CONSTITUTIONAL LAW

2026–27

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III. THE PRESIDENT'S POWERS AND PROTECTIONS

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A. Security and Foreign Affairs (57 PAGES)

As we saw in *McCulloch*, some of the most fundamental questions about our constitutional system concern implied powers. How much, if at all, do Congress's powers extend beyond those specifically enumerated in Article I (whether thanks to the open-endedness of the Necessary and Proper Clause or otherwise)? How can the principle that the Federal Government derives its powers from the Constitution be reconciled with the reality that efficacious government might require some improvisation? Closely analogous questions arise in the context of the President's powers as well, perhaps especially in connection with matters of security or foreign affairs. In fact, the parallel interpretive challenges are arguably greater in this area because the textual grants of authority to the President are so few and terse (even compared to Article I, § 8). If we gloss over a few details and bracket how Presidents are elected and replaced, Article II boils down to this:

> **§ 1.** The executive power shall be vested in a President of the United States of America.[*] …
>
> 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."
>
> **§ 2.** The President shall be commander in chief of the Army and Navy of the United States … and he shall have power to grant reprieves and pardons for offenses against the United States … .
>
> 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 … , 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 … .

[*] This sentence is often termed the "Vesting Clause" of Article II.

> **§ 3.** He shall from time to time give to the Congress information of the state of the union … ; 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 this section, we will consider three main cases that pose questions about how to construe the President's powers, including the general "executive power," in the context of security and foreign affairs. The first, *In re Neagle* (1890), is a natural bookend to *McCulloch*: It illustrates the need to identify an enumerated power in Article II cases, much as in Article I cases, but it also introduces some of the ways that the inquiry differs when executive rather than legislative power is at issue. The second case, *Youngstown Sheet & Tube Co. v. Sawyer* (1952), is the most famous separation-of-powers case ever decided by the Supreme Court. Justice Jackson's concurrence, in particular, introduced a framework for assessing claims of Presidential power that remains enormously influential today—though how much guidance it really provides is open to question. And the third, *Zivotofsky v. Kerry* (2015), is the Court's latest major statement defining the scope of the President's exclusive authority over matters of diplomacy or foreign policy.

In addition to these cases, you'll also read excerpts of two law-review articles that put them in context. You don't need to read those as closely as you would read judicial opinions, so this section shouldn't be quite as heavy a lift as the page count above might suggest.

In re Neagle

135 U.S. 1 (1890)

[After a disgruntled litigant, David Terry, made death threats against Justice Stephen Field, the Attorney General assigned federal marshals, including David Neagle, to protect him. When Terry did go on to attack Field, Neagle shot and killed him. Neagle was then charged with murder by a state prosecutor in California, where the altercation took place, and incarcerated pending trial. He petitioned a federal court for a writ of habeas corpus—a

[*] This clause is often termed the "Take Care Clause."

judicial order to release someone from custody because they are imprisoned without lawful authority. The court granted that relief, and the state prosecutor appealed to the Supreme Court.]

■ JUSTICE MILLER [delivered] the opinion of the court.

[A federal statute authorizes habeas relief when a prisoner is in custody] "for an act done or omitted in pursuance of a law of the United States[.]" [The state] urge[s], however, that there exists no statute authorizing any such protection as that which Neagle was instructed to give Judge Field in the present case, and indeed no protection whatever against a vindictive or malicious assault growing out of the faithful discharge of his official duties[.] [And in order to satisfy the habeas statute, the state argues, Neagle must show that] the act for which [he] is imprisoned was done by virtue of an act of Congress.

It is not supposed that any special act of Congress exists which authorizes the marshals or deputy marshals of the United States in express terms to accompany the judges of the Supreme Court through their circuits, and act as a body-guard to them, to defend them against malicious assaults against their persons. But [we] are satisfied that if it was [nonetheless] the duty of Neagle, under the circumstances, a duty which could only arise under the laws of the United States, to defend Mr. Justice Field from a murderous attack upon him, he brings himself within the meaning of the section we have recited.

[In] the view we take of the Constitution of the United states, any obligation fairly and properly inferable from that instrument, or any duty of the marshal to be derived from the general scope of his duties under the laws of the United States, is a "law," within the meaning of [the habeas statute]. It would be a great reproach to the system of government of the United States, declared to be within its sphere sovereign and supreme, if there is to be found within the domain of its powers no means of protecting the judges, in the conscientious and faithful discharge of their duties, from the malice and hatred of those upon whom their judgments may operate unfavorably.

[If] a person in the situation of Judge Field could have no other guarantee of his personal safety while engaged in the conscientious discharge of a disagreeable duty, than the fact that if he was murdered his murderer would be [punished], the security would be very insufficient. [We] do not believe that the government of the United States is thus inefficient, or that its Constitution and laws have left the high officers of the government so defenceless and unprotected.

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

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

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

Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms,* or does it include the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution?

[If] the President or the Postmaster General is advised that the mails of the United States, possibly carrying treasure, are liable to be robbed and the mail carriers assaulted and murdered in any particular region of country, who can doubt the authority of the President or of one of the executive departments under him to make an order for the protection of the mail and of the persons and lives of its carriers, by doing exactly what was done in the case of Mr. Justice Field[?]

[The] United States is the owner of millions of acres of valuable public land[.] Some of these lands owe a large part of their value to the forests which grow upon them. These forests are liable to [timber] thieves, who make a living by cutting and selling such timber, and who are trespassers. But until quite recently, [there] was no statute authorizing any preventive measures for the protection of this valuable public property. Has the President no authority to place guards upon the public territory to protect its timber? No authority to seize the timber when cut and found upon the ground? Has he no power to take any measures to protect this vast domain?

[Likewise, in] *United States v. San Jacinto Tin Company* (1888), a suit was brought in the name of the United States, by order of the Attorney General, to set aside a [grant] of valuable land, on the ground that it was obtained from the government by fraud[.] [The defendant challenged] the right of the Attorney General or any other officer of the government to institute such a suit in the absence of any act of Congress authorizing it. [The] response of this court to that suggestion conceded that in the acts of Congress [there] was no such express authority. It was further said: "If the United States, in any particular case, has a just cause for calling upon the judiciary of the country [for] relief by setting aside or annulling any of its contracts[,] the question of the appeal to the judicial tribunals of the country must primarily be decided by the Attorney General of the United States. That such a power should exist somewhere, and that the United States should not be more helpless in relieving itself of frauds, impostures, and deceptions, than the private individual, is hardly open to argument."

[We] cannot doubt the power of the President to take measures for the protection of a judge of one of the courts of the United States who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death, and we think it clear that where this protection is to be afforded through the civil power, the Department of Justice is the proper one to set in motion the necessary means of protection.

[We] therefore affirm the judgment of the Circuit Court authorizing [Neagle's] discharge from the custody of the sheriff of San Joaquin County.

■ JUSTICE LAMAR[, with whom CHIEF JUSTICE FULLER joins,] dissenting.

[We agree] that the personal protection of Mr. Justice Field, as a private citizen, even to the death of Terry, was not only the right, but was also the duty of Neagle, and of any other bystander. [But] we deny that, upon the facts of this record, he, as deputy marshal Neagle, or as private citizen Neagle, had any duty imposed on him by the laws of the United States growing out of the official character of Judge Field as a [Justice].

[Neagle] admi[ts] that there is [no] *single*, specific statute making it, in so many words, Neagle's duty to protect the justice. [His position] is, and is wholly, that the authority and duty to protect the justice did arise directly and necessarily out of the Constitution and positive congressional enactments.

[We] recognize that the powers of the government, "within its sphere," as defined by the Constitution, and interpreted by the well-settled principles which have resulted from a century of wise and patriotic analysis, are supreme; [and] that these powers may be found not only in the express authorities conferred by the Constitution, but also in necessary and proper implications. But while that is all true, it is also true that the powers must be exercised, not only by the organs, but also in conformity with the modes, prescribed by the Constitution itself. These great federal powers, whose existence in all their plenitude and energy is incontestable, are not autocratic and lawless; they are organized powers, committed by the people to the hands of their servants for their own government, and distributed among the legislative, executive, and judicial departments; they are not *extra* the Constitution, for, in and by that Constitution, and in and by it alone, the United States, as a great democratic federal republic, was called into existence, and finds its continued existence possible.

[One] very prominent feature of the Constitution which [the President] is sworn to preserve, and which the whole body of the judiciary are bound to enforce, is the closing paragraph of sec. 8, Art. 1, in which it is declared that "the Congress shall have power ... to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

[This clause] contains the germ of all the implication of powers under the Constitution. It is that which has built up the Congress of the United States into the most august and imposing legislative assembly in the world; and which has secured vigor to the practical operations of the government, and at the same time tended largely to preserve the equilibrium of its various powers among its co-ordinate departments, as partitioned by that instrument. And that clause alone, conclusively refutes the assertion of the Attorney General that it was "the duty of the executive department of the United States to guard and protect, at any hazard, the life of Mr. Justice Field in the discharge of his duty, because such protection is essential to the existence of the government." Waiving the question of the essentiality of any such protection to the existence of the government, the manifest answer is that the protection needed and to be given must proceed not from the President, but primarily from Congress.

Again, while it is the President's duty to take care that the laws be faithfully executed, it is not his duty to *make* laws or a law of the United States. The laws he is to see executed are manifestly those contained in the Constitution and those enacted by Congress, whose duty it is to make all laws necessary and proper for carrying into execution the powers of those tribunals. [That] body was perfectly able to pass such laws as it should deem expedient in reference to such matter; indeed, it has passed such laws in reference to elections, expressly directing the United States marshals to attend places of election, to act as peace officers, to arrest with and without process, and to protect the supervisors of election in the discharge of their duties; and there was not the slightest legal necessity out of which to imply any such power in the President.

[As] before stated, if the killing of Terry was done "in pursuance of a law of the United States," that law had somewhere an origin. There are under the general government only two possible sources of law. [The] legislative power possessed by the United States must be found, either exercised in the Constitution as fundamental law, or by some body or person to whom it was delegated by the Constitution. It has already been pointed out that the Constitution does not itself create any such law as that contended for; and that it could not have been created by any executive or judicial action or status is made manifest, not only by [the Necessary and Proper Clause], but also by sec. 1, Art. I, [which] provides that "*All* legislative power herein granted shall be vested in a Congress of the United States[.]" [Thus] we are driven to look for the source of this asserted law to some legislation of Congress[.]

[For] these reasons, [Neagle should be] remanded to [state] custody[;] and we are the less reluctant to express this conclusion, because we cannot permit ourselves to doubt that [even if he] had gone to trial upon this record, God and his country would have given him a good deliverance.

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

NEAGLE, THE HORIZONTAL NECESSARY & PROPER CLAUSE, AND THE "ANTICIPATION PROBLEM"

Consider how *Neagle* resembles and differs from *McCulloch*. In both, the Court is faced with a claim that there is no express authorization for some exercise of power that, the Court thinks, serves important interests and ought to be allowed. Here, though, the same provision that supported the Court's approval of the exercise of power in *McCulloch*—the Necessary and Proper Clause—is enlisted by the dissenters instead. That's because, unlike the critics of the bank law, the dissenters here don't doubt that there is power in the *federal government* to act as it did: They just think that the relevant power lies with Congress, not the President, unless and until Congress enacts a statute authorizing the President to act. In particular, authorizing bodyguards for federal judges would seem to fit comfortably within the "horizontal" component of the Necessary and Proper Clause—the authorization for Congress "to make all Laws which shall be necessary and proper for carrying into Execution," not merely its own enumerated powers, but also "all *other* Powers vested by this Constitution . . . in any Department or Officer [of the U.S. government]." That would include the judicial power vested in courts by Article III.

Why isn't that a perfectly satisfactory resolution of the case? A simple answer is that this won't be very satisfying for David Neagle. And that illustrates the broader concern that animates many claims of unilateral or inherent presidential authority: Sometimes Congress simply won't have anticipated a situation before it arises, and then, when it does arise, some action that Congress didn't think to authorize may seem plainly necessary. Julian Mortenson helpfully labels this "the anticipation problem."[*] Much as *McCulloch* argued that the Necessary & Proper Clause should be read broadly in light of the evident intention that the Constitution "endure for

[*] Julian Davis Mortenson, *A Theory of Republican Prerogative*, 88 S. CAL. L. REV. 45 (2014).

ages to come, and, consequently, [be] adapted to the various *crises* of human affairs" (*supra*, p. II-5), perhaps the "executive power" should be read somewhat flexibly in order to allow the President to meet exigencies that Congress (like the ratifiers) did not specifically foresee.

One influential articulation of this basic idea—not as a matter of constitutional interpretation, but as a matter of political theory or institutional design—is this much-quoted passage from John Locke's *Second Treatise of Government* (1690):

> Where the legislative and executive power are in distinct hands … the good of the society requires, that several things should be left to the discretion of him that has the executive power: for the legislators not being able to foresee, and provide by laws, for all that may be useful to the community, the executor of the laws having the power in his hands, has by the common law of nature a right to make use of it for the good of the society … till the legislative can conveniently be assembled to provide for it.
>
> This Power to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it, is that which is called *Prerogative*. For since in some Governments the Law-making Power is not always in being, and is usually too numerous, and so too slow, for the dispatch requisite to Execution: and because also it is impossible to foresee, and so by laws to provide for, all Accidents and Necessities, that may concern the publick; or to make such Laws, as will do no harm, if they are Executed with an inflexible rigour, on all occasions, and upon all Persons, that may come in their way, therefore there is a latitude left to the Executive power, to do many things of choice, which the Laws do not prescribe.

The framers of the U.S. Constitution did not necessarily give the President the broad "prerogative" powers that the King of England had wielded—in fact, they were clearly concerned *not* to afford all of the "latitude" enjoyed by the King to the new President. But then what solution does the Constitution (or the body of constitutional law that has developed since) offer to the basic policy problem that Locke posed, if any? That is one way of understanding the stakes of many disputes over the President's nonstatutory powers, including both *Neagle* and *Youngstown*, which you'll read next.

Youngstown Sheet & Tube Co. v. Sawyer

343 U.S. 579 (1952)

[In the midst of the Korean War, President Truman issued the following Executive Order:

Directing the Secretary of Commerce to Take Possession of and Operate the Plants and Facilities of Certain Steel Companies

WHEREAS on December 16, 1950, I proclaimed the existence of a national emergency which requires that the military, naval, air, and civilian defenses of this country be strengthened as speedily as possible to the end that we may be able to repel any and all threats against our national security and to fulfill our responsibilities in the efforts being made throughout the United Nations and otherwise to bring about a lasting peace; and

WHEREAS American fighting men and fighting men of other nations of the United Nations are now engaged in deadly combat with the forces of aggression in Korea, and forces of the United States are stationed elsewhere overseas for the purpose of participating in the defense of the Atlantic Community against aggression; and

WHEREAS the weapons and other materials needed by our armed forces and by those joined with us in the defense of the free world are produced to a great extent in this country, and steel is an indispensable component of substantially all of such weapons and materials; and

[WHEREAS] a controversy has arisen between certain companies in the United States producing and fabricating steel and the elements thereof and certain of their workers represented by the United Steel Workers of America, CIO, regarding terms and conditions of employment; and

[WHEREAS] a work stoppage would immediately jeopardize and imperil our national defense and the defense of those joined with us in resisting aggression, and would add to the continuing danger of our soldiers, sailors, and airmen engaged in combat in the field; and

WHEREAS in order to assure the continued availability of steel and steel products during the existing emergency, it is necessary that the United States take possession of and operate the plants, facilities, and other property of the said companies as hereinafter provided:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and laws of the United States, and as President of the United States and Commander in Chief of the armed forces of the United States, it is hereby ordered as follows:

The Secretary of Commerce is hereby authorized and directed to take possession of all or such of the plants, facilities, and other property of the companies named in the list attached hereto [as] he may deem necessary in the interests of national defense; and to operate or to arrange for the operation thereof[; until the seizure is no longer necessary for the national defense.]

Harry S. Truman.

The White House, April 8, 1952.]

▪ JUSTICE BLACK delivered the opinion of the Court.

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

In the latter part of 1951, a dispute arose between the steel companies and their employees over terms and conditions [for] new collective bargaining agreements. [On] April 4, 1952, the [union] gave notice of a nation-wide strike called to begin [five days later]. [The] indispensability of steel as a component of substantially all weapons and other war materials led the President to believe that the proposed work stoppage would immediately jeopardize our national defense and that governmental seizure of the steel mills was necessary in order to assure the continued availability of steel. [Accordingly,] the President, a few hours before the strike was to begin, issued Executive Order 10340 [directing] the Secretary of Commerce to take possession of most of the steel mills and keep them running. [The] next morning the President sent a message to Congress reporting his [action]. Congress has taken no action. [The steel companies challenged the seizure in court.]

The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied. [There] are two statutes which do authorize the President to take both personal and real property under certain conditions. However, the Government admits that these conditions were not met and that the President's order was not rooted in either of the statutes. [Moreover,] the use of the seizure technique to solve labor disputes in order to prevent work stoppages was not only unauthorized by any congressional enactment; prior to this controversy, Congress had refused to adopt that method of settling labor disputes. When the Taft-Hartley Act [a major federal labor law] was under consideration in 1947, Congress rejected an amendment which would have authorized such governmental seizures in cases of emergency [because] it was thought that the technique of compulsory seizure [would] interfere with the process of collective bargaining.

[It] is clear that if the President had authority to issue the order he did, it must be found in some provision of the Constitution. And it is not claimed that express constitutional language grants this power to the President. The contention is that presidential power should be implied from the aggregate of his powers under the Constitution. Particular reliance is placed on provisions in Article II which say that "The executive Power shall be vested in a President"; that "he shall take Care that the Laws be faithfully executed"; and that he "shall be Commander in Chief of the Army and Navy of the United States."

The order cannot properly be sustained as an exercise of the president's military power as Commander in Chief of the Armed Forces. The Government attempts to do so by citing [cases] upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war. Such cases need not concern us here. Even though "theater of war" be an expanding concept, we cannot with faithfulness to our constitutional system hold that the [Commander in Chief] has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities. Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the law-making process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that "All legislative powers herein granted shall be vested in a Congress of the United States . . . ."

[The] President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President. The preamble of the order itself, like that of many statutes, sets out reasons why the President believes certain policies should be adopted, proclaims these policies as rules of conduct to be followed, and again, like a statute, authorizes a government official to promulgate additional [regulations] consistent with the policy proclaimed and needed to carry that policy into execution. The power of Congress to adopt such public policies as those proclaimed by the order is beyond question. It can authorize the taking of private property for public use. It can make laws regulating the relationships between employers and employees[.] The Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control.

It is said that other Presidents without congressional authority have taken possession of private business enterprises in order to settle labor disputes. But even if this be true, Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution "in the Government of the United States, or any Department or Officer thereof."

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

[Affirmed.]

▪ JUSTICE FRANKFURTER, concurring.

Although the considerations relevant to the legal enforcement of the principle of separation of powers seem to me more complicated and flexible than may appear from what Justice Black has written, I join his opinion because I thoroughly agree with the application of the principle to the circumstances of this case.

[The] pole-star for constitutional adjudications is John Marshall's greatest judicial utterance that "it is a *constitution* that we are expounding." *McCulloch*. That requires both a spacious view in applying an instrument of government "made for an undefined and expanding future" and as narrow a delimitation of the constitutional issues as the circumstances permit.

[The] issue before us can be met, and therefore should be, without attempting to define the President's powers comprehensively. [We] must therefore put to one side considerations of what powers a President would have had if there had been no legislation whatever bearing on the authority asserted by the seizure or if the seizure had been only for a short, explicitly temporary period, to be terminated automatically unless Congressional approval were given.

[In] adopting the provisions which it did, by the [Taft-Hartley Act], for dealing with a "national emergency" arising out of a breakdown in peaceful industrial relations, Congress was very familiar with Governmental seizure as a protective measure. On a balance of considerations, it chose not to make available in advance a remedy to which both industry and labor were fiercely hostile. [In] formulating legislation for dealing with industrial conflicts, Congress could not more clearly and emphatically have withheld authority than it did in 1947 [with the Taft-Hartley Act]. [Congress] has expressed its will to withhold this power from the President as though it had said so in so many words. [It] would be not merely infelicitious draftmanship but almost offensive gaucherie to write such a restriction upon the President's power in terms into a statute rather than to have it authoritatively expounded, as it was, by controlling legislative history.

[Apart] from his vast share of responsibility for the conduct of our foreign relations, the embracing function of the President is that "he shall take Care that the Laws be faithfully executed . . . ." Art. II, §3. [The] powers of the President are not as particularized as are those of Congress. But unenumerated powers do not mean undefined powers.

[The] Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature. Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on "executive Power" vested in the President by §1 of Art. II.

[No such] practice can be vouched for executive seizure of property at a time when this country was not at war, in the only constitutional way in which it can be at war.

[A] scheme of government like ours no doubt at times feels the lack of power to act with complete, all-embracing, swiftly moving authority. No doubt a government with distributed authority, subject to be challenged in the courts of law, [labors] under restrictions from which other governments are free. [But in designing the Constitution, that] price was deemed not too high in view of the safeguards which these restrictions afford.

▪ JUSTICE JACKSON, concurring.

That comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country will impress anyone who has served as a legal adviser to a President in a time of transition and public anxiety.* While an interval of detached reflection may temper teachings of that experience, they probably are a more realistic influence on my views than the conventional materials of judicial decision which seem unduly to accentuate doctrine and legal fiction. But as we approach the question of presidential power, we half overcome mental hazards by recognizing them. The opinions of judges, no less than executives and publicists, often suffer the infirmity of confusing the issue of a power's validity with the cause it is invoked to promote, of confounding the permanent executive office with its temporary occupant. The tendency is strong to emphasize transient results upon policies [and] lose sight of enduring consequences upon the balanced power structure of our Republic.

A judge, like an executive advisor, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected resources on each side of any question. They largely cancel each other. And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.

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

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. 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. A seizure executed by the President pursuant to an Act of Congress

* [JUSTICE JACKSON served as President Roosevelt's Attorney General, and in several other roles in the Justice Department before that, before Roosevelt nominated him to the Supreme Court in 1941. —BE]

would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. 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.

Into which of these classifications does this executive seizure of the steel industry fit? It is eliminated from the first by admission, for it is conceded that no congressional authorization exists for this seizure. [Can] it then be defended under flexible tests available to the second category? It seems clearly eliminated from that class because Congress has not left seizure of private property an open field but has covered it by three statutory policies inconsistent with this seizure. [None] of these were invoked. [This] leaves the current seizure to be justified only by the severe tests under the third grouping, where it can be supported only by any remainder of executive power after subtraction of such powers as Congress may have over the subject. In short, we can sustain the President only by holding that seizure of such strike-bound industries is within his domain and beyond control by Congress.

[The] executive branch, like the Federal Government as a whole, possesses only delegated powers. [But] [some] clauses could be made almost unworkable [by] refusal to indulge some latitude of interpretation for changing times. I have heretofore, and do now, give to the enumerated powers the scope and elasticity afforded by what seem to be reasonable, practical implications instead of the rigidity dictated by a doctrinaire textualism.

The Solicitor General seeks the power of seizure in three clauses of the Executive Article, the first reading, "The executive Power shall be vested in a [President]." Lest I be thought to exaggerate, I quote the interpretation which his brief puts upon it: "In our view, this clause constitutes a grant of all the executive powers of which the Government is capable." If that be true, it is difficult to see why the forefathers bothered to add several specific items, including some trifling ones.[9]

The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image. [I] cannot accept the view that this clause is a grant in bulk of all conceivable executive power but regard it as an allocation to the presidential office of the generic powers thereafter stated.

The clause on which the Government next relies is that "The President shall be Commander in Chief of the Army and Navy of the United States[.]" [The Commander-in-Chief Clause] undoubtedly puts the Nation's armed forces under presidential command. Hence, this loose appellation is sometimes advanced as support for any presidential action, internal or external, involving use of force, the idea being that it vests power to do anything, anywhere, that can be done with an army or navy.

That seems to be the logic of an argument tendered at our bar—that the President having, on his own responsibility, sent American troops abroad derives from that act "affirmative power" to seize the means of producing a supply of steel for them. [By dispatching troops to Korea,] it is said, he has invested himself with "war powers."

[Yet n]othing in our Constitution is plainer than that declaration of war is entrusted only to Congress. Of course, a state of war may in fact exist without a formal declaration. But no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture.

[Assuming] that we are in a war *de facto*, whether it is or is not a war *de jure*, does that empower the Commander in Chief to seize industries he thinks necessary to supply our army? [The] Constitution expressly places in Congress power "to raise and *support* Armies" and "to *provide* and *maintain* a Navy." (Emphasis supplied.) This certainly lays upon Congress primary responsibility for supplying the armed forces. Congress alone controls the raising of revenues and their appropriation and may determine in what manner and by what means they shall be spent for military and naval procurement. [If] Congress sees fit to rely on free private enterprise collectively bargaining with free labor for support and maintenance of our armed forces, can the Executive, because of lawful disagreements incidental to that process, seize the facility for operation upon Government-imposed terms?

[9] [The powers to] "require the Opinion, in writing, of the principal Officer in each of the executive Departments," [Art. II, §2], [and to] "Commission all the Officers of the United States," [Art. II, § 3,] would seem to be inherent in the Executive if anything is.

There are indications that the Constitution did not contemplate that the title Commander in Chief *of the Army and Navy* will constitute him also Commander in Chief of the country, its industries and its inhabitants. He has no monopoly of "war powers," whatever they are. While Congress cannot deprive the President of the command of the army and navy, only Congress can provide him an army or navy to command. [That] military powers of the Commander in Chief were not to supersede representative government of internal affairs seems obvious from the Constitution and from elementary American history. [I would give] the widest latitude of interpretation to sustain [the President's] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society. But, when it is turned inward, not because of rebellion but because of a lawful economic struggle between industry and labor, it should have no such indulgence.

[The] third clause in which the Solicitor General finds seizure powers is that "he shall take Care that the Laws be faithfully executed[.]" That authority must be matched against [the Due Process Clause of the Fifth Amendment]. One gives a governmental authority that reaches so far as there is law, the other gives a private right that authority shall go no farther. These signify about all there is of the principle that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules.

The Solicitor General lastly grounds support of the seizure upon nebulous, inherent powers never expressly granted but said to have accrued to the office from the customs and claims of preceding administrations. The plea is for a resulting power to deal with a crisis or an emergency according to the necessities of the case, the unarticulated assumption being that necessity knows no law.

Loose and irresponsible use of adjectives colors all nonlegal and much legal discussion of presidential powers. "Inherent" powers, "implied" powers, "incidental" powers, "plenary" powers, "war" powers and "emergency" powers are used, often interchangeably and without fixed or ascertainable meanings.

The vagueness and generality of the clauses that set forth presidential powers afford a plausible basis for pressures within and without an administration for presidential action beyond that supported by those whose responsibility it is to defend his actions in court. The claim of inherent and unrestricted presidential powers has long been a persuasive dialectical weapon in political controversy. [But] prudence has counseled that actual reliance on such nebulous claims stop short of provoking a judicial test.[16]

[In] the practical working of our Government we already have evolved a technique within the framework of the Constitution by which normal executive powers may be considerably expanded to meet an emergency. Congress may and has granted extraordinary authorities which lie dormant in normal times but may be called into play by the Executive in war or upon proclamation of a national emergency. [Under] this procedure we retain Government by law—special, temporary law, perhaps, but law nonetheless.

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

As to whether there is imperative necessity for such powers, it is relevant to note the gap that exists between the President's paper powers and his real powers. The Constitution does not disclose the measure of the actual controls wielded by the modern presidential office. That instrument must be understood as an Eighteenth-Century sketch of a government hoped for, not as a blueprint of the Government that is. [Vast] accretions of federal power, eroded from that reserved by the States, have magnified the scope of presidential activity. Subtle shifts take place in the centers of real power that do not show on the face of the Constitution.

Executive power has the advantage of concentration in a single head in whose choice the whole Nation has a part, making him the focus of public hopes and expectations. [No] other personality in public life can begin to compete with him in access to the public mind through modern methods of communications. By his prestige as head of state and his influence upon

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[16] President Wilson, just before our entrance into World War I, went before the Congress and asked its approval of his decision to authorize merchant ships to carry defensive weapons. He said: "No doubt I already possess that authority [by] the plain implication of my constitutional duties and powers; but I prefer, in the present circumstances, not to act upon general implication. I wish to feel that the authority and the power of the Congress are behind me in whatever it may become necessary for me to do[.]"

When our Government was itself in need of shipping whilst ships flying the flags of nations overrun by Hitler [were] immobilized in American [harbors], President Roosevelt did not assume that it was in his power to seize such foreign vessels to make up our own deficit. He informed Congress: "I am satisfied [that] we should have statutory authority to take over any such vessels as our needs may require . . . ." The necessary statutory authority was shortly forthcoming. [Other examples omitted —BE]

It is interesting to note Holdsworth's comment on the powers of legislation by proclamation when in the hands of the Tudors. "The extent to which they could be legally used was never finally settled in [the 16th] century, because the Tudors made so tactful a use of their powers that no demand for the settlement of this question was raised." 4 Holdsworth, History of English Law, 104 [(1924)].

public opinion he exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness.

Moreover, rise of the party system has made a significant extraconstitutional supplement to real executive power. Party loyalties and interests, sometimes more binding than law, extend his effective control into branches of government other than his own and he often may win, as a political leader, what he cannot command under the Constitution. [I] cannot be brought to believe that this country will suffer if the Court refuses to further aggrandize the presidential office, already so potent and so relatively immune from judicial review, at the expense of Congress.

But I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. [If] not good law, there was worldly wisdom in the maxim attributed to Napoleon that "The tools belong to the man who can use them." We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.

▪ CHIEF JUSTICE VINSON, with whom [JUSTICES REED and MINTON] join, dissenting.

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

Accepting [its] responsibility in the world community, the United States was instrumental in securing adoption of the United Nations Charter[.] The first purpose of the United Nations is to "maintain international peace and security, and to that end: to take effective collective measures [for] the suppression of acts of aggression or other breaches of the peace, ..." In 1950, when the United Nations called upon member nations "to render every assistance" to repel aggression in Korea, the United States furnished its vigorous support. For almost two full years, our armed forces have been fighting in Korea, suffering casualties of over 108,000 men.

Success of [U.S. efforts to advance the principle of mutual security] may, as has often been observed, dramatically influence the lives of many generations of the world's peoples yet unborn. Alert to our responsibilities, which coincide with our own self-preservation through mutual security, Congress has enacted a large body of implementing legislation. As an illustration of the magnitude of the over-all program, Congress has appropriated $130 billion for our own defense and for military assistance to our allies since the June, 1950, attack in Korea.

In the Mutual Security Act of 1951, Congress authorized "military, economic, and technical assistance to friendly countries to strengthen the mutual security and individual and collective defenses of the free world, ..." Over $5 1/2 billion were appropriated for military assistance for fiscal year 1952[.] [Congress] also directed the President to build up our own defenses.

Congress, recognizing the "grim fact . . . that the United States is now engaged in a struggle for survival[,]" [granted] authority to draft men into the armed forces.

[The] President has the duty to execute [these] legislative programs. Their successful execution depends upon continued production of steel and stabilized prices for steel. Accordingly, [when] a strike shutting down the entire basic steel industry was threatened, the President acted to avert a complete shutdown of steel production. [The] central fact of this case [is] that the Nation's entire basic steel production would have shut down completely if there had been no Government seizure. [Accordingly], if the President has any power under the Constitution to meet a critical situation in the absence of express statutory authorization, there is no basis whatever for criticizing the exercise of such power in this case.

[The] steel mills were seized for a public use. The power of eminent domain, invoked in this case, is an essential attribute of sovereignty and has long been recognized as a power of the Federal Government. [Plaintiffs] claim that the implied power of eminent domain can be exercised only under an Act of Congress[.] Under this view, the President is left powerless at the very moment when the need for action may be most pressing and when no one, other than he, is immediately capable of action. Under this view, he is left powerless because a power not expressly given to Congress is nevertheless found to rest exclusively with Congress.

[The Framers] did not create an automaton impotent to exercise the powers of Government at a time when the survival of the Republic itself may be at stake. [A] review of executive action demonstrates that our Presidents have on many occasions exhibited the leadership contemplated by the Framers when they made the President Commander in Chief, and imposed upon him the trust to "take Care that the Laws be faithfully executed." With or without explicit statutory authorization, Presidents have at such times dealt with national emergencies by acting promptly and resolutely to enforce legislative programs, at least to save those programs until Congress could act. Congress and the courts have responded to such executive initiative with consistent approval.

Our first President displayed at once the leadership contemplated by the Framers. [When] international disputes engendered by the French revolution threatened to involve this country in war, and while congressional policy remained uncertain, Washington issued his Proclamation of Neutrality. [Jefferson's] initiative in the Louisiana Purchase [and] the Monroe Doctrine [further] serve to demonstrate by deed what the Framers described by word when they vested the whole of executive power in the President. [In] an action furnishing a most apt precedent for this case, President Lincoln without statutory authority directed the seizure of rail and telegraph lines leading to Washington. Many months later, Congress recognized and confirmed the power of the President to seize railroads and telegraph lines[.] [When a labor dispute interrupted a segment of the production of military aircraft, six months before Pearl Harbor,] President Roosevelt ordered the seizure of the plant "pursuant to the powers vested in [him] by the Constitution and laws of the United States, as President [and] Commander in [Chief]." The Attorney General [i.e., future Justice Jackson] vigorously proclaimed that the President had the moral duty to keep this Nation's defense effort a "going concern." [These examples] amply demonstrate[] that Presidents have taken prompt action to enforce the laws and protect the country whether or not Congress happened to provide in advance for the particular method of execution. [T]he fact that Congress and the courts have consistently recognized and given their support to such executive action indicates that such a power of seizure has been accepted throughout our [history].

[Focusing] now on the situation confronting the President[,] we cannot but conclude that the President was performing his duty under the Constitution to "take Care that the Laws be faithfully executed[.]" [The] President reported to Congress the morning after the seizure that he acted because a work stoppage in steel production would immediately imperil the safety of the Nation by preventing execution of the legislative programs for procurement of military equipment. [Granting price concessions] would disrupt the price stabilization program also enacted by Congress. Rather than fail to execute either legislative program, the President acted to execute both.

Much of the argument in this case has been directed at straw men. We do not now have before us the case of a President acting solely on the basis of his own notions of the public welfare. Nor is there any question of unlimited executive power in this case. The President himself closed the door to any such claim when he sent his Message to Congress stating his purpose to abide by any action of Congress, whether approving or disapproving his seizure action. [The] absence of a specific statute authorizing seizure of the steel mills as a mode of executing the laws—both the military procurement program and the anti-inflation program—has not until today been thought to prevent the President from executing the laws. [T]he President is a constitutional officer charged with taking care that a "mass of legislation" be executed. Flexibility as to mode of execution to meet critical situations is a matter of practical necessity. This practical construction of the "Take Care" clause, advocated by John Marshall,* was adopted by this Court in *In re Neagle* [and] other cases[.]

* [CHIEF JUSTICE VINSON is referring to Marshall's defense, as a Member of the House of Representatives, of President Adams' order that someone be arrested pursuant to an extradition treaty. Although no statute authorized such arrests, Marshall argued that the

[There] is no statute prohibiting seizure as a method of enforcing legislative programs. Congress has in no wise indicated that its legislation is not to be executed by the taking of private property (subject of course to the payment of just compensation) if its legislation cannot otherwise be executed. Indeed, the Universal Military Training and Service Act authorizes the seizure of *any* plant that fails to fill a Government contract or the properties of *any* steel producer that fails to allocate steel as directed for defense production. And the Defense Production Act authorizes the President to requisition equipment and condemn real property needed without delay in the defense effort.* Where Congress authorizes seizure in instances not necessarily crucial to the defense program, it can hardly be said to have disclosed an intention to prohibit seizures where essential to the execution of that legislative program.

[The] broad executive power granted by Article II to an officer on duty 365 days a year cannot, it is said, be invoked to avert disaster. Instead, the President must confine himself to sending a message to Congress recommending action. Under this messenger-boy concept of the Office, the President cannot even act to preserve legislative programs from destruction so that Congress will have something left to act upon.

Faced with the duty of executing the defense programs which Congress had enacted and the disastrous effects that any stoppage in steel production would have on those programs, the President acted to preserve those programs by seizing the steel mills. There is no question here that the possession was other than temporary in character and subject to congressional direction—either approving, disapproving or regulating the manner in which the mills were to be administered and returned to the owners. [Judicial], legislative and executive precedents throughout our history demonstrate that in this case the President acted in full conformity with his duties under the Constitution. †

President had acted properly:

> The treaty, which is a law, enjoins the performance of a particular object. The person who is to perform this object is marked out by the Constitution, since the person is named who conducts the foreign intercourse, and is to take care that the laws be faithfully executed. The means by which it is to be performed, the force of the nation, are in [his] hands. Ought not this person to perform the object, although the particular mode of using the means has not been prescribed? Congress, unquestionably, may prescribe the mode, [but] till this be done, it seems the duty of the Executive department to execute the contract by any means it possesses.

—BE]

* [Apparently, President Truman did not invoke the UMTSA because it would have required a cumbersome process of placing orders directly with steel plants and then seizing the plants after they failed to meet the orders. Likewise, the White House "did not consider requisitioning the steel mills [under the DPA] because its procedure was too lengthy and involved to meet the needs of the steel crisis." MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: LIMITS OF PRESIDENTIAL POWER 75 (1994). —BE]

† [Additional concurrences by JUSTICE BURTON, JUSTICE CLARK, and JUSTICE DOUGLAS are omitted. —BE]

SOME LESSONS OF *YOUNGSTOWN*

1. The Anticipation Problem Again. Do the different approaches taken by the various *Youngstown* opinions reflect different stances toward, or ideas about how to manage, the "anticipation problem"? What does Justice Black's majority opinion say or imply about that problem? (Note that, while Justice Black's is indeed the opinion of the Court, every Justice who joined it saw fit to write a separate opinion of their own as well.)

2. Justice Jackson's Framework. Justice Jackson's three-part schema for analyzing separation-of-powers questions has proved very influential, so it's worth taking a moment to work through each category and confirm your understanding of what he envisions falling in each. The second category (the "zone of twilight") has proved especially controversial. What do you think he is getting at there? And is it clear that the steel seizure itself belonged in Category 3 rather than Category 2?

Juxtaposing *Youngstown* with **Dames & Moore v. Regan** (1981) highlights the malleability of Jackson's framework. In short, President Carter negotiated a resolution of the Iran Hostage Crisis in which he agreed to terminate all pending private suits by Americans against Iran in U.S. courts. An engineering firm that had an outstanding contract dispute with Iran contested the President's power to extinguish its claim. In a unanimous opinion by Justice Rehnquist, the Court concluded that neither of the statutes on which the President had relied "directly authorizes the President's suspension of claims." But still, the Court said, these statutes were not "entirely irrelevant to the question of the validity of the President's action":

> [W]e cannot ignore the general tenor of Congress' legislation in this area in trying to determine whether the President is acting alone or at least with the acceptance of Congress. As we have noted, Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act. Such failure of Congress specifically to delegate authority does not, especially in the areas of foreign policy and national security, imply congressional disapproval of action taken by the Executive. On the contrary, the enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to "invite" "measures on independent presidential responsibility," *Youngstown* (Jackson, J., concurring). At least this is so where there is no contrary indication of legislative intent and when, as here, there is a history of congressional acquiescence in conduct of the sort engaged in by the President.

Do *Dames & Moore* and Justice Jackson's *Youngstown* opinion draw the same inferences from the combination of Congress's failure to authorize the specific action that the President took with its having nonetheless addressed the same issue in other ways?

3. "Historical Gloss" Arguments. The other famous thread in *Youngstown* is the notion, articulated by Justice Frankfurter, that "a systematic ... executive practice, long pursued to the knowledge of the Congress and never before questioned, ... may be treated as a gloss on 'executive Power' vested in the President by §1 of Art. II" (*supra*, p. III-13). This connects to the broader notion of an argument from settled practice, which we have seen invoked repeatedly, from the Court's decision in *McCulloch* onward (*supra,* p. II-5). But Justice Frankfurter's rendition of the argument also puts a particular spin on that idea—centering whether Congress has in some sense "gone along" with or acquiesced to the President's exercise of some authority—and has proved especially influential in the context of separation-of-powers disputes. (For example, the Court deemed it "crucial" in *Dames & Moore* that Congress had "implicitly approved the practice of claim settlement by executive agreement" in the past—such as by creating a statutory process for distributing funds obtained by the U.S. pursuant to such agreements.)

The next reading is an excerpt of an article that critically assesses this kind of "gloss" argument and explores when it might be more or less persuasive. The article also takes up, toward the end, the broader question of when historical practice should carry weight even in the *absence* of a specific claim of interbranch acquiescence.

Historical Gloss and the Separation of Powers

Curtis A. Bradley and Trevor W. Morrison (2012)*

I. Prevalence of the Historical Gloss Argument

Within the separation of powers area, historical practice is most commonly invoked in connection with debates over the scope of presidential power. Unlike the extensive list of powers granted to Congress in Article I, the text of the Constitution provides relatively little guidance about the scope of presidential authority. [With] some variations, the Supreme Court, executive branch lawyers, and academic commentators have all endorsed the significance of practice-based "gloss" [in filling this gap].

Invocations of historical practice are particularly common in constitutional controversies implicating foreign relations. [For example], a frequent argument in support of the constitutionality of "executive agreements" (that is, binding international agreements concluded by the President without obtaining the advice and consent of two-thirds of the Senate) is the fact that

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* Excerpt from Curtis A. Bradley and Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012). Headings are renumbered.

Presidents have long concluded such agreements. [Relatedly,] historical practice is frequently invoked in debates over the wartime and national security powers of the President. For example, once the warrantless surveillance program secretly initiated by the Bush Administration after the September 11 terrorist attacks became public, the Administration relied heavily on claims about historical practice to defend the program. Another example [is] the Obama Administration's reliance on historical practice in claiming that it had the constitutional authority to conduct military operations in Libya without congressional authorization.

Appeals to historical practice are not confined to matters relating to foreign affairs or war powers, however. For example, arguments about the scope of both the "executive privilege" (concerning the ability to withhold internal executive branch communications from the other branches of government) and the "legislative privilege" (concerning, among other things, the internal powers of the two houses of Congress) are commonly informed by historical practice.

II. Institutional Acquiescence

According to many accounts of how historical practice relates to the separation of powers, a practice by one branch of government that implicates the prerogatives of another branch gains constitutional legitimacy only if the other branch can be deemed to have "acquiesced" in the practice over time. [The] concept of acquiescence has been accorded a range of meanings. Concomitantly, there are a variety of reasons why courts and other interpreters privilege acquiescence to historical practices implicating the separation of powers[.]

1. Acquiescence as Agreement.—On some accounts, institutional acquiescence reflects an agreement on the part of the acquiescing branch that the actions of the other branch are lawful. From this perspective, the key interpretive question is whether the political branches share a common understanding of the constitutional question at issue.

[Arguments] that view acquiescence this way are effectively arguments for deference to the constitutional views of nonjudicial actors. It is hardly novel for the courts to defer, in one way or another, to the constitutional judgments of the political branches. [In] the case of institutional acquiescence, a common assumption is that if one political branch has a constitutional disagreement with a practice that implicates its institutional powers or prerogatives, it will object. When the practice is repeated over time without any such objection, it is therefore appropriate to presume, on this view, that the political branches share a "practical understanding" as to the constitutionality of the practice. Privileging acquiescence can be understood as entailing deference to that presumed understanding.

In a similar but not identical vein, acquiescence is sometimes treated as evidence that the political branches have settled upon an institutional arrangement that they both deem desirable or at least practically workable and acceptable. Here again, acquiescence is taken to reflect interbranch agreement. But the agreement is at the level of operational feasibility and acceptability, not legality in any express, formal sense. On this account, the fact that the political branches have worked out a particular arrangement through repeated practice over time suggests that it is normatively desirable[.]

2. Acquiescence as Waiver.—Another approach treats acquiescence as a kind of waiver of the affected branch's institutional prerogatives, which may in turn generate institutional reliance interests. This idea is akin to the adverse possession doctrine in property law: if one branch of government has been engaging in a practice for a long time without any resistance, it (and potentially also third parties) may have formed reasonable expectation interests surrounding the practice. Moreover, in some cases, the practices of one political branch may have caused the other to assert new powers as a countervailing response. Acquiescence on one front may thus purchase new authority on another, and privileging acquiescence may be a way to honor the implicit bargain.

A possible example of such an implicit bargain relates to the treaty process. Although the Constitution specifies that the Senate is to provide "Advice and Consent" to the conclusion of treaties, Presidents have not accorded the Senate a substantial advisory role in the making of treaties since early in U.S. history. Partly as a result of this exclusion, the Senate has long exercised the power to condition its consent to treaties on the adoption of "reservations" that decline to consent to particular treaty terms.

[To be sure,] it is far from clear that the political branches should have unlimited discretion to engage in transfers of authority that directly implicate individual liberty interests. Indeed, one arguable purpose of textual assignments of authority in the Constitution is to prevent or limit such transfers. The point here is simply that, if the focus is on preserving a particular balance of institutional authority, institutional bargains may be viewed as less problematic than unilateral aggrandizements of power.

3. Acquiescence and the Limits of Judicial Review.—[A] related argument is that the political branches may sometimes be better situated than the courts to enforce the constitutional terms of their relationship. For example, in treating the legality of President Carter's unilateral termination of a treaty with Taiwan as a political question, a plurality of the Supreme Court in *Goldwater v. Carter* emphasized that the case involved "a dispute between coequal branches of our Government, each of which has resources available to protect and assert its interests." [Justice] Jackson elaborated on this point [in *Youngstown*] by quoting Napoleon to the effect that "[t]he tools belong to the man who can use them"; Justice Jackson thus "ha[d] no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems." Ultimately, he emphasized, "only Congress itself can prevent power from slipping through its fingers."

[Part] of the idea here may be that [not] all aspects of th[e] relationship [between legislative and executive power] are reducible to justiciable cases and controversies. In addition, courts may not always have a clear on-the-ground sense of whether a given practice by one political branch truly intrudes upon the prerogatives or powers of the other, and the judicial tools for remedying such intrusions may be rather blunt and imprecise. For all these reasons, a judicial willingness to privilege institutional acquiescence is predictable, whether or not it is normatively ideal.

III. The Madisonian Paradigm and Its Problems

[All of t]hese reasons [for treating acquiescence as significant] depend in important respects on the assumption that each political branch is adequately motivated to raise constitutional objections—and will raise them, sooner or later—when the other branch intrudes on its prerogatives in a problematic way.

[That] assumption [d]erives from a conception of the separation of powers articulated by James Madison in *The Federalist No. 51*. Under this conception, the government's "constituent parts" would, "by their mutual relations, be the means of keeping each other in their proper places." The personal ambitions of the officials in each branch would align with the prerogatives of their branch, so that the pursuit of the former would protect the latter, and each branch would check the other through a process of "[a]mbition . . . counteract[ing] ambition." One of the virtues of this approach, Madison explained, is that it does not require that government officials act responsibly and police themselves. After all, "[i]f men were angels, no government would be necessary." Instead, this model reflects a "policy of supplying, by opposite and rival interests, the defect of better motives."

Unfortunately, this Madisonian theory is not an accurate description of modern separation of powers. As Posner and Vermeule have noted, "[w]hether or not this [Madisonian] picture was ever realistic, it is no longer so today." The Madisonian conception is most flawed with respect to its assumptions about Congress. [In] addition to the limitation [imposed on Congress by the President's veto, and by the veto's deterrent effect on even pursuing legislation that is unlikely to win supermajority support], Congress faces substantial collective action problems that are not present, at least to the same degree, in the executive branch.

[Wholly] apart from their *ability* consistently to protect the interests of the legislative branch, members of Congress are not systematically *motivated* to do so. As Madison noted, in order for his conception of separation of powers to work, "[t]he interest of the man must be connected with the constitutional rights of the place"—that is, government officials must be motivated to act in a way that protects their branch's constitutional authority. Political science scholarship has made clear, however, that a primary motivation for many members of Congress is reelection. [In] its pursuit, legislators often focus on the views and interests of their local constituents, who are concerned more with specific policy outcomes than congressional power.

[By contrast,] modern Presidents, in order to secure reelection and a long-term legacy, seek to cultivate a reputation as an effective leader. Having power generally makes it easier to pursue that goal. Moreover, the public has come to expect Presidents to be at the forefront of addressing a wide range of domestic and international problems. Those voter expectations provide an added incentive for Presidents to maintain and enhance the authority they think is necessary to succeed.

[The] modern party system further reduces the incentives of individual members of Congress to act systematically in constraining executive power or resisting executive aggrandizement. Put simply, individual members of Congress tend overwhelmingly to act in accord with the preferences of their party. [As] a result, the Madisonian model of interbranch rivalry is especially inaccurate during times of unified government.

[For] our purposes, the key point is simply that the Madisonian conception of separation of powers is not an accurate description of modern congressional-executive relations. Although it is not uncommon for Congress and the President to disagree about specific policies (especially when at least one house of Congress is controlled by the opposing party), and while these policy disputes are sometimes framed in terms of institutional authority, as a body the modern Congress does not systematically seek to protect legislative authority from executive encroachment.

IV. Implications for Acquiescence Arguments

The Madisonian model's descriptive shortcomings carry several significant implications for relying on ideas of institutional acquiescence to resolve separation of powers controversies. Although we do not think these shortcomings are fatal for all possible claims of acquiescence, they do demand much greater care and precision in making and evaluating such claims.

Perhaps most significantly, the problems with the Madisonian model show that it is precarious to infer congressional acquiescence from what might appear, on a surface level, to be congressional silence—especially if that "silence" is simply the absence of legislation prohibiting the executive action in question. The various veto-gates through which formal legislation must pass, as well as collective action problems and the likelihood that individual members think more in terms of party than institution, provide a host of reasons why Congress might not legislate in a particular circumstance. Many of those reasons have nothing to do with the ideas of institutional agreement or waiver undergirding theories of acquiescence.

To concretize the point, consider [the] area of war powers. Congress generally does not impose meaningful constraints on unilateral presidential uses of military force, except in times of divided government. This fact supports the proposition that in the war powers area, many in Congress tend to act on the basis of considerations like party loyalty rather than institutional affiliation. Thus, Congress's failure to object to a particular presidential use of military force may reflect partisan political calculations by actors who are not particularly concerned about the constitutional prerogatives of the legislative branch as such. And that possibility, in turn, undercuts the Madisonian basis for treating such congressional inaction as acquiescence.

This does not mean, however, that ideas of congressional acquiescence should be abandoned altogether. Instead, it suggests that where acquiescence is the touchstone of the analysis, the standard for legislative acquiescence should be high. [The] obstacles inherent in the legislative process make it very difficult to enact formal prohibitions of any given executive actions, and so Congress may well rely on more informal "soft law" to influence the conduct of the executive branch.

[The] treatymaking power provides an example. Article II of the Constitution states that the President has the power to make treaties "by and with the Advice and Consent of the Senate . . . provided two thirds of the Senators present concur." This language might suggest that Presidents may constitutionally enter into binding international agreements only by obtaining Senate supermajority approval. Yet Presidents have long concluded some international agreements by other means, including by "congressional-executive agreements"—that is, executive agreements concluded with the ex ante or ex post approval of a majority of Congress. [Arguments] about the extent to which such agreements may be used instead of Article II treaties have relied heavily on claims about historical practice, and the interaction between the executive branch and Congress (or, more particularly, the Senate) in this area provides evidence of soft law constraints on the Executive. Specifically, the Senate, in providing its advice and consent to various arms-control treaties, has issued accompanying declarations that such agreements should be concluded only pursuant to the treaty power and not by congressional-executive agreement. [Analysis] of whether and to what extent the Senate has acquiesced in the use of congressional-executive agreements should take account of such statements.

Expanding the inquiry to include a wider array of congressional responses to executive action will substantially shrink the universe of cases where Congress can truly be said to have remained silent, which will in turn shrink the number of cases drawing inferences from such silence.

[The] same shortcomings with the Madisonian model [also] carry specific implications for the role of the courts in this area. It is a form of judicial deference for a court to privilege historical practice. When articulated in terms of institutional acquiescence, the argument for deference depends on the assumptions of interbranch competition embedded within the Madisonian model. Recall, for example, the plurality's statement in *Goldwater v. Carter* that judicial abstention was appropriate with respect to whether the President has the authority to terminate treaty commitments because the case involved "a dispute between coequal branches of our Government, each of which has resources available to protect and assert its interests." Given that this Madisonian premise does not fit the modern reality of executive-legislative relations, such rationales for judicial deference are weakened.

V. Historical Practice Without Acquiescence

Although claims about institutional acquiescence appear frequently in arguments from historical practice, not all reasons for invoking practice depend on acquiescence. Thus, even if the descriptive shortcomings in the Madisonian model were enough to warrant abandoning ideas of acquiescence altogether, there could still be a role for historical practice. Here we consider some reasons for privileging practice without acquiescence.

1. Burkean Values and Principled Decisionmaking.—Burkean approaches to constitutional interpretation could look to historical practice even in the absence of any evidence of acquiescence. A Burkean's "bias in favor of . . . the status quo" need not depend on ideas of acquiescence; it can instead be animated by a basic belief in the value of established ways of doing things and a concern about the risks of change.

Relatedly, in some areas, historical practice might simply provide the most principled means of deciding disputes. On war powers, for example, once it is conceded that the President has some (but not unlimited) power to direct the use of military force without congressional authorization, it is not clear how one could reliably define the boundary of that power without looking to past practice. Whether or not relying on such practice will produce desirable outcomes (that is, whether or not one agrees with the Burkean's normative preference for the status quo), in some situations it may be an almost inevitable feature of the need to provide a reasoned explanation for reaching a particular conclusion.

2. The Legitimacy of Law and the Role of the Courts.—To the extent past practice predicts the future actions of the branches, it should arguably inform legal analysis because descriptions of what the law is should have some correspondence to operational reality. In this way, appeals to historical practice have a connection to broader claims about the legitimacy and meaning of law. Under at least some accounts, one factor that affects law's legitimacy—and perhaps even whether something is properly described as law—is whether it generally accords with the actual behavior of the participants in the legal system. Especially in areas where the prospect of judicial review is remote, descriptions of the law or a legal system that ignore longstanding institutional practice are likely to fail on descriptive grounds. [In] the same way that entrenched judicial precedents form part of what the law is even if there is reason to believe they were wrongly decided, it can be argued that any account of the law of executive and legislative power must take account of how the branches have actually acted over time.

This need to ensure that the law maps relatively well onto actual institutional practice, while perhaps most acute when judicial review is unavailable, can also support judicial deference to at least certain entrenched practices. The case for such deference is particularly strong if there is reason to believe that the practice in question is part of an interbranch bargain, the full scope of which may be invisible to a court. Where that is the case, judicial invalidation of the practice will undo only part of the bargain, potentially creating an imbalance in executive-legislative relations[.]

3. Internal Reliance by the Executive Branch.—A separate point is that, especially on matters unlikely to come before the courts, the executive branch in particular is liable to privilege past executive practices and legal interpretations even when they diverge from the views of Congress. This tendency is evident in the work of [the Justice Department's Office of Legal Counsel (OLC), which provides legal guidance to the Executive Branch]. Although OLC sometimes stresses the acquiescence idea, on other occasions it places special weight on executive branch precedents and practices even in the face of repeated congressional disagreement.

[In] the foreign affairs area, for example, Congress has at various points over the last few decades contemplated legislation that would direct or otherwise limit how the executive branch conducts diplomacy. OLC has repeatedly resisted such legislation, and in so doing has invoked its own consistent stance on these issues. The fact that Congress has repeatedly contemplated such provisions and that the executive branch has consistently resisted them underscores the lack of acquiescence from either branch in this area. Still, OLC evidently regards its own precedents and other past executive practices as important resources for resisting what it deems to be impermissible legislative intrusions on executive power.

[Viewed] from within the executive branch, the tendency to rely on executive practice is both understandable and defensible. [Some] of the same rationales for the judicial doctrine of stare decisis—such as predictability, efficiency, and credibility—can also support giving weight to nonjudicial practices.

[The] harder question is whether the executive branch can justifiably claim that *other actors* should give its past practices constitutional weight in the absence of congressional acquiescence. [The] risk of self-dealing might well counsel against privileging such practices. Still, we think there are plausible grounds for even nonexecutive actors to credit patterns of executive practice, at least in some circumstances. Resorting to such practice can be a way of demonstrating that the executive branch's position today is not driven simply by the political expediencies of the moment. Relatedly, this practice can help support a claim that the Executive's interpretation of the Constitution is supported by recurring functional considerations that have been salient at least to multiple occupants of the Oval Office. Moreover, the very durability of the practice may suggest that it is at least minimally workable.

These arguments become stronger when the practice in question is more longstanding and when it reflects the views of both Democratic and Republican administrations. Of course, even in those circumstances, there is some danger of executive self-dealing. Self-dealing is also a risk, however, when the Supreme Court relies on its own past decisions to resist legislative or executive incursions on judicial power, yet such resistance is not generally thought to be illegitimate. In both the executive and judicial branches, the appeal to past practice is designed in part to reassure audiences that the legal position in question reflects a good faith judgment shared by institutional occupants over time.

The final case in this section, *Zivotofsky v. Kerry* (2015), is the Court's latest major statement on the respective roles of the President and Congress in the context of foreign affairs.[*] As you read, consider the relative weight carried by the different kinds of arguments that the majority deploys, and try to identify the outer limit of the exclusive presidential power that the Court recognizes. After the opinions in the case, you'll read an excerpt from Jack Goldsmith's article on *Zivotofsky*'s significance as a precedent—not just in future litigation, but in the Executive Branch's internal decision-making as well.

Zivotofsky v. Kerry
576 U.S. 1 (2015)

■ JUSTICE KENNEDY delivered the opinion of the Court.

Questions touching upon the history of the ancient city [of Jerusalem] and its present legal and international status are among the most difficult and complex in international affairs. [Those] matters are for Congress and the President to discuss and consider as they seek to shape the Nation's foreign policies.

[The] Court addresses two questions to resolve the interbranch dispute now before it. First, it must determine whether the President has the exclusive power to grant formal recognition to a foreign sovereign. Second, if he

[*] The decision is sometimes called *Zivotofsky II* because the Court also heard the same case at an earlier phase of the litigation. In that prior decision, *Zivotofsky v. Clinton*, 566 U.S. 189 (2012), the Court ruled that the "political question" doctrine did not bar resolution of the plaintiff's claim on the merits.

has that power, the Court must decide whether Congress can command the President and his Secretary of State to issue a formal statement that contradicts the earlier recognition. The statement here is a congressional mandate that allows a United States citizen born in Jerusalem to direct the President and Secretary of State, when issuing his passport, to state that his place of birth is "Israel."

In 1948, President Truman formally recognized Israel in a signed statement of "recognition." [Yet no] United States President has issued an official statement or declaration acknowledging any country's sovereignty over Jerusalem. [In a 1995 letter to Congress,] then-Secretary of State Warren Christopher expressed the Executive's concern [that] "any effort . . . to bring [that issue] to the forefront" could be "very damaging to the success of the peace process." *

The President's position on Jerusalem is reflected in State Department policy regarding passports and consular reports of birth abroad. Understanding that passports will be construed as reflections of American policy, the State Department's Foreign Affairs Manual [(FAM)] instructs its employees, in general, to record the place of birth on a passport as the "country [having] present sovereignty over the actual area of birth." [Because] the United States does not recognize any country as having sovereignty over Jerusalem, the FAM instructs employees to record the place of birth for citizens born there as "Jerusalem."

In 2002, Congress passed the Act at issue here[.] Section 214 of the Act is titled "United States Policy with Respect to Jerusalem as the Capital of Israel." [That] subsection seeks to override the FAM by allowing citizens born in Jerusalem to list their place of birth as "Israel." Titled "Record of Place of Birth as Israel for Passport Purposes," § 214(d) states "[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel."

When he signed the Act into law, President George W. Bush issued a statement declaring his position that §214 would, "if construed as mandatory rather than advisory, impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states." [Although President Bush sought to reassure the world that "U.S. policy regarding Jerusalem has not changed," diplomats in the region reported that, in the eyes of the Palestinians, the statute had "undermine[d] the role of the U.S. as a sponsor of the peace process."] In the Gaza Strip and elsewhere residents marched in protest.

* [In December 2017—about two years after *Zivotofsky*—President Trump issued a proclamation that "officially recognize[d] Jerusalem as the capital of Israel." —BE]

[In] 2002, petitioner Menachem Binyamin Zivotofsky was born to United States citizens living in Jerusalem. [Pursuant] to § 214(d), Zivotofsky claims the right to have "Israel" recorded as his place of birth in his passport.

In considering claims of Presidential power this Court refers to Justice Jackson's familiar tripartite framework from *Youngstown Sheet & Tube Co.* v. *Sawyer*. [In] this case the Secretary contends that §214(d) infringes on the President's exclusive recognition power by "requiring the President to contradict his recognition position regarding Jerusalem in official communications with foreign sovereigns." [Because] the President's refusal to implement § 214(d) falls into Justice Jackson's third category, his claim must be "scrutinized with caution," and he may rely solely on powers the Constitution grants to him alone.

To determine whether the President possesses the exclusive power of recognition the Court examines the Constitution's text and structure, as well as precedent and history bearing on the question.

Recognition is a "formal acknowledgement" that a particular "entity possesses the qualifications for statehood" or "that a particular regime is the effective government of a state." Restatement (Third) of Foreign Relations Law of the United States (1986). It may also involve the determination of a state's territorial bounds. Recognition is often effected by an express "written or oral declaration." It may also be implied—for example, by concluding a bilateral treaty or by sending or receiving diplomatic agents.

Legal consequences follow formal recognition. Recognized sovereigns may sue in United States courts, and may benefit from sovereign immunity when they are sued. The actions of a recognized sovereign committed within its own territory also receive deference in domestic courts under the act of state doctrine. Recognition at international law, furthermore, is a precondition of regular diplomatic relations. Recognition is thus "useful, even necessary," to the existence of a state.

Despite the importance of the recognition power in foreign relations, the Constitution does not use the term "recognition," either in Article II or elsewhere. The Secretary asserts that the President exercises the recognition power based on the Reception Clause, which directs that the President "shall receive Ambassadors and other public Ministers." Art. II, § 3. [This clause] received little attention at the Constitutional Convention. In fact, during the ratification debates, Alexander Hamilton claimed that the power to receive ambassadors was "more a matter of dignity than of authority," a ministerial duty largely "without consequence." The Federalist No. 69.

At the time of the founding, however, prominent international scholars suggested that receiving an ambassador was tantamount to recognizing the sovereignty of the sending state. It is a logical and proper inference, then, that a Clause directing the President alone to receive ambassadors would be understood to acknowledge his power to recognize other nations. This in fact occurred early in the Nation's history when President Washington recognized the French Revolutionary Government by receiving its ambassador. After this incident the import of the Reception Clause became clear—causing Hamilton to change his earlier view. [As] a result, the Reception Clause provides support, although not the sole authority, for the President's power to recognize other nations.

The inference that the President exercises the recognition power is further supported by his additional Article II powers. It is for the President, "by and with the Advice and Consent of the Senate," to "make Treaties, provided two thirds of the Senators present concur." Art. II, § 2, cl. 2. In addition, "he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors" as well as "other public Ministers and Consuls."

As a matter of constitutional structure, these additional powers give the President control over recognition decisions. At international law, recognition may be effected by different means, but each means is dependent upon Presidential power. In addition to receiving an ambassador, recognition may occur on "the conclusion of a bilateral treaty," or the "formal initiation of diplomatic relations," including the dispatch of an ambassador. The President has the sole power to negotiate treaties, and the Senate may not conclude or ratify a treaty without Presidential action. The President, too, nominates the Nation's ambassadors and dispatches other diplomatic agents. Congress may not send an ambassador without his involvement. Beyond that, the President himself has the power to open diplomatic channels simply by engaging in direct diplomacy with foreign heads of state and their ministers. The Constitution thus assigns the President means to effect recognition on his own initiative. Congress, by contrast, has no constitutional power that would enable it to initiate diplomatic relations with a foreign nation. Because these specific Clauses confer the recognition power on the President, the Court need not consider whether or to what extent the Vesting Clause, which provides that the "executive Power" shall be vested in the President, provides further support for the President's action here.

The text and structure of the Constitution grant the President the power to recognize foreign nations and governments. The question then becomes whether that power is exclusive. The various ways in which the President may unilaterally effect recognition—and the lack of any similar power vested in Congress—suggest that it is. So, too, do functional considerations. Put simply, the Nation must have a single policy regarding which governments are legitimate in the eyes of the United States and which are not. Foreign countries need to know, before entering into diplomatic relations or commerce with the United States, whether their ambassadors will be received; whether their officials will be immune from suit in federal court; and whether they may initiate lawsuits here to vindicate their rights. These assurances cannot be equivocal.

Recognition is a topic on which the Nation must "speak . . . with one voice." That voice must be the President's. Between the two political branches, only the Executive has the characteristic of unity at all times. And with unity comes the ability to exercise, to a greater degree, "[d]ecision, activity, secrecy, and dispatch." The Federalist No. 70 (A. Hamilton). The President is capable, in ways Congress is not, of engaging in the delicate and often secret diplomatic contacts that may lead to a decision on recognition. He is also better positioned to take the decisive, unequivocal action necessary to recognize other states at international law. These qualities explain why the Framers listed the traditional avenues of recognition—receiving ambassadors, making treaties, and sending ambassadors—as among the President's Article II powers.

[The] President since the founding has exercised this unilateral power to recognize new states—and the Court has endorsed the practice. Texts and treatises on international law treat the President's word as the final word on recognition. In light of this authority all six judges who considered this case in the Court of Appeals agreed that the President holds the exclusive recognition power.

It remains true, of course, that many decisions affecting foreign relations—including decisions that may determine the course of our relations with recognized countries—require congressional action. Congress may "regulate Commerce with foreign Nations," "establish an uniform Rule of Naturalization," "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," "declare War," "grant Letters of Marque and Reprisal," and "make Rules for the Government and Regulation of the land and naval Forces." Art. I, § 8. In addition, the President cannot make a treaty or appoint an ambassador without the approval of the Senate. Art. II, § 2, cl. 2. The President, furthermore, could not build an American Embassy abroad without congressional appropriation of the necessary funds. Art. I, § 8, cl. 1. Under basic separation-of-powers principles, it is for the Congress to enact the laws, including "all Laws which shall be necessary and proper for carrying into Execution" the powers of the Federal Government. §8, cl. 18.

[Although] the President alone effects the formal act of recognition, Congress' powers, and its central role in making laws, give it substantial authority regarding many of the policy determinations that precede and follow the act of recognition itself. If Congress disagrees with the President's recognition policy, there may be consequences. Formal recognition may seem a hollow act if it is not accompanied by the dispatch of an ambassador, the easing of trade restrictions, and the conclusion of treaties. And those decisions require action by the Senate or the whole Congress.

In practice, then, the President's recognition determination is just one part of a political process that may require Congress to make laws. The President's exclusive recognition power encompasses the authority to acknowledge, in a formal sense, the legitimacy of other states [and] their territorial bounds. [If] the President is to be effective in negotiations over a formal recognition determination, it must be evident to his counterparts abroad that he speaks for the Nation on that precise question.

A clear rule that the formal power to recognize a foreign government subsists in the President therefore serves a necessary purpose in diplomatic relations. All this, of course, underscores that Congress has an important role to play in other aspects of foreign policy, and the President may be bound by any number of laws Congress enacts. In this way ambition counters ambition, ensuring that the democratic will of the people is observed and respected in foreign affairs as in the domestic realm. See The Federalist No. 51 (J. Madison).

The Secretary [urges] the Court to define the executive power over foreign relations in even broader terms. He contends that under the Court's precedent the President has "exclusive authority to conduct diplomatic relations," along with "the bulk of foreign-affairs powers." [This] Court declines to acknowledge that unbounded power. A formulation broader than the rule that the President alone determines what nations to formally recognize as legitimate—and that he consequently controls his statements on matters of recognition—presents different issues and is unnecessary to the resolution of this case.

[It] is not for the President alone to determine the whole content of the Nation's foreign policy. [But] it is for the President alone to make the specific decision of what foreign power he will recognize as legitimate[.] Recognition is an act with immediate and powerful significance for international relations, so the President's position must be clear. Congress cannot require him to contradict his own statement regarding a formal recognition.

As the power to recognize foreign states resides in the President alone, the question becomes whether § 214(d) infringes on the Executive's consistent decision to withhold recognition with respect to Jerusalem.

[If] the power over recognition is to mean anything, it must mean that the President not only makes the initial, formal recognition determination but also that he may maintain that determination in his and his agent's statements. This conclusion is a matter of both common sense and necessity. If Congress could command the President to state a recognition position inconsistent with his own, Congress could override the President's recognition determination.

As Justice Jackson wrote in *Youngstown*, when a Presidential power is "exclusive," it "disabl[es] the Congress from acting upon the subject." Here, the subject is quite narrow: The Executive's exclusive power extends no further than his formal recognition determination. But as to that determination, Congress may not enact a law that directly contradicts it. This is not to say Congress may not express its disagreement with the President in myriad ways. For example, it may enact an embargo, decline to confirm an ambassador, or even declare war. But none of these acts would alter the President's recognition decision.

If Congress may not pass a law, speaking in its own voice, that effects formal recognition, then it follows that it may not force the President himself to contradict his earlier statement. That congressional command would not only prevent the Nation from speaking with one voice but also prevent the Executive itself from doing so in conducting foreign relations.

[The] flaw in § 214(d) is further underscored by the undoubted fact that the purpose of the statute was to infringe on the recognition power—a power the Court now holds is the sole prerogative of the President. And, indeed, observers interpreted §214 as altering United States policy regarding Jerusalem—which led to protests across the region. From the face of § 214, from the legislative history, and from its reception, it is clear that Congress wanted to express its displeasure with the President's policy by, among other things, commanding the Executive to contradict his own, earlier stated position on Jerusalem. This Congress may not do.

In holding §214(d) invalid the Court does not question the substantial powers of Congress over foreign affairs in general or passports in particular. [But] Congress cannot command the President to contradict an earlier recognition determination in the issuance of passports.

[Affirmed.]

■ JUSTICE BREYER, concurring

I continue to believe that this case presents a political question inappropriate for judicial resolution. See *Zivotofsky v. Clinton* (2012) (Breyer, J., dissenting). But because precedent precludes resolving this case on political question grounds, I join the Court's opinion.

■ JUSTICE THOMAS, concurring in the judgment in part and dissenting in part.

[Our Constitution] vests the residual foreign affairs powers of the Federal Government—*i.e.*, those not specifically enumerated in the Constitution—in the President by way of Article II's Vesting Clause. [The] Vesting Clause of Article II provides that "[t]he executive Power shall be vested in a President of the United States." Art. II, § 1. This Clause is notably different from the Vesting Clause of Article I, which provides only that "[a]ll legislative Powers *herein granted* shall be vested in a Congress of the United States," Art. I, § 1 (emphasis added). By omitting the words "herein granted" in Article II, the Constitution indicates that the "executive Power" vested in the President is not confined to those powers expressly identified in the document. Instead, it includes all powers originally understood as falling within the "executive Power" of the Federal Government.

Founding-era evidence reveals that the "executive Power" included the foreign affairs powers of a sovereign State. John Locke's 17th-century writings laid the groundwork for this understanding of executive power. Locke described foreign affairs powers—including powers of "war and peace, leagues and alliances, and all transactions with all persons and communities without the commonwealth"—as "federative" power. He defined the "executive" power as "comprehending the execution of the municipal laws of the society within itself upon all that are parts of it." Importantly, however, Locke explained that the federative and executive powers must be lodged together, lest "disorder and ruin" erupt from the division of the "force of the public."

Subsequent thinkers began to refer to both of these powers as aspects of "executive power." William Blackstone, for example, described the executive power in England as including foreign affairs powers, such as the "power of sending embassadors to foreign states, and receiving embassadors at home"; making "treaties, leagues, and alliances with foreign states and princes"; "making war and peace"; and "issu[ing] letters of marque and reprisal."

[This] view of executive power was widespread at the time of the framing of the Constitution. [Given] this pervasive view of executive power, it is unsurprising that those who ratified the Constitution understood the "executive Power" vested by Article II to include those foreign affairs powers not otherwise allocated in the Constitution. James Iredell, for example, told the North Carolina ratifying convention that, under the new Constitution, the President would "regulate all intercourse with foreign powers" and act as the "primary agent" of the United States, though no specific allocation of foreign affairs powers in the document so provided.

[In] the Anglo-American legal tradition, passports have consistently been issued and controlled by the body exercising executive power—in England, by the King; in the colonies, by the Continental Congress; and in the United States, by President Washington and every President since.

▪ CHIEF JUSTICE ROBERTS, with whom JUSTICE ALITO joins, dissenting.

Today's decision is a first: Never before has this Court accepted a President's direct defiance of an Act of Congress in the field of foreign affairs. We have instead stressed that the President's power reaches "its lowest ebb" when he contravenes the express will of Congress, "for what is at stake is the equilibrium established by our constitutional system." *Youngstown Sheet & Tube Co.* v. *Sawyer*, (Jackson, J., concurring).

Justice Scalia's principal dissent, which I join in full, refutes the majority's unprecedented holding in detail. I write separately to underscore the stark nature of the Court's error on a basic question of separation of powers.

Assertions of exclusive and preclusive power leave the Executive "in the least favorable of possible constitutional postures," and such claims have been "scrutinized with caution" throughout this Court's history. *Id.* For our first 225 years, no President prevailed when contradicting a statute in the field of foreign affairs.

In this case, the President claims the exclusive and preclusive power to recognize foreign sovereigns. The Court devotes much of its analysis to accepting the Executive's contention. I have serious doubts about that position. The majority places great weight on the Reception Clause, which directs that the Executive "shall receive Ambassadors and other public Ministers." Art. II, § 3.But that provision, framed as an obligation rather than an authorization, appears alongside the *duties* imposed on the President by Article II, Section 3, not the *powers* granted to him by Article II, Section 2. Indeed, the People ratified the Constitution with Alexander Hamilton's assurance that executive reception of ambassadors "is more a matter of dignity than of authority" and "will be without consequence in the administration of the government."

[The] majority's other asserted textual bases are even more tenuous. The President does have power to make treaties and appoint ambassadors. Art. II, § 2. But those authorities are *shared* with Congress, so they hardly support an inference that the recognition power is *exclusive*.

[As] for history, the majority admits that it too points in both directions. Some Presidents have claimed an exclusive recognition power, but others have expressed uncertainty about whether such preclusive authority exists. Those in the skeptical camp include Andrew Jackson and Abraham Lincoln, leaders not generally known for their cramped conceptions of Presidential power. Congress has also asserted its authority over recognition determinations at numerous points in history. The majority therefore falls short of demonstrating that "Congress has accepted" the President's exclusive recognition power. In any event, we have held that congressional acquiescence is only "pertinent" when the President acts in the absence of express congressional authorization, not when he asserts power to disregard a statute, as the Executive does here.

[But] even if the President does have exclusive recognition power, he still cannot prevail in this case, because the statute at issue *does not implicate recognition*. The relevant provision, §214(d), simply gives an American citizen born in Jerusalem the option to designate his place of birth as Israel "[f]or purposes of" passports and other documents. [Congress] has not disputed the Executive's assurances that § 214(d) does not alter the longstanding United States position on Jerusalem. And the annals of diplomatic history record no examples of official recognition accomplished via optional passport designation.

The majority acknowledges both that the "Executive's exclusive power extends no further than his formal recognition determination" and that § 214(d) does "not itself constitute a formal act of recognition." Taken together, these statements come close to a confession of error. [At] most, the majority worries that there may be a *perceived* contradiction based on a *mistaken* understanding of the effect of § 214(d), insisting that some "observers interpreted §214 as altering United States policy regarding Jerusalem." To afford controlling weight to such impressions, however, is essentially to subject a duly enacted statute to an international heckler's veto.

Moreover, expanding the President's purportedly exclusive recognition power to include authority to avoid potential misunderstandings of legislative enactments proves far too much. Congress could validly exercise its enumerated powers in countless ways that would create more severe perceived contradictions with Presidential recognition decision than does § 214(d).

[Ultimately,] the only power that could support the President's position is the one the majority purports to reject: the "exclusive authority to conduct diplomatic relations." [It] has not been necessary over the past 225 years to definitively resolve a dispute between Congress and the President over the recognition power. Perhaps we could have waited another 225 years. But instead the majority strains to reach the question based on the mere possibility that observers overseas might misperceive the significance of the birthplace designation at issue in this case. And in the process, the Court takes the perilous step—for the first time in our history—of allowing the President to defy an Act of Congress in the field of foreign affairs.

■ JUSTICE SCALIA, with whom [CHIEF JUSTICE ROBERTS] and JUSTICE ALITO join, dissenting.

Before this country declared independence, the law of England entrusted the King with the exclusive care of his kingdom's foreign affairs. [The] People of the United States had other ideas when they organized our Government. They considered a sound structure of balanced powers essential to the preservation of just government, and international relations formed no exception to that principle.

[The] Constitution contemplates that the political branches will make policy about the territorial claims of foreign nations the same way they make policy about other international matters: The President will exercise his powers on the basis of his views, Congress its powers on the basis of its views. That is just what has happened here.

[Before] turning to Presidential power under Article II, I think it well to establish the statute's basis in congressional power under Article I. [Congress's] power to "establish an uniform Rule of Naturalization," Art. I, § 8, cl. 4, enables it to grant American citizenship to someone born abroad. The naturalization power also enables Congress to furnish the people it makes citizens with papers verifying their citizenship—say a consular report of birth abroad [or] a passport (which certifies citizenship for purposes of international travel). As the Necessary and Proper Clause confirms, every congressional power "carries with it all those incidental powers which are necessary to its complete and effectual execution." [Even] on a miserly understanding of Congress's incidental authority, Congress may make grants of citizenship "effectual" by providing for the issuance of certificates authenticating them.

One would think that if Congress may grant Zivotofsky a passport and a birth report, it may also require these papers to record his birthplace as "Israel." The birthplace specification promotes the document's citizenship-authenticating function by identifying the bearer, distinguishing people with similar names but different birthplaces from each other, helping authorities uncover identity fraud, and facilitating retrieval of the

Government's citizenship records. To be sure, recording Zivotofsky's birthplace as "Jerusalem" rather than "Israel" would fulfill these objectives, but when faced with alternative ways to carry its powers into execution, Congress has the "discretion" to choose the one it deems "most beneficial to the people." *McCulloch v. Maryland* [*supra*, p. II-5]. It thus has the right to decide that recording birthplaces as "Israel" makes for better foreign policy. Or that regardless of international politics, a passport or birth report should respect its bearer's conscientious belief that Jerusalem belongs to Israel.

The Court frames this case as a debate about recognition. [I] agree that the Constitution *empowers* the President to extend recognition on behalf of the United States, but I find it a much harder question whether it makes that power exclusive. [To] take a stark example, Congress legislated in 1934 to grant independence to the Philippines, which were then an American colony. In the course of doing so, Congress directed the President to "recognize the independence of the Philippine Islands as a separate and self-governing nation" and to "acknowledge the authority and control over the same of the government instituted by the people thereof." Constitutional? And if Congress may control recognition when exercising its power "to dispose of ... the Territory or other Property belonging to the United States," Art. IV, §3, cl. 2, why not when exercising other enumerated powers? Neither text nor history nor precedent yields a clear answer to these questions. Fortunately, I have no need to confront these matters today—nor does the Court—because § 214(d) plainly does not concern recognition.

Recognition is more than an announcement of a policy. Like the ratification of an international agreement or the termination of a treaty, it is a formal legal act with effects under international law. [In] order to extend recognition, a state must perform an act that unequivocally manifests that intention. [To] know all this is to realize at once that §214(d) has nothing to do with recognition. Section 214(d) does not require the Secretary to make a formal declaration about Israel's sovereignty over Jerusalem. And nobody suggests that international custom infers acceptance of sovereignty from the birthplace designation on a passport or birth report, as it does from bilateral treaties or exchanges of ambassadors.

[Section] 214(d) performs a more prosaic function than extending recognition. Just as foreign countries care about what our Government has to say about their borders, so too American citizens often care about what our Government has to say about their identities. The State Department does not grant or deny recognition in order to accommodate these individuals, but it does make exceptions to its rules about how it records birthplaces. [Finding] recognition in this provision is rather like finding admission to the Union in a provision that treats American Samoa as a State for purposes of a federal highway safety program, 23 U.S.C. §401.

[To be sure,] the law displays symbolic support for Israel's territorial claim. That symbolism may have tremendous significance as a matter of international diplomacy, but it makes no difference as a matter of constitutional law.

Even if the Constitution gives the President sole power to extend recognition, it does not give him sole power to make all decisions relating to foreign disputes over sovereignty. To the contrary, a fair reading of Article I allows Congress to decide for itself how its laws should handle these controversies. Read naturally, power to "regulate Commerce with foreign Nations," § 8, cl. 3, includes power to regulate imports from Gibraltar as British goods or as Spanish goods. Read naturally, power to "regulate the Value . . . of foreign Coin," § 8, cl. 5, includes power to honor (or not) currency issued by Taiwan. And so on for the other enumerated powers.

[History] does not even support an exclusive Presidential power to make what the Court calls "formal statements" about "the legitimacy of a state or government and its territorial bounds." [A] recent resolution expressed the House of Representatives' "strong support for the legitimate, democratically-elected Government of Lebanon" and condemned an "illegitimate" and "unjustifiable" insurrection by "the terrorist group Hizballah." An earlier enactment declared "the sense of the Congress that ... Tibet... is an occupied country under the established principles of international law" and that "Tibet's true representatives are the Dalai Lama and the Tibetan Government in exile." After Texas won independence from Mexico, the Senate resolved that "the State of Texas having established and maintained an independent Government, ... it is expedient and proper ... that the independent political existence of the said State be acknowledged by the Government of the United States."

In the final analysis, the Constitution may well deny Congress power to recognize—the power to make an international commitment accepting a foreign entity as a state, a regime as its government, a place as a part of its territory, and so on. But whatever else §214(d) may do, it plainly does not make (or require the President to make) a commitment accepting Israel's sovereignty over Jerusalem.

[Unable to claim that § 214(d) actually effects recognition, the Court] announces a rule that is blatantly gerrymandered to the facts of this case. It concludes that, in addition to the exclusive power to make the "formal recognition determination," the President holds an ancillary exclusive power "to control ... formal statements by the Executive Branch acknowledging the legitimacy of a state or government and its territorial bounds." It follows, the Court explains, that Congress may not "requir[e] the President to contradict an earlier recognition determination in an official document issued by the Executive Branch." *Ibid.* So requiring imports from Jerusalem to be taxed like goods from Israel is fine, but requiring Customs to issue an official invoice to that effect is not? Nonsense.

Recognition is a type of legal act, not a type of statement. It is a leap worthy of the Mad Hatter to go from exclusive authority over making legal commitments about sovereignty to exclusive authority over making statements or issuing documents about national borders. The Court may as well jump from power over issuing declaratory judgments to a monopoly on writing law-review articles.

[To] the extent doubts linger about whether the United States recognizes Israel's sovereignty over Jerusalem, § 214(d) leaves the President free to dispel them by issuing disclaimer of intent to recognize. A disclaimer always suffices to prevent an act from effecting recognition. [Compare the following provision of the Foreign Affairs Manual:] "The United States does not officially recognize Taiwan as a 'state' or 'country,' although passport issuing officers may enter 'Taiwan' as a place of birth." Nothing stops a similar disclaimer here.

[The] Court [also] objects that § 214(d) interferes with the autonomy and unity of the Executive Branch, setting the branch against itself. The Court suggests, for instance, that the law prevents the President from maintaining his neutrality about Jerusalem in "his and his agent's statements." That is of no constitutional significance. As just shown, Congress has power to legislate without regard to recognition, and where Congress has the power to legislate, the President has a duty to "take Care" that its legislation "be faithfully executed," Art. II, §3. It is likewise "the duty of the secretary of state to conform to the law"; where Congress imposes a responsibility on him, "he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others." *Marbury v. Madison* (1803) [*supra*, p. I-2]. The Executive's involvement in carrying out this law does not affect its constitutionality; the Executive carries out every law.

[In] the end, the Court's decision does not rest on text or history or precedent. It instead comes down to "functional considerations[.]" The vices of this mode of analysis go beyond mere lack of footing in the Constitution. Functionalism of the sort the Court practices today will *systematically* favor the unitary President over the plural Congress in disputes involving foreign affairs. It is possible that this approach will make for more effective foreign policy, perhaps as effective as that of a monarchy. It is certain that, in the long run, it will erode the structure of separated powers that the People established for the protection of their liberty.

Zivotofsky II as Precedent in the Executive Branch

Jack Goldsmith (2015)*

Zivotofsky II is the most important Supreme Court decision ever on the sources and scope of the President's independent and exclusive powers to conduct foreign relations—powers that fall in Justice Jackson's *Youngstown* Categories Two and Three, respectively. The Court provided novel guidance on these issues in the course of upholding for the first time "a President's direct defiance of an Act of Congress in the field of foreign affairs," as the Chief Justice said in dissent. Its analysis made a mess of Justice Jackson's third category in *Youngstown*, revived a functional approach to exclusive presidential power that many scholars thought was dead, and left Congress's legislative power related to diplomacy and foreign affairs in an uncertain but probably shrunken position. These and other elements of the analytically promiscuous decision will influence separation-of-powers disputes far beyond the recognition context.

That influence will be felt primarily in the executive branch rather than in courts. *Zivotofsky II* is the rare case in which the Supreme Court addresses a clash between the political branches concerning foreign relations. Executive branch lawyers, by contrast, address such clashes all the time. Until *Zivotofsky II*, these lawyers had to rely on shards of judicial dicta, in addition to executive branch precedents and practices, in assessing the validity of foreign relations statutes thought to intrude on executive power. But now they have a Supreme Court precedent with broad arguments for presidential exclusivity in a case that holds that the President can ignore a foreign relations statute. One can read *Zivotofsky II* narrowly, and future courts might do so if given the chance. But executive branch lawyers, who are governed by different principles and incentives than judges, won't read the decision narrowly. They will read it generously in favor of the President in resolving everyday foreign policy disputes between the political branches. In this respect, *Zivotofsky II* is a reminder that the impact of a Supreme Court decision depends very much on the institution that interprets and applies it.

I. Zivotofsky II's Innovations

Zivotofsky II clarified, reoriented, and in some instances disrupted basic understandings about the allocation of authority among the political branches to conduct foreign relations.

A. Reshaping Justice Jackson's Framework

Zivotofsky II analyzed the constitutionality of section 214(d) within "Justice Jackson's familiar tripartite framework" from *Youngstown*. Justice

* Excerpt from Jack Goldsmith, Zivotofsky II *as Precedent in the Executive Branch*, 129 HARV. L. REV. 112 (2015). Professor Goldsmith led the Office of Legal Counsel as Assistant Attorney General from 2003–2004.

Jackson maintained that as presidential action moves along a continuum from congressional support for the Executive (Category One) to congressional silence (Category Two) to contravention of a congressional command (Category Three), "doubt" about and "challenge[s]" to presidential power grow. For all the sanctification this framework has received in law reviews and public discourse, the Court prior to *Zivotofsky II* had deployed it in only four cases, all involving foreign relations. Basic issues about the framework thus remained open. *Zivotofsky II* resolved some of these issues, and did so in surprising ways.

1. Disabling Congress Without Analyzing Article I.—The Court first addressed the Category Two question of whether the President could recognize foreign nations "in absence of either a congressional grant or denial of authority," on the basis of his "independent powers."

[On] its face, Article II "empowers the President to do . . . strikingly little" with regard to other nations. It vests "[t]he executive Power" in the President, designates him "Commander in Chief" of the Army and Navy, and obliges him to "receive Ambassadors and other public Ministers" and to "take Care that the Laws be faithfully executed." It also authorizes the President, with Senate consent, to make treaties and appoint ambassadors. That's it.

[A] distinctive feature of the constitutional law of foreign relations, however, is that a considerable amount of consequential presidential action is based on the President's "independent powers" under Article II. [For example,] [m]any of President Obama's most consequential foreign policy initiatives—the nuclear deal with Iran, important international environmental agreements, the re-establishment of diplomatic relations with Cuba, the use of force in Libya in 2011, the initial attacks on the Islamic State in August 2014, the pivot to Asia, and many more—were exercises of independent power under Article II.

The Court has never concretely explained the source of these and other vast presidential powers in foreign relations. It has suggested that the Commander in Chief Clause confers substantive authority, but has not explored its latitude or limits. It has grounded the President's authority to make executive agreements, especially to settle foreign claims, in nothing more than established presidential practice. It has stated more generally, in dicta, that the President's "vast share of responsibility for the conduct of our foreign relations" derives from a "historical gloss on the 'executive Power' vested in Article II." It has also identified, in dicta, the President's "unique responsibility" and "lead role" in foreign relations, without specifying their basis in Article II. Until last Term, however, the Court had provided practically no guidance on how the sparse clauses of Article II connect to the manifold foreign relations powers of the President.

Zivotofsky II provided a concrete answer tailored to the recognition power. One Article II candidate for the recognition power was the Reception Clause, which states that the President "shall receive Ambassadors and other public Ministers." The Court declined to ground the recognition power there alone, probably because it found no evidence that the Founders viewed it to authorize recognition and because the government can also extend recognition to a nation by treaty or by sending ambassadors. These latter vehicles for recognition led the Court to consider the President's power (with Senate consent) to make treaties and nominate ambassadors and other public ministers. "As a matter of constitutional structure," it reasoned, these powers, combined with the Reception Clause, imply that "each means" of recognition "is dependent upon Presidential power" and "give the President control over recognition decisions." The Court added that the Constitution "assigns the President means to effect recognition on his own initiative" and that Congress "has no constitutional power that would enable it to initiate diplomatic relations with a foreign nation."

The Court's focus on Congress's supposed lack of power as a basis to infer independent presidential powers is odd, especially since it hadn't at this point analyzed Article I. The arguments also make little sense on their own terms. [T]he President cannot "effect recognition" by treaty or by sending an ambassador without the Senate's consent at some point.

[More] importantly, the Court ignored [another] potential method of recognition—namely, by statute. As the Court acknowledged, Congress has sometimes been a joint participant in the recognition process. After Abraham Lincoln declined to recognize Haiti and Liberia without Congress's "approbation," Congress appropriated funds and "authorized" the President to "appoint diplomatic representatives of the United States" to both "Republics." Congress also pushed President McKinley to recognize Cuba in 1898 and probably effected recognition in a joint resolution entitled "For the recognition of the independence of the people of Cuba."

These and other historical episodes suggest that Congress might have the authority to recognize a foreign nation by statute, and thus might be able to do so by overriding a presidential veto. The most plausible basis for such authority is a combination of the Declare War Clause, the Commerce Clause, and the Necessary and Proper Clause. The Court would implicitly reject this possibility when it later determined that the President's recognition power is exclusive. But at this point in the opinion, in purporting to analyze the President's independent power based solely on textual and structural factors in Article II, the Court had no basis to imply that Congress lacked power under Article I to recognize foreign nations.

The Court's poor arguments for the President's independent power to recognize do not mean that it reached the wrong conclusion. It might have grounded the independent power in the unchallenged historical practice of Presidents recognizing foreign nations. It might also have inferred the independent power from the fact that Article II contemplates presidential involvement in every means of recognition, without any suggestion that

Congress lacked power over recognition. In taking the extra step of questioning Congress's power based on an analysis of Article II alone, however, the Court prejudged all that was to come.

***2. The "Lowest Ebb" Isn't Very Low.*—**Having concluded that the "text and structure of the Constitution grant the President the power to recognize foreign nations and governments," the Court turned to the question of "whether that power is exclusive." This question is especially important in foreign relations law, where the President's broad and mostly unenumerated independent powers often clash with Congress's many enumerated and implied powers.

[Justice] Jackson maintained that a presidential claim of exclusive power in Category Three faces a "severe" test. Such a claim lies at the "lowest ebb" of presidential power and is "most vulnerable to attack and in the least favorable of possible constitutional postures." It thus "must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."

These sound like tough standards that place a heavy burden on the President. But the standards had never been tested because the Court had never faced a situation where the executive branch argued that an admittedly constraining foreign relations statute must give way to an exclusive presidential power. [It] is thus significant that in Category Three's first test, the President won and won big.

The Court wrote one sentence about why text and structure pointed toward an exclusive presidential power over recognition: "The various ways in which the President may unilaterally effect recognition—and the lack of any similar power vested in Congress—suggest" that the President's power to recognize is exclusive. That sentence was nothing but a summary of why the Court had just concluded that the President possessed independent power over recognition. In using these reasons as a basis for exclusive presidential power, the Court didn't consider the Senate's concurrent role in some recognition decisions. It also didn't consider the textual and structural case for Congress effecting recognition by statute, including the extent to which Congress could "carry[] into Execution" the President's independent recognition power in a way that restricts it.[*] And the Court failed to examine why Congress's undoubted power to enact statutes that supersede treaties did not apply as well to presidential determinations of recognition. It simply bootstrapped poor textual and structural arguments for an uncontested independent presidential power into conclusive arguments for a different-in-kind exclusive presidential power—without even looking at Article I.

The Court also took a desultory look at its precedents and the "understandings and practice[s]" of the political branches as a basis for its conclusion about exclusive presidential power. [The] evidence showed that Presidents had often recognized foreign nations and governments on their

[*] U.S. CONST. art. I, § 8, cl. 18.

own authority, especially since the turn of the twentieth century. Congressional silence in these instances, however, might simply signal policy agreement. It hardly shows institutional acquiescence to a claim of exclusive presidential power, especially since Congress sometimes disagreed with the policy and sought to guide the President by statute.

The Court surely understood that text, structure, precedent, and historical practice didn't provide powerful support for an exclusive recognition power in the President, for it leaned heavily throughout its opinion on a fifth factor, "functional considerations." By this phrase, the Court meant characteristics intrinsic to the presidency that made it uniquely suited to determine a "single policy regarding which governments are legitimate in the eyes of the United States." These characteristics include unity and its corollaries, "[d]ecision, activity, secrecy, and dispatch," and the ability to speak with one voice—all of which allow the President to engage in "the delicate and often secret diplomatic contacts that may lead to a decision on recognition" and to "take the decisive, unequivocal action necessary to recognize other states."

The Court is right that "[t]hese qualities explain why the Framers listed the traditional avenues of recognition—receiving ambassadors, making treaties, and sending ambassadors—as among the President's Article II powers." The qualities might also show that the President is uniquely suited to recognize a foreign nation when secrecy and decisiveness necessarily precede recognition. But these arguments don't add up to an exclusive presidential power. The need for a single policy about recognition does not tell us *which* branch of the government must "speak with one voice" for the nation at any particular time, or who gets the final word on the policy. Functional reasons might sometimes argue for the President getting the first word, but they do not explain why that decision cannot later be changed by a determined Congress, just as it can be by a subsequent President.

More fundamentally, the presidency's functional characteristics of secrecy and dispatch that the Court thought so crucial to recognition have not always (or even usually) been necessary for recognition. Secrecy and dispatch were not necessary in the many cases in U.S. history when Congress was a forceful participant in (and, in some instances, effected by statute) recognition.

[In] sum, the Court held that the President possessed an exclusive power of recognition based on weak textual and structural arguments, a tendentious reading of precedent and history, and functional arguments that don't apply to most recognition decisions in U.S. history. [The] overall weakness of these arguments, and not the arguments' details, is what's important. Justice Jackson's framework has long been criticized on the grounds that courts can glide among the three categories through manipulative statutory interpretation and that the framework supplies no guidance for identifying the source and limits of the President's independent power in Category Two. The one place where the framework is supposed to have bite is a case that indisputably falls within Category Three, where exclusive power is narrow and the President must overcome a heavy burden in order to prevail. Yet in the first case ever in which Category Three was tested, when inconclusive evidence for an exclusive presidential power might have made the presumption relevant, the Court [a]ccept[ed] weak arguments for an exclusive presidential power over recognition without even considering the "constitutional powers of Congress over the matter," as Category Three appeared to require[.]

C. Uncertain Limits

Although the Court did not articulate principled limits on its functional approach to presidential exclusivity, it did say that its holding applies only to the recognition power (and its corollaries about territorial sovereignty and presidential speech) and that Congress retains important legislative powers in foreign relations.

[These statements] seem like an ironic commentary on the Court's broad holding about exclusive presidential power. Until *Zivotofsky II*, the Court had little need to provide comfort with remarks like "it is Congress that makes laws, and in countless ways its laws will and should shape the Nation's course." The Court also reminded us that "it is for the Congress to enact the laws, including 'all Laws which shall be necessary and proper for carrying into Execution' the powers of the Federal Government." This truism might have carried more weight had the Court examined the Necessary and Proper Clause's relevance to the case before it. But the Court never again mentions the clause. It thus provides no guidance on the crucial question of how Congress's authority to carry into execution presidential power relates to the President's independent and exclusive foreign relations powers. If anything, the Court's detailed functional analysis in support of exclusive presidential power, followed by mostly platitudinous statements about Congress's still-important role in this area, unsettles what most commentators assumed was Congress's ultimate *ex post* control over the direction of U.S. foreign policy.

[The] Court's most significant statement about congressional power came when it distinguished between the President's exclusive "formal act of recognition" and Congress's authority under Article I "regarding many of the policy determinations that precede and follow the act of recognition itself." Congress can "disagree[] with the President's recognition policy" through legislation, said the Court, adding that "[f]ormal recognition may seem a hollow act if it is not accompanied by the dispatch of an ambassador, the easing of trade restrictions, and the conclusion of treaties." The implication here and in other places is that Congress can exercise its powers under Article I to *affect* the President's recognition determination as long as it does not *effect* recognition. The Court seemed to be groping toward a formalist distinction: Congress can exercise its Article I powers to burden an exclusive Article II power as long as it doesn't exercise an Article II power.

The problem with this potentially limiting formalist principle is that *Zivotofsky II* did not apply it. A formalist ruling became hard once the Court acknowledged that section 214(d) was not "a formal act of recognition," and moved instead to the nonformalist assessments of "whether § 214(d) *infringes on* the Executive's . . . recognition with respect to Jerusalem," and whether Congress's exercise of its authority over passports unduly *"aggrandiz[ed]* its power." In the end, the Court made the qualitative judgment that Congress burdened rather than exercised the recognition power. The Court thus provided no guidance for distinguishing (i) proper exercises of Article I concerning "policy determinations that precede and follow" recognition that can render recognition a "hollow act," from (ii) the improper exercises of Article I (like the passport legislation) that "contradict [the President's] prior recognition determination."

II. *Zivotofsky II* as Precedent in the Executive Branch

Zivotofsky II is a victory for presidential foreign relations power. But it almost certainly does not portend a new era of judicial indulgence of broad exercises of that power.

Separation-of-powers disputes between the branches in foreign relations—including direct clashes of the sort at issue in *Zivotofsky II*—arise all the time but are rarely adjudicated. The main reason this is so is the absence of a plaintiff with standing and a cause of action, but other reasons include the political question doctrine [and] related justiciability and practical factors, including secrecy, ripeness, jurisdictional limitations, and more. Judicial review is unavailable for most of the instances in which Presidents arguably stretch or defy congressional authorizations, or act contrary to congressional restraints in diplomatic, intelligence, and military affairs. *Zivotofsky II* is unusual not just for its analysis and holding, but also for the uncommon set of circumstances that led it to be resolved in court at all.

Even when foreign relations clashes reach the Court, *Zivotofsky II*'s internal logic will not likely have predictable consequences there. [In] the next foreign relations dispute between the branches, the judiciary can latch on to *Zivotofsky II*'s stated limitations, or ignore the mess it made of Jackson's third category, or distinguish its odd use of constitutional structure and historical practice as unique to the recognition and passport context.

To say that *Zivotofsky II* lacks predictable consequences in the judiciary is not to say that it lacks predictable consequences on presidential power. It will have such consequences in the executive branch, which operates under very different principles and incentives than the judiciary. Unlike judges, executive branch lawyers have an institutional predilection to read presidential power broadly. They will accordingly tend to construe *Zivotofsky II*'s holding, dicta, and ambiguities in the President's favor.

A. How the Executive Branch Views Supreme Court Precedent

The President's duty to "take Care that the Laws be faithfully executed" requires him to obey and enforce the mass of laws enacted by Congress. Before the President can obey and enforce the laws, he must determine their meaning, what they authorize and prohibit, and how they fit together. He also "has an independent constitutional obligation to interpret and apply the Constitution" that flows not just from the Take Care Clause but from his constitutional oath as well.[137] When the President believes a law violates a constitutional provision, including Article II, the Take Care and Oath Clauses counsel against enforcing or obeying the statute because, as *Marbury* teaches, "a legislative act contrary to the constitution is not law."

Although the President has the final word in the executive branch on these legal issues, the Attorney General has provided the President and executive agencies with advice on such issues since 1789. The Attorney General in turn delegates her advisory function to the Office of Legal Counsel (OLC). OLC is not the only executive branch office that will interpret and apply *Zivotofsky II*. But it is at the forefront of executive branch clashes with Congress, and it often publishes its legal advice on separation-of-powers disputes. What it says reflects the executive branch view of both separation of powers and judicial precedent.

OLC says its legal advice is "based on its best understanding of what the law requires—not simply an advocate's defense of the contemplated action or position proposed by an agency or the Administration." In performing this task it follows Supreme Court precedents and in general looks at the same sources as courts, with some important modifications. Because OLC is part of the executive branch, "its analyses may also reflect the institutional traditions and competencies of that branch of the Government." Among other things, this means that OLC "ordinarily give[s] great weight to any relevant past opinions of Attorneys General and the Office," and that its work "may appropriately reflect the fact that its responsibilities also include facilitating the work of the Executive Branch and the objectives of the President, consistent with the law."

OLC's self-description is largely borne out in its opinions but is not a complete picture. The head of OLC is nominated by the President, shares his general legal and political outlook, and sees his task of facilitating the President's objectives through that lens. Because OLC addresses many issues that never reach court and for which there is no controlling precedent, it tends to rely on general principles embodied in Supreme Court dicta, especially ones that favor presidential power. It also relies heavily on executive branch opinions and precedents, and on legally undertheorized statements by Presidents and other executive officials in signing statements

[137] *The Constitutional Separation of Powers Between the President & Cong.*, 20 Op. O.L.C. 124, 128 (1996); *see also* U.S. CONST. art. II, § 1, cl. 8 (requiring President to swear that he will "to the best of [his] Ability, preserve, protect and defend the Constitution of the United States").

and speeches. The "institutional traditions and competencies" that inform OLC's reading of precedent and dicta include proprietary intelligence information and the President's unique responsibilities for conducting U.S. foreign relations. These factors together lead OLC (and the executive branch generally) to take a broader, and perhaps much broader, view of presidential power than the Supreme Court[.]

B. *Zivotofsky II* in the Executive Branch

One of course cannot precisely predict how OLC will interpret *Zivotofsky II*. [We] can be sure, however, that OLC will interpret the decision to favor the executive branch in its manifold interactions and disputes with Congress. What follows are some illustrative overlapping contexts in which OLC might do so.

1. The President's Exclusive Recognition Power.—The President's recognition power has dimensions beyond those identified in *Zivotofsky II*. In *United States v. Belmont* [(1937)], the Court held that as an incident to his recognition of the Soviet Union, President Roosevelt had the power to make an executive agreement [with] the effect of validating Soviet government acts in the United States and preempting state law. The Court viewed "[t]he recognition, establishment of diplomatic relations, [a]nd agreements with respect thereto" as "all parts of one transaction," and added that "in respect of what was done here, the Executive had authority to speak as the sole organ of that government." The Court's subsequent decision in *United States v. Pink* [(1937)] [suggested] that the recognition power should be read broadly enough to be effective in "handling the delicate problems of foreign relations" and thus to authorize executive actions related to recognition (including preemption of state law) that would "thwart[] or seriously dilute[]" the President's exercise of the recognition power.

These decisions will permit OLC to read the President's exclusive recognition power to include both powers incidental to recognition and any related "policy" that governs recognition. [For] example, lower court precedent has suggested that executive agreements are subservient to federal statutes. [But a]fter *Zivotofsky II*, OLC could plausibly maintain that Congress cannot constrain or alter a tightly integrated bundle of presidential policy decisions in an executive agreement premised on his exclusive recognition power.

[More] broadly, Justice Scalia listed "a range of settings" where Congress has legislated on matters that burden a President's recognition determination. *Zivotofsky II* gives the executive branch more tools than before to resist these intrusions on presidential recognition decisions. Consider the Taiwan Relations Act. It did not formally reverse President Carter's recognition of the People's Republic of China and his derecognition of the Republic of China (ROC) [i.e., Taiwan]. But it did "determine the scope of, and set conditions on" his recognition decision, and diminished its "strategic ambiguity" by giving "the ROC practically all domestic and international rights of a recognized Taiwanese government." It is unclear under *Zivotofsky II* whether the Taiwan Relations Act amounts to "policy determinations that precede and follow the act of recognition itself," which the Court says Congress can legislate, or attempts to "contradict [the President's] prior recognition determination," which the Court says Congress cannot do. [While] many factors inform this decision, *Zivotofsky II*'s reliance on functional factors in resolving the scope of the recognition power, as well as its clarification that *Pink* and *Belmont* are bases for presidential exclusivity vis-à-vis Congress, gives the executive branch leeway in characterizing congressional actions as inappropriately intruding into the President's exclusive competencies.

2. The President's Exclusive Power to Conduct Diplomacy.— Long before *Zivotofsky II*, OLC had identified and applied what it describes as the President's "exclusive prerogatives in conducting the Nation's diplomatic relations." Its most recent published opinion on the topic says this authority extends to "any subject that has bearing on the national interest" and "includes the 'exclusive authority to determine the time, scope, and objectives' of international negotiations and the individuals who will represent the United States in those contexts," as well as "activities, functions, and preparatory work necessary to carry out meaningful diplomatic interaction with foreign officials." OLC grounds this exclusive presidential power in several clauses of Article II, in Supreme Court dicta[,] in executive branch practice, and in the functional "one-voice" advantages of presidential diplomacy. OLC has invoked this authority to disregard statutes on "widely varied subject matters," ranging from international discussion about international fishing restrictions to inquiries about the status of missing Israeli soldiers to U.S government requests for assistance to foreign governments for covert action.

OLC will read *Zivotofsky II* to strengthen and likely expand the case for the President's exclusive power to conduct diplomacy. The holding, combined with its functional rationale, can be read at least for the broad proposition that the President "has exclusive authority to dictate the content of official communications on issues for which unity of message is important." The Court further stated, in what will become a staple in OLC opinions, that "the President . . . has the power to open diplomatic channels simply by engaging in direct diplomacy with foreign heads of state and their ministers" while Congress has "no constitutional power that would enable it to initiate diplomatic relations with a foreign nation." [In] harvesting these points to support the President's exclusive diplomatic powers, OLC is unlikely to give much weight to the Court's abstract statements about Congress's role in foreign relations, which OLC opinions often acknowledge in terms similar to those used by the Court.

[Several] examples illustrate how the executive branch might apply *Zivotofsky II* to bolster the President's exclusive power to conduct diplomacy. The trade-promotion authority Congress recently gave the President stated that the United States' "principal negotiating objectives" include the discouragement of actions to "boycott, divest from, or sanction Israel," including actions designed to penalize commercial relations with persons doing business in "Israeli-controlled territories." Soon after the enactment of this law, the State Department implied that the executive branch would not honor the provision as it applied to the "occupied territories" in the West Bank, on the ground that the provision "runs counter to longstanding U.S. policy towards the occupied territories, including with regard to settlement activity." The State Department did not reveal the legal basis for this conclusion. But the executive branch could easily have cited *Zivotofsky II* in support of the proposition that it can disregard the provision on the ground either that it intrudes into the President's exclusive power to negotiate, or that it seeks to compel the Executive to negotiate in a manner contrary to his recognition decision related to territorial sovereignty, or both.

Another example grows out of the Obama Administration's release in 2014 of five Taliban soldiers from the Guantánamo Bay detention center in exchange for Bowe Bergdahl, a U.S. soldier detained by the Taliban. In so doing, the Administration disregarded a statute that required thirty days of prior notice to Congress before releasing Guantánamo detainees. The Administration's weak public justifications for ignoring the statute relied on inferences from separation-of-powers decisions that had nothing to do with detention or foreign affairs. The Administration also said, however, that the notice requirement "jeopardize[d] *negotiations* to secure the soldier's release and endanger[ed] the soldier's life." It appeared to believe that the statute burdened the President's exclusive power over diplomacy, a power the executive branch will view to be strengthened by *Zivotofsky II*. It could have made a similar argument had Congress tried to control the content of the President's negotiations with Iran before the conclusion of the deal, or to restrict what the President could say or how he could vote in the United Nations Security Council on the matter. These examples illustrate how easily congressional directives can affect presidential diplomacy and negotiations, which at bottom are mostly forms of speech. In such cases, OLC can look to *Zivotofsky II* to strengthen and broaden the President's claim to exclusive diplomatic powers and to muddy the extent to which Congress can regulate these powers.

Finally, *Zivotofsky II* gives the President new leverage in the rare instances when he wants to oppose an exercise of "legislative diplomacy," the practice of members of Congress in receiving, communicating with, and maintaining contacts with foreign leaders, and travelling abroad to confer with foreign leaders on various topics[.]

3. Military and Intelligence.—*Zivotofsky II* will also prove to be a useful precedent in the military and intelligence contexts [because] of its contemporary affirmation of the relationship between the President's unique functional characteristics and his constitutional power in a decision that [actually] invalidated an act of Congress.

4. Other Doctrinal Innovations.—It is hard to say much concrete about the contexts in which OLC might invoke *Zivotofsky II*'s other doctrinal innovations—its singular analysis of text, structure, precedent, and historical practice—to infer an exclusive presidential power. OLC could read the decision to alter or at least cloud the burden of proof in Category Three cases. Or it could read *Zivotofsky II* to conclude that Congress's necessary and proper power applies sparingly to presidential foreign relations powers. OLC might also be influenced by the Court's analysis of historical practice, and especially its apparent inference of exclusive presidential power from a practice that consisted primarily of congressional silence in the face of the President's assertions of an independent power.

C. Mechanisms of Influence

OLC's interpretations of *Zivotofsky II* will influence executive branch power vis-à-vis Congress through many mechanisms.

OLC records its constitutional objections to bills in Congress that the Office of Management and Budget packages with policy comments and conveys to Congress. White House and other executive officials may use bill comments to pressure Congress to alter a bill. If the executive branch fails to eliminate a constitutionally objectionable provision, the President can veto the bill. Alternatively, he can summarize his constitutional views in a signing statement. [And] of course some signing statements, like the one related to section 214(d), can be accompanied by nonenforcement.

Zivotofsky II's greatest impact will come when OLC uses the decision to inform the President's actual enforcement of the laws. OLC might use *Zivotofsky II* to identify an independent presidential foreign relations power that in turn informs, and expands, a congressional delegation or authorization that the President uses as a basis for action. OLC might use the decision as the basis for a constitutional objection to a statute that, through the canon of avoidance, interprets the statute in a way that avoids a hurdle to executive action. And it might use the decision as a basis for determining that, like the Jerusalem passport law, a statute impinges on an exclusive presidential power and can be disregarded. In all of these contexts, the executive branch's combined powers of interpretation and enforcement outside of judicial review give it enormous leverage in shaping and resolving clashes with Congress.

[There] is a final subtle but important mechanism through which *Zivotofsky II* will influence the expansion of presidential power. It comes when the diplomatic, military, or intelligence stakes are high and OLC's client seeks approval for an action that bumps up against an arguably unconstitutional limitation on presidential power. The reality is that these situations are rarely clear-cut legally, and OLC's decision about where and how to draw the line between permissible and impermissible action involves a great deal of judgment and prudence. Prior to *Zivotofsky II*, a cautious head of the Office (or any other cautious executive branch lawyer) could resist client pressure to disregard a constraining statute in this area on the ground that it had never been done before, and could distinguish the many Supreme Court statements about exclusive presidential foreign relations power as dicta. *Zivotofsky II* diminishes that avenue of restraint[.]

Conclusion

[The] Justices in the *Zivotofsky II* majority appeared to believe that they could arbitrarily limit the opinion's untidy reasoning and otherwise very broad implications with some caveats about the limited scope of the holding and paeans to the breadth of Congress's Article I powers in the field of foreign affairs. This strategy (if it is that) overlooks that the "law" of *Zivotofsky II* will largely be written not by the Court, but by executive branch lawyers who will interpret its pro-executive elements for all they're worth. It is no accident that the three dissenting Justices who characterized *Zivotofsky II* as a "perilous step" or a decision that "will erode the structure of separated powers" all (like Justice Jackson) served previously in roles providing legal advice to the President.

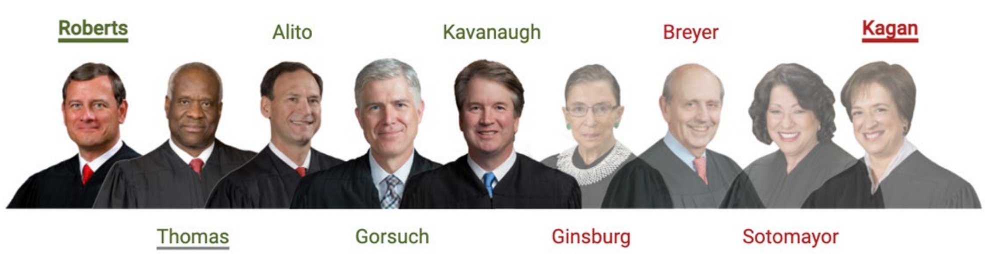
B. Law Execution (35 PAGES)

In the last section, we considered the President's special role as the chief diplomat and, more generally, the possibility that the President has some authority to meet emergencies that Congress may have failed to anticipate. Whatever one makes of those issues, though, there is one job that is clearly at the heart of the President's job description: actually "executing" the laws, in the sense of enforcing them or carrying them into effect. That responsibility is addressed both in Article II, § 1, which vests "[t]he executive power" in the President (the "Vesting Clause"), and in Article II, § 3, which says that "he shall take care that the laws be faithfully executed" (the "Take Care Clause").

How the executive branch carries out federal law is a vast topic, and much of it is covered in courses on administrative law (as well as the "Legislation & Regulation" course). We will focus on two interesting and illustrative issues that have become especially salient in recent years. The first is whether the President's ultimate responsibility for law execution entails a concomitant power to remove subordinate officials with whom he disagrees on policy matters—even when Congress has attempted to grant those officials a measure of independence by making them removable only in more limited circumstances. The second is whether the President's "take care" duty forecloses the Executive Branch from making a considered decision *not* to enforce the law in certain classes of cases—as it has, for example, in adopting "deferred action" policies with respect to certain classes of noncitizens who are not lawfully present in the United States. These questions are distinct, but you'll see that certain themes in the contending conceptions of the President and the President's relationship to Congress recur in both settings.

Seila Law LLC v. Consumer Financial Protection Bureau

140 S. Ct. 2183 (2020)



▪ CHIEF JUSTICE ROBERTS delivered the opinion of the Court with respect to Parts I, II, and III.

In the wake of the 2008 financial crisis, Congress established the Consumer Financial Protection Bureau (CFPB), an independent regulatory agency tasked with ensuring that consumer debt products are safe and transparent. In organizing the CFPB, Congress deviated from the structure of nearly every other independent administrative agency in our history. Instead of placing the agency under the leadership of a board with multiple members, Congress provided that the CFPB would be led by a single Director, who serves for a longer term than the President and cannot be removed by the President except for inefficiency, neglect, or malfeasance. The CFPB Director has no boss, peers, or voters to report to. Yet the Director wields vast rulemaking, enforcement, and adjudicatory authority over a significant portion of the U.S. economy. The question before us is whether this arrangement violates the Constitution's separation of powers.

Under our Constitution, the "executive Power"—all of it—is "vested in a President," who must "take Care that the Laws be faithfully executed." Art. II, § 1, cl. 1; *id.*, § 3. Because no single person could fulfill that responsibility alone, the Framers expected that the President would rely on subordinate officers for assistance. Ten years ago, in *Free Enterprise Fund v. Public Company Accounting Oversight Bd.* (2010), we reiterated that, "as a general matter," the Constitution gives the President "the authority to remove those who assist him in carrying out his duties." "Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else."

The President's power to remove—and thus supervise—those who wield executive power on his behalf follows from the text of Article II, was settled by the First Congress, and was confirmed in the landmark decision *Myers v. United States* (1926). Our precedents have recognized only two exceptions to the President's unrestricted removal power. In *Humphrey's Executor v. United States* (1935), we held that Congress could create expert agencies led by a group of principal officers removable by the President only for good cause. And in *United States v. Perkins* (1886) and *Morrison v. Olson* (1988) we held that Congress could provide tenure protections to certain *inferior* officers with narrowly defined duties.

We are now asked to extend these precedents to a new configuration: an independent agency that wields significant executive power and is run by a single individual who cannot be removed by the President unless certain statutory criteria are met. We decline to take that step. While we need not and do not revisit our prior decisions allowing certain limitations on the President's removal power, there are compelling reasons not to extend those precedents to the novel context of an independent agency led by a single Director. Such an agency lacks a foundation in historical practice and clashes with constitutional structure by concentrating power in a unilateral actor insulated from Presidential control. [The] agency may [continue] to operate, but its Director, in light of our decision, must be removable by the President at will.

I

In the summer of 2007, then-Professor Elizabeth Warren called for the creation of a new, independent federal agency focused on regulating consumer financial products. [Within] months of Professor Warren's writing, the subprime mortgage market collapsed, precipitating a financial crisis that wiped out over $10 trillion in American household wealth. In the aftermath, the Obama administration embraced Professor Warren's recommendation.

[In] 2010, Congress acted on these proposals and created the Consumer Financial Protection Bureau (CFPB) as an independent financial regulator within the Federal Reserve System. Congress tasked the CFPB with "implement[ing]" and "enforc[ing]" a large body of consumer protection laws[.] In addition, Congress enacted a new prohibition on "any unfair, deceptive, or abusive act or practice" by certain participants in the consumer-finance sector. Congress authorized the CFPB to implement that broad standard (and the 18 pre-existing statutes placed under the agency's purview) through binding regulations. Congress also vested the CFPB with potent enforcement powers [and] extensive adjudicatory authority.

[Congress's] design for the CFPB differed from the proposals of Professor Warren and the Obama administration in one critical respect. Rather than create a traditional independent agency headed by a multimember board or commission, Congress elected to place the CFPB under the leadership of a single Director. The CFPB Director is appointed by the President with the advice and consent of the Senate. The Director serves for a term of five years, during which the President may remove the Director from office only for "inefficiency, neglect of duty, or malfeasance in office."

III

[We] hold that the CFPB's leadership by a single individual removable only for inefficiency, neglect, or malfeasance violates the separation of powers.

A

Article II provides that "[t]he executive Power shall be vested in a President," who must "take Care that the Laws be faithfully executed." Art. II, § 1, cl. 1; *id.*, § 3. The entire "executive Power" belongs to the President alone. But because it would be "impossib[le]" for "one man" to "perform all the great business of the State," the Constitution assumes that lesser executive officers will "assist the supreme Magistrate in discharging the duties of his trust." Letter from George Washington to Moustier (May 25, 1789).

These lesser officers must remain accountable to the President, whose authority they wield. As Madison explained, "[I]f any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." That power, in turn, generally includes the ability to remove executive officials, for it is "only the authority that can remove" such officials that they "must fear and, in the performance of [their] functions, obey."

The President's removal power has long been confirmed by history and precedent. It "was discussed extensively in Congress when the first executive departments were created" in 1789. *Free Enterprise Fund*. [The] First Congress's recognition of the President's removal power in 1789 "provides contemporaneous and weighty evidence of the Constitution's meaning," and has long been the "settled and well understood construction of the Constitution."

The Court recognized the President's prerogative to remove executive officials in *Myers v. United States* (1926). Chief Justice Taft, writing for the Court, conducted an exhaustive examination of the First Congress's determination in 1789, the views of the Framers and their contemporaries, historical practice, and our precedents up until that point. He concluded that Article II "grants to the President" the "general administrative control of those executing the laws, including the power of appointment *and removal* of executive officers." Just as the President's "selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible." "[T]o hold otherwise," the Court reasoned, "would make it impossible for the President . . . to take care that the laws be faithfully executed."

We [have since recognized] two exceptions to the President's unrestricted removal power. First, in *Humphrey's Executor*, decided less than a decade after *Myers*, the Court upheld a statute that protected the Commissioners of the [Federal Trade Commission (FTC)] from removal except [for cause]. [In] short, *Humphrey's Executor* permitted Congress to give for-cause removal protections to a multimember body of experts, balanced along partisan lines, that performed [what the Court described as "quasi-judicial" or "quasi-legislative" functions] and was said not to exercise any executive power. [We] have recognized a second exception for *inferior* officers in two cases, *United States* v. *Perkins* and *Morrison* v. *Olson.*[3] In *Perkins*, we upheld tenure protections for a naval cadet-engineer. And, in *Morrison*, we upheld a provision granting good-cause tenure protection to an independent counsel appointed to investigate and prosecute particular alleged crimes by high-ranking Government officials. Backing away from the reliance in *Humphrey's Executor* on the concepts of "quasi-legislative" and

[3] Article II distinguishes between two kinds of officers—principal officers (who must be appointed by the President with the advice and consent of the Senate) and inferior officers (whose appointment Congress may vest in the President, courts, or heads of Departments). § 2, cl. 2. While "[o]ur cases have not set forth an exclusive criterion for distinguishing between principal and inferior officers," we have in the past examined factors such as the nature, scope, and duration of an officer's duties. *Edmond v. United States* (1997). More recently, we have focused on whether the officer's work is "directed and supervised" by a principal officer.

"quasi-judicial" power, we viewed the ultimate question as whether a removal restriction is of "such a nature that [it] impede[s] the President's ability to perform his constitutional duty." [W]e concluded that the removal protections did not unduly interfere with the functioning of the Executive Branch because "the independent counsel [was] an inferior officer . . . with limited jurisdiction and tenure and lacking policymaking or significant administrative authority."

These two exceptions—one for multimember expert agencies that do not wield substantial executive power, and one for inferior officers with limited duties and no policymaking or administrative authority—"represent what up to now have been the outermost constitutional limits of permissible congressional restrictions on the President's removal power."

B

Neither *Humphrey's Executor* nor *Morrison* resolves whether the CFPB Director's insulation from removal is constitutional. [Unlike] the New Deal-era FTC upheld [in *Humphrey's Executor*], the CFPB is led by a single Director who cannot be described as a "body of experts" and cannot be considered "non-partisan" in the same sense as a group of officials drawn from both sides of the aisle. Moreover, [t]he CFPB's single-Director structure and five-year term guarantee abrupt shifts in agency leadership and with it the loss of accumulated expertise. In addition, the CFPB Director is hardly a mere legislative or judicial aid. Instead of making reports and recommendations to Congress, as the 1935 FTC did, the Director possesses the authority to promulgate binding rules fleshing out 19 federal statutes[.] And instead of submitting recommended dispositions to an Article III court, the Director may unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications.

[The] logic of *Morrison* also does not apply. Everyone agrees the CFPB Director is not an inferior officer, and her duties are far from limited. [T]he CFPB Director has the authority to bring the coercive power of the state to bear on millions of private citizens and businesses[.] In light of these differences, the constitutionality of the CFPB Director's insulation from removal cannot be settled by *Humphrey's Executor* or *Morrison* alone.

C

The question instead is whether to extend those precedents to the "new situation" before us, namely an independent agency led by a single Director and vested with significant executive power. We decline to do so.

1

["Perhaps] the most telling indication of [a] severe constitutional problem" with an executive entity "is [a] lack of historical precedent" to support it. *Free Enterprise Fund*. An agency with a structure like that of the CFPB is almost wholly unprecedented.

After years of litigating the agency's constitutionality, the Courts of Appeals, parties, and *amici* have identified "only a handful of isolated" incidents in which Congress has provided good-cause tenure to principal officers who wield power alone rather than as members of a board or commission. "[T]hese few scattered examples"—four to be exact—shed little light.

First, the CFPB's defenders point to the Comptroller of the Currency, who enjoyed removal protection for *one year* during the Civil War. That example has rightly been dismissed as an aberration. It was "adopted without discussion" during the heat of the Civil War and abandoned before it could be "tested by executive or judicial inquiry." (At the time, the Comptroller may also have been an inferior officer, given that he labored "under the general direction of the Secretary of the Treasury.")[5]

Second, the supporters of the CFPB point to the Office of the Special Counsel (OSC), which has been headed by a single officer since 1978. But this first enduring single-leader office, created nearly 200 years after the Constitution was ratified, drew a contemporaneous constitutional objection from the Office of Legal Counsel under President Carter and a subsequent veto on constitutional grounds by President Reagan. In any event, the OSC exercises only limited jurisdiction to enforce certain rules governing Federal Government employers and employees. It does not bind private parties at all or wield regulatory authority comparable to the CFPB.

Third, the CFPB's defenders note that the Social Security Administration (SSA) has been run by a single Administrator since 1994. That example, too, is comparatively recent and controversial. President Clinton questioned the constitutionality of the SSA's new single-Director structure upon signing it into law. In addition, unlike the CFPB, the SSA lacks the authority to bring enforcement actions against private parties. Its role is largely limited to adjudicating claims for Social Security benefits.

The only remaining example is the Federal Housing Finance Agency (FHFA)[.] That agency is essentially a companion of the CFPB, established in response to the same financial crisis. It regulates primarily Government-sponsored enterprises, not purely private actors. And its single-Director structure is a source of ongoing controversy.[*]

[With] the exception of the one-year blip for the Comptroller of the Currency, these isolated examples are modern and contested. And they do not involve regulatory or enforcement authority remotely comparable to that

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[5] The dissent suggests that the Comptroller still enjoyed some degree of insulation after his removal protection was repealed because the President faced a new requirement to "communicate[]" his "reasons" for terminating the Comptroller to the Senate. But the President could still remove the Comptroller for any reason so long as the President was, in the dissent's phrase, "in a firing mood."

[*] [The next year, the Court would rely on *Seila Law* to invalidate the removal restriction for the Director of the FHFA as well. See *Collins v. Yellen*, 141 S. Ct. 1761 (2021).—BE]

exercised by the CFPB. The CFPB's single-Director structure is an innovation with no foothold in history or tradition.[8]

2

In addition to being a historical anomaly, the CFPB's single-Director configuration is incompatible with our constitutional structure. Aside from the sole exception of the Presidency, that structure scrupulously avoids concentrating power in the hands of any single individual.

[To] prevent the "gradual concentration" of power in the same hands, [the Framers] divided the "powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial." [And they] bifurcated the federal legislative power into two Chambers: the House of Representatives and the Senate, each composed of multiple Members and Senators. Art. I, §§ 2, 3.

The Executive Branch is a stark departure from all this division. The Framers viewed the legislative power as a special threat to individual liberty, so they divided that power to ensure that "differences of opinion" and the "jarrings of parties" would "promote deliberation and circumspection" and "check excesses in the majority." See The Federalist No. 70 (A. Hamilton). By contrast, the Framers thought it necessary to secure the authority of the Executive so that he could carry out his unique responsibilities. As Madison put it, while "the weight of the legislative authority requires that it should be . . . divided, the weakness of the executive may require, on the other hand, that it should be fortified." *Id.*, No. 51. [The Framers thus] chose not to bog the Executive down with the "habitual feebleness and dilatoriness" that comes with a "diversity of views and opinions." *Id.*, [No. 70]. Instead, they gave the Executive the "[d]ecision, activity, secrecy, and dispatch" that "characterise the proceedings of one man."

To justify and check *that* authority—unique in our constitutional structure—the Framers made the President the most democratic and politically accountable official in Government. Only the President (along with the Vice President) is elected by the entire Nation. And the President's political accountability is enhanced by the solitary nature of the Executive Branch, which provides "a single object for the jealousy and watchfulness of the people."

[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,

[8] The dissent categorizes the CFPB as one of many "financial regulators" that have historically enjoyed some insulation from the President. But even assuming financial institutions like the Second Bank and the Federal Reserve can claim a special historical status, the CFPB is in an entirely different league. It acts as a mini legislature, prosecutor, and court, responsible for creating substantive rules for a wide swath of industries, prosecuting violations, and levying knee-buckling penalties against private citizens. And, of course, it is the only agency of its kind run by a single Director.

individual executive officials will still wield significant authority, but that authority remains subject to the ongoing supervision and control of the elected President.

[The] CFPB's single-Director structure contravenes this carefully calibrated system by vesting significant governmental power in the hands of a single individual accountable to no one. The Director is neither elected by the people nor meaningfully controlled (through the threat of removal) by someone who is. [Yet] the Director may *unilaterally*, without meaningful supervision, issue final regulations, oversee adjudications, set enforcement priorities, initiate prosecutions, and determine what penalties to impose on private parties. With no colleagues to persuade, and no boss or electorate looking over her shoulder, the Director may dictate and enforce policy for a vital segment of the economy affecting millions of Americans.

The CFPB Director's insulation from removal by an accountable President is enough to render the agency's structure unconstitutional. But several other features of the CFPB combine to make the Director's removal protection even more problematic. In addition to lacking the most direct method of presidential control—removal at will—the agency's unique structure also forecloses certain indirect methods of Presidential control.

Because the CFPB is headed by a single Director with a five-year term, some Presidents may not have any opportunity to shape its leadership and thereby influence its activities. A President elected in 2020 would likely not appoint a CFPB Director until 2023, and a President elected in 2028 may *never* appoint one. That means an unlucky President might get elected on a consumer-protection platform and enter office only to find herself saddled with a holdover Director from a competing political party who is dead set *against* that agenda. To make matters worse, the agency's single-Director structure means the President will not have the opportunity to appoint any other leaders—such as a chair or fellow members of a Commission or Board—who can serve as a check on the Director's authority and help bring the agency in line with the President's preferred policies.

The CFPB's receipt of funds outside the appropriations process further aggravates the agency's threat to Presidential control. [Unlike typical appropriations], the Director receives over $500 million per year [from] the Federal Reserve, which is itself funded outside of the annual appropriations process. This financial freedom makes it even more likely that the agency will "slip from the Executive's control, and thus from that of the people." *Free Enterprise Fund*.

3

[The amicus appointed by the Court to defend the CFPB's constitutionality] raises three principal arguments in the agency's defense. At the outset, *amicus* questions the textual basis for the removal power and highlights statements from Madison, Hamilton, and Chief Justice Marshall expressing "heterodox" views on the subject. But those concerns are misplaced. It is true that "there is no 'removal clause' in the Constitution," but neither is there a "separation of powers clause" or a "federalism clause." These foundational doctrines are instead evident from the Constitution's vesting of certain powers in certain bodies. As we have explained many times before, the President's removal power stems from Article II's vesting of the "executive Power" in the President. *Free Enterprise Fund* (quoting Art. II, § 1, cl. 1). As for the opinions of Madison, Hamilton, and Chief Justice Marshall, we have already considered the statements cited by *amicus* and discounted them in light of their context (Madison), the fact they reflect initial impressions later abandoned by the speaker (Hamilton), or their subsequent rejection as ill-considered dicta (Chief Justice Marshall). See *Free Enterprise Fund* (Madison); *Myers* (Hamilton and Chief Justice Marshall).[10]

Next, *amicus* offers a grand theory of our removal precedents that, if accepted, could leave room for an agency like the CFPB—and many other innovative intrusions on Article II. According to *amicus*, *Humphrey's Executor* and *Morrison* establish a general rule that Congress may impose "modest" restrictions on the President's removal power, with only two limited exceptions. Congress may not reserve a role *for itself* in individual removal decisions (as it attempted to do in *Myers* and *Bowsher*). And it may not eliminate the President's removal power altogether (as it effectively did in *Free Enterprise Fund).* Outside those two situations, *amicus* argues, Congress is generally free to constrain the President's removal power. But text, first principles, the First Congress's decision in 1789, *Myers*, and *Free Enterprise Fund* all establish that the President's removal power is the rule, not the exception.[11]]

[10] The dissent likewise points to Madison's statement in The Federalist No. 39 that the "tenure" of "ministerial offices generally will be a subject of legal regulation." But whatever Madison may have meant by that statement, he later led the charge in contending, on the floor of the First Congress, that "inasmuch as the power of removal is of an Executive nature . . . it is beyond the reach of the Legislative body." 1 Annals of Cong. 464 (1789). [The] dissent further notes that, at the time of the founding, some States placed limitations on their Governors' removal power. But the Framers hardly viewed State Governors as a reliable guide in fashioning the Federal Executive. Indeed, they expressly rejected the "executive council" structure favored by most States, fearing that subjecting the President to oversight, as the States had, would "distract and . . . enervate the whole system of administration" and inject it with "habitual feebleness and dilatoriness." The Federalist No. 70 (A. Hamilton).

[11] Building on *amicus*' proposal, the dissent would endorse whatever "the times demand, so long as the President retains the ability to carry out his constitutional function." But that amorphous test provides no real limiting principle. The "clearest" (and only) "example" the dissent can muster for what may be prohibited is a for-cause removal restriction placed on the President's "close military or diplomatic advisers." But that carveout makes no logical or constitutional sense. In the dissent's view, for-cause removal restrictions are permissible because they guarantee the President "meaningful control" over his subordinates. If that is the theory, then what is the harm in giving the President the same

[The] dissent, for its part, largely reprises points that the Court has already considered and rejected: It notes the lack of an express removal provision, invokes Congress's general power to create and define executive offices, highlights isolated statements from individual Framers, downplays the decision of 1789, minimizes *Myers*, brainstorms methods of Presidential control short of removal, touts the need for creative congressional responses to technological and economic change, and celebrates a pragmatic, flexible approach to American governance.

If these arguments sound familiar, it's because they are. They were raised by the dissent in *Free Enterprise Fund*. The answers to these repeated concerns (beyond those we have already covered) are the same today as they were ten years ago. Today, as then, Congress's "plenary control over the salary, duties, and even existence of executive offices" makes "Presidential oversight" *more* critical—not less—as the "[o]nly" tool to "counter [Congress's] influence." Today, as then, the various "bureaucratic minutiae" a President might use to corral agency personnel is no substitute for at will removal. And today, as always, the urge to meet new technological and societal problems with novel governmental structures must be tempered by constitutional restraints that are not known—and were not chosen—for their efficiency or flexibility.

▪ JUSTICE KAGAN, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR join, concurring in the judgment with respect to severability and dissenting in part.

Throughout the Nation's history, this Court has left most decisions about how to structure the Executive Branch to Congress and the President, acting through legislation they both agree to. In particular, the Court has commonly allowed those two branches to create zones of administrative independence by limiting the President's power to remove agency heads. The Federal Reserve Board. The Federal Trade Commission (FTC). The National Labor Relations Board. Statute after statute establishing such entities instructs the President that he may not discharge their directors except for cause—most often phrased as inefficiency, neglect of duty, or malfeasance in office. Those statutes, whose language the Court has repeatedly approved, provide the model for the removal restriction before us today. If

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"meaningful control" over his close advisers? The dissent claims to see a constitutional distinction between the President's "own constitutional duties in foreign relations and war" and his duty to execute laws passed by Congress. But the same Article that establishes the President's foreign relations and war duties expressly entrusts him to take care that the laws be faithfully executed. And, from the perspective of the governed, it is far from clear that the President's core and traditional powers present greater cause for concern than peripheral and modern ones. If anything, "[t]he 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." *Free Enterprise Fund* (emphasis added).

precedent were any guide, that provision would have survived its encounter with this Court—and so would the intended independence of the [CFPB].

Our Constitution and history demand that result. The text of the Constitution allows these common for-cause removal limits. Nothing in it speaks of removal. And it grants Congress authority to organize all the institutions of American governance, provided only that those arrangements allow the President to perform his own constitutionally assigned duties. [Not] every innovation in governance—not every experiment in administrative independence—has proved successful. And debates about the prudence of limiting the President's control over regulatory agencies, including through his removal power, have never abated. But the Constitution—both as originally drafted and as practiced—mostly leaves disagreements about administrative structure to Congress and the President, who have the knowledge and experience needed to address them. Within broad bounds, it keeps the courts—who do not—out of the picture.

The Court today fails to respect its proper role. It recognizes that this Court has approved limits on the President's removal power over heads of agencies much like the CFPB. Agencies possessing similar powers, agencies charged with similar missions, agencies created for similar reasons. The majority's explanation is that the heads of those agencies fall within an "exception"—one for multimember bodies and another for inferior officers—to a "general rule" of unrestricted presidential removal power. And the majority says the CFPB Director does not. That account, though, is wrong in every respect. The majority's general rule does not exist. Its exceptions, likewise, are made up for the occasion—gerrymandered so the CFPB falls outside them. And the distinction doing most of the majority's work—between multimember bodies and single directors—does not respond to the constitutional values at stake. If a removal provision violates the separation of powers, it is because the measure so deprives the President of control over an official as to impede his own constitutional functions. But with or without a for-cause removal provision, the President has at least as much control over an individual as over a commission—and possibly more. That means the constitutional concern is, if anything, ameliorated when the agency has a single head.

[In] second-guessing the political branches, the majority [commits] the Nation to a static version of governance, incapable of responding to new conditions and challenges. Congress and the President established the CFPB to address financial practices that had brought on a devastating recession, and could do so again. Today's decision wipes out a feature of that agency its creators thought fundamental to its mission—a measure of independence from political pressure. I respectfully dissent.

I.

The text of the Constitution, the history of the country, the precedents of this Court, and the need for sound and adaptable governance—all stand against the majority's opinion. They point not to the majority's "general rule" of "unrestricted removal power" with two grudgingly applied "exceptions." Rather, they bestow discretion on the legislature to structure administrative institutions as the times demand, so long as the President retains the ability to carry out his constitutional duties. And most relevant here, they give Congress wide leeway to limit the President's removal power in the interest of enhancing independence from politics in regulatory bodies like the CFPB.

A.

What does the Constitution say about the separation of powers—and particularly about the President's removal authority? (Spoiler alert: about the latter, nothing at all.)

[It] is of course true that the Framers lodged three different kinds of power in three different entities. [The] problem lies in [failing] to recognize that the separation of powers is, by design, neither rigid nor complete. [To] the contrary, Madison explained, the drafters of the Constitution [opted] against keeping the branches of government "absolutely separate and distinct." The Federalist No. 47.

[One] way the Constitution reflects that vision is by giving Congress broad authority to establish and organize the Executive Branch. Article II presumes the existence of "Officer[s]" in "executive Departments." § 2, cl. 1. But it does not, as you might think from reading the majority opinion, give the President authority to decide what kinds of officers—in what departments, with what responsibilities—the Executive Branch requires. Instead, Article I's Necessary and Proper Clause puts those decisions in the legislature's hands. Congress has the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution" not just its own enumerated powers but also "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." § 8, cl. 18. Similarly, the Appointments Clause reflects Congress's central role in structuring the Executive Branch. Yes, the President can appoint principal officers, but only as the legislature "shall ... establish[] by Law" (and of course subject to the Senate's advice and consent). Art. II, § 2, cl. 2. And Congress has plenary power to decide not only what inferior officers will exist but also who (the President or a head of department) will appoint them. So as Madison told the first Congress, the legislature gets to "create[] the office, define[] the powers, [and] limit[] its duration." The President, as to the construction of his own branch of government, can only try to work his will through the legislative process.[3]

The majority relies for its contrary vision on Article II's Vesting Clause, but the provision can't carry all that weight. [Dean] John Manning has well explained why, even were it not obvious from the Clause's "open-ended language." Separation of Powers as Ordinary Interpretation, 124 Harv. L. Rev. 1939, 1971 (2011). The Necessary and Proper Clause, he writes, makes it impossible to "establish a constitutional violation simply by showing that Congress has constrained the way '[t]he executive Power' is implemented"; that is exactly what the Clause gives Congress the power to do. Only "a *specific* historical understanding" can bar Congress from enacting a given constraint. And nothing of that sort broadly prevents Congress from limiting the President's removal power. I'll turn soon to the Decision of 1789 and other evidence of Post-Convention thought. For now, note two points about practice before the Constitution's drafting. First, in that era, Parliament often restricted the King's power to remove royal officers—and the President, needless to say, wasn't supposed to be a king. Second, many States at the time allowed limits on gubernatorial removal power even though their constitutions had similar vesting clauses. Historical understandings thus belie the majority's "general rule."

Nor can the Take Care Clause come to the majority's rescue. That Clause cannot properly serve as a "placeholder for broad judicial judgments" about presidential control. To begin with, the provision—"he shall take Care that the Laws be faithfully executed"—speaks of duty, not power. Art. II, § 3. [To] be sure, the imposition of a duty may imply a grant of power sufficient to carry it out. But again, the majority's view of that power ill comports with founding-era practice, in which removal limits were common. [M]ore important, the text of the Take Care Clause requires only enough authority to make sure "the laws [are] faithfully executed"—meaning with fidelity to the law itself, not to every presidential policy preference. [A] President can ensure "'faithful execution' of the laws"—thereby satisfying his "take care" obligation—with a removal provision like the one here. A for-cause standard gives him "ample authority to assure that [an official] is competently performing [his] statutory responsibilities in a manner that comports with the [relevant legislation's] provisions." *Morrison*.

Finally, recall the Constitution's telltale silence: Nowhere does the text say anything about the President's power to remove subordinate officials at

[3] Article II's Opinions Clause also demonstrates the possibility of limits on the President's control over the Executive Branch. Under that Clause, the President "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." § 2, cl. 1. For those in the majority's camp, that Clause presents a puzzle: If the President must always have the direct supervisory control they posit, including by threat of removal, why would he ever need a constitutional warrant to demand agency heads' opinions? The Clause becomes at least redundant—though really, inexplicable—under the majority's idea of executive power.

will. The majority professes unconcern. After all, it says, "neither is there a 'separation of powers clause' or a 'federalism clause.'" But those concepts are carved into the Constitution's text—the former in its first three articles separating powers, the latter in its enumeration of federal powers and its reservation of all else to the States. And anyway, at-will removal is hardly such a "foundational doctrine[],"[because] removal is a *tool*—one means among many, even if sometimes an important one, for a President to control executive officials. To find that authority hidden in the Constitution as a "general rule" is to discover what is nowhere there.

B.

History no better serves the majority's cause. [The majority] assert[s] that its muscular view of "[t]he President's removal power has long been confirmed by history." But that is not so.

1.

Begin with evidence from the Constitution's ratification. And note that this moment is indeed the beginning: Delegates to the Constitutional Convention never discussed whether or to what extent the President would have power to remove executive officials. As a result, the Framers advocating ratification had no single view of the matter. In Federalist No. 77, Hamilton presumed that under the new Constitution "[t]he consent of [the Senate] would be necessary to displace as well as to appoint" officers of the United States. [By] contrast, Madison thought the Constitution allowed Congress to decide how any executive official could be removed. Neither view, of course, at all supports the majority's story.[4]

The second chapter is the Decision of 1789, when Congress addressed the removal power while considering the bill creating the Department of Foreign Affairs. Speaking through Chief Justice Taft—a judicial presidentialist if ever there was one—this Court in *Myers v. United States* (1926) read that debate as expressing Congress's judgment that the Constitution gave the President illimitable power to remove executive officials. The majority rests its own historical claim on that analysis (though somehow also finding room for its two exceptions). But Taft's historical research has held up even worse than *Myers*' holding (which was mostly reversed).

[The] best view is that the First Congress was "deeply divided" on the President's removal power, and "never squarely addressed" the central issue here. [Manning, 124 Harv. L. Rev.], at 1965, n. 135. The congressional

[4] The majority dismisses Federalist Nos. 77 and 39 as "reflect[ing] initial impressions later abandoned." But even Hamilton's and Madison's later impressions are less helpful to the majority than it suggests. Assuming Hamilton gave up on the Senate's direct participation in removal (the evidence is sketchy but plausible), there is no evidence to show he accepted the majority's view. And while Madison opposed the first Congress's enactment of removal limits (as the majority highlights), he also maintained that the legislature had constitutional power to protect the Comptroller of the Treasury from at-will firing. In any event, such changing minds and inconstant opinions don't usually prove the existence of constitutional rules.

debates revealed three main positions. Some shared Hamilton's Federalist No. 77 view: The Constitution required Senate consent for removal. At the opposite extreme, others claimed that the Constitution gave absolute removal power to the President. And a third faction maintained that the Constitution placed Congress in the driver's seat: The legislature could regulate, if it so chose, the President's authority to remove. In the end, Congress passed a bill saying nothing about removal, leaving the President free to fire the Secretary of Foreign Affairs at will. But the only one of the three views definitively rejected was Hamilton's theory of necessary Senate consent. As even strong proponents of executive power have shown, Congress never "endorse[d] the view that [it] lacked authority to modify" the President's removal authority when it wished to.

[At] the same time, the First Congress gave officials handling financial affairs—as compared to diplomatic and military ones—some independence from the President. [Congress] left the organization of the Departments of Foreign Affairs and War skeletal, enabling the President to decide how he wanted to staff them. By contrast, Congress listed each of the offices within the Treasury Department, along with their functions. Of the three initial Secretaries, only the Treasury's had an obligation to report to Congress when requested. And perhaps most notable, Congress soon deemed the Comptroller of the Treasury's settlements of public accounts "final and conclusive." That decision, preventing presidential overrides, marked the Comptroller as exercising independent judgment. True enough, no statute shielded the Comptroller from discharge. But even James Madison, who at this point opposed most removal limits, told Congress that "there may be strong reasons why an officer of this kind should not hold his office at the pleasure" of the Secretary or President.

[Contrary] to the majority's view, then, the founding era closed without any agreement that Congress lacked the power to curb the President's removal authority. And as it kept that question open, Congress took the first steps—which would launch a tradition—of distinguishing financial regulators from diplomatic and military officers. The latter mainly helped the President carry out his own constitutional duties in foreign relations and war. The former chiefly carried out statutory duties, fulfilling functions Congress had assigned to their offices. In addressing the new Nation's finances, Congress had begun to use its powers under the Necessary and Proper Clause to design effective administrative institutions. And that included taking steps to insulate certain officers from political influence.

2.

As the decades and centuries passed, those efforts picked up steam. Confronting new economic, technological, and social conditions, Congress—and often the President—saw new needs for pockets of independence within the federal bureaucracy. And that was especially so, again, when it came to financial regulation. [Enacted] under the Necessary and Proper Clause, those [financial regulation] measures—creating some of the Nation's most enduring institutions—themselves helped settle the extent of Congress's power.

[Take] first Congress's decision in 1816 to create the Second Bank of the United States—"the first truly independent agency in the republic's history." Lessig & Sunstein, The President and the Administration, 94 Colum. L. Rev. 1, 30 (1994). Of the twenty-five directors who led the Bank, the President could appoint and remove only five. Yet the Bank had a greater impact on the Nation than any but a few institutions. [Thus,] by the early 19th century, Congress established a body wielding enormous financial power mostly outside the President's dominion.

The Civil War brought yet further encroachments on presidential control over financial regulators. In response to wartime economic pressures, President Lincoln (not known for his modest view of executive power) asked Congress to establish an office called the Comptroller of the Currency. The statute he signed made the Comptroller removable only with the Senate's consent[.] A year later, Congress amended the statute to permit removal by the President alone, but only upon "reasons to be communicated by him to the Senate." The majority dismisses the original version of the statute as an "aberration." But in the wake of the independence given first to the Comptroller of the Treasury and then to the national Bank, it's hard to conceive of this newest Comptroller position as so great a departure. And even the second iteration of the statute preserved a constraint on the removal power, requiring a President in a firing mood to explain himself to Congress—a demand likely to make him sleep on the subject.

[And] then, nearly a century and a half ago, the floodgates opened. In 1887, the growing power of the railroads over the American economy led Congress to create the Interstate Commerce Commission. Under that legislation, the President could remove the five Commissioners only "for inefficiency, neglect of duty, or malfeasance in office"—the same standard Congress applied to the CFPB Director. More—many more—for-cause removal provisions followed. [Examples included the Federal Reserve Board, the FTC, the Federal Deposit Insurance Corporation (FDIC), the Securities and Exchange Commission (SEC), and the Commodity Futures Trading Commission.] By one count, across all subject matter areas, 48 agencies have heads (and below them hundreds more inferior officials) removable only for cause. So year by year by year, the broad sweep of history has spoken to the constitutional question before us[.]

C.

What is more, the Court's precedents before today have accepted the role of independent agencies in our governmental system. To be sure, the line of our decisions has not run altogether straight. But we have repeatedly upheld provisions that prevent the President from firing regulatory officials except for such matters as neglect or malfeasance. In those decisions, we sounded a caution, insisting that Congress could not impede through removal restrictions the President's performance of his own constitutional duties. (So, to take the clearest example, Congress could not curb the President's power to remove his close military or diplomatic advisers.) But within that broad limit, this Court held, Congress could protect from at-will removal the officials it deemed to need some independence from political pressures. Nowhere do those precedents suggest what the majority announces today: that the President has an "unrestricted removal power" subject to two bounded exceptions.

The majority grounds its new approach in *Myers*, ignoring the way this Court has cabined that decision. [Later] decisions read *Myers* as standing for the principle that Congress's own "participation in the removal of executive officers is unconstitutional." *Bowsher*. [Moreover,] *Humphrey's Executor* found constitutional a statute identical to the one here[.] The *Humphrey's* Court, as the majority notes, relied in substantial part on what kind of work the Commissioners performed. [But] *Morrison* both extended *Humphrey's* domain and clarified the standard for addressing removal issues.

The *Morrison* Court, over a one-Justice dissent, upheld for-cause protections afforded to an independent counsel with power to investigate and prosecute crimes committed by high-ranking officials. The Court well understood that those law enforcement functions differed from the rulemaking and adjudicatory duties highlighted in *Humphrey's*[.] But that difference did not resolve the issue. An official's functions, *Morrison* held, were relevant to but not dispositive of a removal limit's constitutionality. The key question in all the cases, *Morrison* saw, was whether such a restriction would "impede the President's ability to perform his constitutional duty." Only if it did so would it fall outside Congress's power. And the protection for the independent counsel, the Court found, did not. True enough, the Court acknowledged, that the for-cause standard prevented the President from firing the counsel for discretionary decisions or judgment calls. But it preserved "ample authority" in the President "to assure that the counsel is competently performing" her "responsibilities in a manner that comports with" all legal requirements. That meant the President could meet his own constitutional obligation "to ensure 'the faithful execution' of the laws." *Ibid.*[9]

[9] Pretending this analysis is mine rather than *Morrison*'s, the majority registers its disagreement. In its view, a test asking whether a for-cause provision impedes the President's ability to carry out his constitutional functions has "no real limiting principle." If the provision leaves the President with constitutionally sufficient control over some subordinates (like the independent counsel), the majority asks, why not over even his close military or diplomatic advisers? But the Constitution itself supplies the answer. If the only presidential duty at issue is the one to ensure faithful execution of the laws, a for-cause provision does not stand in the way: As *Morrison* recognized, it preserves authority in the President to ensure (just as the Take Care Clause requires) that an official is abiding by law. But now suppose an additional constitutional duty is implicated—relating, say, to the conduct of foreign affairs or war. To carry out those duties, the President needs advisers who will (beyond complying with law) help him devise and implement policy. And that means he needs the capacity to fire such advisers for disagreeing with his policy calls.

D.

[The] deferential approach this Court has taken gives Congress the flexibility it needs to craft administrative agencies. Diverse problems of government demand diverse solutions. They call for varied measures and mixtures of democratic accountability and technical expertise, energy and efficiency. Sometimes, the arguments push toward tight presidential control of agencies. [At] other times, the arguments favor greater independence from presidential involvement. [Of] course, the right balance between presidential control and independence is often uncertain, contested, and value-laden. But that is precisely why the issue is one for the political branches to debate—and then debate again as times change. And it's why courts should stay (mostly) out of the way. Rather than impose rigid rules like the majority's, they should let Congress and the President figure out what blend of independence and political control will best enable an agency to perform its intended functions.

[This Court has usually] declined to second-guess the work of the political branches in creating independent agencies like the CFPB. In reversing course today—in spurning a "pragmatic, flexible approach to American governance" in favor of a dogmatic, inflexible one—the majority makes a serious error.

II.

A.

[This] Court, as the majority acknowledges, has sustained the constitutionality of the FTC and similar independent agencies. [There] is nothing different here. The CFPB wields the same kind of power as the FTC and similar agencies [now do]. And all of their heads receive the same kind of removal protection. No less than those other entities—by now part of the fabric of government—the CFPB is thus a permissible exercise of Congress's power under the Necessary and Proper Clause to structure administration.

First, the CFPB's powers are nothing unusual in the universe of independent agencies. The CFPB, as the majority notes, can issue regulations, conduct its own adjudications, and bring civil enforcement actions in court—all backed by the threat of penalties. But then again, so too can (among others) the FTC and SEC, two agencies whose regulatory missions parallel the CFPB's. [And] if influence on economic life is the measure, consider the Federal Reserve, whose every act has global consequence. The CFPB, gauged by that comparison, is a piker.

Second, the removal protection given the CFPB's Director is standard fare. The removal power rests with the President alone; Congress has no role to play, as it did in the laws struck down in *Myers* and *Bowsher*. [T]he for-cause standard gives the President "ample authority to assure that [the official] is competently performing his or her statutory responsibilities in a manner that comports with" all legal obligations. *Morrison*. In other words—and contra today's majority—the President's removal power, though not absolute, gives him the "meaningful[] control[]" of the Director that the Constitution requires.

The analysis is as simple as simple can be. The CFPB Director exercises the same powers, and receives the same removal protections, as the heads of other, constitutionally permissible independent agencies. How could it be that this opinion is a dissent?

B.

The majority focuses on one (it says sufficient) reason: The CFPB Director is singular, not plural.[11] And a solo CFPB Director does not fit within either of the majority's supposed exceptions. He is not an inferior officer, so (the majority says) *Morrison* does not apply; and he is not a multimember board, so (the majority says) neither does *Humphrey's*. Further, the majority argues, "[a]n agency with a [unitary] structure like that of the CFPB" is "novel"—or, if not quite that, "almost wholly unprecedented." Finally, the CFPB's organizational form violates the "constitutional structure" because it vests power in a "single individual" who is "insulated from Presidential control."

I'm tempted at this point just to say: No. All I've explained about constitutional text, history, and precedent invalidates the majority's thesis. But I'll set out here some more targeted points, taking step by step the majority's reasoning.

First, [the] majority's "exceptions" (like its general rule) are made up. [T]he idea that *Morrison* is in a separate box from this case doesn't hold up.[12] Similarly, *Humphrey's* and later precedents give no support to the majority's view that the number of people at the apex of an agency matters to the constitutional issue. Those opinions mention the "groupness" of the agency head only in their background sections. The majority picks out that until-

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[11] The majority briefly mentions, but understandably does not rely on, two other features of Congress's scheme. First, the majority notes that the CFPB receives its funding outside the normal appropriations process. But so too do other financial regulators, including the Federal Reserve Board and the FDIC. And budgetary independence comes mostly at the expense of Congress's control over the agency, not the President's. Second, the majority complains that the Director's five-year term may prevent a President from "shap[ing the agency's] leadership" through appointments. But again that is true, to one degree or another, of quite a few longstanding independent agencies, including the Federal Reserve, the FTC, the Merit Systems Protection Board, and the Postal Service Board of Governors.

[12] The majority, seeking some [way] to distinguish *Morrison*, asserts that the independent counsel's "duties" were more "limited" than the CFPB Director's. That's true in a sense: All (all?) the special counsel had to do was decide whether the President and his top advisers had broken the law. But I doubt (and I suspect Presidents would too) whether the need to control those duties was any less "central to the functioning of the Executive Branch" than the need to control the CFPB's. *Morrison*. And in any event, as I've shown, Morrison did much more than approve a specific removal provision; it created a standard to govern all removal cases that is at complete odds with the majority's reasoning.

now-irrelevant fact to distinguish the CFPB, and constructs around it an until-now-unheard-of exception. So if the majority really wants to see something "novel," it need only look to its opinion.

By contrast, the CFPB's single-director structure has a fair bit of precedent behind it. The Comptroller of the Currency. The Office of the Special Counsel (OSC). The Social Security Administration (SSA). The Federal Housing Finance Agency (FHFA). [I've] already explained why the earliest of those agencies—the Civil-War-era Comptroller—is not the blip the majority describes. The office is one in a long line, starting with the founding-era Comptroller of the Treasury (also one person), of financial regulators designed to do their jobs with some independence. As for the other three, the majority objects: too powerless and too contested. I think not. On power, the SSA runs the Nation's largest government program[;] the FHFA plays a crucial role in overseeing the mortgage market[;] and the OSC prosecutes misconduct in the two-million-person federal workforce. All different from the CFPB, no doubt; but the majority can't think those matters beneath a President's notice. [And] controversial? Well, yes, they are. Almost *all* independent agencies are controversial, no matter how many directors they have. [That's] because whatever might be said in their favor, those agencies divest the President of some removal power. If signing statements and veto threats made independent agencies unconstitutional, quite a few wouldn't pass muster. Maybe that's what the majority really wants (I wouldn't know)—but it can't pretend the disputes surrounding these agencies had anything to do with whether their heads are singular or plural.

Still more important, novelty is not the test of constitutionality when it comes to structuring agencies. Congress regulates in that sphere under the Necessary and Proper Clause, not (as the majority seems to think) a Rinse and Repeat Clause. The Framers understood that new times would often require new measures, and exigencies often demand innovation. In line with that belief, the history of the administrative sphere—its rules, its practices, its institutions—is replete with experiment and change. Indeed, each of the agencies the majority says now fits within its "exceptions" was once new[.] So even if the CFPB differs from its forebears in having a single director, that departure is not itself "telling" of a "constitutional problem." In deciding what *this* moment demanded, Congress had no obligation to make a carbon copy of a design from a bygone era.

And Congress's choice to put a single director, rather than a multimember commission, at the CFPB's head violates no principle of separation of powers. [T]o make sense on the majority's own terms, the distinction between singular and plural agency heads must rest on a theory about why the former more easily "slip" from the President's grasp. But the majority has nothing to offer. In fact, the opposite is more likely to be true: To the extent that such matters are measurable, individuals are easier than groups to supervise.

To begin with, trying to generalize about these matters is something of a fool's errand. Presidential control, as noted earlier, can operate through many means—removal to be sure, but also appointments, oversight devices (*e.g.,* centralized review of rulemaking or litigating positions), budgetary processes, personal outreach, and more. The effectiveness of each of those control mechanisms, when present, can then depend on a multitude of agency-specific practices, norms, rules, and organizational features. In that complex stew, the difference between a singular and plural agency head will often make not a whit of difference. [Indeed,] the very category of multimember commissions breaks apart under inspection, spoiling the majority's essential dichotomy. Some of those commissions have chairs appointed by the President; others do not. Some of those chairs are quite powerful; others are not. Partisan balance requirements, term length, voting rules, and more—all vary widely, in ways that make a significant difference to the ease of presidential control. Why, then, would anyone distinguish along a simple commission/single-director axis when deciding whether the Constitution requires at-will removal?

But if the demand is for generalization, then the majority's distinction cuts the opposite way: More powerful control mechanisms are needed (if anything) for commissions. [A] multimember structure reduces accountability to the President because it's harder for him to oversee, to influence—or to remove, if necessary—a group of five or more commissioners than a single director. Indeed, that is *why* Congress so often resorts to hydra-headed agencies. "[M]ultiple membership," an influential Senate Report concluded, is "a buffer against Presidential control" (especially when combined, as it often is, with partisan-balance requirements). [It] is hard to know why Congress did not take the same tack when creating the CFPB. But its choice brought the agency only closer to the President—more exposed to his view, more subject to his sway. In short, the majority gets the matter backward: Where presidential control is the object, better to have one than many.

Because it has no answer on that score, the majority slides to a different question: Assuming presidential control of any independent agency is vanishingly slim, is a single-head or a multi-head agency more capable of exercising power, and so of endangering liberty? The majority says a single head is the greater threat because he may wield power "*unilaterally*" and "[w]ith no colleagues to persuade[]." So the CFPB falls victim to what the majority sees as a constitutional anti-power-concentration principle (with an exception for the President).

If you've never heard of a statute being struck down on that ground, you're not alone. It is bad enough to "extrapolat[e]" from the "general constitutional language" of Article II's Vesting Clause an unrestricted removal power constraining Congress's ability to legislate under the Necessary and Proper Clause. *Morrison.* It is still worse to extrapolate from the Constitution's general structure (division of powers) and implicit values (liberty) a limit on Congress's express power to create administrative bodies. And more: to extrapolate from such sources a distinction as prosaic as that between the SEC and the CFPB—*i.e.,* between a multiheaded and single-headed agency.

[And] in doing so, the majority again reveals its lack of interest in how agencies work. First, the premise of the majority's argument—that the CFPB head is a mini-dictator, not subject to meaningful presidential control—is wrong. As this Court has seen in the past, independent agencies are not fully independent. A for-cause removal provision, as noted earlier, leaves "ample" control over agency heads in the hands of the President. [H]e can use the many other tools attached to the Office of the Presidency—including in the CFPB's case, rulemaking review—to exert influence over discretionary policy calls. Second, the majority has nothing but intuition to back up its essentially functionalist claim that the CFPB would be less capable of exercising power if it had more than one Director. [That] effect presumably would depend on the agency's internal organization, voting rules, and similar matters. At the least: If the Court is going to invalidate statutes based on empirical assertions like this one, it should offer some empirical support. It should not pretend that its assessment that the CFPB wields more power more dangerously than the SEC comes from someplace in the Constitution. But today the majority fails to accord even that minimal respect to Congress.

III

[In] the midst of the Great Recession, Congress and the President came together to create an agency with an important mission. [Not] only Congress but also the President thought that the new agency, to fulfill its mandate, needed a measure of independence. So the two political branches, acting together, gave the CFPB Director the same job protection that innumerable other agency heads possess. All in all, those branches must have thought, they had done a good day's work. Relying on their experience and knowledge of administration, they had built an agency in the way best suited to carry out its functions. [They] had governed.

And now consider how the dispute ends—with five unelected judges rejecting the result of that democratic process. [The majority] jettisons a measure Congress and the President viewed as integral to the way the agency should operate [even] though the Constitution grants to Congress, acting with the President's approval, the authority to create and shape administrative bodies.

[The] Framers took pains to craft a document that would allow the structures of governance to change, as times and needs change. [Our] history has stayed true to the Framers' vision. Congress has accepted their invitation to experiment with administrative forms[.] And this Court has mostly allowed it to do so. The result is a broad array of independent agencies[.] As to each, Congress thought that formal job protection for policymaking would produce regulatory outcomes in greater accord with the long-term public interest. Congress may have been right; or it may have been wrong; or maybe it was some of both. No matter—the branches accountable to the people have decided how the people should be governed.

The CFPB should have joined the ranks. [There] was no need to send Congress back to the drawing board. The Constitution does not distinguish between single-director and multimember independent agencies. It instructs Congress, not this Court, to decide on agency design.

"Lack of Historical Precedent" as a Constitutional Objection

In *Seila Law*, Chief Justice Roberts posited that "perhaps the most telling indication of a severe constitutional problem with an executive entity is a lack of historical precedent to support it" (*supra*, p. III-62).[*] This is a twist on the familiar appeal to settled practice: Rather than taking a long history to weigh in favor of the constitutionality of some arrangement, the Court is taking the *lack* of a historical precedent as either constituting a constitutional problem in its own right, or at least as highly suggestive evidence of some constitutional problem. As you saw, Justice Kagan criticized this approach as inconsistent with the Necessary and Proper Clause. But setting that criticism aside**,** what would justify this sort of "antinovelty"[†] doctrine in the first place? And if the Court is going to apply it, what should it take to constitute the relevant sort of "novelty"?

The difficulty of these questions, and the Court's ongoing uncertainty about them, are nicely illustrated by a more recent challenge to the CFPB. To make a long story short, Congress has opted to fund the CFPB, not with annual appropriations, but by directing the Federal Reserve (of which the CFPB is formally a part) to make available whatever funds the CFPB Director determines to be necessary for the bureau to do its work, up to a statutory cap. (The Federal Reserve is also not funded by annual appropriations; its operations are financed mainly by interest on securities it owns.) In *Community Financial Services Association v. CFPB*, 514 F.4th 174 (5th Cir. 2022), the Fifth Circuit ruled that this statutory scheme for funding the CFPB violated the Appropriations Clause of the Constitution, which provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Art. I, § 9, cl. 7. That was the first time a statute had ever been held to violate the Appropriations Clause, because the clause has generally been understood to *empower* Congress—by ensuring that no money is spent without its permission—rather than to put *limits* on how Congress may authorize spending.

When the Supreme Court heard oral argument in the case in October 2023, the question of whether or in what sense the CFPB's funding structure

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[*] This line traces to *Free Enterprise Fund*, an earlier separation-of-powers case, where Roberts was quoting a dissent by then-Judge Kavanaugh from the decision below. We also saw Roberts quote the same line, in another form, in discussing the individual mandate provision in *NFIB v. Sebelius* (*supra*, p. II-79).

[†] Leah Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407 (2017).

is "novel" or "unprecedented" loomed large. The Court's questions and Solicitor General Prelogar's answers offer a window into the state of that debate:

> CHIEF JUSTICE ROBERTS: Well, it's pretty unusual to have [an] agency being able to request however much it wants, subject to a limit that it really hasn't gotten very close to over the years, from an entity that is also drawing money from the private sector. I didn't see any particularly compelling historical analogues to that.
>
> . . .
>
> GENERAL PRELOGAR: So I disagree that there is anything unprecedented about this funding arrangement when you look at the relevant constitutional value of protecting Congress's prerogatives.
>
> [They] are attacking four features of the funding statute: the fact that it's [not] time-limited; that it gives the director of the CFPB some discretion to act within the statutory cap[;] third, that the CFPB has enforcement and regulatory functions; and, fourth, as your question touched on, that the CFPB's funding comes from a source that's not, in their words, 'constrained by market forces.'
>
> But we have numerous examples of agencies that have all four of those relevant characteristics. [The] Customs Service and the revenue officers were funded with that kind of mechanism. They had standing appropriations. For the Customs Service, it was uncapped. These were powerful regulatory entities. The Customs Service could board ships and seize vessels [and] levy penalties[,] and there was no way to avoid that kind of regulation. So the 'market constraint' theory that the users could just opt out or regulated parties could decide not to fund the operations doesn't apply to those agencies. And it's still the case with many of the financial regulators today. …
>
> …
>
> JUSTICE ALITO: This is a matter of seeing whether the setup that we have before us is consistent with Congress's historical practices. Is that right?
>
> . . .
>
> JUSTICE ALITO: Is that the test? Is it the test?
>
> GENERAL PRELOGAR: I think that the test in this context, as in most separation of powers cases, is, yes, text and history. And here again, [we] have an unbroken line of history. There have been agencies funded this way for every year of this nation's history.

> . . .
>
> JUSTICE ALITO: What is your best example of an agency that draws its money from another agency that, in turn, does not get its money from a congressional appropriation in the normal sense of that term but gets it from the private sector?
>
> GENERAL PRELOGAR: So I — I can't give you another example of a source that's precisely like that one, but I would dispute the premise that that could possibly be constitutionally relevant. This is a case about Congress's own prerogatives over the purse, its authority. And if Congress has given away too much of its authority by not providing for a durational limit or [providing] too much discretion to the agency, then I don't see how it could possibly fix the problem that other fee-funded agencies directly collect their money from the entities they regulate.
>
> JUSTICE ALITO: So I take it your answer is that you do not — that [it] is not consistent with any historical practice, but you think that to the extent it is unprecedented, it is unprecedented in a way that is not relevant for present purposes? Is that your answer?
>
> GENERAL PRELOGAR: Yes, primarily. I think it would be unprecedented in the way that you could say this is the only agency that has the acronym "CFPB." That's obviously true also, but it doesn't track the constitutional value.
>
> …
>
> JUSTICE JACKSON: I mean, I appreciate all of your historical analysis and all the things that you're saying, and all of that may well be so, but I guess I don't understand, like, what if we found that it wasn't necessarily, you know, set up in this way [before]? Does that on its own establish that Congress couldn't exercise its prerogative?
>
> GENERAL PRELOGAR: I don't think it necessarily would, and especially it wouldn't if one of the points of novelty was something that had nothing to do with aggravating any potential separation of powers issue. And this relates back to what I was saying to Justice Alito, that maybe you can come up with distinctions, but they're not materially relevant to the question before the Court. Instead, I think, if there were truly some kind of unprecedented funding scheme, you'd have to ask: How does it differ and why does that matter? And it's [the challengers'] burden to establish those things.

Although the legal issues in *Community Financial Services Association* are, in a sense, quite different, the basic structure of this back-and-forth should be familiar from the debate you saw unfold in *Seila Law.* And it anticipates a similar debate you will see unfold in the context of individual rights claims, too—maybe especially in the Court's most recent cases elaborating the individual right to own or carry a gun under the Second Amendment, where the demand that a regulation fall within an identifiable historical tradition has become central. *See infra* Section IV.B.3.

As for *Community Financial Services Association* itself, the Court ultimately took a broad and flexible view of the Appropriations Clause—pointing to Founding-era evidence (including the Customs Service)—in a majority opinion by Justice Thomas.[*] Justice Kagan wrote separately—joined by Justices Sotomayor, Kavanaugh, and Barrett—to identify examples of different funding schemes, over the course of American history, that supported the same result. Justice Alito (joined by Justice Gorsuch) dissented.

Although the Take Care Clause figured in *Seila Law* (and *Neagle*) mainly as a source of a claimed presidential power, it also clearly imposes a presidential duty: "he *shall* take care that the laws be faithfully executed." The question of what exactly this demands of the President has not received much attention in the courts, in part because it is doubtful that a court could properly enjoin the President to carry out his constitutional functions anyway. In other words, the "take care" obligation is probably one of the constitutional responsibilities for which, as *Marbury* put it, the President is "accountable only to his country in his political character, and to his own conscience" (*supra*, p. I-2).

But, as that formulation reflects, the Take Care Clause has figured in constitutional argument outside the courts, including within the executive branch itself. The next reading, an excerpt from an opinion of the Office of Legal Counsel (OLC) during the Obama Administration, is a good example. In addition to considering the constitutional merits of the non-enforcement policy at issue, take this (in tandem with the earlier article by Professor Goldsmith) as an opportunity to think about how constitutional reasoning within the executive branch might resemble or differ from such reasoning on the part of courts. (Note that this opinion was withdrawn by Attorney General Bill Barr in 2020, so it is no longer officially the position of the Justice Department.)

DHS's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others

38 Op. O.L.C. 1 (2014)[*]

You have asked [certain] questions concerning the scope of the Department of Homeland Security's discretion to enforce the immigration laws.

[*] *CFPB v. Community Financial Services Ass'n*, 601 U.S. 416 (2024).

[*] The full opinion is available at https://www.justice.gov/file/179206/download.

[S]pecifically, DHS has proposed to implement a program under which an alien could apply for, and would be eligible to receive, deferred action if he or she is not a DHS removal priority[;] has continuously resided in the United States since before January 1, 2010; has a child who is either a U.S. citizen or a lawful permanent resident; is physically present in the United States both when DHS announces its program and at the time of application for deferred action; and presents "no other factors that, in the exercise of discretion, make[] the grant of deferred action inappropriate."

[As] has historically been true of deferred action, [this] program[] would not "legalize" any aliens who are unlawfully present in the United States: Deferred action does not confer any lawful immigration status, nor does it provide a path to obtaining permanent residence or citizenship. Grants of deferred action under the proposed programs would, rather, represent DHS's decision not to seek an alien's removal for a prescribed period of time. Under decades-old regulations promulgated pursuant to authority delegated by Congress, aliens who are granted deferred action—like certain other categories of aliens who do not have lawful immigration status, such as asylum applicants—may apply for authorization to work in the United States in certain circumstances. Under DHS policy guidance, a grant of deferred action also suspends an alien's accrual of unlawful presence for purposes of [statutory provisions] that restrict the admission of aliens who have departed the United States after having been unlawfully present for specified periods of time. A grant of deferred action under the proposed programs would remain in effect for three years, subject to renewal, and could be terminated at any time at DHS's discretion.

For the reasons discussed below, we conclude that DHS's proposed prioritization policy and its proposed deferred action program for parents of U.S. citizens and lawful permanent residents would be permissible exercises of DHS's discretion to enforce the immigration laws[.]

I.

[As] a general rule, when Congress vests enforcement authority in an executive agency, that agency has the discretion to decide whether a particular violation of the law warrants prosecution or other enforcement action. This discretion is rooted in the President's constitutional duty to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, and it reflects a recognition that the "faithful[]" execution of the law does not necessarily entail "act[ing] against each technical violation of the statute" that an agency is charged with enforcing. *Heckler v. Chaney* (1985) [(holding that an agency's decision not to bring a particular enforcement action is ordinarily not subject to judicial review under the Administrative Procedure Act)]. Rather, as the Supreme Court explained in *Chaney*, the decision whether to initiate enforcement proceedings is a complex judgment that calls on the agency to "balanc[e] . . . a number of factors which are peculiarly within its expertise." These factors include "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and . . . whether the agency has enough resources to undertake the action at all."

[The] principles of enforcement discretion discussed in *Chaney* apply with particular force in the context of immigration. [W]hen Congress created the Department of Homeland Security, it expressly charged DHS with responsibility for "[e]stablishing national immigration enforcement policies and priorities." [And w]ith respect to removal decisions in particular, the Supreme Court has recognized that "the broad discretion exercised by immigration officials" is a ""principal feature of the removal system" under the INA. [A]s the Court has explained, "[a]t each stage" of the removal process—"commenc[[ing] proceedings, adjudicat[ing] cases, [and] execut[ing] removal orders"— immigration officials have "discretion to abandon the endeavor." [*Reno v.*] *Am.-Arab Anti-Discrim. Comm.* (1999). Deciding whether to pursue removal at each of these stages implicates a wide range of considerations. As the Court observed in *Arizona* [*v. United States* (2012)]:

> Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. Some discretionary decisions involve policy choices that bear on this Nation's international relations.

[Immigration] officials' discretion in enforcing the laws is not, however, unlimited. Limits on enforcement discretion are both implicit in, and fundamental to, the Constitution's allocation of governmental powers between the two political branches. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer* (1952). These limits, however, are not clearly defined. The open-ended nature of the inquiry under the Take Care Clause—whether a particular exercise of discretion is "faithful[]" to the law enacted by Congress—does not lend itself easily to the application of set formulas or bright-line rules. And because the exercise of enforcement discretion generally is not subject to judicial review, neither the Supreme Court nor the lower federal courts have squarely addressed its constitutional bounds. Rather, the political branches have addressed the proper allocation of enforcement authority through the political process. [When] Congress has been dissatisfied with Executive action, it has responded [b]y enacting legislation to limit the Executive's discretion in enforcing the immigration laws.

Nonetheless, the nature of the Take Care duty does point to at least four general (and closely related) principles governing the permissible scope of enforcement discretion that we believe are particularly relevant here. First, enforcement decisions should reflect "factors which are peculiarly within [the enforcing agency's] expertise." *Chaney*. Those factors may include considerations related to agency resources, such as "whether the agency has enough resources to undertake the action," or "whether agency resources are best spent on this violation or another." *Id.* Other relevant considerations may include "the proper ordering of [the agency's] priorities," *id.*, and the agency's assessment of "whether the particular enforcement action [at issue] best fits the agency's overall policies," *id.*

Second, the Executive cannot, under the guise of exercising enforcement discretion, attempt to effectively rewrite the laws to match its policy preferences. *See id.*(an agency may not "disregard legislative direction in the statutory scheme that [it] administers"). In other words, an agency's enforcement decisions should be consonant with, rather than contrary to, the congressional policy underlying the statutes the agency is charged with administering. *Cf. Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.").

Third, the Executive Branch ordinarily cannot, as the Court put it in *Chaney*, "'consciously and expressly adopt[] a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." Abdication of the duties assigned to the agency by statute is ordinarily incompatible with the constitutional obligation to faithfully execute the laws[.]

Finally, lower courts, following *Chaney*, have indicated that non-enforcement decisions are most comfortably characterized as judicially unreviewable exercises of enforcement discretion when they are made on a case-by-case basis. That reading of *Chaney* reflects a conclusion that case-by-case enforcement decisions generally avoid the concerns mentioned above. [That] does not mean that all "general policies" respecting non-enforcement are categorically forbidden: Some "general policies" may, for example, merely provide a framework for making individualized, discretionary assessments about whether to initiate enforcement actions in particular cases. But a general policy of non-enforcement that forecloses the exercise of case-by-case discretion poses ""special risks" that the agency has exceeded the bounds of its enforcement discretion.

II.

We turn [now] to the permissibility of DHS's proposed deferred action programs for certain aliens who are parents of U.S. citizens [or] lawful permanent residents ("LPRs")[.] We begin by discussing the history and current practice of deferred action. We then discuss the legal authorities on which deferred action relies and identify legal principles against which the proposed use of deferred action can be evaluated. Finally, we turn to an analysis of the proposed deferred action program[] [itself].

A.

In immigration law, the term "deferred action" refers to an exercise of administrative discretion in which immigration officials temporarily defer the removal of an alien unlawfully present in the United States.

[The] practice of granting deferred action dates back several decades. [Although] the practice of granting deferred action "developed without express statutory authorization," it has become a regular feature of the immigration removal system that has been acknowledged by both Congress and the Supreme Court. Deferred action "does not confer any immigration status"—i.e., it does not establish any enforceable legal right to remain in the United States—and it may be revoked by immigration authorities at their discretion. Assuming it is not revoked, however, it represents DHS's decision not to seek the alien's removal for a specified period of time.

Under longstanding regulations and policy guidance promulgated pursuant to statutory authority in the INA, deferred action recipients may receive two additional benefits. First, relying on DHS's statutory authority to authorize certain aliens to work in the United States, DHS regulations permit recipients of deferred action to apply for work authorization if they can demonstrate an "economic necessity for employment." Second, DHS has promulgated regulations and issued policy guidance providing that aliens who receive deferred action will temporarily cease accruing "unlawful presence" for purposes of [statutes that deem certain people inadmissible for re-entry if they have been unlawfully present for too long].

Immigration officials today continue to grant deferred action in individual cases for humanitarian and other purposes, a practice we will refer to as "ad hoc deferred action." Recent USCIS guidance provides that personnel may recommend ad hoc deferred action if they "encounter cases during [their] normal course of business that they feel warrant deferred action."

[For] decades, INS and later DHS have also implemented broader programs that make discretionary relief from removal available for particular classes of aliens. [On] at least five occasions since the late 1990s, INS and later DHS have also made discretionary relief available to certain classes of aliens through the use of deferred action[.] [Discussion of examples omitted. —BE]

Congress has long been aware of the practice of granting deferred action, including in its categorical variety, and of its salient features; and it has never acted to disapprove or limit the practice. On the contrary, it has enacted several pieces of legislation that have either assumed that deferred action would be available in certain circumstances, or expressly directed that deferred action be extended to certain categories of aliens.

B.

[The] practice of granting deferred action, like the practice of setting enforcement priorities, is an exercise of enforcement discretion rooted in

DHS's authority to enforce the immigration laws and the President's duty to take care that the laws are faithfully executed. It is one of several mechanisms by which immigration officials, against a backdrop of limited enforcement resources, exercise their "broad discretion" to administer the removal system—and, more specifically, their discretion to determine whether "it makes sense to pursue removal" in particular circumstances. *Arizona* (2012).

Deferred action, however, differs in at least three respects from more familiar and widespread exercises of enforcement discretion. First, unlike (for example) the paradigmatic exercise of prosecutorial discretion in a criminal case, the conferral of deferred action does not represent a decision not to prosecute an individual for past unlawful conduct; it instead represents a decision to openly tolerate an undocumented alien's continued presence in the United States for a fixed period (subject to revocation at the agency's discretion). Second, unlike most exercises of enforcement discretion, deferred action carries with it benefits in addition to non-enforcement itself; specifically, the ability to seek employment authorization and suspension of unlawful presence for purposes [of the time-based inadmissibility bars]. Third, class-based deferred action programs [d]o not merely enable individual immigration officials to select deserving beneficiaries from among those aliens who have been identified or apprehended for possible removal—as is the case with ad hoc deferred action—but rather set forth certain threshold eligibility criteria and then invite individuals who satisfy these criteria to apply for deferred action status.

While these features of deferred action are somewhat unusual among exercises of enforcement discretion, the differences between deferred action and other exercises of enforcement discretion are less significant than they might initially appear. The first feature—the toleration of an alien's continued unlawful presence—is an inevitable element of almost any exercise of discretion in immigration enforcement. [Deferred] action arguably goes beyond [tacit acknowledgment that the alien will continue to be present in the United States without legal status] by expressly communicating to [them] that [their] unlawful presence will be tolerated for a prescribed period of time. This difference is not, in our view, insignificant. But neither does it fundamentally transform deferred action into something other than an exercise of enforcement discretion: As we have previously noted, deferred action confers no lawful immigration status, provides no path to lawful permanent residence or citizenship, and is revocable at any time in the agency's discretion.

With respect to the second feature, the additional benefits deferred action confers—the ability to apply for work authorization and the tolling of unlawful presence—do not depend on background principles of agency discretion under DHS's general immigration authorities or the Take Care Clause at all, but rather depend on independent and more specific statutory authority rooted in the text of the INA[.]

[The] final unusual feature of deferred action programs is particular to class-based programs. The breadth of such programs, in combination with the first two features of deferred action, may raise particular concerns about whether immigration officials have undertaken to substantively change the statutory removal system rather than simply adapting its application to individual circumstances. But the salient feature of class-based programs—the establishment of an affirmative application process with threshold eligibility criteria—does not in and of itself cross the line between executing the law and rewriting it. Although every class-wide deferred action program that has been implemented to date has established certain threshold eligibility criteria, each program has also left room for case-by-case determinations, giving immigration officials discretion to deny applications even if the applicant fulfills all of the program criteria. [The] guarantee of individualized, case-by-case review helps avoid potential concerns that, in establishing such eligibility criteria, the Executive is attempting to rewrite the law by defining new categories of aliens who are automatically entitled to particular immigration relief. Furthermore, while permitting potentially eligible individuals to apply for an exercise of enforcement discretion is not especially common, many law enforcement agencies have developed programs that invite violators of the law to identify themselves to the authorities in exchange for leniency.

[Apart] from the considerations just discussed, perhaps the clearest indication that these features of deferred action programs are not per se impermissible is the fact that Congress, aware of these features, has repeatedly enacted legislation appearing to endorse such programs.

[Congress's] apparent endorsement of certain deferred action programs does not mean, of course, that a deferred action program can be lawfully extended to any group of aliens, no matter its characteristics or its scope, and no matter the circumstances in which the program is implemented. Because deferred action [i]s an exercise of enforcement discretion rooted in the Secretary's broad authority to enforce the immigration laws and the President's duty to take care that the laws are faithfully executed, it is subject to the [four] general principles previously discussed. Thus, any expansion of deferred action to new classes of aliens must be carefully scrutinized to ensure that it reflects considerations within the agency's expertise, and that it does not seek to effectively rewrite the laws to match the Executive's policy preferences, but rather operates in a manner consonant with congressional policy expressed in the statute. Immigration officials cannot abdicate their statutory responsibilities under the guise of exercising enforcement discretion. And any new deferred action program should leave room for individualized evaluation of whether a particular case warrants the expenditure of resources for enforcement.

Furthermore, because deferred action programs depart in certain respects from more familiar and widespread exercises of enforcement discretion, particularly careful examination is needed to ensure that any proposed expansion of deferred action complies with these general principles, so that the proposed program does not, in effect, cross the line between executing the law and rewriting it. In analyzing whether the proposed programs cross this line, we will draw substantial guidance from Congress's history of legislation concerning deferred action. In the absence of express statutory guidance, the nature of deferred action programs Congress has implicitly approved by statute helps to shed light on Congress's own understandings about the permissible uses of deferred action. Those understandings, in turn, help to inform our consideration of whether the proposed deferred action programs are "faithful[]" to the statutory scheme Congress has enacted. U.S. Const. art. II, § 3.

C.

We now turn to the specifics of DHS's proposed deferred action program[]. [DHS] has offered two justifications for the proposed program for the parents of U.S. citizens and LPRs. First, as noted above, severe resource constraints make it inevitable that DHS will not remove the vast majority of aliens who are unlawfully present in the United States. [Parents] with longstanding ties to the country and who have no significant criminal records or other risk factors rank among the agency's lowest enforcement priorities; absent significant increases in funding, the likelihood that any individual in that category will be determined to warrant the expenditure of severely limited enforcement resources is very low. Second, DHS has explained that the program would serve an important humanitarian interest in keeping parents together with children who are lawfully present in the United States, in situations where such parents have demonstrated significant ties to community and family in this country.

[T]he need to efficiently allocate scarce enforcement resources is a quintessential basis for an agency's exercise of enforcement discretion. [And] determining how to address [humanitarian] concerns in the immigration context is [also] a consideration that is generally understood to fall within DHS's expertise.

This second justification for the program also appears consonant with congressional policy embodied in the INA. Numerous provisions of the statute reflect a particular concern with uniting aliens with close relatives who have attained lawful immigration status in the United States. The INA provides a path to lawful status for the parents, as well as other immediate relatives, of U.S. citizens: U.S. citizens aged twenty-one or over may petition for parents to obtain visas that would permit them to enter and permanently reside in the United States[.] And although the INA contains no parallel provision permitting LPRs to petition on behalf of their parents, it does provide a path for LPRs to become citizens, at which point they too can petition to obtain visas for their parents. [DHS's] proposal to focus on the parents of U.S. citizens and LPRs thus tracks a congressional concern, expressed in the INA, with uniting the immediate families of individuals who have permanent legal ties to the United States.

At the same time, because the temporary relief DHS's proposed program would confer to such parents is sharply limited in comparison to the benefits Congress has made available through statute, DHS's proposed program would not operate to circumvent the limits Congress has placed on the availability of those benefits. The statutory provisions discussed above offer the parents of U.S. citizens and LPRs the prospect of permanent lawful status in the United States. [DHS's] proposed program, in contrast, would not grant the parents of U.S. citizens and LPRs any lawful immigration status, provide a path to permanent residence or citizenship, or otherwise confer any legally enforceable entitlement to remain in the United States. It is true that, as we have discussed, a grant of deferred action would confer eligibility to apply for and obtain work authorization, pursuant to the Secretary's statutory authority to grant such authorization and the longstanding regulations promulgated thereunder. But unlike the automatic employment eligibility that accompanies LPR status, this authorization could be granted only on a showing of economic necessity, and would last only for the limited duration of the deferred action grant.

The other salient features of the proposal are similarly consonant with congressional policy. [Discussion omitted. —BE]

We also do not believe DHS's proposed program amounts to an abdication of its statutory responsibilities, or a legislative rule overriding the commands of the statute. As discussed earlier, DHS's severe resource constraints mean that, unless circumstances change, it could not as a practical matter remove the vast majority of removable aliens present in the United States. The fact that the proposed program would defer the removal of a subset of these removable aliens—a subset that ranks near the bottom of the list of the agency's removal priorities—thus does not, by itself, demonstrate that the program amounts to an abdication of DHS's responsibilities. And the case-by-case discretion given to immigration officials under DHS's proposed program alleviates potential concerns that DHS has abdicated its statutory enforcement responsibilities with respect to, or created a categorical, rule-like entitlement to immigration relief for, the particular class of aliens eligible for the program. An alien who meets all the criteria for deferred action under the program would receive deferred action only if he or she "present[ed] no other factors that, in the exercise of discretion," would "make[] the grant of deferred action inappropriate."

[Finally,] the proposed deferred action program would resemble in material respects the kinds of deferred action programs Congress has implicitly approved in the past, which provides some indication that the proposal is consonant not only with interests reflected in immigration law as a general matter, but also with congressional understandings about the permissible uses of deferred action.

[We] recognize that the proposed program would likely differ in size from these prior deferred action programs. [A]pproximately 4 million individuals could be eligible to apply. We have thus considered whether the size of the program alone sets it at odds with congressional policy or the Executive's duties under the Take Care Clause. [W]hile the potential size of the program is large, it is nevertheless only a fraction of the approximately 11 million undocumented aliens who remain in the United States each year because DHS lacks the resources to remove them; and, as we have indicated, the program is limited to individuals who would be unlikely to be removed under DHS's proposed prioritization policy. There is thus little practical danger that the program, simply by virtue of its size, will impede removals that would otherwise occur in its absence.

[In] light of these considerations, we believe the proposed expansion of deferred action to the parents of U.S. citizens and LPRs is lawful. It reflects considerations [t]hat fall within DHS's expertise. It is consistent with congressional policy, since it focuses on a group—law-abiding parents of lawfully present children who have substantial ties to the community—that Congress itself has granted favorable treatment in the immigration process. The program provides for the exercise of case-by-case discretion, thereby avoiding creating a rule-like entitlement to immigration relief or abdicating DHS's enforcement responsibilities for a particular class of aliens. And, like several deferred action programs Congress has approved in the past, the proposed program provides interim relief that would prevent particularized harm that could otherwise befall both the beneficiaries of the program and their families. We accordingly conclude that the proposed program would constitute a permissible exercise of DHS's enforcement discretion under the INA.

C. The President's Protections Against Scrutiny and Liability

(49 PAGES)

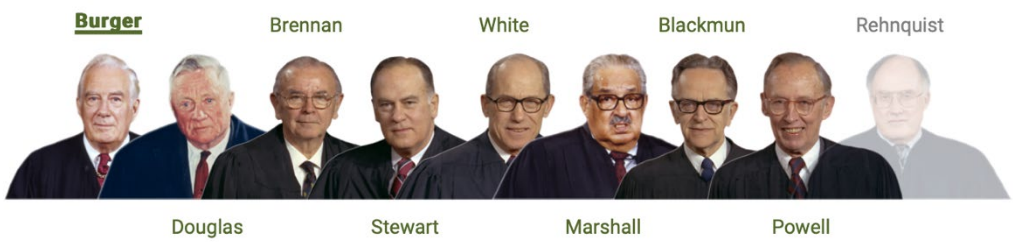
Nothing in the Constitution expressly affords the President any protections against investigations, civil liability, or even criminal prosecution at the hands of state governments or other branches of the Federal Government. Yet, much as with other issues we have considered, the Court has implied or constructed some such protections anyway, mostly in the name of enabling the President to effectively discharge the constitutionally assigned responsibilities of the office.

In this section, we will consider some of the most important of these doctrines. In addition to being significant in their own right (and, in the last few years, very much in the news), these rules raise at least two more general themes. First, how does (and how could) the Court square the importance of public accountability and the ideological commitment that nobody is "above the law," on the one hand, with the reality that unique concerns might arise in connection with proceedings against the President? Second, in the absence of meaningful textual guidance, where does the Court look to construct the law that defines the interactions between different branches and levels of government?

One other introductory comment: The fact patterns that arise in this area can be confusing because they vary along several different axes. The proceeding against the President could be in either state or federal court, and it could be either civil or criminal in nature. In addition, the President may be claiming either an evidentiary privilege or a substantive immunity from liability or prosecution, and that claim may pertain either to the President's official conduct *as* President or to "unofficial" acts by the person who happens to be President. We won't dig into every cell in this matrix, but you'll be in a better position to think about the logics of the different cases if you try to keep track of where they each fall along these different dimensions.*

United States v. Nixon

418 U.S. 683 (1974)



[In the midst of the 1972 presidential campaign, several people were caught trying to bug the phones at the offices of the Democratic National Committee in the Watergate Hotel. Ultimately, a special prosecutor obtained an indictment charging seven people—including the former Attorney General and White House Chief of Staff—with conspiracy and other offenses. (President Nixon himself was not charged with a crime, but he was named in the indictment as a co-conspirator.) As part of the prosecution's preparation for trial, the special prosecutor obtained a subpoena directing Nixon to produce "certain tapes, memoranda, papers, transcripts, or other writings relating to certain precisely identified meetings between the President and others." (The existence of a White House taping system had already been revealed in testimony before the U.S. Senate Watergate Committee.) Nixon sought to "quash" (invalidate) the subpoena.]

■ CHIEF JUSTICE BURGER delivered the opinion of the Court.

* There is another important scenario—a *congressional* subpoena for the President's records—that we won't consider in any detail here. The Court addressed that situation for the first time in *Trump v. Mazars* (2020), when President Trump challenged subpoenas seeking his personal financial records. Without ruling on the validity of those particular subpoenas, the Court directed the lower courts to take "[a] balanced approach," including by "carefully assess[ing] whether the asserted legislative purpose warrants the significant step of involving the President and his papers."

[We] turn to the claim that the subpoena should be quashed because it demands "confidential conversations between a President and his close advisors that it would be inconsistent with the public interest to produce."

[In] support of his claim of absolute privilege, the President's counsel urges two grounds, one of which is common to all governments and one of which is peculiar to our system of separation of powers. The first ground is the valid need for protection of communication between high Government officials and those who advise and assist them in their manifold duties; the importance of this confidentiality is too plain to require further discussion. Human experience 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. Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers;[16] the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.

[The] second ground [rests] on the doctrine of separation of powers. Here it is argued that the independence of the Executive Branch within its own sphere insulates a President from a judicial subpoena in an ongoing criminal prosecution, and thereby protects confidential Presidential communications.

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

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[16] The Special Prosecutor argues that there is no provision in the Constitution for a Presidential privilege as to the President's communications corresponding to the privilege of Members of Congress under the Speech or Debate Clause. But the silence of the Constitution on this score is not dispositive. "The rule of constitutional interpretation announced in *McCulloch v. Maryland*, that that which was reasonably appropriate and relevant to the exercise of a granted power was to be considered as accompanying the grant, has been so universally applied that it suffices merely to state it." *Marshall v. Gordon* (1917).

[*] ["*In camera*" in this context means "in chambers"; the point is that the district court would review the material itself before determining that anything may be disclosed. —BE]

[The separation-of-powers argument also does not justify an absolute privilege.] [To] read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality [would] upset the constitutional balance of "a workable government," *Youngstown* (Jackson, J., concurring) [*supra*, p. III-13], and gravely impair the role of the courts under Art. III.

Since we conclude that the legitimate needs of the judicial process may outweigh Presidential privilege, it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch. [To that end, we conclude that the arguments raised by the President do justify] a presumptive privilege for Presidential communications. [But] this presumptive privilege must be considered in light of our historic commitment to the rule of law. This is nowhere more profoundly manifest than in our view that "the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer." [To] ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

[Although this principle yields to valid evidentiary privileges, those privileges] are designed to protect weighty and legitimate competing interests. [For example,] an attorney or a priest may not be required to disclose what has been revealed in professional confidence. [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.

In this case the President challenges a subpoena served on him as a third party requiring the production of materials for use in a criminal prosecution; he does so on the claim that he has a privilege against disclosure of confidential communications. [Nowhere] in the Constitution, as we have noted earlier, 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. [But the] right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced.

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.[19] [Although] the interest in preserving confidentiality is weighty indeed[, we] cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution.

On the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice.

[We] conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.

[Finally, in] conducting the *in camera* examination[, statements] that meet the test of admissibility and relevance must be isolated; all other material must be excised. [The] District Court has a very heavy responsibility to see to it that Presidential conversations, which are either not relevant or not admissible, are accorded that high degree of respect due the President of the United States.

President Nixon complied with the Court's ruling. In fact, under public pressure, he ultimately disclosed the tapes to the public as well as to the district court. It turned out that the tapes included many incriminating conversations (such as one in which Nixon approved having the CIA tell the FBI to "stay the hell out of this"), and the response among the public and Republican Senators led to his resignation in August 1974.

[19] We are not here concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation, nor with that between the confidentiality interest and congressional demands for information, nor with the President's interest in preserving state secrets. We address only the conflict between the President's assertion of a generalized privilege of confidentiality against the constitutional need for relevant evidence in criminal trials.

Nixon v. Fitzgerald

457 U.S. 731 (1982)

[In 1968, Ernest Fitzgerald testified before Congress about significant financial mismanagement in the Department of Defense. Just over a year later, the agency eliminated his management analyst position as part of a reorganization. Fitzgerald eventually filed a civil suit against Nixon and several of his aides, alleging that they had arranged the dismissal as illegal retaliation for his testimony. Nixon, now out of office, claimed that he was immune from any civil liability for conduct performed in his capacity as President.]

▪ JUSTICE POWELL delivered the opinion of the Court.

[W]e hold that petitioner, as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his official acts. We consider this immunity a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history.

[The] President occupies a unique position in the constitutional scheme. [In] arguing that the President is entitled only to qualified immunity, [Fitzgerald] relies on cases in which we have recognized immunity of this scope for governors and cabinet officers. We find these cases to be inapposite. The President's unique status under the Constitution distinguishes him from other executive officials.*

Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government. As is the case with prosecutors and judges—for whom absolute immunity now is established—a President must concern himself with matters likely to "arouse the most intense feelings." [This] concern is compelling where the officeholder must make the most sensitive and far-reaching decisions entrusted to any official under

* [A note explaining the distinction between absolute and qualified immunity follows this case. See *infra*, p. III-99. —BE]

our constitutional system.[32] Nor can the sheer prominence of the President's office be ignored. In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages. Cognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve.

[A] court [must] balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch. See *United States v. Nixon*. When judicial action is needed to serve broad public interests—as when the Court acts, not in derogation of the separation of powers, but to maintain their proper balance, cf. *Youngstown Sheet & Tube Co. v. Sawyer*, or to vindicate the public interest in an ongoing criminal prosecution, see *United States v. Nixon*—the exercise of jurisdiction has been held warranted. In the case of this merely private suit for damages based on a President's official acts, we hold it is not.

In defining the scope of an official's absolute privilege, this Court has recognized that the sphere of protected action must be related closely to the immunity's justifying purposes. Frequently our decisions have held that an official's absolute immunity should extend only to acts in performance of particular functions of his office. But the Court also has refused to draw functional lines finer than history and reason would support. In view of the special nature of the President's constitutional office and functions, we think it appropriate to recognize absolute Presidential immunity from damages liability for acts within the "outer perimeter" of his official responsibility.

Under the Constitution and laws of the United States the President has discretionary responsibilities in a broad variety of areas, many of them highly sensitive. In many cases it would be difficult to determine which of the President's innumerable "functions" encompassed a particular action. In this case, for example, respondent argues that he was dismissed in retaliation for his testimony to Congress[.] The Air Force, however, has claimed that the underlying reorganization was undertaken to promote efficiency. Assuming that petitioner Nixon ordered the reorganization in which respondent lost his job, an inquiry into the President's motives could not be avoided under the kind of "functional" theory asserted both by respondent and the dissent. Inquiries of this kind could be highly intrusive.

Here respondent argues that petitioner Nixon would have acted outside the outer perimeter of his duties by ordering the discharge of an employee

[32] Among the most persuasive reasons supporting official immunity is the prospect that damages liability may render an official unduly cautions in the discharge of his official duties. As Judge Learned Hand wrote[,] "[t]he justification for . . . [denying recovery] is that it is impossible to know whether the claim is well founded until the case has been tried, and to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute . . . ."

who was lawfully entitled to retain his job in the absence of "'such cause as will promote the efficiency of the service.'" Because Congress has granted this legislative protection, respondent argues, no federal official could, within the outer perimeter of his duties of office, cause Fitzgerald to be dismissed without satisfying this standard in prescribed statutory proceedings.

This construction would subject the President to trial on virtually every allegation that an action was unlawful, or was taken for a forbidden purpose. Adoption of this construction thus would deprive absolute immunity of its intended effect. It clearly is within the President's constitutional and statutory authority to prescribe the manner in which [his subordinates] will conduct the business of the Air Force. Because this mandate of office must include the authority to prescribe reorganizations and reductions in force, we conclude that petitioner's alleged wrongful acts lay well within the outer perimeter of his authority.

[A] rule of absolute immunity for the President will not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive. There remains the constitutional remedy of impeachment. In addition, there are formal and informal checks on Presidential action that do not apply with equal force to other executive officials. The President is subjected to constant scrutiny by the press. Vigilant oversight by Congress also may serve to deter Presidential abuses of office, as well as to make credible the threat of impeachment. Other incentives to avoid misconduct may include a desire to earn reelection, the need to maintain prestige as an element of Presidential influence, and a President's traditional concern for his historical stature. The existence of alternative remedies and deterrents establishes that absolute immunity will not place the President "above the law."[41]

▪ JUSTICE WHITE, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting.

[Attaching] absolute immunity to the Office of the President, rather than to particular activities that the President might perform, places the

[41] The dissenting opinions argue that our decision places the President "above the law." This contention is rhetorically chilling but wholly unjustified. The remedy of impeachment demonstrates that the President remains accountable under law for his misdeeds in office. This case involves only a damages remedy. Although the President is not liable in civil damages for official misbehavior, that does not lift him "above" the law. The dissents do not suggest that a judge is "above" the law when he enters a judgment for which he cannot be held answerable in civil damages; or a prosecutor is above the law when he files an indictment; or a Congressman is above the law when he engages in legislative speech or debate. It is simply error to characterize an official as "above the law" because a particular remedy is not available against him.

President above the law. It is a reversion to the old notion that the King can do no wrong.[2]

[The] Court casually, but candidly, abandons the functional approach to immunity that has run through all of our decisions. Indeed, the majority turns this rule on its head by declaring that because the functions of the President's office are so varied and diverse and some of them so profoundly important, the office is unique and must be clothed with officewide, absolute immunity.

[But w]hile absolute immunity might maximize executive efficiency and therefore be a worthwhile policy, lack of such immunity may not so disrupt the functioning of the Presidency as to violate the separation-of-powers doctrine. [The] functional approach to the separation-of-powers doctrine and the Court's more recent immunity decisions converge on the following principle: The scope of immunity is determined by function, not office. [T]he only question that must be answered here is whether the dismissal of employees falls within a constitutionally assigned executive function, the performance of which would be substantially impaired by the possibility of a private action for damages.

[Personnel] decisions of the sort involved in this case are emphatically not a constitutionally assigned Presidential function that will tolerate no interference by either of the other two branches of Government. [Absolute] immunity is appropriate when the threat of liability may bias the decisionmaker in ways that are adverse to the public interest. But as the various regulations and statutes protecting civil servants from arbitrary executive action illustrate, this is an area in which the public interest is demonstrably on the side of encouraging less "vigor" and more "caution" on the part of decisionmakers.

[The] remedies in which the Court finds comfort were never designed to afford relief for individual harms. Rather, they were designed as political safety valves. Politics and history, however, are not the domain of the courts; the courts exist to assure each individual that he, as an individual, has enforceable rights that he may pursue to achieve a peaceful redress of his legitimate grievances.

I find it ironic, as well as tragic, that the Court would so casually discard its own role of assuring "the right of every individual to claim the protection

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[2] [The] majority vigorously protests this characterization of its position, arguing that the President remains subject to law in the form of impeachment proceedings. But the abandonment of the rule of law here is not in the result reached, but in the manner of reaching it. The majority fails to apply to the President those principles which we have consistently used to determine the scope and credibility of an absolute immunity defense. It does this because of some preconceived notion of the inapplicability of general rules of law to the President[.]

of the laws," *Marbury v. Madison*, in the name of protecting the principle of separation of powers.*

ABSOLUTE AND QUALIFIED IMMUNITY

Nixon v. Fitzgerald was decided together with a companion case, *Harlow v. Fitzgerald*, that addressed Fitzgerald's claims again President Nixon's aides—with whom Nixon had allegedly conspired in unlawfully firing Fitzgerald—rather than against Nixon himself. In *Harlow*, the Court held that these aides were entitled only to "qualified," not absolute, immunity.

Summarizing its prior cases, the Court explained that "qualified" immunity protects executive-branch officials (as well as state and local officials, like police officers) from liability for constitutional violations unless the official "*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the plaintiff." As this standard has been elaborated in *Harlow* and subsequent cases, the touchstone for what an official "reasonably should have known" is "clearly established law." Thus, if it was already "clearly established" that certain conduct would be unlawful—because there was already a precedent squarely on-point—no immunity will attach. But if the same specific issue had not already been resolved by the courts, then the official will be held immune regardless of whether their conduct was actually unlawful.

Recall *Marbury*'s observation that, although "the government of the United States has been emphatically termed a government of laws, and not of men," "[it] will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." [*Supra*, p. I-3]. How, if at all, can qualified (let alone absolute) immunity for executive officials be squared with that commitment? And given the baseline of qualified immunity—which the Supreme Court has described as protecting "all but the plainly incompetent or those who knowingly violate the law"†—is *absolute* immunity for the President really necessary? Finally, whatever you think about that, is the court, acting in the name of the Constitution, the best institution to decide the question? (Note the majority's observation, at the end of the next case, about the choice that its holding leaves to Congress.)

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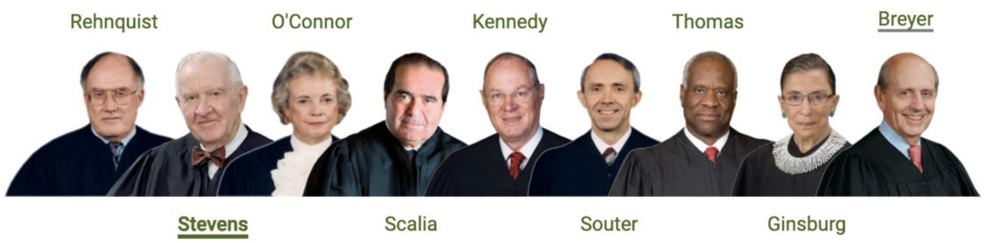
* [A concurrence by CHIEF JUSTICE BURGER and a separate dissent by JUSTICE BLACKMUN are omitted. —BE]

† *Anderson v. Creighton*, 483 U.S. 635, 635 (1987).

Clinton v. Jones
520 U.S. 681 (1997)



▪ JUSTICE STEVENS delivered the opinion of the Court.

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

I

[As] the case comes to us, we are required to assume the truth of the detailed— but as yet untested—factual allegations in the complaint. Those allegations principally describe events that are said to have occurred on the afternoon of May 8, 1991[, when Clinton was Governor of Arkansas.] [Respondent] alleges that [Clinton] made "abhorrent" sexual advances that she vehemently rejected. [She also alleges that] after petitioner was elected President, [people] authorized to speak for the President publicly branded her a liar by denying that the incident had occurred. [Her complaint, filed in federal court, included certain federal statutory claims and state-law tort claims, such as intentional infliction of emotional distress.] [As relevant here], it is perfectly clear that the alleged misconduct of petitioner was unrelated to any of his official duties as President of the United States and, indeed, occurred before he was elected to that office.

[II]

[Clinton's] principal submission—that "in all but the most exceptional cases," the Constitution affords the President temporary immunity from civil damages litigation arising out of events that occurred before he took office—cannot be sustained[.]

[The] principal rationale for affording certain public servants immunity from suits for money damages arising out of their official acts is inapplicable to unofficial conduct. In cases involving prosecutors, legislators, and judges we have repeatedly explained that the immunity serves the public interest in enabling such officials to perform their designated functions effectively without fear that a particular decision may give rise to personal liability. [That] rationale provided the principal basis for our holding that a former President of the United States was "entitled to absolute immunity from damages liability predicated on his official acts," *Nixon v. Fitzgerald*. Our central concern was to avoid rendering the President "unduly cautious in the discharge of his official duties."[19]

This reasoning provides no support for an immunity for *unofficial* conduct. [We] have never suggested that the President, or any other official, has an immunity that extends beyond the scope of any action taken in an official capacity. [As] our opinions have made clear, immunities are grounded in "the nature of the function performed, not the identity of the actor who performed it."

[III]

Petitioner's strongest argument supporting his immunity claim is based on the text and structure of the Constitution. He does not contend that the occupant of the Office of the President is "above the law," in the sense that his conduct is entirely immune from judicial scrutiny. The President argues merely for a postponement of the judicial proceedings that will determine whether he violated any law. His argument is grounded in the character of the office that was created by Article II of the Constitution, and relies on separation-of-powers principles that have structured our constitutional arrangement since the founding.

As a starting premise, petitioner contends that he occupies a unique office with powers and responsibilities so vast and important that the public interest demands that he devote his undivided time and attention to his public duties. He submits that—given the nature of the office—the doctrine of separation of powers places limits on the authority of the Federal Judiciary to interfere with the Executive Branch that would be transgressed by allowing this action to proceed. [In particular,] petitioner contends that—as

[19] Petitioner draws our attention to dicta in *Fitzgerald,* which he suggests are helpful to his cause. We noted there that "[b]ecause of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government," and suggested further that "[c]ognizance of . . . personal vulnerability frequently could distract a President from his public duties." Petitioner argues that in this aspect the Court's concern was parallel to the issue he suggests is of great importance in this case, the possibility that a sitting President might be distracted by the need to participate in litigation during the pendency of his office. In context, however, it is clear that our dominant concern was with the diversion of the President's attention during the decision-making process caused by needless worry as to the possibility of damages actions stemming from any particular official decision. Moreover, *Fitzgerald* did not present the issue raised in this case because that decision involved claims against a *former* President.

a byproduct of an otherwise traditional exercise of judicial power—[an] unacceptable burden [will be imposed] on the President's time and energy, [impairing] the effective performance of his office.

Petitioner's predictive judgment finds little support in either history or the relatively narrow compass of the issues raised in this particular case. [In] the more than 200-year history of the Republic, only three sitting Presidents have been subjected to suits for their private actions.* If the past is any indicator, it seems unlikely that a deluge of such litigation will ever engulf the Presidency. As for the case at hand, if properly managed by the District Court, it appears to us highly unlikely to occupy any substantial amount of petitioner's time.

Of greater significance, [the] fact that a federal court's exercise of its traditional Article III jurisdiction may significantly burden the time and attention of the Chief Executive is not sufficient to establish a violation of the Constitution. Two long-settled propositions, first announced by Chief Justice Marshall, support that conclusion.

First, we have long held that when the President takes official action, the Court has the authority to determine whether he has acted within the law. Perhaps the most dramatic example of such a case is our holding that President Truman exceeded his constitutional authority [by ordering the seizure of] the Nation's steel mills in order to avert a national catastrophe. *Youngstown*. Despite the serious impact of that decision on the ability of the Executive Branch to accomplish its assigned mission, and the substantial time that the President must necessarily have devoted to the matter as a result of judicial involvement, we exercised our Article III jurisdiction to decide whether his official conduct conformed to the law. Our holding was an application of the principle established in *Marbury v. Madison* that "[i]t is emphatically the province and duty of the judicial department to say what the law is."

Second, it is also settled that the President is subject to judicial process in appropriate circumstances. Although Thomas Jefferson apparently thought otherwise, Chief Justice Marshall, when presiding [as a trial judge] in the treason trial of Aaron Burr, ruled that a [subpoena] could be directed to the President. We unequivocally and emphatically endorsed Marshall's position when we held that President Nixon was obligated to comply with a subpoena [in *United States v. Nixon*].

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

* [Complaints based on the pre-presidential conduct of Theodore Roosevelt and Harry Truman were dismissed before they took office, and two cases against John F. Kennedy involving an auto accident during the 1960 Presidential campaign were settled out of court. —BE]

review surely cannot be considered as onerous as the direct burden imposed by judicial review and the occasional invalidation of his official actions.[40] We therefore hold that the doctrine of separation of powers does not require federal courts to stay all private actions against the President until he leaves office.

[IV]

[We] add a final comment on [the] risk that our decision will generate a large volume of politically motivated harassing and frivolous litigation, and the danger that national security concerns might prevent the President from explaining a legitimate need for a continuance. We are not persuaded that either of these risks is serious. Most frivolous and vexatious litigation is terminated at the pleading stage or on summary judgment, with little if any personal involvement by the defendant. Moreover, the availability of sanctions provides a significant deterrent to litigation directed at the President in his unofficial capacity for purposes of political gain or harassment. History indicates that the likelihood that a significant number of such cases will be filed is remote. Although scheduling problems may arise, there is no reason to assume that the district courts will be either unable to accommodate the President's needs or unfaithful to the tradition—especially in matters involving national security—of giving "the utmost deference to Presidential responsibilities." *United States v. Nixon*; see also *Fitzgerald*. Several Presidents, including petitioner, have given testimony without jeopardizing the Nation's security. In short, we have confidence in the ability of our federal judges to deal with both of these concerns.

If Congress deems it appropriate to afford the President stronger protection, it may respond with appropriate legislation. [If] the Constitution embodied the rule that the President advocates, Congress, of course, could not repeal it. But our holding today raises no barrier to a statutory response to these concerns.

[The] Federal District Court has jurisdiction to decide this case. Like every other citizen who properly invokes that jurisdiction, respondent has a right to an orderly disposition of her claims. [Affirmed.]

▪ Justice Breyer, concurring in the judgment.

I agree with the majority that the Constitution does not automatically grant the President an immunity from civil lawsuits based upon his private conduct. [In] my view, however, once the President sets forth and explains a conflict between judicial proceeding and public duties, [the] Constitution permits a judge to schedule a trial in an ordinary civil damages action [only] within the constraints of a constitutional principle [that] forbids a federal

[40] [We] recognize that a President, like any other official or private citizen, may become distracted or preoccupied by pending litigation. Presidents and other officials face a variety of demands on their time, however, some private, some political, and some as a result of official duty. While such distractions may be vexing to those subjected to them, they do not ordinarily implicate constitutional separation-of-powers concerns.

judge in such a case to interfere with the President's discharge of his public duties. I have no doubt that the Constitution contains such a principle applicable to civil suits, based upon Article II's vesting of the entire "executive Power" in a single individual, implemented through the Constitution's structural separation of powers, and revealed both by history and case precedent.

[*Nixon v. Fitzgerald*] strongly supports the principle that judges hearing a private civil damages action against a sitting President may not issue orders that could significantly distract a President from his official duties. [The] Court rested its conclusion in important part upon the fact that civil lawsuits "could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve." [More broadly, the] Court's immunity-related case law [balances] public harm against private need. Distraction and distortion are equally important ingredients of that potential public harm. [A] lawsuit that significantly distracts an official from his public duties can distort the content of a public decision just as can a threat of potential future liability.

[I] concede the possibility that district courts, supervised by the Courts of Appeals and perhaps this Court, might prove able to manage private civil damages actions against sitting Presidents without significantly interfering with the discharge of Presidential duties—at least if they manage those actions with the constitutional problem in mind. Nonetheless, predicting the future is difficult, and I am skeptical. Should the majority's optimism turn out to be misplaced, then, in my view, courts will have to develop administrative rules applicable to such cases (including postponement rules of the sort at issue in this case) in order to implement the basic constitutional directive. A Constitution that separates powers in order to prevent one branch of Government from significantly threatening the workings of another could not grant a single judge more than a very limited power to second-guess a President's reasonable determination (announced in open court) of his scheduling needs, nor could it permit the issuance of a trial scheduling order that would significantly interfere with the President's discharge of his duties[.]

[I] agree with the majority's determination that a constitutional defense must await a more specific showing of need; I do not agree with what I believe to be an understatement of the "danger." [It] may well be that the trial of this case cannot take place without significantly interfering with the President's ability to carry out his official duties. Yet, I agree with the majority that there is no automatic temporary immunity and that the President should have to provide the District Court with a reasoned explanation of why the immunity is needed; and I also agree that, in the absence of that explanation, the court's postponement of the trial date was premature. For those reasons, I concur in the result.

IMMUNITY FROM CRIMINAL INVESTIGATION AND PROSECUTION

The final two cases you'll read—*Trump v. Vance* (2020) and *Trump v. United States* (2024)—arose from Donald Trump's challenges to the wave of criminal investigations and prosecutions that he faced during and after his first term as President. The first of the two, *Vance*, is unique among the cases in this section in that it involved a state rather than another branch of the Federal Government.

Trump v. Vance

140 S. Ct. 2412 (2020)

▪ CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

In our judicial system, "the public has a right to every man's evidence." [This] case involves—so far as we and the parties can tell—the first *state* criminal subpoena directed to a President. The President contends that the subpoena is unenforceable. We granted certiorari to decide whether Article II and the Supremacy Clause categorically preclude, or require a heightened standard for, the issuance of a state criminal subpoena to a sitting President.

I

In the summer of 2018, the New York County District Attorney's Office opened an investigation into what it opaquely describes as "business transactions involving multiple individuals whose conduct may have violated state law." A year later, the office—acting on behalf of a grand jury—served a subpoena *duces tecum* (essentially a request to produce evidence) on Mazars USA, LLP, the personal accounting firm of President Donald J. Trump. [The] President, acting in his personal capacity, sued the district attorney and Mazars in Federal District Court to enjoin enforcement of the subpoena. He argued that, under Article II and the Supremacy Clause, a sitting President enjoys absolute immunity from state criminal process. [The district court and court of appeals rejected the immunity claim, and we] granted certiorari.

II

[In] the summer of 1807, all eyes were on Richmond, Virginia. Aaron Burr, the former Vice President, was on trial for treason. [President Thomas Jefferson], who despised his former running mate Burr for trying to steal the

1800 presidential election from him, [had accused Burr of conspiring to bring about] either the "severance of the Union" or an attack on Spanish territory. [Citing accusatory letters sent to him by Burr's co-conspirator, Jefferson] assured Congress that Burr's guilt was "beyond question."

[The] trial that followed was "the greatest spectacle in the short history of the republic[.]" [Chief] Justice John Marshall, who had recently squared off with the Jefferson administration in *Marbury v. Madison* (1803), presided as Circuit Justice for Virginia.* Meanwhile Jefferson, intent on conviction, orchestrated the prosecution from afar, dedicating Cabinet meetings to the case, peppering the prosecutors with directions, and spending nearly $100,000 from the Treasury on the five-month proceedings.

In the lead-up to trial, Burr, taking aim at his accusers, moved for a subpoena *duces tecum* directed at Jefferson[, seeking the letters on which Jefferson had based his public allegations]. The prosecution opposed the request, arguing that a President could not be subjected to such a subpoena and that the letter might contain state secrets. Following four days of argument, Marshall announced his ruling to a packed chamber.

The President, Marshall declared, does not "stand exempt from the general provisions of the constitution" or, in particular, the Sixth Amendment's guarantee that those accused have compulsory process for obtaining witnesses for their defense. At common law the "single reservation" to the duty to testify in response to a subpoena was "the case of the king," whose "dignity" was seen as "incompatible" with appearing "under the process of the court." But, as Marshall explained, a king is born to power and can "do no wrong." The President, by contrast, is "of the people" and subject to the law. According to Marshall, the sole argument for exempting the President from testimonial obligations was that his "duties as chief magistrate demand his whole time for national objects." But, in Marshall's assessment, those demands were "not unremitting." And should the President's duties preclude his attendance at a particular time and place, a court could work that out upon return of the subpoena.

Marshall also rejected the prosecution's argument that the President was immune from a subpoena *duces tecum* because executive papers might contain state secrets. ["The] propriety of introducing any papers [would] depend on the character of the paper, not on the character of the person who holds it." [Thus, public safety] concerns would have "due consideration" upon the return of the subpoena.

[In] the two centuries since the Burr trial, successive Presidents have accepted Marshall's ruling that the Chief Executive is subject to subpoena. In 1818, President Monroe received a subpoena to testify in a court-martial against one of his appointees. His Attorney General [advised] Monroe that,

* [The Judiciary Act of 1789 established a system, known as "circuit riding," where Justices of the Supreme Court were also required to travel to hear cases on regional circuit courts. (Their rulings in that capacity were not precedents of the Supreme Court.) The Justices generally hated this system and it was finally abolished in 1911. —BE]

per Marshall's ruling, a subpoena to testify may "be properly awarded to the President." Monroe offered to sit for a deposition and ultimately submitted answers to written interrogatories.

Following Monroe's lead, his successors have uniformly agreed to testify when called in criminal proceedings, provided they could do so at a time and place of their choosing. [Historical examples involving Presidents Grant, Ford, Carter, and Clinton, are omitted. —BE]

The bookend to Marshall's ruling came in [*United States v. Nixon*], a decision we later described as "unequivocally and emphatically endors[ing] Marshall's" holding that Presidents are subject to subpoena. *Clinton v. Jones.* [Invoking] the common law maxim that "the public has a right to every man's evidence," the [*Nixon*] Court [concluded] that the President's "generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial." Two weeks later, President Nixon dutifully released the tapes.

III

The history surveyed above all involved *federal* criminal proceedings. Here we are confronted for the first time with a subpoena issued to the President by a local grand jury operating under the supervision of a *state* court.[5]

In the President's view, that distinction makes all the difference. He argues that the Supremacy Clause gives a sitting President absolute immunity from state criminal subpoenas because compliance with those subpoenas would categorically impair a President's performance of his Article II functions. [Alternatively, t]he Solicitor General, arguing on behalf of the United States, [urges] us to [hold] that a state grand jury subpoena for a sitting President's personal records must, at the very least, "satisfy a heightened standard of need[.]"

A

We begin with the question of absolute immunity. No one doubts that Article II guarantees the independence of the Executive Branch. As the head of that branch, the President "occupies a unique position in the constitutional scheme." *Nixon v. Fitzgerald.* His duties, which range from faithfully executing the laws to commanding the Armed Forces, are of unrivaled gravity and breadth. Quite appropriately, those duties come with protections that safeguard the President's ability to perform his vital functions. In addition, the Constitution guarantees "the entire independence of the General Government from any control by the respective States." [Citing a case describing *McCulloch v. Maryland.*] As we have often repeated, "States have no power . . . to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress." *McCulloch*. It follows

[5] While the subpoena was directed to the President's accounting firm, the parties agree that the papers at issue belong to the President and that Mazars is merely the custodian. Thus, for purposes of immunity, it is functionally a subpoena issued to the President.

that States also lack the power to impede the President's execution of those laws.

[The] President's primary contention [is] that complying with state criminal subpoenas would necessarily divert the Chief Executive from his duties. He grounds that concern in *Nixon v. Fitzgerald,* [b]ut *Fitzgerald* did not hold that distraction was sufficient to confer absolute immunity. [Indeed,] we expressly rejected immunity based on distraction alone 15 years later in *Clinton v. Jones.* [Just] as a "properly managed" civil suit is generally "unlikely to occupy any substantial amount of" a President's time or attention, two centuries of experience confirm that a properly tailored criminal subpoena will not normally hamper the performance of the President's constitutional duties[.]

[The] President next claims that the stigma of being subpoenaed will undermine his leadership at home and abroad. [W]e have twice denied absolute immunity claims by Presidents in cases involving allegations of serious misconduct. See *Clinton; Nixon.* But even if a tarnished reputation were a cognizable impairment, there is nothing inherently stigmatizing about a President performing "the citizen's normal duty of . . . furnishing information relevant" to a criminal investigation. [Additionally,] while the current suit [initiated by Trump] has cast the Mazars subpoena into the spotlight, longstanding rules of grand jury secrecy aim to prevent the very stigma the President anticipates.

[Finally,] the President [warns] that subjecting Presidents to state criminal subpoenas will make them "easily identifiable target[s]" for harassment. *Fitzgerald.* But we rejected a nearly identical argument in *Clinton,* where then-President Clinton argued that permitting civil liability for unofficial acts would "generate a large volume of politically motivated harassing and frivolous litigation." The President [nevertheless argues] that state criminal subpoenas pose a heightened risk and could undermine the President's ability to "deal fearlessly and impartially" with the States. They caution that the 2,300 district attorneys in this country are responsive to local constituencies, local interests, and local prejudices, and might "use criminal process to register their dissatisfaction with" the President.

[We] recognize [that] harassing subpoenas could, under certain circumstances, threaten the independence or effectiveness of the Executive. Even so, in *Clinton* we found that the risk of harassment was not "serious" because federal courts have the tools to deter and, where necessary, dismiss vexatious civil suits. [And h]ere again the law already seeks to protect against the predicted abuse.

First, grand juries are prohibited from engaging in "arbitrary fishing expeditions" and initiating investigations "out of malice or an intent to harass." [Second], contrary to Justice Alito's characterization, our holding does not allow States to "run roughshod over the functioning of [the Executive B]ranch." The Supremacy Clause prohibits state judges and prosecutors from interfering with a President's official duties. Any effort to manipulate a President's policy decisions or to "retaliat[e]" against a President for official acts through issuance of a subpoena would thus be an unconstitutional attempt to "influence" a superior sovereign "exempt" from such obstacles, see *McCulloch*. [F]ederal law allows a President to challenge any allegedly unconstitutional influence in a federal forum, as the President has done here.

Given these safeguards and the Court's precedents, we cannot conclude that absolute immunity is necessary or appropriate under Article II or the Supremacy Clause. [Even] Justice Alito, also persuaded by *Burr*, "agree[s]" that "not all" state criminal subpoenas for a President's records "should be barred." On that point the Court is unanimous.

B

We next consider whether a state grand jury subpoena seeking a President's private papers must satisfy a heightened need standard[, such as a requirement] that the evidence sought is "critical" for "specific charging decisions" and that [the] evidence [is] needed "now, rather than at the end of the President's term."

[We reject such a standard] for three reasons. First, such a heightened standard would extend protection designed for official documents to the President's private papers. [Second,] heightened protection against state subpoenas is [not] necessary for the Executive to fulfill his Article II functions. [If] the state subpoena is not issued to manipulate, the documents themselves are not protected, and the Executive is not impaired, then nothing in Article II or the Supremacy Clause supports holding state subpoenas to a higher standard than their federal counterparts. [Finally,] in the absence of a need to protect the Executive, the public interest in fair and effective law enforcement cuts in favor of comprehensive access to evidence.

[Rejecting] a heightened need standard does not leave Presidents with "no real protection" (quoting Justice Alito's dissenting opinion). [Among other things], the Executive can [argue] that compliance with a particular subpoena would impede his constitutional duties. ["Once] the President sets forth and explains a conflict between judicial proceeding and public duties," or shows that an order or subpoena would "significantly interfere with his efforts to carry out" those duties, "the matter changes." *Clinton* (opinion of Breyer, J.). At that point, a court should use its inherent authority to quash or modify the subpoena, if necessary to ensure that such "interference with the President's duties would not occur." *Clinton*.

Two hundred years ago, a great jurist of our Court established that no citizen, not even the President, is categorically above the common duty to produce evidence when called upon in a criminal proceeding. We reaffirm that principle today and hold that the President is neither absolutely immune from state criminal subpoenas seeking his private papers nor entitled to a heightened standard of need.

▪ JUSTICE ALITO, dissenting.

This case is almost certain to be portrayed as a case about the current President and the current political situation, but the case has a much deeper significance. While the decision will of course have a direct effect on President Trump, what the Court holds today will also affect all future Presidents—which is to say, it will affect the Presidency, and that is a matter of great and lasting importance to the Nation.

I

[Our] Constitution [divides] power between the Federal Government and the States. The Constitution permitted the States to retain many of the sovereign powers that they previously possessed, see, *e.g.*, *Murphy v. NCAA*, but it gave the Federal Government powers that were deemed essential for the Nation's well-being and, indeed, its survival. And it provided for the Federal Government to be independent of and, within its allotted sphere, supreme over the States. Art. VI, cl. 2. Accordingly, a State may not block or interfere with the lawful work of the National Government.

This was an enduring lesson of Chief Justice Marshall's landmark opinion for the Court in *McCulloch v. Maryland*. Noting the potency of the taxing power ("[a] right to tax without limit or control, is essentially a power to destroy,"), he concluded that a State's power to tax had to give way to Congress's authority to charter the bank. In his words, the state power to tax could not be used to "defeat the legitimate operations," of the Federal Government or "to retard, impede, burden, or in any manner control" it. Marshall thus held, not simply that Maryland was barred from assessing a crushing tax that threatened the bank's ability to operate, but that the State could not tax the bank at all.

[Building] on this principle of federalism, two centuries of case law prohibit the States from taxing, regulating, or otherwise interfering with the lawful work of federal agencies, instrumentalities, and officers. The Court premised these cases on the principle that "the activities of the Federal Government are free from regulation by any State. No other adjustment of competing enactments or legal principles is possible."

II

In *McCulloch*, Maryland's sovereign taxing power had to yield, and in a similar way, a State's sovereign power to enforce its criminal laws must accommodate the indispensable role that the Constitution assigns to the Presidency. This must be the rule with respect to a state prosecution of a sitting President. Both the structure of the Government established by the Constitution and the Constitution's provisions on the impeachment and removal of a President make it clear that the prosecution of a sitting President is out of the question.

[While] the prosecution of a sitting President provides the most dramatic example of a clash between the indispensable work of the Presidency and a State's exercise of its criminal law enforcement powers, other examples are easy to imagine. Suppose state officers obtained and sought to execute a search warrant for a sitting President's private quarters in the White House. Suppose a state court authorized surveillance of a telephone that a sitting President was known to use. Or suppose that a sitting President was subpoenaed to testify before a state grand jury and, as is generally the rule, no Presidential aides, even those carrying the so-called "nuclear football," were permitted to enter the grand jury room. What these examples illustrate is a principle that this Court has recognized: legal proceedings involving a sitting President must take the responsibilities and demands of the office into account. See *Clinton v. Jones.*

It is not enough to recite sayings like "no man is above the law" and "the public has a right to every man's evidence." These sayings are true—and important—but they beg the question. The law applies equally to all persons, including a person who happens for a period of time to occupy the Presidency. But there is no question that the nature of the office demands in some instances that the application of laws be adjusted at least until the person's term in office ends.

I now come to the specific investigative weapon at issue in the case before us—a subpoena for a sitting President's records. This weapon is less intrusive in an immediate sense than those mentioned above. Since the records are held by, and the subpoena was issued to, a third party, compliance would not require much work on the President's part. And after all, this is just one subpoena.

But we should heed the "great jurist" (quoting the majority opinion) who rejected a similar argument in *McCulloch.* If we say that a subpoena to a third party is insufficient to undermine a President's performance of his duties, what about a subpoena served on the President himself? Surely in that case, the President could turn over the work of gathering the requested documents to attorneys or others recruited to perform the task. And if one subpoena is permitted, what about two? Or three? Or ten? Drawing a line based on such factors would involve the same sort of "perplexing inquiry, so unfit for the judicial department" that Marshall rejected in *McCulloch*.

The Court faced a similar issue when it considered whether a President can be sued for an allegedly unlawful act committed in the performance of official duties. See *Nixon v. Fitzgerald*. We did not ask whether the particular suit before us would have interfered with the carrying out of Presidential duties. (It could not have had that effect because President Nixon had already left office.) [Instead,] we adopted a rule for all such suits, and we should take a similar approach here. The rule should take into account both the effect of subpoenas on the functioning of the Presidency and the risk that they will be used for harassment. [In] a case like this one, a prosecutor should be required (1) to provide at least a general description of the possible offenses that are under investigation, (2) to outline how the subpoenaed records relate to those offenses, and (3) to explain why it is important that the records be produced and why it is necessary for production to occur while the President is still in office.

[There] is considerable irony in the Court's invocation of Marshall to defend a decision allowing a State's prosecutorial power to run roughshod over the functioning of a branch of the Federal Government. [The] Court's decision threatens to impair the functioning of the Presidency and provides no real protection against the use of the subpoena power by the Nation's 2,300+ local prosecutors. Respect for the structure of Government created by the Constitution demands greater protection for an institution that is vital to the Nation's safety and well-being.*

Trump v. United States

144 S. Ct. 2312 (2024)

■ CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

This case concerns the federal indictment of a former President of the United States for conduct alleged to involve official acts during his tenure in office. We consider the scope of a President's immunity from criminal prosecution.

I

From January 2017 until January 2021, Donald J. Trump served as President of the United States. On August 1, 2023, a federal grand jury indicted him on four counts for conduct that occurred during his Presidency following the November 2020 election. The indictment alleged that after losing that election, Trump conspired to overturn it by spreading knowingly false claims of election fraud to obstruct the collecting, counting, and certifying of the election results.

According to the indictment, Trump advanced his goal through five primary means. First, he and his co-conspirators "used knowingly false claims of election fraud to get state legislators and election officials to . . . change electoral votes[.]" Second, [they] "organized fraudulent slates of electors in seven targeted states[.]" Third, [they] attempted to use the Justice Department "to conduct sham election crime investigations [and assert that there

* [A concurrence in the judgment by JUSTICE KAVANAUGH (joined by JUSTICE GORSUCH) and a separate dissent by JUSTICE THOMAS are omitted. —BE]

were] significant concerns that may have impacted the election outcome." Fourth, Trump and his co-conspirators attempted to persuade "the Vice President to use his ceremonial role at the January 6 certification proceeding to fraudulently alter the election results." And when that failed, on the morning of January 6, they "repeated knowingly false claims of election fraud to gathered supporters, falsely told them that the Vice President had the authority to and might alter the election results, and directed them to the Capitol to obstruct the certification proceeding." Fifth, when "a large and angry crowd ... violently attacked the Capitol and halted the proceeding," Trump and his co-conspirators "exploited the disruption by redoubling efforts to levy false claims of election fraud and convince Members of Congress to further delay the certification."

Based on this alleged conduct, the indictment charged Trump with (1) conspiracy to defraud the United States in violation of 18 U.S.C. § 371, (2) conspiracy to obstruct an official proceeding in violation of § 1512(k), (3) obstruction of and attempt to obstruct an official proceeding in violation of §1512(c)(2), § 2, and (4) conspiracy against rights in violation of § 241.

Trump moved to dismiss the indictment based on Presidential immunity. [The district court denied the motion, and the D.C. Circuit affirmed.]

II

[Trump] contends that just as a President is absolutely immune from civil damages liability for acts within the outer perimeter of his official responsibilities, *Nixon v. Fitzgerald*, he must be absolutely immune from criminal prosecution for such acts. And Trump argues that the bulk of the indictment's allegations involve conduct in his official capacity as President. Although the Government agrees that some official actions are included in the indictment's allegations, it maintains that a former President does not enjoy immunity from criminal prosecution for any actions, regardless of how they are characterized.

We conclude that under our constitutional structure of separated powers, the nature of Presidential power requires that a former President have some immunity from criminal prosecution for official acts during his tenure in office. At least with respect to the President's exercise of his core constitutional powers, this immunity must be absolute. As for his remaining official actions, he is also entitled to immunity. At the current stage of proceedings in this case, however, we need not and do not decide whether that immunity must be absolute, or instead whether a presumptive immunity is sufficient.

A

[No] matter the context, the President's authority to act necessarily "stem[s] either from an act of Congress or from the Constitution itself." *Youngstown*. In the latter case, the President's authority is sometimes "conclusive and preclusive." *Id.* (Jackson, J., concurring). When the President exercises such authority, he may act even when the measures he takes are "incompatible with the expressed or implied will of Congress." The exclusive constitutional authority of the President "disabl[es] the Congress from acting upon the subject." And the courts have "no power to control [the President's] discretion" when he acts pursuant to the powers invested exclusively in him by the Constitution. *Marbury*.

[The] Constitution, for example, vests the "Power to Grant Reprieves and Pardons for Offences against the United States" in the President. Art. II, §2, cl. 1. During and after the Civil War, President Lincoln offered a full pardon, with restoration of property rights, to anyone who had "engaged in the rebellion" but agreed to take an oath of allegiance to the Union. *United States v. Klein* (1872). But in 1870, Congress enacted a provision that prohibited using the President's pardon as evidence of restoration of property rights. Chief Justice Chase held the provision unconstitutional because it "impair[ed] the effect of a pardon, and thus infring[ed] the constitutional power of the Executive." *Id.* The President's authority to pardon, in other words, is "conclusive and preclusive," "disabling the Congress from acting upon the subject." *Youngstown* (Jackson, J., concurring).

Some of the President's other constitutional powers also fit that description. "The President's power to remove— and thus supervise—those who wield executive power on his behalf," for instance, "follows from the text of Article II." *Seila Law LLC v. CFPB*. We have thus held that Congress lacks authority to control the President's "unrestricted power of removal" with respect to "executive officers of the United States whom he has appointed." The power "to control recognition determinations" of foreign countries is likewise an "exclusive power of the President." *Zivotofsky v. Kerry* (2015).

Congress cannot act on, and courts cannot examine, the President's actions on subjects within his "conclusive and preclusive" constitutional authority. It follows that an Act of Congress—either a specific one targeted at the President or a generally applicable one—may not criminalize the President's actions within his exclusive constitutional power. Neither may the courts adjudicate a criminal prosecution that examines such Presidential actions. We thus conclude that the President is absolutely immune from criminal prosecution for conduct within his exclusive sphere of constitutional authority.

B

But of course not all of the President's official acts fall within his "conclusive and preclusive" authority. As Justice Robert Jackson recognized in *Youngstown,* the President sometimes "acts pursuant to an express or implied authorization of Congress," or in a "zone of twilight" where "he and Congress may have concurrent authority." The reasons that justify the President's absolute immunity from criminal prosecution for acts within the scope of his exclusive authority therefore do not extend to conduct in areas where his authority is shared with Congress.

We recognize that only a limited number of our prior decisions guide determination of the President's immunity in this context. [To] resolve the matter, therefore, we look primarily to the Framers' design of the Presidency within the separation of powers, our precedent on Presidential immunity in the civil context, and our criminal cases where a President resisted prosecutorial demands for documents.

1

The President "occupies a unique position in the constitutional scheme," *Fitzgerald,* as "the only person who alone composes a branch of government." The Framers "sought to encourage energetic, vigorous, decisive, and speedy execution of the laws by placing in the hands of a single, constitutionally indispensable, individual the ultimate authority that, in respect to the other branches, the Constitution divides among many." *Clinton v. Jones,* (Breyer, J., concurring in judgment). They "deemed an energetic executive essential to 'the protection of the community against foreign attacks,' 'the steady administration of the laws,' 'the protection of property,' and 'the security of liberty.'" *Seila Law* (quoting The Federalist No. 70 (A. Hamilton)). The purpose of a "vigorous" and "energetic" Executive, they thought, was to ensure "good government," for a "feeble executive implies a feeble execution of the government."

The Framers accordingly vested the President with "supervisory and policy responsibilities of utmost discretion and sensitivity." *Fitzgerald*. He must make "the most sensitive and far-reaching decisions entrusted to any official under our constitutional system." There accordingly "exists the greatest public interest" in providing the President with "'the maximum ability to deal fearlessly and impartially with' the duties of his office." Appreciating the "unique risks to the effective functioning of government" that arise when the President's energies are diverted by proceedings that might render him "unduly cautious in the discharge of his official duties," we have recognized Presidential immunities and privileges "rooted in the constitutional tradition of the separation of powers and supported by our history." *Fitzgerald*.

In *Nixon v. Fitzgerald,* for instance, we recognized that as "a functionally mandated incident of [his] unique office," a former President "is entitled to absolute immunity from damages liability predicated on his official acts." [In] holding that Nixon was immune from that suit, "our dominant concern" was to avoid "diversion of the President's attention during the decisionmaking process caused by needless worry as to the possibility of damages actions stemming from any particular official decision." *Clinton*.

[By] contrast, when prosecutors have sought evidence from the President, we have consistently rejected Presidential claims of absolute immunity. For instance, during the treason trial of former Vice President Aaron Burr, Chief Justice Marshall rejected President Thomas Jefferson's claim that the President could not be subjected to a subpoena. [Marshall] acknowledged, however, the existence of a "privilege" to withhold certain "official paper[s]" that "ought not on light ground to be forced into public view." And he noted that a court may not "be required to proceed against the president as against an ordinary individual."

Similarly, when a subpoena issued to President Nixon to produce certain tape recordings and documents relating to his conversations with aides and advisers, this Court rejected his claim of "absolute privilege," given the "constitutional duty of the Judicial Branch to do justice in criminal prosecutions." *United States v. Nixon*. But we simultaneously recognized "the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking," as well as the need to protect "communications between high Government officials and those who advise and assist them in the performance of their manifold duties." Because the President's "need for complete candor and objectivity from advisers calls for great deference from the courts," we held that a "presumptive privilege" protects Presidential communications. That privilege, we explained, "relates to the effective discharge of a President's powers." We thus deemed it "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution."

2

Criminally prosecuting a President for official conduct undoubtedly poses a far greater threat of intrusion on the authority and functions of the Executive Branch than simply seeking evidence in his possession, as in *Burr* and *Nixon*. The danger is akin to, indeed greater than, what led us to recognize absolute Presidential immunity from civil damages liability—that the President would be chilled from taking the "bold and unhesitating action" required of an independent Executive. *Fitzgerald*. Although the President might be exposed to fewer criminal prosecutions than the range of civil damages suits that might be brought by various plaintiffs, the threat of trial, judgment, and imprisonment is a far greater deterrent. Potential criminal liability, and the peculiar public opprobrium that attaches to criminal proceedings, are plainly more likely to distort Presidential decisionmaking than the potential payment of civil damages.

The hesitation to execute the duties of his office fearlessly and fairly that might result when a President is making decisions under "a pall of potential prosecution" raises "unique risks to the effective functioning of government," *Fitzgerald*. A President inclined to take one course of action based on the public interest may instead opt for another, apprehensive that criminal penalties may befall him upon his departure from office. And if a former President's official acts are routinely subjected to scrutiny in criminal prosecutions, "the independence of the Executive Branch" may be significantly undermined. The Framers' design of the Presidency did not envision such counterproductive burdens on the "vigor[]" and "energy" of the Executive.

We must, however, "recognize[] the countervailing interests at stake." *Vance*. Federal criminal laws seek to redress "a wrong to the public" as a whole, not just "a wrong to the individual." There is therefore a compelling "public interest in fair and effective law enforcement." *Vance*. The President, charged with enforcing federal criminal laws, is not above them.

[Taking] into account these competing considerations, we conclude that the separation of powers principles explicated in our precedent necessitate at least a *presumptive* immunity from criminal prosecution for a President's acts within the outer perimeter of his official responsibility. Such an immunity is required to safeguard the independence and effective functioning of the Executive Branch, and to enable the President to carry out his constitutional duties without undue caution. [At] a minimum, the President must therefore be immune from prosecution for an official act unless the Government can show that applying a criminal prohibition to that act would pose no "dangers of intrusion on the authority and functions of the Executive Branch." *Fitzgerald* [*supra*, at III-98].

But as we explain below, the current stage of the proceedings in this case does not require us to decide whether this immunity is presumptive or absolute. See Part III-B, *infra.* Because we need not decide that question today, we do not decide it. "[O]ne case" in more than "two centuries does not afford enough experience" to definitively and comprehensively determine the President's scope of immunity from criminal prosecution. *Trump v. Mazars* (2020).

C

As for a President's unofficial acts, there is no immunity. The principles we set out in *Clinton v. Jones* confirm as much. [The] "'justifying purposes'" of the immunity we recognized in *Fitzgerald,* and the one we recognize today, are not that the President must be immune because he is the President; rather, they are to ensure that the President can undertake his constitutionally designated functions effectively, free from undue pressures or distortions. *Clinton* (quoting *Fitzgerald*). [The] separation of powers does not bar a prosecution predicated on the President's unofficial acts.[2]

III

Determining whether a former President is entitled to immunity from a particular prosecution requires applying the principles we have laid out to his conduct at issue. The first step is to distinguish his official from unofficial actions. In this case, however, no court has thus far considered how to draw that distinction, in general or with respect to the conduct alleged in particular.

[Critical] threshold issues in this case are how to differentiate between a President's official and unofficial actions, and how to do so with respect to

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[2] Our decision in *Clinton* permitted claims alleging unofficial acts to proceed against the sitting President. In the criminal context, however, the Justice Department "has long recognized" that "the separation of powers precludes the criminal prosecution of a sitting President." Brief for United States (citing A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. OLC 222 (2000)).

the indictment's extensive and detailed allegations[.] We offer guidance on those issues below. Certain allegations—such as those involving Trump's discussions with the Acting Attorney General—are readily categorized in light of the nature of the President's official relationship to the office held by that individual. Other allegations—such as those involving Trump's interactions with the Vice President, state officials, and certain private parties, and his comments to the general public—present more difficult questions. Although we identify several considerations pertinent to classifying those allegations and determining whether they are subject to immunity, that analysis ultimately is best left to the lower courts to perform in the first instance.

A

Distinguishing the President's official actions from his unofficial ones can be difficult. [The] breadth of the President's "discretionary responsibilities" under the Constitution and laws of the United States "in a broad variety of areas, many of them highly sensitive," frequently makes it "difficult to determine which of [his] innumerable 'functions' encompassed a particular action." *Fitzgerald*. And some Presidential conduct—for example, speaking to and on behalf of the American people—certainly can qualify as official even when not obviously connected to a particular constitutional or statutory provision. For those reasons, the immunity we have recognized extends to the "outer perimeter" of the President's official responsibilities, covering actions so long as they are "not manifestly or palpably beyond [his] authority." *Blassingame v. Trump* (D.C. Cir. 2023); see *Fitzgerald* (noting that we have "refused to draw functional lines finer than history and reason would support").

In dividing official from unofficial conduct, courts may not inquire into the President's motives. Such an inquiry would risk exposing even the most obvious instances of official conduct to judicial examination on the mere allegation of improper purpose, thereby intruding on the Article II interests that immunity seeks to protect. Indeed, "[i]t would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government" if "[i]n exercising the functions of his office," the President was "under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry." *Fitzgerald*. We thus rejected such inquiries in *Fitzgerald.* ["Bare] allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Harlow v. Fitzgerald* (1982).

Nor may courts deem an action unofficial merely because it allegedly violates a generally applicable law. [Otherwise,] Presidents would be subject to trial on "every allegation that an action was unlawful," depriving immunity of its intended effect. *Nixon v. Fitzgerald*.

B

With these principles in mind, we turn to the conduct alleged in the indictment.

1

[As] part of [their] conspiracy, Trump and his co-conspirators allegedly attempted to leverage the Justice Department's power and authority to convince certain States to replace their legitimate electors with Trump's fraudulent slates of electors. According to the indictment, Trump met with the Acting Attorney General and other senior Justice Department and White House officials to discuss investigating purported election fraud and sending a letter from the Department to those States regarding such fraud. The indictment further alleges that after the Acting Attorney General resisted Trump's requests, Trump repeatedly threatened to replace him.

[These] allegations [plainly] implicate Trump's "conclusive and preclusive" authority. [The] Executive Branch has "exclusive authority and absolute discretion" to decide which crimes to investigate and prosecute, including with respect to allegations of election crime. *United States v. Nixon*. The President may discuss potential investigations and prosecutions with his Attorney General and other Justice Department officials to carry out his constitutional duty to "take Care that the Laws be faithfully executed." Art. II, §3. And the Attorney General, as head of the Justice Department, acts as the President's "chief law enforcement officer" who "provides vital assistance to [him] in the performance of [his] constitutional duty to 'preserve, protect, and defend the Constitution.'" *Mitchell v. Forsyth* (1985) (quoting Art. II, §1, cl. 8).

Investigative and prosecutorial decisionmaking is "the special province of the Executive Branch," *Heckler v. Chaney* (1985),* and the Constitution vests the entirety of the executive power in the President, Art. II, §1. For that reason, Trump's threatened removal of the Acting Attorney General likewise implicates "conclusive and preclusive" Presidential authority. As we have explained, the President's power to remove "executive officers of the United States whom he has appointed" may not be regulated by Congress or reviewed by the courts. The President's "management of the Executive Branch" requires him to have "unrestricted power to remove the most important of his subordinates"— such as the Attorney General—"in their most important duties." *Fitzgerald.*

The indictment's allegations that the requested investigations were "sham[s]" or proposed for an improper purpose do not divest the President of exclusive authority over the investigative and prosecutorial functions of

* [In *Heckler v. Chaney*, the Court held that agency decisions not to initiate an enforcement action are "committed to agency discretion by law" within the meaning of the Administrative Procedure Act, and so are not subject to ordinary judicial review under the APA. We briefly encountered it in the OLC opinion about deferred action policies (*supra*, p. III-85). —BE]

the Justice Department and its officials. And the President cannot be prosecuted for conduct within his exclusive constitutional authority. Trump is therefore absolutely immune from prosecution for the alleged conduct involving his discussions with Justice Department officials.

2

The indictment next alleges that Trump and his co-conspirators "attempted to enlist the Vice President to use his ceremonial role at the January 6 certification proceeding to fraudulently alter the election results." In particular, the indictment alleges several conversations in which Trump pressured the Vice President to reject States' legitimate electoral votes or send them back to state legislatures for review.

[Our] constitutional system anticipates that the President and Vice President will remain in close contact regarding their official duties over the course of the President's term in office. These two officials are the only ones "elected by the entire Nation." *Seila Law*; see Art. II, §1. The Constitution provides that "the Vice President shall become President" in the case of "the removal of the President from office or of his death or resignation." Amdt. 25, §1. It also "empowers the Vice President, together with a majority of the 'principal officers of the executive departments,' to declare the President 'unable to discharge the powers and duties of his office.'" *Freytag v. Commissioner* (1991) (quoting Amdt. 25, §4). And Article I of course names the Vice President as President of the Senate and gives him a tiebreaking vote. §3, cl. 4. It is thus important for the President to discuss official matters with the Vice President to ensure continuity within the Executive Branch and to advance the President's agenda in Congress and beyond.

The Vice President may in practice also serve as one of the President's closest advisers. The Office of Legal Counsel has explained that within the Executive Branch, the Vice President's "sole function [is] advising and assisting the President." [As] the President's second in command, the Vice President has historically performed important functions "at the will and as the representative of the President." Participation of the Vice President in the Affairs of the Executive Branch, 1 Supp. Op. OLC 214, 220 (1961). [Historical examples omitted. —BE]

[Whenever] the President and Vice President discuss their official responsibilities, they engage in official conduct. Presiding over the January 6 certification proceeding at which Members of Congress count the electoral votes is a constitutional and statutory duty of the Vice President. Art. II, §1, cl. 3; Amdt. 12; 3 U.S.C. § 15. The indictment's allegations that Trump attempted to pressure the Vice President to take particular acts in connection with his role at the certification proceeding thus involve official conduct, and Trump is at least presumptively immune from prosecution for such conduct.

The question then becomes whether that presumption of immunity is rebutted under the circumstances. When the Vice President presides over the January 6 certification proceeding, he does so in his capacity as President of the Senate. Despite the Vice President's expansive role of advising and assisting the President within the Executive Branch, the Vice President's Article I responsibility of "presiding over the Senate" is "not an 'executive branch' function." Memorandum from L. Silberman, Deputy Atty. Gen., to R. Burress, Office of the President (1974). With respect to the certification proceeding in particular, Congress has legislated extensively to define the Vice President's role in the counting of the electoral votes, and the President plays no direct constitutional or statutory role in that process. So the Government may argue that consideration of the President's communications with the Vice President concerning the certification proceeding does not pose "dangers of intrusion on the authority and functions of the Executive Branch." *Fitzgerald*.

At the same time, however, the President may frequently rely on the Vice President in his capacity as President of the Senate to advance the President's agenda in Congress. When the Senate is closely divided, for instance, the Vice President's tiebreaking vote may be crucial for confirming the President's nominees and passing laws that align with the President's policies. Applying a criminal prohibition to the President's conversations discussing such matters with the Vice President— even though they concern his role as President of the Senate—may well hinder the President's ability to perform his constitutional functions.

It is ultimately the Government's burden to rebut the presumption of immunity. We therefore remand to the District Court to assess in the first instance, with appropriate input from the parties, whether a prosecution involving Trump's alleged attempts to influence the Vice President's oversight of the certification proceeding in his capacity as President of the Senate would pose any dangers of intrusion on the authority and functions of the Executive Branch.

3

The indictment's remaining allegations cover a broad range of conduct. Unlike the allegations describing Trump's communications with the Justice Department and the Vice President, these remaining allegations involve Trump's interactions with persons outside the Executive Branch: state officials, private parties, and the general public. Many of the remaining allegations, for instance, cover at great length events arising out of communications that Trump and his co-conspirators initiated with state legislators and election officials in Arizona, Georgia, Michigan, Pennsylvania, and Wisconsin regarding those States' certification of electors.

On Trump's view, the alleged conduct qualifies as official because it was undertaken to ensure the integrity and proper administration of the federal election. Of course, the President's duty to "take Care that the Laws be faithfully executed" plainly encompasses enforcement of federal election laws[.] And the President's broad power to speak on matters of public concern does not exclude his public communications regarding the fairness and integrity of federal elections simply because he is running for re-election. Similarly, the President may speak on and discuss such matters with state officials—even when no specific federal responsibility requires his communication—to encourage them to act in a manner that promotes the President's view of the public good.

As the Government sees it, however, these allegations encompass nothing more than Trump's "private scheme with private actors." In its view, Trump can point to no plausible source of authority enabling the President to not only organize alternate slates of electors but also cause those electors—unapproved by any state official—to transmit votes to the President of the Senate for counting at the certification proceeding, thus interfering with the votes of States' properly appointed electors. Indeed, the Constitution commits to the States the power to "appoint" Presidential electors "in such Manner as the Legislature thereof may direct." Art. II, §1, cl. 2. [The] President, meanwhile, plays no direct role in the process, nor does he have authority to control the state officials who do. And the Framers, wary of "cabal, intrigue and corruption," specifically excluded from service as electors "all those who from situation might be suspected of too great devotion to the president in office." The Federalist No. 68 (A. Hamilton); see Art. II, §1, cl. 2.

Determining whose characterization may be correct, and with respect to which conduct, requires a close analysis of the indictment's extensive and interrelated allegations. Unlike Trump's alleged interactions with the Justice Department, this alleged conduct cannot be neatly categorized as falling within a particular Presidential function. The necessary analysis is instead fact specific, requiring assessment of numerous alleged interactions with a wide variety of state officials and private persons. [We] accordingly remand to the District Court to determine in the first instance [whether] Trump's conduct in this area qualifies as official or unofficial.

4

Finally, the indictment contains various allegations regarding Trump's conduct in connection with the events of January 6 itself. It alleges that leading up to the January 6 certification proceeding, Trump issued a series of Tweets (to his nearly 89 million followers) encouraging his supporters to travel to Washington, D. C., on that day. Trump and his co-conspirators addressed the gathered public that morning, asserting that certain States wanted to recertify their electoral votes and that the Vice President had the power to send those States' ballots back for recertification. Trump then allegedly "directed the crowd in front of him to go to the Capitol" to pressure the Vice President to do so at the certification proceeding. When it became public that the Vice President would not use his role at the certification proceeding to determine which electoral votes should be counted, the crowd gathered at the Capitol "broke through barriers cordoning off the Capitol grounds" and eventually "broke into the building."

The alleged conduct largely consists of Trump's communications in the form of Tweets and a public address. The President possesses "extraordinary power to speak to his fellow citizens and on their behalf." *Trump v. Hawaii* (2018). As the sole person charged by the Constitution with executing the laws of the United States, the President oversees—and thus will frequently speak publicly about—a vast array of activities that touch on nearly every aspect of American life. Indeed, a long-recognized aspect of Presidential power is using the office's "bully pulpit" to persuade Americans, including by speaking forcefully or critically, in ways that the President believes would advance the public interest. He is even expected to comment on those matters of public concern that may not directly implicate the activities of the Federal Government—for instance, to comfort the Nation in the wake of an emergency or tragedy. For these reasons, most of a President's public communications are likely to fall comfortably within the outer perimeter of his official responsibilities.

There may, however, be contexts in which the President, notwithstanding the prominence of his position, speaks in an unofficial capacity—perhaps as a candidate for office or party leader. To the extent that may be the case, objective analysis of "content, form, and context" will necessarily inform the inquiry. *Snyder v. Phelps* (2011).* But "there is not always a clear line between [the President's] personal and official affairs." The analysis therefore must be fact specific and may prove to be challenging.

The indictment reflects these challenges. It includes only select Tweets and brief snippets of the speech Trump delivered on the morning of January 6, omitting its full text or context. Whether the Tweets, that speech, and Trump's other communications on January 6 involve official conduct may depend on the content and context of each. [We] therefore remand to the District Court to determine in the first instance whether this alleged conduct is official or unofficial.

C

[The] Government does not dispute that if Trump is entitled to immunity for certain official acts, he may not "be held criminally liable" based on those acts. But it nevertheless contends that a jury could "consider" evidence concerning the President's official acts "for limited and specified purposes," and that such evidence would "be admissible to prove, for example, [Trump's] knowledge or notice of the falsity of his election-fraud claims." That proposal threatens to eviscerate the immunity we have recognized. It would permit a prosecutor to do indirectly what he cannot do directly—invite the jury to examine acts for which a President is immune from prosecution to nonetheless prove his liability on any charge. But "[t]he

* [*Snyder* addressed the constitutionality of subjecting picketers at a funeral to tort liability for intentional infliction of emotional distress. Under the Court's First Amendment case law, that depends on whether the relevant speech addressed a "matter of public concern" or "purely private matters," and the *Snyder* Court said that this determination required assessing the "content, form, and context" of the speech. —BE]

Constitution deals with substance, not shadows." *Cummings v. Missouri* (1867). And the Government's position is untenable in light of the separation of powers principles we have outlined.

If official conduct for which the President is immune may be scrutinized to help secure his conviction, even on charges that purport to be based only on his unofficial conduct, the "intended effect" of immunity would be defeated. *Fitzgerald*. The President's immune conduct would be subject to examination by a jury on the basis of generally applicable criminal laws. Use of evidence about such conduct, even when an indictment alleges only unofficial conduct, would thereby heighten the prospect that the President's official decisionmaking will be distorted. See *Clinton*[.]

[Footnote 3 relocated to text:] JUSTICE BARRETT disagrees, arguing that in a bribery prosecution, for instance, excluding "any mention" of the official act associated with the bribe "would hamstring the prosecution." But of course the prosecutor may point to the public record to show the fact that the President performed the official act. And the prosecutor may admit evidence of what the President allegedly demanded, received, accepted, or agreed to receive or accept in return for being influenced in the performance of the act. What the prosecutor may not do, however, is admit testimony or private records of the President or his advisers probing the official act itself. Allowing that sort of evidence would invite the jury to inspect the President's motivations for his official actions and to second-guess their propriety. As we have explained, such inspection would be "highly intrusive" and would "'seriously cripple'" the President's exercise of his official duties. *Fitzgerald*. And such second-guessing would "threaten the independence or effectiveness of the Executive." *Trump v. Vance*.

IV

[The] Government does not dispute that Congress may not criminalize Presidential conduct within the President's "conclusive and preclusive" constitutional authority. And it too accords protection to Presidential conduct if subjecting that conduct to generally applicable laws would "raise serious constitutional questions regarding the President's authority" or cause a "possible conflict with the President's constitutional prerogatives." Indeed, the Executive Branch has long held that view. The Office of Legal Counsel has recognized, for instance, that a federal statute generally prohibiting appointments to "'any office or duty in any court'" of persons within certain degrees of consanguinity to the judges of such courts would, if applied to the President, infringe his power to appoint federal judges, thereby raising a serious constitutional question. 19 Op. OLC 350 (1995) (quoting 28 U.S.C. §458). So it viewed such a statute as not applying to the President. [The] Government thus broadly agrees that the President's official acts are entitled to some degree of constitutional protection.

[Yet] the Government contends that the President should not be considered immune from prosecution for those official acts. On the Government's view, as-applied challenges in the course of the trial suffice to protect Article II interests, and review of a district court's decisions on such challenges should be deferred until after trial. If the President is instead immune from prosecution, a district court's denial of immunity would be appealable before trial. See *Mitchell v. Forsyth* (1985) (explaining that questions of immunity are reviewable before trial because the essence of immunity is the entitlement not to be subject to suit).

[Questions] about whether the President may be held liable for particular actions, consistent with the separation of powers, must be addressed at the outset of a proceeding. Even if the President were ultimately not found liable for certain official actions, the possibility of an extended proceeding alone may render him "unduly cautious in the discharge of his official duties." *Fitzgerald*. Vulnerability "to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute." The Constitution does not tolerate such impediments to "the effective functioning of government."

[As] for the dissents, they strike a tone of chilling doom that is wholly disproportionate to what the Court actually does today—conclude that immunity extends to official discussions between the President and his Attorney General, and then remand to the lower courts to determine "in the first instance" whether and to what extent Trump's remaining alleged conduct is entitled to immunity.

The principal dissent's starting premise—that unlike Speech and Debate Clause immunity, no constitutional text supports Presidential immunity—is one that the Court rejected decades ago as "unpersuasive." *Fitzgerald*; see also *Nixon* (rejecting unanimously a similar argument in the analogous executive privilege context). "[A] specific textual basis has not been considered a prerequisite to the recognition of immunity." *Fitzgerald*. Nor is that premise correct. True, there is no "Presidential immunity clause" in the Constitution. But there is no "'separation of powers clause'" either. *Seila Law*. Yet that doctrine is undoubtedly carved into the Constitution's text by its three articles separating powers and vesting the Executive power solely in the President. And the Court's prior decisions, such as *Nixon* and *Fitzgerald,* have long recognized that doctrine as mandating certain Presidential privileges and immunities, even though the Constitution contains no explicit provision for immunity.

[The] assortment of historical sources the principal dissent cites are unhelpful. [Some] of its cherry-picked sources do not even discuss the President in particular. And none of them indicate whether he may be prosecuted for his official conduct. The principal dissent's most compelling piece of evidence consists of excerpted statements of Charles Pinckney from an 1800 Senate debate. But those statements reflect only the now-discredited argument that any immunity not expressly mentioned in the Constitution must not exist. And Pinckney is not exactly a reliable authority on the separation of powers: He went on to state on the same day that "it was wrong to give the nomination of Judges to the President"—an opinion expressly rejected by the Framers. Given the Framers' desire for an energetic and vigorous President, the principal dissent's view that the Constitution they designed allows all his actions to be subject to prosecution—even the exercise of powers it grants exclusively to him—defies credulity.

Unable to muster any meaningful textual or historical support, the principal dissent suggests that there is an "established understanding" that "former Presidents are answerable to the criminal law for their official acts." Conspicuously absent is mention of the fact that since the founding, no President has ever faced criminal charges—let alone for his conduct in office. And accordingly no court has ever been faced with the question of a President's immunity from prosecution. All that our Nation's practice establishes on the subject is silence.

Coming up short on reasoning, the dissents repeatedly level variations of the accusation that the Court has rendered the President "above the law." As before, that "rhetorically chilling" contention is "wholly unjustified." *Fitzgerald*. Like everyone else, the President is subject to prosecution in his unofficial capacity. But unlike anyone else, the President is a branch of government, and the Constitution vests in him sweeping powers and duties. Accounting for that reality—and ensuring that the President may exercise those powers forcefully, as the Framers anticipated he would—does not place him above the law; it preserves the basic structure of the Constitution from which that law derives.

The dissents' positions in the end boil down to ignoring the Constitution's separation of powers and the Court's precedent and instead fear mongering on the basis of extreme hypotheticals about a future where the President "feels empowered to violate federal criminal law." The dissents overlook the more likely prospect of an Executive Branch that cannibalizes itself, with each successive President free to prosecute his predecessors, yet unable to boldly and fearlessly carry out his duties for fear that he may be next. [The] enfeebling of the Presidency and our Government that would result from such a cycle of factional strife is exactly what the Framers intended to avoid. Ignoring those risks, the dissents are instead content to leave the preservation of our system of separated powers up to the good faith of prosecutors[.]

V

This case poses a question of lasting significance: When may a former President be prosecuted for official acts taken during his Presidency? Our Nation has never before needed an answer. But in addressing that question today, unlike the political branches and the public at large, we cannot afford to fixate exclusively, or even primarily, on present exigencies. In a case like this one, focusing on "transient results" may have profound consequences for the separation of powers and for the future of our Republic. *Youngstown* (Jackson, J., concurring). Our perspective must be more farsighted, for "[t]he peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional."

Our first President had such a perspective. In his Farewell Address, George Washington reminded the Nation that "a Government of as much vigour as is consistent with the perfect security of Liberty is indispensable." A government "too feeble to withstand the enterprises of faction," he warned, could lead to the "frightful despotism" of "alternate domination of one faction over another, sharpened by the spirit of revenge." And the way to avoid that cycle, he explained, was to ensure that government powers remained "properly distributed and adjusted."

It is these enduring principles that guide our decision in this case. The President enjoys no immunity for his unofficial acts, and not everything the President does is official. The President is not above the law. But Congress may not criminalize the President's conduct in carrying out the responsibilities of the Executive Branch under the Constitution. And the system of separated powers designed by the Framers has always demanded an energetic, independent Executive. The President therefore may not be prosecuted for exercising his core constitutional powers, and he is entitled, at a minimum, to a presumptive immunity from prosecution for all his official acts. That immunity applies equally to all occupants of the Oval Office, regardless of politics, policy, or party.

■ JUSTICE BARRETT, concurring in part.

For reasons I explain below, I do not join Part III-C of the Court's opinion. The remainder of the opinion is consistent with my view that the Constitution prohibits Congress from criminalizing a President's exercise of core Article II powers and closely related conduct. That said, I would have framed the underlying legal issues differently. The Court describes the President's constitutional protection from certain prosecutions as an "immunity." As I see it, that term is shorthand for two propositions: The President can challenge the constitutionality of a criminal statute as applied to official acts alleged in the indictment, and he can obtain interlocutory review of the trial court's ruling.

There appears to be substantial agreement on the first point. Like the Court, the dissenting Justices and the Special Counsel all accept that some prosecutions of a President's official conduct may be unconstitutional. As for interlocutory review, our precedent recognizes that resolving certain legal issues before trial is necessary to safeguard important constitutional interests—here, Executive Branch independence on matters that Article II assigns to the President's discretion.

Properly conceived, the President's constitutional protection from prosecution is narrow. The Court leaves open the possibility that the Constitution forbids prosecuting the President for *any* official conduct, instructing the lower courts to address that question in the first instance. I would have answered it now. Though I agree that a President cannot be held criminally liable for conduct within his "conclusive and preclusive" authority and closely related acts, the Constitution does not vest every exercise of executive power in the President's sole discretion, *Youngstown* (Jackson, J., concurring) [*supra*, p. III-15].[1] Congress has concurrent authority over many Government functions, and it may sometimes use that authority to regulate the President's official conduct, including by criminal statute. Article II poses no barrier to prosecution in such cases.

I would thus assess the validity of criminal charges predicated on most official acts—*i.e.,* those falling outside of the President's core executive power—in two steps. The first question is whether the relevant criminal statute reaches the President's official conduct. Not every broadly worded statute does. For example, [18 U.S.C.] § 956 covers conspiracy to murder in a foreign country and does not expressly exclude the President's decision to, say, order a hostage rescue mission abroad. The underlying murder statute, however, covers only "unlawful" killings. The Office of Legal Counsel has interpreted that phrase to reflect a public-authority exception for official acts involving the military and law enforcement. I express no view about the merits of that interpretation, but it shows that the threshold question of statutory interpretation is a nontrivial step.

If the statute covers the alleged official conduct, the prosecution may proceed only if applying it in the circumstances poses no "dange[r] of intrusion on the authority and functions of the Executive Branch." *Ante* (quoting *Fitzgerald*). On remand, the lower courts will have to apply that standard to various allegations involving the President's official conduct. Some of those allegations raise unsettled questions about the scope of Article II power, but others do not. For example, the indictment alleges that the President "asked the Arizona House Speaker to call the legislature into session to hold a hearing" about election fraud claims. The President has no authority over state legislatures or their leadership, so it is hard to see how prosecuting him for crimes committed when dealing with the Arizona House Speaker would unconstitutionally intrude on executive power.

This two-step analysis—considering first whether the statute applies and then whether its application to the particular facts is constitutional—is [our] usual approach to considering the validity of statutes in situations raising a constitutional question. See, *e.g., Seila Law*. An important difference in this context is that the President is entitled to an interlocutory appeal of the trial court's ruling. A criminal defendant in federal court normally must wait until after trial to seek review of the trial court's refusal to dismiss charges. But where trial itself threatens certain constitutional interests, we have treated the trial court's resolution of the issue as a "final decision" for

[1] Consistent with our separation of powers precedent, I agree with the Court that the supervision and removal of appointed, high ranking Justice Department officials falls within the President's core executive power. See *Seila Law*. I do not understand the Court to hold that all exercises of the Take Care power fall within the core executive power. Cf. *post* (Sotomayor, J., dissenting). I agree with the dissent that the Constitution does not justify such an expansive view. [See *infra*, p. III-137.]

purposes of appellate jurisdiction. [Here, the] prospect of a trial court erroneously allowing the prosecution to proceed poses a unique danger to the "independence of the Executive Branch." *Vance*. As the Court explains, the possibility that the President will be made to defend his official conduct before a jury after he leaves office could distort his decisions while in office. These Article II concerns do not insulate the President from prosecution. But they do justify interlocutory review of the trial court's final decision on the President's as-applied constitutional challenge.

I understand most of the Court's opinion to be consistent with these views. I do not join Part III-C, however, which holds that the Constitution limits the introduction of protected conduct as *evidence* in a criminal prosecution of a President, beyond the limits afforded by executive privilege. I disagree with that holding; on this score, I agree with the dissent. The Constitution does not require blinding juries to the circumstances surrounding conduct for which Presidents *can* be held liable. Consider a bribery prosecution—a charge not at issue here but one that provides a useful example. The federal bribery statute forbids any public official to seek or accept a thing of value "for or because of any official act." 18 U.S.C. §201(c). The Constitution, of course, does not authorize a President to seek or accept bribes, so the Government may prosecute him if he does so. See Art. II, §4 (listing "Bribery" as an impeachable offense). Yet excluding from trial any mention of the official act connected to the bribe would hamstring the prosecution. To make sense of charges alleging a *quid pro quo,* the jury must be allowed to hear about both the *quid* and the *quo,* even if the *quo,* standing alone, could not be a basis for the President's criminal liability.

I appreciate the Court's concern that allowing into evidence official acts for which the President cannot be held criminally liable may prejudice the jury. But the rules of evidence are equipped to handle that concern on a case-by-case basis. Most importantly, a trial court can exclude evidence of the President's protected conduct "if its probative value is substantially outweighed by a danger of ... unfair prejudice" or "confusing the issues." Fed. Rule Evid. 403; see also Rule 105 (requiring the court to "restrict the evidence to its proper scope and instruct the jury accordingly"). The balance is more likely to favor admitting evidence of an official act in a bribery prosecution, for instance, than one in which the protected conduct has little connection to the charged offense. And if the evidence comes in, the trial court can instruct the jury to consider it only for lawful purposes. I see no need to depart from that familiar and time-tested procedure here.

■ JUSTICE SOTOMAYOR, with whom JUSTICE KAGAN and JUSTICE JACKSON join, dissenting.

Today's decision to grant former Presidents criminal immunity reshapes the institution of the Presidency. It makes a mockery of the principle, foundational to our Constitution and system of Government, that no man is above the law. Relying on little more than its own misguided wisdom about the need for "bold and unhesitating action" by the President, the Court gives former President Trump all the immunity he asked for and more. Because our Constitution does not shield a former President from answering for criminal and treasonous acts, I dissent.

[II]

The Court now confronts a question it has never had to answer in the Nation's history: Whether a former President enjoys immunity from federal criminal prosecution. The majority thinks he should, and so it invents an atextual, ahistorical, and unjustifiable immunity that puts the President above the law.

The majority makes three moves that, in effect, completely insulate Presidents from criminal liability. First, the majority creates absolute immunity for the President's exercise of "core constitutional powers." This holding is unnecessary on the facts of the indictment, and the majority's attempt to apply it to the facts expands the concept of core powers beyond any recognizable bounds. In any event, it is quickly eclipsed by the second move, which is to create expansive immunity for all "official act[s]." Whether described as presumptive or absolute, under the majority's rule, a President's use of any official power for any purpose, even the most corrupt, is immune from prosecution. That is just as bad as it sounds, and it is baseless. Finally, the majority declares that evidence concerning acts for which the President is immune can play no role in any criminal prosecution against him. That holding, which will prevent the Government from using a President's official acts to prove knowledge or intent in prosecuting private offenses, is nonsensical. [Argument] by argument, the majority invents immunity through brute force[.]

III

The main takeaway of today's decision is that all of a President's official acts, defined without regard to motive or intent, are entitled to immunity that is "at least . . . *presumptive,*" and quite possibly "absolute." Whenever the President wields the enormous power of his office, the majority says, the criminal law (at least presumptively) cannot touch him. This official-acts immunity has "no firm grounding in constitutional text, history, or precedent." *Dobbs v. Jackson Women's Health Organization* (2022) [*infra*, p. VI-9]. Indeed, those "standard grounds for constitutional decisionmaking" all point in the opposite direction. No matter how you look at it, the majority's official-acts immunity is utterly indefensible.

[The] Constitution's text contains no provision for immunity from criminal prosecution for former Presidents. [Aware] of its lack of textual support, the majority points out that this Court has "recognized Presidential immunities and privileges 'rooted in the constitutional tradition of the separation of powers and supported by our history.'" *Ante* (quoting *Fitzgerald*). That is true, as far as it goes. Nothing in our history, however, supports the majority's entirely novel immunity from criminal prosecution for official acts.

The historical evidence that exists on Presidential immunity from criminal prosecution cuts decisively against it. For instance, Alexander Hamilton wrote that former Presidents would be "liable to prosecution and punishment in the ordinary course of law." The Federalist No. 69. For Hamilton, that was an important distinction between "the king of Great Britain," who was "sacred and inviolable," and the "President of the United States," who "would be amenable to personal punishment and disgrace." In contrast to the king, the President should be subject to "personal responsibility" for his actions, "stand[ing] upon no better ground than a governor of New York, and upon worse ground than the governors of Maryland and Delaware," whose State Constitutions gave them some immunity.

At the Constitutional Convention, James Madison, who was aware that some state constitutions provided governors immunity, proposed that the Convention "conside[r] what privileges ought to be allowed to the Executive." There is no record of any such discussion. Delegate Charles Pinckney later explained that "[t]he Convention which formed the Constitution well knew" that "no subject had been more abused than privilege," and so it "determined to . . . limi[t] privilege to what was necessary, and no more." "No privilege . . . was intended for [the] Executive."

Other commentators around the time of the Founding observed that federal officials had no immunity from prosecution, drawing no exception for the President. James Wilson recognized that federal officers who use their official powers to commit crimes "may be tried by their country; and if their criminality is established, the law will punish. A grand jury may present, a petty jury may convict, and the judges will pronounce the punishment."

This historical evidence reinforces that, from the very beginning, the presumption in this Nation has always been that no man is free to flout the criminal law. The majority fails to recognize or grapple with the lack of historical evidence for its new immunity. [It] seems history matters to this Court only when it is convenient. See, *e.g., New York State Rifle & Pistol Assn., Inc. v. Bruen* (2022) [*infra*, p. IV-115]; *Dobbs*.

[Our] country's history also points to an established understanding, shared by both Presidents and the Justice Department, that former Presidents are answerable to the criminal law for their official acts. Consider Watergate, for example. After the Watergate tapes revealed President Nixon's misuse of official power to obstruct the Federal Bureau of Investigation's investigation of the Watergate burglary, President Ford pardoned Nixon. [Both] Ford's pardon and Nixon's acceptance of the pardon necessarily "rested on the understanding that the former President faced potential criminal liability." Brief for the United States.

Subsequent special counsel and independent counsel investigations have also operated on the assumption that the Government can criminally prosecute former Presidents for their official acts, where they violate the criminal law. [Indeed,] Trump's own lawyers during his second impeachment trial assured Senators that declining to impeach Trump for his conduct related to January 6 would not leave him "in any way above the law." They insisted that a former President "is like any other citizen and can be tried in a court of law."

In sum, the majority today endorses an expansive vision of Presidential immunity that was never recognized by the Founders, any sitting President, the Executive Branch, or even President Trump's lawyers, until now. Settled understandings of the Constitution are of little use to the majority in this case, and so it ignores them.

IV

A

Setting aside this evidence, the majority announces that former Presidents are "absolute[ly]," or "at least ... presumptive[ly]," immune from criminal prosecution for all of their official acts. The majority purports to keep us in suspense as to whether this immunity is absolute or presumptive, but it quickly gives up the game. It explains that, "[a]t a minimum, the President must . . . be immune from prosecution for an official act unless the Government can show that applying a criminal prohibition to that act would pose *no 'dangers of intrusion* on the authority and functions of the Executive Branch.'" No dangers, none at all. It is hard to imagine a criminal prosecution for a President's official acts that would pose no dangers of intrusion on Presidential authority in the majority's eyes. [When] presumptive immunity is this conclusive, the majority's indecision as to "whether [official-acts] immunity must be absolute" or whether, instead, "presumptive immunity is sufficient," hardly matters.

[Quick] on the heels of announcing this astonishingly broad official-acts immunity, the majority assures us that a former President can still be prosecuted for "unofficial acts." Of course he can. No one has questioned the ability to prosecute a former President for unofficial (otherwise known as private) acts.

[In] fact, the majority's dividing line between "official" and "unofficial" conduct narrows the conduct considered "unofficial" almost to a nullity. It says that whenever the President acts in a way that is "'not manifestly or palpably beyond [his] authority,'" he is taking official action. It then goes a step further: "In dividing official from unofficial conduct, courts may not inquire into the President's motives." It is one thing to say that motive is irrelevant to questions regarding the scope of civil liability, but it is quite another to make it irrelevant to questions regarding criminal liability. Under that rule, any use of official power for any purpose, even the most corrupt purpose indicated by objective evidence of the most corrupt motives and intent, remains official and immune. Under the majority's test, if it can be called a test, the category of Presidential action that can be deemed "unofficial" is destined to be vanishingly small.

B

[So] how does the majority get to its rule? With text, history, and established understanding all weighing against it, the majority claims just one arrow in its quiver: the balancing test in *Nixon v. Fitzgerald*. Yet even that test cuts against it. The majority concludes that official-acts immunity "is required to safeguard the independence and effective functioning of the Executive Branch," by rejecting that Branch's own protestations that such immunity is not at all required and would in fact be harmful. In doing so, it decontextualizes *Fitzgerald*'s language, ignores important qualifications, and reaches a result that the *Fitzgerald* Court never would have countenanced.

[The] majority says that the danger "of intrusion on the authority and functions of the Executive Branch" posed by criminally prosecuting a former President for official conduct "is akin to, indeed greater than, what led us to recognize absolute Presidential immunity from civil damages liability [.]" [Yet] there are many facets of criminal liability [that] make it less likely to chill Presidential action than the threat of civil litigation.

First, in terms of probability, the threat of criminal liability is much smaller. [*Fitzgerald*] observed that, given the "visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages." [The] risk in the criminal context is only that a former President may face one federal prosecution, in one jurisdiction, for each criminal offense allegedly committed while in office.

[Second,] federal criminal prosecutions require "robust procedural safeguards" not found in civil suits. The criminal justice system has layers of protections[.] If the prosecution makes it past the grand jury, then the former President still has all the protections our system provides to criminal defendants. If the former President has an argument that a particular statute is unconstitutional as applied to him, then he can move to dismiss the charges on that ground. Indeed, a former President is likely to have legal arguments that would be unavailable to the average criminal defendant. For example, he may be able to rely on a public-authority exception from particular criminal laws, or an advice-of-the-Attorney-General defense.

If the case nonetheless makes it to trial, the Government will bear the burden of proving every element of the alleged crime beyond a reasonable doubt to a unanimous jury of the former President's fellow citizens. If the Government manages to overcome even that significant hurdle, then the former President can appeal his conviction [and] can ultimately seek this Court's review[.]

[The] majority insists that the threat of criminal sanctions is "more likely to distort Presidential decisionmaking than the potential payment of civil damages." If that is right, then that distortion has been shaping Presidential decisionmaking since the earliest days of the Republic. Although it makes sense to avoid "diversion of the President's attention during the decisionmaking process" with "needless worry," *Clinton,* one wonders why requiring some small amount of his attention (or his legal advisers' attention) to go towards complying with federal criminal law is such a great burden. If the President follows the law that he must "take Care" to execute, Art. II, §3, he has not been rendered "unduly cautious." Some amount of caution is necessary, after all. It is a far greater danger if the President feels empowered to violate federal criminal law, buoyed by the knowledge of future immunity. I am deeply troubled by the idea, inherent in the majority's opinion, that our Nation loses something valuable when the President is forced to operate within the confines of federal criminal law.

So what exactly is the majority worried about deterring when it expresses great concern for the "deterrent" effect that "the threat of trial, judgment, and imprisonment" would pose? It cannot possibly be the deterrence of acts that are truly criminal. Nor does it make sense for the majority to wring its hands over the possibility that Presidents might stop and think carefully before taking action that borders on criminal. Instead, the majority's main concern could be that Presidents will be deterred from taking necessary and lawful action by the fear that their successors might pin them with a baseless criminal prosecution—a prosecution that would almost certainly be doomed to fail, if it even made it out of the starting gate. The Court should not have so little faith in this Nation's Presidents. [The] concern that countless (and baseless) civil suits would hamper the Executive may have been justified in *Fitzgerald,* but a well-founded federal criminal prosecution poses no comparable danger to the functioning of the Executive Branch.

At the same time, the public interest in a federal criminal prosecution of a former President is vastly greater than the public interest in a private individual's civil suit. All nine Justices in *Fitzgerald* explicitly recognized that distinction. [At] the very least, the *Fitzgerald* Court did not expect that its balancing test would lead to the same outcome in the criminal context.

The public's interest in prosecution is transparent: a federal prosecutor herself acts on behalf of the United States. [The] public interest in criminal prosecution is particularly strong with regard to officials who are granted some degree of civil immunity because of their duties. It is in those cases where the public can see that officials exercising power under public trust remain on equal footing with their fellow citizens under the criminal law. [The] public interest in the federal criminal prosecution of a former President alleged to have used the powers of his office to commit crimes may be greater still. [When] Presidents use the powers of their office for personal gain or as part of a criminal scheme, every person in the country has an interest in that criminal prosecution. The majority overlooks that paramount interest entirely.

Finally, the question of federal criminal immunity for a former President "involves a countervailing Article II consideration absent in *Fitzgerald*": recognizing such an immunity "would frustrate the Executive Branch's enforcement of the criminal law." Brief for United States. The majority seems to think that allowing former Presidents to escape accountability for breaking the law while disabling the current Executive from prosecuting such violations somehow respects the independence of the Executive. It does not. Rather, it diminishes that independence, exalting occupants of the office over the office itself. There is a twisted irony in saying, as the majority does, that the person charged with "tak[ing] Care that the Laws be faithfully executed" can break them with impunity.

In the case before us, the public interest and countervailing Article II interest are particularly stark. The public interest in this criminal prosecution implicates both "[t]he Executive Branch's interest in upholding Presidential elections and vesting power in a new President under the Constitution" as well as "the voters' interest in democratically selecting their President." *United States v. Trump* (D.C. Cir. 2024). It also, of course, implicates Congress's own interest in regulating conduct through the criminal law. Cf. *Fitzgerald* (noting that the case did not involve "affirmative action by Congress"). Yet the majority believes that a President's anxiety over prosecution overrides the public's interest in accountability and negates the interests of the other branches in carrying out their constitutionally assigned functions. It is, in fact, the majority's position that "boil[s] down to ignoring the Constitution's separation of powers."

V

[Separate] from its official-acts immunity, the majority recognizes absolute immunity for "conduct within [the President's] exclusive sphere of constitutional authority."

[The] core immunity that the majority creates will insulate a considerably larger sphere of conduct than the narrow core of "conclusive and preclusive" powers that the Court previously has recognized. The first indication comes when the majority includes the President's broad duty to "'take Care that the Laws be faithfully executed'" among the core functions for which a former President supposedly enjoys absolute immunity. That expansive view of core power will effectively insulate all sorts of noncore conduct from criminal prosecution. Were there any question, consider how the majority applies its newly minted core immunity to the allegations in this case. It concludes that "Trump is . . . absolutely immune from prosecution for" any "conduct involving his discussions with Justice Department officials." That conception of core immunity expands the "conclusive and preclusive" category beyond recognition, foreclosing the possibility of prosecution for broad swaths of conduct. Under that view of core powers, even fabricating evidence and insisting the Department use it in a criminal case could be covered. The majority's conception of "core" immunity sweeps far more broadly than its logic, borrowed from *Youngstown,* should allow.

[When] forced to wade into thorny separation-of-powers disputes, this Court's usual practice is to "confine the opinion only to the very questions necessary to decision of the case." There is plenty of peril and little value in crafting a core immunity doctrine that Trump did not seek and that rightly has no application to this case[.]

VII

[Looking] beyond the fate of this particular prosecution, the long-term consequences of today's decision are stark. The Court effectively creates a law-free zone around the President, upsetting the status quo that has existed since the Founding. This new official-acts immunity now "lies about like a loaded weapon" for any President that wishes to place his own interests, his own political survival, or his own financial gain, above the interests of the Nation. *Korematsu v. United States* (1944) (Jackson, J., dissenting). The President of the United States is the most powerful person in the country, and possibly the world. When he uses his official powers in any way, under the majority's reasoning, he now will be insulated from criminal prosecution. Orders the Navy's Seal Team 6 to assassinate a political rival? Immune. Organizes a military coup to hold onto power? Immune. Takes a bribe in exchange for a pardon? Immune. Immune, immune, immune.

Let the President violate the law, let him exploit the trappings of his office for personal gain, let him use his official power for evil ends. Because if he knew that he may one day face liability for breaking the law, he might not be as bold and fearless as we would like him to be. That is the majority's message today.

Even if these nightmare scenarios never play out, and I pray they never do, the damage has been done. The relationship between the President and the people he serves has shifted irrevocably. In every use of official power, the President is now a king above the law.

* * *

The majority's single-minded fixation on the President's need for boldness and dispatch ignores the countervailing need for accountability and restraint. The Framers were not so single-minded. In the Federalist Papers, after "endeavor[ing] to show" that the Executive designed by the Constitution "combines ... all the requisites to energy," Alexander Hamilton asked a separate, equally important question: "Does it also combine the requisites to safety, in a republican sense, a due dependence on the people, a due responsibility?" The Federalist No. 77. The answer then was yes, based in part upon the President's vulnerability to "prosecution in the common course of law." The answer after today is no.

Never in the history of our Republic has a President had reason to believe that he would be immune from criminal prosecution if he used the trappings of his office to violate the criminal law. Moving forward, however, all former Presidents will be cloaked in such immunity. If the occupant of that office misuses official power for personal gain, the criminal law that the rest of us must abide will not provide a backstop.

With fear for our democracy, I dissent.*

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* [A separate concurrence by JUSTICE THOMAS and a separate dissent by JUSTICE JACKSON are omitted. —BE]

SOME QUESTIONS ABOUT PRESIDENTIAL IMMUNITY

1. "Above the Law." One trope throughout these cases is the notion that nobody, including the President, should be "above the law." Most conspicuously, the dissenters in both *Nixon v. Fitzgerald* and *Trump v. United States* charged that those decisions had elevated the President above the law, and the majority opinions in each case insisted that they had not done so. But what does it even mean to be "above the law"? Is Justice Alito right when he says, in *Vance*, that this rhetoric just "beg[s] the question" (*supra*, p. III-113) of what the law should be?

2. Official and Unofficial Acts. In both civil and criminal contexts, the Court stresses the distinction between official acts, for which the President is potentially immune, and unofficial acts, for which he is not. But how does one sort conduct into these categories? In *Trump v. United States,* the district court was poised to undertake that inquiry on remand, but the special counsel abandoned the case after Trump won the 2024 election. Had the case moved forward, how should the court have classified each of the categories of conduct—such as Trump's tweets and speech on January 6—for which the Supreme Court left the question open?

3. Dissenting Strategies. *Trump v. United States* illustrates a choice that often confronts dissenters. In major cases, the majority will often include hints of moderation or ambiguity in its opinion—perhaps in a sincere spirit of incrementalism or uncertainty, or perhaps in an effort to mollify the public. Dissenters (and commentators) then have to choose between seizing on these as potential openings for narrowing the ruling and diminishing them in the name of unmasking just how bad the majority's ruling really is. Note, for instance, the contrast between how Justices Barrett and Sotomayor each address the question of whether "all exercises of the Take Care power fall within the core executive power" for immunity purposes (*supra*, p. III-130 n.1), even though they agree on the correct answer. What do you think figures in the strategic calculus here? Or, to take another example, what do you think is gained and lost when the dissenters announce that, under their reading of the opinion, a President who "[t]akes a bribe in exchange for a pardon" would be "immune" (*supra*, p. III-138)?[*]

4.* Trump v. United States *and the Scope of Presidential Power. Recall Jack Goldsmith's observation that OLC, not the courts, has the final legal say on many important questions about the separation of powers—and that it "tends to rely on general principles embodied in Supreme Court dicta, especially ones that favor presidential power" (*supra*, p. III-52). In part for that reason, Goldsmith has suggested that the *Trump* case's greater significance

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[*] As we proceed, you'll see similar strategic judgments reflected in the dissents from each of the Court's major gay-rights cases, as well as from its recent decisions in *Dobbs v. Jackson Women's Health Organization* [*infra*, p. VI-9] and *SFFA v. Harvard College* [*infra*, p. V-110].

may lie not in its immunity holding as such, but in its assertions and presuppositions about what falls within the President's "conclusive and preclusive" authority:

> Executive branch lawyers will use these elements of the decision to stave off efforts by Congress to direct any aspect of prosecution or law enforcement disfavored by the executive branch. They will also use them to reject congressional efforts to constrain the president's directive power [i.e., power to personally direct how subordinates exercise their statutorily assigned responsibilities], and to resist statutes that purport to regulate the structure of the government in ways the executive branch dislikes, especially concerning the Justice Department. Some administrations will use the decision to try to remove a broader swath of subordinate officials than has been allowed in the past, including possibly independent agency heads and inferior officers. [And] executive branch lawyers will invoke the decision in support of enhanced executive branch power to exercise discretion in law enforcement, including civil law enforcement.[*]

How might the *Trump* decision move the needle on these issues? For example, might OLC's defense of large-scale deferred action policies (*supra*, p. III-83) be strengthened, or its criteria for the permissibility of such policies relaxed, with *Trump* on the books?

[*] Jack Goldsmith, *The Relative Insignificance of the Immunity Holding in* Trump v. United States *(and What Is Really Important in the Decision)*, LAWFARE (Sept. 23, 2024), https://tinyurl.com/yzsjzaz2.