1. ORIGINS AND NATURE OF U.S. FOREIGN RELATIONS LAW

Constitutional history plays an important role in modern U.S. foreign relations law for several reasons. The Constitution’s text relating to foreign relations uses some language drawn from 18th Century international law and practice; the study of historical sources thus helps us understand the meaning of those terms at the time the Constitution was enacted. Second, to understand the types of powers accorded to the federal government under the U.S. Constitution, it is useful to know what governmental powers existed under the Articles of Confederation and why those powers were regarded as deficient. After all, the U.S. Constitution was written against the backdrop of the Articles of Confederation. The framers were trying to fix certain problems of the previous government. By understanding these problems, we can better understand what the framers were trying to accomplish—and what they were trying to avoid—in creating certain federal foreign affairs powers.

Related to the foregoing is a third reason that constitutional history plays an especially prominent role in foreign relations law: the text of the Constitution—famed for its brevity—includes an impressive (if sometimes baffling) list of foreign relations-related powers. Constitutional text and the historical meaning of that text is thus potentially more important to modern foreign relations law than it is to some other areas of constitutional interpretation. Fourth, although constitutional theorists employ different interpretive approaches to the Constitution, all accept that constitutional text and its meaning when the Constitution was adopted is at least relevant to contemporary constitutional interpretation, even if not dispositive. Finally, the Supreme Court has relied on constitutional history in many of its important foreign relations cases, including Curtiss-Wright and Zivotofsky.

As you read the materials below, consider the following. The ability to represent the American colonies in matters of foreign relations resided with the British government up until 1776. Where did that foreign relations power reside after the U.S. Declaration of Independence? Where
did it reside after the formation of the new government under the U.S. Constitution in 1789? To the extent that concern about foreign affairs powers was one impetus to shift from the Articles of Confederation to the U.S. Constitution, what exactly were the problems under the Articles of Confederation? Was it a concern with the division of powers within the central government or the division of powers between the central government and the states?

**ANDREW C. MC LAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES**

125–146 (1935).

... The powers granted to Congress [under the Articles of Confederation, which were ratified in 1781,] bear a general resemblance to those exercised by the Crown and Parliament in the old colonial system in which the colonies had grown to maturity; and if one compares the Articles with the Constitution adopted at Philadelphia in 1787, he will find a considerable similarity in the scheme of distribution. Time was to show the defects of the system; but the actual merits of the system agreed upon are noteworthy. No power to lay taxes was bestowed on Congress, and no power to regulate commerce, the two things about which there had been so much dispute in the preceding decade. These omissions were largely instrumental in bringing into existence the Constitutional Convention of 1787.

Without the consent of Congress, the states were expressly forbidden to send an embassy to a foreign state, receive an embassy, enter into any agreement with a foreign power, form any treaty of combination among themselves, maintain ships of war or troops in time of peace—though a militia must be provided and sufficiently armed,—or engage in war unless actually invaded or in immediate danger of Indian attack. All charges of war and other expenses incurred for the common defense and general welfare were to be defrayed out of a common treasury supplied by the several states. To Congress was given, among other powers, the general powers of determining on war and peace, carrying on foreign affairs, though with some restrictions, regulating the alloy and value of coin, fixing the standard of weights and measures, regulating the trade and managing all the affairs with the Indians “not members of any of the States”, establishing and regulating post offices from one state to another, appointing important army officers and all naval officers, borrowing money, building and equipping a navy, and making requisitions upon the states for troops....

While the Articles granted to Congress considerable authority, its powers were qualified, in some respects carefully, for the protection of the states’ rights. Although Congress was given power to enter into treaties,
the states were not totally forbidden to lay imposts, but they were forbidden to levy such duties as might interfere with “stipulations in treaties entered into by the United States . . . in pursuance of any treaties already proposed by Congress to the courts of France and Spain.” Congress could make no treaty of commerce whereby the states should be restrained from imposing such imposts on foreigners as their own people were subjected to; and apparently the states could freely prohibit the exportation or importation of any kind of goods. The failure to grant Congress complete power to regulate commerce rendered it difficult or impossible to make a commercial treaty with a foreign nation and to have assurance that the states would comply with its provisions. The years that followed disclosed the fact that the want of authority to make treaties which would bind the states was one of the cardinal defects of the system. . . .

The industrial and commercial conditions after the [revolutionary] war were in considerable confusion. Readjustments were necessary, especially for the resuscitation of the New England shipping industry. Some improvement came fairly quickly, and there is evidence that by 1786 the clouds of depression were beginning to lift. But it was hard to make much headway, especially as Britain was not ready to treat her former colonies as if they deserved particular favors or consideration; they had made their own beds, now let them lie there—a condition of retirement not suited to the restless spirit of the New England skippers whose ships were soon plowing the seas, even on to the Orient as well as to the ports of continental Europe. Commercial treaties were desirable, and some steps were taken in that direction; but it was hard to do anything effectively as long as the individual states could not be relied on to fulfill their obligations. Foreign nations naturally queried whether America was one or many, or, perhaps, one to-day and thirteen to-morrow.

The [1783 U.S.-Great Britain] treaty of peace was not carried out. Britain still held the western posts from Lake Champlain to Mackinaw and thus retained control of the northern fur trade and influence over the Indians. Spain holding the mouth of the Mississippi was unwilling to allow free navigation through her territory. Trouble was brewing because of American treatment of loyalists and because the stipulation in the treaty, that there should be no unlawful impediment to the collection of debts due British creditors, received no particular attention. John Jay declared in 1786 that the treaty had been constantly violated by one state or another from the time of its signing and ratification. The Barbary powers, eager to take advantage of a helpless country, to seize American seamen, and to hold them for ransom, entered upon the game with lusty vigor. A nation which was not yet a nation in terms of law and political authority could do nothing to resist scorn and humiliation. . . .

But what was the very center of the difficulty? What was the chief problem of the time? The trouble and confusion were manifestly caused by
the failure of the states to abide by their obligations. The problem was to
find a method, if union was to subsist at all, for overcoming the difficulty,
to find therefore some arrangement, some scheme or plan of organization
wherein there would be reasonable assurance that the states would fulfill
their obligations and play their part under established articles of union and
not make mockery of union by willful disregard or negligent delay. That
was the chief problem of the day. . . .

THE FEDERALIST PAPERS NO. 41 (MADISON)

The Constitution proposed by the convention may be considered under
two general points of view. The first relates to the sum or quantity of power
which it vests in the government, including the restraints imposed on the
States. The second, to the particular structure of the government and the
distribution of this power among its several branches.

Under the first view of the subject, two important questions arise: 1.
Whether any part of the powers transferred to the general government be
unnecessary or improper? 2. Whether the entire mass of them be dangerous
to the portion of jurisdiction left in the several States? . . .

It cannot have escaped those who have attended with candor to the
arguments employed against the extensive powers of the government that
the authors of them have very little considered how far these powers were
necessary means of attaining a necessary end. They have chosen rather to
dwell on the inconveniences which must be unavoidably blended with all
political advantages; and on the possible abuses which must be incident to
every power or trust of which a beneficial use can be made. . . .

That we may form a correct judgment on this subject, it will be proper
to review the several powers conferred on the government of the Union;
and that this may be the more conveniently done they may be reduced into
different classes as they relate to the following different objects: 1. Security
against foreign danger; 2. Regulation of the intercourse with foreign
nations; 3. Maintenance of harmony and proper intercourse among the
States; 4. Certain miscellaneous objects of general utility; 5. Restraint
of the States from certain injurious acts; 6. Provisions for giving due efficacy
to all these powers. . . .

Security against foreign danger is one of the primitive objects of civil
society. It is an avowed and essential object of the American Union. The
powers requisite for attaining it must be effectually confided to the federal
councils. . . .

The Union itself, which it cements and secures, destroys every pretext
for a military establishment which could be dangerous. America united,
with a handful of troops, or without a single soldier, exhibits a more
forbidding posture to foreign ambition than America disunited, with a hundred thousand veterans ready for combat. . . . Instead of deriving from our situation the precious advantage which Great Britain has derived from hers, the face of America [in the absence of union] will be but a copy of that of the continent of Europe. It will present liberty everywhere crushed between standing armies and perpetual taxes. The fortunes of disunited America will be even more disastrous than those of Europe. The sources of evil in the latter are confined to her own limits. No superior powers of another quarter of the globe intrigue among her rival nations, inflame their mutual animosities, and render them the instruments of foreign ambition, jealousy, and revenge. In America the miseries springing from her internal jealousies, contentions, and wars would form a part only of her lot. A plentiful addition of evils would have their source in that relation in which Europe stands to this quarter of the earth, and which no other quarter of the earth bears to Europe.

THE FEDERALIST PAPERS NO. 42 (MADISON)

The second class of powers lodged in the general government consist of those which regulate the intercourse with foreign nations, to wit: to make treaties; to send and receive ambassadors, other public ministers, and consuls;¹ to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations; to regulate foreign commerce. . . .²

This class of powers forms an obvious and essential branch of federal administration. If we are to be one nation in any respect, it clearly ought to be in respect to other nations.

The powers to make treaties and to send and receive ambassadors speak their own propriety. Both of them are comprised in the Articles of Confederation, with this difference only, that the former is disembarrassed by the plan of the convention, of an exception under which treaties might be substantially frustrated by regulations of the States; and that a power of appointing and receiving “other public ministers and consuls” is expressly and very properly added to the former provision concerning ambassadors. . . .

The power to define and punish piracies and felonies committed on the high seas and offenses against the law of nations belongs with equal propriety to the general government, and is a still greater improvement on the Articles of Confederation. These articles contain no provision for the case of offenses against the law of nations; and consequently leave it in the

¹ [Authors' Note: See U.S. CONST. art. II, § 2, cl. 2.]
² [Authors' Note: See U.S. CONST. art. I, § 8.]
power of any indiscreet member to embroil the Confederacy with foreign nations.

**The Federalist Papers No. 44 (Madison)**


A *fifth* class of provisions in favor of the federal authority consists of the following restrictions on the authority of the several States.

1. “No State shall enter into any treaty, alliance, or confederation; [or] grant letters of marque and reprisal. . . .”

The prohibition against treaties, alliances, and confederations makes a part of the existing [Articles of Confederation]; and for reasons which need no explanation, is copied into the new Constitution. The prohibition of letters of marque is another part of the old system, but is somewhat extended in the new. According to the former, letters of marque could be granted by the States after a declaration of war; according to the latter, these licenses must be obtained, as well during war as previous to its declaration, from the government of the United States. This alteration is fully justified by the advantage of uniformity in all points which relate to foreign powers; and of immediate responsibility to the nation in all those for whose conduct the nation itself is to be responsible.

2. “No state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, and the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress. No State shall, without the consent of Congress, lay any duty on tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war unless actually invaded, or in such imminent danger as will not admit of delay.”

The restraint on the power of the States over imports and exports is enforced by all the arguments which prove the necessity of submitting the regulation of trade to the federal councils. It is needless, therefore, to remark further on this head, than that the manner in which the restraint is qualified seems well calculated at once to secure to the States a reasonable discretion in providing for the conveniency of their imports and exports, and to the United States a reasonable check against the abuse of this discretion. The remaining particulars of this clause fall within reasonings which are either so obvious, or have been so fully developed, that they may be passed over without remark.

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1. [Authors' Note: U.S. Const. art. I, § 10, cl. 1.]
2. [Authors' Note: U.S. Const. art. I, § 10, cl. 2 & 3.]
The sixth and last class consists of the several powers and provisions by which efficacy is given to all the rest.

1. Of these the first is the “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.”

Few parts of the Constitution have been assailed with more intemperance than this; yet on a fair investigation of it, as has been elsewhere shown, no part can appear more completely invulnerable. Without the substance of this power, the whole Constitution would be a dead letter.

2. “This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.”

The indiscreet zeal of the adversaries to the Constitution has betrayed them into an attack on this part of it also, without which it would have been evidently and radically defective. To be fully sensible of this, we need only to suppose for a moment that the supremacy of the State constitutions had been left complete by a saving clause in their favor.

**CHAE CHAN PING V. UNITED STATES**

**[THE CHINESE EXCLUSION CASE]**

130 U.S. 581 (1889).

[Following the anti-Chinese riots of 1885–86 in San Francisco, the United States and China took measures to limit emigration from China to America. Under the Bayard-Zhang Treaty (1888), China agreed to suspend immigration for twenty years. In return, the American government pledged to protect Chinese assets in the United States. Massive protests erupted in China following the signing of the Bayard-Zhang Treaty, and the agreement was never formally ratified by the Chinese government. Congress proceeded legislatively, enacting the Scott Act in 1888, which permanently banned the immigration or return of Chinese to the United States. In 1889, the Supreme Court considered the legality of the Scott Act.]

MR. JUSTICE FIELD delivered the opinion of the Court.

There being nothing in the treaties between China and the United States to impair the validity of the act of Congress of October 1, 1888, was it on any other ground beyond the competency of Congress to pass it? If so,
it must be because it was not within the power of Congress to prohibit Chinese laborers who had at the time departed from the United States, or should subsequently depart, from returning to the United States. Those laborers are not citizens of the United States; they are aliens. That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power.

While under our Constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects or citizens are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory. The powers to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the States, and admit subjects of other nations to citizenship, are all sovereign powers, restricted in their exercise only by the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations.

To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us. The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth; and its determinations, so far as the subjects affected are concerned, are necessarily conclusive upon all its departments and officers. If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects. The existence of war would render the necessity of the proceeding only more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist, and the same authority which adjudges the necessity in one case must also determine it in the other. In both cases its determination is conclusive upon the judiciary. If the government of the country of which the foreigners excluded are subjects is dissatisfied with this action, it can make complaint to the executive head of our government,
or resort to any other measure which, in its judgment, its interests or dignity may demand; and there lies its only remedy.

**United States v. Curtiss-Wright Export Corp.**


[From 1932 to 1935, Bolivia and Paraguay fought a war for control of a large part of the Chaco region of South America, which was thought to contain vast oil resources. In 1934, Congress enacted and the president signed into law a joint resolution providing that, if the president made certain findings and issued a proclamation to the effect that a ban on arms sales to Bolivia and Paraguay would serve the cause of regional peace, then such arms sales would be illegal. Thereafter, the president made the findings and issued the proclamation. Upon being charged in 1936 with violating the law by selling arms to Bolivia, defendant Curtiss-Wright Corporation challenged the law's constitutionality inter alia on a theory that it invalidly delegated legislative power to the executive.]

MR. JUSTICE SUTHERLAND delivered the opinion of the Court. . . .

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

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

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

As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency—namely, the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence. Rulers come and go; governments end and forms of government change; but sovereignty survives. A political society cannot endure without a supreme will somewhere. Sovereignty is never held in suspense. When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union. *See Penhallow v. Doane*, 3 Dall. 54, 80–81. That fact was given practical application almost at once. The treaty of peace, made on September 23, 1783, was concluded between his Brittanic Majesty and the “United States of America.”

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

“The states were not ‘sovereigns’ in the sense contended for by some. They did not possess the peculiar features of sovereignty,—they could not make war, nor peace, nor alliances, nor treaties. Considering them as political beings, they were dumb, for they could not speak to any foreign sovereign whatever.
They were deaf, for they could not hear any propositions from such sovereign. They had not even the organs or faculties of defence or offence, for they could not of themselves raise troops, or equip vessels, for war.” 5 Elliot’s Debates 212.

It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality. Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens; and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law. As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign. The power to acquire territory by discovery and occupation, the power to expel undesirable aliens, the power to make such international agreements as do not constitute treaties in the constitutional sense, none of which is expressly affirmed by the Constitution, nevertheless exist as inherently inseparable from the conception of nationality. This the court recognized, and in each of the cases cited found the warrant for its conclusions not in the provisions of the Constitution, but in the law of nations.

Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, “The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.” Annals, 6th Cong., col. 613. The Senate Committee on Foreign Relations at a very early day in our history (February 15, 1816), reported to the Senate, among other things, as follows:

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

U.S. Senate, Reports, Committee on Foreign Relations, vol. 8, p. 24.

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

“The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers. The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in
the President, with the advice and consent of the Senate, the principle on which that body was formed confining it to a small number of members. To admit, then, a right in the House of Representatives to demand and to have as a matter of course all the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent.” 1 Messages and Papers of the Presidents, p. 144.

The marked difference between foreign affairs and domestic affairs in this respect is recognized by both houses of Congress in the very form of their requisitions for information from the executive departments. In the case of every department except the Department of State, the resolution directs the official to furnish the information. In the case of the State Department, dealing with foreign affairs, the President is requested to furnish the information “if not incompatible with the public interest.” A statement that to furnish the information is not compatible with the public interest rarely, if ever, is questioned.

When the President is to be authorized by legislation to act in respect of a matter intended to affect a situation in foreign territory, the legislator properly bears in mind the important consideration that the form of the President’s action—or, indeed, whether he shall act at all—may well depend, among other things, upon the nature of the confidential information which he has or may thereafter receive, or upon the effect which his action may have upon our foreign relations. This consideration, in connection with what we have already said on the subject, discloses the unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed. As this court said in Mackenzie v. Hare, 239 U.S. 299, 311, “As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers.” (Italics supplied.)

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

The uniform, long-continued and undisputed legislative practice just disclosed rests upon an admissible view of the Constitution which, even if the practice found far less support in principle than we think it does, we should not feel at liberty at this late day to disturb.
We deem it unnecessary to consider, *seriatim*, the several clauses which are said to evidence the unconstitutionality of the Joint Resolution as involving an unlawful delegation of legislative power. It is enough to summarize by saying that, both upon principle and in accordance with precedent, we conclude there is sufficient warrant for the broad discretion vested in the President to determine whether the enforcement of the statute will have a beneficial effect upon the reestablishment of peace in the affected countries; whether he shall make proclamation to bring the resolution into operation; whether and when the resolution shall cease to operate and to make proclamation accordingly; and to prescribe limitations and exceptions to which the enforcement of the resolution shall be subject. . . .

*Reversed.*

MR. JUSTICE MCREYNOLDS does not agree. He is of opinion that the court below reached the right conclusion and its judgment ought to be affirmed.

MR. JUSTICE STONE took no part in the consideration or decision of this case.

**NOTES**

1. *Content of U.S. Foreign Relations Powers.* At the end of this casebook, the U.S. Constitution is appended. (*See Appendix 1*). Look through the Constitution and identify what powers relating to foreign affairs have been expressly allocated to the federal government. In doing so, you may wish to divide them up based on whether they were allocated to the legislative, executive, or judicial branches. To which branch are the most powers accorded? To which the least? Note that in some instances specific foreign affairs powers (such as the power to make treaties) were expressly denied to the several states. Are any significant foreign affairs powers left unaddressed? Do any appear to have been allocated to the several states? What arguments were made in the Federalist Papers in favor of the centralization of foreign affairs powers in the federal government? The division of power between the federal government and the states in the area of foreign affairs remains an important issue today. For cases and commentary, see Chapter 6.

2. *Nature of U.S. Foreign Relations Powers.* Do you think the foreign relations powers of the United States emanate solely from the U.S. Constitution or are they also drawn from other sources? Do you see in the *Chinese Exclusion Case* a reliance upon sovereignty as a source of extra-constitutional congressional authority? Or is sovereignty a source of authority that comes from the Constitution, albeit one that is not specified in the text? Does the sovereignty-based reasoning in *Curtiss-Wright* and the *Chinese Exclusion Case* mean that the powers of the federal government change based on developments in international or comparative law?
In *Curtiss-Wright*, the Court explicitly reasoned that the federal government’s power over foreign affairs has an extra-constitutional source. Does either the *Chinese Exclusion Case* or *Curtiss-Wright* suggest that the foreign relations power trumps protections that might otherwise exist for individuals, or must the foreign relations power be read consonant with individual rights and liberties, as they existed at the founding and as they have evolved over time? See Louis Henkin, *Essays Commemorating the One Hundredth Anniversary of the Harvard Law Review: The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 Harv. L. Rev. 853, 862–63 (1987); David A. Martin, *Why Immigration’s Plenary Power Doctrine Endures*, 68 Ok. L. Rev. 29 (2015).

3. **Methodology.** How important is constitutional history to contemporary constitutional interpretation? One family of theories called originalism (or, more broadly, formalism), posits that the original meaning of the Constitution’s text is controlling unless that meaning is ambiguous or otherwise does not provide a clear answer. Another family of theories, functionalism, generally holds that the contemporary practice of the political branches should be relevant to constitutional interpretation in separation of powers cases and that constitutional policy or goals are relevant to interpretation generally. Professor Harlan Cohen, quoting from William Eskridge, has described the distinction in this way:

... [T]he tension between these two visions, one formalist and the other functionalist, can take a number of forms in judicial opinions. One manifestation is the choice between rules and standards. ‘Formalism might be associated with bright-line rules that seek to place determinate, readily enforceable limits on public actors. Functionalism, at least as an antipode, might be associated with standards or balancing tests that seek to provide public actors with greater flexibility.’ A different manifestation is in the forms of reasoning we might use to answer hard questions. ‘Formalism might be understood as deduction from authoritative constitutional text, structure, original intent, or all three working together. Functionalism might be understood as induction from constitutional policy and practice, with practice typically being examined over time.’ Finally, a third manifestation might be with regard to goals. ‘Formalism might be understood as giving priority to rule of law values such as transparency, predictability, and continuity in law. Functionalism, in turn, might be understood as emphasizing pragmatic values like adaptability, efficacy, and justice in law.’

Formalism is essentially backward-looking, tethering interpretations to existing doctrines, prior precedents, and original text. Functionalism looks to the present and future, asking what rule will lead to the best results (understood, of course, within the general constitutional design).

the Supreme Court’s reasoning in separation of powers and foreign relations cases has oscillated between various kinds of formalism and functionalism. The Court has generally failed to “articulate a consistent theoretical framework for determining the significance” of various interpretative tools such as constitutional text, structure, original intent or meaning, subsequent practice, and other potential sources of constitutional meaning. See Michael J. Glennon, Constitutional Diplomacy 35–36 (1990).

4. Foreign Affairs Exceptionalism. Are foreign affairs issues and cases “exceptional,” meaning that they involve different tools of constitutional interpretation, different constraints on judicial decision-making, or especially compelling arguments in favor of federal and presidential power? The Curtiss-Wright opinion reasons that foreign affairs are exceptional for both historical and functional reasons. Since the Curtiss-Wright decision, the Court has sometimes suggested that foreign relations cases are exceptional and at other times has reasoned that they should be treated like other cases. See Ganesh Sitaraman & Ingrid Wuerth, The Normalization of Foreign Relations Law, 128 HARV. L. REV. 1897 (2015). How compelling are Justice Sutherland’s functional reasons in favor of foreign relations exceptionalism?

5. Hindsight. Is Justice Sutherland’s view of history correct? For the view that sovereignty resided in the states for at least some period of time between 1776 and 1789, see Akhil Reed Amar, America’s Constitution: A Biography (2005) (arguing, based in part on comparisons to Dutch and Swiss confederacies from the eighteenth century, that the each state was sovereign notwithstanding their agreement to “what the Articles [of Confederation] called a ‘perpetual’ ‘union’”); Merrill Jensen, The Articles of Confederation 176 (1970) (“according to the constitution which united the thirteen states from 1781 to 1789, the several states were de facto and de jure sovereign”); Claude H. Van Tyne, Sovereignty in the American Revolution: An Historical Study, 12 AM. HIST. REV. 529 (1907) (arguing that both psychologically and legally the states were regarded as sovereign throughout the period).

6. International Law. What role should international law play in interpreting the Constitution’s allocation of foreign affairs authority? In analyzing Curtiss-Wright, Professor Sarah Cleveland notes, “the Court has also relied on inherent sovereign powers derived from international law to establish national quasi-constitutional or extra-constitutional authority in a variety of areas, including immigration and the governance of Native American tribes and territorial inhabitants, as well as the power of eminent domain. . . . In each of these contexts, the Court has looked to international law, not to inform constitutional text, but to supplant it.” Sarah H. Cleveland, Our International Constitution, 31 YALE J. INT’L L. 1, 39 (2006).

7. Sole Organ. Does the president “alone ha[ve] the power to speak or listen as a representative of the nation,” as Curtiss-Wright reasons? What does the opinion cite in support of this claim? The phrase is attributed to John Marshall’s speech in 1800 before the House of Representatives. But at issue there was only President Adams’ authority to turn over to Britain an individual
charged with murder. Marshall took to the floor of the House to argue against efforts to impeach Adams. Louis Fisher, Congressional Abdication on War and Spending 31 (2000). Does the “sole organ” argument mean that the president has exclusive control over the conduct of diplomacy? The Office of Legal Counsel (OLC) has reasoned that an appropriations bill that purported to prohibit funds from being used to pay the expenses of U.S. delegations to certain international meetings was unconstitutional. See Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act (June 1, 2009), available at https://www.justice.gov/sites/default/files/olc/opinions/2009/06/31/section7054.pdf, [http://perma.cc/RD6W-6277]. The OLC’s Memorandum discusses many statutes in which Congress has attempted to control the conduct of diplomacy. Does this practice suggest that the issue is unsettled? (See generally Chapter 5).

8. Delegation Theory. In Curtiss-Wright, Congress and the president were marching in lockstep. Does the case present a significant constitutional issue? Is it surprising that the Supreme Court should take the case? Part of the explanation lies in cases decided during the year before Curtiss-Wright was handed down. In these cases, the Supreme Court struck down key pieces of New Deal legislation on the theory that the statutes unconstitutionally delegated legislative power to the Executive. See Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). Arguably, some clarification was required concerning the extent to which the “non-delegation doctrine” applied in the realm of foreign affairs.

9. An Executive Stalwart. The Curtiss-Wright case is often cited by the executive branch to support wide-ranging presidential powers in the field of foreign affairs, even though in that case Congress fully supported the executive action. Was it necessary for the Court to discuss the scope of the president’s “inherent” powers? Is the discussion of sovereignty and its effect on executive power holding or dictum? The case gives important functional reasons in favor of executive power in foreign relations cases. Are they convincing? Does the answer change depending upon the military and economic strength of the nation?

2. SEPARATION OF POWERS

The Constitution’s division of foreign relations powers between the president and Congress has framed the conduct of U.S. foreign policy since the late eighteenth century. From the 1790s through today, Congress has enacted legislation related to many foreign policy issues including the capture of enemy vessels, trade and commerce, the assets and immunity of foreign nations, sanctions, international human rights, the treatment of prisoners, foreign aid, and other topics. Many of these statutes delegate power to the president. Most of them rarely give rise to litigation. In practice, many foreign relations powers are shared or concurrent. Studying court cases that address the separation of powers between the president
and Congress accordingly presents a somewhat distorted view of that relationship which can often function without difficulty. Nevertheless, there are seminal separation of powers cases that have set limits on presidential and congressional action. This Section addresses four especially significant ones. As you read them, keep in mind that they also raise, whether implicitly or explicitly, the question of how and under what circumstances courts should demarcate the boundaries between executive and legislative power.

**LITTLE V. BARREME**

6 U.S. (2 Cranch) 170 (1804).

[Relations between the United States and France, two allies during the American Revolutionary War, deteriorated rapidly following ratification of the Jay Treaty between America and Britain in 1795. Within just a few years, French privateers were raiding U.S. vessels, including in the Chesapeake Bay. Consequently, during 1798–1800, the United States fought an undeclared naval war with France.

*Little v. Barreme* was one of three Supreme Court cases to address this so-called “quasi-war” with France. In this case, U.S. frigates in 1799 captured a Danish vessel (the *Flying Fish*) near the island of Hispaniola (a large island that is now home to the countries of Haiti and the Dominican Republic). The *Flying Fish* was en route from Jeremie (a port on the French-controlled part of Hispaniola, now in Haiti) to the island of St. Thomas (part of the Virgin Islands then under Danish control). The U.S. captain (Little) brought the vessel to Boston, thinking that he was acting in accordance with a 1799 statute entitled “an act further to suspend the commercial intercourse between the United States and France, and the dependencies thereof.” That statute suspended all U.S. seaborne trade with France (section 1) and allowed for seizure on the high seas of U.S. vessels bound for France if thought to be carrying cargo for France (section 5).]

*February 27. MARSHALL, CHIEF JUSTICE, now delivered the opinion of the Court.*

The *Flying-Fish*, a Danish vessel, having on board Danish and neutral property, was captured on the 2d of December 1799, on a voyage from Jeremie to St. Thomas’s, by the United States frigate *Boston*, commanded by Captain Little, and brought into the port of Boston, where she was libelled as an American vessel that had violated the non-intercourse law.

The judge before whom the cause was tried, directed a restoration of the vessel and cargo as neutral property, but refused to award damages for the capture and detention, because in his opinion, there was probable cause to suspect the vessel to be American.
On an appeal to the circuit court this sentence was reversed, because the *Flying-Fish* was on a voyage *from*, not *to*, a French port, and was therefore, had she even been an American vessel, not liable to capture on the high seas.

During the hostilities between the United States and France, an act for the suspension of all intercourse between the two nations was annually passed. That under which the *Flying-Fish* was condemned, declared every vessel, owned, hired or employed wholly or in part by an American, which should be employed in any traffic or commerce with or for any person resident within the jurisdiction or under the authority of the French republic, to be forfeited together with her cargo; the one half to accrue to the United States, and the other to any person or persons, citizens of the United States, who will inform and prosecute for the same.

The 5th section of this act authorizes the president of the United States, to instruct the commanders of armed vessels, “to stop and examine any ship or vessel of the United States on the high seas, which there may be reason to suspect to be engaged in any traffic or commerce contrary to the true tenor of the act, and if upon examination it should appear that such ship or vessel is bound, or sailing *to* any port or place within the territory of the French republic or her dependencies, it is rendered lawful to seize such vessel, and send her into the United States for adjudication.”

It is by no means clear that the president of the United States whose high duty it is to “take care that the laws be faithfully executed,” and who is commander in chief of the armies and navies of the United States, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication, American vessels which were forfeited by being engaged in this illicit commerce. But when it is observed that the general clause of the first section of the “act, which declares that such vessels may be seized, and may be prosecuted in any district or circuit court, which shall be holden within or for the district where the seizure shall be made,” obviously contemplates a seizure within the United States; and that the 5th section gives a special authority to seize on the high seas, and limits that authority to the seizure of vessels bound or sailing *to* a French port, the legislature seems to have prescribed that the manner in which this law shall be carried into execution, was to exclude a seizure of any vessel not bound *to* a French port. Of consequence, however strong the circumstances might be, which induced Captain Little to suspect the *Flying-Fish* to be an American vessel, they could not excuse the detention of her, since he would not have been authorised to detain her had she been really American.

It was so obvious, that if only vessels sailing to a French port could be seized on the high seas, that the law would be very often evaded, that this
act of congress appears to have received a different construction from the executive of the United States; a construction much better calculated to give it effect.

A copy of this act was transmitted by the secretary of the navy, to the captains of the armed vessels, who were ordered to consider the 5th section as a part of their instructions. The same letter contained the following clause. “A proper discharge of the important duties enjoined on you, arising out of this act, will require the exercise of a sound and an impartial judgment. You are not only to do all that in you lies, to prevent all intercourse, whether direct or circuitous, between the ports of the United States and those of France or her dependencies, where the vessels are apparently as well as really American, and protected by American papers only, but you are to be vigilant that vessels or cargoes really American, but covered by Danish or other foreign papers, and bound to or from French ports, do not escape you.”

These orders given by the executive under the construction of the act of congress made by the department to which its execution was assigned, enjoin the seizure of American vessels sailing from a French port. Is the officer who obeys them liable for damages sustained by this misconstruction of the act, or will his orders excuse him? If his instructions afford him no protection, then the law must take its course, and he must pay such damages as are legally awarded against him; if they excuse an act not otherwise excusable, it would then be necessary to inquire whether this is a case in which the probable cause which existed to induce a suspicion that the vessel was American, would excuse the captor from damages when the vessel appeared in fact to be neutral.

I confess the first bias of my mind was very strong in favor of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages. I was much inclined to think that a distinction ought to be taken between acts of civil and those of military officers; and between proceedings within the body of the country and those on the high seas. That implicit obedience which military men usually pay to the orders of their superiors, which indeed is indispensably necessary to every military system, appeared to me strongly to imply the principle that those orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to obey them, and who is placed by the laws of his country in a situation which in general requires that he should obey them. I was strongly inclined to think that where, in consequence of orders from the legitimate authority, a vessel is seized with pure intention, the claim of the injured party for damages would be against that government from which the orders proceeded, and would be a proper subject for negotiation. But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is, that the
instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass.

It becomes therefore unnecessary to inquire whether the probable cause afforded by the conduct of the *Flying-Fish* to suspect her of being an American, would excuse Captain Little from damages for having seized and sent her into port, since had she actually been an American, the seizure would have been unlawful.

Captain Little then must be answerable in damages to the owner of this neutral vessel, and as the account taken by order of the circuit court is not objectionable on its face, and has not been excepted to by council before the proper tribunal, this court can receive no objection to it.

There appears then to be no error in the judgment of the circuit court, and it must be affirmed with costs.

**NOTES**

1. **Congressional Power.** What constitutional power of Congress was at play in *Little v. Barreme*? The power to declare war? To make rules concerning captures on water? To make rules for the governing and regulation of naval forces? To regulate foreign commerce?

2. **Presidential Power.** Is there any constitutional power of the president that should have been relevant in *Little v. Barreme*? Of what significance is it that the Court does not discuss whether the president has “inherent” or “independent” power to conduct U.S. foreign policy, especially in the context of an informal war? Why does the Court not discuss the constitutionality of the statute in question, *i.e.*, the ability of Congress to inhibit the president’s conduct in waging an informal war?

3. **Relating Congressional Power to Executive Power.** What specific act of the executive was challenged in *Little v. Barreme*? With respect to that challenged act, what was the posture of Congress? Did Congress approve of the act? Oppose it? Neither? Does the constitutionality of the president’s act turn on how you answer that question? Would the president’s act have been constitutional if Congress had been silent?

4. **Implying Congressional Approval.** Assuming that the non-intercourse statute is the relevant source of law, might the Secretary of the Navy have *implied* a broader congressional restriction on trade with France from the statute? Is Justice Marshall’s interpretation the only viable one? What if Congress had appropriated funding for naval patrols off the coast of Port-au-Prince? The question of implied congressional authorization is one that has arisen repeatedly and will be revisited in the materials to come.

5. **Precedential Value.** *Little v. Barreme* is frequently cited as a case dealing with the distribution of war powers between Congress and the president, one that helps define the scope of presidential power in the face of congressional disapproval. How significant is it that the congressional statute
at issue authorized the seizure of American vessels engaged in commerce with France, given Congress’s express constitutional power to regulate foreign commerce? Further, should the case be read narrowly as concerning merely the liability of a military official for damages during a period of hostilities? One scholar has suggested that “the Court instead viewed the provisions of the act as primarily pertaining to Congress’s power to regulate commerce with other nations,” Gregory J. Sidak, The Quasi-War Cases, 28 HARV. J.L. & PUB. POL’Y 465, 493 (2005), while another has argued that Barreme does not reach the issue of presidential war powers because the Court was asked only to consider Captain Little’s liability. See John C. Yoo, The Continuation of Politics by Other Means: The Original Understanding of War Powers, 84 CAL. L. REV. 167, 294–95 n.584 (1996). Do you agree?

YOUNGSTOWN SHEET & TUBE CO. v. SAWYER
343 U.S. 579 (1952).

MR. JUSTICE BLACK delivered the opinion of the Court.

We are asked to decide whether the President was acting within his constitutional power when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation’s steel mills. The mill owners argue that the President’s order amounts to lawmaking, a legislative function which the Constitution has expressly confided to the Congress and not to the President. The Government’s position is that the order was made on findings of the President that his action was necessary to avert a national catastrophe which would inevitably result from a stoppage of steel production, and that in meeting this grave emergency the President was acting within the aggregate of his constitutional powers as the Nation’s Chief Executive and the Commander in Chief of the Armed Forces of the United States. 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 that should be included in new collective bargaining agreements. Long-continued conferences failed to resolve the dispute. On April 4, 1952, the Union gave notice of a nation-wide strike called to begin at 12:01 a.m. April 9. The indispensability of steel as a component of substantially all weapons and other war materials led the President to believe that the proposed work stoppage would immediately jeopardize our national defense and that governmental seizure of the steel mills was necessary in order to assure the continued availability of steel Reciting these considerations for his action, the President, a few hours before the strike was to begin, issued Executive Order 10340. The order directed the Secretary of Commerce to take possession of most of the steel mills and keep them running. The Secretary immediately issued his own possessory orders, calling upon the presidents of the various seized companies to serve as operating managers for the
United States. They were directed to carry on their activities in accordance with regulations and directions of the Secretary. The next morning the President sent a message to Congress reporting his action. Twelve days later he sent a second message. Congress has taken no action.

Obeying the Secretary’s orders under protest, the companies brought proceedings against him in the District Court. Their complaints charged that the seizure was not authorized by an act of Congress or by any constitutional provisions. The District Court was asked to declare the orders of the President and the Secretary invalid and to issue preliminary and permanent injunctions restraining their enforcement. Opposing the motion for preliminary injunction, the United States asserted that a strike disrupting steel production for even a brief period would so endanger the well-being and safety of the Nation that the President had “inherent power” to do what he had done—power “supported by the Constitution, by historical precedent, and by court decisions.” . . .

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. Indeed, we do not understand the Government to rely on statutory authorization for this seizure. 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. The Government refers to the seizure provisions of one of these statutes as “much too cumbersome, involved, and time-consuming for the crisis which was at hand.”

Moreover, the use of the seizure technique to solve labor disputes in order to prevent work stoppages was not only unauthorized by any congressional enactment; prior to this controversy, Congress had refused to adopt that method of settling labor disputes. When the Taft-Hartley Act was under consideration in 1947, Congress rejected an amendment which would have authorized such governmental seizures in cases of emergency. Apparently it was thought that the technique of seizure, like that of compulsory arbitration, would interfere with the process of collective bargaining. Consequently, the plan Congress adopted in that Act did not provide for seizure under any circumstances. Instead, the plan sought to bring about settlements by use of the customary devices of mediation, conciliation, investigation by boards of inquiry, and public reports.

It is clear that if the President had authority to issue the order he did, it must be found in some provisions 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 a number of 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 of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation’s lawmakers, not for its military authorities.

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 lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that “All legislative Powers herein granted shall be vested in a Congress of the United States. . . .” After granting many powers to the Congress, Article I goes on to provide that Congress may “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.”

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 rules and 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, prescribing rules designed to settle labor disputes, and fixing wages and working conditions in certain fields of our economy. 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 in 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.

The judgment of the District Court is

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MR. JUSTICE JACKSON, concurring in the judgment and opinion of the Court.

That comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country will impress anyone who has served as legal adviser to a President in time of transition and public anxiety. 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—such as wages or stabilization—and lose sight of enduring consequences upon the balanced power structure of our Republic.

A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each
side of any question. They largely cancel each other. 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 of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress. We may well begin by a somewhat over-simplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity.

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth), 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 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

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1 A Hamilton may be matched against a Madison. 7 The Works of Alexander Hamilton, 76–117; 1 Madison, Letters and Other Writings, 611–654. Professor Taft is counterbalanced by Theodore Roosevelt. Taft, Our Chief Magistrate and His Powers, 139–140; Theodore Roosevelt, Autobiography, 388–389. It even seems that President Taft cancels out Professor Taft. Compare his “Temporary Petroleum Withdrawal No. 5” of September 27, 1909, United States v. Midwest Oil Co., 236 U.S. 459, 467, 468, with his appraisal of executive power in “Our Chief Magistrate and His Powers” 139–140.

2 It is in this class of cases that we find the broadest recent statements of presidential power, including those relied on here. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, involved, not the question of the President’s power to act without congressional authority, but the question of his right to act under and in accord with an Act of Congress. . . . That case does not solve the present controversy. It recognized internal and external affairs as being in separate categories, and held that the strict limitation upon congressional delegations of power to the President over internal affairs does not apply with respect to delegations of power in external affairs. It was intimating that the President might act in external affairs without congressional authority, but not that he might act contrary to an Act of Congress.
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. That takes away also the support of the many precedents and declarations which were made in relation, and must be confined, to this category.\(^\text{5}\)

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. . . .

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

I did not suppose, and I am not persuaded, that history leaves it open to question, at least in the courts, that the executive branch, like the Federal Government as a whole, possesses only delegated powers. The purpose of the Constitution was not only to grant power, but to keep it from getting out of hand. However, because the President does not enjoy unmentioned powers does not mean that the mentioned ones should be narrowed by a niggardly construction. Some clauses could be made almost unworkable, as well as immutable, by refusal to indulge some latitude of interpretation for changing times. I have heretofore, and do now, give to

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\(^5\) The oft-cited Louisiana Purchase had nothing to do with the separation of powers as between the President and Congress, but only with state and federal power. The Louisiana Purchase was subject to rather academic criticism, not upon the ground that Mr. Jefferson acted without authority from Congress, but that neither had express authority to expand the boundaries of the United States by purchase or annexation. Mr. Jefferson himself had strongly opposed the doctrine that the State’s delegation of powers to the Federal Government could be enlarged by resort to implied powers.
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 of the United States of America.” 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. Continental European examples were no more appealing. And if we seek instruction from our own times, we can match it only from the executive powers in those governments we disparagingly describe as totalitarian. 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. . . .” These cryptic words have given rise to some of the most persistent controversies in our constitutional history. Of course, they imply something more than an empty title. But just what authority goes with the name has plagued presidential advisers who would not waive or narrow it by nonassertion yet cannot say where it begins or ends. It 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. To quote, “Perhaps the most forceful illustrations of the scope of Presidential power in this connection is the fact that American troops in Korea, whose safety and effectiveness are so directly involved here, were sent to the field by an exercise of the

9 “. . . he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices. . . .” U.S. Const., Art. II, § 2. He “. . . shall Commission all the Officers of the United States.” U.S. Const., Art. II, § 3. Matters such as those would seem to be inherent in the Executive if anything is.
President’s constitutional powers.” Thus, it is said, he has invested himself with “war powers.”

I cannot foresee all that it might entail if the Court should indorse this argument. Nothing in our Constitution is plainer than that declaration of a 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.10 I do not, however, find it necessary or appropriate to consider the legal status of the Korean enterprise to discountenance argument based on it.

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. I suppose no one would doubt that Congress can take over war supply as a Government enterprise. On the other hand, if Congress sees fit to rely on free private enterprise collectively bargaining with free labor for support and maintenance of our armed forces, can the Executive, because of lawful disagreements incidental to that process, seize the facility for operation upon Government-imposed terms?

10 How widely this doctrine espoused by the President’s counsel departs from the early view of presidential power is shown by a comparison. President Jefferson, without authority from Congress, sent the American fleet into the Mediterranean, where it engaged in a naval battle with the Tripolitan fleet. He sent a message to Congress on December 8, 1801, in which he said:

“Tripoli, the least considerable of the Barbary States, had come forward with demands unfounded either in right or in compact, and had permitted itself to denounce war on our failure to comply before a given day. The style of the demand admitted but one answer. I sent a small squadron of frigates into the Mediterranean . . . with orders to protect our commerce against the threatened attack. . . . Our commerce in the Mediterranean was blockaded and that of the Atlantic in peril. . . . One of the Tripolitan cruisers having fallen in with and engaged the small schooner Enterprise, . . . was captured, after a heavy slaughter of her men. . . . Unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense, the vessel being disabled from committing further hostilities, was liberated with its crew. The Legislature will doubtless consider whether, by authorizing measures of offense also, they will place our force on an equal footing with that of its adversaries. I communicate all material information on this subject, that in the exercise of the important function confided by the Constitution to the Legislature exclusively their judgment may form itself on a knowledge and consideration of every circumstance of weight.” I Richardson, Messages and Papers of the Presidents, 314.
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. It is also empowered to make rules for the “Government and Regulation of land and naval Forces,” by which it may to some unknown extent impinge upon even command functions.

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. Time out of mind, and even now in many parts of the world, a military commander can seize private housing to shelter his troops. Not so, however, in the United States, for the Third Amendment says, “No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.” Thus, even in war time, his seizure of needed military housing must be authorized by Congress. It also was expressly left to Congress to “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions....” Such a limitation on the command power, written at a time when the militia rather than a standing army was contemplated as the military weapon of the Republic, underscores the Constitution’s policy that Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy.

We should not use this occasion to circumscribe, much less to contract, the lawful role of the President as Commander in Chief. I should indulge the widest latitude of interpretation to sustain his 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. His command power is not such an absolute as might be implied from that office in a militaristic system but is subject to limitations consistent with a constitutional Republic whose law and policy-making branch is a representative Congress. The purpose of lodging dual titles in one man was to insure that the civilian would control the military, not to enable the military to subordinate the presidential office. No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role. What the power of command may include I do not try to envision, but I think it is not a military prerogative, without support of law, to seize persons or property because they are important or even essential for the military and naval establishment.
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 words of the Fifth Amendment that “No person shall be . . . deprived of life, liberty or property, without due process of law. . . .” 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 non-legal 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. While it is not surprising that counsel should grasp support from such unadjudicated claims of power, a judge cannot accept self-servings press statements of the attorney for one of the interested parties as authority in answering a constitutional question, even if the advocate was himself. But prudence has counseled that actual reliance on such nebulous claims stop short of provoking a judicial test. . . .

Germany, after the First World War, framed the Weimar Constitution, designed to secure her liberties in the Western tradition. However, the President of the Republic, without concurrence of the Reichstag, was empowered temporarily to suspend any or all individual rights if public safety and order were seriously disturbed or endangered. This proved a temptation to every government, whatever its shade of opinion, and in 13 years suspension of rights was invoked on more than 250 occasions. Finally, Hitler persuaded President Von Hindenberg to suspend all such rights, and they were never restored.

The French Republic provided for a very different kind of emergency government known as the “state of siege.” It differed from the German emergency dictatorship, particularly in that emergency powers could not
be assumed at will by the Executive but could only be granted as a parliamentary measure. And it did not, as in Germany, result in a suspension or abrogation of law but was a legal institution governed by special legal rules and terminable by parliamentary authority.

Great Britain also has fought both World Wars under a sort of temporary dictatorship created by legislation.22 As Parliament is not bound by written constitutional limitations, it established a crisis government simply by delegation to its Ministers of a larger measure than usual of its own unlimited power, which is exercised under its supervision by Ministers whom it may dismiss.

This contemporary foreign experience may be inconclusive as to the wisdom of lodging emergency powers somewhere in a modern government. But it suggests that emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them. That is the safeguard that would be nullified by our adoption of the “inherent powers” formula. Nothing in my experience convinces me that such risks are warranted by any real necessity, although such powers would, of course, be an executive convenience.

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. In 1939, upon congressional request, the Attorney General listed ninety-nine such separate statutory grants by Congress of emergency or wartime executive powers. They were invoked from time to time as need appeared. Under this procedure we retain Government by law—special, temporary law, perhaps, but law nonetheless. The public may know the extent and limitations of the powers that can be asserted, and persons affected may be informed from the statute of their rights and duties.

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

The essence of our free Government is “leave to live by no man’s leave, underneath the law”—to be governed by those impersonal forces which we call law. Our Government is fashioned to fulfill this concept so far as
humanly possible. The Executive, except for recommendation and veto, has no legislative power. The executive action we have here originates in the individual will of the President and represents an exercise of authority without law. . . . With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.

Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.

NOTES

1. *The Majority’s Reasoning on Presidential Power.* Justice Black wrote for the Court that the president had engaged in a lawmaking function, one that the Constitution assigns to Congress. What standard does Justice Black apply to distinguish a “legislative act” from an “executive act”? What guidance is provided by the Constitution? Is the distinction useful? Do you think that the result would have been different if substantial United States casualties in Korea had been directly traceable to the strike against the steel companies? Should it? See Harry S. Truman, II Memoirs 465–71 (1955). Viewed in this light, should the president’s conduct have been seen as an exercise of executive power to address a growing national security crisis?

2. *Wither Curtiss-Wright?* Justice Black makes no reference to *Curtiss-Wright*—even though it had been decided only sixteen years earlier. Could not the president’s seizure of the steel mills have been justified under the *Curtiss-Wright* wide-ranging “sovereignty” theory? Does Justice Black mean to repudiate the theory when he writes, that “[t]he President’s power, if any, . . . must stem either from an act of Congress or from the Constitution itself”? What does Justice Jackson say about *Curtiss-Wright*?

3. *Justice Jackson’s Approach.* Although set forth in a concurring opinion, Justice Jackson’s tripartite framework has proven very influential. Many of the separation of powers cases in this book apply that framework. Is Justice Jackson correct in placing the executive act in *Youngstown* in category three? Why should it not be placed in the “zone of twilight”? As Justice Rehnquist (a former clerk of Justice Jackson) wrote in *Dames & Moore*, “Justice Jackson himself recognized that his three categories represented ‘a somewhat oversimplified grouping,’ and it is doubtless the case that executive action in any particular instance falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition.” 453 U.S. 654, 669 (1981). What do you think Justice Rehnquist means?

Note that if Congress prohibits an action taken by the president, Jackson reasons that the president’s power is “at its lowest ebb,” not that the president is then without any power to act. Under these circumstances, a second inquiry is necessary: whether the act in question falls within the exclusive powers of
the president—whether, in Justice Jackson’s calculus, the “constitutional powers of Congress over the matter” amount to zero? If this second level of inquiry is necessary, Justice Jackson leaves open which method of constitutional interpretation should be applied to determine the existence of an exclusive presidential power.

4. Political Question Doctrine. Why didn’t Youngstown present a non-justiciable “political question”? If Congress had been silent, would such a question have presented itself? What is the relationship between the “zone of twilight” and the political question doctrine? (See Chapter 7).

5. Playing with Jackson’s Categories. Into which of Justice Jackson’s three categories does the particular executive act in Little v. Barreme fall? The executive act in Curtiss-Wright? Note the parallel between Justice Jackson’s third category and the reasoning of Chief Justice Marshall in Little v. Barreme. Does Chief Justice Marshall also suggest that the president’s powers fluctuate as a function of action taken by Congress? Yet, conceptually, how can a statute alter the scope of a constitutional power? Do these opinions discuss constitutional power or statutory power—or some amalgam of the two? In cases applying Justice Jackson’ framework, often the most important issue is determining into which category the president’s action falls. As you read Dames & Moore v. Regan in Chapter 3, Sec. 7 and Hamdi v. Rumsfeld in Chapter 4, Sec. 7, consider how the Court addresses this issue. In Medellín v. Texas, the Supreme Court was asked to enforce a memorandum by President George W. Bush ordering Texas state courts to implement a decision of the International Court of Justice. The president argued that the memorandum was authorized by two treaties which made the ICJ judgment binding on the United States. The treaties were not, however, self-executing and could not be directly enforced in U.S. Courts. The Supreme Court reasoned that

The responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress, not the Executive. Foster, 2 Pet., at 315. It is a fundamental constitutional principle that “[t]he power to make the necessary laws is in Congress; the power to execute in the President.” Hamdan v. Rumsfeld, 548 U.S. 557, 591. A non-self-executing treaty, by definition, is one that was ratified with the understanding that it is not to have domestic effect of its own force. That understanding precludes the assertion that Congress has implicitly authorized the President—acting on his own—to achieve precisely the same result. Accordingly, the President’s Memorandum does not fall within the first category of the Youngstown framework. Indeed, because the non-self-executing character of the relevant treaties not only refutes the notion that the ratifying parties vested the President with the authority to unilaterally make treaty obligations binding on domestic courts, but also implicitly prohibits him from doing so, the President’s assertion of authority is within Youngstown’s third category, not the first or even the second.
Is this reasoning convincing? Is it relevant to note that treaty self-execution was an unclear area of law when the treaties were ratified? (See Chapter 3, Sec. 4).

6. **The Commander-in-Chief Clause.** Why wasn’t the seizure of the steel mills a lawful exercise of the president’s power as Commander in Chief? How is Justice Jackson’s reasoning about the Commander-in-Chief Clause different from Justice Black’s reasoning in the majority opinion? Justice Jackson notes that the Clause “undoubtedly puts the Nation’s armed forces under presidential command.” In other words, a statute purporting to put the military under the command of someone other than the president would be unconstitutional. What other powers are exclusive to the president under the Commander-in-Chief Clause? Do they depend upon designations such as “theater of war” or “internal” and “external”? What does *Little v. Barreme* suggest? These questions are revisited in Chapter 4.


8. **The Distinction Between Domestic and Foreign.** The *Youngstown* opinions reason that separation of powers questions can be resolved in part by distinguishing between domestic and foreign conduct. The *Curtiss-Wright* case drew a similar distinction. The application of the Constitution and of various federal statutes to external or foreign events has generated a number of important and closely-divided Supreme Court cases including *Boumediene v. Bush*, 553 U.S. 723 (2008) (application of the privilege of habeas corpus to Guantánamo detainees) (see Chapter 4, Sec. 7); *Kiobel v. Royal Dutch Petroleum*, 133 S.Ct. 1659 (2013) (extraterritorial application of the Alien Tort Statute) (see Chapter 2, Sec. 6); *RJR Nabisco, Inc. v. European Community*, 136 S.Ct. 2090 (2016) (extraterritorial application of the Racketeer Influenced and Corrupt Organizations Act) (see Chapter 2, Sec. 5). Should the Constitution and federal statutes be interpreted to apply differently (or not at all) to extraterritorial events? How clear is the distinction between domestic and foreign? Are globalization, digitalization, and new forms of armed conflict making boundaries less relevant and conduct more difficult to characterize?

9. **The Non-Delegation Doctrine.** As discussed in the notes following the *Curtiss-Wright* case, the non-delegation doctrine in U.S. constitutional law is the principle that the Congress, being vested with “all legislative powers” by Article I, Section 1 of the Constitution, cannot delegate that power to anyone...
else. Yet when one looks at the foreign affairs powers accorded to the Congress under the Constitution and the foreign affairs powers exercised by the president in practice, it seems that there is a considerable amount of delegation to the president. What is the current viability of this doctrine and to what extent does it apply to foreign affairs legislation? If a significant amount of delegation to the president is permissible for reasons of convenience and efficiency, are there ways for Congress to “claw back” some of its authority when it disagrees with the president’s action?”

**INS v. Chadha**


CHIEF JUSTICE BURGER delivered the opinion of the Court.

I

Chadha is an East Indian who was born in Kenya and holds a British passport. He was lawfully admitted to the United States in 1966 on a nonimmigrant student visa. His visa expired on June 30, 1972. On October 11, 1973, the District Director of the Immigration and Naturalization Service ordered Chadha to show cause why he should not be deported for having “remained in the United States for a longer time than permitted.” . . . [A] deportation hearing was held before an Immigration Judge on January 11, 1974. Chadha conceded that he was deportable for overstaying his visa and the hearing was adjourned to enable him to file an application for suspension of deportation.

Pursuant to § 244(c)(1) of the Act, the Immigration Judge suspended Chadha's deportation and a report of the suspension was transmitted to Congress.

Once the Attorney General’s recommendation for suspension of Chadha’s deportation was conveyed to Congress, Congress had the power under [the Act] to veto the Attorney General’s determination that Chadha should not be deported.

On December 12, 1975, Representative Eilberg, Chairman of the Judiciary Subcommittee on Immigration, Citizenship, and International Law, introduced a resolution opposing “the granting of permanent residence in the United States to [six] aliens,” including Chadha. . . . The resolution was passed without debate or recorded vote. Since the House action was pursuant to § 244(c)(2), the resolution was not treated as an Art. I legislative act; it was not submitted to the Senate or presented to the President for his action.

. . . We begin, of course, with the presumption that the challenged statute is valid. Its wisdom is not the concern of the courts; if a challenged action does not violate the Constitution, it must be sustained.
By the same token, the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government and our inquiry is sharpened rather than blunted by the fact that congressional veto provisions are appearing with increasing frequency in statutes which delegate authority to executive and independent agencies:

“Since 1932, when the first veto provision was enacted into law, 295 congressional veto-type procedures have been inserted in 196 different statutes as follows: from 1932 to 1939, five statutes were affected; from 1940–49, nineteen statutes; between 1950–59, thirty-four statutes; and from 1960–69, forty-nine. From the year 1970 through 1975, at least one hundred sixty-three such provisions were included in eighty-nine laws.” Abourezk, The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives, 52 Ind. L. Rev. 323, 324 (1977). . . .

Justice White undertakes to make a case for the proposition that the one-House veto is a useful “political invention,” and we need not challenge that assertion. We can even concede this utilitarian argument although the long-range political wisdom of this “invention” is arguable. It has been vigorously debated, and it is instructive to compare the views of the protagonists. But policy arguments supporting even useful “political inventions” are subject to the demands of the Constitution which defines powers and, with respect to this subject, sets out just how those powers are to be exercised.

Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process. Since the precise terms of those familiar provisions are critical to the resolution of these cases, we set them out verbatim. Article I provides:

“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” Art. I, § 1. (Emphasis added.)

“Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President of the United States. . . .” Art. I, § 7, cl. 2. (Emphasis added.)

“Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take
Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.” Art. I, § 7, cl. 3. (Emphasis added.)

These provisions of Art. I are integral parts of the constitutional design for the separation of powers. . . .

We see therefore that the Framers were acutely conscious that the bicameral requirement and the Presentment Clauses would serve essential constitutional functions. The President’s participation in the legislative process was to protect the Executive Branch from Congress and to protect the whole people from improvident laws. The division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings. The President’s unilateral veto power, in turn, was limited by the power of two-thirds of both Houses of Congress to overrule a veto thereby precluding final arbitrary action of one person. . . . It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7, represents the Framers’ decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure. . . .

Not every action taken by either House is subject to the bicameralism and presentment requirements of Art. I. See infra . . . nn. 20, 21. Whether actions taken by either House are, in law and fact, an exercise of legislative power depends not on their form but upon “whether they contain matter which is properly to be regarded as legislative in its character and effect.” S. Rep. No. 1335, 54th Cong., 2d Sess., 8 (1897).

Examination of the action taken here by one House pursuant to § 244(c)(2) reveals that it was essentially legislative in purpose and effect. In purporting to exercise power defined in Art. I, § 8, cl. 4, to “establish an uniform Rule of Naturalization,” the House took action that had the purpose and effect of altering the legal rights, duties, and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the Legislative Branch. Section 244(c)(2) purports to authorize one House of Congress to require the Attorney General to deport an individual alien whose deportation otherwise would be canceled under § 244. The one-House veto operated in these cases to overrule the Attorney General and mandate Chadha’s deportation; absent the House action, Chadha would remain in the United States. Congress has acted and its action has altered Chadha’s status.

The legislative character of the one-House veto in these cases is confirmed by the character of the congressional action it supplants. Neither the House of Representatives nor the Senate contends that, absent the veto
provision in § 244(c)(2), either of them, or both of them acting together, could effectively require the Attorney General to deport an alien once the Attorney General, in the exercise of legislatively delegated authority, had determined the alien should remain in the United States. Without the challenged provision in § 244(c)(2), this could have been achieved, if at all, only by legislation requiring deportation. Similarly, a veto by one House of Congress under § 244(c)(2) cannot be justified as an attempt at amending the standards set out in § 244(a)(1), or as a repeal of § 244 as applied to Chadha. Amendment and repeal of statutes, no less than enactment, must conform with Art. I.

The nature of the decision implemented by the one-House veto in these cases further manifests its legislative character. After long experience with the clumsy, time-consuming private bill procedure, Congress made a deliberate choice to delegate to the Executive Branch, and specifically to the Attorney General, the authority to allow deportable aliens to remain in this country in certain specified circumstances. It is not disputed that this choice to delegate authority is precisely the kind of decision that can be implemented only in accordance with the procedures set out in Art. I. Disagreement with the Attorney General’s decision on Chadha’s deportation—that is, Congress’ decision to deport Chadha—no less than Congress’ original choice to delegate to the Attorney General the authority to make that decision, involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked.

Finally, we see that when the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action. [The Court then discusses four constitutional provisions by which one House may act alone, such as according to the House of Representatives the sole power to initiate impeachments. See U.S. CONST. Art. I, § 2, cl. 5.] . . .

Since it is clear that the action by the House under § 244(c)(2) was not within any of the express constitutional exceptions authorizing one House to act alone, and equally clear that it was an exercise of legislative power, that action was subject to the standards prescribed in Art. I. The bicameral requirement, the Presentment Clauses, the President’s veto, and Congress’ power to override a veto were intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps. To preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded. To accomplish what has been attempted by one House of Congress in this case requires action in conformity with the express procedures of the Constitution’s prescription
for legislative action: passage by a majority of both Houses and presentment to the President. . . .

The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumbersoness and delays often encountered in complying with explicit constitutional standards may be avoided, either by the Congress or by the President. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.

Affirmed. . . .

JUSTICE WHITE, dissenting.

Today the Court not only invalidates § 244(c)(2) of the Immigration and Nationality Act, but also sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a “legislative veto.” For this reason, the Court’s decision is of surpassing importance. And it is for this reason that the Court would have been well advised to decide the cases, if possible, on the narrower grounds of separation of powers, leaving for full consideration the constitutionality of other congressional review statutes operating on such varied matters as war powers and agency rulemaking, some of which concern the independent regulatory agencies.

The prominence of the legislative veto mechanism in our contemporary political system and its importance to Congress can hardly be overstated. It has become a central means by which Congress secures the accountability of executive and independent agencies. Without the legislative veto, Congress is faced with a Hobson’s choice: either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its law-making function to the Executive Branch and independent agencies. To choose the former leaves major national problems unresolved; to opt for the latter risks unaccountable policymaking by those not elected to fill that role. Accordingly, over the past five decades, the legislative veto has been placed in nearly 200 statutes. The device is known in every field of governmental concern: reorganization, budgets, foreign affairs, war

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2 A selected list and brief description of these provisions is appended to this opinion.
powers, and regulation of trade, safety, energy, the environment, and the economy. . . .

During the 1970’s the legislative veto was important in resolving a series of major constitutional disputes between the President and Congress over claims of the President to broad impoundment, war, and national emergency powers. The key provision of the War Powers Resolution authorizes the termination by concurrent resolution of the use of armed forces in hostilities. . . .

Even this brief review suffices to demonstrate that the legislative veto is more than “efficient, convenient, and useful.” It is an important if not indispensable political invention that allows the President and Congress to resolve major constitutional and policy differences, assures the accountability of independent regulatory agencies, and preserves Congress’ control over lawmaking. Perhaps there are other means of accommodation and accountability, but the increasing reliance of Congress upon the legislative veto suggests that the alternatives to which Congress must now turn are not entirely satisfactory. . . .

APPENDIX TO OPINION OF WHITE, J., DISSenting, Statutes with Provisions Authorizing Congressional Review

This compilation, reprinted from the Brief for the United States Senate, identifies and describes briefly current statutory provisions for a legislative veto by one or both Houses of Congress. . . .

A.

FOREIGN AFFAIRS AND NATIONAL SECURITY

1. Act for International Development of 1961 (Funds made available for foreign assistance under the Act may be terminated by concurrent resolution).

2. War Powers Resolution (Absent declaration of war, President may be directed by concurrent resolution to remove United States armed forces engaged in foreign hostilities.)

[the remaining statutes on Justice White’s list are omitted]

NOTES

1. Thwarting a Congressional Claw-Back. As indicated in Chadha, the increased effort to use legislative vetoes was probably the result of an increased delegation of power from Congress to the president over the past 70 years. As a matter of constitutional theory, why is the Court willing to tolerate extensive delegation of power to the president that is legislative in nature, but is unwilling to allow Congress to try to maintain some kind of check on that power through a legislative veto? Do you think Chadha is constitutionally sound or does it rely upon an overly rigid conception of separation of powers?
FOREIGN RELATIONS LAW: NATURE AND
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2. Types of Congressional Measures. Four kinds of measures are used by Congress: bills, joint resolutions, concurrent resolutions, and simple resolutions. A bill is passed by both houses and presented to the president for his signature or veto. If enacted, it has the force of law. A joint resolution is different in name only: it too is passed by both houses and presented to the president for his signature or veto. The two can be used interchangeably, although proposals to amend the Constitution typically are set forth in joint resolutions. A concurrent resolution is passed by both houses, but not sent to the president. Consequently, it does not have the force and effect of law. Concurrent resolutions often are used for “sense-of-the-Congress” statements. A simple resolution is passed by only one house and thus also lacks the force of law. It is used to amend the standing rules of that house and for “sense-of-the-House” or “sense-of-the-Senate” declarations. Chadha involved use of a simple resolution. Does the reasoning of the Court apply equally to a legislative veto consisting of a concurrent resolution? Should it matter that the one-House veto in Chadha was not enacted as a “bolt out of the blue” but was incorporated in an otherwise valid statute?

3. Convenience and Efficiency. Is the Court correct in assuming that congressional use of the legislative veto is motivated by concerns of “convenience and efficiency”? Could not the alternative—a statute spelling out specific limits on executive discretion—actually be more convenient and efficient, inasmuch as it would involve no subsequent congressional approval or disapproval procedure? Is not the real reason for the legislative veto, or at least some legislative vetoes, a belief that certain executive activities require regulation but cannot be regulated with specific, prospective statutory limitation?

4. Post-Enactment Contingencies. There are numerous statutes that delegate authority to an executive official so long as certain statutorily-specified contingencies occur after enactment. That contingency is often a finding by the president that a certain event has (or has not) occurred. The contingency need not turn solely on an executive branch determination, however. For example, in January 2004 Congress passed and President George W. Bush signed into law the Millennium Challenge Act of 2003 (MCA). See 22 U.S.C. §§ 7701–18 (2006). Under the statute, a developing country may qualify for foreign aid if it demonstrates commitment to three broad criteria: good governance; health and education for its people; and sound economic policies. A “Millennium Challenge Corporation” (MCC) was established as a government corporation to administer the MCA. The MCC uses sixteen “indicators” drawn from reputable sources (e.g., Freedom House, the World Bank Institute, the Heritage Foundation) to measure developing country performance on the three criteria. Based on these indicators, the MCC selects those countries eligible for MCA assistance. If the MCC decides that the criteria have not been met for a country seeking aid, then that country cannot receive aid under the MCA.

The Supreme Court has previously upheld the constitutionality of statutes which condition the authority granted therein upon the occurrence or
nonoccurrence of a specified contingent event. See, e.g., *J. W. Hampton & Co. v. United States*, 276 U.S. 394 (1927) (statute authorizing the president to raise tariff rates if he determines it necessary to equalize foreign and domestic production costs); *Hirabayashi v. United States*, 320 U.S. 81 (1943) (statute authorizing a military commander to determine that danger existed warranting imposition of a curfew).

Why is it that the effectiveness of action legislative in character may be conditioned upon decisions by organizations such as Freedom House or the Heritage Foundation, but under *Chadha*, may not be conditioned on the vote of the two legislative bodies of the Congress? Is it sufficient to say that the effect accorded to Freedom House or the Heritage Foundation is not governed by the Presentment Clause?

5. **Functional Effects of Chadha.** In considering this issue it may be useful to examine the functional effect of the *Chadha* decision. A good vehicle for illustrating that effect is the Arms Export Control Act, Pub. L. No. 94–329, 90 Stat. 729 (1976), as amended. In 1976, following concerns about arms sales abuses, the Senate Foreign Relations Committee proposed sweeping revisions of the Foreign Military Sales Act, including renaming it the “Arms Export Control Act.” President Ford vetoed the original version of the Act, objecting, *inter alia*, to various legislative veto provisions. See President’s Message to the Senate Returning S. 2662 Without His Approval, 12 WEEKLY COMP. PRES. DOC. 828 (May 7, 1976). A new version was considered and several of the legislative vetoes were dropped, but the Act continued to provide, in section 36(b), that Congress could disapprove certain presidentially-proposed arms sales in excess of $25 million in value through the use of a concurrent resolution. After *Chadha*, such use of the concurrent resolution is no longer permissible, and the Act was amended to preclude such sales when prohibited by joint resolution. See 22 U.S.C. § 2753 (2006).

Clearly, however, the Act could have been re-written to permit presidential arms sales in excess of $25 million only if approved by a bill or joint resolution. Under such circumstances, to make the proposed sale, the president would have to persuade a majority in each house of Congress to vote for the proposed sale. In other words, where before it took two houses of Congress to block presidential action, after *Chadha* a majority of only one house might be required to do so. It thus seems doubtful that the decision in all circumstances benefits the president. Moreover, could it not be argued that, viewed functionally, certain pre-*Chadha* procedures better served principles of bicameralism than those now required by the Court?

6. **Interpretive Theory.** Why should the Court’s inquiry be “sharpened rather than blunted by the fact that Congressional veto provisions are appearing with greater frequency . . .”? Does not practice provide a “gloss” on the constitutional text? The original version of the Arms Export Control Act (discussed in the prior note) included seven legislative veto provisions. See S. 2662, 94th Cong., 1st Sess. (1975). In justifying those provisions constitutionally, the Senate Foreign Relations Committee said that, “[i]f
custom has tended to validate otherwise questionable practices engaged in by the executive branch, custom would seem just as surely to have validated the congressional practice embodied in the legislative veto." S. Rep. No. 94–605, 94th Cong., 2d Sess., at 15 (1976).

7. Relation to War Powers Resolution. Should it matter whether the presidential act subject to the veto is authorized by the Constitution rather than by a statute? See the materials concerning the legislative veto in section 5(c) of the War Powers Resolution set forth in Chapter 4, Sec. 4.

ZIVOTOFSKY EX REL. ZIVOTOFSKY v. KERRY

JUSTICE KENNEDY delivered the opinion of the Court.

A delicate subject lies in the background of this case. That subject is Jerusalem. Questions touching upon the history of the ancient city and its present legal and international status are among the most difficult and complex in international affairs. In our constitutional system these matters are committed to the Legislature and the Executive, not the Judiciary. As a result, in this opinion the Court does no more, and must do no more, than note the existence of international debate and tensions respecting Jerusalem. Those matters are for Congress and the President to discuss and consider as they seek to shape the Nation’s foreign policies.

The Court addresses two questions to resolve the inter-branch dispute now before it. First, it must determine whether the President has the exclusive power to grant formal recognition to a foreign sovereign. Second, if he has that power, the Court must determine whether Congress can command the President and his Secretary of State to issue a formal statement that contradicts the earlier recognition. The statement in question here is a congressional mandate that allows a United States citizen born in Jerusalem to direct the President and Secretary of State, when issuing his passport, to state that his place of birth is “Israel.”

I

A

Jerusalem’s political standing has long been, and remains, one of the most sensitive issues in American foreign policy, and indeed it is one of the most delicate issues in current international affairs. In 1948, President Truman formally recognized Israel in a signed statement of “recognition.” That statement did not recognize Israeli sovereignty over Jerusalem. Over the last 60 years, various actors have sought to assert full or partial sovereignty over the city, including Israel, Jordan, and the Palestinians. Yet, in contrast to a consistent policy of formal recognition of Israel, neither President Truman nor any later United States President has issued an official statement or declaration acknowledging any country’s sovereignty
over Jerusalem. Instead, the Executive Branch has maintained that “the status of Jerusalem . . . should be decided not unilaterally but in consultation with all concerned.” . . . The President’s position on Jerusalem is reflected in State Department policy regarding passports and consular reports of birth abroad. Understanding that passports will be construed as reflections of American policy, the State Department’s Foreign Affairs Manual instructs its employees, in general, to record the place of birth on a passport as the “country [having] present sovereignty over the actual area of birth.” Dept. of State, 7 Foreign Affairs Manual (FAM) § 1383.4 (1987). If a citizen objects to the country listed as sovereign by the State Department, he or she may list the city or town of birth rather than the country. See id., § 1383.6. The FAM, however, does not allow citizens to list a sovereign that conflicts with Executive Branch policy. See generally id., § 1383. Because the United States does not recognize any country as having sovereignty over Jerusalem, the FAM instructs employees to record the place of birth for citizens born there as “Jerusalem.”

In 2002, Congress passed the Act at issue here, the Foreign Relations Authorization Act, Fiscal Year 2003, 116 Stat. 1350. Section 214 of the Act is titled “United States Policy with Respect to Jerusalem as the Capital of Israel.” Id., at 1365. The subsection that lies at the heart of this case, § 214(d), addresses passports. That subsection seeks to override the FAM by allowing citizens born in Jerusalem to list their place of birth as “Israel.” Titled “Record of Place of Birth as Israel for Passport Purposes,” § 214(d) states “[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen’s legal guardian, record the place of birth as Israel.” Id., at 1366.

When he signed the Act into law, President George W. Bush issued a statement declaring his position that § 214 would, “if construed as mandatory rather than advisory, impermissibly interfere with the President’s constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states.” Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003, Public Papers of the Presidents, George W. Bush, Vol. 2, Sept. 30, 2002, p. 1698 (2005). The President concluded, “U. S. policy regarding Jerusalem has not changed.” Ibid.

Some parties were not reassured by the President’s statement. A cable from the United States Consulate in Jerusalem noted that the Palestine Liberation Organization Executive Committee, Fatah Central Committee, and the Palestinian Authority Cabinet had all issued statements claiming that the Act “undermines the role of the U. S. as a sponsor of the peace process.” In the Gaza Strip and elsewhere residents marched in protest.
In response the Secretary of State advised diplomats to express their understanding of “Jerusalem’s importance to both sides and to many others around the world.” He noted his belief that America’s “policy towards Jerusalem” had not changed.

B

In 2002, petitioner Menachem Binyamin Zivotofsky was born to United States citizens living in Jerusalem. In December 2002, Zivotofsky’s mother visited the American Embassy in Tel Aviv to request both a passport and a consular report of birth abroad for her son. She asked that his place of birth be listed as “Jerusalem, Israel.” The Embassy clerks explained that, pursuant to State Department policy, the passport would list only “Jerusalem.” Zivotofsky’s parents objected and, as his guardians, brought suit on his behalf in the United States District Court for the District of Columbia, seeking to enforce § 214(d).

Pursuant to § 214(d), Zivotofsky claims the right to have “Israel” recorded as his place of birth in his passport.

II

In considering claims of Presidential power this Court refers to Justice Jackson’s familiar tripartite framework from Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579, 635–638 (1952) (concurring opinion).

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.” In so doing the Secretary acknowledges the President’s power is “at its lowest ebb.” Youngstown, 343 U. S., at 637. Because the President’s refusal to implement § 214(d) falls into Justice Jackson’s third category, his claim must be “scrutinized with caution,” and he may rely solely on powers the Constitution grants to him alone.

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

A

Recognition is a “formal acknowledgement” that a particular “entity possesses the qualifications for statehood” or “that a particular regime is the effective government of a state.” Restatement (Third) of Foreign Relations Law of the United States § 203, Comment a, p. 84 (1986). It may also involve the determination of a state’s territorial bounds. See 2 M. Whiteman, Digest of International Law § 1, p. 1 (1963) (Whiteman) (“[S]tates may recognize or decline to recognize territory as belonging to, or under the sovereignty of, or having been acquired or lost by, other states”).
Recognition is often effected by an express “written or oral declaration.” 1 J. Moore, Digest of International Law § 27, p. 73 (1906) (Moore). It may also be implied—for example, by concluding a bilateral treaty or by sending or receiving diplomatic agents. Ibid.; I. Brownlie, Principles of Public International Law 93 (7th ed. 2008) (Brownlie).

Legal consequences follow formal recognition. Recognized sovereigns may sue in United States courts, see Guaranty Trust Co. v. United States, 304 U. S. 126, 137 (1938), and may benefit from sovereign immunity when they are sued, see National City Bank of N. Y. v. Republic of China, 348 U. S. 356, 358–359 (1955). The actions of a recognized sovereign committed within its own territory also receive deference in domestic courts under the act of state doctrine. See Oetjen v. Central Leather Co., 246 U. S. 297, 302–303 (1918). Recognition at international law, furthermore, is a precondition of regular diplomatic relations. Recognition is thus “useful, even necessary,” to the existence of a state. Ibid.

Despite the importance of the recognition power in foreign relations, the Constitution does not use the term “recognition,” either in Article II or elsewhere. The Secretary asserts that the President exercises the recognition power based on the Reception Clause, which directs that the President “shall receive Ambassadors and other public Ministers.” Art. II, § 3. As Zivotofsky notes, the Reception Clause received little attention at the Constitutional Convention. In fact, during the ratification debates, Alexander Hamilton claimed that the power to receive ambassadors was “more a matter of dignity than of authority,” a ministerial duty largely “without consequence.” The Federalist No. 69, p. 420 (C. Rossiter ed. 1961).

At the time of the founding, however, prominent international scholars suggested that receiving an ambassador was tantamount to recognizing the sovereignty of the sending state. See E. de Vattel, The Law of Nations § 78, p. 461 (1758) (J. Chitty ed. 1853) (“[E]very state, truly possessed of sovereignty, has a right to send ambassadors” and “to contest their right in this instance” is equivalent to “contesting their sovereign dignity”). . . . 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. He wrote that the Reception Clause “includes th[e power] of judging, in the case of a revolution of government in a foreign country, whether the new rulers are competent organs of the national will, and ought to be recognised, or not.” 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, see United States v. Curtiss-Wright Export Corp., 299 U. S. 304, 319 (1936), and the Senate may not conclude or ratify a treaty without Presidential action. The President, too, nominates the Nation’s ambassadors and dispatches other diplomatic agents. Congress may not send an ambassador without his involvement. Beyond that, the President himself has the power to open diplomatic channels simply by engaging in direct diplomacy with foreign heads of state and their ministers. The Constitution thus assigns the President means to effect recognition on his own initiative. Congress, by contrast, has no constitutional power that would enable it to initiate diplomatic relations with a foreign nation. Because these specific Clauses confer the recognition power on the President, the Court need not consider whether or to what extent the Vesting Clause, which provides that the “executive Power” shall be vested in the President, provides further support for the President’s action here. Art. II, § 1, cl. 1.

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

branches, only the Executive has the characteristic of unity at all times. And with unity comes the ability to exercise, to a greater degree, “[d]ecision, activity, secrecy, and dispatch.” The Federalist No. 70, p. 424 (A. Hamilton). The President is capable, in ways Congress is not, of engaging in the delicate and often secret diplomatic contacts that may lead to a decision on recognition. He is also better positioned to take the decisive, unequivocal action necessary to recognize other states at international law.

1 Oppenheim’s International Law § 50, p. 169 (R. Jennings & A. Watts eds., 9th ed. 1992) (act of recognition must “leave no doubt as to the intention to grant it”). These qualities explain why the Framers listed the traditional avenues of recognition—receiving ambassadors, making treaties, and sending ambassadors—as among the President’s Article II powers. . . .

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. . . .

In foreign affairs, as in the domestic realm, the Constitution “enjoins upon its branches separateness but interdependence, autonomy but reciprocity.” Youngstown, 343 U. S., at 635 (Jackson, J., concurring). Although the President alone effects the formal act of recognition, Congress’ powers, and its central role in making laws, give it substantial authority regarding many of the policy determinations that precede and follow the act of recognition itself. If Congress disagrees with the President’s recognition policy, there may be consequences. Formal recognition may seem a hollow act if it is not accompanied by the dispatch of an ambassador, the easing of trade restrictions, and the conclusion of treaties. And those decisions require action by the Senate or the whole Congress.

In practice, then, the President’s recognition determination is just one part of a political process that may require Congress to make laws. The President’s exclusive recognition power encompasses the authority to acknowledge, in a formal sense, the legitimacy of other states and governments, including their territorial bounds. Albeit limited, the exclusive recognition power is essential to the conduct of Presidential duties. The formal act of recognition is an executive power that Congress may not qualify. If the President is to be effective in negotiations over a formal recognition determination, it must be evident to his counterparts abroad that he speaks for the Nation on that precise question.

A clear rule that the formal power to recognize a foreign government subsists in the President therefore serves a necessary purpose in diplomatic relations. All this, of course, underscores that Congress has an important role in other aspects of foreign policy, and the President may be bound by any number of laws Congress enacts. In this way ambition counters ambition, ensuring that the democratic will of the people is
observed and respected in foreign affairs as in the domestic realm. See The Federalist No. 51, p. 322 (J. Madison).

B

No single precedent resolves the question whether the President has exclusive recognition authority and, if so, how far that power extends. In part that is because, until today, the political branches have resolved their disputes over questions of recognition. The relevant cases, though providing important instruction, address the division of recognition power between the Federal Government and the States, see, e.g., Pink, 315 U. S. 203, or between the courts and the political branches, see, e.g., Banco Nacional de Cuba, 376 U. S., at 410—not between the President and Congress. As the parties acknowledge, some isolated statements in those cases lend support to the position that Congress has a role in the recognition process. In the end, however, a fair reading of the cases shows that the President’s role in the recognition process is both central and exclusive.

. . . [D]uring the 1930’s and 1940’s, the Court addressed issues surrounding President Roosevelt’s decision to recognize the Soviet Government of Russia. In United States v. Belmont, 301 U. S. 324 (1937), and Pink, 315 U. S. 203, New York state courts declined to give full effect to the terms of executive agreements the President had concluded in negotiations over recognition of the Soviet regime. In particular the state courts, based on New York public policy, did not treat assets that had been seized by the Soviet Government as property of Russia and declined to turn those assets over to the United States. The Court stated that it “may not be doubted” that “recognition, establishment of diplomatic relations, . . . and agreements with respect thereto” are “within the competence of the President.” In these matters, “the Executive ha[s] authority to speak as the sole organ of th[e] government.” The Court added that the President’s authority “is not limited to a determination of the government to be recognized. It includes the power to determine the policy which is to govern the question of recognition.” Thus, New York state courts were required to respect the executive agreements.

It is true, of course, that Belmont and Pink are not direct holdings that the recognition power is exclusive. Those cases considered the validity of executive agreements, not the initial act of recognition. The President’s determination in those cases did not contradict an Act of Congress. And the primary issue was whether the executive agreements could supersede state law. Still, the language in Pink and Belmont, which confirms the President’s competence to determine questions of recognition, is strong support for the conclusion that it is for the President alone to determine which foreign governments are legitimate.
Banco Nacional de Cuba contains even stronger statements regarding the President’s authority over recognition. There, the status of Cuba’s Government and its acts as a sovereign were at issue. As the Court explained, “Political recognition is exclusively a function of the Executive.” 376 U. S., at 410. Because the Executive had recognized the Cuban Government, the Court held that it should be treated as sovereign and could benefit from the “act of state” doctrine. As these cases illustrate, the Court has long considered recognition to be the exclusive prerogative of the Executive.

The Secretary now urges the Court to define the executive power over foreign relations in even broader terms. He contends that under the Court’s precedent the President has “exclusive authority to conduct diplomatic relations,” along with “the bulk of foreign-affairs powers.” In support of his submission that the President has broad, undefined powers over foreign affairs, the Secretary quotes United States v. Curtiss-Wright Export Corp., which described the President as “the sole organ of the federal government in the field of international relations.” 299 U. S., at 320. This Court declines to acknowledge that unbounded power. A formulation broader than the rule that the President alone determines what nations to formally recognize as legitimate—and that he consequently controls his statements on matters of recognition—presents different issues and is unnecessary to the resolution of this case.

Th[e] description of the President’s exclusive power was not necessary to the holding of Curtiss-Wright—which, after all, dealt with congressionally authorized action, not a unilateral Presidential determination. Indeed, Curtiss-Wright did not hold that the President is free from Congress’ lawmaking power in the field of international relations. Whether the realm is foreign or domestic, it is still the Legislative Branch, not the Executive Branch, that makes the law.

In a world that is ever more compressed and interdependent, it is essential the congressional role in foreign affairs be understood and respected. For it is Congress that makes laws, and in countless ways its laws will and should shape the Nation’s course. The Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue.

That said, judicial precedent and historical practice teach that it is for the President alone to make the specific decision of what foreign power he will recognize as legitimate, both for the Nation as a whole and for the purpose of making his own position clear within the context of recognition in discussions and negotiations with foreign nations. Recognition is an act with immediate and powerful significance for international relations, so the President’s position must be clear. Congress cannot require him to
contradict his own statement regarding a determination of formal recognition.

C

Having examined the Constitution’s text and this Court’s precedent, it is appropriate to turn to accepted understandings and practice. In separation-of-powers cases this Court has often “put significant weight upon historical practice.” NLRB v. Noel Canning, 573 U. S. ___, ___, 134 S.Ct. 2550, 2559 (2014) (emphasis deleted). Here, history is not all on one side, but on balance it provides strong support for the conclusion that the recognition power is the President’s alone. As Zivotofsky argues, certain historical incidents can be interpreted to support the position that recognition is a shared power. But the weight of historical evidence supports the opposite view, which is that the formal determination of recognition is a power to be exercised only by the President.

Even a brief survey of the major historical examples, with an emphasis on those said to favor Zivotofsky, establishes no more than that some Presidents have chosen to cooperate with Congress, not that Congress itself has exercised the recognition power.

The first debate over the recognition power arose in 1793, after France had been torn by revolution.

The new French Government proposed to send an ambassador, Citizen Genet, to the United States. Members of the President’s Cabinet agreed that receiving Genet would be a binding and public act of recognition. They decided, however, both that Genet should be received and that consultation with Congress was not necessary. Congress expressed no disagreement with this position, and Genet’s reception marked the Nation’s first act of recognition—one made by the President alone.

For the most part, Congress has respected the Executive’s policies and positions as to formal recognition. At times, Congress itself has defended the President’s constitutional prerogative. Over the last 100 years, there has been scarcely any debate over the President’s power to recognize foreign states. In this respect the Legislature, in the narrow context of recognition, on balance has acknowledged the importance of speaking “with one voice.” The weight of historical evidence indicates Congress has accepted that the power to recognize foreign states and governments and their territorial bounds is exclusive to the Presidency.

III

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

Section 214(d) requires that, in a passport or consular report of birth abroad, “the Secretary shall, upon the request of the citizen or the citizen's
SEC. 2  SEPARATION OF POWERS

legal guardian, record the place of birth as Israel” for a “United States citizen born in the city of Jerusalem.” 116 Stat. 1366. That is, § 214(d) requires the President, through the Secretary, to identify citizens born in Jerusalem who so request as being born in Israel. But according to the President, those citizens were not born in Israel. As a matter of United States policy, neither Israel nor any other country is acknowledged as having sovereignty over Jerusalem. In this way, § 214(d) “directly contradicts” the “carefully calibrated and longstanding Executive branch policy of neutrality toward Jerusalem.”

If the power over recognition is to mean anything, it must mean that the President not only makes the initial, formal recognition determination but also that he may maintain that determination in his and his agent’s statements. This conclusion is a matter of both common sense and necessity. If Congress could command the President to state a recognition position inconsistent with his own, Congress could override the President’s recognition determination. Under international law, recognition may be effected by “written or oral declaration of the recognizing state.” 1 Moore § 27, at 73. In addition an act of recognition must “leave no doubt as to the intention to grant it.” 1 Oppenheim’s International Law § 50, at 169. Thus, if Congress could alter the President’s statements on matters of recognition or force him to contradict them, Congress in effect would exercise the recognition power.

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

Although the statement required by § 214(d) would not itself constitute a formal act of recognition, it is a mandate that the Executive contradict his prior recognition determination in an official document issued by the Secretary of State. See Urtetiqui v. D’Arcy, 9 Pet. 692, 699 (1835) (a passport “from its nature and object, is addressed to foreign powers” and “is to be considered ... in the character of a political document”). As a result, it is unconstitutional. This is all the more clear in light of the longstanding treatment of a passport’s place-of-birth section as an official executive statement implicating recognition. The Secretary’s position on this point has been consistent: He will not place information in the place-of-birth section of a passport that contradicts the President’s recognition policy. See 7 FAM § 1383. If a citizen objects to the country listed as sovereign over his place of birth, then the Secretary will accommodate him by listing the city or town of birth rather than the country. See id., § 1383.6. But the Secretary will not list a sovereign that contradicts the President’s recognition policy in a passport. Thus, the
Secretary will not list “Israel” in a passport as the country containing Jerusalem.

The flaw in § 214(d) is further underscored by the undoubted fact that that the purpose of the statute was to infringe on the recognition power—a power the Court now holds is the sole prerogative of the President. The statute is titled “United States Policy with Respect to Jerusalem as the Capital of Israel.” § 214, 116 Stat. 1365. The House Conference Report proclaimed that § 214 “contains four provisions related to the recognition of Jerusalem as Israel’s capital.” H. R. Conf. Rep. No. 107–671, p. 123 (2002). And, indeed, observers interpreted § 214 as altering United States policy regarding Jerusalem—which led to protests across the region.

It is true, as Zivotofsky notes, that Congress has substantial authority over passports. In Kent v. Dulles, for example, the Court held that if a person’s “liberty” to travel “is to be regulated” through a passport, “it must be pursuant to the law-making functions of the Congress.” Later cases, such as Zemel v. Rusk and Haig v. Agee, also proceeded on the assumption that Congress must authorize the grounds on which passports may be approved or denied. See Zemel, at 7–13; Haig, supra, at 289–306. This is consistent with the extensive lawmaking power the Constitution vests in Congress over the Nation’s foreign affairs.

The problem with § 214(d), however, lies in how Congress exercised its authority over passports. It was an improper act for Congress to “aggrandiz[e] its power at the expense of another branch” by requiring the President to contradict an earlier recognition determination in an official document issued by the Executive Branch. Freytag v. Commissioner, 501 U.S. 868, 878 (1991). To allow Congress to control the President’s communication in the context of a formal recognition determination is to allow Congress to exercise that exclusive power itself. As a result, the statute is unconstitutional.

In holding § 214(d) invalid the Court does not question the substantial powers of Congress over foreign affairs in general or passports in particular. This case is confined solely to the exclusive power of the President to control recognition determinations, including formal statements by the Executive Branch acknowledging the legitimacy of a state or government and its territorial bounds. Congress cannot command the President to contradict an earlier recognition determination in the issuance of passports.

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

Today’s decision is a first: Never before has this Court accepted a President’s direct defiance of an Act of Congress in the field of foreign affairs. We have instead stressed that the President’s power reaches “its lowest ebb” when he contravenes the express will of Congress, “for what is
at stake is the equilibrium established by our constitutional system.” Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637–638 (1952) (Jackson, J., concurring). . . .

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 Federalist No. 69, p. 420 (C. Rossiter ed. 1961). In short, at the time of the founding, “there was no reason to view the reception clause as a source of discretionary authority for the president.” Adler, The President’s Recognition Power: Ministerial or Discretionary? 25 Presidential Studies Q. 267, 269 (1995). . . .

Precedent and history lend no more weight to the Court’s position. The majority cites dicta suggesting an exclusive executive recognition power, but acknowledges contrary dicta suggesting that the power is shared. . . . When the best you can muster is conflicting dicta, precedent can hardly be said to support your side.

As for history, the majority admits that it too points in both directions. Some Presidents have claimed an exclusive recognition power, but others have expressed uncertainty about whether such preclusive authority exists. . . .

In sum, although the President has authority over recognition, I am not convinced that the Constitution provides the “conclusive and preclusive” power required to justify defiance of an express legislative mandate. Youngstown, 343 U. S., at 638 (Jackson, J., concurring). As the leading scholar on this issue has concluded, the “text, original understanding, post-ratification history, and structure of the Constitution do not support the . . . expansive claim that this executive power is plenary.” Reinstein, Is the President’s Recognition Power Exclusive? 86 Temp. L. Rev. 1, 60 (2013).

But even if the President does have exclusive recognition power, he still cannot prevail in this case, because the statute at issue does not implicate recognition. The relevant provision, § 214(d), simply gives an American citizen born in Jerusalem the option to designate his place of birth as Israel “[f]or purposes of” passports and other documents. Foreign Relations Authorization Act, Fiscal Year 2003, 116 Stat. 1366. The State
Department itself has explained that “identification”—not recognition—“is the principal reason that U. S. passports require ‘place of birth.’” 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. The majority attempts to reconcile its position by reconceiving § 214(d) as a “mandate that the Executive contradict his prior recognition determination in an official document issued by the Secretary of State.” But as just noted, neither Congress nor the Executive Branch regards § 214(d) as a recognition determination, so it is hard to see how the statute could contradict any such determination.

At most, the majority worries that there may be a perceived contradiction based on a mistaken understanding of the effect of § 214(d), insisting that some “observers interpreted § 214 as altering United States policy regarding Jerusalem.” To afford controlling weight to such impressions, however, is essentially to subject a duly enacted statute to an international heckler’s veto. Moreover, expanding the President’s purportedly exclusive recognition power to include authority to avoid potential misunderstandings of legislative enactments proves far too much. Congress could validly exercise its enumerated powers in countless ways that would create more severe perceived contradictions with Presidential recognition decisions than does § 214(d). If, for example, the President recognized a particular country in opposition to Congress’s wishes, Congress could declare war or impose a trade embargo on that country. A neutral observer might well conclude that these legislative actions had, to put it mildly, created a perceived contradiction with the President’s recognition decision. And yet each of them would undoubtedly be constitutional. So too would statements by nonlegislative actors that might be seen to contradict the President’s recognition positions, such as the declaration in a political party platform that “Jerusalem is and will remain the capital of Israel.”

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.” The Government offers a single citation for this allegedly exclusive power: United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319–320 (1936). But as the majority rightly acknowledges, Curtiss-Wright did not involve a claim that the Executive
could contravene a statute; it held only that he could act pursuant to a legislative delegation.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE ALITO join, dissenting.

Before this country declared independence, the law of England entrusted the King with the exclusive care of his kingdom’s foreign affairs. The royal prerogative included the “sole power of sending ambassadors to foreign states, and receiving them at home,” the sole authority to “make treaties, leagues, and alliances with foreign states and princes,” “the sole prerogative of making war and peace,” and the “sole power of raising and regulating fleets and armies.” 1 W. Blackstone, Commentaries *253, *257, *262. The People of the United States had other ideas when they organized our Government. They considered a sound structure of balanced powers essential to the preservation of just government, and international relations formed no exception to that principle.

The People therefore adopted a Constitution that divides responsibility for the Nation’s foreign concerns between the legislative and executive departments. The Constitution gave the President the “executive Power,” authority to send and responsibility to receive ambassadors, power to make treaties, and command of the Army and Navy—though they qualified some of these powers by requiring consent of the Senate. Art. II, §§ 1–3. At the same time, they gave Congress powers over war, foreign commerce, naturalization, and more. Art. I, § 8. “Fully eleven of the powers that Article I, § 8 grants Congress deal in some way with foreign affairs.” L. Tribe, American Constitutional Law, § 5–18, p. 965.

This case arises out of a dispute between the Executive and Legislative Branches about whether the United States should treat Jerusalem as a part of Israel. The Constitution contemplates that the political branches will make policy about the territorial claims of foreign nations the same way they make policy about other international matters: The President will exercise his powers on the basis of his views, Congress its powers on the basis of its views. That is just what has happened here.

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 (which certifies citizenship of an American born outside the United States) or a passport (which certifies citizenship for purposes of international travel). . . .

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 Zivotovsky’s birthplace as “Jerusalem” rather than “Israel” would fulfill these objectives, but when faced with alternative ways to carry its powers into execution, Congress has the “discretion” to choose the one it deems “most beneficial to the people.” *McCulloch v. Maryland*, 4 Wheat. 316, 421 (1819). It thus has the right to decide that recording birthplaces as “Israel” makes for better foreign policy. Or that regardless of international politics, a passport or birth report should respect its bearer’s conscientious belief that Jerusalem belongs to Israel.

No doubt congressional discretion in executing legislative powers has its limits; Congress’s chosen approach must be not only “necessary” to carrying its powers into execution, but also “proper.” Congress thus may not transcend boundaries upon legislative authority stated or implied elsewhere in the Constitution. But as we shall see, § 214(d) does not transgress any such restriction.

The Court frames this case as a debate about recognition. . . . The Court holds that the Constitution makes the President alone responsible for recognition and that § 214(d) invades this exclusive power. I agree that the Constitution empowers the President to extend recognition on behalf of the United States, but I find it a much harder question whether it makes that power exclusive. The Court tells us that “the weight of historical evidence” supports exclusive executive authority over “the formal determination of recognition.” But even with its attention confined to formal recognition, the Court is forced to admit that “history is not all on one side.” 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. It signifies acceptance of an international status, and it makes a commitment to
continued acceptance of that status and respect for any attendant rights. See, e.g., Convention on the Rights and Duties of States, Art. 6, Dec. 26, 1933, 49 Stat. 3100, T. S. No. 881. “Its legal effect is to create an estoppel. By granting recognition, [states] debar themselves from challenging in future whatever they have previously acknowledged.” 1 G. Schwarzenberger, International Law 127 (3d ed. 1957). In order to extend recognition, a state must perform an act that unequivocally manifests that intention. Whiteman § 3. That act can consist of an express conferral of recognition, or one of a handful of acts that by international custom imply recognition—chiefly, entering into a bilateral treaty, and sending or receiving an ambassador.

To know all this is to realize at once that § 214(d) has nothing to do with recognition. Section 214(d) does not require the Secretary to make a formal declaration about Israel’s sovereignty over Jerusalem. And nobody suggests that international custom infers acceptance of sovereignty from the birthplace designation on a passport or birth report, as it does from bilateral treaties or exchanges of ambassadors. Recognition would preclude the United States (as a matter of international law) from later contesting Israeli sovereignty over Jerusalem. But making a notation in a passport or birth report does not encumber the Republic with any international obligations. It leaves the Nation free (so far as international law is concerned) to change its mind in the future. That would be true even if the statute required all passports to list “Israel.” But in fact it requires only those passports to list “Israel” for which the citizen (or his guardian) requests “Israel”; all the rest, under the Secretary’s policy, list “Jerusalem.” It is utterly impossible for this deference to private requests to constitute an act that unequivocally manifests an intention to grant recognition. . . .

The best indication that § 214(d) does not concern recognition comes from the State Department’s policies concerning Taiwan. According to the Solicitor General, the United States “acknowledges the Chinese position” that Taiwan is a part of China, but “does not take a position” of its own on that issue. Even so, the State Department has for a long time recorded the birthplace of a citizen born in Taiwan as “China.” It indeed insisted on doing so until Congress passed a law (on which § 214(d) was modeled) giving citizens the option to have their birthplaces recorded as “Taiwan.” The Solicitor General explains that the designation “China” “involves a geographic description, not an assertion that Taiwan is . . . part of sovereign China.” Quite so. Section 214(d) likewise calls for nothing beyond a “geographic description”; it does not require the Executive even to assert, never mind formally recognize, that Jerusalem is a part of sovereign Israel. Since birthplace specifications in citizenship documents are matters within Congress’s control, Congress may treat Jerusalem as a part of Israel when regulating the recording of birthplaces, even if the President does not do so when extending recognition. Section 214(d), by the way, expressly directs
the Secretary to “record the place of birth as Israel” “[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport.” (Emphasis added.) And the law bears the caption, “Record of Place of Birth as Israel for Passport Purposes.” (Emphasis added.) Finding recognition in this provision is rather like finding admission to the Union in a provision that treats American Samoa as a State for purposes of a federal highway safety program, 23 U. S. C. § 401.

The Court complains that § 214(d) requires the Secretary of State to issue official documents implying that Jerusalem is a part of Israel; that it appears in a section of the statute bearing the title “United States Policy with Respect to Jerusalem as the Capital of Israel”; and that foreign “observers interpreted [it] as altering United States policy regarding Jerusalem.” But these features do not show that § 214(d) recognizes Israel’s sovereignty over Jerusalem. They show only that the law displays symbolic support for Israel’s territorial claim. That symbolism may have tremendous significance as a matter of international diplomacy, but it makes no difference as a matter of constitutional law.

Even if the Constitution gives the President sole power to extend recognition, it does not give him sole power to make all decisions relating to foreign disputes over sovereignty. To the contrary, a fair reading of Article I allows Congress to decide for itself how its laws should handle these controversies. Read naturally, power to “regulate Commerce with foreign Nations,” § 8, cl. 3, includes power to regulate imports from Gibraltar as British goods or as Spanish goods. Read naturally, power to “regulate the Value . . . of foreign Coin,” § 8, cl. 5, includes power to honor (or not) currency issued by Taiwan. And so on for the other enumerated powers. These are not airy hypotheticals. A trade statute from 1800, for example, provided that “the whole of the island of Hispaniola”—whose status was then in controversy—“shall for purposes of [the] act be considered as a dependency of the French Republic.” In 1938, Congress allowed admission of the Vatican City’s public records in federal courts, decades before the United States extended formal recognition. The Taiwan Relations Act of 1979 grants Taiwan capacity to sue and be sued, even though the United States does not recognize it as a state. 22 U. S. C. § 3303(b)(7). Section 214(d) continues in the same tradition.

The 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.” 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.

To the extent doubts linger about whether the United States recognizes Israel’s sovereignty over Jerusalem, § 214(d) leaves the President free to dispel them by issuing a disclaimer of intent to recognize. A disclaimer always suffices to prevent an act from effecting recognition. Restatement (Second) of Foreign Relations Law of the United States § 104(1) (1962). Recall that an earlier law grants citizens born in Taiwan the right to have their birthplaces recorded as “Taiwan.” The State Department has complied with the law, but states in its Foreign Affairs Manual: “The United States does not officially recognize Taiwan as a ‘state’ or ‘country,’ although passport issuing officers may enter ‘Taiwan’ as a place of birth.” 7 FAM § 1300, App. D, § 1340(d)(6). Nothing stops a similar disclaimer here.

At other times, the Court seems concerned with Congress’s failure to give effect to a recognition decision that the President has already made. The Court protests, for instance, that § 214(d) “directly contradicts” the President’s refusal to recognize Israel’s sovereignty over Jerusalem. But even if the Constitution empowers the President alone to extend recognition, it nowhere obliges Congress to align its laws with the President’s recognition decisions. Because the President and Congress are “perfectly coordinate by the terms of their common commission,” The Federalist No. 49, p. 314 (C. Rossiter ed. 1961) (Madison), the President’s use of the recognition power does not constrain Congress’s use of its legislative powers.

Congress has legislated without regard to recognition for a long time and in a range of settings. For example, responding in 1817 and 1818 to revolutions in Latin America, Congress amended federal neutrality laws—which originally prohibited private military action for or against recognized states—to prohibit private hostilities against unrecognized states too. See The Three Friends, 166 U. S. 1, 52–59 (1897). Federal law today prohibits murdering a foreign government’s officials, 18 U. S. C. § 1116, counterfeiting a foreign government’s bonds, § 478, and using American vessels to smuggle goods in violation of a foreign government’s laws, § 546—all “irrespective of recognition by the United States,” §§ 11, 1116. Just as Congress may legislate independently of recognition in all of those areas, so too may it legislate independently of recognition when regulating the recording of birthplaces.

The Court elsewhere objects that § 214(d) interferes with the autonomy and unity of the Executive Branch, setting the branch against itself. The Court suggests, for instance, that the law prevents the President from maintaining his neutrality about Jerusalem in “his and his agent’s statements.” That is of no constitutional significance. As just shown,
Congress has power to legislate without regard to recognition, and where Congress has the power to legislate, the President has a duty to “take Care” that its legislation “be faithfully executed,” Art. II, § 3. It is likewise “the duty of the secretary of state to conform to the law”; where Congress imposes a responsibility on him, “he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.” *Marbury v. Madison*, 1 Cranch 137, 158, 166 (1803). The Executive’s involvement in carrying out this law does not affect its constitutionality; the Executive carries out every law.

In the end, the Court’s decision does not rest on text or history or precedent. It instead comes down to “functional considerations”—principally the Court’s perception that the Nation “must speak with one voice” about the status of Jerusalem. 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.

**NOTES**

1. Youngstown *Category III*. Zivotofsky II was an unusual and important case because it addressed a conflict between the political branches over an issue of foreign relations law. Such conflicts are unusual in part because Congress has delegated significant power over foreign relations to the president, and in part because the Court has sometimes inferred congressional authorization or relied upon congressional acquiescence to uphold actions by the president. The political question doctrine and standing have also limited the justiciability of potential conflicts between the political branches. In *Zivotofsky II*, however, the conflict was unavoidable and the Court reached the merits. Justice Breyer argued in *Zivotofsky I* that the case should be dismissed as presenting a political question. Was he correct? (See Chapter 7, Sec. 1). *Zivotofsky II* is also an important case because the Court held for the executive branch. Was Chief Justice Roberts right to urge greater caution in doing so? How important is the reasoning and holding of *Zivotofsky II*? See Jack L. Goldsmith, Zivotofsky II as Precedent in the Executive Branch, 129 HARV. L. REV. 112 (2015) and Ingrid Wuerth, Zivotofsky v. Kerry: A Foreign Relations Law Bonanza, 109 AM. J. INT’L L. 636 (2015).

2. *International Law*. For what purposes do the majority and the dissenting opinions cite to international law? Is modern international law relevant to the interpretation of the Constitution? Why or why not? Does your answer vary depending upon the constitutional issue with which courts are confronted? These questions arise throughout the course and are specifically addressed in Chapter 2, Sec. 4.
3. **A Loss for the “Sole Organ” Doctrine?** Is the majority’s analysis of the relationship between section 214(d) and the recognition power convincing? What do the dissenting opinions argue on this point? Note that the majority could have reached the same result without addressing the relationship between section 214(d) and recognition if it had held that the president has the exclusive power to conduct diplomacy. As the majority opinion notes, *United States v. Curtiss-Wright Export Corp.* describes the president as “the sole organ of the federal government in the field of international relations.” Why did the Court reject this argument?

4. **Methodology.** To what extent do the dissenting and majority opinions disagree about the proper method of constitutional interpretation? What roles do constitutional text, constitutional history, post-constitutional practice of Congress and the executive branch, prior cases, and functional reasoning play in each opinion? How important is each? Are functional concerns central to the majority opinion?

### 3. INDIVIDUAL LIBERTY AND FOREIGN RELATIONS

**John Locke, Second Treatise of Government**


... This power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it, is that which is called *prerogative*; for since in some governments the lawmaking 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 public, or 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.

**Ex Parte Merryman**

17 F. Cas. 144 (C.C.D. Md. 1861).

[After the 1861 bombardment of Fort Sumter by Confederate troops, President Lincoln called for reinforcements to defend Washington, D.C. Riots erupted as Union soldiers from Massachusetts traveled through Maryland, a slave state. President Lincoln ordered his officers to suspend the writ of *habeas corpus* along the “military line” between Philadelphia and Washington. John Merryman, an officer of the Maryland cavalry, was imprisoned on suspicion of sabotage. Merryman petitioned for a writ of *habeas corpus.*]
TANEY, CIRCUIT JUSTICE. . . .

As the case comes before me, therefore, I understand that the president not only claims the right to suspend the writ of habeas corpus himself, at his discretion, but to delegate that discretionary power to a military officer, and to leave it to him to determine whether he will or will not obey judicial process that may be served upon him. No official notice has been given to the courts of justice, or to the public, by proclamation or otherwise, that the president claimed this power, and had exercised it in the manner stated in the return. And I certainly listened to it with some surprise, for I had supposed it to be one of those points of constitutional law upon which there was no difference of opinion, and that it was admitted on all hands, that the privilege of the writ could not be suspended, except by act of congress. . . .

The clause of the constitution, which authorizes the suspension of the privilege of the writ of habeas corpus, is in the 9th section of the first article. This article is devoted to the legislative department of the United States, and has not the slightest reference to the executive department. . . .

It is the second article of the constitution that provides for the organization of the executive department, enumerates the powers conferred on it, and prescribes its duties. And if the high power over the liberty of the citizen now claimed, was intended to be conferred on the president, it would undoubtedly be found in plain words in this article; but there is not a word in it that can furnish the slightest ground to justify the exercise of the power. . . .

With such provisions in the constitution, expressed in language too clear to be misunderstood by any one, I can see no ground whatever for supposing that the president, in any emergency, or in any state of things, can authorize the suspension of the privileges of the writ of habeas corpus, or the arrest of a citizen, except in aid of the judicial power. He certainly does not faithfully execute the laws, if he takes upon himself legislative power, by suspending the writ of habeas corpus, and the judicial power also, by arresting and imprisoning a person without due process of law. . . .

[Following the circuit court's decision, Merryman was released on bail. He was never tried.]

NOTES

1. *Locke and Load*. Do you think John Locke is correct that there are times when governmental authorities must be allowed to act “without the prescription of the law, and sometimes even against it,” when society is severely threatened? Is the field of foreign relations and national security law one where this is most likely to happen? What are the dangers of allowing such action? Of prohibiting it?
2. *State of Emergency and the U.S. Constitution.* The U.S. Constitution, unlike the constitutions of some other countries, does not contain a “state of emergency” provision. Nor is there any notion of “derogable” rights in United States constitutional jurisprudence. The only provision of the Constitution that expressly provides for its own suspension is the *Habeas Corpus* Clause, article I, section 9, clause 2, which provides that the writ “shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.” Does this mean that the scope of the president’s constitutional power is constant, or does it expand during a national emergency? If the latter, does this mean that the power of the president and Congress, acting together, also expands so that what would otherwise be unconstitutional (even though within Justice Jackson’s first category) is rendered permissible?

3. *Judicial Complicity.* Is the “bending” process greater if the courts consider and legitimate what would otherwise be a transgression? In *The Imperial Presidency*, Arthur Schlesinger writes that, while the Founding Fathers did not rule out the possibility that “crisis might require the executive to act outside the Constitution,” neither did they intend to confer constitutional legitimacy on such acts, believing that the “legal order would be better preserved if departures from it were frankly identified as such than if they were anointed with a factitious legality and thereby enabled to serve as constitutional precedents for future action.” Arthur Schlesinger, Jr., *The Imperial Presidency* 8 (1973). In this connection, consider in particular the dissent of Justice Jackson in the following case.

**Korematsu v. United States**

323 U.S. 214 (1944).

Mr. Justice Black delivered the opinion of the Court.

The petitioner, an American citizen of Japanese descent, was convicted in a federal district court for remaining in San Leandro, California, a “Military Area”, contrary to Civilian Exclusion Order No. 34 of the Commanding General of the Western Command, U.S. Army, which directed that after May 9, 1942, all persons of Japanese ancestry should be excluded from that area. No question was raised as to petitioner’s loyalty to the United States. The Circuit Court of Appeals affirmed, and the importance of the constitutional question involved caused us to grant certiorari.

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.
In the instant case prosecution of the petitioner was begun by information charging violation of an Act of Congress, of March 21, 1942, 56 Stat. 173, which provides that

“... whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense.”

Exclusion Order No. 34, which the petitioner knowingly and admittedly violated, was one of a number of military orders and proclamations, all of which were substantially based upon Executive Order No. 9066, 7 Fed. Reg. 1407. That order, issued after we were at war with Japan, declared that “the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities...”

One of the series of orders and proclamations, a curfew order, which like the exclusion order here was promulgated pursuant to Executive Order 9066, subjected all persons of Japanese ancestry in prescribed West Coast military areas to remain in their residences from 8 p.m. to 6 a.m. As is the case with the exclusion order here, that prior curfew order was designed as a “protection against espionage and against sabotage.” In Hirabayashi v. United States, 320 U.S. 81, we sustained a conviction obtained for violation of the curfew order. The Hirabayashi conviction and this one thus rest on the same 1942 Congressional Act and the same basic executive and military orders, all of which orders were aimed at the twin dangers of espionage and sabotage.

The 1942 Act was attacked in the Hirabayashi case as an unconstitutional delegation of power; it was contended that the curfew order and other orders on which it rested were beyond the war powers of the Congress, the military authorities and of the President, as Commander in Chief of the Army; and finally that to apply the curfew order against none but citizens of Japanese ancestry amounted to a constitutionally prohibited discrimination solely on account of race. To these questions, we gave the serious consideration which their importance justified. We upheld the curfew order as an exercise of the power of the government to take steps
necessary to prevent espionage and sabotage in an area threatened by Japanese attack.

In the light of the principles we announced in the *Hirabayashi* case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did. True, exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 p.m. to 6 a.m. Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either. But exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage. The military authorities, charged with the primary responsibility of defending our shores, concluded that curfew provided inadequate protection and ordered exclusion. They did so, as pointed out in our *Hirabayashi* opinion, in accordance with Congressional authority to the military to say who should, and who should not, remain in the threatened areas.

In this case the petitioner challenges the assumptions upon which we rested our conclusions in the *Hirabayashi* case. He also urges that by May 1942, when Order No. 34 was promulgated, all danger of Japanese invasion of the West Coast had disappeared. After careful consideration of these contentions we are compelled to reject them.

Here, as in the *Hirabayashi* case, *supra*, at p. 99, “... we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.”

Like curfew, exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country. It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the entire group was rested by the military on the same ground. The judgment that exclusion of the whole group was for the same reason a military imperative answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin. That there were members of the group who retained
loyalties to Japan has been confirmed by investigations made subsequent to the exclusion. Approximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan.²

We uphold the exclusion order as of the time it was made and when the petitioner violated it. . . . In doing so, we are not unmindful of the hardships imposed by it upon a large group of American citizens. . . . But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger. . . .

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

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ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.

Affirmed.

MR. JUSTICE FRANKFURTER, concurring. . . .

The provisions of the Constitution which confer on the Congress and the President powers to enable this country to wage war are as much part of the Constitution as provisions looking to a nation at peace. And we have had recent occasion to quote approvingly the statement of former Chief Justice Hughes that the war power of the Government is “the power to wage war successfully.” Hirabayashi v. United States, supra at 93. Therefore, the validity of action under the war power must be judged wholly in the context of war. That action is not to be stigmatized as lawless because like action in times of peace would be lawless. To talk about a military order that expresses an allowable judgment of war needs by those entrusted with the duty of conducting war as “an unconstitutional order” is to suffuse a part of the Constitution with an atmosphere of unconstitutionality. The respective spheres of action of military authorities and of judges are of course very different. But within their sphere, military authorities are no more outside the bounds of obedience to the Constitution than are judges within theirs. “The war power of the United States, like its other powers . . . is subject to applicable constitutional limitations”. Hamilton v. Kentucky Distilleries Co., 251 U.S. 146, 156. To recognize that military orders are “reasonably expedient military precautions” in time of war and yet to deny them constitutional legitimacy makes of the Constitution an instrument for dialectic subtleties not reasonably to be attributed to the hard-headed Framers, of whom a majority had had actual participation in war. If a military order such as that under review does not transcend the means appropriate for conducting war, such action by the military is as constitutional as would be any authorized action by the Interstate Commerce Commission within the limits of the constitutional power to regulate commerce. And being an exercise of the war power explicitly granted by the Constitution for safeguarding the national life by prosecuting war effectively, I find nothing in the Constitution which denies to Congress the power to enforce such a valid military order by making its violation an offense triable in the civil courts. Compare Interstate Commerce Commission v. Brimson, 154 U.S. 447; 155 U.S. 3, and Monongahela Bridge Co. v. United States, 216 U.S. 177. To find that the Constitution does not forbid the military measures now complained of does not carry with it approval of that which Congress and the Executive did. That is their business, not ours.

MR. JUSTICE ROBERTS.

I dissent, because I think the indisputable facts exhibit a clear violation of Constitutional rights.
This is not a case of keeping people off the streets at night as was *Hirabayashi v. United States*, 320 U.S. 81, nor a case of temporary exclusion of a citizen from an area for his own safety or that of the community, nor a case of offering him an opportunity to go temporarily out of an area where his presence might cause danger to himself or to his fellows. On the contrary, it is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. If this be a correct statement of the facts disclosed by this record, and facts of which we take judicial notice, I need hardly labor the conclusion that Constitutional rights have been violated.

I would reverse the judgment of conviction.

MR. JUSTICE MURPHY, dissenting.

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

In dealing with matters relating to the prosecution and progress of a war, we must accord great respect and consideration to the judgments of the military authorities who are on the scene and who have full knowledge of the military facts. The scope of their discretion must, as a matter of necessity and common sense, be wide. And their judgments ought not to be overruled lightly by those whose training and duties ill-equip them to deal intelligently with matters so vital to the physical security of the nation.

At the same time, however, it is essential that there be definite limits to military discretion, especially where martial law has not been declared. Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support. Thus, like other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled. “What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.” *Sterling v. Constantine*, 287 U.S. 378, 401.

The judicial test of whether the Government, on a plea of military necessity, can validly deprive an individual of any of his constitutional rights is whether the deprivation is reasonably related to a public danger that is so “immediate, imminent, and impending” as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger. *United States v. Russell*, 13 Wall. 623, 627, 628; *Mitchell v. Harmony*, 13 How. 115, 134, 135; *Raymond v. Thomas*, 91 U.S.
712, 716. Civilian Exclusion Order No. 34, banishing from a prescribed area of the Pacific Coast “all persons of Japanese ancestry, both alien and non-alien,” clearly does not meet that test. Being an obvious racial discrimination, the order deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment. It further deprives these individuals of their constitutional rights to live and work where they will, to establish a home where they choose and to move about freely. In excommunicating them without benefit of hearings, this order also deprives them of all their constitutional rights to procedural due process. Yet no reasonable relation to an “immediate, imminent, and impending” public danger is evident to support this racial restriction which is one of the most sweeping and complete deprivations of constitutional rights in the history of this nation in the absence of martial law.

It must be conceded that the military and naval situation in the spring of 1942 was such as to generate a very real fear of invasion of the Pacific Coast, accompanied by fears of sabotage and espionage in that area. The military command was therefore justified in adopting all reasonable means necessary to combat these dangers. In adjudging the military action taken in light of the then apparent dangers, we must not erect too high or too meticulous standards; it is necessary only that the action have some reasonable relation to the removal of the dangers of invasion, sabotage and espionage. But the exclusion, either temporarily or permanently, of all persons with Japanese blood in their veins has no such reasonable relation. And that relation is lacking because the exclusion order necessarily must rely for its reasonableness upon the assumption that all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage and to aid our Japanese enemy in other ways. It is difficult to believe that reason, logic or experience could be marshalled in support of such an assumption.

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

Justification for the exclusion is sought, instead, mainly upon questionable racial and sociological grounds not ordinarily within the
realm of expert military judgment, supplemented by certain semi-military conclusions drawn from an unwarranted use of circumstantial evidence. Individuals of Japanese ancestry are condemned because they are said to be “a large, unassimilated, tightly knit racial group, bound to an enemy nation by strong ties of race, culture, custom and religion.” They are claimed to be given to “emperor worshipping ceremonies” and to “dual citizenship.” Japanese language schools and allegedly pro-Japanese organizations are cited as evidence of possible group disloyalty, together with facts as to certain persons being educated and residing at length in Japan. It is intimated that many of these individuals deliberately resided “adjacent to strategic points,” thus enabling them “to carry into execution a tremendous program of sabotage on a mass scale should any considerable number of them have been inclined to do so.” The need for protective custody is also asserted. The report refers without identity to “numerous incidents of violence” as well as to other admittedly unverified or cumulative incidents. . . .

The main reasons relied upon by those responsible for the forced evacuation, therefore, do not prove a reasonable relation between the group characteristics of Japanese Americans and the dangers of invasion, sabotage and espionage. The reasons appear, instead, to be largely an accumulation of much of the misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices—the same people who have been among the foremost advocates of the evacuation. A military judgment based upon such racial and sociological considerations is not entitled to the great weight ordinarily given the judgments based upon strictly military considerations. Especially is this so when every charge relative to race, religion, culture, geographical location, and legal and economic status has been substantially discredited by independent studies made by experts in these matters. . . .

MR. JUSTICE JACKSON, dissenting.

Korematsu was born on our soil, of parents born in Japan. The Constitution makes him a citizen of the United States by nativity and a citizen of California by residence. No claim is made that he is not loyal to this country. There is no suggestion that apart from the matter involved here he is not law-abiding and well disposed. Korematsu, however, has been convicted of an act not commonly a crime. It consists merely of being present in the state whereof he is a citizen, near the place where he was born, and where all his life he has lived.

Even more unusual is the series of military orders which made this conduct a crime. They forbid such a one to remain, and they also forbid him to leave. They were so drawn that the only way Korematsu could avoid violation was to give himself up to the military authority. This meant
submission to custody, examination, and transportation out of the territory, to be followed by indeterminate confinement in detention camps. . . .

Neither the Act of Congress nor the Executive Order of the President, nor both together, would afford a basis for this conviction. It rests on the orders of General DeWitt. And it is said that if the military commander had reasonable military grounds for promulgating the orders, they are constitutional and become law, and the Court is required to enforce them. There are several reasons why I cannot subscribe to this doctrine.

It would be impracticable and dangerous idealism to expect or insist that each specific military command in an area of probable operations will conform to conventional tests of constitutionality. . . . But a commander in temporarily focusing the life of a community on defense is carrying out a military program; he is not making law in the sense the courts know the term. He issues orders, and they may have a certain authority as military commands, although they may be very bad as constitutional law.

But if we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient. That is what the Court appears to be doing, whether consciously or not. I cannot say, from any evidence before me, that the orders of General DeWitt were not reasonably expedient military precautions, nor could I say that they were. But even if they were permissible military procedures, I deny that it follows that they are constitutional. If, as the Court holds, it does follow, then we may as well say that any military order will be constitutional and have done with it.

The limitation under which courts always will labor in examining the necessity for a military order are illustrated by this case. How does the Court know that these orders have a reasonable basis in necessity? No evidence whatever on that subject has been taken by this or any other court. There is sharp controversy as to the credibility of the DeWitt report. So the Court, having no real evidence before it, has no choice but to accept General DeWitt’s own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable. And thus it will always be when courts try to look into the reasonableness of a military order.

In the very nature of things, military decisions are not susceptible of intelligent judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved. Information in support of an order could not be disclosed to courts without danger that it would reach the enemy. Neither can courts act on communications made in confidence. Hence courts can never have any real alternative to accepting the mere
declaration of the authority that issued the order that it was reasonably necessary from a military viewpoint.

Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. All who observe the work of courts are familiar with what Judge Cardozo described as “the tendency of a principle to expand itself to the limit of its logic.”¹ A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. Nothing better illustrates this danger than does the Court’s opinion in this case.

I should hold that a civil court cannot be made to enforce an order which violates constitutional limitations even if it is a reasonable exercise of military authority. The courts can exercise only the judicial power, can apply only law, and must abide by the Constitution, or they cease to be civil courts and become instruments of military policy.

Of course the existence of a military power resting on force, so vagrant, so centralized, so necessarily heedless of the individual, is an inherent threat to liberty. But I would not lead people to rely on this Court for a review that seems to me wholly delusive. The military reasonableness of these orders can only be determined by military superiors. If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint. The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history.

My duties as a justice as I see them do not require me to make a military judgment as to whether General DeWitt’s evacuation and detention program was a reasonable military necessity. I do not suggest

¹ Nature of the Judicial Process, p. 51.
that the courts should have attempted to interfere with the Army in carrying out its task. But I do not think they may be asked to execute a military expedient that has no place in law under the Constitution. I would reverse the judgment and discharge the prisoner.

NOTES

1. **Detaining Americans as Threats to National Security.** To what extent might Korematsu serve as precedent for the detention without trial of other civilians thought to pose a threat to national security? How might such a group constitutionally be identified? If race can serve as the basis for detention, can expressive activity? Could the government properly take into account, for example, a person’s contributions to certain charitable organizations in the Middle East? Could it consider one’s membership in a religious congregation deemed to be “radical”?

2. **Applying Justice Jackson’s Categories.** Would the challenged executive order have been constitutional if Congress had been silent? If Congress had opposed?

3. **Post-Script.** In 1980, a special commission appointed by President Jimmy Carter determined that the internment of Japanese-Americans during World War II occurred because of race prejudice, war hysteria, and a failure of political leadership. In 1984, Fred Korematsu petitioned the government for a writ of coram nobis to vacate his 1944 conviction on the grounds of governmental misconduct. A district court judge for the Northern District of California granted the writ, holding that “the government knowingly withheld information from the courts when they were considering the critical question of military necessity [as to the detention of Japanese-Americans].” 584 F.Supp. 1406 (N.D. Cal. 1984). In particular, the court cited the “erroneous” sabotage statistics included in the *Final Report of General DeWitt* (1943). In 1988, Congress apologized for the detentions and granted personal compensation of $20,000 to each surviving prisoner or their spouse/parent. See Civil Liberties Act of 1988, 50 U.S.C. § 1989b (2006). In 1998, President Clinton awarded Korematsu the Presidential Medal of Freedom, seven years before his death in 2005. Despite these measures, the Supreme Court’s decision in *Korematsu v. United States* has never been overruled and remains valid law.

4. **Individual Liberties and the Armed Conflict with Al Qaeda.** After the terrorist attack of September 11, 2001, Congress enacted an Authorization for the Use of Military Force (AUMF or 2001 AUMF) which provides that:

   the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.
Pub. L. No. 107–40, § 2(a), 115 Stat. 224 (2001). The executive branch then embarked on an aggressive campaign against the terrorist organization al Qaeda by invading its stronghold in Afghanistan, toppling its allied Afghan government (the Taliban), and disrupting its activities in other countries, including Pakistan, the Philippines, and Yemen. (See Chapter 4, Sec. 5 (B)).

HAMDI v. RUMSFELD

Justice O’Connor announced the judgment of the Court and delivered an opinion, in which The Chief Justice, Justice Kennedy, and Justice Breyer join. . . .

This case arises out of the detention of a man whom the Government alleges took up arms with the Taliban during this conflict. His name is Yaser Esam Hamdi. Born in Louisiana in 1980, Hamdi moved with his family to Saudi Arabia as a child. By 2001, the parties agree, he resided in Afghanistan. At some point that year, he was seized by members of the Northern Alliance, a coalition of military groups opposed to the Taliban government, and eventually was turned over to the United States military. The Government asserts that it initially detained and interrogated Hamdi in Afghanistan before transferring him to the United States Naval Base in Guantanamo Bay in January 2002. In April 2002, upon learning that Hamdi is an American citizen, authorities transferred him to a naval brig in Norfolk, Virginia, where he remained until a recent transfer to a brig in Charleston, South Carolina. The Government contends that Hamdi is an “enemy combatant,” and that this status justifies holding him in the United States indefinitely—without formal charges or proceedings—unless and until it makes the determination that access to counsel or further process is warranted. . . .

[The district court] ordered the Government to turn over numerous materials for in camera review, including copies of all of Hamdi’s statements and the notes taken from interviews with him that related to his reasons for going to Afghanistan and his activities therein; a list of all interrogators who had questioned Hamdi and their names and addresses; statements by members of the Northern Alliance regarding Hamdi’s surrender and capture; a list of the dates and locations of his capture and subsequent detentions; and the names and titles of the United States Government officials who made the determinations that Hamdi was an enemy combatant and that he should be moved to a naval brig. The court indicated that all of these materials were necessary for “meaningful judicial review” of whether Hamdi’s detention was legally authorized and whether Hamdi had received sufficient process to satisfy the Due Process Clause of the Constitution and relevant treaties or military regulations. . . .
It is beyond question that substantial interests lie on both sides of the scale in this case. Hamdi’s “private interest . . . affected by the official action” is the most elemental of liberty interests—the interest in being free from physical detention by one’s own government. *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (“Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action”); see also *Parham v. J. R.*, 442 U.S. 584, 600 (1979) (noting the “substantial liberty interest in not being confined unnecessarily”). . . .

On the other side of the scale are the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States. As discussed above, the law of war and the realities of combat may render such detentions both necessary and appropriate, and our due process analysis need not blink at those realities. Without doubt, our Constitution recognizes that core strategic matters of war making belong in the hands of those who are best positioned and most politically accountable for making them. *Department of Navy v. Egan*, 484 U.S. 518, 530 (1988) (noting the reluctance of the courts “to intrude upon the authority of the Executive in military and national security affairs”); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (acknowledging “broad powers in military commanders engaged in day-to-day fighting in a theater of war”). . . .

With due recognition of these competing concerns, we believe that neither the process proposed by the Government nor the process apparently envisioned by the District Court below strikes the proper constitutional balance when a United States citizen is detained in the United States as an enemy combatant. That is, “the risk of erroneous deprivation” of a detainee’s liberty interest is unacceptably high under the Government’s proposed rule, while some of the “additional or substitute procedural safeguards” suggested by the District Court are unwarranted in light of their limited “probable value” and the burdens they may impose on the military in such cases. *Mathews*, 424 U.S., at 335.

We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker. . . . “For more than a century the central meaning of procedural due process has been clear: ‘Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.’ It is equally fundamental that the right to notice and an opportunity to be heard ‘must be granted at a meaningful time and in a meaningful manner.’” *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (quoting *Baldwin v. Hale*, 1 Wall. 223, 233 (1864)). . . . These essential constitutional promises may not be eroded.
At the same time, the exigencies of the circumstances may demand that, aside from these core elements, enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government’s evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria. A burden-shifting scheme of this sort would meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion that the detainee is in fact an enemy combatant. In the words of Matheus, process of this sort would sufficiently address the “risk of erroneous deprivation” of a detainee’s liberty interest while eliminating certain procedures that have questionable additional value in light of the burden on the Government. 424 U.S., at 335.

We think it unlikely that this basic process will have the dire impact on the central functions of warmaking that the Government forecasts. The parties agree that initial captures on the battlefield need not receive the process we have discussed here; that process is due only when the determination is made to continue to hold those who have been seized. The Government has made clear in its briefing that documentation regarding battlefield detainees already is kept in the ordinary course of military affairs. Any factfinding imposition created by requiring a knowledgeable affiant to summarize these records to an independent tribunal is a minimal one. Likewise, arguments that military officers ought not have to wage war under the threat of litigation lose much of their steam when factual disputes at enemy-combatant hearings are limited to the alleged combatant’s acts. This focus meddles little, if at all, in the strategy or conduct of war, inquiring only into the appropriateness of continuing to detain an individual claimed to have taken up arms against the United States. While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here. Cf. Korematsu v. United States, 323 U.S. 214, 233–234 (1944) (Murphy, J., dissenting) (“[L]ike other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject
itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled”). . . .

In sum, while the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting, the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen’s core rights to challenge meaningfully the Government’s case and to be heard by an impartial adjudicator. . . .

In so holding, we necessarily reject the Government’s assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to condense power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens. Youngstown Sheet & Tube, 343 U.S., at 587. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake. Mistretta v. United States, 488 U.S. 361, 380 (1989) (it was “the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty”); Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398, 426 (1934) (The war power “is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties”). Likewise, we have made clear that, unless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive’s discretion in the realm of detentions. . . .

The judgment of the United States Court of Appeals for the Fourth Circuit is vacated, and the case is remanded for further proceedings.

It is so ordered.

JUSTICE THOMAS, dissenting.

The Executive Branch, acting pursuant to the powers vested in the President by the Constitution and with explicit congressional approval, has determined that Yaser Hamdi is an enemy combatant and should be detained. This detention falls squarely within the Federal Government’s war powers, and we lack the expertise and capacity to second-guess that
decision. As such, petitioners’ habeas challenge should fail, and there is no reason to remand the case. The plurality reaches a contrary conclusion by failing adequately to consider basic principles of the constitutional structure as it relates to national security and foreign affairs and by using the balancing scheme of *Mathews v. Eldridge*, 424 U.S. 319 (1976). I do not think that the Federal Government’s war powers can be balanced away by this Court. Arguably, Congress could provide for additional procedural protections, but until it does, we have no right to insist upon them. But even if I were to agree with the general approach the plurality takes, I could not accept the particulars. The plurality utterly fails to account for the Government’s compelling interests and for our own institutional inability to weigh competing concerns correctly. I respectfully dissent.

“It is ‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation.” *Haig v. Agee*, 453 U.S. 280, 307 (1981) (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 509 (1964)). The national security, after all, is the primary responsibility and purpose of the Federal Government. . . . But because the Founders understood that they could not foresee the myriad potential threats to national security that might later arise, they chose to create a Federal Government that necessarily possesses sufficient power to handle any threat to the security of the Nation. The power to protect the Nation

“ought to exist without limitation . . . [b]ecause it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent & variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.” [The Federalist No. 23, p. 147 (J. Cooke ed. 1961) (A. Hamilton)]. . . .

The Founders intended that the President have primary responsibility—along with the necessary power—to protect the national security and to conduct the Nation’s foreign relations. They did so principally because the structural advantages of a unitary Executive are essential in these domains. “Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks.” *Id.*, No. 70, at 471 (A. Hamilton). The principle “ingredient[t]” for “energy in the executive” is “unity.” *Id.*, at 472. This is because “[d]ecision, activity, secrecy, and dispatch will generally characterise the proceedings of one man, in a much more eminent degree, than the proceedings of any greater number.” *Ibid*.

These structural advantages are most important in the national-security and foreign-affairs contexts. “Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities
which distinguish the exercise of power by a single hand.” *Id.*, No. 74, at 500 (A. Hamilton). Also for these reasons, John Marshall explained that “[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.” 10 Annals of Cong. 613 (1800); see *id.*, at 613–614. To this end, the Constitution vests in the President “[t]he executive Power,” Art. II, § 1, provides that he “shall be Commander in Chief of the” Armed Forces, § 2, and places in him the power to recognize foreign governments, § 3.

This Court has long recognized these features and has accordingly held that the President has *constitutional* authority to protect the national security and that this authority carries with it broad discretion.

“If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. Whether the President in fulfilling his duties, as Commander in-chief, in suppressing an insurrection, has met with such armed hostile resistance . . . is a question to be decided by him.” *Prize Cases*, 2 Black 635, 668, 670 (1863).

The Court has acknowledged that the President has the authority to “employ [the Nation’s Armed Forces] in the manner he may deem most effectual to harass and conquer and subdue the enemy.” *Fleming v. Page*, 9 How. 603, 615 (1850). With respect to foreign affairs as well, the Court has recognized the President’s independent authority and need to be free from interference. See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (explaining that the President “has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results”); *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 111 (1948). . . .

[W]here “the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress[, and i]n such a case the executive action ‘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.’” *Dames & Moore*, 453 U.S. 654, 668 (1981) (quoting *Youngstown*, *supra*, at 637 (Jackson, J., concurring)). That is why the Court has explained, in a case analogous to this one, that “the detention[,] ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger[, is] not to be set aside by the courts without the clear conviction that [it is] in conflict with the Constitution or laws of Congress.
constitutionally enacted.” *Ex parte Quirin*, 317 U.S. 1, 25 (1942). See also *Ex parte Milligan*, 4 Wall. 2, 133 (1866) (Chase, C. J., concurring in judgment) (stating that a sentence imposed by a military commission “must not be set aside except upon the clearest conviction that it cannot be reconciled with the Constitution and the constitutional legislation of Congress”). This deference extends to the President’s determination of all the factual predicates necessary to conclude that a given action is appropriate.

Although the President very well may have inherent authority to detain those arrayed against our troops, I agree with the plurality that we need not decide that question because Congress has authorized the President to do so. The Authorization for Use of Military Force (AUMF), 115 Stat. 224, authorizes the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks” of September 11, 2001.

**NOTES**

1. *War Powers and Individual Liberties. Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) is a significant case for the study of both war powers and individual liberties. As discussed in Chapter 4 on war powers, the Court considered in *Hamdi* how to interpret the AUMF, including its relationship to international law. Writing for the plurality, Justice O’Connor determined that “Congress has in fact authorized Hamdi’s detention” through the AUMF. 542 U.S. at 517. (See Chapter 4, Sec.7). In the excerpt above, the Court considered whether Congress and the president, even when working together in the field of foreign relations, are limited by due process concerns. The plurality held that due process required that Hamdi be given the opportunity to contest the factual basis for his detention. Do you agree with the plurality’s analysis or do you find Justice Thomas’s dissent compelling?

2. *The Least Dangerous Branch*. The *Hamdi* case reminds us that while foreign affairs powers are largely exercised concurrently by the two political branches, the judicial branch can play a pivotal role as well, even when the two political branches are acting in apparent harmony. In times of extremis, should courts be more deferential to the political branches, or is that the situation where judicial oversight is most needed?

3. *Deferring to the President*. How much deference should a court give to the executive branch’s determination that Yaser Hamdi is an enemy combatant? By what standards would a court determine that the executive branch is mistaken? Are courts equipped to make such judgments? Recall the Court’s treatment of the *Final Report of General DeWitt* (1943) in *Korematsu*; would that deference be more appropriate? Or are you troubled by what happened in the *Korematsu* case? Given that the executive branch makes such
determinations based in part on highly classified information, how could that information be properly shared with the court and with the alleged terrorist?

4. Interpreting Congressional Action. Does the existence of a statute authorizing the use of force by the executive mean that courts should be more deferential to executive detention of U.S. citizens without charge? Note that Justice Thomas places the president’s authority to detain U.S. citizens as enemy combatants in Justice Jackson’s first category where “the President acts pursuant to an express or implied authorization of Congress” and “his authority is at its maximum.” Do you agree with the plurality, and with Justice Thomas, that Congress authorized the detention of U.S. citizens when it enacted the AUMF?

5. Never Mind. The Supreme Court’s decision in Hamdi remanded the case for further proceedings on the issue of what procedures would be implemented in order to ensure Yaser Hamdi’s due process rights. However, this issue was never resolved. Rather than granting Hamdi a hearing, in the fall of 2004 the U.S. government brokered a deal in which Hamdi—a U.S. citizen raised in Saudi Arabia—was freed from detention in exchange for agreeing to return to Saudi Arabia, renouncing his American citizenship, and adhering to prescribed travel restrictions. See Eric Lichtblau, U.S., Bowing to Court Ruling, Will Free “Enemy Combatant,” N.Y. TIMES, Sept. 23, 2004.

6. Preventive Detentions. Separate from the detention of certain U.S. citizens, in the aftermath of the September 11 attacks the executive branch embarked on an aggressive domestic law enforcement campaign that involved the detention of thousands of aliens in the United States as a preventive strategy against future terrorist activity. Consider the following description:

   Such arrests—which were on a scale not seen in the United States since the Second World War—were conducted under great secrecy. Gag orders and other rules (including rules relating to the grand jury and to the detainees’ privacy) prevented officials from discussing the detainees, and defense lawyers were sometimes allowed to see documents only at the courthouse. A Washington Post analysis of 235 detainees revealed that the largest groups came from Egypt, Pakistan, and Saudi Arabia; virtually all were men in their twenties and thirties; and the greatest concentration were in U.S. states with large Islamic populations that included what law enforcement officials identified as Al Qaeda sympathizers: California, Florida, Michigan, New Jersey, New York, and Texas. Many were arrested because they were in the same places or engaged in the same kinds of activities as the hijackers (for example, taking flying lessons); many others apparently were detained because they came from certain countries or had violated U.S. immigration law. Further, the Justice Department announced a new policy that it would monitor communications between lawyers and persons being held on suspicion of being terrorists.
Sean D. Murphy, *United States Practice in International Law, Vol. 1: 1999–2001* 437 (2002) (footnotes omitted). When combined with the detention of some U.S. citizens as “enemy combatants,” does this development suggest that a new approach should be considered for handling foreign relations law in times of crisis? By trying to adhere to the normal rules, do we risk watering down those rules by trying to make them fit extreme circumstances? By shifting to another model, do we risk jettisoning core values just when they are needed most?

7. Extra-Legal Measures and Emergencies. Should executive branch officials ever respond to emergency situations by defying legal restraints on their authority? If a court believes the executive branch might ignore its ruling, how, if at all, should that possibility factor into the court’s decision-making? Oren Gross has written that “The dilemma confronting a constitutional democracy having to respond to emergencies has been famously captured by Abraham Lincoln’s rhetorical question: ‘[A]re all the laws but one to go unexecuted, and the Government itself go to pieces, lest that one be violated?’” Gross goes on to argue that “there may be circumstances where the appropriate method of tackling grave dangers and threats entails going outside the constitutional order, at times even violating otherwise accepted constitutional principles, rules, and norms. Such a response, if pursued in appropriate circumstances and properly applied, may strengthen rather than weaken, and result in more rather than less, long-term constitutional fidelity and commitment to the rule of law.” How might “going outside the legal order” promote “ethical concepts of political and popular responsibility, political morality, and candor”? See Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?* 112 YALE L.J. 1011, 1014–15, 1023–24 (2003).