

THE PRESIDENT'S SPHERE OF ACTION

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To what extent can the President say what the law is? Throughout our history Presidents have asserted the power to disregard unconstitutional statutes. The exercise of this power has sometimes rankled the other branches and the public. President Andrew Johnson sought to remove his Secretary of War in violation of the Tenure in Office Act and was impeached and almost removed from office for it.¹ More recently, the ABA, the media, and a number of legal scholars have been exercised about President George W. Bush merely asserting in signing statements the right to disregard statutory constraints on executive powers.²

Although examples of executive review and disregard abound, the legality and appropriateness of such actions continue to be in dispute. A great deal of commentary has considered the theoretical basis for the President's review power and has focused primarily on the President's constitutional powers and duties and the corresponding powers of Congress and the Supreme Court.

Rather than focus on presidential *powers*, I propose here to examine the constitutional *limits* on the President's interpretive authority. The structural and institutional boundaries on the President's power provide a different way of getting at the question of executive review. We may be better able to judge the size of the President's sphere of action negatively—to examine the constitutional constraints rather than the positive grants of power.

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1. HANS L. TREFOUSSE, *IMPEACHMENT OF A PRESIDENT: ANDREW JOHNSON, THE BLACKS AND RECONSTRUCTION* 81–83, 165–67 (1999).

2. See Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 *CONST. COMMENT.* 307, 309–10 (2006) (summarizing the controversy); see also Michael B. Rappaport, *The Unconstitutionality of "Signing and Not-Enforcing,"* 16 *WM. & MARY BILL RTS. J.* 113 (2007).

In our constitutional structure, limitations have more than theoretical significance. The Framers paid close attention to structural boundaries and to the problem of how each branch would defend against encroachments by the others. James Madison explained,

It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary; the next, and most difficult task, is to provide some practical security for each, against the invasion of the others. What this security ought to be, is the great problem to be solved.³

Parchment barriers did not satisfy the Framers; rather, they specifically contrived “the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.”⁴

Accordingly, the Constitution provides government officials with

the necessary constitutional means, and personal motives, to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man, must be connected with the constitutional rights of the place.⁵

The means of defense are inextricably linked to the powers of each branch as well as to the threats they face from the other branches. The Framers focused on structure, not man’s better nature, to keep government within certain limits. The “interior structure of the government” provides important evidence about the proper scope of the legislative, judicial, and executive powers. The checks and balances tell us not only about the limits of power, but also about the *nature* of the power conferred.

Each branch faces a different mix of *ex ante* and *ex post* constraints on their ability to “say what the law is.” The limitations on the branches, like the powers accorded to them, are both distinct

3. THE FEDERALIST NO. 48, at 256 (James Madison) (George W. Carey & James McClellan eds., 2001).

4. THE FEDERALIST NO. 51 (James Madison), *supra* note 3, at 267.

5. *Id.* at 268. *See also* THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 3, at 402 (discussing the capacity of the judiciary in comparison to the executive and legislature).

and overlapping. They relate to the particular functions of each branch and their institutional and structural strengths and weaknesses. Congress, the President, and the courts are equally bound to obey and follow the Constitution, but the Constitution establishes different types of constraints for each of the branches both before and after they interpret the Constitution. Moreover, each branch faces different prudential limits imposed by political opinion and concerns of institutional preservation.⁶

Scholars have taken a variety of approaches to the question of the scope of the President's interpretive power.⁷ A few scholars deny the existence of independent presidential interpretation power.⁸ Others acknowledge the existence of such a power, but would circumscribe it with a variety of functional or practical considerations.⁹ Finally, some have argued that the power not only exists, but that the President has a constitutional duty not to enforce laws he determines unconstitutional.¹⁰ These contributions have been illuminating, even if not conclusive. Because the Constitution is silent with regard to executive or judicial review of the

6. These limits apply to constitutional interpretation in the same way that they apply to other forms of government action. In a federal government of limited powers, every action contains, at minimum, an assertion of constitutional authority for acting. Sometimes constitutional interpretations are explicitly set forward, but even ordinary actions by the President, Congress, and the courts reflect a form of constitutional interpretation, in so far as they imply that such actions are constitutional and within delegated powers. The checks and balances that constrain each of the branches will also constrain the scope of interpretive power.

7. See Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1619–28 (2008) (demonstrating the variety of views with a helpful catalogue of different theories relating to “executive disregard”).

8. See, e.g., Christopher N. May, *Presidential Defiance of “Unconstitutional” Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865 (1994).

9. See, e.g., David Barron, *Constitutionalism in the Shadow of Doctrine: The President's Non-Enforcement Power*, 63 LAW & CONTEMP. PROBS. 61, 63 (Winter/Spring 2000) (declining to adopt a “categorical response[] to the non-enforcement dilemma”); Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7, 29 (Winter/Spring 2000); David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 116 (1993) (explaining that whether the executive may lawfully “interpret the Constitution autonomously” has “no simple, comprehensive answer” but rather “depends on the particular constitutional provision at stake, and it requires difficult judgments of institutional competence”).

10. See, e.g., Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 262 (1994) (“Taken seriously, the President’s oath requires that the President exercise full legal review over the lawfulness of other branches’ acts whenever he is called on to employ the executive power in furtherance of those acts.”); Prakash, *supra* note 7, at 1617 (arguing that “the President has a duty to disregard statutes he believes are unconstitutional[]” and lacks discretion to do otherwise).

constitutionality of statutes, a consideration of affirmative powers has given support both to views of mandatory enforcement and mandatory non-enforcement of unconstitutional statutes.

To my knowledge, however, no one has focused specifically on the limits of each branch's interpretative powers.¹¹ A consideration of these limits reinforces the commonly held view that the President has some independent review power. Additionally, it demonstrates the significant space in which the President can act. The scant *ex ante* constraints and the tentative *ex post* checks on the President bolster the conclusion for a wide scope of executive review. My analysis does not address the important practical questions about when the President should exercise this power.¹² Rather, I explore a new angle to the nature and extent of executive interpretive power.¹³

This article considers in turn the structural limitations on the exercise of independent interpretive power by Congress, the Supreme Court, and the President. The "constitutional and effectual power[s] of self-defence"¹⁴ given to each of the branches provide valuable insights about the nature of the legislative, judicial and executive powers and each branch's ability to advance its particular form of constitutional interpretation.

While I focus on the boundaries of executive power, my argument is not a statement about raw power and should not be taken to mean that the President may through the sheer force of his office interpret the Constitution by his own lights. Rather, my claim is one about constitutional design and structure, a comparison of the limits on each of the branches. By creating an executive accountable primarily through the responsibility and visibility of his unitary office,

11. A number of scholars have considered constitutional structure in examining the scope of executive review, but this literature has largely focused on the President's affirmative powers and duties, and not specifically on the constraints that he faces.

12. See, e.g., Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?* 67 LAW & CONTEMP. PROBS. 105, 109 (Summer 2004) (advancing "functional departmentalism" and explaining that "whether Congress or the President has the authority to act on independent views depends on factors that include the constitutional power exercised, the constitutional text or structural arrangement being interpreted, and the potential impact on constitutionally protected rights").

13. Practical questions about executive power are often difficult and interesting. Concerns about the theoretical scope of executive review power continue to be salient, however, because such scope will guide responses to difficult practical questions. An assessment of whether the President has acted wisely or well when he contradicts the judgments of the other branches will depend, in part, on a prior conception of the space in which the President can act.

14. THE FEDERALIST NO. 73 (Alexander Hamilton), *supra* note 3, at 380.

the Constitution leaves open the possibility for, and perhaps even requires, independent presidential action. The President may choose to defer to the other branches in ordinary cases, but he can and sometimes must exercise his constitutional judgment against the other branches. The forms of constitutional accountability for the executive reflect his unique role in the constitutional structure as protector and preserver of the Constitution.

I. CONGRESS

The Framers thought that Congress and its legislative powers would naturally predominate and therefore pose the greatest threat to liberty. James Madison explained that because the legislative power is “less susceptible of precise limits, it can, with the greater facility, mask under complicated and indirect measures the encroachments which it makes on the co-ordinate departments.”¹⁵ The natural strength of Congress required significant internal checks, such as dividing Congress into two houses, and external checks, such as the qualified veto.¹⁶ Congress was not given an “equal power of self-defense” from the other branches in part because of its already significant powers.¹⁷

This Part describes the various non-legislative and legislative powers through which Congress can advance constitutional interpretation and explains the limits on the exercise of these powers. While Congress plays an important role as a co-equal branch in considering constitutional issues, it has few means of enforcing its view of the Constitution when its view is at odds with that of the President or the Supreme Court. Although Congress holds the ultimate constitutional checks of impeachment and amendment, the Constitution makes these powers difficult to exercise. For structural as well as practical reasons, Congress usually defers to the constitutional judgments of the other branches and exercises only limited independent constitutional interpretation.

15. THE FEDERALIST NO. 48 (James Madison), *supra* note 3, at 257.

16. THE FEDERALIST NO. 51 (James Madison), *supra* note 3, at 269.

17. *Id.*

A. Non-Legislative Powers: Amendment, Impeachment, and Confirmation

Congress may, by a two-thirds vote, propose constitutional amendments for ratification by the States.¹⁸ The power to propose constitutional amendments gives Congress a chance to address a perceived constitutional deficiency or to respond to a Supreme Court decision with which it disagrees. Congress initiates amendments infrequently, no doubt in part because of the difficulty of receiving a two-thirds vote of both Houses and then of achieving ratification by the legislatures of three-fourths of the States. Article V erects a high hurdle to amendment; and Congress can initiate but cannot complete the process.

Another infrequently used but potentially significant opportunity for constitutional interpretation exists in the impeachment and removal powers. As Neil Katyal has argued, impeachment and removal present special opportunities for Congress to exercise a politically accountable form of constitutional interpretation.¹⁹ In deciding the scope of “high Crimes and Misdemeanors,”²⁰ Congress is limited in part by constitutional text and history, but may also be guided, Katyal argues, by political considerations.²¹ He explains that Congress, unlike the courts, “can say that the text, history, and structure do not provide a clear answer, and that constitutional meaning should reflect popular views and beliefs about whether a ‘high Crime’ has been committed.”²² A number of scholars have similarly argued that Congress, a democratic and politically accountable branch, has a distinct institutional competence and should interpret the Constitution in light of popular values and sentiments.²³

Impeachment proceedings, like constitutional amendments, are relatively uncommon. There may be any number of reasons for this,

18. U.S. CONST. art. V.

19. Neil Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 1382 (2001).

20. U.S. CONST. art. II, § 4.

21. Katyal, *supra* note 19, at 1382.

22. *Id.*

23. *Id.* at 1393 (“Having the Court adhere to strict construction of the . . . Constitution, while Congress makes determinations about contemporary values, might yield a better balance.”); see also Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 419 (1993); see generally LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

including that impeachment is a relatively blunt tool for punishing official wrongdoing. Furthermore, the threat of impeachment is likely internalized by high-level officials and need not be exercised regularly to be an effective restraint. Because of the extreme and sole penalty of removal from office, impeachments will tend to be initiated only for egregious actions that are also politically unpopular. The two-thirds requirement in the Senate for removal also places a significant political hurdle to seeking impeachments.²⁴

The Senate's "advice and consent" power for judicial and other officers²⁵ presents an ongoing opportunity for the Senate to weigh in on matters of constitutional interpretation. When a lower court judicial vacancy arises, the President will usually seek the input of the senators from the state in which the vacancy exists.²⁶ In practice, senators have a large degree of control over district court nominees and often significant input for the court of appeals. Senators can help narrow the pool of candidates to those who agree with their views of constitutional interpretation.²⁷ The "blue slip" policy gives home-state senators an effective veto over judicial nominees they do not support.

Once the President makes a nomination, the Senate may subject nominees to probing inquiry of their constitutional views on any number of controversial topics. Confirmation hearings give senators an opportunity to discuss their views of constitutional law and draw attention to Supreme Court decisions with which they disagree. By withholding their consent, the Senate can block nominees and signal to the President the types of nominees that will be confirmed. The confirmation process allows the Senate a potentially important role in shaping the judiciary and therefore constitutional interpretation.²⁸

24. U.S. CONST. art. I, § 3, cl. 6.

25. U.S. CONST. art II, § 2.

26. My account of how this process works draws from my experience with judicial nominations as Counsel to the Senate Judiciary Committee and as Associate Counsel to President George W. Bush.

27. Senators, of course, may suggest judicial candidates for political reasons, or any other reason, but then they lose out on their chance to shape constitutional interpretation.

28. See, e.g., Katyal, *supra* note 19, at 1339; Stephen J. Wermiel, *Confirming the Constitution: The Role of the Senate Judiciary Committee*, 56 LAW & CONTEMP. PROBS. 121, 121 (Autumn 1993) (explaining how in the post-Bork era senators use the judicial confirmation process as a means of influencing constitutional interpretation).

B. Congress's Lawmaking Power

Although each of the foregoing powers is significant, Congress's primary interpretive role exists through lawmaking. When Congress enacts a statute it contains a judgment of a majority in both houses that a policy is both constitutional and desirable.²⁹ The power to initiate and make law gives Congress the first crack at a constitutional issue. Legislative proposals deemed unconstitutional will simply not be enacted. "[T]he most obvious way for a legislator to support the Constitution is to enact only legislation that is constitutional."³⁰

Despite the common perception that our modern Congress does not give adequate consideration to constitutional issues, both the President and the courts give statutes a strong presumption of constitutionality. For example, the executive branch will almost always defend the constitutionality of a statute in litigation. The decision not to defend a statute occurs rarely and only after significant deliberation.³¹ Similarly, courts accord a strong presumption of constitutionality to statutes. In *City of Boerne v. Flores*,³² the Court explained that this presumption stemmed from Congress's duty to independently interpret the Constitution:

When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution. . . . Were it otherwise, we would not afford Congress the presumption of validity its enactments now enjoy.³³

Nonetheless, there are a number of reasons why Congress may give limited attention to constitutional issues. Congress faces a substantial number of structural limits on its ability to legislate, and

29. The constitutional grounds for a statute may be explicit within the text of the statute, but often it is simply implicit.

30. Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 587 (1975).

31. See, e.g., *The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation*, 4A OP. OFF. LEGAL COUNSEL 55, 55 (1980) ("[I]t is almost always the case that [the Attorney General] can best discharge the responsibilities of his office by defending and enforcing the Act of Congress.").

32. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

33. *Id.* at 535. This presumption was overcome in *Boerne*, which invalidated the Religious Freedom Restoration Act. Some have suggested that the Supreme Court's purported "deference" to the views of Congress may be just judicial sweet talk before invalidation. See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514 ("[T]he mealy-mouthed word 'deference' [does] not necessarily mean[] anything more than considering [Congress's] views with attentiveness and profound respect, before we reject them.").

consequently on its ability to put forward its own constitutional interpretations. The Framers deliberately made it difficult to enact legislation. As a large multimember body, Congress rarely acts quickly and must negotiate a number of hurdles before enacting legislation. Hamilton considered this proceduralism security against bad laws and noted that “[t]he injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones.”³⁴ Accordingly, Article I requires bicameralism and presentment to the President before a bill can become a law.³⁵ Overriding the President’s veto requires two-thirds of both houses.³⁶ As the Supreme Court has explained, this reflects “the Framers’ decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.”³⁷

One of Congress’s primary modes of constitutional interpretation occurs through legislation, but structural and procedural hurdles place significant *ex ante* limits on Congress’s ability to make laws, and, by extension, also place limits on Congress’s interpretive capacity.³⁸

These constitutional procedures suggest reasons why, as a practical matter, even when faced with an opportunity, members of Congress may give short shrift to constitutional considerations. There are few political incentives for a senator or representative to hold up legislation on constitutional grounds. Constitutional deliberation is a kind of public good and individual legislators lack the capacity or incentive to monitor legislation for constitutional issues.³⁹ Even a

34. THE FEDERALIST NO. 73 (Alexander Hamilton), *supra* note 3, at 382.

35. U.S. CONST. art. I, § 7.

36. *Id.*

37. *INS v. Chadha*, 462 U.S. 919, 951 (1983). The Supreme Court has consistently invalidated legislative attempts to alter this procedure. *See, e.g., id.* (invalidating the one-house legislative veto); *Clinton v. City of New York*, 524 U.S. 417, 438 (1998) (invalidating the Line-Item Veto Act).

38. In addition, social choice theory has raised questions about whether legislation can even reflect the will of a majority of legislators. *See generally* KENNETH ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963); WILLIAM RIKER, *LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE* (1982).

39. Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1298–1301 (2001). If an individual member supplies constitutional deliberation

[s]he loses time for fundraising, casework, media appearances, and obtaining particularized spending projects in her district[] . . . If constitutional deliberation is an individually supplied good, individual legislators do not internalize all of the

conscientious legislator who wishes to raise constitutional issues may be unable to manage this within the rules and agenda of the House or Senate.⁴⁰

Although legislation starts with a presumption of constitutionality, Congress may see its work undone in a number of ways. The President may veto the legislation on constitutional (or any other) grounds and an override faces a difficult two-thirds vote in both houses.⁴¹ Even if the President signs a statute into law, he may indicate that he will not enforce provisions that he deems unconstitutional.⁴² Individuals aggrieved by the statute may challenge it on constitutional grounds and the judiciary may invalidate it. The Supreme Court has boldly asserted final authority to judge the scope of congressional powers in at least some instances, and has frustrated attempts by Congress to challenge the Court's authority in others.⁴³

The President and the Supreme Court can and do review the constitutionality of legislation, and Congress has only limited means of self-defense. If the President refuses to enforce a statute on constitutional grounds, there is little that Congress can do. It may seek to harass the President about funding or appointments or may, *in extremis*, seek impeachment. Similarly, if the Supreme Court invalidates a statute on constitutional grounds, Congress must seek a constitutional amendment to overturn the Court's decision. In both instances, the Constitution erects super-majority hurdles for Congress

benefits of constitutional deliberation but do shoulder the costs. In such a system, constitutional deliberation will be underproduced.

Id.

Larry Alexander and Frederick Schauer have argued for virtually unqualified judicial supremacy and deference to Supreme Court precedent in constitutional interpretation in part because of the lack of constitutional judgment exercised by Congress. They explain, "[o]ccasional rhetoric notwithstanding, there are few examples of Congress subjugating its own policy views to its views about constitutional constraints." Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1368 (1997). *But see* Mark Tushnet, *Evaluating Congressional Constitutional Interpretation: Some Criteria and Two Informal Case Studies*, 50 DUKE L.J. 1395, 1424-25 (2001) (arguing that there are some structures and incentives for Congress to provide reasonable constitutional interpretations including reelection pressures and the various "veto points" in the legislative process that give members the opportunity "to act on their sense of constitutional responsibility").

40. See Garrett & Vermeule, *supra* note 39, at 1300.

41. U.S. CONST. art. I, § 7.

42. See *generally* Bradley & Posner, *supra* note 2.

43. The Supreme Court has asserted judicial supremacy in a number of decisions. See, e.g., *Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Cooper v. Aaron*, 358 U.S. 1 (1958).

to contradict the constitutional judgments of the other branches.⁴⁴

Even though it may at times exercise significant and unique forms of constitutional judgment, such as for impeachment or proposed amendments, in legislative matters, Congress will often defer to the constitutional judgments of the other branches. Congress cannot easily overturn the constitutional judgments of the other branches, and the ready availability of judicial and executive review dampens the incentives for independent constitutional judgment. Congress's "practical security" against judicial and executive branch interpretations is limited to extraordinary circumstances (amendments, impeachments, and veto overrides), leaving as a structural and practical matter a relatively narrow sphere of independent constitutional judgment for Congress.

II. THE SUPREME COURT

In Federalist No. 78, Alexander Hamilton termed the Supreme Court the "least dangerous to the political rights of the Constitution" because "[i]t may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."⁴⁵ Tenure during "good behavior" and irreducible salaries were part of the design to keep the judiciary independent and beyond political influence. What the courts lack in democratic accountability they are supposed to make up for in independence. Their authority comes not from political power, but rather from the judgment that they exercise.

Because of its unique independence and expertise, the political branches often treat the Supreme Court as the final word on constitutional issues. Many scholars and the public similarly view the Court as both final and supreme on matters of constitutional interpretation. Accordingly, the Court regularly advances independent constitutional judgment. Such authority exists, however, not as a constitutional necessity, but largely through political acquiescence. This Part explains how, unlike the political branches,

44. These structural limitations may provide further explanation for the minimal independent constitutional deliberation that occurs in Congress. Because of the difficulty of enacting legislation and the availability of effective judicial and executive review, Congress will naturally be risk-averse to contradicting the constitutional judgments of the Supreme Court and the President. Congress will be reluctant to expend precious time and political capital in constitutional back-and-forth with the other branches, except perhaps on issues with overwhelming political support.

45. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 3, at 402.

the judiciary polices its own constitutional and prudential boundaries in order to preserve its substantial institutional power.

A. *The Supreme Court's Jurisdictional Limits*

Article III vests the “judicial Power” in the federal courts and extends such power only to certain categories of “Cases” and “Controversies.”⁴⁶ As Madison recognized, the boundaries of this power were relatively certain,⁴⁷ and the extent and meaning of “judicial power” has been cabined by historical understandings of that term.

Judgment belongs to the courts, but a number of formidable *ex ante* constraints govern when and to what types of cases this power will be applied. The Supreme Court has articulated significant jurisdictional limits, both constitutional and prudential on the issues that it may decide. The Court has interpreted Article III to include a number of justiciability requirements—such as standing,⁴⁸ ripeness,⁴⁹ and mootness⁵⁰—that limit the federal courts to hearing only concrete, live disputes.

In addition, the Supreme Court will not issue advisory opinions,

46. U.S. CONST. art. III, §2, cl. 1.

47. THE FEDERALIST NO. 48 (James Madison), *supra* note 3, at 257–58 (explaining that the legislative power was “less susceptible of precise limits” but that the executive power was “restrained within a narrower compass” and the judiciary was “described by land-marks still less uncertain”).

48. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the Supreme Court summarized the minimum constitutional requirements of standing. “First, [a] plaintiff must [demonstrate] an ‘injury in fact,’” which means that the plaintiff has “a legally protected interest [that] is (a) concrete and particularized . . . and (b) ‘actual or imminent, not [merely] hypothetical[.]’ . . . Second, there must be a causal connection between” the defendant’s actions and the alleged harm. Finally, standing requires that the plaintiff’s harm will likely be “redress[able] by a favorable decision[.]” of the Court. *Id.* at 560–61. Justice Scalia explained that these requirements have important separation-of-powers implications and are an essential limitation upon the business of the courts. *Id.* at 576–77.

49. The Supreme Court has considered it a part of Article III’s requirements that cases be ripe for determination, meaning that they are fit for judicial decision and do not require the court to deal with abstractions. See LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW § 3-10 (3d ed. 2000); *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993).

50. See TRIBE, *supra* note 49, at § 3-11. While it has generally been accepted in recent cases that mootness is a constitutional requirement, there has been some debate on the Court as to whether these are constitutional or prudential limitations on the courts. Compare *Honig v. Doe*, 484 U.S. 305, 317 (1988) (explaining that Article III allows the Court to “adjudicate [only] actual, ongoing controversies”), with *id.* at 332 (Rehnquist, C.J., concurring) (expressing doubt that Article III mandates the mootness doctrine, in light of the historical development of the doctrine and the exception to mootness for cases “capable of repetition, yet evading review”).

a prohibition established early in our history when Chief Justice John Jay declined to answer a variety of questions posed by then-Secretary of State Thomas Jefferson.⁵¹ The Court explained,

[T]he lines of separation drawn by the Constitution between the three departments of the government[—there] being in certain respects checks upon each other, and our being judges of a court in the last resort[—]are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to.⁵²

Similarly, since *Marbury v. Madison*,⁵³ the Court has sometimes declined to extend the judicial power to political questions. The political question doctrine provides a model of restraint for the judiciary and, at least in theory, prevents the Court from interfering in matters better left for constitutional, institutional or prudential reasons to the other branches.⁵⁴

Another consequence of the “case and controversy” requirement is that the Court decides issues only *after* they have been considered by Congress and the President. The Court “reviews” the work of the political branches. Alexander Bickel explained that “judgment of [the] courts . . . come[s] . . . after the hopes and prophecies expressed in legislation have been tested in the actual workings of our society.”⁵⁵ The Court will have to render its decision in the face of what has come before and likely after the passage of some time. By limiting the Court to concrete disputes, democratically enacted policies have a chance to become more familiar, to generate reliance, and to develop popular support or opposition. This passage of time

51. Letter from Chief Justice John Jay and Associate Justices to President George Washington (Aug. 8, 1793), in 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY, 1763–1826, at 485 (Henry P. Johnston ed., 1890).

52. *Id.* See also ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 114–15 (2d ed., 1986). Bickel explained that courts may make no pronouncements in the large and in the abstract, by way of opinions advising the other departments at their request; that they may give no opinions, even in a concrete cases, which are advisory because they are not finally decisive, the power of ultimate disposition of the case have having been reserved elsewhere; and that they may not decide non-cases, which do not require decision because they are not adversary situations and nothing of immediate consequence to the parties hangs on the result.

Id.

53. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

54. See *Baker v. Carr*, 369 U.S. 186, 217 (1962) (describing six circumstances in which the Court has declined to decide a case on political question grounds).

55. BICKEL, *supra* note 52, at 115.

may well give an edge to the judgments of the political branches.⁵⁶

These jurisdictional hurdles all serve to narrow the sphere of judicial review. The Court may invalidate unconstitutional statutes or find executive branch action unlawful—but it will have the chance to do so only in a small number of cases. These limits ensure that a significant amount of constitutional interpretation will be left to the political branches.

Once a case has cleared jurisdictional hurdles, a variety of canons and presumptions constrain the Court's decisionmaking. To begin with, the Court gives substantial deference to the constitutional judgments of the political branches.⁵⁷ Statutes enjoy a strong presumption of constitutionality, and invalidating a statute is an action that occurs relatively rarely.

As part of this general deference, the Supreme Court will often seek to avoid constitutional questions, deciding a case on statutory grounds when possible or choosing an interpretation of a statute that will avoid constitutional difficulties.⁵⁸ The standard rationale for this stems from the finality of judicial decisions and the “countermajoritarian difficulty” that arises when the Court invalidates the actions of the political branches.⁵⁹ Deference to Congress does not prevent the Supreme Court from invalidating statutes in appropriate cases, but, in theory, it leaves such invalidation for the rare case in which no other saving construction is possible.

56. *Id.* at 116–17 (“No doubt the T.V.A. and the Bank of the United States seemed less objectionable to the judges as established facts than they might have as abstract proposals. If this gives an edge to the decisions of the representative institutions, it is not difficult to deem it an acceptable one.”).

57. *See supra* notes 31–33 and accompanying text; *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985).

Judging the constitutionality of an Act of Congress is properly considered the gravest and most delicate duty that this Court is called upon to perform, and we begin our analysis here with no less deference than we customarily must pay to the duly enacted and carefully considered decision of a coequal and representative branch of our Government.

Id. (internal citations and quotation marks omitted).

58. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

59. *See Lisa A. Kloppenberg, Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1036 (1994); *see also id.* at 1047–65 (discussing other grounds for the avoidance doctrine, including institutional limitations on the judiciary, separation of powers, and federalism); Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 91, 95.

The Court extends similar deference to the executive branch. Many cases reviewing executive branch interpretation deal with administrative law. If a statute delegates lawmaking authority to an agency and is ambiguous, the Court will give some level of deference to a reasonable agency interpretation.⁶⁰ The Court has at times accorded significant deference to the executive in foreign affairs matters;⁶¹ although in recent years the Court has overturned the judgments of both Congress and the President even with regard to the war powers.⁶²

The limitations of the judicial power also serve to curb overreaching. The Court renders each decision with the knowledge that it cannot enforce its judgments. The inability to enforce its edicts must work as a strong tempering force for the Court, which must seek to conserve its institutional capital. It must be independent in its judgments, yet stay within boundaries that the political branches will accept. A web of constitutional and prudential limits constrains the Court in the process of constitutional interpretation.

B. *Checking the Court*

Once the Court has rendered a judgment, Congress and the President have a variety of *ex post* mechanisms for checking the Court. Most of these, however, are discretionary and rarely exercised.

As Hamilton recognized, the Court depends on the executive branch for the execution and enforcement of its judgments. Although the Supreme Court's judgments are almost always enforced by the President, the threat of non-enforcement remains. President Lincoln famously suspended the writ of habeas corpus and then refused to comply when Chief Justice Roger Taney found the suspension unconstitutional and ordered the release of John Merryman.⁶³ In the wake of one Supreme Court decision, President Andrew Jackson is

60. See *United States v. Mead Corp.*, 533 U.S. 218 (2001); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). In light of recent Supreme Court decisions, the level of deference to be afforded to agency interpretation remains in flux. See, e.g., Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005); Adrian Vermeule, *Mead in the Trenches*, 71 GEO. WASH. L. REV. 347 (2003).

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

62. See *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (invalidating statutory provisions for assessing claims of enemy combatants); see *id.* at 2293 (Roberts, C.J., dissenting) (arguing that the majority turns over “a bit more control over the conduct of this Nation’s foreign policy to unelected, politically unaccountable judges”).

63. *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487).

reputed to have said, “John Marshall has made his decision, now let him enforce it.”⁶⁴ Actual non-enforcement of particular judgments, however, is rare and widely considered to be an abuse of the executive power.⁶⁵

While the Court nearly always has the final word in a particular judgment, the same is not always true about broader constitutional rules established by a case. The President may follow a specific judgment but fail to accept the case as precedent in similar circumstances. He may direct executive branch officials to continue to litigate already decided issues or otherwise seek to undermine judicial precedent.⁶⁶ In criminal matters, the President may undo a conviction by issuing a pardon.⁶⁷

Congress also has several mechanisms to check the Court. First, it may seek to legislate around judgments with which it disagrees—either directly confronting the precedent,⁶⁸ or more carefully trying to step around it.⁶⁹ Second, it has the power to propose constitutional amendments.⁷⁰ Third, Congress can initiate impeachment proceedings against judges, who are civil officers. Historical practice, however, has established that impeachment will not be used for good

64. The comment was made in response to *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

65. Even those who take a relatively broad view of executive power suggest that particular judgments are binding and must be executed. See Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926–27 (1990). But see Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 109 (1993) (outlining, but not resolving, a dilemma that “when push comes to shove, either the principle of executive coordinacy or the principle of judicial supremacy must give way”).

66. See, e.g., Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 644 (1993) (providing examples of disagreement with the Supreme Court’s “lawsaying” power and processes for testing the finality of judicial decisions).

67. U.S. CONST. art. II, § 2, cl. 1.

68. See, e.g., Religious Freedom Restoration Act, 42 U.S.C. § 2000bb(a)–(b) (explaining in the findings that “in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion” and stating a purpose “to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened”).

69. For example, the Supreme Court has invalidated on First Amendment grounds a number of statutes aimed at prohibiting and controlling child pornography. See, e.g., *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002) (Child Pornography Prevention Act of 1996); *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656 (2004) (Child Online Prevention Act).

70. U.S. CONST. art. V.

faith disagreements about constitutional interpretation, despite occasional proposals to the contrary.⁷¹

Congress can also limit the appellate jurisdiction of the federal courts. Article III gives Congress power to establish “inferior Courts”⁷² and creates appellate jurisdiction in the Supreme Court “with such Exceptions, and under such Regulations as the Congress shall make.”⁷³ The Supreme Court has held that power to limit jurisdiction is plenary over the lower federal courts⁷⁴ and that Congress has broad authority to make exceptions to the Supreme Court’s appellate jurisdiction.⁷⁵ Congress can thus punish overreaching courts by withdrawing jurisdiction in certain types of cases.⁷⁶ Such withdrawal occurs infrequently, although proposals to that effect continue to be made.⁷⁷ Congress could also punish the judiciary by limiting its budget, and cutting back on staff and resources.⁷⁸

71. Throughout history legislators have called for the impeachment of judges with whom they disagree about constitutional interpretation, but such suggestions have not gone far. *See, e.g.,* Michael J. Gerhardt, *What’s Old Is New Again*, 86 B.U. L. REV. 1267, 1290–95 (2006) (explaining that political standards for impeachment of judges have repeatedly been rejected and that “[t]he original understanding of the Constitution is squarely at odds with allowing removal for a federal judge’s bad decisions”). *Cf.* Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72 (2006) (arguing that Congress could enact legislation permitting the removal of federal judges upon a finding of misbehavior in the ordinary courts of law).

72. U.S. CONST. art. III, § 1.

73. U.S. CONST. art. III, § 2, cl. 2.

74. *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448–49 (1850).

75. *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 514 (1868). (“We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.”).

76. The extent of this power has been subject to significant debate. Some have argued that there are inherent limitations in the Exceptions Power, whereas others have found it to be as broad as the language of Article III. *Compare* Lawrence Gene Sager, *The Supreme Court, 1980 Term-Foreword: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981) (examining certain “essential functions” of the federal judiciary as limits on Congress’s Exceptions Power), *with* John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 255 (1997) (arguing that Congress’s power over jurisdiction is in the Constitution and serves in part as “a check on the judiciary”).

77. *See, e.g.,* Gerhardt, *supra* note 71, at 1279–81 (examining recent proposals to strip federal courts from hearing particular issues, such as cases relating to gay marriage or challenging the Pledge of Allegiance).

78. Congress, however, cannot reduce the salaries of federal judges during their time in office. U.S. CONST. art. III, § 1.

The availability of extreme checks such as non-enforcement of judgments or withdrawal of jurisdiction encourages the Court to exercise self-restraint both in asserting jurisdiction and in the manner in which it decides cases. Since *Marbury*, the judiciary has asserted its power to review the actions of the other branches, but has defined that power largely with reference to constitutional, prudential, and historical limitations. Such self-restraint may protect the Court's institutional power and may encourage or ensure compliance by the political branches.

The President and Congress rarely check or reprimand the federal courts for unpopular decisions. Despite political rhetoric and public complaints about overreaching judges, the political branches rarely seek to curb judicial power. We have a long tradition of maintaining the independence of the judiciary. Political interference or the appearance of interference by the President or Congress is unpopular and makes Americans uneasy. Meddling with the Court's independence has usually been a losing battle.⁷⁹ This norm of deference by the political branches perhaps allows the Court to presume the supremacy and finality of its constitutional decisions and to create a culture in which the Court's near-complete independence and supremacy is widely accepted. As a practical matter, the Court has a significant sphere of action.

This space for the supremacy and finality of judicial decisions, however, exists largely as a matter of grace. The political branches have the power to constrict it. If they choose to do this, the judiciary lacks the means of self-defense and is generally impotent to protect itself from such encroachments. This weakness casts doubt on the idea that judicial supremacy is *required* by the constitutional structure. The Constitution provides the means of self-defense commensurate to the powers of each branch—where the defenses are lacking, so too the effective powers. The inability of the Supreme Court to enforce its decisions necessarily leaves an important space for constitutional interpretation by the political branches.

III. THE PRESIDENT

Analysis of constitutional text and history has not settled the question of the extent to which the President has independent interpretive power. Scholars have read the powers and duties in

79. See Gerhardt, *supra* note 71.

Article II⁸⁰ in a number of ways. Some read the Take Care Clause to mean that the President must enforce all statutes, regardless of his view of their constitutionality, until a court declares them unconstitutional.⁸¹ Others have read the Oath Clause and the Take Care Clause to mean that the President should never enforce a law he considers unconstitutional, because in the reasoning of *Marbury v. Madison*, such a law is no law at all.⁸² Others read the text more pragmatically or functionally to suggest some non-enforcement power for the President, the scope of which will depend on the particular circumstances.⁸³ Materials from English history and the Founding have similarly been used to provide different answers to this question.⁸⁴

While I make no claim to resolve these differences of opinion about text and history between distinguished scholars, I propose to examine a somewhat different piece of constitutional evidence—the nature of limitations on the President’s powers. As I mentioned in the introduction, my argument is not that the President can or should act by virtue of his raw power as head of the executive branch. Rather, the limited *ex ante* constraints and the tenuous *ex post* checks on the

80. Commentary has focused in particular on the Vesting Clause, “The executive Power shall be vested in a President of the United States of America,” U.S. CONST. art. II, § 1, cl. 1; the Oath Clause, in which the President swears to “faithfully execute the Office of President of the United States” and to “preserve, protect and defend the Constitution of the United States,” U.S. CONST. art. II, § 1, cl. 8; and the Take Care Clause, which provides that the President “shall take Care that the Laws be faithfully executed.” U.S. CONST. art. II, § 3.

81. See May, *supra* note 8, at 894. (“[T]he Constitution does not give the President a suspending power, not even where the Chief Executive may think that a particular law is unconstitutional.”).

82. See *supra* note 13.

83. See, e.g., Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 OP. OFF. LEGAL COUNSEL 199 (1994) [hereinafter Dellinger Memorandum] (explaining that even if the President determines a statute to be unconstitutional, he must decide whether or not to comply “after careful weighing of the effect of compliance with the provision on the constitutional rights of affected individuals and on the executive branch’s constitutional authority. Also relevant is the likelihood that compliance or noncompliance will permit judicial resolution of the issue.”); Johnsen, *Functional Departmentalism and Nonjudicial Interpretation*, *supra* note 12.

84. Compare Prakash, *supra* note 7, at 1672 (“Given that there is no historical evidence to support the notion that the President must execute statutes he believes are unconstitutional and there is considerable textual and historical support for a duty to disregard, the evidence is decidedly in favor of a duty to disregard.”), with May, *supra* note 8, (arguing that the Constitution did not give the power to “suspend” laws to the President, but acknowledging that the Constitution is silent on this point).

President suggest that, by comparison to the other branches, the Constitution allows the President a fairly broad sphere of action.⁸⁵

A. *Ordinary Interpretation in the Executive Branch*

Before reaching the more contentious cases, it may be helpful to consider briefly the ordinary aspects of executive branch interpretation. My discussion of this reflects personal experience working in the Office of the White House Counsel as well as the accounts of other former executive branch lawyers, who, at least at a descriptive level, largely agree about how things actually work.⁸⁶ Although much has been debated about the President's authority to disagree with Congress and the Supreme Court, such conflicts rarely occur. The executive branch does not regularly and aggressively seek to advance independent constitutional interpretation.

The President enforces virtually all statutes and defends them in court, even when there may be constitutional doubts about the statute's validity.⁸⁷ In the course of enforcing statutes, however, the executive must necessarily engage in statutory interpretation. To faithfully execute the laws, the President must ensure that various statutory policies and directives work together to create coherent government action. Generating such coherence from our myriad laws will often require detailed and sometimes creative interpretation.⁸⁸ Ordinarily such interpretations do not challenge the authority of the other branches.

Similarly, the executive branch virtually always enforces judgments of the Supreme Court⁸⁹ and treats judicial precedent as

85. There may be many reasons for the President not to exercise his interpretive power to the outer limits of his authority, and I do not address here how the President should properly exercise his interpretive powers, but note that most presidents have wisely restrained the use of such power and not asserted their prerogatives regularly.

86. See, e.g., Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, *supra* note 9; Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437 (1993); Strauss, *supra* note 9, at 115.

87. See, e.g., Dellinger Memorandum, *supra* note 83 ("As a general matter, if the President believes that the Court would sustain a particular provision as constitutional, the President should execute the statute, notwithstanding his own beliefs about the constitutional issue.").

88. Paulsen, *The Most Dangerous Branch*, *supra* note 10, at 262 ("The power of executive review cannot readily be confined. . . . [T]he President has the power to expound and interpret the Constitution, U.S. treaties, and all federal statutes, whenever their meaning is relevant to the execution of the laws or the President's other constitutional responsibilities.").

89. See, e.g., Easterbrook, *supra* note 65, at 926 (arguing that the President should not disobey particular judgments because "Article III of the Constitution creates the 'judicial

binding.⁹⁰ Executive branch lawyers often consider proposed action in terms of whether it would be defensible in court, rather than whether it is constitutional.⁹¹ Such deference may stem from widely accepted ideas about the Supreme Court's institutional advantages with regard to constitutional interpretation and also its greater independence from political pressures. While this court-centered perspective poses various problems,⁹² in my experience, it accurately describes the prevailing mode of interpretation.

B. *Ex Ante Constraints*

As with the other branches, the primary *ex ante* constraints on the President are inherent in the nature of the executive power. As the Chief Executive, the President stands in a unique position—he represents the nation, oversees implementation of its laws, and preserves the nation's safety.⁹³ These responsibilities impose certain constraints on the President.

Power of the United States,' and a 'judicial Power' is one to render dispositive judgments. People may disagree about the meaning of the Constitution or the generality of its commands without doubting that a judgment conclusively resolves the case."); Strauss, *supra* note 9, at 115 ("Theoretically, the executive could assert the power to disagree with Supreme Court interpretations of the Constitution and act on its own view, even in cases that will end up in court. But as a practical matter, it very seldom does so."). There are historically only a few instances of outright defiance of Supreme Court decisions. See *supra* notes 63–65 and accompanying text. Nonetheless, the executive often rejects the finality of Supreme Court interpretation by continuing to litigate controversial interpretations or delaying full implementation of decisions. See Friedman, *supra* note 66, at 644–48.

90. The Office of Legal Counsel confirms this institutional understanding that executive branch interpretation will often follow Supreme Court precedents or predictions about how the Supreme Court would decide a particular case. See Dellinger Memorandum, *supra* note 83.

91. Strauss, *supra* note 9, at 133. See also Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 72 (1993) ("Even if judicial opinions are not binding, they are probably the best source of information for predicting what judgments courts will enter in future cases. And the prospect of future adverse judgments can be a very powerful constraining force.").

92. See Strauss, *supra* note 9, at 131–34; see also Prakash, *supra* note 7, 96 GEO. L. J. at 1674 ("If the President must ask whether the Supreme court would agree that some statute is unconstitutional, the President becomes something of a lower court, asked to apply Supreme court doctrine . . . Yet the Constitution never makes the President the constitutional second fiddle to the Supreme Court."); Barron, *supra* note 9, at 63 (challenging the court-centered approach to the scope of the President's non-enforcement power because such an approach "unduly circumscribes the possible scope of constitutional limitations").

93. The special position of his office is captured in the specific constitutional oath required for the President, that he "will faithfully execute the Office of the President of the United States" and will "preserve, protect and defend the Constitution of the United States." U.S. CONST. art. II, § 1, cl 8. Senators and representatives, members of the state legislatures,

The Framers deliberately chose a unitary executive because, as Hamilton explained, “unity is conducive to energy. . . Decision, activity, secrecy, and despatch, will generally characterize the proceedings of one man, in a much more eminent degree than the proceeding of any greater number.”⁹⁴ In addition to energy in the executive, unity promotes both visibility and responsibility. Because the President alone commands the executive branch, the public can identify the source and author of bad policies. As Hamilton explained, the “two greatest securities” the people have in the faithful exercise of the executive power are the restraint of public opinion and the “opportunity of discovering with facility and clearness the misconduct of the persons they trust”⁹⁵ so that censure or punishment may follow.⁹⁶

Similarly, Madison noted that the executive power has a narrower scope than the legislative power and is “more simple in its nature.”⁹⁷ Accordingly, he argued, “projects of usurpation . . . would immediately betray and defeat themselves.”⁹⁸ By their nature, the President’s actions are usually visible, and this visibility provides accountability.⁹⁹

The President’s visibility substitutes for more concrete *ex ante* constraints on the exercise of his powers. Execution of the laws usually generates public awareness of the President’s actions and triggers the possibility of political and judicial review. This

and other executive and judicial officers are bound by oath simply “to support this Constitution.” U.S. CONST. art. VI., § 3.

94. THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 3, at 363.

95. *Id.* at 367.

96. By contrast, a plural executive “tends to conceal faults, and destroy responsibility.” *Id.* at 366.

97. THE FEDERALIST NO. 48 (James Madison), *supra* note 3, at 257–58.

98. *Id.*

99. See *Korematsu v. United States*, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting).

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.

Id.

A number of commentators have examined how secrecy in the executive might undermine accountability. See, e.g., Mark J. Rozell, *Restoring Balance to the Debate over Executive Privilege: A Response to Berger*, 8 WM. & MARY BILL RTS. J. 541 (2000); Heidi Kitrosser, *Congressional Oversight of National Security Activities: Improving Information Funnels*, 29 CARDOZO L. REV. 1049, 1062 (2008) (considering the balance between presidential secrecy and political accountability).

arrangement maximizes energy in the executive by leaving accountability largely to follow after the fact of executive action.

Finally, although most of the constitutional constraints on presidential powers occur after he acts, the availability of *ex post* checks on the President (discussed in the next part) will affect presidential deliberation and decision-making. Executive branch lawyers regularly consider the possible legislative and judicial responses to proposed action. As the Founders envisioned, constraints were often designed to be internalized—they might have “a silent and unperceived, though forcible, operation.”¹⁰⁰

C. Accountability After Action

The primary checks on the President occur after he acts, when the courts and Congress have a chance to disagree with the President's interpretations and exercise of power. The President's actions may be subject to judicial review. In *Youngstown Sheet and Tube Co. v. Sawyer*,¹⁰¹ the Supreme Court made clear that it could review the President's actions and invalidate those outside of his statutory and constitutional authority.¹⁰² In recent cases brought by War on Terror detainees, the Supreme Court has not hesitated to hold the President to statutory and other judicial standards of conduct even with regard to actions taken under his Commander-in-Chief power.¹⁰³ The Court has shown decreasing deference in this area both to the President and to Congress.¹⁰⁴ And the political branches have followed the Court.¹⁰⁵

100. THE FEDERALIST No. 73 (Alexander Hamilton), *supra* note 3, at 383 (discussing the President's veto power); *see also id.* (“When men engaged in unjustifiable pursuits are aware, that obstructions may come from a quarter which they cannot control, they will often be restrained, by the bare apprehension of opposition, from doing what they would with eagerness rush into, if no such external impediments were to be feared.”).

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

102. *Id.* at 588–89.

103. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (implementing balancing test to provide due process for enemy combatants); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

104. In *Boumediene v. Bush*, the Supreme Court for the first time invalidated a wartime policy that had the joint support of Congress and the President. 128 S. Ct. 2229 (2008). *See generally* Eric A. Posner, *Boumediene and the Uncertain March of Judicial Cosmopolitanism*, 2008 CATO SUP. CT. REV. 23.

105. For example, after *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), President Bush made clear that he would follow the Supreme Court's decision and work with Congress to enact appropriate legislation. This resulted in the Military Commissions Act. *See* Robert J. Pushaw, Jr., *The “Enemy Combatant” Cases in Historical Context: The Inevitability of Pragmatic Judicial Review*, 82 NOTRE DAME L. REV. 1005, 1076–77 (2007).

Congress may also hold the President accountable. Congress possesses a number of ordinary tools to sanction the executive, such as reducing or eliminating funding for presidential excursions both at home and abroad. Congress can cut off or threaten to cut off funding in order to cajole the President to change his policies. Congress may also use oversight hearings to make executive branch officials account for alleged misdeeds. Such hearings may draw public attention to actions within the White House or executive branch agencies that have otherwise gone without notice.

In extreme cases, Congress may vote to impeach and remove the President and disqualify him from holding any other federal office. This significant power was given to Congress, as opposed to the Court, after much debate during the drafting of the Constitution.¹⁰⁶ Impeachment serves as a significant check on the President and other high-ranking officials. Hamilton argued that the presidency preserves republican values because the President is subject to reelection every four years and remains liable for impeachment and removal and disqualification from other office.¹⁰⁷ Moreover, even after removal from office, a President may be criminally liable for his actions.¹⁰⁸ The President's pardon power does not extend to impeachment,¹⁰⁹ and it is generally considered that there would be no judicial review of impeachment. Congress thus possesses an ultimate and unreviewable power to remove the President and his appointees from office.

Finally, the President remains politically accountable for his decisions, often for one reelection and also as the national representative of his party. Perception that the President is acting in contravention of the Constitution, without Congress, and in disregard of the courts, may anger the public and lead to political reprisals against the President and the President's party in Congress. Political disapproval may have widespread consequences beyond the ballot box. An unpopular President will find his leadership compromised and face difficulty enacting his domestic and international agenda.

The courts, Congress, and the people can hold the President accountable. Yet each of these accountability mechanisms has its

106. See *Nixon v. United States*, 506 U.S. 224, 233–35 (1993) (recounting the debate at the Founding about where the impeachment power should lie).

107. THE FEDERALIST NO. 77 (Alexander Hamilton).

108. U.S. CONST. art. I, § 3, cl. 7.

109. U.S. CONST. art. II, § 2, cl. 1 (the President “shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment”).

own constraints. For example, Supreme Court review may take years. A number of controversial decisions by the executive may never be subject to judicial review, because there is no appropriate party with standing, or because of other jurisdictional hurdles. The Court may decline to hear political questions or choose to avoid constitutional questions raised by the President's actions.¹¹⁰

Congress's checks on the President also have inherent limitations. Impeachment is a blunt tool for addressing presidential wrongdoing. It requires significant political will to receive two-thirds of senators present to remove the President.¹¹¹ Historical practice as well as the nature of this remedy have generally confined impeachment to egregious cases of overreaching or wrongdoing by the President.

Electoral pressures on the President face similar limits. The President will be up for reelection at most once. While voters may be outraged by particular actions, these will have to be judged in the context of a President's broader service to the country. There is no national plebiscite on particular issues.

Furthermore, all of these accountability mechanisms are diffuse and depend on discretionary actions by the other branches or the people to check the President. The slow, ponderous, and majoritarian methods of holding the President accountable leave a significant space in which the President may act unimpaired. The nature of the checks on the President strongly supports the claim of independent executive review power and suggests that such power may, at times, have a significant scope.

D. The President's Means of Defense

The President has powerful tools with which to defend his considerable sphere of action against Congress and the Court. Although enforcement of statutes and adherence to Supreme Court precedent is the ordinary course, the President retains the power to act against the constitutional judgments of the other branches. If after careful review the President determines that a statute is

110. See *supra* text accompanying notes 54–58.

111. U.S. CONST. art. I, § 3, cl. 6.

unconstitutional, he may decline to enforce it.¹¹² The President may also decide not to follow Supreme Court precedent, and in the rare instance, may decide against enforcement of a particular judgment.¹¹³

Thomas Jefferson explained that the Constitution created independence in each of the three branches, and each branch was furnished with the means for protecting itself from “enterprises of force attempted on them by the others.”¹¹⁴ Although each branch has its means, the Constitution gives the “most effectual and diversified means [] to the executive.”¹¹⁵ The “practical security”¹¹⁶ given to the President to fend off invasion from the other branches reflects both the significant scope of his powers and the dangers thought to emanate from Congress (and also possibly the courts).

Of the three branches, the President has the most formidable tools for protecting his autonomy. The nature of the executive power allows the President to act unilaterally and quickly—execution of the laws does not require the assistance of the other branches. Moreover, the tools he possesses—including the veto, the pardon, and the non-enforcement power—may all be used to ward off encroachments by the other branches.

By contrast, as discussed above, Congress cannot legislate without concurrence from the President (although it can overrule a veto with two-thirds of each house). Similarly, the Supreme Court cannot decide issues *sua sponte*, but must wait for an appropriate case in which it has jurisdiction. Both Congress and the Supreme Court

112. See Dellinger Memorandum, *supra* note 83 (“[T]here are circumstances in which the President may appropriately decline to enforce a statute he views as unconstitutional.”); The Attorney General’s Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A OP. OFF. LEGAL COUNSEL 55 (1980).

I do not believe that the prerogative of the Executive is to exercise free and independent judgment on constitutional questions presented by Acts of Congress. At the same time, I think that in rare cases the Executive’s duty to the constitutional system may require that a statute be challenged; and if that happens, executive action in defiance of the statute is authorized and lawful if the statute is unconstitutional.

Id.

113. See *supra* notes 63–66 and accompanying text.

114. Letter from President Thomas Jefferson to George Hay (June 17, 1807), in 10 THE WORKS OF THOMAS JEFFERSON 404 (Paul L. Ford, ed. 1905).

115. *Id.*

116. THE FEDERALIST NO. 48 (James Madison), *supra* note 3, at 256. Similarly, Madison observed that “it is not possible to give to each department an equal power of self-defense” because the types of power are also different and unequal. THE FEDERALIST NO. 51 (James Madison), *supra* note 3, at 269.

require coordinated majorities before acting. Moreover, they require the executive to fulfill their directives. The legislative and judicial powers are not designed for quick action—rather such “energy” belongs with the executive.¹¹⁷

In the exercise of his duties, the President has an obligation to ascertain constitutional requirements. Identifying the scope of the President’s independent interpretive authority does not mean legitimizing broad and abusive uses of presidential power. Rather, recognition of the breadth of executive power highlights the important constitutional duties of Congress and the Supreme Court to reign in overreaching by the President when necessary.¹¹⁸ Even if the President decides not to enforce a statute or judgment on constitutional grounds, the Court, Congress and the people may disagree with the President and hold him accountable for his actions—an accountability that ensures an energetic executive subject to the rule of law.

* * *

Both Congress and the Supreme Court face important structural impediments before engaging in their primary activities of legislating and adjudicating. By contrast, the President acts with few impediments. He may say what the law is simply by executing the laws in a manner he determines to be consistent with the Constitution.

117. THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 3, at 362.

Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks: it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy.

Id.

118. In a similar context, Michael Paulsen explains that the constitutional power of necessity for the executive

does not mean that the President’s power is plenary nor that it should not go unchecked. Both the judiciary, through the power of constitutional interpretation it possesses in deciding cases arising under the Constitution, and the Congress, through the power of constitutional interpretation it possesses in exercising its legislative powers and the check of impeachment, have a duty of independent constitutional review over the judgment of necessity. Abdication of such a duty, whether by refusal to act or by excessive deference to executive judgments, renders less valuable and more dangerous the President’s power to act to preserve, protect, and defend the constitutional order in the name of necessity.

Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1259 (2004).

Unlike Congress and the Supreme Court, the President can act alone in his judgment of what the Constitution requires. Judicial review, political condemnation, and even impeachment may follow, but they do not impede the President at the moment of action.

In addition, the *ex post* constraints on the President are slower and require greater consensus before presidential action can be undone. The Court may hold the President accountable if a particular issue is justiciable and at least five members of the Court decide against the President, but a final resolution may take years. Impeachment requires a majority of the House of Representatives and removal requires agreement of two-thirds of the Senate.

By contrast, the President can cut off the other two branches quickly and with precision. For any particular piece of legislation, the President holds the veto power and he may decline to enforce statutes that he considers unconstitutional. The President may ignore Supreme Court decisions as precedent, and some argue that he even has the power to decline to enforce particular judgments. While the Supreme Court and the Congress must cobble together majorities to check the President, the President can ward off encroachments through swift and targeted action.¹¹⁹

Why does the Constitution give the President both the power to act with energy and expediency and the ability to defend himself quickly from the other branches? Such a substantial degree of discretion would hardly be consistent with the view that the President should always (or even mostly) defer to the Court or Congress in its constitutional judgments.

The Framers of our Constitution were not willing to leave the constraints on government actors to chance or good will.¹²⁰ Rather, they carefully delineated the legislative, executive and judicial powers and then explicitly provided mechanisms for each branch to thwart the ambitions of the others. The Constitution confers on each branch the means of self-defense commensurate to its constitutional powers. The President's significant capacity for action combined with his

119. See THE FEDERALIST NO. 70 (Alexander Hamilton).

120. THE FEDERALIST NO. 51 (James Madison), *supra* note 3, at 269.

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable to the government to control the governed; and in the next place oblige it to control itself.

Id.

2009]

PRESIDENT'S SPHERE OF ACTION

555

varied means of self-defense support a powerful and independent authority for the President to say what the law is.

