *Id.*

⁶ 4 JOHN BASSETT MOORE, *supra* note 2, at 680–81.

⁷ This measure is now contained in 18 U.S.C. § 953.

⁸ See Memorandum on the History and Scope of the Law Prohibiting Correspondence with a Foreign Government, S. Doc. No. 696, 64th Cong. (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 EDWARD CORWIN, *supra* note 1, at 183–84, 430–31.

⁹ 10 ANNALS OF CONG. 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)

¹⁰ 9S. Doc. No. 56, 54th Congress, 2d Sess. (1897).

ARTICLE II—EXECUTIVE BRANCH
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ArtII.S3.2.1

Early Doctrine on Receiving Ambassadors and Public Ministers

questions of foreign policy fell within the ambit of Congress, by virtue of its power to declare war. In support of this proposition, Madison disparaged the presidential function of reception, asserting that “little, if anything, more was intended by the [reception] clause, than to provide for a particular mode of communication, almost grown into a right among modern nations.”¹¹ The Clause, in his view, did nothing more than “point[] out the department of the government” that is “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.”¹² Accordingly, Madison concluded that “it would be highly improper to magnify the function into an important prerogative.”¹³ The right to receive ambassadors, in his view, did not grant the Executive the right to, for instance, recognize a new foreign government—a right that “belongs to the nation.”¹⁴

In defending Washington’s proclamation, Alexander Hamilton advocated for a broader view of the President’s reception power. Writing under the pseudonym Pacificus, Hamilton opined that

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 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.¹⁵

In Hamilton’s view, this right of the Executive, in certain cases, “to determine the condition of the nation” can sometimes “affect the exercise of the power of the legislature to declare war.”¹⁶ Nevertheless, Hamilton acknowledged that the Executive cannot control Congress’s exercise of that power. In his view, however, “the executive, in the exercise of its constitutional powers, may establish an antecedent state of things, which ought to weigh in the legislative decision,” such that the two branches share concurrent authorities in particular circumstances.¹⁷

Jefferson likewise did not officially support Madison’s point of view. Writing about his July 10, 1793 conversation with Genet, Jefferson noted that he informed Genet that Congress was not the United States’ sovereign. Instead, Congress was “sovereign in making laws only, the executive was sovereign in executing them, and the judiciary in construing them where they related to their department.”¹⁸ Thus, Jefferson explained to Genet, it is the President’s—and not Congress’s—responsibility “to see that treaties are observed,” and that “the Constitution had made the President the last appeal” for his decisions related to treaties.¹⁹

¹¹ 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 611 (1865).

¹² *Id.*

¹³ *Id.*

¹⁴ LETTERS OF HELVIDIUS, 5 WRITINGS OF JAMES MADISON 133 (G. Hunt ed., 1905).

¹⁵ LETTER OF PACIFICUS, NO. 1, 7 WORKS OF ALEXANDER HAMILTON 76, 82–83 (J. Hamilton ed., 1851).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ 4 J. MOORE, *supra* note 2, at 680–81.

¹⁹ *Id.*

ARTICLE II—EXECUTIVE BRANCH

Sec. 3—Duties: Head of State

ArtII.S3.2.2

Specific Cases on Receiving Ambassadors and Public Ministers

History has largely affirmed Hamilton’s view of the President’s reception power. After reviewing the circumstances surrounding the United States’ recognition of new states, governments, and belligerency before 1906, John Basset Moore observed that “[i]n every case, . . . the question of recognition was determined solely by the Executive.”²⁰ The President’s power to receive thus encompasses the power to recognize new states, communities claiming the status of belligerency, and changes of government in established states. By the same token, the power also encompasses the power to decline recognition, and thereby decline diplomatic relations with such new states or governments.²¹

ArtII.S3.2.2 Specific Cases on Receiving Ambassadors and Public Ministers

Article II, Section 3:

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

The question concerning whether Congress shares with the President the right 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, in 1897, made an elaborate investigation of the subject. The Committee concluded in a memorandum that “[t]he executive branch is the sole mouthpiece of the nation in communication with foreign sovereignties,” and that “[i]n the department of international law, . . . a Congressional recognition of belligerency or independence would be a nullity.”¹

The Committee reasoned that the recognition of independence or belligerency of a foreign power “is distinctly a diplomatic matter” evidenced “either by sending a public minister to the government thus recognized, or by receiving a public minister therefrom.”² The reception of a foreign envoy, the Committee stated, “is the act of the President alone.”³ The next step of sending a public minister to the nation thus recognized, is likewise “primarily the act of the President.”⁴ The Committee noted that the Senate can take no part in the selection at all until the President has sent in a nomination, and upon such nomination, act “in its executive capacity, and, customarily, in ‘executive session.’”⁵ Because “[f]oreign nations communicate only through their respective executive departments,” their legislative departments’ resolutions upon diplomatic matters “have no status in international law.” Thus, while

²⁰ *Id.* at 243–44. (noting that “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”), *See also* RESTATEMENT, FOREIGN RELATIONS §§ 204, 205.

²¹ *See* 4 J. MOORE, *supra* note 2, at 243–44.

¹ S. Doc. No. 56, 54th Congress, 2d Sess. (1897), 20–22.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

ARTICLE II—EXECUTIVE BRANCH
Sec. 3—Duties: Head of State

ArtII.S3.2.2
Specific Cases on Receiving Ambassadors and Public Ministers

Congress can help the Cuban insurgents by legislation in many ways, “it cannot help them legitimately by mere declarations, or by attempts to engage in diplomatic negotiations, if our interpretation of the Constitution is correct.”⁶

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 arguing that at that point, diplomacy had come to an end, after 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 as part of the exercise of that power, it has the right to state the purpose of the war which it was about to declare.⁷

After Cuba, numerous presidents had occasions to exercise their power to recognize—or in some cases, not recognize—new foreign states or governments. The recognition of the Union of Soviet Socialist Republics in 1933, for instance, was an exclusively presidential act. President Woodrow Wilson, early in 1913, refused to recognize Provisional President José Victoriano Huerta as the de facto government of Mexico, thereby contributing materially to Huerta’s downfall the year following. President Wilson also announced a general policy of nonrecognition of any government founded on acts of violence. 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. President Herbert Hoover’s Administration similarly refused in 1932 to recognize the independence of the Japanese puppet state of Manchukuo. The People’s Republic of China (PRC) likewise remained unrecognized from President Harry Truman’s Administration until President Richard Nixon’s de facto recognition through a 1972 visit, not long after the People’s Republic of China was admitted to the United Nations and Taiwan excluded. President Jimmy Carter’s official recognition of the PRC became effective on January 1, 1979.⁸ The earlier nonrecognition of the PRC proved to be an important part of American foreign policy during the Cold War.⁹

ArtII.S3.2.3 Modern Doctrine on Receiving Ambassadors and Public Ministers

Article II, Section 3:

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

⁶ *Id.*

⁷ Senator Knute 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).

⁸ Joint Communique of the United States of America and the People’s Republic of China (Jan. 1, 1979).

⁹ President Carter’s termination of the Sino-American Mutual Defense Treaty (SAM Defense Treaty) with Taiwan, which precipitated a constitutional and political debate, was perhaps an example of nonrecognition or more appropriately derecognition. The Supreme Court declined to hear a challenge to whether President Carter could unilaterally terminate the SAM Defense Treaty absent Senate consent. *Goldwater v. Carter*, 444 U.S. 996 (1979) (per curiam) (holding that the case was not justiciable). On recognition and nonrecognition policies in the post-World War II era, see RESTATEMENT, FOREIGN RELATIONS, §§ 202, 203.

ARTICLE II—EXECUTIVE BRANCH

Sec. 3—Duties: Enforcer of Laws

ArtII.S3.3.1
Overview of Take Care Clause

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

The Supreme Court considered whether the President has the exclusive power to grant formal recognition to a foreign sovereign in *Zivotofsky v. Kerry*.¹ At issue in that case was a provision of the Foreign Relations Authorization Act that allowed United States citizens born in Jerusalem to list their place of birth as “Israel” in their passports.² This provision sought to override legislatively a State Department policy that instructed agency employees to list the place of birth for citizens born in Jerusalem as “Jerusalem” in passports because the United States did not recognize any country as having sovereignty over Jerusalem.³

After examining the historical practice related to recognition and other functional considerations, the Supreme Court held that the President retains exclusive authority over the recognition of foreign sovereigns and their territorial bounds.⁴ Although Congress, pursuant to its enumerated powers in the field of foreign affairs, may properly legislate on matters which precede and follow a presidential act of recognition—including in ways which may undercut the policies that inform the President’s recognition decision—it may not alter the President’s recognition decision.⁵

ArtII.S3.3 Enforcer of Laws

ArtII.S3.3.1 Overview of Take Care Clause

Article II, Section 3:

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

The Constitution provides that the President “shall take Care that the Laws be faithfully executed” This duty potentially implicates at least five categories of executive power, including: (1) powers the Constitution confers directly upon the President by the opening and succeeding clauses of Article II; (2) powers that congressional acts directly confer upon the President; (3) powers that congressional acts confer upon heads of departments and other executive agencies of the federal government; (4) power that stems implicitly from the duty to enforce the criminal statutes of the United States; and (5) power to carry out the so-called “ministerial duties,” regarding which an executive officer can exercise limited discretion as to the occasion or manner of their discharge. The following essays explore some of the questions raised by these executive powers, including how the President may exercise the powers which the Constitution or the statutes confer upon him, the relationship between the Take Care

¹ 576 U.S. 1 (2015).

² *Id.* at 7.

³ *Id.*

⁴ The Court identified the Reception Clause, along with additional provisions in Article II, as providing the basis for the Executive’s power over recognition. *Id.* at 11–15.

⁵ See *Zivotofsky*, 576 U.S. at 29–30. While observing that Congress may not enact a law that directly contradicts a presidential recognition decision, the Court stated that Congress could still express its disagreement in multiple ways: For example, it may enact an embargo, decline to confirm an ambassador, or even declare war. But none of these acts would alter the President’s recognition decision. *Id.* at 30

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ArtII.S3.3.1
Overview of Take Care Clause

Clause and the President’s power to remove—and thus supervise—those who wield executive power on his behalf, and the extent to which Congress can direct the actions of executive officials.

ArtII.S3.3.2 Who Can Fulfill the Take Care Duty

Article II, Section 3:

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Whereas the British monarch is constitutionally required to always act through agents if his acts are to receive legal recognition, the President is presumed to exercise certain of his constitutional powers personally. In an 1855 opinion, Attorney General Caleb Cushing identified several such examples, including the President’s granting of reprieves and pardons for offenses against the United States and his role as “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.”¹ According to Cushing, the President’s power as Commander in Chief is “constitutionally inherent in the person of the President” such that “[n]o 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.”²

Moreover, according to Cushing, the President’s obligation to act personally may be sometimes enlarged by statute. The act organizing the President with other designated officials into “an Establishment by name of the Smithsonian Institute,” in Cushing’s view, is one such example. Cushing also believed that expenditures from the “secret service” fund, in order to be valid, must be vouched for by the President personally.³ On like grounds the Supreme Court once held void a court martial decree because it was not specifically approved by the President as required by the 65th Article of War.⁴ The Court, however, has effectively overruled this case, and at any rate such cases are exceptional.⁵

Over time, the general rule that developed 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, become the President’s acts.⁶ In *Williams v. United States*,⁷ for instance, the Supreme Court considered a statute that prohibited the advance of public

¹ 7 Ops. Atty. Gen. 453, 464–65 (1855).

² *Id.*

³ *Cf.* 2 Stat. 78. The provision has long since dropped out of the statute book.

⁴ *Runkle v. United States*, 122 U.S. 543 (1887).

⁵ *Cf. In re Chapman*, 166 U.S. 661, 670–671 (1897), the Supreme Court 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*.

⁶ In exercising his or her executive power under the Constitution, the President 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 the President’s authorized assistants in the performance of the his or her executive duties, and their official acts, promulgated in the regular course of business, are presumptively the President’s acts. *Wilcox v. McConnell*, 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).

⁷ 42 U.S. (1 How.) 290 (1843).

ARTICLE II—EXECUTIVE BRANCH

Sec. 3—Duties: Enforcer of Laws

ArtII.S3.3.3

Relationship Between Take Care Clause and President's Removal Power

money in any case whatsoever to disbursing officers of the United States, except under special direction by the President.⁸ The Supreme Court held that the act did not require the personal performance by the President of this duty.⁹ Such a practice, said the Court, would “absorb the duties of the various departments of the government in the personal acts of one chief executive officer” and be not just impracticable but “impossible.”¹⁰ While “[t]he President’s duty in general requires his superintendence of the administration,” the Court reasoned that “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 he is technically required by the Constitution and applicable laws to perform.¹¹ As a matter of administrative practice, in fact, most orders and instructions are attributed to the heads of the departments, even though such orders and instructions are based on powers conferred by statute on the President.¹²

ArtII.S3.3.3 Relationship Between Take Care Clause and President’s Removal Power

Article II, Section 3:

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

As the Supreme Court has observed, the Constitution vests all executive power in the President, who must “take Care that laws be faithfully executed.”¹ Because no single person could fulfill that responsibility alone, the Court notes, “the Framers expected that the President would rely on subordinate officers for assistance.”² As a result, the Court reasoned that “[t]he President’s power to remove—and thus supervise—those who wield executive power on his behalf follows from the text of Article II.”³

Some early views of the President’s removal power grounds this authority in large part in the Take Care Clause. In a 1789 debate in the First Congress concerning whether the Constitution authorizes the President to remove Executive Branch officers unilaterally, for instance, Representative James Madison expressed the view that the heads of certain executive departments should be removable by the President alone. According to him, 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 carried with it the power to “inspect and control” the conduct of subordinate

⁸ 3 Stat. 723 (1823), now covered in 31 U.S.C. § 3324.

⁹ See *Williams*, 42 U.S. at 297.

¹⁰ *Id.*

¹¹ 942 U.S. (1 How.) at 297–98.

¹² See 38 Ops. Atty. Gen. 457, 458 (1936). If the President exercises his or her duty through subordinates, the President must appoint them or appoint the officers who appoint them, *Buckley v. Valeo*, 424 U.S. 1, 109–143 (1976), and he or she must have the power to discharge those officers in the Executive Branch, *Myers v. United States*, 272 U.S. 52 (1926).

¹ *Seila Law LLC v. Consumer Financial Protection Bureau*, No. 19-7, slip op. 2 (U.S. 2020).

² *Id.*

³ *Id.*

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Executive Officers.⁴ Vesting removal power in the Senate jointly with the President would, in Madison’s view, “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.”⁵

Over time, however, as the Supreme Court refined its jurisprudence on the President’s removal power, it came to characterize the basis of this power as stemming more generally from separation of power principles embedded in the Constitution’s scheme, as evidenced by provisions including the Vesting Clause, Take Care Clause, and the Appointment Clause.⁶

ArtII.S3.3.4 Removal Power as the President’s Primary Means of Supervision

Article II, Section 3:

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

If the President’s duty to “take care” that laws are faithfully executed in part provides the basis for his authority to remove the principal officers who wield executive power on his behalf, a related question is whether such duty also entitles the President to substitute his own judgment for that of such principal officers regarding the discharge of such duty.¹ Put another way, does the Take Care Clause allow Congress to vest, in a head of an executive department, certain discretion which the President is not entitled to control, such that the President’s only means of supervision is through the exercise of his removal authority?

An 1823 opinion rendered by Attorney General William Wirt asserted the proposition that the President’s duty under the Take Care Clause generally required him to do no more than exercise his removal authority when those subordinate officers failed to discharge their duty to execute the laws faithfully, including by removing them or by setting in motion against them the processes of impeachment or of criminal prosecutions.²

⁴ 1 ANNALS OF CONG. 495, 499 (1789). For more information about the 1789 debate, also known as the “decision of 1789”, see ArtII.S2.C2.3.15.2 Decision of 1789 and Removals in Early Republic.

⁵ *Id.* Shortly thereafter, however, when the question arose as to the power of Congress to regulate the tenure of the Comptroller of the Treasury, Madison assumed a very different position. He conceded in effect that this office was to be an arm of certain of Congress’s own powers and should therefore be protected against the President’s removal power. *Id.* at 611–612. In *Marbury v. Madison*, 5 U.S. (1 Cr.) 137 (1803), Justice John Marshall drew 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 a later act. *Id.* at 166. The former duties were, according to Chief Justice Marshall, entirely political and thus must “conform precisely to the will of the President.” *Id.* The latter duties, on the other hand, were exclusively of statutory origin and sprang from the powers of Congress. *Id.* Chief Justice John Marshall reasoned that with respect to these duties, the Secretary was “an officer of the law” and “amenable to the law for his conduct,” suggesting that Congress may exercise certain removal power over Executive Officers.

⁶ For a detailed discussion of the President’s removal power and the evolution in its interpretation, see ArtII.S3.3.1 Overview of Take Care Clause through ArtII.S2.C2.3.15.7 Twenty-First Century Cases on Removal.

¹ For more information about the distinction between principal and inferior executive officers, see ArtII.S2.C2.3.11.1 Overview of Principal and Inferior Officers through ArtII.S2.C2.3.11.3 Modern Doctrine on Principal and Inferior Officers.

² 1 Ops. Atty. Gen. 624 (1823). See also B. WYMAN, THE PRINCIPLES OF THE ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS 231–32 (1903) (describing the case of the Jewels of the Princess of Orange, in which the King of the Netherlands requested the return of certain jewels belonging to the Princess of Orange that were allegedly illegally imported into the United States and later seized by officers of the United States Customs; then Attorney General Roger Taney expressed the view that while the President may order the District Attorney to discontinue a prosecution,

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ArtII.S3.3.5

Interpretations of Law as Part of the President's Take Care Duties

In its 1838 decision *Kendall v. United States ex rel. Stokes*,³ the Supreme Court agreed that the President's Take Care duty does not foreclose the possibility that Congress may entrust the construction of its statutes to an executive officer other than the President. In that case, the United States owed several mail carriers, who had performed services under contract, money. When Postmaster General Amos Kendall, at President Andrew Jackson's instigation, refused to pay it, Congress passed a special act ordering payment.⁴ When Kendall continued to refuse to pay, the mail carriers sued and obtained a mandamus in the United States circuit court for the District of Columbia. The lower court concluded that the duty of the President under the Take Care 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.⁵

The Supreme Court affirmed, rejecting the argument every officer in the Executive Branch is under the exclusive direction of the President.⁶ The Court noted that while there are "certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President," it would be "an alarming doctrine" to hold "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."⁷ In such cases, the Court continued, "the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President."⁸ This was especially the case, the Court added, "where the duty enjoined is of a mere ministerial character."⁹ 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.

ArtII.S3.3.5 Interpretations of Law as Part of the President's Take Care Duties

Article II, Section 3:

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Because the interpretation of law and its scope is a necessary prerequisite to any enforcement action, the precise scope of the President's authority to "take Care that the laws be faithfully executed" is informed and shaped by this interpretive task. The power accruing to

the decision to comply resides with the District Attorney, and in the event he "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.").

³ 37 U.S. (12 Pet.) 524 (1838).

⁴ See *id.* at 528.

⁵ See *id.* at 543.

⁶ See *id.* at 610.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

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Interpretations of Law as Part of the President's Take Care Duties

the President from such interpretations is daily illustrated in relation to such statutes as the Anti-Trust Acts, the Taft-Hartley Act, and many other statutes.

Nor is this interpretive task 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 Supreme Court's reading of such statutes or of the Constitution,¹ but in several early cases, the Supreme Court has suggested that the President can sometimes make law in a more special sense. In the famous *Neagle* case,² 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 Samuel 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 government under the Constitution?"³ The Court assumed an affirmative answer to the second branch of this inquiry, after noting several historical precedents.⁴ And, in *United States v. Midwest Oil Co.*,⁵ 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, particularly given that Congress had never repudiated the practice.⁶

ArtII.S3.3.6 The President's Take Care Duties and International Law

Article II, Section 3:

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

The President's duty to discharge the responsibilities of the United States in international law raises unique foreign relations considerations. One example of a significant exercise of the President's powers in this context was the closure of the Marconi Wireless Station at Siasconset, Massachusetts, by President Woodrow Wilson—in effort to avoid difficulties with other foreign governments—on the outbreak of the European War in 1914, after the company

¹ *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).

² *In re Neagle*, 135 U.S. 1 (1890).

³ 135 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*.

⁴ *Neagle*, 135 U.S. at 64–65.

⁵ 236 U.S. 459 (1915). See also *Mason v. United States*, 260 U.S. 545 (1923).

⁶ See *Midwest Oil*, 236 U.S. at 471–72.

ARTICLE II—EXECUTIVE BRANCH

Sec. 3—Duties: Enforcer of Laws

ArtII.S3.3.7
Impounding Appropriated Funds

refused to assure that it would comply with naval censorship regulations. Justifying this drastic invasion of private rights, Attorney General Thomas Gregory said:

The President of the United States 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.¹

ArtII.S3.3.7 Impounding Appropriated Funds

Article II, Section 3:

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

The Take Care Clause has figured in debates between the political branches over the Executive Branch practice of impounding appropriated funds. No definition for this term exists in statute or in Supreme Court case law. One possible definition, though, describes Executive Branch action or inaction that results in a delay or refusal to spend appropriated funds, whether or not a statute authorizes the withholding.

It is difficult to state with certainty how frequently the Executive Branch has used impoundment. In perhaps the earliest example, President Thomas Jefferson delayed spending funds appropriated in 1803 for the purchase of gun boats, a response to international tensions concerning the port of New Orleans.¹ After Congress made the funds available, the President negotiated the Louisiana Purchase, rendering the immediate use of the gun-boat appropriation “unnecessary.”² Presidents in the nineteenth³ and twentieth centuries⁴ similarly signaled a willingness to delay or withhold spending appropriated funds.

¹ 30 Ops. Atty. Gen. 291 (1914).

¹ See Sally K. & William D. Reeves, *Two Hundred Years of Maritime New Orleans: An Overview*, 35 TUL. MAR. L.J. 183, 186 (2010) (describing the Spanish intendant’s refusal to allow American use of the port of New Orleans before its acquisition by the United States).

² 10 THE WORKS OF THOMAS JEFFERSON IN TWELVE VOLUMES 41 (Paul L. Ford ed., 1905) (Third Annual Message to Congress). The next year, President Jefferson reported that the appropriation was slated for use. *See Id.* at 115 (Fourth Annual Message to Congress) (stating that the 1803 appropriation “is now in a course of execution to the extent there provided for”).

³ See, e.g., ULYSSES S. GRANT, SPECIAL MESSAGE TO THE HOUSE OF REPRESENTATIVES (Aug. 14, 1876), reprinted in 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS: 1789–1897, at 377 (James D. Richardson, ed., 1898) (asserting that though he approved of an act providing appropriations for river and harbor projects, no funds would be spent on projects that served “purely private or local interest” as opposed to national interests).

⁴ See, e.g., H.R. Doc. No. 89–492, at 4 (1966) (message from President Lyndon B. Johnson stating that, as a means of controlling inflation, his Administration would withhold sums appropriated above the levels set forth in the

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ArtII.S3.3.7
Impounding Appropriated Funds

Impoundments usually proceeded on the view that an appropriation sets a ceiling on spending for a particular purpose but typically did not mandate that all such sums be spent.⁵ According to this view, if that purpose could be accomplished by spending less than the appropriation's total amount, there would be no impediment in law to realizing savings.⁶ Impoundments were also justified on the ground that a statute, other than the appropriation itself, authorized the withholding.⁷

Executive impoundment reached its apex under President Richard Nixon, who employed impoundment more frequently than his predecessors.⁸ Often, his Administration justified impoundments by stating that different funding levels,⁹ or different funding models,¹⁰ were preferable to the ones that Congress had selected when it appropriated the funds.

The Nixon impoundments were scrutinized in congressional hearings.¹¹ Members of Congress likened the impoundments to an unconstitutional assertion of a line-item veto.¹² By withholding funding for a program, these Members argued, the President could modify or terminate the program without having to veto formally the entire act that made the withheld funds available.¹³ Administration officials, on the other hand, located the President's authority to impound funds in, among other places, the Take Care Clause.¹⁴ These officials argued that the President's duty to ensure faithful execution of the laws was not confined to mechanically spending the funds provided in a particular appropriation. Instead, the President had to "consider all the laws" that bore on fiscal policy (e.g., statutes allegedly bearing on inflation)

administration's budget request); Budget of the United States Government For The Fiscal Year Ending June 30, 1943, at IX (1942) (relaying President Franklin D. Roosevelt's plan to restrict expenditures for certain civilian construction projects so as to focus on the war effort).

⁵ See H.R. Exec. Doc. No. 44–23, at 2 (1876) (report of Secretary of War James Cameron arguing that spending "the full amount" of an appropriation "was in no way mandatory").

⁶ Presidential Authority to Direct Departments and Agencies to Withhold Expenditures from Appropriations Made, 1 Op. O.L.C. Supp. 12, 16 (1937). In 1950, Congress authorized the use of reserves to realize savings. See General Appropriations Act of 1951, ch. 896, § 1211, 64 Stat. 595, 765–66 (1950).

⁷ EXECUTIVE IMPOUNDMENT OF APPROPRIATED FUNDS: HEARINGS BEFORE THE SUBCOMM. ON SEPARATION OF POWERS OF THE S. COMM. ON THE JUDICIARY, 92nd Cong. 96 (1971) [hereinafter *1971 Impoundment Hearings*] (statement of C. Weinberger, Deputy Director, Off. of Mgmt. & Budget, Exec. Off. of the President) (asserting that to stay within the statutory debt limit President Eisenhower directed that fiscal year (FY) 1958 spending not exceed FY1957 levels).

⁸ JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 64 (2017) (noting estimates of \$18 billion in Nixon-era withholdings and scholarly opinion that the extent of these impoundments constituted "a difference in kind, not simply in degree," from prior impoundments).

⁹ WITHHOLDING OF FUNDS FOR HOUSING AND URBAN DEVELOPMENT PROGRAMS, FISCAL YEAR 1971, 92nd Cong. 163, 165 (1971) (statement of George Romney, Sec. of Transp.) (explaining that the administration did not "intend to accelerate" grant programs it had "scheduled for termination" and that therefore "extra" funds provided by Congress for one fiscal year would not be spent until the next).

¹⁰ Letter to Rep. Clement J. Zablocki, U.S. House of Representatives, from Caspar W. Weinberger, Deputy Director, Office of Management and Budget (Mar. 9, 1971), *reprinted in* 1971 IMPOUNDMENT HEARINGS, *supra* note 7, at 310 (urging that sums the administration was withholding from infrastructure categorical grant programs be repurposed for a revenue sharing program).

¹¹ This congressional interest eventually resulted in the Congressional Budget and Impoundment Control Act of 1974, which establishes the statutory framework that today governs the delay or withholding of budget authority. See Pub. L. No. 93-344, Title X, 88 Stat. 297, 332 (1974).

¹² For a discussion of line-item vetoes, see ArtI.S7.C2.3 Line Item Veto.

¹³ See, e.g., IMPOUNDMENT OF APPROPRIATED FUNDS BY THE PRESIDENT, JOINT HEARINGS BEFORE THE AD HOC SUBCOMM. ON IMPOUNDMENTS OF FUNDS OF THE S. COMM. ON GOV'T OPS. AND THE SUBCOMM. ON SEPARATION OF POWERS OF THE S. COMM. ON THE JUDICIARY, 93d Cong. 59 (1973) (statement of Sen. Hubert H. Humphrey).

¹⁴ Officials also argued that, acting under his foreign affairs or Commander in Chief powers, the President could withhold spending in these areas. See *Id.* at 271 (statement of Roy L. Ash, Director-Designate, Off. of Mgmt. & Budget, Exec. Off. of the President).

ARTICLE II—EXECUTIVE BRANCH

Sec. 3—Duties: Executive Privilege

ArtII.S3.4.1

Overview of Executive Privilege

and accommodate the “purposes” of these other laws when deciding whether to spend all, or only some, of the funds appropriated for a particular program.¹⁵

The constitutional dimensions of impoundment disputes have been confined to the political branches. The Supreme Court has not directly considered the extent of the President’s constitutional authority, if any, to impound funds.¹⁶ However, a case decided in 1838, *United States v. Kendall*,¹⁷ has been cited as standing for the proposition that the President may not direct the withholding of certain appropriations that, by their terms, mandate spending.¹⁸

In that case, the Court considered a statute directing one official (the Solicitor of the Treasury) to determine amounts the government owed to a mail contractor.¹⁹ A second official (the Postmaster General) was then required to credit the contractor’s account according to the Solicitor’s findings.²⁰ The Postmaster General refused to make the full credit.²¹ When the contractor then asked the federal courts to order that the full credit be made, the Postmaster General responded that only the President could control his execution of the law.²² The Court rejected that argument. The President’s duty to see that the laws be faithfully executed did not include the power to forbid the execution of a law requiring a precise, definite action, such as updating Post Office accounts to reflect the Solicitor’s credit findings.²³

ArtII.S3.4 Executive Privilege

ArtII.S3.4.1 Overview of Executive Privilege

Article II, Section 3:

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

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 the Legislative or Judicial Branch of the government. While the Constitution does not expressly confer upon the Executive Branch any such privilege, the Supreme Court has held that executive privilege derives from the constitutional separation of powers and from a necessary and proper concept respecting the carrying out of the duties of the presidency

¹⁵ See *id.* at 372, 381 (testimony of Joseph T. Sneed, Deputy Att’y Gen. of the United States).

¹⁶ The Supreme Court resolved one impoundment-related dispute on statutory grounds. See *Train v. City of New York*, 420 U.S. 35, 43–44 (1975).

¹⁷ 37 U.S. 524 (1838).

¹⁸ See, e.g., *The President’s Veto Power*, 12 U.S. Op. Off. Legal Counsel 128, 167 (1988) (noting that the Supreme Court has not recognized “an inherent power to impound” and that *Kendall* “can be read to support the proposition that the executive’s duty faithfully to execute the laws requires it to spend funds at the direction of Congress”). *Kendall* did not involve foreign affairs or defense duties, where additional considerations might apply for determining the President’s authority to engage in impoundment.

¹⁹ An Act for the Relief of William B. Stokes, Richard C. Stockton, Lucius W. Stockton, and Daniel Moore, ch. 284, 6 Stat. 665 (1836)

²⁰ *Id.*

²¹ *Kendall*, 37 U.S. at 611.

²² *Id.* at 612–13.

²³ *Id.*

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ArtII.S3.4.1
Overview of Executive Privilege

imposed by the Constitution.¹ Although there are various and distinct components to executive privilege,² the privilege's foundation lies in the proposition that in making judgments and reaching decisions, the President and his advisors must be free to discuss issues candidly, express opinions, and explore options without fear that those deliberations will later be made public.³

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 in the course of exercising its investigatory powers;⁴ government prosecutors may seek information in the course of investigating and prosecuting crimes;⁵ and private parties may seek information in the possession of the President for use as evidence in either a criminal or civil proceeding.⁶ In all of these contexts, the courts have generally assessed any asserted privilege by weighing the President's need for confidentiality against the interests of the party seeking the information.⁷

Today, it is apparent that executive privilege is qualified rather than absolute. For the vast majority of U.S. history, however, the existence and appropriate scope of the privilege was uncertain and nearly untouched by the courts.⁸ Chief Justice John Marshall referred to the confidentiality of presidential communications in *Marbury v. Madison* and during the treason trial of former Vice President Aaron Burr,⁹ but in “neither instance [] was Marshall forced to definitively decide whether such a presidential privilege existed and if so, in what form.”¹⁰ In fact, the judiciary's involvement in addressing the privilege's use in resisting disclosure in the face of either judicial or legislative subpoenas did not begin in earnest until the 1970s and the Administration of Richard Nixon.¹¹ Prior to the Nixon era, executive privilege's contours were defined, if at all, by historical practice and the actions and interpretations of Congress and the President. And with little further explication coming from the Supreme Court since, the Nixon era remains the defining era of judicial consideration of the privilege.

This lack of judicial involvement is most pronounced in the context of executive privilege disputes between Congress and the President. The Supreme Court has never directly considered the application of executive privilege in the context of a congressional

¹ See *United States v. Nixon*, 418 U.S. 683, 711 (1974) (“Nowhere in the Constitution . . . is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based.”).

² See CRS Report R47102, EXECUTIVE PRIVILEGE AND PRESIDENTIAL COMMUNICATIONS: JUDICIAL PRINCIPLES, by Todd Garvey at 3–5.

³ *Id.* at 708.

⁴ See, e.g., Senate Select Comm. On Presidential Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974).

⁵ See, e.g., *Nixon*, 418 U.S. at 686.

⁶ See, e.g., *Dellums v. Powell*, 561 F.2d 242 (D.C. Cir. 1977).

⁷ *Nixon*, 418 U.S. at 707.

⁸ See *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425 (1977).

⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 169–70 (1803) (suggesting that “[t]he intimate political relation, subsisting between the president of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation”); *United States v. Burr*, 25 F. Cas. 30, 37 (noting that if a letter to President Jefferson “does contain any matter which it would be imprudent to disclose, which it is not the wish of the executive to disclose, such matter, if it be not immediately and essentially applicable to the point, will, of course, be suppressed”).

¹⁰ *In re Sealed Case*, 121 F.3d 729, 738 (D.C. Cir. 1997).

¹¹ *Id.* at 739–40 (“[I]t was not until the 1970s and Watergate-related lawsuits seeking access to President Nixon's tapes as well as other materials that the existence of the presidential privilege was definitively established as a necessary derivation from the President's constitutional status in a separation of powers regime.”); see also *Id.* at 742 (“These lawsuits, referred to generically as the Nixon cases, remain a quarter century later the leading—if not the only—decisions on the scope of the presidential communications privilege.”).

ARTICLE II—EXECUTIVE BRANCH
Sec. 3—Duties: Executive Privilege

ArtII.S3.4.2
Defining Executive Privileges

investigation.¹² Lower federal court decisions are similarly scarce. The only appellate-level decision to reach the merits of an executive privilege dispute between Congress and a sitting President occurred nearly 50 years ago.¹³ In light of this near judicial vacuum, the historical actions and interpretations of the branches necessarily play a significant role in establishing the meaning of executive privilege.

ArtII.S3.4.2 Defining Executive Privileges

Article II, Section 3:

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

There is not a single “executive privilege.” Instead, a suite of distinct privileges exist, each of different—though sometimes overlapping—scope.¹ The political branches, in support of their often competing interests and priorities, have adopted somewhat divergent views on these different component privileges. Whereas Congress has generally interpreted executive privilege narrowly, limiting its application to the types of presidential, national security, and diplomatic communications referenced by judicial decisions,² the Executive Branch has historically viewed executive privilege more broadly, providing protections to different categories of documents and communications that implicate Executive Branch confidentiality interests.³ Under the Executive Branch’s interpretation, these privileges include

- the *State Secrets Privilege*, which protects certain military, diplomatic, and national security information;⁴

¹² The Supreme Court recently issued an opinion addressing congressional subpoenas for presidential records, but that case did not involve an assertion of executive privilege. *See Trump v. Mazars USA, LLP*, No. 19-760, slip op. at 5 (U.S. July 9, 2020) (“The President did not, however, resist the subpoenas by arguing that any of the requested records were protected by executive privilege.”); *Id.* at 2 (“We have never addressed a congressional subpoena for the President’s information.”).

¹³ *See* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974). The D.C. Circuit recently reached the merits of a dispute between the House and a former President. *Trump v. Thompson*, 20 F.4th 10 (D.C. Cir. 2021), *cert. denied*, No. 21A272, slip op. (U.S. Jan. 20, 2022) (2022).

¹ *In re Sealed Case*, 121 F.3d at 736 (noting that “executive officials have claimed a variety of privileges to resist disclosure of information”). *See also* John E. Bies, *Primer on Executive Privilege and the Executive Branch Approach to Congressional Oversight*, LAWFARE (June 16, 2017) (“[A] review of Executive Branch practice identifies a number of categories of information that the Executive Branch, at least, believes may be protected by an invocation of the privilege.”), <https://www.lawfareblog.com/primer-executive-privilege-and-executive-branch-approach-congressional-oversight>.

² *See* H. COMM. ON OVERSIGHT AND GOV’T REFORM, 110TH CONG., REP. ON PRESIDENT BUSH’S ASSERTION OF EXECUTIVE PRIVILEGE IN RESPONSE TO THE COMMITTEE SUBPOENA TO ATTORNEY GENERAL MICHAEL B. MUKASKEY 8 (Comm. Print 2008) (rejecting an executive privilege claim on the grounds that “[t]he Attorney General did not cite a single judicial decision recognizing this alleged privilege”); H.R. REP. NO. 105-728, at 16 n. 43 (1998) (“As the D.C. Circuit has recently held, the doctrine of executive privilege which arises from the constitutional separation of powers applies only to decisionmaking of the President. Since the subject of the Committee’s subpoena is not one that does (or legally could) involve Presidential decisionmaking, no constitutional privilege could be invoked here.”) (citations omitted).

³ *See* Dep’t of Justice, Office of Legal Counsel, *Assertion of Executive Privilege Over Documents Generated in Response to Congressional Investigation into Operation Fast and Furious*, 8 Op. O.L.C. 101, 116 (2012) (“The scope of executive privilege includes several related areas in which confidentiality within the Executive Branch is necessary for the effective execution of the laws.”).

⁴ *Id.* at 116-17.

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ArtII.S3.4.2

Defining Executive Privileges

- the *Presidential Communications Privilege*, which generally protects confidential communications between the President and his advisers that relate to presidential decisionmaking, as well as a certain subset of communications not involving the President but that are still made for purposes of advising the President;⁵
- the *Deliberative Process Privilege*, which protects pre-decisional and deliberative communications within Executive Branch agencies;⁶ and
- the *Law Enforcement Privilege*, which protects the contents of open (and sometimes closed) law enforcement files, including communications related to investigative and prosecutorial decisionmaking.⁷

The Executive Branch has tended to consolidate these various privileges into one “executive privilege,” particularly when responding to congressional investigative requests.⁸ Congressional committees, on the other hand, have typically distinguished among the different individual privileges.⁹

The executive privileges may appropriately be treated as distinct, not only because of the different communications they protect, but also because the privileges appear to arise from different sources of law, with some more firmly established in judicial precedent than others. In short, the different privileges apply with different strengths and, in the congressional context, are balanced against Congress’s Article I powers differently. For example, courts have “traditionally shown the utmost deference” to presidential claims of a need to protect military or diplomatic secrets.¹⁰ The President’s more generalized interest in the confidentiality of his other communications, though arising implicitly from the Constitution, has not been “extended this high degree of deference.”¹¹ Because the other privileges have been given less weight, they are assessed differently in the face of an exercise of Congress’s investigative powers. For example, when compared to the Presidential Communications Privilege, the Deliberative Process Privilege is more easily overcome by Congress and “disappears altogether when there is any reason to believe government misconduct occurred.”¹² Its legal source also appears to be different from the Presidential Communications Privilege, as it arises “primarily” from the

⁵ *Id.* at 116.

⁶ See Dep’t of Justice, Office of Legal Counsel, Assertion of Executive Privilege Over Documents Generated in Response to Congressional Investigation into Operation Fast and Furious, 36 Op. O.L.C. 1 (2012).

⁷ See Dep’t of Justice, Office of Legal Counsel, Protective Assertion of Executive Privilege Over Unredacted Mueller Report and Related Investigative Files, 43 Op. O.L.C. 374 (2019).

⁸ See 8 Op. O.L.C. 101, 116 (reasoning that “[t]he scope of executive privilege includes several related areas”); 13 Op. O.L.C. 153, 154 (reasoning that “the Executive Branch’s interest in keeping the information confidential” is “usually discussed in terms of ‘executive privilege’”).

⁹ See H. COMM. ON OVERSIGHT AND GOV’T REFORM, 110TH CONG., REP. ON PRESIDENT BUSH’S ASSERTION OF EXECUTIVE PRIVILEGE IN RESPONSE TO THE COMMITTEE SUBPOENA TO ATTORNEY GENERAL MICHAEL B. MUKASKEY 8 (Comm. Print 2008) (“The Attorney General’s argument that the subpoena implicates the ‘law enforcement component’ of executive privilege is equally flawed. There is no basis to support the proposition that a Law Enforcement Privilege, particularly one applied to closed investigations, can shield from congressional scrutiny information that is important for addressing congressional oversight concerns. The Attorney General did not cite a single judicial decision recognizing this alleged privilege.”); H.R. REP. NO. 105–728, at 16 n. 43 (1998) (“As the D.C. Circuit has recently held, the doctrine of executive privilege which arises from the constitutional separation of powers applies only to decisionmaking of the President. Since the subject of the Committee’s subpoena is not one that does (or legally could) involve Presidential decisionmaking, no constitutional privilege could be invoked here.”) (citations omitted).

¹⁰ *United States v. Nixon*, 418 U.S. 683, 710 (1974).

¹¹ *Id.* at 711.

¹² *In re Sealed Case*, 121 F.3d 729, 746 (D.C. Cir. 1997). Given its broad scope, the Deliberative Process Privilege is “the most frequent form of executive privilege raised.” *Id.* at 737.

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ArtII.S3.4.3
State Secrets Privilege

common law,¹³ but may have a “constitutional dimension.”¹⁴ Least potent are those executive privileges that arise purely from the common law, which have generally been viewed, at least by Congress, as legally insufficient to justify noncompliance with a congressional subpoena.¹⁵

ArtII.S3.4.3 State Secrets Privilege

Article II, Section 3:

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

In civil cases, the government may invoke the State Secrets Privilege to ensure the government is not forced to reveal military or other secrets. By contrast, in criminal cases, the Sixth Amendment guarantees a defendant compulsory process to obtain witnesses, and the Due Process Clause of the Fifth Amendment guarantees access to relevant exculpatory information in possession of the prosecution.¹ Generally speaking, when a judicial order directs the prosecution to provide information to a defendant that the prosecution does not wish to make available, the prosecution has the option of dropping the prosecution to avoid disclosure.²

In 1876, the Supreme Court first recognized the State Secrets Privilege in *Totten v. United States*.³ *Totten* involved a breach of contract claim brought by the estate of a former Union Civil War spy against the government for compensation owed for secret wartime espionage services.⁴ The Court dismissed the claim because “as a general principle, [] 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.”⁵ The Court reasoned

¹³ In *In re Sealed Case*, the D.C. Circuit determined that “the deliberative process privilege is primarily a common law privilege,” but that “[s]ome aspects of the privilege, for example the protection accorded the mental processes of agency officials, have roots in the constitutional separation of powers.” 121 F.3d at 745, 737 n.4.

¹⁴ Comm. on Oversight & Gov’t Reform v. Lynch, 156 F. Supp. 3d 101, 104 (D.D.C. 2016). The scope and source of the Law Enforcement Privilege is unclear, particularly when asserted in the context of congressional investigations where committees have voiced consistent objections to its use. Congress has previously viewed the Executive Branch’s position on the confidentiality of law enforcement information as a nondisclosure “policy” rather than a constitutionally based privilege. See H. COMM. ON OVERSIGHT AND GOV’T REFORM, 110TH CONG., REP. ON PRESIDENT BUSH’S ASSERTION OF EXECUTIVE PRIVILEGE IN RESPONSE TO THE COMMITTEE SUBPOENA TO ATTORNEY GENERAL MICHAEL B. MUKASKEY 8 (Comm. Print 2008).

¹⁵ The Supreme Court recently stated in dicta that the recipients of a congressional subpoena “have long been understood to retain common law . . . privileges with respect to certain materials. . . .” *Trump v. Mazars USA, LLP*, No. 19-760, slip op. at 12 (U.S. July 9, 2020). This statement is in tension with the congressional practice of treating common law privileges as discretionary and has been subject to some criticism. See CRS Report RL30240, *Congressional Oversight Manual*, coordinated by Christopher M. Davis, Todd Garvey, and Ben Wilhelm at 62–63.

¹ See *Brady v. Maryland*, 373 U.S. 83 (1963), and Rule 16, Federal Rules of Criminal Procedure. For an early judicial dispute involving executive privilege concerns, see *United States v. Burr*, 25 F. Cas. 30 and 187 (C.C.D. Va. 1807), where Aaron Burr sought certain exculpatory material from President Thomas Jefferson.

² See, e.g., *Alderman v. United States*, 394 U.S. 165 (1969).

³ 92 U.S. 105 (1876).

⁴ *Id.*

⁵ *Totten v. U.S.*, 92 U.S. at 107.

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ArtII.S3.4.3
State Secrets Privilege

that “[t]he service stipulated by the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed.”⁶

Totten has continued to inform the treatment of claims brought against the government. In 2005, the Supreme Court considered a contract claim brought against the Central Intelligence Agency (CIA) by alleged Cold War spies in *Tenet v. Doe*.⁷ Affirming the “*Totten*” bar,⁸ the *Tenet* Court stated: “*Totten* precludes judicial review in cases such as respondents’ where success depends upon the existence of their secret espionage relationship with the [g]overnment.”⁹ In 2011, the Supreme Court again applied the *Totten* bar to dismiss a suit against the United States but this time outside the context of espionage contracts. In *General Dynamics Corp. v. United States*, the federal government asserted the State Secrets Privilege to prevent disclosing sensitive stealth technology in a defense contract dispute. While the government contractor in *General Dynamics* had set forth a prima facie valid affirmative defense to the government’s allegation of breach of contract,¹⁰ the Court held that the underlying subject matter of the suit rendered it nonjusticiable and the parties must remain “where they stood when they knocked on the courthouse door.”¹¹ Referring to *Totten* and *Tenet*, the Court stated: “We think a similar situation obtains here, and that the same consequence should follow.”¹² In not finding an enforceable contract, the Court held that “[w]here liability depends upon the validity of a plausible . . . defense, and when full litigation of that defense ‘would inevitably lead to the disclosure of’ state secrets, neither party can obtain judicial relief.”¹³ The Court reasoned: “Both parties—the [g]overnment no less than petitioners—must have assumed the risk that state secrets would prevent the adjudication of claims of inadequate performance.”¹⁴

In a separate line of judicial inquiry regarding protection of state secrets outside the context of contract claims, the Supreme Court articulated an analytical framework for the State Secrets Privilege in its 1953 decision in *United States v. Reynolds*.¹⁵ *Reynolds* involved multiple wrongful death claims against the government brought by the widows of three civilians who died aboard a military aircraft that crashed while testing secret electronic equipment.¹⁶ The plaintiffs sought discovery of the official Air Force post-incident report and survivors’ statements that were in the possession of the U.S. Air Force.¹⁷ The Air Force opposed disclosure of the documents as the aircraft and its occupants were engaged in a secret mission.¹⁸

While *Reynolds* recognized that it is the judiciary’s role to evaluate the validity of a claim of privilege, the Court declined to require that courts automatically compel inspection of the underlying information. The Court stated: “[T]oo much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect, while a

⁶ *Id.* at 106.

⁷ 544 U.S. 1 (2005).

⁸ The *Totten* bar has been labeled a “rule of non-justiciability, akin to a political question.” *Al-Haramain Islamic Found. Inc. v. Bush*, 507 F.3d 1190, 1197 (9th Cir. 2007).

⁹ *Id.* at 8.

¹⁰ *General Dynamics Corporation v. United States*, 563 U.S. 478, 482 (2011).

¹¹ *Id.* at 487.

¹² *Id.* at 486.

¹³ *Id.* at 486 (quoting *Totten v. United States*, 92 U.S. 105, (1876)).

¹⁴ *Id.* at 491.

¹⁵ 345 U.S. 1 (1953).

¹⁶ *Id.* at 3.

¹⁷ *Id.*

¹⁸ 345 U.S. 1 (1953).

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complete abandonment of judicial control would lead to intolerable abuses.” To evaluate assertions of the State Secrets Privilege, the *Reynolds* Court identified a two-step analysis. The first requirement is a largely procedural hurdle to assure that the privilege is not “lightly invoked,” in which the head of the department in control of the information in question, after “personal consideration,” invokes the privilege in writing. The second requirement asks the court to evaluate whether there is a reasonable danger that disclosure “will expose military matters which, in the interest of national security, should not be divulged.”

The Supreme Court accepted the government’s claim, holding that courts “must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.”¹⁹ According to the Court, a private litigant’s specific showing of necessity for the information should govern how far the trial court should probe. Where the necessity is strong, the trial court should require a strong showing that the privilege is appropriate, but once that is satisfied, the privilege must prevail no matter how compelling the need.²⁰ While *Reynolds* dealt with an evidentiary privilege, cases may be “dismissed on the pleadings without ever reaching the question of evidence” in other circumstances.²¹

While *Reynolds* and *Totten* remain the foundational cases on the state secrets privilege, the Supreme Court issued a pair of decisions in 2022 that impact the judicial understanding of that privilege. First, in *United States v. Zubaydah*, the Court determined that a court cannot declare that classified information apparently in the public domain is exempt from the State Secrets Privilege when the United States has not officially confirmed or denied such information.²² Second, in *Federal Bureau of Investigation v. Fazaga*, the Court decided that certain Foreign Intelligence Surveillance Act of 1978 (FISA) provisions, which specifically require courts to review the underlying classified FISA applications and information to determine the lawfulness of surveillance, do not displace the traditional *Reynolds* privilege that protects information that would harm national security if disclosed.²³

ArtII.S3.4.4 Presidential Communications Privilege Generally

Article II, Section 3:

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Deriving implicitly from the President’s powers under Article II and the separation of powers doctrine, the Presidential Communications Privilege (Communications Privilege)

¹⁹ *Id.* at 8.

²⁰ *Id.* at 7–8, 9–10, 11. Privilege is often claimed for information relating to government employee clearances, disciplines, or discharges. *See, 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 government secrecy agreement for CIA employees, *Snepp v. United States*, 444 U.S. 507 (1980), the government expanded its secrecy program for classified and “classifiable” information. When Congress sought to curb this policy, a federal district judge declared the restrictions void as they encroached on the President’s executive powers. *Nat’l Fed’n of Fed. Emps. v. United States*, 688 F. Supp. 671 (D.D.C. 1988), vacated and remanded sub nom. *Am. Foreign Serv. Ass’n v. Garfinkel*, 490 U.S. 153 (1989).

²¹ *Reynolds*, 345 U.S. at 11, n.26.

²² No. 20-827, slip op. (U.S. Mar. 3, 2022).

²³ No. 20-828, slip op. (U.S. Mar. 4, 2022).

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protects the confidentiality of the President’s decisionmaking process.¹ The Communications Privilege is grounded on the proposition that to make judgments and reach decisions the President and his advisers must be free to discuss issues candidly, express opinions, and explore options without fear that those deliberations will later be made public.²

The Communications Privilege is qualified, rather than absolute, and applies only to confidential communications made in support of official presidential decisionmaking that directly involve the President or close presidential advisers.³ For the vast majority of U.S. history, however, the existence and appropriate scope of the Communications Privilege was uncertain and nearly untouched by the courts.⁴ While Chief Justice John Marshall referred to the confidentiality of presidential communications in *Marbury v. Madison* and during the treason trial of former Vice President Aaron Burr,⁵ in “neither instance [] was Marshall forced to definitively decide whether such a presidential privilege existed and if so, in what form.”⁶ In fact, the Judiciary’s involvement in addressing the Communications Privilege’s use in resisting disclosure in the face of either judicial or legislative subpoenas did not begin in earnest until the 1970s and the Administration of President Richard Nixon.⁷ Prior to the Nixon era, the Communications Privilege’s contours were instead left to be defined, if at all, by historical practice and the actions and interpretations of Congress and the President.

The years during and immediately following the Nixon Administration are arguably the defining era of the Communications Privilege’s judicial development. It was during that time period (1972–1977) that the courts first confirmed the Communications Privilege’s existence and began to delineate—but did not significantly develop—its application in criminal and civil proceedings, as well as its use in response to exercises of Congress’s oversight and legislative powers.⁸ In each of these contexts, courts were asked to resolve significant but unsettled

¹ See *Nixon*, 418 U.S. at 705–06.

² *Id.* at 708. In this sense, executive privilege is partly based on the theory that transparency can inhibit decisionmaking.

³ See *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425 (1977).

⁴ See, e.g., RAOUL BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* 1 (1974) (describing executive privilege as a “myth” and a “product of the nineteenth century, fashioned by a succession of presidents who created ‘precedents’ to suit the occasion.”).

⁵ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 169–70 (1803) (suggesting that “[t]he intimate political relation, subsisting between the president of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation”); *United States v. Burr*, 25 F. Cas. 30, 37 (noting that if a letter to President Jefferson “does contain any matter which it would be imprudent to disclose, which it is not the wish of the executive to disclose, such matter, if it be not immediately and essentially applicable to the point, will, of course, be suppressed”). The Supreme Court addressed the State Secrets Privilege in *United States v. Reynolds*, 345 U.S. 1, 7–8 (1953) (articulating a “privilege which protects military and state secrets” that “belongs to the Government and must be asserted by it” but “is not to be lightly invoked.”).

⁶ *In re Sealed Case*, 121 F.3d at 738.

⁷ *Id.* at 739–40 (“[I]t was not until the 1970s and Watergate-related lawsuits seeking access to President Nixon’s tapes as well as other materials that the existence of the presidential privilege was definitively established as a necessary derivation from the President’s constitutional status in a separation of powers regime.”); see also *Id.* at 742 (“These lawsuits, referred to generically as the Nixon cases, remain a quarter century later the leading—if not the only—decisions on the scope of the presidential communications privilege.”).

⁸ See, e.g., *Nixon*, 418 U.S. 683, 707 (1974) (assessing the Privilege in the context of a criminal trial); *Sirica*, 487 F.2d at 717 (assessing the Privilege in the context of a grand jury investigation); *Senate Select.*, 498 F.2d at 731 (assessing the Privilege in the context of a congressional investigation); *Dellums v. Powell*, 561 F.2d 242, 249 (D.C. Cir. 1977) (assessing the Privilege in the context of civil case).

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questions of constitutional law, ranging from whether the President is immune from all compulsory process to the scope and force of presidential claims of the Communications Privilege.⁹

ArtII.S3.4.5 Congressional Access to Presidential Information

Article II, Section 3:

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Presidents have claimed a right to withhold their communications from Congress since the start of the Republic.¹ Congress’s resistance to such claims, however, is equally grounded in history.² The resulting, recurring, and often prominent disagreements over what has come to be known broadly as “executive privilege” tend to place in opposition two implied and often competing constitutional principles: Congress’s right to obtain information necessary to carry out its legislative functions and the President’s interest in protecting the confidentiality of his (and sometimes his subordinates’) communications.³

Unlike more traditional legal disagreements between parties, resolution of these interbranch executive privilege disputes has not historically come from the courts. Instead, when conflict has been avoided, it has typically been because of a process of compromise and accommodation in which absolute claims—for either access or confidentiality—are relinquished and replaced by a negotiated resolution acceptable to both Congress and the Executive.⁴

The traditional preference for political rather than judicial solutions is supported by the fact that neither Congress nor the President appears to have sought judicial resolution of an

⁹ President Nixon also asserted the Privilege in the impeachment context in response to subpoenas issued by the House Judiciary Committee. The House did not, however, enlist the aid of the courts in order to enforce its demands for information in that context, and instead chose to respond to the President’s refusals by adopting a specific article of impeachment rebuking the President for his failure to comply with the committee’s subpoenas. *See* H. Rep. No. 93-1305, 93rd Cong., at 206–13 (1974).

¹ *See In re Sealed Case*, 121 F.3d 729, 736 (D.C. Cir. 1997) (“Since the beginnings of our nation, executive officials have claimed a variety of privileges to resist disclosure of information the confidentiality of which they felt was crucial to fulfillment of the unique role and responsibilities of the executive branch of our government.”).

² Disputes between Congress and the President over executive privilege can be traced back to the 1790s. *See* MARK J. ROZELL, EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY, AND ACCOUNTABILITY 31–32 (2002) (describing the House’s resistance to President Washington’s refusal to disclose information relating to the Jay Treaty).

³ *United States v. Nixon*, 418 U.S. 683, 711 (1974) (“Nowhere in the Constitution . . . is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President’s powers, it is constitutionally based.”); *Watkins v. United States*, 354 U.S. 178, 187 (1957) (“The power of the Congress to conduct investigations is inherent in the legislative process.”). For a thorough discussion of the judicial treatment of executive privilege see CRS Report R47102, EXECUTIVE PRIVILEGE AND PRESIDENTIAL COMMUNICATIONS: JUDICIAL PRINCIPLES, by Todd Garvey.

⁴ *See In re Sealed Case*, 121 F.3d at 729 (“[G]iven the restrictions on congressional standing and the courts’ reluctance to interfere in political battles, few executive-congressional disputes over access to information have ended up in the courts.”); *see also Breaking the Logjam: Principles and Practice of Congressional Oversight and Executive Privilege*, Hearing before the Senate Committee on the Judiciary, Subcommittee on Federal Courts, Oversight, Agency Action and Federal Rights, Aug. 3, 2021.

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interbranch executive privilege dispute until the 1970s.⁵ Courts have also been wary of judicially declared outcomes and have generally sought to avoid adjudicating executive privilege disputes, instead encouraging the political branches to settle their differences while noting that judicial intervention should, as a prudential matter, “be avoided whenever possible” or at least “delayed until all possibilities for settlement have been exhausted.”⁶

As a result, the judiciary has historically played a limited role in determining how executive privilege may be used to restrict congressional access to information.⁷ The Supreme Court has never directly considered applying executive privilege in the context of a congressional investigation.⁸ Lower federal court decisions are similarly scarce.⁹ The only appellate-level decision to reach the merits of an executive privilege dispute between Congress and a sitting President occurred nearly fifty years ago during President Richard Nixon’s administration.¹⁰ In that case, the Senate Select Committee on Presidential Campaign Activities elected to seek a declaratory judgment in the courts with respect to the President’s obligations to obey its subpoenas.¹¹

Although not involving executive privilege, the Court in its 2020 decision, *Trump v. Mazars*, nevertheless recognized several important separation of powers-based limitations on Congress’s ability to access presidential records.¹² Writing on behalf of the Court, Chief Justice John Roberts began by acknowledging three central limits on all congressional inquiries, regardless of the target of the inquiry: (1) there must be a valid legislative purpose related to a subject of legislation, (2) the purpose of the inquiry must not be for law enforcement or to expose for the sake of exposure, and (3) certain constitutional and common law privileges can limit disclosures of information.¹³ The Court, however, viewed these limitations, standing alone, as inadequately checking Congress’s powers in a dispute with the Executive Branch.¹⁴

⁵ See Senate Select Comm. On Presidential Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974); see also JAMES HAMILTON, THE POWER TO PROBE: A STUDY OF CONGRESSIONAL INVESTIGATIONS 197 (1976) (noting that the Senate Select Committee’s lawsuit to enforce the subpoena issued to President Nixon was “the first civil action to enforce a congressional subpoena issued to the executive”).

⁶ See *Cheney v. United States Dist. Court*, 541 U.S. 913, 389 (2004) (“These ‘occasion[s] for constitutional confrontation between the two branches’ should be avoided whenever possible”); see also CRS Legal Sidebar LSB10432, RESOLVING SUBPOENA DISPUTES BETWEEN THE BRANCHES: POTENTIAL IMPACTS OF RESTRICTING THE JUDICIAL ROLE, by Todd Garvey.

⁷ In addition to other justiciability issues, the Speech or Debate Clause, which generally prevents direct pre-enforcement challenges to congressional subpoenas, also plays a role in limiting litigation connected to Congress’s investigatory powers. See CRS Report R45043, UNDERSTANDING THE SPEECH OR DEBATE CLAUSE, by Todd Garvey.

⁸ See *Trump v. Mazars USA, LLP*, No. 19-760, slip op. at 2 (U.S. July 9, 2020) (“We have never addressed a congressional subpoena for the President’s information.”).

⁹ There has been a recent increase in information access disputes between the branches making their way to the courts. See, e.g., CRS Testimony TE10064, CIVIL ENFORCEMENT OF CONGRESSIONAL AUTHORITIES, by Todd Garvey. These cases have not, however, directly involved the merits of an interbranch executive privilege disputes.

¹⁰ See Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974). The D.C. Circuit reached the merits of a dispute between a House committee and a former President in 2021. *Trump v. Thompson*, 20 F.4th 10 (D.C. Cir. 2021), cert. denied, 142 S. Ct. 1350 (2022).

¹¹ Senate Select, 498 F.2d at 726. The House Judiciary Committee’s subpoenas were similarly rejected by the President, but instead of going to the courts for enforcement, the Committee adopted as one of its Articles of Impeachment the refusal of the President to honor its subpoenas. 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).

¹² See *Trump v. Mazars USA, LLP*, No. 19-760, slip op. at 2 (U.S. July 9, 2020).

¹³ *Trump v. Mazars USA, LLP*, No. 19-760, slip op. at 2 (U.S. July 9, 2020).

¹⁴ *Id.* at 3.

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ArtII.S3.4.6

Prosecutorial and Grand Jury Access to Presidential Information

After all, according to *Mazars*, any paper possessed by a President could relate to a conceivable subject of legislation, possibly allowing Congress significant authority to interfere with the Executive Branch.¹⁵

Recognizing that the typical limits on the subpoena power did not prevent Congress from attempting to “aggrandize itself at the President’s expense,” the Chief Justice feared that judicial resolution of such a dispute using only those limits could deter negotiation between the two branches, historically the hallmark of such inquiries, and encourage Congress to seek compliance through the courts.¹⁶ As a result, the Chief Justice instructed lower courts to perform a “careful analysis” using “[s]everal special considerations” that take “adequate account” of the separation of powers principles at stake during a legislative inquiry into the President’s records.¹⁷ Specifically, in such a dispute, courts should, among other considerations, (1) carefully assess whether the confrontation can be avoided by relying on other sources to provide Congress the information it needs in light of its legislative objective; (2) “insist” on a subpoena that is no broader than is reasonably necessary to support Congress’s objective; (3) consider the nature of the evidence of Congress’s legislative purpose, preferring more detailed and substantial evidence to vague or loosely worded evidence of Congress’s purpose; and (4) assess the burdens, such as time and attention, the subpoena imposes on the President.¹⁸

ArtII.S3.4.6 Prosecutorial and Grand Jury Access to Presidential Information

Article II, Section 3:

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Recognizing that the “public has a right to every man’s evidence,” the Supreme Court has held that the President may be required to testify or produce documents in criminal proceedings when required by the courts.¹ This principle dates to the earliest days of the Republic, when Chief Justice John Marshall presided as the Circuit Justice for Virginia over the infamous treason trial of Aaron Burr. In that case, Chief Justice Marshall concluded that President Thomas Jefferson could be subject to a subpoena to provide a document relevant to

¹⁵ *Id.*

¹⁶ *Id.* While the papers at stake in *Mazars* were the President’s personal records, the Court concluded that the close connection between the Office of the President and its occupant did not diminish the separation of powers concerns at issue, and may have even posed a “heightened risk” given the records’ “less evident connection to a legislative task.” *Id.* at 2. The *Mazars* Court likewise rejected the argument that separation of powers concerns were diminished because the records at issue were in the hands of a third party, as opposed to the President himself. *Id.* For the Court, the central issue was that the President’s information was at stake, and ruling otherwise would have encouraged side-stepping constitutional requirements. *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 5. The Court observed that “[o]ther considerations may be pertinent as well.” *Id.* at 6. While adopting this four-factor test, the Court rejected the need for a more “demanding” standard that would have required Congress to demonstrate a specific need for particular records that were “critical” to a legislative purpose. *Id.* at 2 (concluding that imposing a standard akin to the one governing executive privilege claims would “risk seriously impeding Congress in carrying out” inquiries to obtain information it needs to legislate effectively).

¹ See *Trump v. Vance*, No. 19-635, slip op. (U.S. July 9, 2020).

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the trial.² Specifically, he declared that, in contrast to common law privileges afforded the King of England, the President was not “exempt from the general provisions of the constitution,” like the Sixth Amendment, that provide for compulsory process for the defense.³ Nonetheless, Chief Justice Marshall recognized that while the President could be subject to a criminal subpoena, the President could still withhold specific information from disclosure based on the existence of a privilege.⁴ In the two centuries since the Burr trial, historical practice by the Executive Branch⁵ and Supreme Court rulings “unequivocally and emphatically endorsed” Chief Justice Marshall’s position that the President was subject to federal criminal process.⁶ In 2020, the Court extended the precedent developed in federal criminal proceedings to *state* criminal proceeding in *Trump v. Vance*, concluding that the President was not absolutely immune from state criminal subpoenas.⁷

While the President is subject to criminal process, the question remains as to the limits on that process. The Court has recognized several constraints on the ability of a prosecutor to obtain evidence from the President through the use of a criminal subpoena.⁸ First, like any citizen, the President can challenge a particular subpoena on the grounds that it was issued in bad faith or was unduly broad.⁹ Second, the timing and scope of criminal discovery must be informed by the nature of the office of the President—for example, granting deference in scheduling proceedings to avoid significant interference with the President’s official responsibilities.¹⁰ Third, the President can raise subpoena-specific constitutional challenges, arguing that compliance with a particular subpoena would significantly interfere with his efforts to carry out an official duty.¹¹ As the Court first recognized in *United States v. Nixon*, one particularly notable constitutionally based challenge that a President can lodge against a criminal subpoena is a claim of executive privilege in certain presidential communications.¹²

² *United States v. Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (No. 14,692D).

³ *See id.* (observing that while the King is born to power and can “do no wrong,” the President, by contrast is “of the people” and subject to the law).

⁴ *United States v. Burr*, 25 F. Cas. 187, 192 (C.C.D. Va. 1807) (No. 14,694).

⁵ *Vance*, No. 19-635, slip op. (discussing historical practices of Presidents Monroe, Grant, Ford, Carter, and Clinton).

⁶ *Clinton v. Jones*, 520 U.S. 681, 704 (1997) (citing *United States v. Nixon*, 418 U.S. 683, 706 (1974)). In rejecting separation of powers challenges to claims that the President is immune from federal criminal process, the Court rejected the argument that criminal subpoenas “rise to the level of constitutionally forbidden impairment of the Executive’s ability to perform its constitutionally mandated functions.” *Id.* at 702–03.

⁷ *See Vance*, No. 19-635, slip op. (rejecting the categorical argument that state criminal subpoenas would unduly distract the President, impose a stigma on the presidency, or result in harassment by state prosecutors). The *Vance* Court also rejected the argument that a state prosecutor should have to satisfy a heightened standard of need before seeking a sitting President’s records, absent any constitutional privileges. *Id.* . Importantly, in *Vance*, the state prosecutor was seeking private presidential records, and no claim of executive privilege was at stake. *Id.* (Kavanaugh, J., concurring in the judgment). The Court refused to extend the heightened-need standard established in *Nixon* to private records, discussed *infra*, reasoning that: (1) *Burr* and its progeny foreclosed that argument; (2) the heightened-need standard was unnecessary to allow the President to fulfill his Article II functions; and (3) the public interest in fair and effective law enforcement favors “comprehensive access to evidence.” *Id.* (majority opinion).

⁸ *See id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² 418 U.S. 683, 708 (1974)

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In *Nixon*,¹³ the Court confirmed several fundamental principles of the privilege protecting presidential communications.¹⁴ First, *Nixon* recognized an implied constitutional privilege protecting presidential communications.¹⁵ The Court stated that the “privilege of confidentiality of presidential communications” is “fundamental to the operation of Government and inextricably rooted in the separation of powers” and “the supremacy of each branch within its own assigned area of constitutional duties.”¹⁶ The Court held that the Communications Privilege, however, must not be “expansively construed” as it, like other privileges, is “in derogation of the search for truth.”¹⁷

Second, the Court explicitly reaffirmed its role as the “ultimate interpreter of the Constitution” and the privileges emanating from it, noting that it was the Court, and not the President, that must have the final say on the Communications Privilege.¹⁸

Third, the Court held that the underlying justification for the Communications Privilege related to the “public interest” in the integrity of presidential decisionmaking.¹⁹ “Human experience,” the Court reasoned, “teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.”²⁰ The Court added that there is a

public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. 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.²¹

As such, the Court held that “[t]he President’s need for complete candor and objectivity from advisers calls for great deference from the courts” and justified a “presumptive privilege for Presidential communications” made in “the exercise of Art. II powers.”²²

Fourth, the Court emphasized that the implied constitutional Privilege was not “absolute” or “unqualified,” at least not when founded upon a “generalized” need for confidentiality in “nonmilitary and nondiplomatic discussions.”²³ Instead, when the Communications Privilege is invoked in response to a judicial subpoena, a “confrontation with other values arise[s]” requiring courts to “resolve those competing interests in a manner that preserves the essential functions of each branch.”²⁴ The President’s interest, therefore, would need to be balanced

¹³ *United States v. Nixon*, 418 U.S. 683 (1974). The *Nixon* opinion, which was before the Court on expedited direct appeal from the district court decision in *Mitchell*, was issued with some urgency. Noting the “public importance of the issues presented and the need for their prompt resolution,” the Court issued its opinion only sixteen days after oral argument.

¹⁴ *Id.* at 706 (“[N]either 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.”).

¹⁵ *Id.* at 711 (“Nowhere in the Constitution . . . is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President’s powers, it is constitutionally based.”).

¹⁶ *Id.* at 708, 705.

¹⁷ *Id.* at 709–10 (“These and other interests are recognized in law by privileges against forced disclosure, established in the Constitution, by statute, or at common law. Whatever their origins, these exceptions to the demand for every man’s evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.”).

¹⁸ *Id.* at 704.

¹⁹ *Nixon*, 418 U.S. at 705.

²⁰ *Id.* at 705.

²¹ *Id.* at 708.

²² *Id.* at 706.

²³ *Id.* at 707.

²⁴ *Id.*

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against the “fundamental and comprehensive” need to “develop all relevant facts” and evidence in a criminal case.²⁵ In weighing these interests, the Court held the following:

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 functions of the courts.

As a result, the Communications Privilege, when based “only on a generalized interest in confidentiality,” “cannot prevail over the fundamental demands of . . . the fair administration of justice” and therefore “must yield to the demonstrated, specific need for evidence in a pending criminal trial.”²⁶

Finally, *Nixon* approved a “staged decisional structure.” If a President determines that “compliance with a subpoena would be injurious to the public interest he may properly . . . invoke a claim of privilege.”²⁷ Such an invocation creates “presumptive” protections for the subpoenaed material. As a result of these initial protections, a court may only order *in camera* review when the party has “made a sufficient showing to rebut the presumption.”²⁸ Once the presumptively privileged material is reviewed *in camera*, a court may then direct the further disclosure of all “relevant” and “admissible” information.²⁹

The *Nixon* opinion made two additional points worth noting. First, the Court repeatedly suggested that its analysis may have been different if instead of a generalized interest in the confidentiality of his communications, the President had asserted a claim of “military or diplomatic secrets.”³⁰ “As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities.”³¹ Second, the Court explicitly disclaimed any attempt to assess the application of the Communications Privilege in a congressional investigation: “we are not here concerned with the balance between the President’s generalized interest in confidentiality . . . and congressional demands for information.”³²

²⁵ *Nixon*, 418 U.S. at 711–12 (“In this case we must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President’s responsibilities against the inroads of such a privilege on the fair administration of criminal justice.”).

²⁶ *Id.* at 713.

²⁷ *Id.*

²⁸ *Id.* at 714.

²⁹ During that review (at least when the Privilege is asserted in response to a criminal trial subpoena) a court must distinguish between material that is both “probably admissible in evidence and relevant” and that which is not. *Id.* at 714. The latter material must be “restored to its privileged status” and “accorded that high degree of respect due the President of the United States,” while the former would be provided to the requesting party. *Id.* at 714–16.

³⁰ *Id.* at 710.

³¹ *Id.* at 710.

³² *Id.* at 712 n.19. Shortly after the Supreme Court’s opinion in *Nixon*, the House Judiciary Committee voted to recommend articles of impeachment against President Nixon for obstruction of justice, abuse of power, and contempt of Congress for his refusal to comply with congressional subpoenas. The contempt of Congress allegation was based on the President’s failure to comply with subpoenas issued by the House Judiciary committee as part of its impeachment investigation. H.R. REP. NO. 93–1305 at 4 (1974). On August 9, 1974, before the full House considered the articles of impeachment but after determining that he had lost support in Congress and would not survive impeachment, President Nixon resigned.

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ArtII.S3.4.7

Statutory Requirements and Communications Privilege

ArtII.S3.4.7 Statutory Requirements and Communications Privilege

Article II, Section 3:

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

The Supreme Court considered the nature of executive privilege in a statutory context in its 1977 decision of *Nixon v. Administrator of General Services (Nixon II)*.¹ In that case, former President Richard Nixon challenged the Presidential Recordings and Materials Preservation Act, a statute that nullified a contract that gave Nixon control over his own presidential records. The Act instead established a process to secure and preserve his records with a government agency.² Along with other claims, Nixon argued that provisions of the law permitting the screening and cataloguing of presidential materials by Executive Branch archivists impermissibly infringed on his Privilege. *Nixon II* was therefore distinct from *Nixon I*, because it concerned disclosure within the Executive Branch pursuant to a statutory provision, rather than disclosure outside the Executive Branch pursuant to a subpoena.

The Court rejected former President Nixon's position, holding that the statutory arrangement for preservation of the President's records worked only a "very limited intrusion" into the President's confidentiality interests, especially given that the law built in safeguards to prevent the public disclosure of protected materials.³ Like the previous cases, the Court engaged in a balancing test, evaluating whether the public interest justified such an intrusion, ultimately holding that it did. Congress had acted, the Court determined, based on a variety of "important objectives," including to "preserve the materials for legitimate historical and governmental purposes"; "restore public confidence in our political processes by preserving the materials as a source for facilitating a full airing of the events leading to appellant's resignation"; and based on its "need to understand how those political processes had in fact operated in order to gauge the necessity for remedial legislation."⁴

The Court's view of the severity of the intrusion appears to have been colored by the fact that the claim was being made by a former President.⁵ Although recognizing that the Communications Privilege "survives the individual President's tenure" and thus can be invoked by former Presidents to protect covered communications occurring while in office, the Court nonetheless noted that the President's interest in confidentiality is "subject to erosion over time after an administration leaves office."⁶

Nixon II also provided the Court's clearest explanation of the types of communications covered by the Communications Privilege. Interpreting *Nixon*, the Court held that the "the privilege is limited to communications 'in performance of [a President's] responsibilities,' 'of his

¹ *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425 (1977) [hereinafter *Nixon II*].

² *Id.* at 430–33.

³ *Id.* 451 (noting a "consistent historical practice" in which archivists "have performed the identical task in each of the Presidential libraries without any suggestion that such activity has in any way interfered with executive confidentiality").

⁴ *Id.* at 452–54.

⁵ See ArtII.S3.4.9 Former Presidents and Communications Privilege.

⁶ *Nixon II*, 433 U.S. at 451.

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office,’ and made ‘in the process of shaping policies and making decisions.’”⁷ This passage reflects the fundamental principle that the Communications Privilege does not act as a generalized safeguard for “Presidential privacy,” but instead protects the public interest in effective and deliberative presidential decisionmaking. As such, the Communications Privilege applies not to all presidential communications, but only those that bear a relationship to a presidential decision.

Nixon II marked the end of President Nixon’s lengthy and largely unsuccessful legal battles over the release of his communications. But the importance of the Nixon-era cases transcends those materials. The cases established the fundamental characteristics of the Communications Privilege: (1) there is a qualified constitutional privilege that provides presumptive protections to confidential communications made to assist presidential decisionmaking; (2) the Communications Privilege can be invoked to resist disclosure of covered communications in various contexts; and (3) the Communications Privilege is not absolute, and can be overcome when the party seeking the information can articulate a sufficient showing of need.

ArtII.S3.4.8 Separation of Powers and Communications Privilege

Article II, Section 3:

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

In 2004, the Supreme Court issued *Cheney v. United States District Court*¹ in which it reaffirmed distinctions first articulated in the Nixon-era cases between civil and criminal proceedings and expounded on the relationship between the Communications Privilege and the separation of powers.

The *Cheney* decision interacted with the Communications Privilege in a complicated procedural posture, and for this reason the implications of the decision to more traditional scenarios, especially to the congressional context, are difficult to discern. In *Cheney*, a federal district court had entered orders in a Federal Advisory Committee Act (FACA) lawsuit allowing discovery of documents relating to the structure and operation of the National Energy Policy Development Group (NEPDG), a task force chaired by the Vice President and established to give policy recommendations on energy issues to the President.² The George W. Bush Administration, though not asserting executive privilege, challenged that discovery order on the ground that it represented a “substantial intrusion[] on the process by which those in closest operational proximity to the President advise the President” in violation of the separation of powers.³ The district court and the D.C. Circuit rejected the Administration’s

⁷ *Id.* at 449 (citations omitted). As such, it was only a “small fraction” of Nixon’s complete collection of presidential records that would be covered by the Privilege. *Id.* at 454.

¹ *Cheney v. United States Dist. Court*, 542 U.S. 367, 383–91 (2004)

² *Id.* at 376.

³ *Id.* at 381. That action was in the form of mandamus, which among other things requires a party to show that there is “no other adequate means to attain the relief” desired. *Id.* at 403.

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arguments, mainly because the Administration had another means to protect its interests; it could assert executive privilege in response to the civil discovery subpoena.⁴

The Supreme Court reversed, holding that when a lower court has allowed “unnecessarily broad” discovery, reviewing courts have authority to “explore other avenues, short of forcing the Executive to invoke privilege.”⁵ The Court reasoned that to *require* the Executive Branch to assert the Communications Privilege in such a scenario would ignore the “weighty separation of powers objections raised in the case,” because “[o]nce executive privilege is asserted, coequal branches of the Government are set on a collision course.”⁶ The Court determined that the lower courts had “labored under the mistaken assumption that the assertion of executive privilege is a necessary precondition to the Government’s separation of powers objections.”⁷ *Cheney*, therefore, appears to suggest that there are separation of powers concerns associated with executive confidentiality issues that attach *even before* executive privilege is asserted.⁸

Cheney also reaffirmed the principle that the confidentiality interests associated with the Communications Privilege are weighed differently in different types of proceedings. In fact, the nature of the proceeding, whether civil or criminal, appears to affect both sides of the judicially developed balancing test. As for the requesting party, the Court held that “[t]he need for information for use in civil cases, while far from negligible, does not share the urgency or significance of [a] criminal subpoena,” where the need for the information “is much weightier.”⁹ As for the President’s interest, the court viewed the potential for a civil subpoena to disrupt the functioning of the Executive Branch as far greater than a criminal subpoena. In the criminal context, “there are various constraints . . . to filter out insubstantial legal claims,” but “there are no analogous checks in the civil discovery process.”¹⁰ Like past cases, however, *Cheney* did not address how a congressional proceeding relates to either civil or criminal proceedings.¹¹

ArtII.S3.4.9 Former Presidents and Communications Privilege

Article II, Section 3:

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

⁴ *Id.* at 376–77.

⁵ *Id.* at 390.

⁶ *Id.* at 391, 389.

⁷ *Cheney*, 542 U.S. at 391.

⁸ *Id.* at 385 (noting that “special considerations control when the Executive Branch’s interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated.”). *See also*, Karnoski v. Trump, 926 F.3d 1180, 1205–06 (9th Cir. 2019).

⁹ *Cheney*, 542 U.S. at 384.

¹⁰ *Id.* at 386 (noting that in the criminal system decisions are made by a “publicly accountable prosecutor subject to budgetary considerations” and subject to the “responsible exercise of prosecutorial discretion”).

¹¹ The Supreme Court did appear to draw a distinction between the criminal process and the legislative process in *Trump v. Mazars USA, LLP*, No. 19-715, slip op. (U.S. May 12, 2020) (“Unlike in criminal proceedings, where ‘[t]he very integrity of the judicial system’ would be undermined without ‘full disclosure of all the facts,’ efforts to craft legislation involve predictive policy judgments that are ‘not hamper[ed] . . . in quite the same way’ when every scrap of potentially relevant evidence is not available. While we certainly recognize Congress’s important interests in obtaining information through appropriate inquiries, those interests are not sufficiently powerful to justify access to the President’s personal papers when other sources could provide Congress the information it needs.”) (citations omitted).

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

In *Nixon II*, the Supreme Court determined that the Communications Privilege continues to protect presidential communications after the conclusion of the Administration within which the communication occurred and may be asserted by the former President.¹ As described above, the Court found that a former President may “legitimately” assert the Communications Privilege to prevent disclosure of his official records after he has left office.² The Court reasoned that the confidentiality necessary to ensure the free exchange of ideas between the President and his advisers while the President is in office

cannot be measured by the few months or years between the submission of the information and the end of the President’s tenure; the privilege is not for the benefit of the President as an individual, but for the benefit of the Republic. Therefore the privilege survives the individual President’s tenure.³

The Court’s determination appears to have rested on the reasoning that the general purpose of the Communications Privilege—ensuring the provision of frank advice to the President—could be threatened or undermined no matter when the disclosure of the covered communications occurs. *Nixon II* distinguished former Presidents from incumbents in three important ways. First, the Court explicitly stated that “to the extent that the privilege serves as a shield for executive officials against burdensome requests for information which might interfere with the proper performance of their duties, a former President is in less need of it than an incumbent.”⁴ Second, the Court concluded that the “expectation of the confidentiality of executive communications” is “subject to erosion over time after an administration leaves office.”⁵ Thus, the strength of a former President’s Communications Privilege claim appears to dwindle as time passes.

Third and perhaps most importantly, the Court determined that because only the sitting President is “charged with performance of executive duty under the Constitution,” he is “in the best position to assess the present and future needs of the Executive Branch, and to support invocation of the privilege accordingly.”⁶ In *Nixon II*, the fact that President Carter—the sitting President at the time—did not support former President Nixon’s privilege claim “detract[ed] from the weight of” Nixon’s assertion.⁷ In the Court’s view, it is the incumbent President who is better situated to make determinations about the need for executive confidentiality, because it is the incumbent President who may suffer the harm that the Communications Privilege purports to protect against if privileged documents were disclosed (namely that current advisers would be dissuaded from giving the incumbent President candid advice).⁸ As a result, when the incumbent President does not support a former President’s privilege claim, the strength of the claim declines.

The importance of the incumbent’s concurrence to a privilege claim by a former President was recently reaffirmed in *Trump v. Thompson*.⁹ *Thompson* arose from the inquiry conducted

¹ *Nixon II*, 433 U.S. at 446–49.

² *Id.* at 449.

³ *Id.* (citations omitted).

⁴ *Id.* at 448.

⁵ *Id.* at 451.

⁶ *Id.* at 449.

⁷ *Nixon II*, 433 U.S. at 449.

⁸ *Id.*

⁹ *Trump v. Thompson*, 20 F.4th 10 (D.C. Cir. 2021), *cert. denied*, No. 21A272, slip op. (U.S. Jan. 20, 2022).

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by the House Select Committee to Investigate the January 6th Attack on the U.S. Capitol (Select Committee). As part of its investigation, the Select Committee requested that the National Archives and Records Administration (NARA) produce relevant presidential records from the former Trump Administration pursuant to the Presidential Records Act (PRA).¹⁰ The request sought various categories of White House communications and documents created on or around January 6, 2021. Under the PRA, if any congressional committee requests a presidential record on a “matter within its jurisdiction” that is “needed for the conduct of its business and that is not otherwise available,” the National Archives “shall” make the record available.¹¹ However, consistent with principles established in *Nixon* and *Nixon II*, the PRA also preserves the right of both current and former Presidents to assert privilege claims by providing that disclosure by NARA is “subject to any rights, defenses, or privileges which the United States or any agency or person may invoke.”¹²

Shortly thereafter, President Joseph Biden determined that under the “unique and extraordinary circumstances” and because of Congress’s “compelling need” to understand the “horrific events” of January 6, asserting executive privilege over the requested documents would not be “in the best interests of the United States.”¹³ Former President Trump disagreed and notified the Archivist that he was asserting the Communications Privilege. After President Biden clarified that he would “not uphold the former President’s assertion of Privilege,” former President Trump filed suit in federal district court to block NARA from disclosing privileged documents to the Select Committee.¹⁴

The D.C. District Court in *Thompson* viewed the case as “a dispute between a former and incumbent President.”¹⁵ Citing to *Nixon II*, the court stated that because the incumbent President is “best suited” to identify and determine the best interests of the Executive Branch, former President Trump’s Privilege claim was “outweighed by President Biden’s decision not to uphold the Privilege.”¹⁶ Moreover, the court reasoned that to side with the former President would not only second guess the sitting President’s judgment, but also the Legislative Branch’s judgment—for both President Biden and the House agreed that the requested documents should be disclosed.¹⁷

The D.C. Circuit affirmed the district court decision on appeal. The court acknowledged, with reference to *Nixon II*, that there was “no question” that former President Trump could assert the Communications Privilege and that the Communications Privilege was “of constitutional stature.”¹⁸ Nevertheless, the court held that a “rare and formidable alignment of [three] factors” supported disclosure of the documents to the Committee and outweighed the former President’s interest in confidentiality.¹⁹

First, the court stated that President Biden’s determination that it was neither in the Executive Branch’s nor the public’s interest to assert Privilege over the requested documents

¹⁰ *Id.* at 16.

¹¹ 44 U.S.C. § 2205(2)(C).

¹² *Id.* at § 2205(2).

¹³ *Thompson*, 20 F.4th at 20–21.

¹⁴ *Id.* at 21–22.

¹⁵ *Trump v. Thompson*, Civil Action No. 21-cv-2769 (TSC), 2021 U.S. Dist. LEXIS 216812, at *26 (D.D.C. Nov. 9, 2021).

¹⁶ *Id.* at *29.

¹⁷ *Id.* at *27–29.

¹⁸ *Thompson*, 20 F. 4th at 32.

¹⁹ *Id.* at 33.

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“carries immense weight in overcoming the former President’s” claim.²⁰ Consistent with previous case law, the court viewed President Biden as “the principal holder and keeper of executive privilege” and the judiciary as “ill equipped to . . . second guess the expert judgment of the sitting President.”²¹

Second, the House had a “uniquely weighty interest in investigating the causes and circumstances” of the January 6 attack on the U.S. Capitol.²² Indeed, the court noted that having presented a “sound factual predicate” for the requested documents, “there would seem to be few, if any, more imperative interests squarely within Congress’s wheelhouse than ensuring the safe and uninterrupted conduct of its constitutionally assigned business.”²³

Third, and “weighing still more heavily” against former President Trump, was “the fact that the judgment of the Political Branches is unified as to these particular documents.”²⁴ The court was unwilling to “needlessly disturb the compromises and working arrangements that” the Congress and the President had already reached.²⁵

In light of these three factors, the D.C. Circuit held that “the profound interests in disclosure advanced by President Biden and the January 6th Committee far exceed [former President Trump’s] generalized concerns for Executive Branch confidentiality.”²⁶ That holding was given added significance by the court’s determination that it would have been compelled to reach that conclusion “under any of the tests advocated by former President Trump,” including the “demonstrated, specific need” standard from *Nixon* or the “demonstrably critical” standard from *Senate Select*.²⁷ As such, it appears the Select Committee would have been able to overcome the Communications Privilege in this circumstance even if President Biden had supported former President Trump’s Privilege claim.

The Supreme Court picked up on this point in denying former President Trump’s petition to stay the D.C. Circuit decision.²⁸ In interpreting the opinion below, the Supreme Court—in an unsigned order—reasoned that Mr. Trump’s “status as a former President [] made no difference to the court’s decision” since the D.C. Circuit had “concluded that President Trump’s claims would have failed even if he were an incumbent.”²⁹ Because the former President’s assertion of privilege would have been unsuccessful either way, the Court declared the D.C. Circuit’s discussion of when executive privilege claims could properly be asserted by former Presidents to be nonbinding dictum.³⁰

²⁰ *Id.*

²¹ *Id.* at 35.

²² *Id.*

²³ *Id.* at 35–36.

²⁴ *Thompson*, 20 F.4th at 37.

²⁵ *Id.* at 38 (quoting *Trump v. Mazars USA, LLP*, No. 19-715, slip op. (U.S. May 12, 2020)).

²⁶ *Id.* at 33.

²⁷ *Id.* at 41 (“The legislative interest at stake passes muster under any of the tests pressed by former President Trump.”).

²⁸ *Trump v. Thompson*, No. 21A272, slip op. (U.S. Jan. 20, 2022). The Supreme Court later denied certiorari. No. 21A272, slip op. (U.S. Jan. 20, 2022).

²⁹ *Id.* Justice Clarence Thomas would have granted the former President’s application. Justice Brett Kavanaugh authored a concurrence to clarify his position that “[a] former President must be able to successfully invoke the Presidential communications privilege for communications that occurred during his Presidency.” *Id.* (Kavanaugh, J., concurring) Once invoked, it appears to be Justice Kavanaugh’s view that the tests from *Nixon* and *Senate Select* “may apply to a former President’s privilege claim as they do to a current President’s privilege claim.” *Id.* at 681.

³⁰ *Id.* at 680.

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Sec. 3—Duties: Executive Privilege

ArtII.S3.4.10
Deliberative Process and Law Enforcement Privileges

ArtII.S3.4.10 Deliberative Process and Law Enforcement Privileges

Article II, Section 3:

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Of the various executive privileges, the Deliberative Process Privilege is the one most frequently asserted.¹ The purpose underlying the Privilege is to protect the “quality of agency decisions’ by allowing government officials freedom to debate alternative approaches in private.”² But the Deliberative Process Privilege applies only to those documents and communications that are *predecisional*, meaning they are created prior to the agency reaching its final decision, and *deliberative*, meaning they relate to the thought process of Executive officials and are not purely factual.³ The Privilege does not protect entire documents. Rather, the Executive Branch must disclose non-privileged factual information that can be reasonably segregated from privileged information in the requested documents. And like the other executive privileges, the Deliberative Process Privilege is overcome by an adequate showing of need.⁴

The idea of the Deliberative Process Privilege was developed under the Freedom of Information Act (FOIA) to provide limited protection for communications and documents evidencing the predecisional considerations of agency officials.⁵ Over time, the Executive Branch has melded this deliberative process idea with the recognized confidentiality interest in the President’s communications with close advisers, such that the privilege would extend to any policy deliberations or communications within the Executive Branch in which the President may have an interest.

The result has been a presumption by the Executive, though regularly contested by Congress, that its predecisional deliberations are beyond the scope of congressional demand. For instance, Attorney General William French Smith advised President Ronald Reagan that “Congress will have a legitimate need to know the preliminary positions taken by Executive Branch officials during internal deliberations only in the rarest of circumstances.”⁶ According

¹ Given its broad scope, the Deliberative Process Privilege is “the most frequent form of executive privilege raised.” *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997).

² *Id.* at 737 (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975)).

³ See *Assassination Archives & Research Ctr. v. CIA*, No. 18–5280, 2020 U.S. App. LEXIS 40001, 5–6 (D.C. Cir. Dec. 21, 2020) (“The privilege covers information that is both ‘predecisional’ and ‘deliberative.’ Documents are predecisional if they were ‘generated before the adoption of an agency policy,’ and deliberative if they ‘reflect[] the give-and-take of the consultative process.’”) (quoting *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)).

⁴ See *Comm. on Oversight & Gov’t Reform v. Lynch*, 156 F. Supp. 3d 101, 112–14 (D.D.C. 2016) (finding that a congressional committee’s need for deliberative materials outweighed the Executive Branch’s interest in confidentiality).

⁵ See *EPA v. Mink*, 410 U.S. 73, 85–90 (1973).

⁶ Letter from Attorney General William French Smith to President Reagan, October 31, 1981, reprinted in 5 Op. O.L.C. 27, 31 (1981) [hereinafter *Smith Letter/Watt*]; *accord* Memorandum to General Counsels’ Consultative Group Re: Congressional Requests for Confidential Executive Branch Information, 13 Op. O.L.C. 153, 192 (1989) (“Congress will seldom have any legitimate legislative interest in knowing the precise predecisional positions and statements of particular Executive Branch officials.”) [hereinafter *Barr Memo*]; Letter from Assistant Attorney General Robert Rabkin, Office of Legislative Affairs, DOJ, to Honorable John Linder, Chairman House Subcommittee on Rules and Organization of the House, Committee on Rules, June 27, 2000 at 5–6 (“[T]he Department has a broad confidentiality

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to this view, the need for the Executive to prevent disclosure of its deliberations is at its apex when Congress attempts to discover information about ongoing policymaking within the Executive Branch. In that case, the Executive has argued, the deliberative process exemption serves as an important boundary marking the separation of powers. When congressional oversight “is used as a means of participating directly in an ongoing process of decisionmaking within the Executive Branch, it oversteps the bounds of the proper legislative function.”⁷

The legal justifications asserted by the Barack Obama Administration for withholding documents from Congress during a House probe into Operation Fast and Furious appear to reflect a heavy reliance on the Deliberative Process Privilege. In a letter to the President asking him to invoke executive privilege over the subpoenaed documents, Attorney General Eric Holder noted that “Presidents have repeatedly asserted executive privilege to protect confidential Executive Branch deliberative materials from congressional subpoena.”⁸ The Attorney General went on to argue that “[i]t is well established that ‘the doctrine of executive privilege . . . encompasses Executive Branch deliberative communications.’”⁹ The dispute ultimately reached the courts, and although the litigation was eventually settled, a federal district court initially held that after “balancing the competing interests” at stake, in this instance the Deliberative Process Privilege must yield to Congress’s “legitimate need” for the documents.¹⁰

Similar to Deliberative Process Privilege, the Law Enforcement Privilege operates to protect information, the disclosure of which by the Executive Branch would have a chilling effect on conducting “the candid and independent analysis essential to just and effective law enforcement.”¹¹

interest in matters that reflect its internal deliberative process. In particular, we have sought to ensure that all law enforcement and litigation decisions are products of open, frank, and independent assessments of the law and facts—uninhibited by political and improper influences that may be present outside the department. We have long been concerned about the chilling effect that would ripple throughout government if prosecutors, policy advisors at all levels and line attorneys believed that their honest opinion—be it ‘good’ or ‘bad’—may be the topic of debate in Congressional hearings or floor debates. These include assessments of evidence and law, candid advice on strength and weaknesses of legal arguments, and recommendations to take or not to take legal action against individuals and corporate entities.”); *see also* Smith Letter/Watt, *supra*, at 30 (“congressional oversight interest will support a demand for predecisional, deliberative documents in the possession of the Executive Branch only in the most unusual circumstances”).

⁷ Smith Letter/Watt at 30; *see also* Statement of Assistant Attorney General William H. Rehnquist, reprinted in Executive Privilege: The Withholding of Information by the Executive: Hearings Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 92nd Cong., 1st Sess. 424 (“The notion that the advisors whom he has chosen should bear some sort of a hybrid responsibility to opinion makers outside of the government, which notion in practice would inevitably have the effect of diluting their responsibility to him, is entirely inconsistent with our tripartite systems of government. The President is entitled to undivided and faithful advice from his subordinates, just as Senators and Representatives are entitled to the same sort of advice from their legislative and administrative assistants, and judges to the same sort of advice from their law clerks.”).

⁸ LETTER TO PRESIDENT BARACK OBAMA FROM ERIC HOLDER, ATTORNEY GENERAL, June 19, 2012, at 3.

⁹ *Id.*

¹⁰ Comm. on Oversight & Gov’t Reform v. Lynch, 156 F. Supp. 3d 101, 112, 115 (D.D.C. 2016).

¹¹ Letter from Assistant Attorney General Robert Rabkin, Office of Legislative Affairs, DOJ, to Honorable John Linder, Chairman House Subcommittee on Rules and Organization of the House, Committee on Rules, June 27, 2000 at 5–6 (“The foregoing concerns apply with special force to Congressional requests for prosecution and declination memoranda and similar documents. These are extremely sensitive law enforcement materials. The Department’s attorneys are asked to render unbiased, professional judgments about the merits of potential criminal and civil law enforcement cases. If their deliberative documents were made subject to Congressional challenge and scrutiny, we would face a grave danger that they would be chilled from providing the candid and independent analysis essential to just and effective law enforcement or just as troubling, that our assessments of the strengths and weaknesses of evidence of the law, before they are presented in court. That may result in an unfair advantage to those who seek public funds and deprive the taxpayers of confidential representation enjoyed by other litigants.”). *See also* Dep’t of Justice, Office of Legal Counsel, Protective Assertion of Executive Privilege Over Unredacted Mueller Report and Related Investigative Files, 43 Op. O.L.C. 374 (2019).

ARTICLE II—EXECUTIVE BRANCH
Sec. 3—Duties: Presidential Immunity

ArtII.S3.5.1
Presidential Immunity to Suits and Official Conduct

ArtII.S3.5 Presidential Immunity

ArtII.S3.5.1 Presidential Immunity to Suits and Official Conduct

Article II, Section 3:

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

In its 1867 decision *Mississippi v. Johnson*, the Supreme Court established that the President is largely beyond the reach of the judiciary by holding that it could not direct President Andrew Johnson in how he exercised his “purely executive and political” powers.¹ The Court stated, it had “no jurisdiction . . . to enjoin the President in the performance of his official duties.”²

In subsequent decisions, however, the Court made clear that *Johnson* does not stand for the proposition that the President is immune from judicial process. For example, in *United States v. Nixon*,³ the Court held that President Richard Nixon was amenable to a subpoena to produce evidence for use in a federal criminal case. There, the President had argued that he 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.”⁴ The Supreme Court unanimously disagreed, holding that “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.”⁵ The Court noted that the constitutional duty of courts “to do justice in criminal prosecutions” was counterbalanced by the claim of presidential immunity. To accept the President’s argument, the Court further reasoned, would undermine the separation of powers that was at the core of “a workable government” as well as “gravely impair the role of the courts under Art. III.”⁶

Throughout the Watergate investigation, it was unclear whether the President could be subject to criminal prosecution prior to being convicted upon impeachment.⁷ The Court, however, resolved that courts may require the President to testify or produce documents in

¹ 71 U.S. (4 Wall.) 475 (1867). The Court declined to express an opinion on “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) (Scalia, J., concurring). In *NTEU v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974), the court held that it could issue a writ of mandamus 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.

² *Johnson*, 71 U.S. at 501.

³ *United States v. Nixon*, 418 U.S. 683 (1974)

⁴ 418 U.S. at 706.

⁵ *Id.*

⁶ *Id.* at 706–07. The lower courts considered the issue more fully. 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). Assessments of the subpoena of President Jefferson in the *Burr* trial have conflicted. *United States v. Burr*, 25 F. Cas. 187 (No. 14694) (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).

⁷ The Impeachment Clause, Article I, § 3, cl. 7, provides that a party convicted upon impeachment shall nonetheless be liable for criminal proceedings. Gouveneur Morris in the Convention and Alexander Hamilton in the

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criminal proceedings.⁸ This principle dates to the earliest days of the Republic, when Chief Justice John Marshall presided as the Circuit Justice for Virginia over the treason trial of Aaron Burr. In that case, Chief Justice Marshall concluded that President Thomas Jefferson could be subject to a subpoena to provide a document relevant to the trial.⁹ Specifically, Chief Justice Marshall declared that, in contrast to common law privileges afforded the King of England, the President was not “exempt from the general provisions of the constitution,” like the Sixth Amendment, which provides the defense compulsory process.¹⁰

Nonetheless, Chief Justice Marshall recognized that while the President could be subject to a criminal subpoena, the President could still withhold information from disclosure based on executive privilege.¹¹ In the two centuries since the Burr trial, the Executive Branch’s practices¹² and Supreme Court rulings “unequivocally and emphatically endorsed” Chief Justice Marshall’s position that the President was subject to federal criminal process.¹³ In its 2020 opinion in *Trump v. Vance*, the Court extended this precedent to *state* criminal proceedings, concluding that the President was not absolutely immune from state criminal subpoenas.¹⁴

Finally, with respect to civil liability, the Court held in *Nixon v. Fitzgerald* that the President is absolutely immune in actions for civil damages for all acts within the “outer perimeter” of his official duties.¹⁵ The Court’s close decision was premised on the President’s “unique position in the constitutional scheme,” that is, the Court conducted 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.”¹⁶ Although the Constitution expressly afforded Members of Congress immunity in matters arising from “speech or debate” and was silent on presidential immunity, the Court nonetheless considered immunity to be “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.”¹⁷

Federalist Papers asserted that a criminal trial would follow a successful impeachment. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 500 (Max Farrand ed., 1937); THE FEDERALIST NOS. 65 & 69.

⁸ See *Trump v. Vance*, No. 19-635, slip op. (July 9, 2020) (recognizing that the “public has a right to every man’s evidence”).

⁹ See *United States v. Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (No. 14,692D).

¹⁰ See *id.* (observing that while the King is born to power and can “do no wrong,” the President, by contrast, is “of the people” and subject to the law).

¹¹ See *United States v. Burr*, 25 F. Cas. 187, 192 (C.C.D. Va. 1807) (No. 14,694).

¹² See *Vance*, No. 19-635, slip op. at 7–9 (discussing historical practices of Presidents James Monroe, Ulysses S. Grant, Gerald Ford, Jimmy Carter, and William Clinton).

¹³ *Clinton v. Jones*, 520 U.S. 681, 704 (1997) (citing *United States v. Nixon*, 418 U.S. 683, 706 (1974)). In rejecting separation of powers challenges to claims that the President is immune from federal criminal process, the Court rejected the argument that criminal subpoenas “rise to the level of constitutionally forbidden impairment of the Executive’s ability to perform its constitutionally mandated functions.” *Id.* at 702–03.

¹⁴ See *Vance*, No. 19-635, slip op. at 12–15 (rejecting the categorical argument that state criminal subpoenas would unduly distract the President, impose a stigma on the presidency, or result in harassment by state prosecutors). The *Vance* Court also rejected the argument that a state prosecutor should satisfy a heightened standard of need when seeking a sitting President’s records. *Id.* at 15–16. More important, in *Vance*, the state prosecutor sought private presidential records, and executive privilege was not at issue. *Id.* (Kavanaugh, J., concurring in the judgment). The Court refused to extend the heightened-need standard established in *Nixon* to private records, discussed *infra*, reasoning that: (1) *Burr* and its progeny foreclosed that argument; (2) the heightened-need standard was unnecessary to allow the President to fulfill his Article II functions; and (3) the public interest in fair and effective law enforcement favors “comprehensive access to evidence.” *Id.* (majority opinion).

¹⁵ *Nixon v. Fitzgerald*, 457 U.S. 731 (1982)

¹⁶ *Id.* at 748.

¹⁷ *Id.* at 749.

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Presidential Immunity to Suits and Unofficial Conduct

While the Court relied, in part, upon its practice of finding immunity for officers, such as judges, for whom the Constitution is silent, but for which a long common-law history exists, and in part upon historical evidence, which it admitted was fragmentary and ambiguous,¹⁸ the Court focused on the fact that the President is different from all other executive officials. The President is charged with a long list of “supervisory and policy responsibilities of utmost discretion and sensitivity,”¹⁹ and diversion of his energies by concerns with private lawsuits would “raise unique risks to the effective functioning of government.”²⁰ Moreover, the presidential privilege is rooted in the separation of powers doctrine, counseling courts to tread carefully before intruding. While some interests are important enough to require judicial action, the Court reasoned that “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.²¹ 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 it was to prevent; absolute immunity was required.²²

ArtII.S3.5.2 Presidential Immunity to Suits and Unofficial Conduct

Article II, Section 3:

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

In *Clinton v. Jones*,¹ the Court, in a case of first impression, held that President William Clinton did not have qualified immunity from civil suit for conduct alleged to have taken place prior to his election, and therefore denied President Clinton’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 so that the President could perform his duties effectively absent fear that a particular decision might lead to personal liability—did not apply when the alleged conduct at issue had occurred before his election. Moreover, the Supreme Court observed, the separation of powers doctrine did not require a stay of all private actions against the President, as the trial court had sufficient powers to accommodate the President’s schedule and his workload so as not to impede the President from performing his duties. Finally, the Court stated that allowing such suits to proceed would not generate a large volume of politically motivated harassing and frivolous litigation. Congress has the power, the Court advised, if it should think necessary, to protect the President.²

¹⁸ *Id.* at 750–52 n.31.

¹⁹ *Id.* at 750.

²⁰ *Id.* at 751.

²¹ *Id.* at 754.

²² *Id.* at 755–57. Justices Byron White, William Brennan, Thurgood Marshall, and Henry Blackmun dissented. The Court reserved decision on whether Congress could expressly create a damages action against the President and abrogate immunity, *id.* at 748–49 n.27, thus appearing to disclaim that the Constitution mandated the decision; Chief Justice Warren Burger disagreed with the implication of this footnote, *id.* at 763–64 n.7 (concurring opinion), and the dissenters noted they agreed with the Chief Justice on this point. *Id.* at 770 & n.4.

¹ 520 U.S. 681 (1997)

² 457 U.S. at 749.

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ArtII.S3.5.2

Presidential Immunity to Suits and Unofficial Conduct

While courts may be unable to compel the President to act or prevent him from acting, his acts, when performed, are generally subject to judicial review and disallowance. Typically, the President's subordinates, through whom he acts, may be sued pursuant to a legal fiction to enjoin committing acts that might lead to irreparable damage³ or to compel by writ of mandamus performing a duty required by law.⁴ Such suits are usually brought in the United States District Court for the District of Columbia.⁵ In common law, courts may hold a subordinate executive officer personally liable for damages that resulted from any act the officer committed that was beyond his authority,⁶ although he has immunity for anything, even malicious wrongdoing, that he does in performing his duties.⁷

Different rules prevail when a plaintiff sues an officer for wrongs based on a "constitutional tort."⁸ The Court has suggested that, in some "sensitive" areas, officers acting in the "outer perimeter" of their duties may be accorded absolute immunity from liability.⁹ To reach such officers for acts for which they can be held responsible, courts must use the general "federal question" jurisdictional statute.¹⁰

³ *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).

⁴ *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).

⁵ This was based 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 since authorized federal district courts outside the District of Columbia to entertain such suits. 76 Stat. 744 (1962), 28 U.S.C. §1361.

⁶ *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. 270 (1885); *Belknap v. Schild*, 161 U.S. 10 (1896).

⁷ *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) (an action must be discretionary in nature as well as within the scope of employment, before a 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 an incident occurred that led to a lawsuit; upon certification, the employee is dismissed from the action, and the United States is substituted. As a result, sometimes the action will be dismissed against the government because the government has not waived sovereign immunity under the Federal Tort Claims Act. *United States v. Smith*, 499 U.S. 160 (1991) (the *Westfall Act* bars suit against federal employee even if sovereign immunity forecloses 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 an Attorney General's certification is subject to judicial review.

⁸ The Supreme Court recognized an implied cause of action against officers accused of constitutional violations 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), which concerned 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 Congress had 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 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 *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).

⁹ *Harlow v. Fitzgerald*, 457 U.S. 800, 812 (1982)

¹⁰ *See* 28 U.S.C. § 1331. On deleting the jurisdictional amount, *see* Pub. L. No. 94-574, 90 Stat. 2721 (1976), and Pub. L. No. 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). *See* 28 U.S.C. § 1331.

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ArtII.S3.5.3
Qualified Immunity Doctrine

ArtII.S3.5.3 Qualified Immunity Doctrine

Article II, Section 2, 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 supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

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 damage¹ or to compel by writ of mandamus the performance of a duty definitely required by law.² Such suits are usually brought in the United States District Court for the District of Columbia.³ 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,⁴ although immunity exists for anything, even malicious wrongdoing, done in the course of his duties.⁵

Different rules prevail when such an official is sued for a “constitutional tort” for wrongs allegedly in violation of our basic charter,⁶ although the Court has hinted that in some

¹ *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).

² *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).

³ 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.

⁴ *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. 270 (1885); *Belknap v. Schild*, 161 U.S. 10 (1896).

⁵ *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 government 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.

⁶ 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

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“sensitive” areas officials acting in the “outer perimeter” of their duties may be accorded an absolute immunity from liability.⁷ 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.⁸

SECTION 4—IMPEACHMENT

ArtII.S4.1 Overview of Impeachment Clause

Article II, 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.

The Constitution gives Congress the authority to impeach and remove the President,¹ Vice President, and all federal “civil officers” for treason, bribery, or other high crimes and misdemeanors.² This tool was inherited from English practice, in which Parliament impeached and convicted ministers and favorites of the Crown in a struggle to rein in the Crown’s power.

Congress’s power of impeachment is an important check on the Executive and Judicial Branches, recognized by the Framers as a crucial tool for holding government officers accountable for violations of the law and abuses of power.³ Congress has most notably employed the impeachment tool against the President and federal judges, but all federal civil officers are subject to removal by impeachment.⁴ The Senate has also concluded (by majority vote) on various occasions that an official impeached while in office remains subject to trial, conviction, and imposition of the penalty of disqualification even after he or she leaves office.⁵ The practice of impeachment makes clear, however, that Members of Congress are not civil officers subject to impeachment and removal.⁶

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).

⁷ *Harlow v. Fitzgerald*, 457 U.S. 800, 812 (1982).

⁸ *See* 28 U.S.C. § 1331. On deleting the jurisdictional amount, *see* Pub. L. No. 94-574, 90 Stat. 2721 (1976), and Pub. L. No. 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).

¹ The Constitution contains a number of provisions that are relevant to the impeachment of federal officials. Article I, Section 2, Clause 5 grants the sole power of impeachment to the House of Representatives; Article I, Section 3, Clause 6 assigns the Senate sole responsibility to try impeachments; Article I, Section 3, Clause 7 provides that the sanctions for an impeached and convicted individual are limited to removal from office and potentially a bar from holding future office, but an impeachment proceeding does not preclude criminal liability; Article II, Section 2, Clause 1 provides that the President enjoys the pardon power, but it does not extend to cases of impeachment; and Article II, Section 4 defines which officials are subject to impeachment and what kinds of misconduct constitute impeachable behavior. Article III does not mention impeachment expressly, but Section 1, which establishes that federal judges shall hold their seats during good behavior, is widely understood to provide the unique nature of judicial tenure. And Article III, Section 2, Clause 3 provides that trials, “except in Cases of Impeachment, shall be by jury.”

² U.S. CONST. art. II, § 4.

³ *See* THE FEDERALIST NOS. 65, 81 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁴ U.S. CONST. art. II, § 4; *see* ArtII.S4.4.5 Jurisprudence on Impeachable Offenses (1865–1900).

⁵ *See* 167 CONG. REC. S609 (daily ed. Feb. 9, 2021) (determining that “Donald John Trump is subject to the jurisdiction of a Court of Impeachment for acts committed while President of the United States, notwithstanding the expiration of his term in that office”); JARED P. COLE & TODD GARVEY, CONG. RSCH. SERV., R46013, IMPEACHMENT AND THE CONSTITUTION 47–48 (2019), <https://crsreports.congress.gov/product/pdf/R/R46013>.

⁶ *See* ArtII.S4.4.3 Jurisprudence on Impeachable Offenses (1789–1860).

ARTICLE II—EXECUTIVE BRANCH
Sec. 4—Impeachment

ArtII.S4.2
Offices Eligible for Impeachment

While judicial precedents inform the effective substantive meaning of various provisions of the Constitution, impeachment is at bottom a unique political process largely unchecked by the judiciary. While the meaning of treason and bribery is relatively clear, the scope of high crimes and misdemeanors lacks a formal definition and has been fleshed out over time, in a manner perhaps analogous to the common law, through the practice of impeachments in the United States Congress.⁷ The type of behavior that qualifies as impeachable conduct, and the circumstances in which impeachment is an appropriate remedy for such actions, are thus determined by, among other things, competing political interests, changing institutional relationships among the three branches of government, and legislators' interaction with and accountability to the public.⁸ The weight of historical practice, rather than judicial precedent, is thus central to understanding the nature of impeachment in the United States.

ArtII.S4.2 Offices Eligible for Impeachment

Article II, 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.

The Constitution provides that “[t]he President, Vice President, and all civil Officers of the United States” are subject to removal from office upon impeachment and conviction.¹ However, neither the text nor early historical sources precisely delineate *who qualifies* as a “civil officer.” For example, debates at the Constitutional Convention do not appear to reveal the scope of who may be impeached beyond the provision’s applicability to the President.² And while the *Federalist Papers* emphasized that the power of impeachment serves as a check on the Executive³ and Judicial Branches,⁴ they did not outline exactly what types of officials were considered to be civil officers.⁵

Historical practice thus informs the understanding of who qualifies as a civil officer. Aside from the President and Vice President, who are plainly identified in the Constitution’s text as impeachable officials, historical practice indicates that federal judges clearly qualify as officers subject to impeachment and removal, as the majority of proceedings have applied to those positions.⁶ Congress has also impeached the head of a cabinet-level Executive department.⁷

⁷ 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 762 (1833) (“Not but that crimes of a strictly legal character fall within the scope of the power, (for, as we shall presently see, treason, bribery, and other high crimes and misdemeanours are expressly within it;) but that it has a more enlarged operation, and reaches, what are aptly termed, political offences, growing out of personal misconduct, or gross neglect, or usurpation, or habitual disregard of the public interests, in the discharge of the duties of political office. These are so various in their character, and so indefinable in their actual involutions, that it is almost impossible to provide systematically for them by positive law.”); *id.* §§ 795–98.

⁸ See MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS x–xi (2000). See also STORY, *supra* note 7, at § 762.

¹ U.S. CONST. art. II, § 4.

² Statements from at least one delegate indicate that participants at the Constitutional Convention assumed that judges were subject to impeachment. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 66 (Max Farrand ed., 1911) (describing Rufus King’s observation that judges would be impeachable because they hold their office during good behavior).

³ THE FEDERALIST NO. 66 (Alexander Hamilton).

⁴ *Id.* at No. 79; *Id.* at No. 81; see generally ArtIII.S1.10.2.1 Overview of Good Behavior Clause et seq.

⁵ See, e.g., VA. CONST. OF 1776, para. 14 (providing that the chief executive of the state could only be impeached after leaving office); DEL. CONST. OF 1776, art. 23 (same).

⁶ See List of Individuals Impeached by the House of Representatives, U.S. HOUSE OF REPRESENTATIVES, <http://history.house.gov/Institution/Impeachment/Impeachment-List/> (last visited Jan. 24, 2018).

ARTICLE II—EXECUTIVE BRANCH
Sec. 4—Impeachment

ArtII.S4.2
Offices Eligible for Impeachment

While this indicates a congressional understanding that high-level Executive officers may be subject to impeachment, it is unclear how far down the ranks of the federal bureaucracy this principle travels.⁸

The second impeachment trial of President Donald Trump centered on the question of whether former officials remain subject to trial by the Senate after leaving office. There is historical evidence to support an original understanding that former officials remain subject to conviction and punishment by the Senate for actions taken while in office.⁹ The constitutional text, however, does not directly address the question. Former President Trump’s attorneys viewed the Constitution’s command that “[t]he President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment . . . and Conviction,” as supporting a requirement that the impeachment process applies only to officials who are holding office during the impeachment proceedings.¹⁰ Justice Joseph Story, in his influential *Commentaries on the Constitution of the United States*, similarly argued that “the language of the constitution may create some doubt, whether [disqualification] can be pronounced without being coupled with a removal from office.”¹¹ Moreover, to extend the impeachment process to former officials could be viewed as in tension with the Constitution’s otherwise clear break from the British model, which permitted impeachment of private citizens.¹²

But it has also been argued, including by the House managers in the second Trump trial, that the constitutionally enumerated punishments of removal from office and disqualification from future office are distinct components of the remedy for impeachable misconduct.¹³ The fact that an official has left office, and is therefore no longer subject to removal, does not “exempt” them from the remaining penalty of disqualification.¹⁴ Moreover, if impeachment does not extend to officials who are no longer in office, then an important aspect of the

⁷ See 3 ASHER C. HINDS, HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §§ 2444–68 (1907), <https://www.govinfo.gov/content/pkg/GPO-HPREC-HINDS-V3/pdf/GPO-HPREC-HINDS-V3.pdf> [hereinafter HINDS]; see *infra* ArtII.S4.4.5 Jurisprudence on Impeachable Offenses (1865–1900).

⁸ Judicial interpretations of which positions qualify as officers under the Appointments Clause may shed light on which Executive Branch positions are filled by civil officers that are subject to impeachment. See Akhil Reed Amar, *On Impeaching Presidents*, 28 HOFSTRA L. REV. 291, 303 (1999); Michael J. Broyde & Robert A. Schapiro, *Impeachment and Accountability: The Case of the First Lady*, 15 CONST. COMMENT. 479 (1998). The Supreme Court, in interpreting those provisions, has distinguished between officers, who exercise “significant authority” of the United States, *Buckley v. Valeo*, 424 U.S. 1, 126 (1976), and employees, or non-officers who are “lesser functionaries subordinate to the officers of the United States.” *Id.* at 126 n.162. The Court has further recognized the Constitution’s distinction between principal officers, who must be appointed by the President and confirmed by the Senate, and inferior officers, whose appointment may be placed in the President, department heads, or the courts of law. *Edmond v. United States*, 520 U.S. 651, 663 (1997). Assuming this line of cases serves as a guide in deciding who is a civil officer subject to impeachment, it appears that “employees,” as non-officers, are not subject to impeachment, while principal officers, such as the head of a cabinet-level Executive department, are. In between these two categories, historical practice does not indicate whether an inferior officer is subject to impeachment, as the House has never impeached such an individual.

⁹ For a historical and textual interpretation of whether a former official is subject to trial for impeachment, see JARED P. COLE & TODD GARVEY, CONG. RSCH. SERV., LSB10565, THE IMPEACHMENT AND TRIAL OF A FORMER PRESIDENT (2021), <https://crsreports.congress.gov/product/pdf/LSB/LSB10565>.

¹⁰ U.S. CONST. art. II § 4; PROCEEDINGS OF THE UNITED STATES SENATE IN THE IMPEACHMENT TRIAL OF DONALD JOHN TRUMP, PART II, 117TH CONG., S. DOC. NO. 117-2, at 122–32 (2021).

¹¹ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 801 (1833).

¹² *Id.* at § 788.

¹³ PROCEEDINGS OF THE UNITED STATES SENATE IN THE IMPEACHMENT TRIAL OF DONALD JOHN TRUMP, PART I, 117TH CONG., S. DOC. NO. 117-2, at 70–97 (2021).

¹⁴ PROCEEDINGS OF THE UNITED STATES SENATE IN THE IMPEACHMENT TRIAL OF DONALD JOHN TRUMP, PART III, 117TH CONG., S. DOC. NO. 117-2, at 101 (2021).

ARTICLE II—EXECUTIVE BRANCH
Sec. 4—Impeachment

ArtII.S4.2
Offices Eligible for Impeachment

impeachment punishment would be lost as Congress could never bar an official from holding office in the future as long as that individual resigns at some point prior to a Senate conviction.¹⁵

While these interpretive arguments have, and likely will continue to be raised, the Senate has determined by majority vote on multiple occasions that they retain the power to proceed against an Executive Branch official who has resigned from office. These decisions span from the trial of former Secretary of War William Belknap in 1876 to former President Trump in 2020.¹⁶ Nevertheless, it appears that while Congress may have legal authority to impeach and try a former official, current disagreement on the matter may be widespread enough to create a practical obstacle to obtaining the supermajority necessary to convict a former official.

The Constitution’s structure and historical practice also indicate that impeachment likely does not apply to Members of Congress.¹⁷ First, Article II, Section 3 provides that officers of the United States are commissioned by the President;¹⁸ Members of Congress receive no such commission. Second, Members may be removed from office by other means explicitly provided in the Constitution.¹⁹ Third, the Ineligibility Clause bars any person “holding any office under the United States” from serving in any house of Congress, indicating the Members of Congress are not considered officers of the United States.²⁰

Finally, congressional practice indicates that Members of Congress are not officers of the United States.²¹ In 1797, the House of Representatives voted to impeach Senator William Blount, the first impeachment in the history of the young Republic.²² Two years later, the Senate concluded that Senator Blount was not a civil officer subject to impeachment and voted to dismiss the articles because that body lacked jurisdiction over the matter.²³ This determination has been accepted ever since by the House and the Senate, and since then, the House has never again voted to impeach a Member of Congress.²⁴

¹⁵ *Id.* at 191.

¹⁶ See COLE & GARVEY, *supra* note 9 (discussing the Senate’s decision to exercise jurisdiction in the Belknap impeachment); 167 CONG. REC. S609 (daily ed. Feb. 9, 2021).

¹⁷ See ArtII.S4.4.3 Jurisprudence on Impeachable Offenses (1789–1860); THE FEDERALIST NO. 66 (Alexander Hamilton).

¹⁸ U.S. CONST. art. II, § 3.

¹⁹ *Id.* art. I, § 5.

²⁰ *Id.* § 6.

²¹ See Legal Aspects of Impeachment: An Overview, DOJ, OFFICE OF LEGAL COUNSEL 55 n.31 (1974), <https://www.justice.gov/olc/page/file/980036/download> (“The Senator William Blount precedent of 1798 does seem to have determined that the Senate will not try its members on an impeachment.”); DAVID CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801 275–281 (1997).

²² 3 HINDS, *supra* note 7, at §§ 2300–02.

²³ *Id.* at § 2318.

²⁴ See CHARLES W. JOHNSON, JOHN V. SULLIVAN, AND THOMAS J. WICKHAM, JR., HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS AND PROCEDURES OF THE HOUSE 604–06 (2017); STAFF OF H. COMM. ON THE JUDICIARY, 93D CONG., IMPEACHMENT, SELECTED MATERIALS 692 (Comm. Print 1973); *Motions Sys. Corp. v. Bush*, 437 F.3d 1356, 1373 (Fed. Cir. 2006) (“This principle has been accepted since 1799, when the Senate, presented with articles of impeachment against Senator William Blount, concluded after four days of debate that a Senator was not a civil officer for purposes of the Impeachment Clause.”); MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 48 (2000). In addition, in contrast to English practice, impeachment does not extend to private citizens or state officers, but is limited to officers of the federal government. 3 HINDS, *supra* note 7, at §§ 2007, 2315. No military officer has ever been impeached, which is consistent with the views of some early constitutional commentary that military officers are not subject to impeachment. Justice Joseph Story has suggested that “civil officers” was not intended to cover military officers. See II JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 789 (1833) (concluding that “[t]he sense, in which [civil] is used in the Constitution, seems to be in contradistinction to military, to indicate the rights and duties relating to citizens generally, in contradistinction to those of persons engaged in the land or naval service of the government”).

ARTICLE II—EXECUTIVE BRANCH
Sec. 4—Impeachment

ArtII.S4.3
Future of Impeachment Remedy

ArtII.S4.3 Future of Impeachment Remedy

Article II, 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.

While the historical practices of Congress offer the best guide as to what behavior constitutes a high crime or misdemeanor, this principle does not necessarily preclude the development or expansion of impeachment’s reach in the future. Indeed, as noted previously,¹ the absence of impeachment proceedings directed against particular conduct in the past does not mean that such conduct would not be deemed impeachable in different circumstances.² For example, certain conduct giving rise to impeachment might not have occurred or attracted notice at an earlier time. Understandings of impeachable behavior might also change over time to recognize impeachment as available for a wider range of behavior than has been previously recognized. One possibility, among others, is that impeachment may be seen as appropriate to punish violations of the law or the Constitution that lack an alternative remedy, such as redress in the federal courts.³ For example, impeachment has been proposed, but never applied, for alleged violations of constitutional and statutory requirements relating to the use of military force without congressional authorization.⁴

Likewise, future impeachments might shed light on unresolved issues pertinent to the impeachment process. For instance, the applicability of the Due Process Clause of the Fifth Amendment to federal impeachments is unclear.⁵ In a suit challenging his impeachment and removal from office, former Judge Alcee Hastings argued that he had a property interest in his seat and salary and the government could not deprive him of these without according him due process—including a full trial before the entire Senate.⁶ The U.S. District Court for the District of Columbia ruled that due process applied to impeachment proceedings.⁷ However, the U.S. Court of Appeals for the District of Columbia Circuit reversed and remanded the ruling⁸ because of the Supreme Court’s intervening decision of *Nixon v. United States*.⁹ On remand, the district court dismissed the case as nonjusticiable without commenting on the merits of the due process claim.¹⁰ Presently, therefore, individual Senators themselves must decide whether the Due Process Clause applies to impeachment trials and what procedures such a requirement might entail. At times, this has led to inconsistent practices. For example, at the

¹ See ArtII.S4.4.2 Historical Background on Impeachable Offenses and accompanying notes.

² See CHARLES BLACK, IMPEACHMENT 33–36 (1974).

³ *Id.*

⁴ See, e.g., H. COMM. ON THE JUDICIARY, IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, 93D CONG., 2D SESS., H.R. REP. NO. 93-1305, at 220–26 (1974); H. Res. 370, 98th Cong. (1983) (alleging that President committed high crimes or misdemeanors by ordering the invasion of Grenada).

⁵ The issue of due process in the House impeachment investigation was raised by the President’s attorneys in the first Trump impeachment trial. See PROCEEDINGS OF THE UNITED STATES SENATE IN THE IMPEACHMENT TRIAL OF DONALD JOHN TRUMP, PART II, 117TH CONG., S. DOC. NO. 117-2, at 175–80 (2021). The managers asserted that the argument that the President had been denied due process in the House impeachment investigation had “no grounding in law or fact.” PROCEEDINGS OF THE UNITED STATES SENATE IN THE IMPEACHMENT TRIAL OF DONALD JOHN TRUMP, PART III, 117TH CONG., S. DOC. NO. 117-2, at 211 (2021). For a discussion of the application of the Due Process Clause in House and Senate impeachment proceedings see TODD GARVEY, CONG. RSCH. SERV., R45983, CONGRESSIONAL ACCESS TO INFORMATION IN AN IMPEACHMENT INVESTIGATION 17 n.118 (2019), <https://crsreports.congress.gov/product/pdf/R/R45983>.

⁶ MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 41 (2000).

⁷ *Hastings v. United States*, 802 F. Supp. 490, 502 (D.D.C. 1992).

⁸ *Hastings v. United States*, 988 F.2d 1280 (D.C. Cir. 1993).

⁹ *Nixon v. United States*, 506 U.S. 224 (1993).

¹⁰ *Hastings v. United States*, 837 F. Supp. 3 (D.D.C. 1993).

ARTICLE II—EXECUTIVE BRANCH
Sec. 4—Impeachment: Impeachable Offenses

ArtII.S4.4.1
Overview of Impeachable Offenses

trial of Alcee Hastings, several Senators had been Members of the House in the previous session that voted for impeachment.¹¹ All three recused themselves from trial to avoid the appearance of a conflict.¹² In contrast, the same situation presented itself at the trials of Judge John Pickering and President Bill Clinton, but no Senators recused themselves in those cases.¹³

ArtII.S4.4 Impeachable Offenses

ArtII.S4.4.1 Overview of Impeachable Offenses

Article II, 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.

The Constitution provides that the grounds of impeachment are for “treason, bribery, or other high Crimes and Misdemeanors.” While the types of conduct constituting treason and bribery are relatively well-understood terms,¹ the meaning of “high Crimes and Misdemeanors” is not defined in the Constitution or in statute.² The basic framework for impeachment was inherited from English practice by the colonies in their adoption of state constitutions.³ Both experiences informed the adoption of impeachment provisions in the federal Constitution.

The common method for interpreting the Constitution’s impeachment provisions stands in some contrast to that of other constitutional provisions. Whereas judicial precedent drives the prevailing understanding of many provisions of the Constitution, impeachment is essentially a political process that is largely unreviewable by the Judicial Branch.⁴ As such, the historical practice of impeachment proceedings, rather than judicial decisions, informs our understanding of the Constitution’s meaning in this area. In this vein, the meaning of “high crimes and misdemeanors” is informed not by judicial decisions, but by the history of congressional impeachments.⁵

¹¹ GERHARDT, *supra* note 6, at 41.

¹² PETER HOFFER & N.E.H. HULL, *IMPEACHMENT IN AMERICA, 1635–1805* 213 (1984).

¹³ GERHARDT, *supra* note 6, at 41

¹ See U.S. CONST. art. III, § 3 (“Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.”); 18 U.S.C. § 201 (bribery of public officials and witnesses). See also Act of April 30, 1790 § 21, 1 Stat. 112 (1845) (establishing bribery as a federal criminal offense).

² See CHARLES BLACK, *IMPEACHMENT* 27 (1974).

³ THE FEDERALIST No. 65 (Alexander Hamilton); PETER HOFFER & N.E.H. HULL, *IMPEACHMENT IN AMERICA, 1635–1805* 59–95 (1984).

⁴ See *Nixon*, 506 U.S. at 237–38 (1993) (ruling that a challenge to the Senate’s use of a trial committee to take evidence posed a nonjusticiable political question).

⁵ 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 795 (1833) (“Again, there are many offences, purely political, which have been held to be within the reach of parliamentary impeachments, not one of which is in the slightest manner alluded to in our statute book. And, indeed, political offences are of so various and complex a character, so utterly incapable of being defined, or classified, that the task of positive legislation would be impracticable, if it were not almost absurd to attempt it.”); *id.* at § 798 (“In examining the parliamentary history of impeachments, it will be found, that many offences, not easily definable by law, and many of a purely political character, have been deemed high crimes and misdemeanours worthy of this extraordinary remedy.”).

ARTICLE II—EXECUTIVE BRANCH
Sec. 4—Impeachment: Impeachable Offenses

ArtII.S4.4.1
Overview of Impeachable Offenses

Impeachment has been used to remove government officers who abuse the power of the office; conduct themselves in a manner incompatible with the purpose and function of their office; or misuse the office for improper or personal gain.⁶

ArtII.S4.4.2 Historical Background on Impeachable Offenses

Article II, 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.

The concept of impeachment and the standard of “high crimes and misdemeanors”¹ originally stems from English Parliamentary practice.² The House of Commons impeached and tried before the House of Lords both private citizens and government officers, but not the Crown itself, for offenses considered beyond the reach of the common-law criminal courts.³ The tool was used by Parliament to corral the power of the Crown and police political offenses committed by ministers and favorites of the King.⁴ Impeachment applied to conduct that damaged the state or subverted the government.⁵ The standard of “high crimes and misdemeanors” appears intended to address conduct involving an individual’s abuse of power or office.⁶ Punishment for a conviction could include a range of penalties, including imprisonment, fines, or even death.⁷

The American colonies adopted their own impeachment procedures that informed the Framers’ understanding of impeachment.⁸ These traditions extended into state constitutions established during the early years of the Republic. During the years of 1776–1787, states adopted into their constitutions’ impeachment provisions that limited impeachment to government officials and restricted the punishment for impeachment to removal from office with the possibility of future disqualification from office.⁹ At the state level, the body charged with trying an impeachment varied.¹⁰

⁶ See CONG. GLOBE, 40th Cong., 2d Sess. 1400 (1868) (impeaching President Andrew Johnson for violating the Tenure of Office Act); 132 CONG. REC. H4710–22 (daily ed. July 22, 1986) (impeaching Judge Harry E. Claiborne for providing false information on federal income tax forms); 156 CONG. REC. 3155–57 (2010) (impeaching Judge G. Thomas Porteous for engaging in a corrupt relationship with bail bondmen where he received things of value in return for helping bondsmen develop relationships with state judges).

¹ For more on the historical background of the impeachment clauses, see ArtIII.S1.10.2.2 Historical Background on Good Behavior Clause; ArtI.S2.C5.2 Historical Background on Impeachment; ArtI.S3.C6.2 Historical Background on Impeachment Trials.

² See THE FEDERALIST NO. 65 (Alexander Hamilton); RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 54 (1973); H. COMM. ON THE JUDICIARY, 93D CONG., CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT 4 (Comm. Print 1974) [hereinafter CONSTITUTIONAL GROUNDS].

³ BERGER, *supra* note 2, at 59; CONSTITUTIONAL GROUNDS, *supra* note 2, at 4. The availability of impeachment in England appears to have depended on whether the offense endangered the government or society. See PETER HOFFER & N.E.H. HULL, IMPEACHMENT IN AMERICA, 1635–1805 3 (1984).

⁴ CONSTITUTIONAL GROUNDS, *supra* note 2, at 4–5.

⁵ *Id.* (citing John Rushworth, *The Tryal of Thomas Earl of Stafford*, in 8 HISTORICAL COLLECTIONS 8 (1686)).

⁶ *Id.* at 4–6.

⁷ BERGER, *supra* note 2, at 67.

⁸ See HOFFER & HULL, *supra* note 3, at 15–26.

⁹ See *id.* at 68–95; see, e.g., MASS. CONST. OF 1780 § 2, art. VIII; § 3, art. VI; NEW YORK CONST. OF 1777 art. XXXIII.

¹⁰ See GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 141 (1969); see, e.g., N.Y. CONST. OF 1777 arts. XXXII–XXXIII (providing that impeachments be tried before a court composed of Senators, judges of the Supreme Court, and the chancellor).

ARTICLE II—EXECUTIVE BRANCH
Sec. 4—Impeachment: Impeachable Offenses

ArtII.S4.4.2
Historical Background on Impeachable Offenses

The standards for impeachments adopted at the Constitutional Convention were thus inspired by both English and colonial practice, but ultimately differed in structure from both these traditions. In particular, the Framers aimed to narrow the scope of impeachable offenses and persons subject to impeachment as compared to English practice.¹¹ For example, while according to English practice at the time of the Constitution’s enactment, impeachment extended to anyone except a member of the royal family, the federal Constitution limited impeachment to federal government officers (including the President and Vice President).¹² In addition, whereas the English Parliament never formally defined the parameters of what counted as impeachable conduct, the Framers restricted impeachment to treason, bribery, and high crimes and misdemeanors.¹³ In English practice, the Crown could pardon individuals following an impeachment conviction.¹⁴ In contrast, the Framers restricted the pardon power from being applied to impeachments, rendering the impeachment process essentially unchecked by the Executive Branch.¹⁵

The Framers also rejected a proposal made during the Constitutional Convention to include—in addition to treason and bribery¹⁶—“maladministration” as an impeachable offense, which would have presumably incorporated a broad range of common-law offenses.¹⁷ Although “maladministration” was a ground for impeachment in many state constitutions at the time of the Constitution’s drafting,¹⁸ the Framers instead adopted the term “high Crimes and misdemeanors” from English practice. James Madison, at the Constitutional Convention, objected to the inclusion of “maladministration” as grounds for impeachment because such a vague impeachment standard would “be equivalent to a tenure during pleasure of the Senate.”¹⁹ Immediately thereafter, the Convention voted to include “high crimes and misdemeanors” instead.²⁰ Arguably, the Framers’ rejection of such a broad term supports the view that congressional disagreement with a President’s policy goals is not sufficient grounds for impeachment.²¹

Of particular importance to the understanding of the practice in America were the roughly contemporaneous British impeachment proceedings of Warren Hastings, the governor general of India, which were transpiring at the time of the Constitution’s formulation and ratification.²² Hastings was charged with high crimes and misdemeanors, which included

¹¹ See Michael J. Gerhardt, *Putting the Law of Impeachment in Perspective*, 43 ST. LOUIS U. L.J. 905, 908–12 (1999).

¹² 15 THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 1061, 1064 (David S. Garland & Lucius P. McGehee eds., 1900).

¹³ *Id.* at 1066 (David S. Garland & Lucius P. McGehee eds., 1900). Further, the English House of Lords could convict on a bare majority, while the Framers required a two-thirds vote of the Senate to remove an officer. *Id.* at 1071. The House of Lords could also require any punishment upon conviction, while the federal Constitution limits the results of impeachment to removal from office and, potentially, disqualification from holding federal office in the future. *Id.* at 1072. Finally, British judges could be removed for a variety of reasons, while impeachment is the sole remedy to remove federal judges under the Constitution.

¹⁴ 15 THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW, *supra* note 12, at 1071–72.

¹⁵ See U.S. CONST. art. II, § 2, cl. 1 (providing that the President “shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment”).

¹⁶ 2 JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 508 (Gaillard Hunt & James Brown Scott eds., 1987).

¹⁷ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 550 (Max Farrand ed., 1911); see Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1, 14–15 (1989).

¹⁸ GERHARDT, CONSTITUTIONAL LIMITS, *supra* note 17, at 29; CONSTITUTIONAL GROUNDS, *supra* note 2, at 11; CHARLES BLACK, IMPEACHMENT 29 (1974).

¹⁹ 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 17, at 550; BLACK, *supra* note 17, at 29–30.

²⁰ 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 17, at 64–65; BLACK, *supra* note 17, at 28.

²¹ BLACK, *supra* note 17, at 30.

²² CONSTITUTIONAL GROUNDS, *supra* note 2, at 7; HOFFER & HULL, *supra* note 3, at 113–15.

ARTICLE II—EXECUTIVE BRANCH
Sec. 4—Impeachment: Impeachable Offenses

ArtII.S4.4.2

Historical Background on Impeachable Offenses

corruption and abuse of power.²³ At the Constitutional Convention, George Mason positively referenced the impeachment of Hastings. At that point in the Convention, a proposal to define impeachment as appropriate for treason and bribery was under consideration. George Mason objected, noting that treason would not cover the misconduct of Hastings.²⁴ Moreover, he thought impeachment should extend to “attempts to subvert the Constitution.”²⁵ Accordingly, he proposed that maladministration be included as an impeachable offense, although, as noted earlier, this was eventually rejected in favor of “high crimes and misdemeanors.”²⁶

The Framers thus ultimately considered impeachment to be an essential tool to hold government officers accountable for political crimes.²⁷ The representatives of the people were best placed to investigate the “conduct of public men.”²⁸ Moreover, impeachment is an essential bulwark in the separation of powers for the legislature against the power of the Executive and Judicial Branches. The President enjoys the power to appoint—with Senate approval—officers of the United States in the Executive and Judicial Branches, as well as the authority to remove those in the Executive Branch.²⁹ Judicial officers, once appointed, maintain their positions for life.³⁰ Consequently, Congress’s power of impeachment serves as a crucial legislative check on the potential “encroach[ing]” power of Executive Branch officers³¹ and likewise guards against judicial “usurpations on the authority of the legislature.”³²

Evidence of precisely what conduct the Framers and ratifiers of the Constitution considered to constitute high crimes and misdemeanors is relatively sparse. At the North Carolina ratifying convention, James Iredell, later to serve as an associate Justice of the Supreme Court, noted the difficulty in defining what constitutes an impeachable offense, beyond causing injury to the government.³³ For him, impeachment was “calculated to bring [offenders] to punishment for crime which is not easy to describe, but which every one must be convinced is a high crime and misdemeanor against government. [T]he occasion for its exercise will arise from acts of great injury to the community.”³⁴ He thought the President would be impeachable for receiving a “bribe or act[ing] from some corrupt motive or other,”³⁵ but not merely for “want of judgment.”³⁶ Similarly, Samuel Johnston, then the governor of North Carolina and later the state’s first Senator, thought impeachment was reserved for “great misdemeanors against the public.”³⁷

At the Virginia ratifying convention, a number of individuals claimed that impeachable offenses were not limited to indictable crimes.³⁸ For example, James Madison argued that were the President to assemble a minority of states in order to ratify a treaty at the expense of the

²³ CONSTITUTIONAL GROUNDS, *supra* note 2, at 7; HOFFER & HULL, *supra* note 3, at 113–15.

²⁴ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 17, at 550.

²⁵ *Id.*

²⁶ See ArtII.S4.4.2 Historical Background on Impeachable Offenses and accompanying notes.

²⁷ See THE FEDERALIST NO. 65 (Alexander Hamilton).

²⁸ *Id.*

²⁹ U.S. CONST. art. II, § 2, cl. 2.

³⁰ *Id.* art. III, § 1.

³¹ See THE FEDERALIST NO. 66 (Alexander Hamilton).

³² See *Id.* No. 81.

³³ See MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 19 (2000).

³⁴ 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 113 (Jonathan Elliot ed., 1827) [hereinafter ELLIOT’S DEBATES] (North Carolina, statement of James Iredell).

³⁵ *Id.* at 127.

³⁶ *Id.* at 126.

³⁷ *Id.* See GERHARDT, *supra* note 33, at 19.

³⁸ See *Id.*

ARTICLE II—EXECUTIVE BRANCH
Sec. 4—Impeachment: Impeachable Offenses

ArtII.S4.4.3
Jurisprudence on Impeachable Offenses (1789–1860)

other states, this would constitute a impeachable “misdemeanor.”³⁹ And Virginia governor Edmund Randolph, who would later become the Nation’s first Attorney General, noted that impeachment was appropriate for a “willful mistake of the heart,” but not for incorrect opinions.⁴⁰ In addition, Randolph argued that impeachment was appropriate for a President’s violation of the Foreign Emoluments Clause, which, he noted, guards against corruption.⁴¹

James Wilson, delegate to the Constitutional Convention and later a Supreme Court Justice, delivered talks at the College of Philadelphia following the adoption of the federal Constitution concerning impeachment. He claimed that impeachment was reserved to “political crimes and misdemeanors, and to political punishments.”⁴² He argued that, in the eyes of the Framers, impeachments did not come “within the sphere of ordinary jurisprudence. They are founded on different principles; are governed by different maxims; and are directed to different objects.”⁴³ Consequently, for Wilson, the impeachment and removal of an individual did not preclude a later trial and punishment for a criminal offense predicated on the same behavior.⁴⁴

At the time of ratification of the Constitution, the phrase “high crimes and misdemeanors” thus appears understood to have applied to uniquely “political” offenses, or misdeeds committed by public officials against the state.⁴⁵ Alexander Hamilton, in explaining the Constitution’s impeachment provisions, described impeachable offenses as arising from “the misconduct of public men, or in other words from the abuse or violation of some public trust.”⁴⁶ Such offenses were “*Political*, as they relate chiefly to injuries done immediately to the society itself.”⁴⁷ In the centuries following the Constitution’s ratification, precisely what behavior constitutes a high crime or misdemeanor has been the subject of much debate.⁴⁸

ArtII.S4.4.3 Jurisprudence on Impeachable Offenses (1789–1860)

Article II, 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.

Congressional understanding of the scope of activities subject to impeachment and the potential persons who may be impeached was first put to the test during the Adams Administration. In 1797, letters sent to President John Adams revealed a conspiracy by Senator William Blount—in violation of the United States government’s policy of neutrality on

³⁹ 1 ELLIOT’S DEBATES, *supra* note 34, at 500.

⁴⁰ 2 *id.* at 401.

⁴¹ DAVID ROBERTSON, DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA 345 (2d ed. 1805).

⁴² James Wilson, *Lectures on Law*, reprinted in, 1 THE WORKS OF JAMES WILSON 426 (Robert Green McCloskey ed., 1967).

⁴³ *Id.* at 408.

⁴⁴ *Id.*

⁴⁵ Gary L. McDowell, *High Crimes and Misdemeanors: Recovering the Intentions of the Founders*, 67 GEO. WASH. L. REV. 626, 638 (1999); BERGER, *supra* note 2, at 59–61.

⁴⁶ THE FEDERALIST NO. 65 (Alexander Hamilton).

⁴⁷ *Id.*

⁴⁸ Compare H.R. REP. NO. 105-830, at 110–18 (1998) (majority views), with *id.* at 204 (minority views). See Gary L. McDowell, *High Crimes and Misdemeanors: Recovering the Intentions of the Founders*, 67 GEO. WASH. L. REV. 626, 627 (1999); Laurence H. Tribe, *Defining “High Crimes and Misdemeanors”: Basic Principles*, 67 GEO. WASH. L. REV. 712, 717 (1999).

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the matter and the Neutrality Act¹—to organize a military expedition with the British to invade land in the American Southwest under Spanish control.² The House voted to impeach Senator Blount on July 7, 1797,³ while the Senate voted to expel Senator William Blount the next day.⁴ Before impeaching Senator Blount, several House Members questioned whether Senators were “civil officers” subject to impeachment.⁵ But Samuel W. Dana of Connecticut argued that Members of Congress must be civil officers, because other provisions of the Constitution that mention offices appear to include holding legislative office.⁶ Despite already having voted to impeach Senator Blount, it was not until early in the next year that the House actually adopted specific articles of impeachment against Senator Blount.⁷

At the Senate impeachment trial in 1799, Blount’s attorneys argued that impeachment was improper because Blount had already been expelled from his Senate seat and had not been charged with a crime.⁸ However, the primary issue of debate was whether Members of Congress qualified as civil officers subject to impeachment. The House prosecutors argued that under the American system, as in England, virtually anyone was subject to impeachment.⁹ The defense responded that this broad interpretation of the impeachment power would enable Congress to impeach state officials as well as federal, upending the proper division of federal and state authorities in the young Republic.¹⁰ The Senate voted to defeat a resolution that declared Blount was a “civil officer” and therefore subject to impeachment.¹¹ The Senate ultimately voted to dismiss the impeachment articles brought against Blount because it lacked jurisdiction over the matter, although the impeachment record does not indicate precisely the basis for this conclusion.¹² Regardless, the House has not impeached a Member of Congress since.

The first federal official to be impeached and removed from office was John Pickering, a federal district judge. The election of President Thomas Jefferson in 1800, along with Jeffersonian Republican majorities in both House of Congress, signaled a shift from Federalist party control of government.¹³ Much of the federal judiciary at this early stage of the Republic were members of the Federalist party, and the new Jeffersonian Republican majority strongly

¹ 1 Stat. 381, 384 § 5 (June 5, 1794).

² See BUCKNER F. MELTON, *THE FIRST IMPEACHMENT* 60–103 (1998); MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 48 (2000); DAVID CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801* 275–81 (1997).

³ EMILY F.V. TASSEL & PAUL FINKELMAN, *IMPEACHABLE OFFENSES: A DOCUMENTARY HISTORY FROM 1787 TO THE PRESENT* 87–88 (1999).

⁴ GERHARDT, *supra* note 2, at 48; see U.S. CONST. art. I, § 5.

⁵ CURRIE, *supra* note 2, at 276.

⁶ *Id.* (noting Article I, Section 9 and Article I, Section 3).

⁷ TASSEL & FINKELMAN, *supra* note 3, at 87–88; MELTON, *supra* note 2, at 104–89.

⁸ CURRIE, *supra* note 2, at 277.

⁹ *Id.* at 279.

¹⁰ *Id.*

¹¹ 8 ANNALS OF CONG. 2317 (1799).

¹² PETER HOFFER & N.E.H. HULL, *IMPEACHMENT IN AMERICA, 1635–1805* 155 (1984). 9 ANNALS OF CONG. 2648–49 (1799). CURRIE, *supra* note 2, at 2780–81. While the Senate’s vote to dismiss for lack of jurisdiction might also be based on the fact that the Senator had been expelled from Congress, and therefore did not occupy an “office,” it is generally accepted that the Senate’s decision stands for the proposition that impeachment does not extend to Members of Congress. See CHARLES W. JOHNSON, JOHN V. SULLIVAN, AND THOMAS J. WICKHAM, JR., *HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS AND PROCEDURES OF THE HOUSE* 604–06 (2017); STAFF OF H. COMM. ON THE JUDICIARY, 93D CONG., *IMPEACHMENT, SELECTED MATERIALS* 692 (Comm. Print 1973); *Motions Sys. Corp. v. Bush*, 437 F.3d 1356, 1373 (Fed. Cir. 2006) (“This principle has been accepted since 1799, when the Senate, presented with articles of impeachment against Senator William Blount, concluded after four days of debate that a Senator was not a civil officer for purposes of the Impeachment Clause.”).

¹³ HOFFER & HULL, *supra* note 12, at 181.

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opposed the Federalist-controlled courts.¹⁴ John Pickering was impeached by the House of Representatives in 1803¹⁵ and convicted by the Senate on March 12, 1804.¹⁶ The circumstances of Judge Pickering’s impeachment are somewhat unique as it appears that the judge had been mentally ill for some time, although the articles of impeachment did not address Pickering’s mental faculties but instead accused him of drunkenness, blasphemy on the bench, and refusing to follow legal precedent.¹⁷ Judge Pickering did not appear at his trial, and Senator John Quincy Adams apparently served as a defense counsel.¹⁸ Following debate in a closed session, the Senate voted to permit evidence of Judge Pickering’s insanity, drunkenness, and behavior on the bench.¹⁹ The Senate also rejected a resolution to disqualify three Senators, who were previously in the House and had voted to impeach Judge Pickering, from participating in the impeachment trial.²⁰ The Senate voted to convict Judge Pickering guilty as charged, but the articles did not explicitly specify that any of Pickering’s behavior constituted a high crime or misdemeanor.²¹ Objections to the framing of the question at issue caused several Senators to withdraw from the trial.²²

On the same day the Senate convicted Judge Pickering, the House of Representatives impeached Supreme Court Justice Samuel Chase.²³ Like the impeachment trial of Judge Pickering, the proceedings occurred following the election of President Thomas Jefferson and amidst intense conflict between the Federalists and Jeffersonian Republicans.²⁴ Justice Chase was viewed by Jeffersonian Republicans as openly partisan, and in fact the Justice did openly campaign for the election of Federalist John Adams in the election of 1800.²⁵ In addition, Republicans took issue with Justice Chase’s aggressive approach to jury instructions in Sedition Act prosecutions.²⁶ The eight articles of impeachment accused him of acting in an “arbitrary, oppressive, and unjust” manner at trial, misapplying the law, and expressing partisan political views to a grand jury.²⁷ The Senate trial began on February 4, 1805. Both the House managers and defense counsel for Justice Chase presented witnesses detailing the Justice’s behavior.²⁸ While some aspects of the dispute focused on whether Justice Chase took certain actions, the primary conflict centered on whether his behavior was impeachable.²⁹ Before reaching a verdict, the Senate approved a motion from Senator James Bayard, a Federalist from Delaware, that the underlying question be whether Justice Chase was guilty of

¹⁴ *Id.* at 181.

¹⁵ See 12 ANNALS OF CONG. 642 (1803); 13 ANNALS OF CONG. 380 (1803).

¹⁶ See 13 ANNALS OF CONG. 368 (1804); HOFFER & HULL, *supra* note 12, at 208, 216–17.

¹⁷ ELEANORE BUSHNELL, CRIMES, FOLLIES, AND MISFORTUNES: THE FEDERAL IMPEACHMENT TRIALS 45–46 (1992).

¹⁸ HOFFER & HULL, *supra* note 12, at 211–13.

¹⁹ BUSHNELL, *supra* note 17, at 48–51. Scholars have noted that the Senate vote in favor of admitting evidence of insanity likely stemmed from two opposing reasons. The minority party Federalists—of which Judge Pickering was a member—considered evidence of insanity a reason to acquit the judge because it was not an impeachable offense. The majority party Republicans, in contrast, considered insanity a reason to remove him from the bench. *Id.* at 48–49.

²⁰ *Id.* at 47.

²¹ 13 ANNALS OF CONG. 367 (1804); BUSHNELL, *supra* note 17, at 53–54.

²² BUSHNELL, *supra* note 17, at 53–54.

²³ 13 ANNALS OF CONG. 1180 (1804); BUSHNELL, *supra* note 17, at 60.

²⁴ HOFFER & HULL, *supra* note 12, at 228–138.

²⁵ BUSHNELL, *supra* note 17, at 63.

²⁶ JOSH CHAFETZ, CONGRESS’S CONSTITUTION 108 (2017).

²⁷ IMPEACHMENT, SELECTED MATERIALS, *supra* note 12, at 133–35.

²⁸ BUSHNELL, *supra* note 17, at 63–73.

²⁹ BUSHNELL, *supra* note 17, at 67–84; see GERHARDT, *supra* note 2, at 181.

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high crimes and misdemeanors, rather than guilty as charged.³⁰ The Senate vote ultimately fell short of the necessary two-thirds majority to secure a conviction on any of the articles.³¹ Of the eight articles, a majority of Senators voted to convict on three, while the remaining five did not muster a majority for conviction.³²

The trial raised a number of questions which have recurred throughout the history of impeachments. For example, is impeachment limited to criminal acts, or does it extend to non-criminal behavior?³³ The opposing sides in the Chase case took differing views on this matter, as they would in later impeachments to come.³⁴ Due in part to the charged political atmosphere of the historical context, the attempted impeachment of Justice Chase has also come to represent an important limit on the scope of the impeachment remedy. Commentators have interpreted the acquittal of Justice Chase as establishing that impeachment does not extend to congressional disagreement with a judge's opinions or judicial philosophy.³⁵ At least some of the Senators who voted to acquit did not consider the alleged offenses as rising to the level of impeachable behavior.³⁶

By the time of the next impeachment in 1830, both houses of Congress were controlled by Jacksonian Democrats, and the federal courts were unpopular with Congress and the public.³⁷ The House of Representatives impeached James Peck, a federal district judge, for abusing his judicial authority. The sole article accused the judge of holding an attorney in contempt for publishing an article critical of Peck and barring the attorney from practicing law for 18 months. The context surrounding Judge Peck's actions involved disputes over French and Spanish land grant titles following the transfer of land in the Louisiana territory from French to U.S. control.³⁸ Shortly after Missouri was admitted to the United States as part of the Missouri Compromise in 1821, Judge Peck decided a land rights case against the claimants in favor of the United States.³⁹ The attorney for the plaintiffs wrote an article critical of the decision in a local paper.⁴⁰ Judge Peck held the attorney in contempt, sentenced him to jail for twenty-four hours, and barred him from practicing law for eighteen months.⁴¹

The House impeached Judge Peck by a wide margin.⁴² Of central concern during the Senate trial were the limits of a judge's common law contempt power, a matter that appeared to be in dispute.⁴³ The Senate ultimately acquitted Judge Peck, with roughly half of the

³⁰ BUSHNELL, *supra* note 17, at 84.

³¹ TASSEL & FINKELMAN, *supra* note 3, at 103.

³² 14 ANNALS OF CONG. 664–69 (1805); TASSEL & FINKELMAN, *supra* note 3, at 103.

³³ BUSHNELL, *supra* note 17, at 82–87.

³⁴ H. COMM. ON THE JUDICIARY, IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, 93D CONG., 2D SESS., H.R. REP. NO. 93–1305, at 362–72 (1974) (minority views); 3 LEWIS DESCHLER, PRECEDENTS OF THE UNITED STATES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 94-661, at Ch. 14 § 3.8 (1974), <https://www.govinfo.gov/content/pkg/GPO-HPREC-DESCHLERS-V3/pdf/GPO-HPREC-DESCHLERS-V3.pdf>.

³⁵ See David P. Currie, *The Constitution in Congress: the Most Endangered Branch, 1801–1805*, 33 WAKE FOREST L. REV. 219, 259 (1998); WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS 114 (1992); CHAFETZ, *supra* note 26, at 150. *But see* CHAFETZ, *supra* note 26, at 109 (arguing that Justice Chase returned to the bench “humbled” and that one result of the affair was that the Marshall Court “made its peace with Republican politics”).

³⁶ See Michael J. Gerhardt, *Putting the Law of Impeachment in Perspective*, 43 ST. LOUIS U. L.J. 905, 921 (1999).

³⁷ BUSHNELL, *supra* note 17, at 91.

³⁸ TASSEL & FINKELMAN, *supra* note 3, at 108–09; BUSHNELL, *supra* note 17, at 92.

³⁹ TASSEL & FINKELMAN, *supra* note 3, at 108–09.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² 6 CONG. DEB. 818–19 (1830).

⁴³ BUSHNELL, *supra* note 17, at 91–113.

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Jacksonian Democrats voting against conviction.⁴⁴ Shortly thereafter, Congress passed a law reforming and defining the scope of the judicial contempt power.⁴⁵

Finally, in the midst of the Civil War, federal district judge West H. Humphreys was appointed to a position as a judge in the Confederate government, but he did not resign as a United States federal judge.⁴⁶ In 1862, the House impeached and the Senate convicted Judge Humphreys for joining the Confederate government and abandoning his position.⁴⁷ As in the trial of Judge Pickering previously, Judge Humphreys did not attend the proceedings.⁴⁸ Unlike in the case of Judge Pickering, however, no defense was offered in the impeachment trial of Judge Humphreys.⁴⁹

ArtII.S4.4.4 President Andrew Johnson and Impeachable Offenses

Article II, 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.

The impeachment and trial of President Andrew Johnson transpired in the shadow of the Civil War and the assassination of President Abraham Lincoln.¹ President Johnson was a Democrat and former slave owner who was the only Southern Senator to remain in his seat when the South seceded from the Union.² President Lincoln, a Republican, appointed Johnson military governor of Tennessee in 1862,³ and Johnson was later selected as Lincoln's second-term running mate on a "Union" ticket.⁴ Given these unique circumstances, President Johnson lacked both a party and geographic power base when in office, which likely isolated him when he assumed the presidency following the assassination of President Lincoln.⁵

The majority Republican Congress and President Johnson clashed over, among other things, Reconstruction policies implemented in the former slave states and control over officials in the Executive Branch.⁶ President Johnson vetoed twenty-one bills while in office, compared to thirty-six vetoes by all prior Presidents. Congress overrode fifteen of Johnson's vetoes, compared to just six with prior Presidents.⁷ On March 2, 1867, Congress reauthorized, over President Johnson's veto, the Tenure of Office Act, extending its protections for all officeholders.⁸ In essence, the Act provided that all federal officeholders subject to Senate

⁴⁴ 7 CONG. DEB. 45 (1831).

⁴⁵ See Act of Mar. 2, 1831, ch. 99, 4 Stat. 487.

⁴⁶ TASSEL & FINKELMAN, *supra* note 3, at 114–16.

⁴⁷ 2 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §§ 2385–97 (1907), <https://www.govinfo.gov/content/pkg/GPO-HPREC-HINDS-V2/pdf/GPO-HPREC-HINDS-V2.pdf>.

⁴⁸ BUSHNELL, *supra* note 17, at 115.

⁴⁹ *Id.*

¹ See WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS 185–98 (1992).

² ELEANORE BUSHNELL, CRIMES, FOLLIES, AND MISFORTUNES: THE FEDERAL IMPEACHMENT TRIALS 128 (1992).

³ *Id.*

⁴ EMILY F.V. TASSEL & PAUL FINKELMAN, IMPEACHABLE OFFENSES: A DOCUMENTARY HISTORY FROM 1787 TO THE PRESENT 222 (1999)

⁵ BUSHNELL, *supra* note 2, at 128.

⁶ MICHAEL LES BENEDICT, THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON 1–25 (1973); KEITH WHITTINGTON, CONSTITUTIONAL CONSTRUCTION 113–57 (1999).

⁷ TASSEL & FINKELMAN, *supra* note 4, at 222–23.

⁸ Tenure of Office Act, 14 Stat. 430 (1867). TASSEL & FINKELMAN, *supra* note 4, at 224.

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confirmation could not be removed by the President except with Senate approval,⁹ although the reach of this requirement to officials appointed by a prior administration was unclear.¹⁰ Congressional Republicans apparently anticipated the possible impeachment of President Johnson when drafting the legislation; Republicans already knew of President Johnson's plans to fire Secretary of War Edwin Stanton and the Act provided that a violation of its terms constituted a "high misdemeanor."¹¹

President Johnson subsequently fired Secretary Stanton without the approval of the Senate. Importantly, his cabinet unanimously agreed that the new restrictions on the President's removal power imposed by the Tenure of Office Act were unconstitutional.¹² Shortly thereafter, on February 24, 1868, the House voted to impeach President Johnson.¹³ The impeachment articles adopted by the House against President Johnson included defying the Tenure of Office Act by removing Stanton from office¹⁴ and violating (and encouraging others to violate) the Army Appropriations Act.¹⁵ In addition, one article of impeachment accused the President of making "utterances, declarations, threats, and harangues" against Congress.¹⁶

The Senate appointed a committee to recommend rules of procedure for the impeachment trial which subsequently were adopted by the Senate, including a one-hour time limit for each side to debate questions of law that would arise during the trial.¹⁷ Chief Justice Salmon P. Chase presided over the trial and was sworn in by Associate Justice Samuel Nelson.¹⁸ During the swearing-in of the individual Senators, the body paused to debate whether Senator Benjamin Wade of Indiana, the president pro tempore of the Senate, was eligible to participate in the trial. Because the office of the Vice President was empty, under the laws of succession at that time Senator Wade would assume the presidency upon a conviction of President Johnson. Ultimately, the Senator who raised this point, Thomas Hendricks of Indiana, withdrew the issue and Senator Wade was sworn in.¹⁹

An important point of contention at the trial was whether the Tenure of Office Act protected Stanton at all due to his appointment by President Lincoln, rather than President Johnson.²⁰ Counsel for President Johnson argued that impeachment was inappropriate for violation of a statute whose meaning was unclear, and the statute barring removal of the Secretary of War was an unconstitutional intrusion into the President's authority under Article II.²¹

⁹ Tenure of Office Act, 14 Stat. 430 (1867). See Michael J. Gerhardt, *Constitutional Arrogance*, 164 U. PA. L. REV. 1649, 1663 (2016).

¹⁰ REHNQUIST, *supra* note 1, at 228.

¹¹ LES BENEDICT, *supra* note 6, at 92–125.

¹² REHNQUIST, *supra* note 1, at 230.

¹³ CONG. GLOBE, 40th Cong., 2d Sess. 1400 (1868).

¹⁴ See Act of March 2, 1867, ch. 154, § 6, 14 Stat. 430. Incidentally, such tenure protections were later invalidated as unconstitutional by the Supreme Court. See *Myers v. United States*, 272 U.S. 52, 106 (1926).

¹⁵ TASSEL & FINKELMAN, *supra* note 4, at 226.

¹⁶ *Id.* at 235.

¹⁷ REHNQUIST, *supra* note 1, at 219–20.

¹⁸ *Id.* at 221.

¹⁹ See AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION* (2012).

²⁰ REHNQUIST, *supra* note 1, at 221.

²¹ *Id.* at 230–31.

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The Senate failed to convict President Johnson by one vote on three different articles, and it failed to vote on the remaining eight.²² However, reports indicate that several Senators were prepared to acquit if their votes were needed.²³ Seven Republicans voted to acquit; of those Senators, some thought it questionable whether the Tenure of Office Act applied to Stanton and that it was improper to impeach a President for incorrectly interpreting an arguably ambiguous law.²⁴

Certain commentators have concluded that the failure to convict President Johnson coincides with a general understanding that impeachment is appropriate for abuses of power or violations of the public trust, but does not pertain to political or policy disagreements with the President, no matter how weighty.²⁵

ArtII.S4.4.5 Jurisprudence on Impeachable Offenses (1865–1900)

Article II, 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.

The post-bellum experience in American history saw a variety of government officials impeached on a number of different grounds. These examples provide important principles that guide the practice of impeachment through the present day. For example, the Senate has not always conducted a trial following an impeachment by the House. In 1873, the House impeached federal district judge Mark. H. Delahay for, among other things, drunkenness on and off the bench.¹ The impeachment followed an investigation by a subcommittee of the House Judiciary Committee into his conduct.² Following the House vote on impeachment, Judge Delahay resigned before written impeachment articles were drawn up and the Senate did not hold a trial.³ The impeachment of Judge Delahay indicates that the scope of impeachable behavior is not limited to strictly criminal behavior; Congress has been willing to impeach individuals for behavior that is not indictable, but nonetheless constitutes an abuse of an individual's power and duties.

This period of American history was fraught with partisan conflict over Reconstruction.⁴ In addition to President Johnson, a number of other individuals were investigated by Congress during this time for purposes of impeachment. For example, in 1873, the House voted to authorize the House Judiciary Committee to investigate the behavior of Edward H. Durrell,

²² 3 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 2443 (1907), <https://www.govinfo.gov/content/pkg/GPO-HPREC-HINDS-V3/pdf/GPO-HPREC-HINDS-V3.pdf>; see REHNQUIST, *supra* note 1, at 234–35.

²³ TASSEL & FINKELMAN, *supra* note 4, at 221; HANS L. TREFOUSSE, IMPEACHMENT OF A PRESIDENT: ANDREW JOHNSON, THE BLACKS, AND RECONSTRUCTION 169 (1975).

²⁴ REHNQUIST, *supra* note 1, at 240–46.

²⁵ PETER HOFFER & N.E.H. HULL, IMPEACHMENT IN AMERICA, 1635–1805 101 (1984); Michael J. Gerhardt, *Putting the Law of Impeachment in Perspective*, 43 ST. LOUIS U. L.J. 905, 921–22 (1999).

¹ 3 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §§ 2504–05 (1907), <https://www.govinfo.gov/content/pkg/GPO-HPREC-HINDS-V3/pdf/GPO-HPREC-HINDS-V3.pdf> [hereinafter HINDS]; CHARLES W. JOHNSON, JOHN V. SULLIVAN, AND THOMAS J. WICKHAM, JR., HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS AND PROCEDURES OF THE HOUSE 608–13 (2017).

² 3 HINDS, *supra* note 1, at §§ 2504–05.

³ EMILY F.V. TASSEL & PAUL FINKELMAN, IMPEACHABLE OFFENSES: A DOCUMENTARY HISTORY FROM 1787 TO THE PRESENT 119 (1999).

⁴ See generally ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 (1988).

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federal district judge for Louisiana.⁵ A majority of the House Judiciary Committee reported in favor of impeaching Judge Durell for corruption and usurpation of power, including interfering with the state’s election.⁶ Judge Durrell resigned on December 1, 1874, and the House discontinued impeachment proceedings.⁷

The first and only time a Cabinet-level official was impeached occurred during the presidential administration of Ulysses S. Grant. Grant’s Secretary of War, William W. Belknap, was impeached in 1876 for allegedly receiving payments in return for appointing an individual to maintain a trading post in Indian territory.⁸ Belknap resigned two hours before the House unanimously impeached him,⁹ but the Senate nevertheless conducted a trial in which Belknap was acquitted.¹⁰ During the trial, upon objection by Secretary Belknap’s counsel that the Senate lacked jurisdiction because Belknap was now a private citizen, the Senate voted 37-29 in favor of jurisdiction.¹¹ A majority of Senators voted to convict Secretary Belknap, but no article mustered a two-thirds majority, resulting in acquittal. A number of Senators voting to acquit indicated that they did so because the Senate did not have jurisdiction over an individual no longer in office.¹² Notably, although bribery is explicitly included as an impeachable offense in the Constitution, the impeachment articles brought against Secretary Belknap instead charged his behavior as constituting high crimes and misdemeanors.¹³ Bribery was mentioned at the Senate trial, but it was not specifically referenced in the impeachment articles themselves.¹⁴

ArtII.S4.4.6 Early Twentieth Century Jurisprudence on Impeachable Offenses

Article II, 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.

The twentieth century saw further development of the scope of conduct considered by Congress to be impeachable, including the extent to which non-criminal conduct can constitute impeachable behavior and the proper role of a federal judge. Further, the question of judicial review of impeachments received its first treatment in the federal courts.

The question of whether Congress can designate particular behavior as a “high crime or misdemeanor” via statute arose in the impeachment of Charles Swayne, a federal district judge for the Northern District of Florida, during the first decade of the twentieth century. A federal statute provided that federal district judges live in their districts and that anyone

⁵ 3 HINDS, *supra* note 1, at §§ 2506–08.

⁶ *Id.*

⁷ *Id.* at § 2509. For a defense of Judge Durell’s actions in the matters in question, see Charles Lane, *Edward Henry Durell: A Study in Reputation*, 13 GREEN BAG 2D 153, 153–68 (2010).

⁸ 3 HINDS, *supra* note 1, at §§ 2444–68; see H. COMM. ON THE JUDICIARY, 93D CONG., CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT 20 (Comm. Print 1974).

⁹ ELEANORE BUSHNELL, CRIMES, FOLLIES, AND MISFORTUNES: THE FEDERAL IMPEACHMENT TRIALS 165 (1992).

¹⁰ 3 HINDS, *supra* note 1, at §§ 2444–68.

¹¹ 3 HINDS, *supra* note 1, at §§ 2459–60. Two of the thirty-seven voting “guilty” and twenty-two of the twenty-five voting “not guilty” stated that they believed the Senate lacked jurisdiction in the case. 3 HINDS, *supra* note 1, § 2467.

¹² BUSHNELL, *supra* note 9, at 186.

¹³ U.S. CONST. art. II, § 4.

¹⁴ BUSHNELL, *supra* note 9, at 170.

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violating this requirement was “guilty of a high misdemeanor.”¹ Judge Swayne’s impeachment originated from a resolution passed by the Florida legislature requesting the state’s congressional delegation to recommend an investigation into his behavior.² The procedures followed by the House in impeaching Judge Swayne were somewhat unique. First, the House referred the impeachment request to the Judiciary Committee for investigation. Following this investigation, the House voted to impeach Judge Swayne based on the report prepared by the Committee.³ The Committee was then tasked with preparing articles of impeachment to present to the Senate.⁴ The House then voted again on these individual articles, each of which received less support than the single prior impeachment vote had received.⁵ The impeachment articles accused Judge Swayne of a variety of offenses, including misusing the office, abusing the contempt power, and living outside his judicial district. At the trial in the Senate, Judge Swayne essentially admitted to certain accused behavior, although his attorneys did dispute the residency charge, and Swayne instead argued that his actions were not impeachable.⁶ The Senate vote failed to convict Judge Swayne on any of the charges brought by the House.⁷

The impeachability of certain non-criminal behavior for federal judges was firmly established by the impeachment of Judge Robert W. Archbald in 1912. Judge Archbald served as a federal district judge before being appointed to the short-lived U.S. Commerce Court, which was created to review decisions of the Interstate Commerce Commission.⁸ He was impeached by the House for behavior occurring both as a federal district judge and as a judge on the Commerce Court.⁹ The impeachment articles accused Judge Archbald of, among other things, using his position as a judge to generate profitable business deals with potential future litigants in his court.¹⁰ This behavior did not violate any criminal statute and did not appear to violate any laws regulating judges.¹¹ Judge Archbald argued at trial that non-criminal conduct was not impeachable. The Senate voted to convict him on five articles and also voted to disqualify him from holding office in the future.¹² Four of those articles centered on behavior that occurred while Judge Archbald sat on the Commerce Court, the fifth described his conduct over the course of his career.¹³

In the 1920s, a series of corruption scandals swirled around the administration of President Warren G. Harding. Most prominently, the Teapot Dome Scandal, which involved the noncompetitive lease of government land to oil companies, implicated numerous government officials and led to resignations and the criminal conviction and incarceration of a cabinet-level official.¹⁴ The Secretary of the Navy, at the time Edwin Denby, was entrusted with overseeing the development of oil reserves that had recently been located. The Secretary of the Interior,

¹ REVISED STATUTES OF THE UNITED STATES, 2d Edition, Title XIII, Ch. 2 § 551 (1878); EMILY F.V. TASSEL & PAUL FINKELMAN, IMPEACHABLE OFFENSES: A DOCUMENTARY HISTORY FROM 1787 TO THE PRESENT 123–24 (1999).

² ELEANORE BUSHNELL, CRIMES, FOLLIES, AND MISFORTUNES: THE FEDERAL IMPEACHMENT TRIALS 191 (1992).

³ 39 CONG. REC. 248 (1905).

⁴ BUSHNELL, *supra* note 2, at 191–92.

⁵ *Id.* at 191–93.

⁶ TASSEL & FINKELMAN, *supra* note 1, at 123–25.

⁷ 39 CONG. REC. 3467–72 (1905).

⁸ TASSEL & FINKELMAN, *supra* note 1, at 132.

⁹ 48 CONG. REC. 8904–34 (1912).

¹⁰ TASSEL & FINKELMAN, *supra* note 1, at 133.

¹¹ *Id.* at 134.

¹² 49 CONG. REC. 1438–48 (1913).

¹³ BUSHNELL, *supra* note 2, at 221.

¹⁴ See *The Teapot Dome Scandal, 1922–24*, in CONGRESS INVESTIGATES: A CRITICAL AND DOCUMENTARY HISTORY 460–74 (Roger A. Bruns, David L. Hostetter, Raymond W. Smock, eds., 2011).

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Albert Fall, convinced Denby that the Interior Department should assume responsibility for two of the reserve locations, including in Teapot Dome, Wyoming. Secretary Fall then leased the reserves to two of his friends, Harry F. Sinclair and Edward L. Doheny. Revelations of the lease without competitive bidding launched a lengthy congressional investigation which sparked the eventual criminal conviction of Fall for bribery and conspiracy and Sinclair for jury tampering. President Harding, however, died in 1923, before congressional hearings began. The affair also generated significant judicial decisions examining the scope of Congress's investigatory powers.¹⁵

One aspect of the controversy included an impeachment investigation into the decisions of then-Attorney General Harry M. Daugherty.¹⁶ In 1922 the House of Representatives referred a resolution to impeach Daugherty for a variety of activities, including his failure to prosecute those involved in the Teapot Dome Scandal, to the House Judiciary Committee.¹⁷ The House Judiciary Committee eventually found there was not sufficient evidence to impeach Daugherty. However, in 1924, a Senate special committee was formed to investigate similar matters.¹⁸ That investigation spawned allegations of a variety of improper activities in the Justice Department. Daugherty resigned on March 28, 1924.¹⁹

In 1926, federal district judge George W. English was impeached for a variety of alleged offenses, including (1) directing a U.S. marshal to gather a number of state and local officials into court in an imaginary case where Judge English proceeded to denounce them; (2) threatening two members of the press with imprisonment without sufficient cause; and (3) showing favoritism to certain litigants before his court.²⁰ Judge English resigned before a trial in the Senate occurred and the Senate dismissed the charges without conducting a trial in his absence.²¹

Federal district judge Harold Louderback was impeached in 1933 for showing favoritism in the appointment of bankruptcy receivers, which were coveted positions following the stock market crash of 1929 and the ensuing Depression.²² The House authorized a subcommittee to investigate, which held hearings and recommended to the Judiciary Committee that Judge Louderback be impeached.²³ The Judiciary Committee actually voted against recommending impeachment, urging censure of Judge Louderback instead, but permitted the minority report

¹⁵ See *McGrain v. Daugherty*, 273 U.S. 135, 174–75 (1927) (“We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.”); *Sinclair v. United States*, 279 U.S. 263, 295 (1929) (observing that Congress has authority to require disclosures in aid of its constitutional powers).

¹⁶ 6 CLARENCE CANNON, CANNON’S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 536–38 (1936), <https://www.govinfo.gov/content/pkg/GPO-HPREC-CANNONS-V6/pdf/GPO-HPREC-CANNONS-V6.pdf> [hereinafter CANNON].

¹⁷ See 62 CONG. REC. 12,381 (1922); CHARGES OF HON. OSCAR E. KELLER AGAINST THE ATTORNEY GENERAL AND THE ATTORNEY GENERAL’S ANSWERS THERETO BEFORE THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, 67TH CONG., 3D SESS., ON H. RES. 425 (1922).

¹⁸ S. Res. 157, 68th Cong., 1st Sess. (1924); *Hearings Before the Select Committee on Investigation of the Attorney General, United States Senate, Investigation of Hon. Harry M. Daugherty, Formerly Attorney General of the United States*, 68th Cong., 1st Sess. (1924).

¹⁹ See *The Teapot Dome Scandal, 1922–24*, in CONGRESS INVESTIGATES: A CRITICAL AND DOCUMENTARY HISTORY 460–74 (Roger A. Bruns, David L. Hostetter, Raymond W. Smock, eds., 2011).

²⁰ 67 CONG. REC. 6705–55 (1926); 6 CANNON, *supra* note 16, at §§ 544–47.

²¹ TASSEL & FINKELMAN, *supra* note 1, at 144–46.

²² 76 CONG. REC. 4913–26 (1933); 6 CANNON, *supra* note 16, at §§ 514–24.

²³ BUSHNELL, *supra* note 2, at 191.

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that favored impeachment to be reported to the House together with the majority report.²⁴ The full House voted to impeach anyway,²⁵ but the Senate failed to convict him.²⁶

Shortly thereafter, the House impeached federal district judge Halsted L. Ritter for showing favoritism in and profiting from appointing receivers in bankruptcy proceedings; practicing law while a judge; and failing to fully report his income on his tax returns.²⁷ The Senate acquitted Judge Ritter on each individual count alleging specific behavior, but convicted him on the final count which referenced the previous articles, and charged him with bringing his court into disrepute and undermining the public's confidence in the judiciary.²⁸

Congress's impeachment of Judge Ritter was the first to be challenged in court.²⁹ Judge Ritter brought a suit in the Federal Court of Claims seeking back pay, arguing that the charges brought against him were not impeachable under the Constitution and that the Senate improperly voted to acquit on six specific articles but to convict on a single omnibus article.³⁰ In rejecting Judge Ritter's suit, the court held that the Senate has exclusive jurisdiction over impeachments and courts lack authority to review the Senate's verdict.³¹

ArtII.S4.4.7 President Richard Nixon and Impeachable Offenses

Article II, 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.

The impeachment investigation and ensuing resignation of President Richard Nixon stands out as a profoundly important experience informing the standard for the impeachment of presidents.¹ Although President Nixon was never impeached by the House or subjected to a trial in the Senate, his conduct exemplifies for many authorities, scholars, and the general public the paradigmatic case of impeachable behavior in a President.

Less than two years after a landslide reelection as President, Richard Nixon resigned following the House Judiciary Committee's adoption of three articles of impeachment against him.² The circumstances surrounding the impeachment of President Nixon were sparked on June 17, 1972, by the arrest of five men for breaking into the Democratic National Headquarters at the Watergate Hotel and Office Building. The arrested men were employed by the Committee to Re-Elect the President (CRP), a campaign organization formed to support President Nixon's reelection.³

²⁴ *Id.* at 246.

²⁵ *Id.* at 245.

²⁶ 77 CONG. REC. 4064–88 (1933).

²⁷ 80 CONG. REC. 3066–92 (1936); TASSEL & FINKELMAN, *supra* note 1, at 157.

²⁸ 80 CONG. REC. 5602–08 (1936); PROCEEDINGS OF THE U.S. SENATE IN THE TRIAL OF IMPEACHMENT OF HALSTED L. RITTER, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF FLORIDA, 74TH CONG., 2D SESS., S. DOC. NO. 74–200, at 637–38 (1936); TASSEL & FINKELMAN, *supra* note 1, at 158–59.

²⁹ *Ritter v. United States*, 84 Ct. Cl. 293, 296 (1936), *cert. denied*, 300 U.S. 668 (1937).

³⁰ BUSHNELL, *supra* note 2, at 286–87.

³¹ *Ritter v. United States*, 84 Ct. Cl. 293, 296 (1936), *cert. denied*, 300 U.S. 668 (1937).

¹ For a more detailed account of the Watergate Scandal, see STANLEY I. KUTLER, *THE WARS OF WATERGATE* (1990).

² Carroll Kilpatrick, *Nixon Resigns*, WASH. POST (Aug. 9, 1974), <https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/080974-3.htm>.

³ KUTLER, *supra* note 1, at 187–211.

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In the early summer of 1973, Attorney General Elliot Richardson appointed Archibald Cox as a special prosecutor to investigate the connection between the five burglars and CRP. Likewise, the Senate Select Committee on Presidential Campaign Activities initiated its own investigation.⁴ After President Nixon fired various staffers allegedly involved in covering up the incident, he spoke on national television disclaiming knowledge of the cover up. However, the investigations uncovered evidence that President Nixon was involved, that he illegally harassed his enemies through, among other things, the use of tax audits, and that the men arrested for the Watergate break-in—the “plumbers unit,” because they were used to “plug leaks” considered damaging to the Nixon Administration—had committed burglaries before.⁵ Eventually a White House aide revealed that the President had a tape recording system in his office, raising the possibility that many of Nixon’s conversations about the Watergate incident were recorded.⁶

The President refused to hand over such tapes to the special prosecutor or Congress. In his capacity as special prosecutor, Cox then subpoenaed tapes of conversations in the Oval Office on Saturday, October 20, 1973. This sparked the sequence of events commonly known as the Saturday Night Massacre.⁷ In response to the subpoena, President Nixon ordered Attorney General Elliot Richardson to fire Special Prosecutor Cox. Richardson refused and resigned. Nixon ordered Deputy Attorney General William D. Ruckelshaus to fire the special prosecutor, but Ruckelshaus also refused to do so and resigned. Solicitor General Robert Bork, in his capacity as Acting Attorney General, then fired the special prosecutor.⁸ Nixon eventually agreed to deliver some of the subpoenaed tapes to the judge supervising the grand jury. The Justice Department appointed Leon Jaworski to replace Cox as special prosecutor.

The House Judiciary Committee began an official investigation of the Watergate issue and commenced impeachment hearings in April 1974.⁹ On March 1, 1974, a grand jury indicted seven individuals connected to the larger Watergate investigation and named the President as an unindicted coconspirator.¹⁰ On April 18, a subpoena was issued, upon the motion of the special prosecutor, by the United States District Court for the District of Columbia requiring the production of tapes and various items relating to meetings between the President and other individuals. Following a challenge to the subpoena in district court, the Supreme Court reviewed the case. On July 24, 1974, the Supreme Court affirmed the district court’s order.¹¹

In late July, following its investigation and hearings, the House Judiciary Committee voted to adopt three articles of impeachment against President Nixon.¹² The first impeachment article alleged that the President obstructed justice by attempting to impede the investigation into the Watergate break-in.¹³ The second charged the President with abuse of power for using federal agencies to harass his political enemies and authorizing burglaries of private citizens

⁴ KUTLER, *supra* note 1, at 323–49; EMILY F.V. TASSEL & PAUL FINKELMAN, *IMPEACHABLE OFFENSES: A DOCUMENTARY HISTORY FROM 1787 TO THE PRESENT* 255–56 (1999).

⁵ TASSEL & FINKELMAN, *supra* note 4, at 255–56; KUTLER, *supra* note 1, at 111–16, 351–72.

⁶ TASSEL & FINKELMAN, *supra* note 4, at 256–57.

⁷ JERRY ZEIFMAN, *WITHOUT HONOR: CRIMES OF CAMELOT AND THE IMPEACHMENT OF PRESIDENT NIXON* 59 (1995).

⁸ Carroll Kilpatrick, *Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit*, WASH. POST (Oct. 21, 1973), <https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/102173-2.htm>.

⁹ TASSEL & FINKELMAN, *supra* note 4, at 258–59.

¹⁰ *United States v. Nixon*, 418 U.S. 683, 686–87 (1974).

¹¹ *Id.* at 713–14 (1974).

¹² H. COMM. ON THE JUDICIARY, *IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES*, 93D CONG., 2D SESS., H.R. REP. NO. 93-1305, at 6–11 (1974).

¹³ *Id.* at 1–2.

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who opposed the President.¹⁴ The third article accused the President of refusing to cooperate with the Judiciary Committee’s investigation.¹⁵

The Committee considered but rejected two proposed articles of impeachment. The first rejected article concerned receiving compensation in the form of government expenditures at his private properties in California and Florida—which allegedly constituted an emolument from the United States in violation of Article II, Section, 1, Clause 7 of the Constitution—and tax evasion.¹⁶ Those Members opposed to the portion of the charge alleging receipt of federal funds argued that most of the President’s expenditures were made pursuant to a request from the Secret Service; that there was no direct evidence the President knew at the time that the source of these funds was public, rather than private; and that this conduct failed to rise to the level of an impeachable offense.¹⁷ Some Members opposed to the tax evasion charge argued that the evidence was insufficient to impeach; others that tax fraud is not the type of behavior “at which the remedy of impeachment is directed.”¹⁸

The second rejected article accused the President of concealing from Congress the bombing operations in Cambodia during the Vietnam conflict.¹⁹ This article was rejected for two primary reasons: some Members thought (1) the President was performing his constitutional duty as Commander in Chief and (2) Congress was given sufficient notice of these operations.²⁰

President Nixon resigned on August 9, 1974, before the full House voted on the articles.²¹ The lessons and standards established by the Nixon impeachment investigation and resignation are disputed. On the one hand, the behavior alleged in the *approved* articles against President Nixon is arguably a “paradigmatic” case of impeachment, constituting actions that are almost certainly impeachable conduct for the President.²²

On the other hand, the significance of the House Judiciary Committee’s rejection of certain impeachment articles is unclear. In particular, whether conduct considered unrelated to the performance of official duties, such as the rejected article alleging tax evasion, can constitute an impeachable offense for the President is disputed. During the subsequent impeachment of President Bill Clinton, for example, the majority and minority reports of the House Judiciary Committee concerning the Committee’s impeachment recommendation took different views on when conduct that might traditionally be viewed as private or unrelated to the functions of the presidency constituted an impeachable offense.²³ The House Judiciary Committee report that recommended articles of impeachment argued that perjury by the President was an impeachable offense, even if committed with regard to matters outside his official duties.²⁴ In contrast, the minority views contained in the report argued that impeachment was reserved for “conduct that constitutes an egregious abuse or subversion of the powers of the executive office.”²⁵ The minority noted that the Judiciary Committee had rejected an article of

¹⁴ *Id.* at 3–4.

¹⁵ *Id.* at 4.

¹⁶ *Id.* at 217–19.

¹⁷ *Id.* at 221.

¹⁸ *Id.* at 223.

¹⁹ *Id.* at 220–26.

²⁰ *Id.* at 219.

²¹ Kilpatrick, *Nixon Resigns*, *supra* note 2.

²² Michael J. Gerhardt, *The Lessons of Impeachment History*, 67 GEO. WASH. L. REV. 603, 604 (1999).

²³ Compare H.R. REP. NO. 105-830, at 110–18 (1998), with *id.* at 204–07 (minority views).

²⁴ See H.R. REP. NO. 105-830, at 108.

²⁵ *Id.*

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impeachment against President Nixon alleging that he committed tax fraud, primarily because that “related to the President’s private conduct, not to an abuse of his authority as President.”²⁶

ArtII.S4.4.8 President Bill Clinton and Impeachable Offenses

Article II, 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.

The impeachment of President Bill Clinton stemmed from an investigation that originally centered on financial transactions occurring many years prior to President Clinton taking federal office.¹ Attorney General Janet Reno appointed Robert Fiske, Jr. as a special prosecutor in January 1994 to investigate the dealings of President Clinton and his wife with the “Whitewater” real estate development during the President’s tenure as attorney general and then governor of Arkansas.²

Following the reauthorization of the Independent Counsel Act in June, the Special Division of the United States Court of Appeals for the District of Columbia Circuit replaced Fiske in August with Independent Counsel Kenneth W. Starr, a former Solicitor General in the George H.W. Bush Administration and federal appellate judge.³

During the Whitewater investigation, Paula Jones, an Arkansas state employee, filed a civil suit against President Clinton in May 1994 alleging that he sexually harassed her in 1991 while governor of Arkansas.⁴ Lawyers for Jones took depositions of President Clinton at the White House and asked questions about the President’s relationship with staffers, including an intern named Monica Lewinsky.⁵ Independent Counsel Starr received information alleging that Lewinsky had attempted to influence the testimony of a witness in the Jones litigation,⁶ along with tapes of recordings between Monica Lewinsky and former White House employee Linda Tripp.⁷ Tripp had recorded conversations between herself and Lewinsky concerning Lewinsky’s relationship with the President and hope of obtaining a job outside the White House. Starr presented this information to Attorney General Reno. Reno petitioned the Special Division of the United States Court of Appeals for the District of Columbia Circuit to expand the independent counsel’s jurisdiction, and the Special Division issued an order on January 16, 1998, permitting the expansion of Starr’s investigation into President Clinton’s response to the Paula Jones case.⁸ Over the course of the spring and summer a grand jury investigated

²⁶ *Id.*

¹ See KEN GORMLEY, *DEATH OF AMERICAN VIRTUE: CLINTON VS. STARR* 33–114 (2010).

² EMILY F.V. TASSEL & PAUL FINKELMAN, *IMPEACHABLE OFFENSES: A DOCUMENTARY HISTORY FROM 1787 TO THE PRESENT* 267 (1999); see generally *Whitewater: Timeline*, WASH. POST, <http://www.washingtonpost.com/wp-srv/politics/special/whitewater/timeline.htm> (1998) (last visited Jan. 24, 2018).

³ GORMLEY, *supra* note 1, at 143–69. A previous version of the statute under which the independent counsel was appointed was challenged as unconstitutional in *Morrison v. Olson*, 487 U.S. 654 (1998). The Supreme Court upheld the statute as constitutional. *Id.* at 685–96.

⁴ In *Clinton v. Jones*, 520 U.S. 681, 684 (1997), the Supreme Court held that the President was subject to civil suits in his individual capacity while in office. *Id.* at 684.

⁵ TASSEL & FINKELMAN, *supra* note 2, at 268.

⁶ *The Starr Report: Introduction*, WASH. POST (1998), <http://www.washingtonpost.com/wp-srv/politics/special/clinton/icreport/5intro.htm>.

⁷ See GORMLEY, *supra* note 1, at 304–06.

⁸ *Id.*

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whether President Clinton committed perjury in his response to the Jones suit and whether he obstructed justice by encouraging others to lie about his relationship with Lewinsky.⁹ President Clinton appeared by video before the grand jury and testified concerning the Lewinsky relationship.¹⁰

Independent Counsel Starr referred his report to the House of Representatives on September 9, 1998, noting that under the independent counsel statute, his office was required to do so because President Clinton engaged in behavior that might constitute grounds for impeachment.¹¹ The House then voted to open an impeachment investigation into President Clinton's behavior, released the Starr report publicly, and the House Judiciary Committee voted to release the tape of the President's grand jury testimony.¹²

Although the House Judiciary Committee already had conducted several hearings regarding the possibility of impeachment,¹³ the Committee did not engage in an independent fact-finding investigation or call any live witnesses to testify about the President's conduct.¹⁴ Instead, the Judiciary Committee largely relied on the Starr report to inform the Committee's own report recommending impeachment, which was released December 16, 1998.¹⁵ The Committee report recommended impeachment of President Clinton on four counts.¹⁶ The first article alleged that President Clinton perjured himself when testifying to a criminal grand jury regarding his response to the Jones lawsuit and relationship with Lewinsky.¹⁷ The second alleged that the President committed perjury during a deposition in the civil suit brought against him by Paula Jones.¹⁸ The third alleged that President Clinton obstructed justice in the suit brought against him by Jones and in the investigation by Independent Counsel Starr.¹⁹ The fourth alleged that the President abused his office by refusing to respond to certain requests for admission from Congress and making untruthful responses to Congress during the investigation into his behavior.²⁰

On December 19, 1998, in a lame-duck session, the House voted to approve the first and third articles.²¹ After trial in the Senate, the President was acquitted on February 12, 1999.²² Statements of the Senators entered into the record regarding the impeachment indicate disagreement about what constitutes an impeachable offense for the President and whether Clinton's behavior rose to this level.²³ For instance, Republican Senator Richard G. Luger

⁹ TASSEL & FINKELMAN, *supra* note 2, at 269.

¹⁰ H.R. REP. NO. 105-830, at 28 (1998); *The Starr Report: Grounds For Impeachment, No. II*, Wash. Post (1998), <http://www.washingtonpost.com/wp-srv/politics/special/clinton/icreport/7groundsii.htm>.

¹¹ *The Starr Report: Introduction*, WASH. POST (1998), <http://www.washingtonpost.com/wp-srv/politics/special/clinton/icreport/5intro.htm>; see 28 U.S.C. § 595(c).

¹² TASSEL & FINKELMAN, *supra* note 2, at 271.

¹³ *Background and History of Impeachment, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong., 2d Sess. (1998); *Impeachment Inquiry: William Jefferson Clinton, President of the United States, Hearing Before the H. Comm. on the Judiciary*, 105th Cong., 2d Sess. (1998).

¹⁴ MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 176–77 (2000).

¹⁵ See H.R. REP. NO. 105-830, at 200–02 (1998) (minority views).

¹⁶ H.R. REP. NO. 105-830, at 28.

¹⁷ *Id.* at 2.

¹⁸ *Id.* at 2–3.

¹⁹ *Id.* at 3–4.

²⁰ *Id.* at 4–5.

²¹ 144 CONG. REC. 28,035–113 (1998).

²² 145 CONG. REC. 2375–78 (1999); Alison Mitchell, *Clinton is Acquitted Decisively by Senate on Both Charges*, N.Y. TIMES (Feb. 13, 1999), http://www.nytimes.com/learning/general/featured_articles/990216tuesday.html.

²³ See Published Closed Door Statements, 145 CONG. REC. S1471–1637 (daily ed. Feb. 12, 1999); GERHARDT, *supra* note 14, at 175.

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voted to convict on both articles, noting in his statement the gravity of the “presidential misconduct at issue” and arguing that the case was “not about adultery.”²⁴ Instead, it centered on the obstruction of justice that occurred when the President “lied to a federal grand jury and worked to induce others to give false testimony.”²⁵ For Senator Lugar, the President ultimately “betrayed [the] trust” of the nation through his actions and should be removed from office.²⁶ In contrast, Republican Senator Olympia Snowe voted to acquit on both articles. In her statement, she admonished the President’s “lowly conduct,” but concluded there was “insufficient evidence of the requisite untruth and the requisite intent” to establish perjury with regard to the concealment of his relationship with a subordinate; and the perjury charges regarding his relationship with a subordinate concerned statements that were largely “ruled irrelevant and inadmissible in the underlying civil case” which “undermine[d] [their] materiality.”²⁷ She also stated that she thought one of the allegations in the second impeachment article had been proven—the President’s attempt to influence the testimony of his personal assistant—but that the proper remedy for this was a criminal prosecution.²⁸ Indeed, a number of Senators indicated that they did not consider the President’s behavior to constitute an impeachable offense because the President’s conduct was not of a distinctly public nature.²⁹ For instance, Democratic Senator Byron L. Dorgan voted to acquit on both articles.³⁰ He described Clinton’s behavior as “reprehensible,” but concluded that it did not constitute “a grave danger to the nation.”³¹

The significance of the Clinton impeachment experience to informing the understanding of what constitutes an impeachable offense is thus open to debate. One might point to the impeachment articles recommended by the House Judiciary Committee, but not adopted by the full House, as concerning conduct insufficient to establish an impeachable offense. Specifically, the House declined to impeach President Clinton for his alleged perjury in a civil suit against him as well as for alleged untruthful statements made in response to congressional requests.³² Likewise, some scholars have pointed to the acquittal in the Senate of both impeachment articles that were brought by the House as evidence that the Clinton impeachment articles lacked merit or were adopted on purely partisan grounds.³³ The statements of some of the Senators just mentioned, reasoning that Clinton’s conduct did not qualify as an impeachable offense, may provide support for arguments that impeachment is not an appropriate tool to address at least some sphere of conduct by a President not directly

²⁴ PROCEEDINGS OF THE UNITED STATES SENATE IN THE IMPEACHMENT TRIAL OF PRESIDENT WILLIAM JEFFERSON CLINTON, VOLUME IV: STATEMENTS OF SENATORS REGARDING THE IMPEACHMENT TRIAL, 106TH CONG., 1ST SESS., S. DOC. NO. 106-4, at 2571–72 (1999).

²⁵ *Id.*

²⁶ *Id.* at 2573.

²⁷ *Id.* at 3002.

²⁸ *Id.* at 3004.

²⁹ See 145 CONG. REC. S1471–1637 (daily ed. Feb. 12, 1999); GERHARDT, *supra* note 14, at 175.

³⁰ CLINTON PROCEEDINGS, *supra* note 24, at 2942.

³¹ *Id.*

³² 144 CONG. REC. 28,110–12 (1998).

³³ Randall K. Miller, *Presidential Sanctuaries After the Clinton Sex Scandals*, 22 HARV. J.L. & PUB. POL’Y 647, 728 (1999) (“President Clinton’s acquittal, a constitutional law decision by the Senate—the final arbiter of the impeachment law—will reaffirm Congress’s prior ‘holdings’ that impeachment carries a ‘substantiality’ requirement. Impeachable offenses are offenses seriously incompatible with the institutions of government or those that substantially impair a president’s ability to perform his constitutional duties. President Clinton’s conduct falls short of this extraordinarily high threshold.”). *But see* Charles J. Cooper, *A Perjurer in the White House?: The Constitutional Case for Perjury and Obstruction of Justice As High Crimes and Misdemeanors*, 22 HARV. J.L. & PUB. POL’Y 619, 621 (1999) (“[T]he crimes alleged against the President . . . plainly do involve the derelict violation of executive duties. Those crimes are plainly impeachable offenses.”).

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tied to his official duties.³⁴ However, the failure to convict President Clinton might instead simply reflect the failure of the House managers to prove their case,³⁵ or simply bare political calculation by some Senators.³⁶ Ultimately, the lessons of the Clinton impeachment experience will be revealed in the future practice of Congress when assessing whether similar conduct if committed by future Presidents is impeachable.

More broadly, the results of the Clinton impeachment revealed perceived problems with the Independent Counsel Act (ICA), the statute that authorized the investigation which sparked the impeachment proceedings.³⁷ Dating back at least to the 1988 Supreme Court case of *Morrison v. Olson*, some expressed concern that the scope of an independent counsel's authority under the ICA, combined with a lack of accountability to the political branches, posed considerable risk of abuse.³⁸ The statute was permitted to lapse in 1999 amidst bipartisan congressional agreement that the law posed significant problems.³⁹

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Article II, 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.

President Donald Trump was impeached twice during his single term in office. In each case, he was acquitted on all counts by the Senate.

The first impeachment trial stemmed from a call President Trump had with the President Volodymyr Zelenskyy of Ukraine in which President Trump asked the Ukrainian President to announce two investigations: one involving his potential opponent in the upcoming 2020 presidential election and a second into unsubstantiated allegations that entities within Ukraine had interfered in the 2016 presidential election.¹ At the time of the call, the Office of Management and Budget had frozen \$400 million in military aid to Ukraine at the direction of the President.² The contents of the call initially came to light through an intelligence community whistleblower report, but a summary of the call was later made public by President Trump.³

³⁴ Michael J. Gerhardt, *The Perils of Presidential Impeachment*, 67 U. CHI. L. REV. 293, 300 (2000) [hereinafter Gerhardt, *Perils of Presidential Impeachment*].

³⁵ See 145 CONG. REC. S1577 (daily ed. Feb. 12, 1999).

³⁶ GERHARDT, *supra* note 14, at 175–76.

³⁷ AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION* 296 (2012); GERHARDT, *supra* note 14, at 189–91.

³⁸ *Morrison v. Olson*, 487 U.S. 654, 699–734 (1988) (Scalia, J., dissenting) (asserting that the independent counsel statute created improper incentives for investigations and prevented the President from holding prosecutors accountable) (quoting Brief for Edward H. Levi et. al, as Amici Curiae in Support of Appellees at 11, *Morrison v. Olson*, No. 87-1279 (Apr. 8, 1988)).

³⁹ See Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 525–26 (2005) (“In the wake of Kenneth Starr’s investigation of several Clinton-era scandals, a bipartisan consensus emerged against the use of independent counsels.”); GERHARDT, *supra* note 14, at 189–91; see, e.g., *Future of the Independent Counsel Act*, Senate Governmental Affairs Committee, 106th Cong. 248 (1999) (statement of Janet Reno, Attorney General) (“However, after working with the Act, I have come to believe—after much reflection and with great reluctance—that the Independent Counsel Act is structurally flawed and that those flaws cannot be corrected within our constitutional framework.”); *id.* at 425 (testimony of Kenneth Starr, Independent Counsel) (describing the independent counsel statute as creating a “fourth branch of government” with results that are “structurally unsound [and] constitutionally dubious”).

¹ H.R. REP. NO. 116-346, at 81–83 (2019).

² *Id.* at 82.

³ *Id.* at 126.

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The House investigation proceeded in two phases. The fact-finding portion of the investigation was primarily handled by the House Intelligence Committee, in cooperation with the Committee on Oversight and Reform and the Committee on Foreign Affairs.⁴ The early stage of this phase of the investigation saw some controversy over whether the House must explicitly authorize the initiation of an impeachment investigation. Although the Speaker of the House had announced that the committee investigations constituted an “official impeachment inquiry,” the White House counsel objected to the investigations on the ground that the investigation lacked “the necessary authorization for a valid impeachment proceeding” and violated the Due Process Clause.⁵ As a result, the President instructed members of his administration not to cooperate with the House’s “unconstitutional inquiry.”⁶

The House later took action to explicitly approve the impeachment investigation by adopting a resolution authorizing the House committees “to continue their ongoing investigations as part of the existing House of Representatives inquiry into whether sufficient grounds exist . . . to impeach Donald John Trump.”⁷ Nevertheless, the White House and other Executive Branch offices generally refused to comply with the House investigators requests for information, including subpoenas. Some Executive Branch officials, however, made the individual determination to cooperate with the impeachment inquiry and, as a result, the Intelligence Committee was able to hold a number of investigative hearings and issue a report outlining their findings. The record established in the fact finding phase was then provided to the Judiciary Committee.

Phase two of the impeachment investigation was conducted by the Judiciary Committee. This phase focused on whether the President’s conduct, as uncovered in the fact finding phase of the inquiry, constituted an impeachable offense.⁸ Following a series of hearings, the Committee recommended two articles of impeachment against the President, both of which were ultimately approved by the House. The first charged the President with abuse of power, alleging that he had used the powers of his office to solicit Ukraine’s interference in the 2020 election and had conditioned official acts, such as the release of military aid to Ukraine and a White House visit, on President Zelenskyy agreeing to announce the investigations.⁹ “President Trump,” the article alleged, “engaged in this scheme or course of conduct for corrupt purposes in pursuit of personal political benefit.”¹⁰ The second article charged the President with obstruction of the House impeachment investigation by directing the “unprecedented, categorical, and indiscriminate defiance of subpoenas issued by the House of Representatives.”¹¹ “This abuse of office,” the article alleged, was “subversive of constitutional government” and “nullif[ied] a vital constitutional safeguard vested solely in the House of Representatives.”¹²

⁴ See STAFF OF H. PERM. SELECT COMM. ON INTELLIGENCE, H. COMM. ON OVERSIGHT AND REFORM, & H. COMM. ON FOREIGN AFFAIRS, 116TH CONG., THE TRUMP-UKRAINE IMPEACHMENT INQUIRY REPORT: REPORT FOR THE H. PERM. SELECT COMM. ON INTELLIGENCE PURSUANT TO H. RES. 660 IN CONSULTATION WITH THE H. COMM. ON OVERSIGHT AND REFORM AND THE H. COMM. ON FOREIGN AFFAIRS (Comm. Print 2019).

⁵ Press Release, Nancy Pelosi, Speaker of the House, Pelosi Remarks Announcing Impeachment Inquiry (Sept. 24, 2019), <https://www.speaker.gov/newsroom/92419-0>.

⁶ See Letter from Pat Cipollone, White House Counsel, to Nancy Pelosi, Speaker of the House of Representatives, et al. (Oct. 8, 2019) <https://s3.documentcloud.org/documents/6459967/PAC-Letter-10-08-2019.pdf>.

⁷ H.R. Res. 660, 116th Cong. (2019).

⁸ See H.R. REP. NO. 116-346; REPORT BY THE MAJORITY STAFF OF THE H. COMM. ON THE JUDICIARY, 116TH CONG., CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT (Comm. Print 2019).

⁹ H.R. Res. 755, 116th Cong. (2019).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

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Although the impeachment articles were adopted by the House on December 18, 2019, the managers were not appointed and the articles not delivered to the Senate until January 15, 2020.¹³

The Senate trial was characterized by deep partisan divides and complicated disagreements over questions of law and fact, including presidential motive. But one clear constitutional conflict that arose during the trial involved the proper relationship between impeachment and criminal law. Trial briefs and debate made clear that the House managers and President Trump’s attorneys reached very different conclusions on the question of whether “high crimes and misdemeanors” require evidence of a criminal act or other legal violation.¹⁴ The House, consistent with past impeachment practice, asserted that for purposes of Article II “high Crimes and Misdemeanors” “need not be indictable criminal offenses.”¹⁵ In response, however, the President’s attorneys asserted that an “impeachable offense must be a violation of established law,” and that the articles “fail[ed] to allege any crime or violation of law whatsoever, let alone ‘high Crimes and Misdemeanors,’ as required by the Constitution.”¹⁶ The acquittal provided no clear resolution to these conflicting positions, but the debate over a link between illegal acts and impeachable acts appears to have had some impact on individual Senators. Indeed, the House’s managers’ failure to allege an explicit criminal act appears, along with criticism of the House investigation and failure of the House to prove its case, to have been among the primary reasons given for acquittal.¹⁷

As the Senate trial proceeded, it became apparent that a major point of contention would be whether the Senate would call its own witnesses. The House managers asked that the Senate authorize subpoenas for relevant Executive Branch documents and for testimony from various White House officials including former National Security Advisor John Bolton.¹⁸ With only forty-nine Senators voting in favor, the Senate chose not to approve that request, and the record was limited to the evidence provided by the House.¹⁹

¹³ H.R. Res. 798, 116th Cong. (2020).

¹⁴ U.S. CONST. art. II, § 4.

¹⁵ PROCEEDINGS OF THE UNITED STATES SENATE IN THE IMPEACHMENT TRIAL OF PRESIDENT DONALD JOHN TRUMP, VOL. I: PRELIMINARY PROCEEDINGS, 116TH CONG., S. DOC. NO. 116-18, at 416 (2020).

¹⁶ *Id.* at 471.

¹⁷ *See, e.g.*, PROCEEDINGS OF THE UNITED STATES SENATE IN THE IMPEACHMENT TRIAL OF PRESIDENT DONALD JOHN TRUMP, VOL. IV: STATEMENTS OF SENATORS, 116TH CONG., S. DOC. NO. 116-18, at 1914 (2020) (statement of Senator James M. Inhofe) (“Each of the past impeachment cases in the House of Representatives accused Presidents Johnson, Nixon, and Clinton of committing a crime. This President didn’t commit a crime.”); *id.* at 1984 (statement of Senator Ted Cruz) (“Indeed, in the Articles of Impeachment they sent over here, they don’t allege any crime whatsoever. They don’t even allege a single Federal law that the President violated.”); *id.* at 1990 (statement of Senator David Perdue) (“President Trump is the first President ever to face impeachment who was never accused of any crime in these proceedings, whatsoever. These two Articles of Impeachment simply do not qualify as reasons to impeach any President”); *id.* at 2034 (statement of Senator John Cornyn) (“But they failed to bring forward compelling and unassailable evidence of any crime—again, the Constitution talks about treason, bribery, or other high crimes and misdemeanors; clearly, a criminal standard . . .”). Other Senators identified the non-existence of a crime as an important factor in their vote, but nevertheless made clear their belief that a crime is not constitutionally required. *See, e.g., id.* at 1937 (statement of Senator Mitch McConnell) (“Now, I do not subscribe to the legal theory that impeachment requires a violation of a criminal statute, but there are powerful reasons why, for 230 years, every Presidential impeachment did in fact allege a criminal violation.”); *id.* at 2016 (statement of Senator Rob Portman) (“In this case, no crime is alleged. Let me repeat. In the two Articles of Impeachment that came over to us from the House, there is no criminal law violation alleged. Although I don’t think that that is always necessary—there could be circumstances where a crime isn’t necessary in an impeachment . . .”).

¹⁸ *See* PROCEEDINGS OF THE UNITED STATES SENATE IN THE IMPEACHMENT TRIAL OF PRESIDENT DONALD JOHN TRUMP, VOL. II: FLOOR AND TRIAL PROCEEDINGS, 116TH CONG., S. DOC. NO. 116-18, at 1498–99 (2020).

¹⁹ *Id.* at 1499.

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Ultimately, the Senate acquitted President Trump on both counts. Article I failed by a vote of 48-52 while Article II failed by a vote of 47-53.²⁰

The second Trump impeachment occurred a year later in the waning days of the Trump presidency following the events on January 6, 2021, at the U.S. Capitol in which some supporters of President Trump attempted to disrupt the congressional certification of the 2020 presidential election as having been won by Joseph Biden. The House moved quickly following those events. Passing on an investigation, the Judiciary Committee staff compiled publicly available evidence relating to the President’s actions on January 6 and within one week had introduced and approved a single article of impeachment charging the President with “incitement to insurrection.”²¹ Specifically, the article alleged that in the months running up to January 6th the President had consistently “issued false statements asserting that the Presidential election results were the product of widespread fraud and should not be accepted by the American people.”²² He then repeated those claims when addressing a crowd on January 6, and “willfully made statements that, in context, encouraged—and foreseeably resulted in—lawless action at the Capitol. . . .”²³ Notably, although the House ultimately impeached President Trump prior to the expiration of his term, the Senate did not commence a trial until after President Trump had left office.²⁴

The Senate trial saw the chamber make two important threshold determinations regarding trials of former Presidents. First, although the Constitution clearly requires the Chief Justice to preside over presidential impeachment trials, the Senate implicitly determined that that requirement does not extend to the trial of a former President. At the opening of the trial, Senator Patrick Leahy, President pro tempore of the United States Senate, was sworn in as presiding officer without objection.²⁵

The Senate also made the threshold determination of whether it had the constitutional authority to try a former President. After briefing and debate on the question of whether the Senate had jurisdiction over a former President for acts that occurred during his tenure in office, the Senate explicitly determined by a vote of 56-44 that it did.²⁶ Thus a majority of Senators, as they have on previous occasions, determined that former officials may be tried by the Senate and, though not removable, remain subject to disqualification from holding future office if convicted.²⁷

With respect to whether the President had committed an impeachable offense, the main substantive question during the trial arguably revolved around the proper application of the First Amendment. The former President’s attorneys invoked the First Amendment as a defense to the impeachment charge, asserting that free speech protections apply and limit the

²⁰ 166 CONG. REC. S937 (daily ed. Feb. 5, 2020) (acquitting President Trump on Article I by a vote of 48-52); *id.* at S938 (acquitting President Trump on Article II by a vote of 47-53).

²¹ See STAFF OF H. COMM. ON THE JUDICIARY, 116TH CONG., MATERIALS IN SUPPORT OF H. RES. 24 IMPEACHING DONALD JOHN TRUMP, PRESIDENT OF THE UNITED STATES, FOR HIGH CRIMES AND MISDEMEANORS (Comm. Print Jan. 12, 2021); H.R. Res. 24, 117th Cong. (2021).

²² H.R. Res. 24, 117th Cong. (2021).

²³ *Id.*

²⁴ See PROCEEDINGS OF THE UNITED STATES SENATE IN THE IMPEACHMENT TRIAL OF DONALD JOHN TRUMP, VOL. I: PRELIMINARY AND FLOOR TRIAL PROCEEDINGS, 117TH CONG., S. DOC. NO. 117-3, at 23 (2021).

²⁵ 167 CONG. REC. S142 (daily ed. Jan. 26, 2021) (swearing in Patrick Leahy (D-VT), President pro tempore of the United States Senate, as presiding officer).

²⁶ 167 CONG. REC. S609 (daily ed. Feb. 9, 2021) (determining that “Donald John Trump is subject to the jurisdiction of a Court of Impeachment for acts committed while President of the United States, notwithstanding the expiration of his term in that office”).

²⁷ See JARED P. COLE & TODD GARVEY, CONG. RSCH. SERV., R46013, IMPEACHMENT AND THE CONSTITUTION 47–48 (2019), <https://crsreports.congress.gov/product/pdf/R/R46013>

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conduct that can be considered an impeachable offense.²⁸ The President’s political statements at the rally, his attorneys argued, constituted “core free speech under the First Amendment” and thus not an impeachable offense.²⁹ The House managers disagreed, arguing that “The First Amendment has no application in an impeachment proceeding” because impeachment “does not seek to punish unlawful speech, but instead to protect the Nation from a President who violated his oath of office and abused the public trust.”³⁰ Moreover, even if the First Amendment did restrict the impeachment power, “it still would not protect President Trump’s calls to violence,” which the managers asserted fell within the well-established category of unprotected speech “directed to inciting or producing imminent lawless action.”³¹ In the end, the First Amendment arguments made by the former President’s attorneys do not appear to have had an impact on Senators, as only one Senator who voted to acquit the former President mentioned the First Amendment in the formal explanation of his vote.³²

Although a majority of Senators voted to convict, former President Trump was ultimately acquitted by a vote of 57-43.³³

ArtII.S4.4.10 Judicial Impeachments

Article II, 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.

Congress has impeached federal judges with comparatively greater frequency in recent decades, and some of these impeachments appear to augur important consequences for the practice in the future. In particular, within three years in the 1980s the House voted to impeach three federal judges, each occurring after a criminal trial of the judge. One impeached federal judge was not barred from future office and subsequently was elected to serve in the House of Representatives, the body that earlier had impeached him.¹ Another judge challenged the adequacy of his impeachment trial in a case that ultimately reached the Supreme Court, which ruled that the case was non-justiciable.²

The House of Representatives impeached federal district judge Harry E. Claiborne in 1986, following his criminal conviction and subsequent imprisonment for providing false statements on his tax returns.³ Despite his incarceration, Judge Claiborne did not resign his

²⁸ PROCEEDINGS OF THE UNITED STATES SENATE IN THE IMPEACHMENT TRIAL OF DONALD JOHN TRUMP, PART II, 117TH CONG., S. DOC. NO. 117-2, at 146–75 (2021).

²⁹ *Id.* at 156.

³⁰ PROCEEDINGS OF THE UNITED STATES SENATE IN THE IMPEACHMENT TRIAL OF DONALD JOHN TRUMP, PART III, 117TH CONG., S. DOC. NO. 117-2, at 208 (2021).

³¹ *Id.* at 209 (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

³² See PROCEEDINGS OF THE UNITED STATES SENATE IN THE IMPEACHMENT TRIAL OF DONALD JOHN TRUMP, VOL. II: VISUAL AIDS FROM THE TRIAL AND STATEMENTS OF SENATORS, 117TH CONG., S. DOC. NO. 117-3, at 875 (2021) (statement of Senator Dan Sullivan) (“[T]he House managers claimed, in arguing their incitement charge, that First Amendment political speech protections do not apply to elected officials in impeachment proceedings. A conviction based on this breathtaking precedent has the potential to significantly further undermine core constitutional protections for Americans and their ability to undertake political speech in the future.”) *But see id.* at 791 (statement of Senator Charles E. Schumer) (“The First Amendment right to free speech protects Americans from jail, not Presidents from impeachment.”).

³³ 167 CONG. REC. S733 (daily ed. Feb. 13, 2021) (acquitting former President Trump by a vote of 57-43).

¹ See H. RES. 499 (Aug. 9, 1988); H.R. REP. NO. 100-810, at 8 (1988).

² *Nixon v. United States*, 506 U.S. 224, 237–38 (1993).

³ *United States v. Claiborne*, 727 F.2d 842 (9th Cir. 1984).

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seat and continued to collect his judicial salary.⁴ The House unanimously voted in favor of four articles of impeachment against him.⁵ The first two articles against Judge Claiborne simply laid out the underlying behavior that had given rise to his criminal prosecution.⁶ The third article “rest[ed] entirely on the conviction itself” and stood for the principle that “by conviction alone he is guilty of ‘high crimes’ in office.”⁷ The fourth alleged that Judge Claiborne’s actions brought the “judiciary into disrepute, thereby undermining public confidence in the integrity and impartiality of the administration of justice” which amounted to a “misdemeanor.”⁸

The Senate impeachment trial of Judge Claiborne was the first in which that body used a committee to take evidence. Rather than conducting a full trial with the entire Senate, the committee took testimony, received evidence, and voted on pretrial motions regarding evidence and discovery.⁹ The committee then reported a transcript of the proceedings to the full Senate, without recommending whether impeachment was warranted.¹⁰ The Senate voted to convict Judge Claiborne on the first, second, and fourth articles.¹¹

In 1988, the House impeached a federal district judge who had been indicted for a criminal offense but acquitted. Judge Alcee L. Hastings was acquitted in a criminal trial where he was accused of conspiracy and obstruction of justice for soliciting a bribe in return for reducing the sentences of two convicted felons.¹² After his acquittal, a judicial committee investigated the case and concluded that Judge Hastings’s behavior might merit impeachment. The Judicial Conference (a national entity composed of federal judges that reviews investigations of judges and is authorized to refer recommendations to Congress) eventually referred the matter to the House of Representatives, noting that impeachment might be warranted.¹³ The House of Representatives approved seventeen impeachment articles against Judge Hastings, including for perjury, bribery, and conspiracy.¹⁴

Judge Hastings objected to the impeachment proceedings as “double jeopardy” because he had already been acquitted in a previous criminal proceeding.¹⁵ The Senate, however, rejected his motion to dismiss the articles against him.¹⁶ The Senate again used a trial committee to

⁴ EMILY F.V. TASSEL & PAUL FINKELMAN, *IMPEACHABLE OFFENSES: A DOCUMENTARY HISTORY FROM 1787 TO THE PRESENT* 168 (1999).

⁵ 132 CONG. REC. H4710–22 (daily ed. July 22, 1986).

⁶ H. COMM. ON THE JUDICIARY, *IMPEACHMENT OF JUDGE HARRY E. CLAIBORNE, REPORT TO ACCOMPANY H. RES. 461, 99TH CONG., 2D SESS., H.R. REP. NO. 99-688*, at 1–2 (1986).

⁷ *Id.* at 12.

⁸ *Id.* at 23.

⁹ STAFF FROM THE S. IMPEACHMENT TRIAL COMM., *ON THE IMPEACHMENT OF HARRY E. CLAIBORNE, 99TH CONG., 2D SESS., S. REP. NO. 99-511*, at 1–4 (1986).

¹⁰ *Id.* at 1.

¹¹ 132 CONG. REC. 29,870–72 (1986).

¹² H.R. REP. NO. 100-810, at 8 (1988).

¹³ *Id.* The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 authorizes the Judicial Conference to forward a certification to the House that impeachment of a federal judge may be warranted. 28 U.S.C. § 355.

¹⁴ H. Res. 499 (Aug. 9, 1988); H.R. REP. NO. 100-810, at 8 (1988).

¹⁵ *IMPEACHMENT OF JUDGE ALCEE L. HASTINGS, MOTIONS OF JUDGE ALCEE L. HASTINGS TO DISMISS ARTICLES I–XV AND XVII OF THE ARTICLES OF IMPEACHMENT AGAINST HIM AND SUPPORTING AND OPPOSING MEMORANDA* S. DOC. 101–4, at 48–65 (1989).

¹⁶ *The Impeachment Trial of Alcee Hastings*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/briefing/Impeachment_Hastings.htm (last visited Jan. 24, 2018).

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receive evidence. That body voted to convict and remove Judge Hastings on eight articles, but did not vote to disqualify him from holding future office.¹⁷ Judge Hastings was later elected to the House of Representatives.¹⁸

Before the trial of Judge Hastings even began in the Senate, the House impeached Judge Walter L. Nixon. Judge Nixon was convicted in a criminal trial of perjury to a grand jury and imprisoned.¹⁹ Following an investigation by the House Judiciary Committee’s Subcommittee on Civil and Constitutional Rights, the Judiciary Committee reported a resolution to the full House recommending impeachment on three articles.²⁰ The full House approved three articles of impeachment, the first two involving lying to a grand jury and the last for undermining the integrity of and bringing disrepute on the federal judicial system.²¹ The Senate convicted Judge Nixon on the first two articles but acquitted him on the third.²²

Judge Nixon challenged the Senate’s use of a committee to receive evidence and conduct hearings. He brought a suit in federal court arguing that the use of a committee, rather than the full Senate, to take evidence violated the Constitution’s provision that the Senate “try” all impeachments.²³ The Supreme Court ultimately rejected his challenge in *Nixon v. United States*, ruling that the issue was a non-justiciable political question because the Constitution grants the power to try impeachments “in the Senate and nowhere else”; and the word “try” “lacks sufficient precision to afford any judicially manageable standard of review of the Senate’s actions.”²⁴ As a result of this decision, impeachment proceedings appear largely immune from judicial review.²⁵

Two judges have been impeached in the twenty-first century. As with the three impeachments of judges in the 1980s, the first followed a criminal indictment. District Judge Samuel B. Kent pled guilty to obstruction of justice for lying to a judicial investigation into alleged sexual misconduct and was sentenced to 33 months in prison.²⁶ The House impeached Judge Kent for sexually assaulting two court employees, obstructing the judicial investigation of his behavior, and making false and misleading statements to agents of the Federal Bureau of Investigation (FBI) about the activity.²⁷ Judge Kent resigned his office before a Senate trial.²⁸ The Senate declined to conduct a trial following his resignation.

¹⁷ 135 CONG. REC. S13,783–87 (daily ed. Oct. 20, 1989).

¹⁸ TASSEL & FINKELMAN, *supra* note 4, at 173.

¹⁹ H. COMM. ON THE JUDICIARY, IMPEACHMENT OF WALTER L. NIXON, JR., REPORT TO ACCOMPANY H. RES. 87, 101ST CONG., 1ST SESS., H.R. REP. NO. 101-36, at 12–13 (1989).

²⁰ *Id.* at 14–16.

²¹ 135 CONG. REC. H1802–11 (daily ed. May 10, 1989).

²² 135 CONG. REC. S14,633–39 (daily ed. Nov. 3, 1989).

²³ *Nixon*, 506 U.S. at 226.

²⁴ *Id.* at 229.

²⁵ The U.S. District Court for the District of Columbia initially threw out Judge Hastings’ Senate impeachment conviction, because the Senate had tried his impeachment before a committee rather than the full Senate. *Hastings v. United States*, 802 F. Supp. 490, 505 (D.D.C. 1992). The decision was vacated on appeal and remanded for reconsideration in light of *Nixon v. United States*. *Hastings v. United States*, 988 F.2d 1280 (D.C. Cir. 1993). The district court then dismissed the suit because it presented a nonjusticiable political question. *Hastings v. United States*, 837 F. Supp. 3, 5–6 (D.D.C. 1993).

²⁶ H. COMM. ON THE JUDICIARY, IMPEACHMENT OF JUDGE SAMUEL B. KENT, REPORT TO ACCOMPANY H. RES. 520, 11TH CONG., 1ST SESS., H.R. REP. NO. 111-159, at 6–13 (2009) [hereinafter KENT IMPEACHMENT].

²⁷ 155 CONG. REC. H7053–67 (daily ed. June 19, 2009); KENT IMPEACHMENT, *supra* note 26, at 2–3.

²⁸ CHARLES W. JOHNSON, JOHN V. SULLIVAN, AND THOMAS J. WICKHAM, JR., HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS AND PROCEDURES OF THE HOUSE 608–13 (2017).

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Although the four previous impeachments of federal judges followed criminal proceedings, the most recent impeachment did not.²⁹ In 2010, Judge G. Thomas Porteous Jr. was impeached for participating in a corrupt financial relationship with attorneys in a case before him, and engaging in a corrupt relationship with bail bondsmen whereby he received things of value in return for helping the bondsmen develop corrupt relationships with state court judges.³⁰ Judge Porteous was the first individual impeached by the House³¹ and convicted by the Senate based in part upon conduct occurring before he began his tenure in federal office. The first and second articles of impeachment each alleged misconduct by Judge Porteous during both his state and federal judgeships.³² The fourth alleged that Judge Porteous made false statements to the Senate and FBI in connection with his nomination and confirmation to the U.S. District Court for the Eastern District of Louisiana.³³

Judge Porteous’s filings in answer to the articles of impeachment argued that conduct occurring before he was appointed to the federal bench cannot constitute impeachable behavior.³⁴ The House Managers’ replication, or reply to this argument, argued that Porteous’s contention had no basis in the Constitution.³⁵ On December 8, 2010, he was convicted on all four articles, removed from office, and disqualified from holding future federal offices.³⁶ The first article, which included conduct occurring before he was a federal judge, was affirmed 96-0.³⁷ The second article, approved 90-6, alleged that he lied to the Senate in his confirmation hearing to be a federal judge.³⁸ A number of Senators explicitly adopted the reasoning supplied by expert witness testimony before the House that the crucial issue regarding the appropriateness of impeachment was not the timing of the misconduct, but “whether Judge Porteous committed such misconduct and whether such misconduct demonstrates the lack of integrity and judgment that are required in order for him to continue to function” in office.³⁹

Senator Claire McCaskill explained in her statement entered in the *Congressional Record* that Judge Porteous’s argument for an “absolute, categorical rule that would preclude impeachment and removal for any pre-federal conduct” should be rejected.⁴⁰ “That should not be the rule,” she noted, “any more than allowing impeachment for any pre-federal conduct that

²⁹ The FBI investigated judicial corruption in Louisiana’s 24th Judicial District, the court on which Judge Porteous served before being appointed to the District Court for the Eastern District of Louisiana. The Department of Justice declined to seek criminal charges but did submit a complaint of judicial misconduct to the Fifth Circuit Court of Appeals. REPORT OF THE IMPEACHMENT TRIAL COMM. ON THE ARTICLES AGAINST JUDGE G. THOMAS PORTEOUS, JR., 111TH CONG., 2D SESS., S. REP. NO. 111-347, at 5 (2010) [hereinafter PORTEOUS IMPEACHMENT].

³⁰ PORTEOUS IMPEACHMENT, *supra* note 29, at 1–2.

³¹ 156 CONG. REC. 3155–57 (2010).

³² PORTEOUS IMPEACHMENT, *supra* note 29, at 1–2.

³³ PORTEOUS IMPEACHMENT, *supra* note 29, at 2.

³⁴ 156 CONG. REC. S2183–84 (daily ed. Apr. 12, 2010). *See also* Judge G. Thomas Porteous, Jr.’s Post-Trial Brief (Oct. 29, 2010), in PROCEEDINGS OF THE UNITED STATES SENATE IN THE IMPEACHMENT TRIAL OF G. THOMAS PORTEOUS, JR., A JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, 111TH CONG., 2D SESS., S. DOC. NO. 111-20, at 61–76 (2010) [hereinafter PORTEOUS PROCEEDINGS].

³⁵ 156 CONG. REC. S2358 (daily ed. Apr. 15, 2010). *See also* Post-Trial Memorandum of the House of Representatives (Oct. 29, 2010), in PORTEOUS PROCEEDINGS, *supra* note 29, at 304–15.

³⁶ 156 CONG. REC. 19,134–36 (2010).

³⁷ 156 CONG. REC. 8609 (2010).

³⁸ 156 CONG. REC. 8610 (2010).

³⁹ *To Consider Possible Impeachment of United States District Judge G. Thomas Porteous, Jr. (Part IV), Hearing Before the Task Force on Judicial Impeachment of the H. Comm. on the Judiciary*, 111th Cong., 1st Sess., H. Hrg. 111–46, at 30 (Dec. 15, 2009) (statement of Michael J. Gerhardt, Professor of Law, University of North Carolina, Chapel Hill School of Law); *see, e.g.*, 156 CONG. REC. S10,285 (daily ed. Dec. 15, 2010) (statement of Senator Tom Udall); *id.* at S10,284 (statement of Senator Patrick Leahy).

⁴⁰ 156 CONG. REC. S10,282 (daily ed. Dec 15, 2010).

ARTICLE II—EXECUTIVE BRANCH
Sec. 4—Impeachment: Impeachable Offenses

ArtII.S4.4.10
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is entirely unrelated to the federal office.”⁴¹ Senator Patrick Leahy agreed, noting that he “reject[ed] any notion of impeachment immunity [for pre-federal behavior] if misconduct was hidden, or otherwise went undiscovered during the confirmation process, and it is relevant to a judge’s ability to serve as an impartial arbiter.”⁴²

⁴¹ *Id.*

⁴² 156 CONG. REC. S10, 284. *See also id.* at S10,286 (statement of Senator Jeanne Shaheen) (“I was totally unpersuaded by the defense team’s argument that Judge Porteous’s ‘pre-Federal’ conduct should be outside the scope of our deliberation—I do not believe the act of being confirmed to a Federal judgeship by the Senate erases or excuses an individual’s conduct up to the point of confirmation.”); *id.* at S10,405 (statement of Senator Jeff Sessions) (“The Constitution does not require that all conduct be committed post Federal appointment nor does it stipulate at all when the conduct must occur.”).

