

Chapter Nine: Liberalism Divided

I. INTRODUCTION

The New Deal coalition was powerful but unstable. It wedded traditional Democratic constituencies in the white agricultural South with the ethnic, urban working-class of the north. Committed liberals provided much of the energy of the party and drove its agenda, but a substantial and powerful group of conservative Democrats imposed limits on what the party could do, especially on issues that affected race. Both major parties were made up of diverse coalitions. Liberals in the Democratic and Republican parties could often agree to advance reform policies. The “conservative coalition” made up of both Democrats and Republicans could often limit how far reforms could go. Despite the existence of Democratic majorities in Congress, governing in the postwar era often meant negotiating these diverse groups and effective political leaders such as House Speaker Sam Rayburn and Senate majority leader Lyndon Johnson were best known for their bargaining skills.

The end of the 1960s marked the beginning of the end for the New Deal coalition. The political parties began the process of sorting themselves out into more ideologically homogeneous but polarized groups, with liberals moving into the Democratic Party and conservatives moving into the Republican Party. The civil rights movement and the Voting Rights Act disrupted the traditional Democratic Party in the South, bringing new liberal black voters into the Democratic fold even as many conservative white voters left. The Vietnam War and a variety of “social issues,” including crime and abortion, shuffled allegiances. Changing economic conditions affected voter calculations in the Sunbelt and elsewhere. As the sorting process began, divisions in and between the parties were felt particularly intensely.

[Insert Table 9-1 about here]

The process was only beginning in 1968 when Richard Nixon was elected to the presidency in 1968. Nixon was the first president to be elected since 1848 who did not have at least one chamber of Congress in the hands of his own party. He came to power in a position of weakness, and immediately focused on how best to exploit the tools available within the executive branch itself to accomplish his goals. On the one hand, Congress and the president were entangled in persistent conflicts over how Nixon was using presidential power in both domestic and foreign affairs right up until his resignation during the Watergate scandal. On the other hand, Nixon and Congress frequently reached agreement on major legislative initiatives, from the Occupational Safety and Health Act of 1970 to the Consumer Product Safety Act of 1972, that in many ways extended in the legacy of the New Deal-Great Society era.

From 1968 to 1978, the Democrats had little difficulty retaining control of both houses of Congress. They regained the White House in the first opportunity after Watergate, in the 1976 elections, and had the benefit of unified government. But internal divisions within the party and an uncertain agenda hampered action during Jimmy Carter’s single term of office. The Democrats had no opportunity to appoint new members to the Supreme Court during this period, since there were no vacancies during Carter’s term. By contrast, Nixon was able to make four appointments to the Court, and his successor Gerald Ford was able to make a fifth. Carter had to content himself with making appointments to an expanded lower federal court.

[Insert Table 9-2 about here]

For the first time, many of the most prominent constitutional issues of the period revolved around problems of separation of powers. Scholars, politicians and judges had long been supportive of the growth of a more powerful president that could respond to crises and manage the increasingly complex federal government. Many liberals in the postwar period were attracted to the possibility of a president

who could exercise decisive “leadership” and cut through the obstructions and compromises that conservatives often created in Congress. By the Nixon administration, liberals began to talk about an “imperial presidency” that had short-circuited valuable checks and balances in the constitutional system. The debate over presidential power reverberated long after the Nixon administration came to a close. Not only did Ford and Carter continue to grapple with legislative and administrative reforms made in the wake of Vietnam and Watergate, but former Nixon administration officials such as Antonin Scalia and Richard Cheney carried forward their own concerns about the future of the constitutional powers of the presidency.

Richard M. Nixon, Speech Accepting the Republican Presidential Nomination (1968)

In 1964, the Democrats seemed to have the Republican Party on the ropes. Lyndon Johnson defeated the conservative Republican nominee, Barry Goldwater, in a landslide, and liberals Democrats made large gains in the House and the Senate. Four years later, the Democrats were in disarray and there was talk of an “emerging Republican majority.” The Democrats held Congress in the 1968 elections, but Richard Nixon successfully launched a presidential bid that emphasized “law and order” and frequently criticized the Warren Court as much as the Johnson administration.

. . . .

As we look at America, we see cities enveloped in smoke and flame. We hear sirens in the night. We see Americans dying on distant battlefields abroad. We see Americans hating each other; fighting each other; killing each other at home.

And as we see and hear these things, millions of Americans cry out in anguish;

Did we come all this way for this? Did American boys die in Normandy and Korea and in Valley Forge for this?

Listen to the answers to those questions.

It is another voice, it is a quiet voice in the tumult of the shouting. It is the voice of the great majority of Americans, the forgotten Americans, the non shouters, the non demonstrators. They’re not racists or sick; they’re not guilty of the crime that plagues the land; they are black, they are white; they’re native born and foreign born; they’re young and they’re old.

. . . .

They’re good people. They’re decent people; they work and they save and they pay their taxes and they care.

. . . .

If we are to restore prestige and respect for America abroad, the place to begin is at home – in the United States of America.

My friends, we live in an age of revolution in America and in the world. And to find the answers to our problems, let us turn to a revolution . . . the American Revolution.

The American Revolution was and is dedicated to progress. But our founders recognized that the first requisite of progress is order.

. . . .

And tonight it’s time for some honest talk about the problem of order in the United States. . . .

. . . .

Let those who have the responsibility to enforce our laws, and our judges who have the responsibility to interpret them, be dedicated to the great principles of civil rights. But let them also recognize that the first civil right of every American is to be free from domestic violence. And that right must be guaranteed in this country.

. . . .

Jimmy Carter, Inaugural Address (1977)¹

Jimmy Carter was a dark-horse candidate in 1976. A little-known, post-civil-rights governor from Georgia, Carter offered himself as an outsider to both business-as-usual D.C. politics and to the national Democratic Party. His message often emphasized both personal and national reform and renewal. The message was symbolized more hopefully by his walking to the White House after delivering his inaugural address. It was reflected less successfully in his "malaise" speech near the end of his term where the president seemed to dwell on the "crisis of the American spirit . . . all around us." He was challenged for the Democratic nomination for president by the more orthodox liberal Senator Edward Kennedy in 1980, and defeated in the general elections by conservative Republican Ronald Reagan.

. . . .

Let our recent mistakes bring a resurgent commitment to the basic principles of our Nation, for we know that if we despise our own government we have no future. We recall in special times when we have stood briefly, but magnificently, united. In those times no prize was beyond our grasp.

But we cannot dwell upon remembered glory. We cannot afford to drift. We reject the prospect of failure or mediocrity or an inferior quality of life for any person. Our Government must at the same time be both competent and compassionate.

We have already found a high degree of personal liberty, and we are now struggling to enhance equality of opportunity. Our commitment to human rights must be absolute, our laws fair, our natural beauty preserved; the powerful must not persecute the weak, and human dignity must be enhanced.

We have learned that "more" is not necessarily "better," that even our great Nation has its recognized limits, and that we can neither answer all questions nor solve all problems. We cannot afford to do everything, nor can we afford to lack boldness as we meet the future. So, together, in a spirit of individual sacrifice for the common good, we must simply do our best.

. . . .

¹ Excerpt taken from GET CITE

II. POWERS OF THE NATIONAL GOVERNMENT

The power of the national government to take action on most issues of interest to national political officials and their constituents was largely taken for granted during this period. The justices had been clear since the 1940s that they were not interested in enforcing boundaries on national power. The Tenth Amendment was a mere “truism.” Such “sweeping” clauses as the Necessary and Proper Clause and the Spending Clause gave Congress ample authority and discretion for creative policymaking. The scope of the Commerce Clause seemed fairly boundless to judges and politicians of both political parties.

Congress launched bold new initiatives, and expanded the scope and size of the federal government throughout this period. There were few mainstream debates about the constitutional limits of federal authority. An exception was *Oregon v. Mitchell* (1970), which held that Congress could not change the voting age in state and local elections. The result was not unexpected, and Congress quickly responded by passing the Twenty-Sixth Amendment to the Constitution, lowering the voting age to eighteen. But the federal government was expanding its role in a variety of other areas, while giving somewhat less deference to state and local governments than it once had. In 1974, for example, Congress amended the Fair Labor Standards Act to remove the exemption that had been given to state and local governments when the act was first passed during the New Deal. The result was a lawsuit that led the Supreme Court to consider whether states were entitled to some constitutional immunity from the application of federal statutes (see *National League of Cities v. Usery* [1976] below). In 1974, Congress passed the Emergency Highway Energy Conservation Act, which used the threat of a reduction of federal highway funds to force states to adopt a national speed limit of 55 miles per hour. In keeping with the “law and order” themes of the Nixon campaign, the federal government continued to expand its role in criminal justice with bills such as the Organized Crime Control Act of 1970 and the Omnibus Crime Control Act of 1970. Regulatory policymaking took on new goals and approaches with the rise of such “social” regulation as the Clean Air Act of 1970 and the Water Pollution Control Act of 1972.

III. FEDERALISM

Professor Herbert Wechsler provided a good summary of the dominant New Deal/Great Society understanding of federalism in an influential article, “The Political Safeguards of Federalism.”¹ Wechsler insisted that New Dealers recognized federalism to be an important political and constitutional value, but that federalism values were adequately protected by the political branches of the government. In particular, he maintained, a Congress staffed by senators elected from the states and representatives elected from districts entirely within states could be trusted to protect distinctive state interests. In his view, when the national government passed laws that appeared to trench on traditional state prerogatives, it did so because many representatives believed such regulations were actually in the best interests of the state or were appropriately counterbalanced by other concerns. Courts did not need to intervene in order to ensure that federalism was adequately maintained within the constitutional system.

Conservatives were more skeptical that modern national officeholders adequately represented the interests of state and local governments. William Rehnquist was among the conservative skeptics. He had been among a group of young Arizona lawyers who had played a role in Senator Barry Goldwater’s failed presidential campaign in 1964, with its prominent rhetoric of states’ rights and denunciation of “big government” in Washington, D.C. He later moved into Nixon’s Office of Legal Counsel, and then to the Supreme Court. One option for reining in the federal power would be to revisit the Court’s doctrine on enumerated powers. Rehnquist pursued this option with a group of Reagan and Bush appointed justices in the 1990s. In the 1970s, he tried a different strategy. Taking congressional power as a given, he tried to carve out constitutional exceptions for the states. The strategy was somewhat analogous to what the Warren Court had done for some individual rights in the 1960s. Rehnquist won a majority in *National League of Cities v. Usery* (1976), but the victory proved to be limited.

In *National League of Cities*, Rehnquist emphasized that states needed to have the authority and policy space to make diverse choices. In that case, the choices being made involved the wages of local government employees, with potential implications for government budgets and the policy options that they could pursue. The question for the Court and for other national officials is whether the diversity being pursued in the states is desirable, tolerable or constitutionally preventable. Congress had long tolerated a diverse set of wage policies in the states, but that had come to an end in 1974 when it adopted amendments to the Fair Labor Standards Act applying national standards to state and local governments. States had adopted diverse policies on racial segregation, but the Court and Congress had worked to eliminate many of those in the 1950s and 1960s. States often adopt policies that favor their own residents and protect their own resources, but in a federal system states also have an obligation to treat the residents of other states fairly. At the tail end of the Warren Court, a majority of the justices led by Justice Brennan argued that residency requirements on welfare payments hampered an interstate right to travel in *Shapiro v. Thompson* (1969). *Shapiro* was part of a broader effort inside and outside the courts to open up access to welfare programs, but it also pointed to the range of uses to which federalism could be put.

[ILLUSTRATION 9-1 ABOUT HERE]

A. STATE IMMUNITY FROM FEDERAL REGULATION

National League of Cities v. Usery, 426 U.S. 833 (1976).

¹ Herbert Wechsler, “The Political Safeguards of Federalism: The Role of States in the Composition and Selection of the National Government” *Columbia Law Review* 54 (1954): 543. For an update, see Larry D. Kramer, “Putting the Politics Back into the Political Safeguards of Federalism,” *Columbia Law Review* 100 (2000): 215. For a critique, see John Yoo, “The Judicial Safeguards of Federalism,” *Southern California Law Review* 70 (1996): 1311.

The Tenth Amendment largely ceased to be a source of independent constitutional authority or limitation during the New Deal/Great Society Era. If Congress was regulating interstate commerce, then evidence that the regulation trespassed on traditional state prerogatives or even on attributes of the state government was not constitutionally relevant. As Justice Stone, stated in Darby v. United States (1941), the Tenth Amendment “states but a truism that all is retained which has not been surrendered.” Four years later, in Fernandez v. Weiner (1945), the justices more bluntly stated, “[t]he Tenth Amendment does not operate as a limitation upon the powers, express or implied, delegated to the national government.” The Supreme Court during the New Deal/Great Society Era consistently ruled against states claims to immunity from federal regulation. United States v. California (1936) held that the federal government could regulate state owned railroads. New York v. United States (1946) held that Congress could tax the sale of state goods. Maryland v. Wirtz (1968) held that Congress could require that some state employees be paid minimum wages. These decisions were not unanimous. Justice Douglas, in particular, repeatedly insisted that the Tenth Amendment placed some limits on national power. His dissent in Wirtz declared the measure “a serious invasion of state sovereignty” that was “not consistent with our constitutional federalism.” Interesting, the majority opinion in Wirtz was written by Justice Harlan, who in such national powers cases as Katzenbach, was far more sympathetic to state concerns than Justice Douglas.

National League of Cities was the first case in forty years in which the Supreme Court declared a federal law unconstitutional on Tenth Amendment grounds. No other federal law was declared unconstitutional under the Tenth Amendment while the Burger Court sat, and it was eventually overturned in Garcia v. San Antonio Metropolitan Transit Authority (1985). Justice Rehnquist’s majority opinion overruled Wirtz when holding that the federal government could not regulate the salaries and hours of state employees. Justice Brennan’s dissent insisted that states did not need judicial protection, that state interests were sufficiently protected in Congress. These opinions were particularly remarkable because, until National League, Justice Rehnquist was considered the leading proponent of judicial restraint on the Burger Court and Justice Brennan the leading proponent of judicial activism. As you read their opinions, consider whether either justice explains why the judicial activism is justified in some kinds of cases, but not others?

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Appellants in no way challenge [past] decisions establishing the breadth of authority granted Congress under the commerce power. Their contention, on the contrary, is that when Congress seeks to regulate directly the activities of States as public employers, it transgresses an affirmative limitation on the exercise of its power akin to other commerce power affirmative limitations contained in the Constitution. Congressional enactments which may be fully within the grant of legislative authority contained in the Commerce Clause may nonetheless be invalid because found to offend against the right to trial by jury contained in the Sixth Amendment . . . or the Due Process Clause of the Fifth Amendment. Appellants' essential contention is that the 1974 amendments to the Act, while undoubtedly within the scope of the Commerce Clause, encounter a similar constitutional barrier because they are to be applied directly to the States and subdivisions of States as employers.¹

¹ MR. JUSTICE BRENNAN'S dissent intimates. . . that guarantees of individual liberties are the only sort of constitutional restrictions which this Court will enforce as against congressional action. It reasons that "Congress is constituted of representatives in both Senate and House elected from the States... Decisions upon the extent of federal intervention under the Commerce Clause into the affairs of the States are in that sense decisions of the States themselves." . . . Precisely what is meant by the phrase "are in that sense decisions of the States themselves" is not entirely clear from this language; it is indisputable that a common constituency of voters elects both a State's Governor and its two United States Senators. It is equally indisputable that since the enactment of the Seventeenth

This Court has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce which are conferred by Art. I of the Constitution. In [*Maryland v.*] *Wirtz*, for example, the Court took care to assure the appellants that it had "ample power to prevent... 'the utter destruction of the State as a sovereign political entity,'" which they feared. . . . In *Fry [v. United States]*, the Court recognized that an express declaration of this limitation is found in the Tenth Amendment:

"While the Tenth Amendment has been characterized as a 'truism,' stating merely that 'all is retained which has not been surrendered,' . . . it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." . . .

. . . .

. . . Appellee Secretary argues that the cases in which this Court has upheld sweeping exercises of authority by Congress, even though those exercises pre-empted state regulation of the private sector, have already curtailed the sovereignty of the States quite as much as the 1974 amendments to the Fair Labor Standards Act. We do not agree. It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States. We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner. In *Coyle v. Oklahoma*, the Court gave this example of such an attribute:

"The power to locate its own seat of government and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers. That one of the original thirteen States could now be shorn of such powers by an act of Congress would not be for a moment entertained."

One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours

Amendment those Senators are not dependent upon state legislators for their election. But in any event the intimation which this reasoning is used to support is incorrect.

In *Myers v. United States*, 272 U.S. 52 (1926), the Court held that Congress could not by law limit the authority of the President to remove at will an officer of the Executive Branch appointed by him. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court held that Congress could not constitutionally require that members of the Federal Elections Commission be appointed by officers of the House of Representatives and of the Senate, and that all such appointments had to be made by the President. In each of these cases, an even stronger argument than that made in the dissent could be made to the effect that since each of these bills had been signed by the President, the very officer who challenged them had consented to their becoming law, and it was therefore no concern of this Court that the law violated the Constitution. Just as the dissent contends that "the States are fully able to protect their own interests..." . . . it could have been contended that the President, armed with the mandate of a national constituency and with the veto power, was able to protect his own interests. Nonetheless, in both cases the laws were held unconstitutional, because they trespassed on the authority of the Executive Branch.

those persons will work, and what compensation will be provided where these employees may be called upon to work overtime. The question we must resolve here, then, is whether these determinations are "functions essential to separate and independent existence," . . . so that Congress may not abrogate the States' otherwise plenary authority to make them.

Judged solely in terms of increased costs in dollars, these allegations show a significant impact on the functioning of the governmental bodies involved. . . . The State of California, which must devote significant portions of its budget to fire-suppression endeavors, estimated that application of the Act to its employment practices will necessitate an increase in its budget of between \$ 8 million and \$ 16 million.

. . . California asserted that it could not comply with the overtime costs (approximately \$ 750,000 per year) which the Act required to be paid to California Highway Patrol cadets during their academy training program. California reported that it had thus been forced to reduce its academy training program from 2,080 hours to only 960 hours, a compromise undoubtedly of substantial importance to those whose safety and welfare may depend upon the preparedness of the California Highway Patrol.

. . . .

Quite apart from the substantial costs imposed upon the States and their political subdivisions, the Act displaces state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require. The Act, speaking directly to the States qua States, requires that they shall pay all but an extremely limited minority of their employees the minimum wage rates currently chosen by Congress. It may well be that as a matter of economic policy it would be desirable that States, just as private employers, comply with these minimum wage requirements. But it cannot be gainsaid that the federal requirement directly supplants the considered policy choices of the States' elected officials and administrators as to how they wish to structure pay scales in state employment. The State might wish to employ persons with little or no training, or those who wish to work on a casual basis, or those who for some other reason do not possess minimum employment requirements, and pay them less than the federally prescribed minimum wage. It may wish to offer part-time or summer employment to teenagers at a figure less than the minimum wage, and if unable to do so may decline to offer such employment at all. But the Act would forbid such choices by the States. The only "discretion" left to them under the Act is either to attempt to increase their revenue to meet the additional financial burden imposed upon them by paying congressionally prescribed wages to their existing complement of employees, or to reduce that complement to a number which can be paid the federal minimum wage without increasing revenue.

This dilemma presented by the minimum wage restrictions may seem not immediately different from that faced by private employers, who have long been covered by the Act and who must find ways to increase their gross income if they are to pay higher wages while maintaining current earnings. The difference, however, is that a State is not merely a factor in the "shifting economic arrangements" of the private sector of the economy, . . . but is itself a coordinate element in the system established by the Framers for governing our Federal Union.

. . . .

. . . [E]ven if we accept appellee's assessments concerning the impact of the amendments, their application will nonetheless significantly alter or displace the States' abilities to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation. These activities are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services. Indeed, it is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens. If Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States' "separate and independent existence." . . . Thus, even if appellants may have overestimated the effect which the Act will have upon their current levels and patterns of governmental activity, the dispositive factor is that Congress has attempted to exercise its Commerce Clause authority to prescribe minimum wages and maximum hours to be paid by the States in their capacities as sovereign governments. In so doing, Congress has sought to

wield its power in a fashion that would impair the States' "ability to function effectively in a federal system." . . . This exercise of congressional authority does not comport with the federal system of government embodied in the Constitution. We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3.

. . . .
 [In *Fry v. United States*,] the Court held that the Economic Stabilization Act of 1970 was constitutional as applied to temporarily freeze the wages of state and local government employees. . . . The Court recognized that the Economic Stabilization Act was "an emergency measure to counter severe inflation that threatened the national economy." . . .

We think our holding today quite consistent with *Fry*. The enactment at issue there was occasioned by an extremely serious problem which endangered the well-being of all the component parts of our federal system and which only collective action by the National Government might forestall. The means selected were carefully drafted so as not to interfere with the States' freedom beyond a very limited, specific period of time. The effect of the across-the-board freeze authorized by that Act, moreover, displaced no state choices as to how governmental operations should be structured, nor did it force the States to remake such choices themselves. . . . The limits imposed upon the commerce power when Congress seeks to apply it to the States are not so inflexible as to preclude temporary enactments tailored to combat a national emergency. . . .

With respect to the Court's decision in *Wirtz*, we reach a different conclusion. . . .

Wirtz relied heavily on the Court's decision in *United States v. California* (1936). The opinion quotes the following language from that case:

"[We] look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual.' . . .

But we have reaffirmed today that the States as States stand on a quite different footing from an individual or a corporation when challenging the exercise of Congress' power to regulate commerce. We think the dicta from *United States v. California*, simply wrong. Congress may not exercise that power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made. . . . We are therefore persuaded that *Wirtz* must be overruled.

MR. JUSTICE BLACKMUN, concurring.

. . . . I may misinterpret the Court's opinion, but it seems to me that it adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential. . . . With this understanding on my part of the Court's opinion, I join it.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE and MR. JUSTICE MARSHALL join, dissenting.

The Court concedes, as of course it must, that Congress enacted the 1974 amendments pursuant to its exclusive power under Art. I, § 8, cl. 3, of the Constitution "[t]o regulate Commerce... among the several States." It must therefore be surprising that my Brethren should choose this bicentennial year of our independence to repudiate principles governing judicial interpretation of our Constitution settled since the time of Mr. Chief Justice John Marshall, discarding his postulate that the Constitution contemplates

that restraints upon exercise by Congress of its plenary commerce power lie in the political process and not in the judicial process. For 152 years ago Mr. Chief Justice Marshall enunciated that principle to which, until today, his successors on this Court have been faithful.

"[T]he power over commerce... is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are... the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments." *Gibbons v. Ogden*. . . .

Only 34 years ago, *Wickard v. Filburn*, . . . reaffirmed that "[a]t the beginning Chief Justice Marshall... made emphatic the embracing and penetrating nature of [Congress' commerce] power by warning that effective restraints on its exercise must proceed from political rather than from judicial processes."

My Brethren do not successfully obscure today's patent usurpation of the role reserved for the political process by their purported discovery in the Constitution of a restraint derived from sovereignty of the States on Congress' exercise of the commerce power. Mr. Chief Justice Marshall recognized that limitations "prescribed in the constitution," . . . restrain Congress' exercise of the power. . . . Thus laws within the commerce power may not infringe individual liberties protected by the First Amendment . . . or the Sixth Amendment. . . . But there is no restraint based on state sovereignty requiring or permitting judicial enforcement anywhere expressed in the Constitution; our decisions over the last century and a half have explicitly rejected the existence of any such restraint on the commerce power.

We said in *United States v. California* (1936), for example: "The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution... [T]he power of the state is subordinate to the constitutional exercise of the granted federal power." . . .

. . . .

. . . [M]y Brethren are also repudiating the long line of our precedents holding that a judicial finding that Congress has not unreasonably regulated a subject matter of "commerce" brings to an end the judicial role.

The reliance of my Brethren upon the Tenth Amendment as "an express declaration of [a state sovereignty] limitation," . . . not only suggests that they overrule governing decisions of this Court that address this question but must astound scholars of the Constitution. For not only early decisions, *Gibbons v. Ogden*. . . , *McCulloch v. Maryland*, . . . and *Martin v. Hunter's Lessee*, . . . hold that nothing in the Tenth Amendment constitutes a limitation on congressional exercise of powers delegated by the Constitution to Congress. Rather, as the Tenth Amendment's significance was more recently summarized:

"The amendment states but a truism that all is retained which has not been surrendered. . .

..

"From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." *United States v. Darby*. . . .

. . . .

Today's repudiation of this unbroken line of precedents that firmly reject my Brethren's ill-conceived abstraction can only be regarded as a transparent cover for invalidating a congressional judgment with which they disagree. The only analysis even remotely resembling that adopted today is found in a line of opinions dealing with the Commerce Clause and the Tenth Amendment that ultimately

provoked a constitutional crisis for the Court in the 1930's. E.g., *Carter v. Carter Coal Co.*, . . . *United States v. Butler*, . . . *Hammer v. Dagenhart*. . . .

. . . .
My Brethren's treatment of *Fry v. United States*, . . . further illustrates the paucity of legal reasoning or principle justifying today's result. . . . Obviously the Stabilization Act - no less than every exercise of a national power delegated to Congress by the Constitution - displaced the State's freedom. It is absurd to suggest that there is a constitutionally significant distinction between curbs against increasing wages and curbs against paying wages lower than the federal minimum.

. . . .
My Brethren do more than turn aside longstanding constitutional jurisprudence that emphatically rejects today's conclusion. More alarming is the startling restructuring of our federal system, and the role they create therein for the federal judiciary. This Court is simply not at liberty to erect a mirror of its own conception of a desirable governmental structure. . . .

. . . .
Judicial restraint in this area merely recognizes that the political branches of our Government are structured to protect the interests of the States, as well as the Nation as a whole, and that the States are fully able to protect their own interests in the premises. Congress is constituted of representatives in both the Senate and House elected from the States. . . . Decisions upon the extent of federal intervention under the Commerce Clause into the affairs of the States are in that sense decisions of the States themselves. Judicial redistribution of powers granted the National Government by the terms of the Constitution violates the fundamental tenet of our federalism that the extent of federal intervention into the States' affairs in the exercise of delegated powers shall be determined by States' exercise of political power through their representatives in Congress. See Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *Col. L. Rev.* 543 (1954). There is no reason whatever to suppose that in enacting the 1974 amendments Congress, even if it might extensively obliterate state sovereignty by fully exercising its plenary power respecting commerce, had any purpose to do so. Surely the presumption must be to the contrary. Any realistic assessment of our federal political system, dominated as it is by representatives of the people elected from the States, yields the conclusion that it is highly unlikely that those representatives will ever be motivated to disregard totally the concerns of these States. . . .

. . . .
We are left then with a catastrophic judicial body blow at Congress' power under the Commerce Clause. Even if Congress may nevertheless accomplish its objectives - for example, by conditioning grants of federal funds upon compliance with federal minimum wage and overtime standards, . . . there is an ominous portent of disruption of our constitutional structure implicit in today's mischievous decision. I dissent.

MR. JUSTICE STEVENS, dissenting.

. . . .
The Federal Government may, I believe, require the State to act impartially when it hires or fires the janitor, to withhold taxes from his paycheck, to observe safety regulations when he is performing his job, to forbid him from burning too much soft coal in the capitol furnace, from dumping untreated refuse in an adjacent waterway, from overloading a state-owned garbage truck, or from driving either the truck or the Governor's limousine over 55 miles an hour. Even though these and many other activities of the capitol janitor are activities of the State qua State, I have no doubt that they are subject to federal regulation.

. . . .
My disagreement with the wisdom of this legislation may not, of course, affect my judgment with respect to its validity. On this issue there is no dissent from the proposition that the Federal Government's power over the labor market is adequate to embrace these employees. Since I am unable to identify a

limitation on that federal power that would not also invalidate federal regulation of state activities that I consider unquestionably permissible, I am persuaded that this statute is valid. Accordingly, with respect and a great deal of sympathy for the views expressed by the Court, I dissent from its constitutional holding.

B. INTERSTATE TRAVEL

Shapiro v. Thompson, 394 U.S. 618 (1969)

Aid to Families with Dependent Children (AFDC) was a federal welfare program that was administered through and partly funded by the states. The Connecticut Welfare Department, following state law, denied the application of Vivian Marie Thompson to benefits under AFDC on the grounds that she had not been a resident of the state for a year before filing the application. (Thompson and her infant son had recently moved from Massachusetts to live with her mother in Hartford, Connecticut, but moved into her own apartment soon after her arrival in Hartford). Such state waiting-periods were common, especially as more generous states hoped to avoid becoming “welfare magnets” for the indigent residing in less generous states and as states in general hoped to discourage the poor from migrating into them. A divided federal three-judge panel struck down the provision as a violation of the Equal Protection Clause of the Fourteenth Amendment and a burden on an intrinsic right to travel. Companion cases from the District of Columbia and Pennsylvania raised the same issue and were heard at the same time. The case fragmented the liberals on the Warren Court in part on the issue of how much deference should be shown to the policy choices and implicit constitutional judgments that Congress had made.

In Shapiro, at the tail end of the Warren era, the Court took a step toward creating a new right to welfare. The case was first argued in 1967, and the Court voted 6-3 to uphold the residency requirements. Chief Justice Warren’s would-be majority opinion, however, provoked strong dissenting opinions from Douglas and Fortas that persuaded Brennan to switch sides (Marshall was the third dissenter in the initial vote) and Stewart to waver. The case was scheduled reargument, after which Warren was left in dissent. As the senior justice in the new majority, Douglas assigned the opinion to Brennan. Brennan was able to hold together his majority while suggesting that class like race was a category of special constitutional concern and that “the very means to subsist” was a fundamental right requiring judicial protection.

In Shapiro, the Court emphasized how the relations of federalism imposed limits on the burdens that states could impose on new residents and on those engaging in interstate travel. Residency requirements on welfare benefits ran afoul of a right to interstate travel. The majority and dissent differed, however, on whether such a right had implications for other issues. The Court avoided the question later in the term by dismissing a challenge to state residency requirements for voting as moot since by the time the case reached the Court the plaintiffs had satisfied the residency requirement in Hall v. Beals (1969).

MR. JUSTICE BRENNAN delivered the opinion of the Court.

.....

There is no dispute that the effect of the waiting-period requirement in each case is to create two classes of needy resident families indistinguishable from each other except that one is composed of residents who have resided a year or more, and the second of residents who have resided less than a year, in the jurisdiction. On the basis of this sole difference the first class is granted and the second class is denied welfare aid upon which may depend the ability of the families to obtain the very means to subsist - food, shelter, and other necessities of life. In each case, the District Court found that appellees met the test for residence in their jurisdictions, as well as all other eligibility requirements except the requirement of residence for a full year prior to their applications. On reargument, appellees' central contention is that the statutory prohibition of benefits to residents of less than a year creates a classification which

constitutes an invidious discrimination denying them equal protection of the laws.¹ We agree. The interests which appellants assert are promoted by the classification either may not constitutionally be promoted by government or are not compelling governmental interests.

Primarily, appellants justify the waiting-period requirement as a protective device to preserve the fiscal integrity of state public assistance programs. It is asserted that people who require welfare assistance during their first year of residence in a State are likely to become continuing burdens on state welfare programs. Therefore, the argument runs, if such people can be deterred from entering the jurisdiction by denying them welfare benefits during the first year, state programs to assist long-time residents will not be impaired by a substantial influx of indigent newcomers.

There is weighty evidence that exclusion from the jurisdiction of the poor who need or may need relief was the specific objective of these provisions. In the Congress, sponsors of federal legislation to eliminate all residence requirements have been consistently opposed by representatives of state and local welfare agencies who have stressed the fears of the States that elimination of the requirements would result in a heavy influx of individuals into States providing the most generous benefits. . . . The sponsor of the Connecticut requirement said in its support: "I doubt that Connecticut can and should continue to allow unlimited migration into the state on the basis of offering instant money and permanent income to all who can make their way to the state regardless of their ability to contribute to the economy." . . .

. . . .
This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement. That proposition was early stated by Chief Justice Taney in the *Passenger Cases* (1849):

"For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States."

We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision. It suffices that, as MR. JUSTICE STEWART said for the Court in *United States v. Guest* (1966):

"The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized."

. . . .
Thus, the purpose of deterring the in-migration of indigents cannot serve as justification for the classification created by the one-year waiting period, since that purpose is constitutionally impermissible. If a law has "no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional." *United States v. Jackson* (1968).

. . . . [T]he class of barred newcomers is all-inclusive, lumping the great majority who come to the State for other purposes with those who come for the sole purpose of collecting higher benefits. In actual operation, therefore, the three statutes enact what in effect are nonrebuttable presumptions that every applicant for assistance in his first year of residence came to the jurisdiction solely to obtain higher benefits. Nothing whatever in any of these records supplies any basis in fact for such a presumption.

More fundamentally, a State may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally. Implicit in any such distinction is the

¹ This constitutional challenge cannot be answered by the argument that public assistance benefits are a "privilege" and not a "right." See *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

notion that indigents who enter a State with the hope of securing higher welfare benefits are somehow less deserving than indigents who do not take this consideration into account. But we do not perceive why a mother who is seeking to make a new life for herself and her children should be regarded as less deserving because she considers, among others factors, the level of a State's public assistance. Surely such a mother is no less deserving than a mother who moves into a particular State in order to take advantage of its better educational facilities.

Appellants argue further that the challenged classification may be sustained as an attempt to distinguish between new and old residents on the basis of the contribution they have made to the community through the payment of taxes. We have difficulty seeing how long-term residents who qualify for welfare are making a greater present contribution to the State in taxes than indigent residents who have recently arrived. . . . Appellants' reasoning would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed it would permit the State to apportion all benefits and services according to the past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of state services.

We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools. . . .

. . . .
 The waiting-period provision denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction. But in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional. Cf. *Skinner v. Oklahoma* (1942); *Korematsu v. United States* (1944); *Bates v. Little Rock* (1960); *Sherbert v. Verner* (1963).

. . . .
 We conclude therefore that appellants in these cases do not use and have no need to use the one-year requirement for the governmental purposes suggested. Thus, even under traditional equal protection tests a classification of welfare applicants according to whether they have lived in the State for one year would seem irrational and unconstitutional. But, of course, the traditional criteria do not apply in these cases. Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest. Under this standard, the waiting-period requirement clearly violates the Equal Protection Clause.¹

Connecticut and Pennsylvania argue, however, that the constitutional challenge to the waiting-period requirements must fail because Congress expressly approved the imposition of the requirement by the States as part of the jointly funded AFDC program.

Section 402 (b) of the Social Security Act of 1935, as amended, 42 U. S. C. § 602 (b), provides that:

"The Secretary shall approve any [state assistance] plan which fulfills the conditions specified in subsection (a) of this section, except that he shall not approve any plan which imposes as a condition of eligibility for aid to families with dependent children, a residence requirement which denies aid with respect to any child residing in the State (1) who has resided in the State for one year immediately preceding the application for such aid, or (2) who was born within one year

¹ We imply no view of the validity of waiting-period *or* residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel.

immediately preceding the application, if the parent or other relative with whom the child is living has resided in the State for one year immediately preceding the birth."

On its face, the statute does not approve, much less prescribe, a one-year requirement. . . . Rather than constituting an approval or a prescription of the requirement in state plans, the directive was the means chosen by Congress to deny federal funding to any State which persisted in stipulating excessive residence requirements as a condition of the payment of benefits. . . . Both the House and Senate Committee Reports expressly stated that the objective of § 402 (b) was to compel "liberality of residence requirement." . . .

. . . .

. . . . [E]ven if it could be argued that the constitutionality of § 402 (b) is somehow at issue here, it follows from what we have said that the provision, insofar as it permits the one-year waiting-period requirement, would be unconstitutional. Congress may not authorize the States to violate the Equal Protection Clause. . . . *Katzenbach v. Morgan* (1966).

The waiting-period requirement in the District of Columbia Code involved in No. 33 is also unconstitutional even though it was adopted by Congress as an exercise of federal power. In terms of federal power, the discrimination created by the one-year requirement violates the Due Process Clause of the Fifth Amendment. "While the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" *Schneider v. Rusk* (1964); *Bolling v. Sharpe* (1954).

Affirmed.

MR. JUSTICE STEWART, concurring.

. . . .

The Court today does *not* "pick out particular human activities, characterize them as 'fundamental,' and give them added protection" To the contrary, the Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands.

"The constitutional right to travel from one State to another . . . has been firmly established and repeatedly recognized." *United States v. Guest*. This constitutional right, which, of course, includes the right of "entering and abiding in any State in the Union," *Truax v. Raich*, is *not* a mere conditional liberty subject to regulation and control under conventional due process or equal protection standards. "The right to travel freely from State to State finds constitutional protection that is quite independent of the Fourteenth Amendment." *United States v. Guest*

MR. CHIEF JUSTICE WARREN, with whom MR. JUSTICE BLACK joins, dissenting.

In my opinion the issue before us can be simply stated: May Congress, acting under one of its enumerated powers, impose minimal nationwide residence requirements or authorize the States to do so? Since I believe that Congress does have this power and has constitutionally exercised it in these cases, I must dissent.

. . . .

The Great Depression of the 1930's exposed the inadequacies of state and local welfare programs and dramatized the need for federal participation in welfare assistance. . . . The primary purpose of the categorical assistance programs was to encourage the States to provide new and greatly enhanced welfare programs. See, *e. g.*, S. Rep. No. 628, 74th Cong., 1st Sess., 5-6, 18-19 (1935); H. R. Rep. No. 615, 74th Cong., 1st Sess., 4 (1935). Federal aid would mean an immediate increase in the amount of benefits paid under state programs. But federal aid was to be conditioned upon certain requirements so that the States

would remain the basic administrative units of the welfare system and would be unable to shift the welfare burden to local governmental units with inadequate financial resources. . . .

. . . . The congressional decision to allow the States to impose residence requirements and to enact such a requirement for the District was the subject of considerable discussion. Both those favoring lengthy residence requirements and those opposing all requirements pleaded their case during the congressional hearings on the Social Security Act. Faced with the competing claims of States which feared that abolition of residence requirements would result in an influx of persons seeking higher welfare payments and of organizations which stressed the unfairness of such requirements to transient workers forced by the economic dislocation of the depression to seek work far from their homes, Congress chose a middle course. . . .

. . . . Residence requirements have remained a part of this combined state-federal welfare program for 34 years. Congress has adhered to its original decision that residence requirements were necessary in the face of repeated attacks against these requirements. . . .

Congress, pursuant to its commerce power, has enacted a variety of restrictions upon interstate travel. It has taxed air and rail fares and the gasoline needed to power cars and trucks which move interstate. Many of the federal safety regulations of common carriers which cross state lines burden the right to travel. And Congress has prohibited by criminal statute interstate travel for certain purposes. Although these restrictions operate as a limitation upon free interstate movement of persons, their constitutionality appears well settled. As the Court observed in *Zemel v. Rusk* (1965), "the fact that a liberty cannot be inhibited without due process of law does not mean that it can under no circumstances be inhibited."

. . . . As already noted, travel itself is not prohibited. Any burden inheres solely in the fact that a potential welfare recipient might take into consideration the loss of welfare benefits for a limited period of time if he changes his residence. Not only is this burden of uncertain degree, but appellees themselves assert there is evidence that few welfare recipients have in fact been deterred by residence requirements. . . .

. . . . One fact which does emerge with clarity from the legislative history is Congress' belief that a program of cooperative federalism combining federal aid with enhanced state participation would result in an increase in the scope of welfare programs and level of benefits. . . . Our cases require only that Congress have a rational basis for finding that a chosen regulatory scheme is necessary to the furtherance of interstate commerce. See, e. g., *Katzenbach v. McClung* (1964); *Wickard v. Filburn* (1942). . . .

Appellees suggest, however, that Congress was not motivated by rational considerations. Residence requirements are imposed, they insist, for the illegitimate purpose of keeping poor people from migrating. Not only does the legislative history point to an opposite conclusion, but it also must be noted that "into the motives which induced members of Congress to [act] . . . this Court may not enquire." *Arizona v. California* (1931). We do not attribute an impermissible purpose to Congress if the result would be to strike down an otherwise valid statute. . . . Since the congressional decision is rational and the restriction on travel insubstantial, I conclude that residence requirements can be imposed by Congress as an exercise of its power to control interstate commerce consistent with the constitutionally guaranteed right to travel.

. . . . Assuming that the constitutionality of § 402 (b) is properly treated by the Court, the cryptic footnote in *Katzenbach v. Morgan*, 384 U.S. 641, 651-652, n. 10 (1966), does not support its conclusion. Footnote 10 indicates that Congress is without power to undercut the equal-protection guarantee of racial equality in the guise of implementing the Fourteenth Amendment. I do not mean to suggest otherwise. However, I do not understand this footnote to operate as a limitation upon Congress' power to further the flow of interstate commerce by reasonable residence requirements. Although the Court dismisses § 402 (b) with the remark that Congress cannot authorize the States to violate equal protection, I believe that the dispositive issue is whether under its commerce power Congress can impose residence requirements.

Nor can I understand the Court's implication that other state residence requirements such as those employed in determining eligibility to vote do not present constitutional questions. . . . If a State would violate equal protection by denying welfare benefits to those who have recently moved interstate, then it

would appear to follow that equal protection would also be denied by depriving those who have recently moved interstate of the fundamental right to vote. There is nothing in the opinion of the Court to explain this dichotomy. . . .

The era is long past when this Court under the rubric of due process has reviewed the wisdom of a congressional decision that interstate commerce will be fostered by the enactment of certain regulations. Speaking for the Court in *Helvering v. Davis* (1937), Mr. Justice Cardozo said of another section of the Social Security Act:

"Whether wisdom or unwisdom resides in the scheme of benefits set forth . . . is not for us to say. The answer to such inquiries must come from Congress, not the courts. Our concern here, as often, is with power, not with wisdom."

I am convinced that Congress does have power to enact residence requirements of reasonable duration or to authorize the States to do so and that it has exercised this power.

The Court's decision reveals only the top of the iceberg. Lurking beneath are the multitude of situations in which States have imposed residence requirements including eligibility to vote, to engage in certain professions or occupations or to attend a state-supported university. Although the Court takes pains to avoid acknowledging the ramifications of its decision, its implications cannot be ignored. I dissent.

MR. JUSTICE HARLAN, dissenting.

. . . .

In upholding the equal protection argument, the Court has applied an equal protection doctrine of relatively recent vintage: the rule that statutory classifications which either are based upon certain "suspect" criteria or affect "fundamental rights" will be held to deny equal protection unless justified by a "compelling" governmental interest.

The "compelling interest" doctrine, which today is articulated more explicitly than ever before, constitutes an increasingly significant exception to the long-established rule that a statute does not deny equal protection if it is rationally related to a legitimate governmental objective. . . .

I think that this branch of the "compelling interest" doctrine is sound when applied to racial classifications, for historically the Equal Protection Clause was largely a product of the desire to eradicate legal distinctions founded upon race. However, I believe that the more recent extensions have been unwise. For the reasons stated in my dissenting opinion in *Harper v. Virginia Bd. of Elections*, I do not consider wealth a "suspect" statutory criterion. And when, as in *Williams v. Rhodes*, and the present case, a classification is based upon the exercise of rights guaranteed against state infringement by the Federal Constitution, then there is no need for any resort to the Equal Protection Clause; in such instances, this Court may properly and straightforwardly invalidate any undue burden upon those rights under the Fourteenth Amendment's Due Process Clause.

The second branch of the "compelling interest" principle is even more troublesome. For it has been held that a statutory classification is subject to the "compelling interest" test if the result of the classification may be to affect a "fundamental right," regardless of the basis of the classification. . . .

I think this branch of the "compelling interest" doctrine particularly unfortunate and unnecessary. It is unfortunate because it creates an exception which threatens to swallow the standard equal protection rule. Virtually every state statute affects important rights. This Court has repeatedly held, for example, that the traditional equal protection standard is applicable to statutory classifications affecting such fundamental matters as the right to pursue a particular occupation, the right to receive greater or smaller wages or to work more or less hours, and the right to inherit property. Rights such as these are in principle indistinguishable from those involved here, and to extend the "compelling interest" rule to all cases in which such rights are affected would go far toward making this Court a "super-legislature." This branch of the doctrine is also unnecessary. When the right affected is one assured by the Federal Constitution, any infringement can be dealt with under the Due Process Clause. But when a statute affects only matters

not mentioned in the Federal Constitution and is not arbitrary or irrational, I must reiterate that I know of nothing which entitles this Court to pick out particular human activities, characterize them as "fundamental," and give them added protection under an unusually stringent equal protection test.

....

.... In light of this undeniable relation of residence requirements to valid legislative aims, it cannot be said that the requirements are "arbitrary" or "lacking in rational justification." Hence, I can find no objection to these residence requirements under the Equal Protection Clause of the Fourteenth Amendment or under the analogous standard embodied in the Due Process Clause of the Fifth Amendment.

....

.... I do not minimize the importance of the right to travel interstate. However, the impact of residence conditions upon that right is indirect and apparently quite insubstantial. On the other hand, the governmental purposes served by the requirements are legitimate and real, and the residence requirements are clearly suited to their accomplishment. . . .

I conclude with the following observations. Today's decision, it seems to me, reflects to an unusual degree the current notion that this Court possesses a peculiar wisdom all its own whose capacity to lead this Nation out of its present troubles is contained only by the limits of judicial ingenuity in contriving new constitutional principles to meet each problem as it arises. For anyone who, like myself, believes that it is an essential function of this Court to maintain the constitutional divisions between state and federal authority and among the three branches of the Federal Government, today's decision is a step in the wrong direction. . . .

IV. SEPARATION OF POWERS

Separation of powers issues became more central to American constitutional politics after 1968. Richard Nixon's election began a period of divided government, when increasingly conservative Republican presidents faced increasingly liberal Democratic congresses. Nixon maintained that the president had broad powers to act unilaterally when making both foreign and domestic policy. His decisions to expand the military conflict in Southeast Asia and impound funds appropriated by Congress were aggressively challenged by both national legislators and litigants. The results of the political crisis that led to Watergate were ambiguous. On the one hand, President Nixon was forced to resign, the Supreme Court rejected his broad claims of executive privilege in *United States v. Nixon* and his efforts to impound federal funds in *United States v. Train*, and the War Powers Act of 1973 limited presidential power to engage in military hostilities abroad. On the other hand, the War Powers Act also recognized an executive authority to initiate military combat that many liberals thought unconstitutional and the Supreme Court, when rejected President Nixon's more extreme claims, did give constitutional sanction to both executive privilege and executive immunity. Most important, the Nixon impeachment did not end the era of the imperial presidency. Both Republicans and Democrats who followed would seek to build on the constitutional foundations of the New Deal/Great Society presidency. By the time Ronald Reagan took office, presidents were as likely to wear wigs as espouse William Howard Taft's vision of the passive presidency.

Presidents have asserted that the presence of military conflict or an international crisis expands national and executive power in two ways. First, New Deal/Great Society presidents have asserted the right to take unilateral actions during times of military conflict that they admit would normally be unconstitutional. The Nixon Administration, for example, insisted that the Vietnam War justified that administration's internal surveillance policies. Second, New Deal/Great Society presidents have insisted that war expands national powers in general, that presidential actions that would violate individual rights in peace do not violate rights in wartime. The Roosevelt Administration made such claims when justifying executive orders providing curfews and the eventual resettlement of Japanese-Americans. For the most part, both Congress and the Courts either accepted or did not interfere with Roosevelt's assertions of executive authority during World War II, the one exception being *Ex Parte Endo*, which declared unconstitutional a measure the administration was abandoning. Congress did refuse to grant Truman the power to seize property used to manufacture munitions and the Supreme Court supported that refusal in the *Youngstown* case. Both Congress and the courts more aggressively policed executive power once Richard Nixon took office. Democrats in Congress attempted to restrict the powers Nixon thought necessary for fighting Communism. The Supreme Court further limited executive authority to combat subversive activities in *United States v. United States District Court*. Wartime can lead government officials to curb rights, but war has also been a time for acknowledging and expanding rights.

The end of American isolation in the 1930s prompted renewed calls for increased executive power which would enable effective national action. Executive action seems particularly pressing when the United States was involved in foreign combat, which was often the case during the New Deal/Great Society Era. Mark Brandon observes that the United States during the twentieth century was involved in a declared war, an undeclared war or a significant military action in all but six years.¹ These ongoing military hostilities raised numerous constitutional questions that, by the end of the New Deal/Great Society Era were threatening constitutional crises. The most important of these was presidential power to send troops into foreign combat in the absence of a declared war or in the absence of congressional approval. Other questions concerned how military action abroad influenced public policy at home. In particular, Presidents Roosevelt, Truman, and Nixon all claimed that their power as commander-in-chief justified taking unilateral action domestically without congressional approval.

Judicial efforts to limit presidential power were largely limited to circumstances when the justices perceived that Congress had affirmatively rejected the presidential authority in question. Although some

¹ Mark E. Brandon, War and American Constitutional Order," *Vanderbilt Law Review* 56 (2003): 1815, 1820.

language in concurring opinions in the *Youngstown* case suggested greater limits on unilateral executive action, the justices for the most part insisted that Congress clearly disapprove of presidential action before setting constitutional limits. Congressional efforts to assert power during the middle of the twentieth century tended to be intermittent, symbolic or ambiguous. For the most part Congress either acquiesced to Roosevelt Administration policy during World War II or engaged in relatively ineffective grumbling about executive aggrandizement. The national legislature was far more assertive during the Vietnam War, as a Democratic legislature increased controlled by anti-war liberals vigorously condemned President Richard Nixon's military policies in southeast Asia. Whether the end result of that constitutional dispute, the War Powers Act of 1973, increased or decreased executive authority was difficult to assess.

A. PRESIDENTIAL WAR AND FOREIGN AFFAIRS POWERS

1. POWER TO SEND TROOPS INTO FOREIGN COMBAT

Leonard C. Meeker, *The Legality of the United States Participation in the Defense of Viet-Nam* (1966)¹

The Meeker memo became the starting point for defenders of the presidential direction of the war in Vietnam, not only in the Johnson administration but also in the Nixon administration and in Congress itself. In 1966, State Department Legal Advisor Leonard Meeker produced a memorandum for submission to the Senate Committee on Foreign Relations explicating the legal basis for the Vietnam War. The memo was wide-ranging, primarily focusing on international law, American treaty obligations to Vietnam, and the 1964 Gulf of Tonkin Resolutions authorizing the use of military force in Vietnam. It included, however, a constitutional analysis of presidential war powers that later became influential as Congress became disillusioned with the war and began to debate its own proper role in authorizing or ending the use of military force by the United States.

. . . .

Under the Constitution, the President, in addition to being Chief Executive, is Commander in Chief of the Army and Navy. He holds the prime responsibility for the conduct of United States foreign relations. These duties carry very broad powers, including the power to deploy American forces abroad and commit them to military operations when the President deems such action necessary to maintain the security and defense of the United States.

At the Federal Constitutional Convention in 1787, it was originally proposed that Congress have the power "to make war." There were objections that legislative proceedings were too slow for this power to be vested in Congress; it was suggested that the Senate might be a better repository. Madison and Gerry then moved to substitute "to declare war" for "to make war," "leaving to the Executive the power to repel sudden attacks." It was objected that this might make it too easy for the Executive to involve the nation in war, but the motion carried with but one dissenting vote.

In 1787 the world was a far larger place, and the framers probably had in mind attacks upon the United States. In the 20th century, the world has grown much smaller. An attack on a country far from our shores can impinge directly on the nation's security. . . .

Since the Constitution was adopted there have been at least 125 instances in which the President has ordered the armed forces to take action or maintain positions abroad without obtaining prior congressional authorization, starting with the "undeclared war" with France (1798-1800). For example, President Truman ordered 250,000 troops to Korea during the Korean war of the early 1950's. President Eisenhower dispatched 14,000 troops to Lebanon in 1958.

¹ Excerpted from *Congressional Record*, 91st Cong., 2nd sess., vol. 116, pt. 15 (June 23, 1970), 20972-20977.

The Constitution leaves to the President the judgment to determine whether the circumstances of a particular armed attack are so urgent and the potential consequences so threatening to the security of the United States that he should act without formally consulting Congress.

....

Over a very long period of our history, practice and precedent have confirmed the constitutional authority to engage United States forces in hostilities without a declaration of war. . .

James Madison, one of the leading framers of the Constitution, and Presidents John Adams and Jefferson all construed the Constitution, in their official actions during the early years of the Republic, as authorizing the United States to employ its armed forces abroad in hostilities in the absence of any congressional declaration of war. Their views and actions constitute persuasive evidence as to the meaning and effect of the Constitution. History has accepted the interpretation that was placed on the Constitution by the early Presidents and Congresses in regard to the lawfulness of hostilities without a declaration of war. The instances of such actions in our history are numerous.

....

It may be suggested that a declaration of war is the only available constitutional process by which congressional support can be made effective for the use of United States armed forces in combat abroad. But the Constitution does not insist on any rigid formalism. It gives Congress a choice of ways in which to exercise its powers. In the case of Viet-Nam the Congress has supported the determination of the President by the Senate's approval of the SEATO treaty, the adoption of the joint resolution of August 10, 1964, and the enactment of the necessary authorization and appropriations.

....

J. William Fulbright, *Congress and Foreign Policy* (1967)¹

J. William Fulbright, chairman of the Senate Foreign Relations Committee from 1959 through 1974, had ushered the 1964 Gulf of Tonkin Resolution through the Senate, formally launching the Vietnam War. Within a few years, however, Fulbright was pressing for a more active congressional role in the making of foreign policy. The Committee held numerous hearings and issued several reports highlighting what Fulbright viewed as an abdication by Congress of its constitutional role in foreign policy generally and the war powers specifically. Even as he raised those concerns, however, Fulbright and others in Congress struggled with what the practical congressional response could be to the perceived imbalance of power given the nature of American involvement in the world in the latter half of the twentieth century. Those efforts eventually lead to the passage of the War Powers Resolution in 1973, but in the late 1960s Fulbright pressed the National Commitments Resolution, which argued that presidents should not promise or commit American resources and support to foreign countries without active congressional approval.

....

The authority of Congress in foreign policy has been eroding since 1940, the year of America's emergence as a major and permanent participant in world affairs, and the erosion has created a significant constitutional imbalance. Many if not most of the major decisions of American foreign policy in this era have been executive decisions. . . . Since World War II the United States has fought two wars without benefit of Congressional declaration and has engaged in numerous small-scale military activities—in the Middle East, for example, in 1958, and in the Congo on several occasions—without meaningful consultation with the Congress.

New devices have been invented which have the appearance but not the reality of Congressional participation in the making of foreign policy. . . . One is the joint resolution; another is the congressional briefing session. Neither is a satisfactory occasion for deliberation or the rendering of advice; both are

¹ Excerpted from *Congressional Record*, 90th Cong., 1st sess., vol. 113, pt. 15 (July 31, 1967), 20702-20706.

designed to win consent without advice. Their principal purpose is to put the Congress on record in support of some emergency action at a moment when it would be most difficult to withhold support and, therefore, to spare the executive subsequent controversy or embarrassment.

The cause of the constitutional imbalance is crisis. I do not believe that the executive has willfully usurped the constitutional authority of Congress; nor do I believe that the Congress has knowingly given away its traditional authority, although some of its members—I among them, I regret to say—have sometimes shown excessive regard for the executive freedom of action. In the main, however, it has been circumstance rather than design which has given the executive its great predominance in foreign policy. The circumstance has been crisis, an entire era of crisis in which urgent decisions have been required again and again, decisions of a kind that the Congress is ill-equipped to make with what has been thought to be the requisite speed. The President has the means at his disposal for prompt action; the Congress does not. . . . (I might add that I think there have been many occasions when the need for immediate action has been exaggerated, resulting in mistakes which might have been avoided by greater deliberation.)

The question before us is whether and how the constitutional balance can be restored It is improbable that we will soon return to a kind of normalcy in the world, and impossible that the United States will return to its pre-1940 isolation. How then can we in the Congress do what the Constitution does not simply ask of us, but positively requires of us, under precisely the conditions which have resulted in the erosion of our authority? It is not likely that the President . . . will take the initiative in curtailing his own freedom of action and restoring the constitutional prerogative—that would be too much to expect of him. It is up to the Congress . . . to re-evaluate its role and to re-examine its proper responsibilities.

. . . .

Prior to redefining our responsibilities, it is important for us to distinguish clearly between two kinds of power, that pertaining to the shaping of foreign policy, to its direction and purpose and philosophy, and that pertaining to the day-to-day conduct of foreign policy. The former is the power which the Congress has the duty to discharge, diligently, vigorously and continuously; the latter, by and large calling for specialized skills, is best left to the executive and its administrative arms. . . .

Our performance in recent years has, unfortunately, been closer to the reverse. We have tended to snoop and pry in matters of detail, interfering in the handling of specific problems in specific places which we happen to chance upon, and, worse still, harassing individuals in the executive departments, thereby undermining their morale and discouraging the creative initiative which is so essential to a successful foreign policy. At the same time we have resigned from our responsibility in the shaping of policy and the defining of its purposes, submitting too easily to the pressures of crisis, giving away things that are not ours to give: the war power of Congress, the treaty power of the Senate and the broader advice and consent power.

. . . .

Permit me to recall some recent crises and the extremely limited role of the Senate in dealing with them. . . . At the time of the Cuban missile crisis in October 1962, many of us were in our home states campaigning for re-election. . . . [N]one of us, so far as I know, were given official information until after the Administration had made its policy decisions. President Kennedy called the congressional leadership for a meeting at the White House on Monday, October 22, 1962. The meeting lasted from about 5 p.m. to about 6 p.m.; at 7 p.m. President Kennedy went on national television to announce to the country the decisions which had of course been made before the Congressional leadership were called in. The meeting was not a consultation but a briefing, a kind of courtesy or ceremonial occasion for the leadership of the Congress. At that meeting, the senior Senator from Georgia and I made specific suggestions as to how the crisis might be met; we did so in the belief that we had a responsibility to give the President our best advice on the basis of the limited facts then at our command. With apparent reference to our temerity in expressing our views, Theodore Sorensen in his book on President Kennedy described this occasion as “the only sour note” in an otherwise flawless process of decision making. It is

not exaggeration to say that on the one occasion when the world has gone to the very brink of nuclear war . . . the Congress took no part whatever in the shaping of American policy.

....

On the Senate floor as well as in the Foreign Relations Committee, vigorous and responsible discussion of our foreign relations is essential both to the shaping of wise foreign policy and to the sustenance of our constitutional system. The criteria of responsible and constructive debate are restraint in matters of detail and the day-to-day conduct of foreign policy, combined with diligence and energy in discussing the values, direction and purposes of American foreign policy. Just as it is an excess of democracy when Congress is overly aggressive in attempting to supervise the conduct of foreign policy, it is a failure of democracy when it fails to participate actively in determining policy objectives and in the making of significant decisions.

....

The War Powers Act of 1973

In 1973, Congress passed the War Powers Resolution over President Richard Nixon's veto. For several years, Congress had been debating whether and by what means the legislature should take a more active role in setting foreign policy and initiating military conflict. The continuation and expansion of the Vietnam War, even after congressional sentiment had turned against it, and the weakness of the Nixon administration in the midst of the Watergate scandal and in the final days before his resignation from office spurred Congress to pass the Resolution. The War Powers Resolution was a compromise between those who favored congressional supremacy in this area and those who simply favored greater and more effective congressional participation in the policymaking process. The Resolution called for presidential "consultation" "in every possible instance" with Congress when American troops would be placed in harm's way, a requirement for reporting to Congress on the necessity and authority for presidential action when hostilities did occur, and requiring the president to disengage American forces if Congress either passed a joint resolution calling for such disengagement or failed to authorize the continued use of military force.

Although presidents have formally complied with the terms of the Resolution, they have also consistently maintained that they are not constitutionally required to do so. Congress has provided resolutions authorizing major military operations such as the Iraq war, but other, smaller scale military actions such as the invasion of Grenada, Haiti and Panama did not have prior congressional authorization. Such actions did not, in the words of President Clinton's assistant attorney general Walter Dellinger, rise to the level of "'war' in the constitutional sense" given their "anticipated nature, scope and duration."¹

Public Law 93-148

....

SEC. 2. (a) It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.

SEC. 2. (b) Under article I, section 8, of the Constitution, it is specifically provided that the Congress shall have the power to make all laws necessary and proper for carrying into execution, not only its own powers but also all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof.

¹ Walter Dellinger, "Deployment of United States Armed Forces into Haiti, September 27, 1994," GET CITE

SEC. 2. (c) The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

SEC. 3. The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situation where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.

SEC. 4. (a) In the absence of a declaration of war, in any case in which United States Armed Forces are introduced--

(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;

(2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or

(3) (A) the circumstances necessitating the introduction of United States Armed Forces;

(B) the constitutional and legislative authority under which such introduction took place; and

(C) the estimated scope and duration of the hostilities or involvement.

SEC. 4. (b) The President shall provide such other information as the Congress may request in the fulfillment of its constitutional responsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad.

Sec. 4. (c) Whenever United States Armed Forces are introduced into hostilities or into any situation described in subsection (a) of this section, the President shall, so long as such armed forces continue to be engaged in such hostilities or situation, report to the Congress periodically on the status of such hostilities or situation as well as on the scope and duration of such hostilities or situation, but in no event shall he report to the Congress less often than once every six months.

....

SEC. 5. (b) Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 4(a)(1), whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.

SEC. 5. (c) Notwithstanding subsection (b), at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.

....

SEC. 8. (a) Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred-- (1) from any provision of law (whether or not in effect before the date of the enactment of this joint resolution), including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution; or (2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into

such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution.

....

SEC. 8. (d) Nothing in this joint resolution--

(1) is intended to alter the constitutional authority of the Congress or of the President, or the provision of existing treaties; or

(2) shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this joint resolution.

Richard Nixon, Veto of the War Powers Resolution (1973)¹

President Nixon had threatened to veto the War Powers Resolution, but by the time it was passed he was mired in the Watergate scandal and the Vietnam War was regarded as a costly failure exacerbated by an unresponsive executive branch. Nixon was faced with Democratic majorities in both the House and the Senate throughout his time as president, but Congress overrode his veto of the War Powers Resolution with bipartisan support for the bill.

To the House of Representatives:

I hereby return without my approval House Joint Resolution 542—the War Powers Resolution. While I am in accord with the desire of the Congress to assert its proper role in the conduct of our foreign affairs, the restrictions which this resolution would impose upon the authority of the President are both unconstitutional and dangerous to the interests of our Nation.

The proper roles of the Congress and the Executive in the conduct of foreign affairs have been debated since the founding of our country. Only recently, however, has there been a serious challenge to the wisdom of the Founding Fathers in choosing not to draw a precise and detailed line of demarcation between the foreign policy powers of the two branches.

....

CLEARLY UNCONSTITUTIONAL

House Joint Resolution 542 would attempt to take away, by a mere legislative act, authorities which the President has properly exercised under the Constitution for almost 200 years. One of its provisions would automatically cut off certain authorities after sixty days unless the Congress extended them. Another would allow the Congress to eliminate certain authorities merely by the passage of a concurrent resolution—an action which does not normally have the force of law, since it denies the President his constitutional role in approving legislation.

I believe that both these provisions are unconstitutional. The only way in which the constitutional powers of a branch of the Government can be altered is by amending the Constitution—and any attempt to make such alterations by legislation alone is clearly without force.

UNDERMINING OUR FOREIGN POLICY

¹ Excerpted from *Public Papers of the Presidents of the United States: Richard Nixon, 1973* (Washington, D.C.: Government Printing Office, 1975), 893-895.

. . . I am also deeply disturbed by the practical consequences of this resolution. For it would seriously undermine this Nation's ability to act decisively and convincingly in times of international crisis. . . .

FAILURE TO REQUIRE POSITIVE CONGRESSIONAL ACTION

I am particularly disturbed by the fact that certain of the President's constitutional powers as Commander in Chief of the Armed Forces would terminate automatically under this resolution 60 days after they were invoked. . . . In effect, the Congress is here attempting to increase its policymaking role through a provision that it requires it to take absolutely no action at all.

In my view, the proper way for the Congress to make known its will on such foreign policy questions is through a positive action, with full debate on the merits of the issue and with each member taking the responsibility of casting a yes or no vote after considering those merits. The authorization and appropriations process represents one of the ways in which such influence can be exercised. . . . [The joint resolution] would give every future Congress the ability to handcuff every future President merely by doing nothing and sitting still. In my view, one cannot become a responsible partner unless one is prepared to take responsible action.

2. PRESIDENTIAL POWER DURING TIMES OF MILITARY CONFLICT

United States v. United States District Court, 407 U.S. 297 (1972) (the "Keith case")

Robert Plamondon and two co-defendants were charged with the dynamite bombing of a CIA office in Ann Arbor, Michigan. During pretrial motions it was revealed that the government had wiretapped the defendants without first obtaining a search warrant. Plamondon's lawyers argued that this warrantless surveillance violated the Fourth Amendment and that any other evidence obtained as a result of this illegal search should be excluded from the trial. In response, the Justice Department – headed by Attorney General John Mitchell – claimed that the surveillance was lawful as a reasonable exercise of the President's independent Article II power to protect the national security, and that any information so obtained did not have to be disclosed to the defendants. The Nixon administration also relied, in part, on Title III of the Omnibus Crime Control and Safe Streets Act of 1968, which contained a provision stating that nothing in that law limits the President's constitutional power to protect against the overthrow of the government or against "any other clear and present danger to the structure or existence of the government."

District Court Judge Damon Keith disagreed and ordered the government to disclose the information. The government appealed Judge Keith's ruling (often known as the "Keith case") but its position was unanimously rejected by the Sixth Circuit Court of Appeals. It fared no better before the Supreme Court. In an 8-0 opinion (with newly appointed Justice Rehnquist not participating due to his prior affiliation with the Justice Department) the justices found that the government's internal security concerns did not justify departure from the customary requirement of judicial approval prior to initiation of a search or surveillance. The justices did not address the question of whether similar requirements were necessary for "foreign surveillance."

MR. JUSTICE POWELL delivered the opinion of the Court.

The issue before us is an important one for the people of our country and their Government. It involves the delicate question of the President's power, acting through the Attorney General, to authorize electronic surveillance in internal security matters without prior judicial approval. Successive Presidents

for more than one-quarter of a century have authorized such surveillance in varying degrees, without guidance from the Congress or a definitive decision of this Court. This case brings the issue here for the first time. Its resolution is a matter of national concern, requiring sensitivity both to the Government's right to protect itself from unlawful subversion and attack and to the citizen's right to be secure in his privacy against unreasonable Government intrusion....

During pretrial proceedings, the defendants moved to compel the United States to disclose certain electronic surveillance information and to conduct a hearing to determine whether this information "tainted" the evidence on which the indictment was based or which the Government intended to offer at trial. In response, the Government filed an affidavit of the Attorney General, acknowledging that its agents had overheard conversations in which Plamondon had participated....

....

Together with the elaborate surveillance requirements in Title III, there is the following proviso, 18 U. S. C. § 2511 (3):

"Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U. S. C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. *Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government....*" (Emphasis supplied.)

The Government relies on § 2511 (3). It argues that "in excepting national security surveillances from the Act's warrant requirement Congress recognized the President's authority to conduct such surveillances without prior judicial approval." The section thus is viewed as a recognition or affirmation of a constitutional authority in the President to conduct warrantless domestic security surveillance such as that involved in this case.

We think the language of § 2511 (3), as well as the legislative history of the statute, refutes this interpretation....

Section 2511 (3) ... merely provides that the Act shall not be interpreted to limit or disturb such power as the President may have under the Constitution. In short, Congress simply left presidential powers where it found them....

It is important at the outset to emphasize the limited nature of the question before the Court. This case raises no constitutional challenge to electronic surveillance as specifically authorized by Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Nor is there any question or doubt as to the necessity of obtaining a warrant in the surveillance of crimes unrelated to the national security interest. Further, the instant case requires no judgment on the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country. The Attorney General's affidavit in this case states that the surveillances were "deemed necessary to protect the nation from attempts of *domestic organizations* to attack and subvert the existing structure of Government" (emphasis supplied). There is no evidence of any involvement, directly or indirectly, of a foreign power....

We begin the inquiry by noting that the President of the United States has the fundamental duty, under Art. II, § 1, of the Constitution, to "preserve, protect and defend the Constitution of the United States." Implicit in that duty is the power to protect our Government against those who would subvert or overthrow it by unlawful means. In the discharge of this duty, the President -- through the Attorney General -- may find it necessary to employ electronic surveillance to obtain intelligence information on the plans of those who plot unlawful acts against the Government....

But a recognition of these elementary truths does not make the employment by Government of electronic surveillance a welcome development -- even when employed with restraint and under judicial supervision. There is, understandably, a deep-seated uneasiness and apprehension that this capability will be used to intrude upon cherished privacy of law-abiding citizens. We look to the Bill of Rights to

safeguard this privacy. Though physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed, its broader spirit now shields private speech from unreasonable surveillance. Our decision in *Katz* refused to lock the Fourth Amendment into instances of actual physical trespass. Rather, the Amendment governs "not only the seizure of tangible items, but extends as well to the recording of oral statements . . . without any 'technical trespass under . . . local property law.'" That decision implicitly recognized that the broad and unsuspected governmental incursions into conversational privacy which electronic surveillance entails necessitate the application of Fourth Amendment safeguards.

National security cases, moreover, often reflect a convergence of First and Fourth Amendment values not present in cases of "ordinary" crime. . . . History abundantly documents the tendency of Government -- however benevolent and benign its motives -- to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect "domestic security." . . .

The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official eavesdropping deter vigorous citizen dissent and discussion of Government action in private conversation. For private dissent, no less than open public discourse, is essential to our free society....

As the Fourth Amendment is not absolute in its terms, our task is to examine and balance the basic values at stake in this case: the duty of Government to protect the domestic security, and the potential danger posed by unreasonable surveillance to individual privacy and free expression. If the legitimate need of Government to safeguard domestic security requires the use of electronic surveillance, the question is whether the needs of citizens for privacy and free expression may not be better protected by requiring a warrant before such surveillance is undertaken. We must also ask whether a warrant requirement would unduly frustrate the efforts of Government to protect itself from acts of subversion and overthrow directed against it.

. . . .

These Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch. The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates.... The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech....

It is true that there have been some exceptions to the warrant requirement. But those exceptions are few in number and carefully delineated; in general, they serve the legitimate needs of law enforcement officers to protect their own well-being and preserve evidence from destruction. Even while carving out those exceptions, the Court has reaffirmed the principle that the "police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure."

The Government argues that the special circumstances applicable to domestic security surveillances necessitate a further exception to the warrant requirement. It is urged that the requirement of prior judicial review would obstruct the President in the discharge of his constitutional duty to protect domestic security.... It is said that this type of surveillance should not be subject to traditional warrant requirements which were established to govern investigation of criminal activity, not ongoing intelligence gathering.

The Government further insists that courts "as a practical matter would have neither the knowledge nor the techniques necessary to determine whether there was probable cause to believe that surveillance was necessary to protect national security." These security problems, the Government contends, involve "a large number of complex and subtle factors" beyond the competence of courts to evaluate....

We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in domestic security cases....

Nor do we believe prior judicial approval will fracture the secrecy essential to official intelligence gathering. The investigation of criminal activity has long involved imparting sensitive information to judicial officers who have respected the confidentialities involved. Judges may be counted upon to be especially conscious of security requirements in national security cases....

Thus, we conclude that the Government's concerns do not justify departure in this case from the customary Fourth Amendment requirement of judicial approval prior to initiation of a search or surveillance. Although some added burden will be imposed upon the Attorney General, this inconvenience is justified in a free society to protect constitutional values....

The judgment of the Court of Appeals is hereby
Affirmed

MR. JUSTICE DOUGLAS, concurring.

While I join in the opinion of the Court, I add these words in support of it.

This is an important phase in the campaign of the police and intelligence agencies to obtain exemptions from the Warrant Clause of the Fourth Amendment. For, due to the clandestine nature of electronic eavesdropping, the need is acute for placing on the Government the heavy burden to show that "exigencies of the situation [make its] course imperative." Other abuses, such as the search incident to arrest, have been partly deterred by the threat of damage actions against offending officers, the risk of adverse publicity, or the possibility of reform through the political process. These latter safeguards, however, are ineffective against lawless wiretapping and "bugging" of which their victims are totally unaware. Moreover, even the risk of exclusion of tainted evidence would here appear to be of negligible deterrent value inasmuch as the United States frankly concedes that the primary purpose of these searches is to fortify its intelligence collage rather than to accumulate evidence to support indictments and convictions. If the Warrant Clause were held inapplicable here, then the federal intelligence machine would literally enjoy unchecked discretion.

Here, federal agents wish to rummage for months on end through every conversation, no matter how intimate or personal, carried over selected telephone lines, simply to seize those few utterances which may add to their sense of the pulse of a domestic underground.

....

That "domestic security" is said to be involved here does not draw this case outside the mainstream of Fourth Amendment law. Rather, the recurring desire of reigning officials to employ dragnet techniques to intimidate their critics lies at the core of that prohibition. For it was such excesses as the use of general warrants and the writs of assistance that led to the ratification of the Fourth Amendment....

...[W]e are currently in the throes of another national seizure of paranoia, resembling the hysteria which surrounded the Alien and Sedition Acts, the Palmer Raids, and the McCarthy era. Those who register dissent or who petition their governments for redress are subjected to scrutiny by grand juries, by the FBI, or even by the military. Their associates are interrogated. Their homes are bugged and their telephones are wiretapped. They are befriended by secret government informers. Their patriotism and loyalty are questioned. Senator Sam Ervin, who has chaired hearings on military surveillance of civilian dissidents, warns that "it is not an exaggeration to talk in terms of hundreds of thousands of . . . dossiers."... More than our privacy is implicated. Also at stake is the reach of the Government's power to intimidate its critics.

When the Executive attempts to excuse these tactics as essential to its defense against internal subversion, we are obliged to remind it, without apology, of this Court's long commitment to the preservation of the Bill of Rights from the corrosive environment of precisely such expedients....

...We have as much or more to fear from the erosion of our sense of privacy and independence by the omnipresent electronic ear of the Government as we do from the likelihood that fomenters of domestic upheaval will modify our form of governing.

MR. JUSTICE WHITE, concurring.

...I would affirm the Court of Appeals but on the statutory ground urged by defendant-respondents without reaching or intimating any views with respect to the constitutional issue decided by both the District Court and the Court of Appeals....

.... Because I conclude that on the record before us the surveillance undertaken by the Government in this case was illegal under the statute itself, I find it unnecessary, and therefore improper, to consider or decide the constitutional questions which the courts below improvidently reached....

B. EXECUTIVE PRIVILEGE

United States v. Nixon, 418 U.S. 683 (1974)

The crisis known as Watergate arose as a result of an investigation into potential White House involvement in the burglary and attempted bugging of the Democratic Party's headquarters at the Watergate Hotel on June 17, 1972. This investigation led to inquiries into an alleged secret White House "Special Investigations Unit" known as the "Plumbers." This group was made up of members and former members of America's intelligence community (including former CIA official E. Howard Hunt and former FBI official G. Gordon Liddy) and was created in response to the release of the Pentagon Papers. Their initial job (as plumbers) was to plug leaks; however, before long members of the plumbers were recruited to engage in a variety of off-the-books campaign activities, including the sabotage of Ed Muskie's presidential campaign, the identification and harassment of people considered White House "enemies," the mugging of demonstrators at Republican events, and conspiracies to obstruct justice. It was later learned that the plumbers was funded by millions of dollars of secret contributions to Nixon's reelection campaign, known as CREEP (the Committee to Reelect the President).

It did not take long before some of Nixon's top aides were implicated in the burglary and the subsequent pre-election cover-up of White House involvement. As District Judge John Sirica was busy presiding over the trial of the Watergate burglars, the Senate established a select committee, chaired by Sam Ervin, to investigate the Watergate affair.

In testimony before this committee it was revealed that Nixon secretly taped all Oval Office conversations. This revelation prompted the Special Watergate Prosecutor, Archibald Cox, to begin legal proceedings to obtain from the President those tapes that were thought likely to contain evidence important for the prosecution of the suspected Watergate conspirators.

In October 1973 Nixon demanded that Cox drop his quest for the White House tapes. When he refused, Attorney General Richardson was ordered to fire Cox. Both Richardson and his deputy refused, citing promises made during Senate confirmation hearings to respect Cox's independence, and so they too were fired by the third ranking official in the Justice Department, Solicitor General Robert Bork, in what became known as the Saturday Night Massacre.

In response to the political firestorm that followed the massacre, Nixon informed Sirica that nine tapes would be forthcoming. Unfortunately, on the tape that had recorded the first conversation between Nixon and Haldeman after the Watergate break-in, there was an eighteen and a half minute gap which the White House blamed on an innocent mistake made by Nixon's secretary; it was later established that the erasure had been deliberate. One week after Nixon agreed to release these nine (edited) tapes, the House Judiciary Committee began its impeachment inquiry.

In a further attempt to mollify the opposition, Nixon agreed to hire a new Special Prosecutor, Leon Jaworski. Jaworski continued to push for the tapes. Specifically, he wanted an additional 64 tapes to use in his prosecution of Mitchell, Haldeman, and Ehrlichman. Nixon refused to turn over the tapes, claiming that they were protected by executive privilege. Jaworski sought a subpoena from the federal courts compelling the president to turn over the tapes.

U.S. v. Nixon thus raised a classic separation of powers question: How should we balance the president's interest in maintaining the confidentiality of White House conversations against the judiciary's interest in providing due process in a criminal proceeding? Does this issue represent a zero-sum game for these two branches, in the sense that supporting the president's position would make it impossible for the judiciary to carry out its constitutional responsibilities, while (conversely) supporting the judiciary's position would undermine the president's ability to carry out her or his responsibilities?

As you read the opinion, consider the issues that the Court leaves unanswered. Apparently the need for relevant evidence in a criminal proceeding outweighs the general executive interest in confidential advice. What other competing interests might outweigh a general claim of privilege? Should the president be forced to hand over information whenever the Court or Congress requests it and the president asserts only a general interest in executive confidentiality? Is executive confidentiality less weighty than the judiciary's interest in the operation of the criminal justice system but more weighty than a general congressional interest in administrative oversight? Does the judiciary's interest in relevant information extend to all judicial proceedings or simply those that involve high government officials charged with serious criminal offenses? Does an invocation of executive privilege on the grounds of national security always outweigh the competing interests of the other branches? Who decides whether a president's assertion of executive privilege on grounds of national security is legitimate? The president? The Congress? Certain members of Congress? The Courts? Is it properly within the judiciary's sphere of authority to second-guess executive determinations about what will or will not harm national security?

It should be noted that, when the tapes were finally released, they revealed among other things that from the very beginning the president and his top advisers conspired to obstruct justice by arranging for millions of dollars in hush money for the Watergate burglars; that Haldeman intended to use the CIA for political espionage; that Nixon's close friend John Mitchell, the former Attorney General and the head of CREEP, originated the break-in of the Watergate hotel; and that Nixon and his advisers discussed contriving a "national security" justification for the break-in. Four days later, after learning that senators of his own political party were urging him to leave office, Nixon resigned.

Richard Nixon went 1-2 in the Supreme Court on various claims of executive privilege, with two important cases being heard after Nixon left office. In Nixon v. Administrator of General Services (1977), the Supreme Court by a 7-2 vote ruled that Congress could pass rules governing the disposal of Nixon's presidential papers, that a former president could not assert an absolute privilege to keep all presidential papers private. Nixon was more successful when defending against a civil lawsuit by a military analyst, who claimed that he had been illegally fired by the former president in retaliation for his congressional testimony. The Supreme Court by a 5-4 vote in Nixon v. Fitzgerald (1982) asserted that the Constitution vested the president with absolute immunity for "acts in performance of particular functions of his office." "Because of the singular importance of the President's duties," Justice Powell's majority opinion declared, "diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government."

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

...

On March 1, 1974, a grand jury of the United States District Court for the District of Columbia returned an indictment charging seven named individuals with various offenses, including conspiracy to defraud the United States and to obstruct justice. Although he was not designated as such in the indictment, the grand jury named the President, among others, as an unindicted coconspirator. On April 18, 1974, upon motion of the Special Prosecutor, a subpoena *duces tecum* was issued pursuant to Rule 17

(c) to the President by the United States District Court and made returnable on May 2, 1974. This subpoena required the production, in advance of the September 9 trial date, of certain tapes, memoranda, papers, transcripts, or other writings relating to certain precisely identified meetings between the President and others. . . .

[W]e turn to the claim that the subpoena should be quashed because it demands "confidential conversations between a President and his close advisors that it would be inconsistent with the public interest to produce." The first contention is a broad claim that the separation of powers doctrine precludes judicial review of a President's claim of privilege. The second contention is that if he does not prevail on the claim of absolute privilege, the court should hold as a matter of constitutional law that the privilege prevails over the subpoena *duces tecum* .

In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. The President's counsel, as we have noted, reads the Constitution as providing an absolute privilege of confidentiality for all Presidential communications. Many decisions of this Court, however, have unequivocally reaffirmed the holding of *Marbury v. Madison*, that "[it] is emphatically the province and duty of the judicial department to say what the law is." . . .

Notwithstanding the deference each branch must accord the others, the "judicial Power of the United States" vested in the federal courts by Art. III, § 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government. *The Federalist*, No. 47. . . .

In support of his claim of absolute privilege, the President's counsel urges two grounds, one of which is common to all governments and one of which is peculiar to our system of separation of powers. The first ground is the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process. Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.

The second ground asserted by the President's counsel in support of the claim of absolute privilege rests on the doctrine of separation of powers. Here it is argued that the independence of the Executive Branch within its own sphere insulates a President from a judicial subpoena in an ongoing criminal prosecution, and thereby protects confidential Presidential communications.

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

The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III. In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution

sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence.

"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." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S., at 635 (Jackson, J., concurring).

To read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of "a workable government" and gravely impair the role of the courts under Art. III.

Since we conclude that the legitimate needs of the judicial process may outweigh Presidential privilege, it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch....

The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution....

But this presumptive privilege must be considered in light of our historic commitment to the rule of law. ... We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense....

In this case the President challenges a subpoena served on him as a third party requiring the production of materials for use in a criminal prosecution; he does so on the claim that he has a privilege against disclosure of confidential communications. He does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities....

No case of the Court, however, has extended this high degree of deference to a President's generalized interest in confidentiality. Nowhere in the Constitution, as we have noted earlier, is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based.

The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced.

In this case we must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President's responsibilities against the inroads of such a privilege on the fair administration of criminal justice. The interest in preserving confidentiality is

weighty indeed and entitled to great respect. However, we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution.

On the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.

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

...We now turn to the important question of the District Court's responsibilities in conducting the *in camera* examination of Presidential materials or communications delivered under the compulsion of the subpoena *duces tecum*.

...It is elementary that *in camera* inspection of evidence is always a procedure calling for scrupulous protection against any release or publication of material not found by the court, at that stage, probably admissible in evidence and relevant to the issues of the trial for which it is sought. That being true of an ordinary situation, it is obvious that the District Court has a very heavy responsibility to see to it that Presidential conversations, which are either not relevant or not admissible, are accorded that high degree of respect due the President of the United States. Mr. Chief Justice Marshall, sitting as a trial judge in the *Burr* case, *supra*, was extraordinarily careful to point out that

"[in] no case of this kind would a court be required to proceed against the president as against an ordinary individual."

Marshall's statement cannot be read to mean in any sense that a President is above the law, but relates to the singularly unique role under Art. II of a President's communications and activities, related to the performance of duties under that Article. Moreover, a President's communications and activities encompass a vastly wider range of sensitive material than would be true of any "ordinary individual." It is therefore necessary in the public interest to afford Presidential confidentiality the greatest protection consistent with the fair administration of justice. The need for confidentiality even as to idle conversations with associates in which casual reference might be made concerning political leaders within the country or foreign statesmen is too obvious to call for further treatment. We have no doubt that the District Judge will at all times accord to Presidential records that high degree of deference suggested in *United States v. Burr*, and will discharge his responsibility to see to it that until released to the Special Prosecutor no *in camera* material is revealed to anyone. This burden applies with even greater force to excised material; once the decision is made to excise, the material is restored to its privileged status and should be returned under seal to its lawful custodian.

Since this matter came before the Court during the pendency of a criminal prosecution, and on representations that time is of the essence, the mandate shall issue forthwith.

MR. JUSTICE REHNQUIST took no part in the decision of these cases.

V. JUDICIAL POWER

The Warren Court came to an abrupt end in 1968. Chief Justice Earl Warren, at the age of 77, did not expect to serve through the term of another presidential administration. He had hoped that his successor would be named by his own favorite Robert Kennedy, but Kennedy was killed in the summer of 1968. Instead, Warren saw the next president would likely be his old political rival from California, the Republican Richard Nixon. Worse yet, Nixon was advancing his campaign by specifically criticizing the “activist judges” on the Warren Court. In the midst of the presidential campaign, Warren contacted his ally, President Lyndon Johnson, to inform him that he would resign as soon as a new chief justice was confirmed. Johnson and Warren agreed that Associate Justice Abe Fortas, a Johnson advisor and one of the most liberal justices (and most skilled lawyers) on the Court, would be a fitting successor. Warren rushed the Fortas nomination to the Democratic Senate, hoping for a quick confirmation. It was a disaster. The Republicans and the media denounced the timing of the nomination as inappropriate. South Carolina Democrat Strom Thurmond helped turn the confirmation hearings into a referendum on the Warren Court itself, which by 1968 had at least as many critics as defenders in Congress. Fortas’s ethically questionable financial dealings came to light. The president was forced to withdraw the nomination, and under an impeachment threat Fortas soon resigned from the Court entirely. Immediately after his inauguration, Richard Nixon was given the opportunity to replace two key liberal members of the Warren Court.

[Insert figure 9-1 about here]

Under the leadership of Chief Justice Warren Burger, the Supreme Court immediately moved in a more conservative direction. One indication of the transition can be seen in Figure 9-1. Figure 9-1 tracks how conservative or liberal the median members of the various institutions of the federal government have been over the second half of the twentieth century, using one common metric. The 1960s stands out as an unusually liberal period in the Court’s postwar history. By this measure, looking across all the Court’s cases, the Court immediately shifted back into a relatively more conservative pattern with the start of the Burger Court and has only drifted slightly more to the right since then. Of course, Figure 9-1 also suggests that the Burger Court was only about as conservative as the House of Representatives, which had a Democratic majority, and so it is no surprise that the Burger Court could produce new decisions like *Roe v. Wade* (1973) at the same time that it began to limit the implications of some of the Warren-era decisions.

The Burger Court showed no hesitation about using the power of judicial review. Both Republicans and Democrats, conservatives and liberals, were committed to the notion that the judiciary should define and enforce constitutional limits. They disagreed about what those limits were, however, and they disagreed about how far courts should go in trying to remedy constitutional and policy problems. As a result, the Burger Court in the 1970s struck down state and federal laws in even more cases than did the Warren Court in the 1960s. There may have been fewer landmark cases that marked out new areas of constitutional law in the 1970s, but the Burger Court proved just as willing to nullify the actions of elected officials (recall Figure 8-5).

At the same time, conservatives on and off the Court pressed the justices to pare back on the broadened standards of justiciability that the Warren Court had set. Conservative efforts from 1968 to 1980 to curb constitutional litigation were only partly successful. Burger Court majorities did rule that various parties lacked standing to raise challenges to the constitutionality of the Vietnam War, and some of the broader implications of *Flast* were not realized. Nevertheless, as Ronald Reagan entered office there were far fewer barriers to constitutional litigation than existed when Franklin Roosevelt entered office.

1. STANDING

Laird v. Tatum, 408 U.S. 1 (1972)

By statute, the president may use the armed forces to help quell insurrections, and President Lyndon Johnson had used federal troops to help put down riots in Detroit in the summer of 1967. From that experience, the army decided that it should better anticipate and plan for such domestic missions, and as part of that planning army intelligence began a domestic data-gathering system that consisted of compiling reports on public information about meetings and leaders of potentially troublesome groups. The intelligence gathering primarily involved monitoring public activities that had the possibility of leading to civil disorder. In 1970, Congress held public hearings on the army's domestic intelligence gathering, and in response the army reviewed and severely revised and cut back the program.

Based on the congressional hearings and media reports, individuals who believed themselves potentially subject to such reports filed suit in federal district court seeking a declaration that the intelligence program was an unconstitutional infringement on their First Amendment liberties and an injunction prohibiting the army from continuing the program. The district court dismissed the suit on the grounds that the plaintiffs had suffered no justiciable injury as a result of the army's actions. On appeal, the circuit court reversed, admitting that there was no claim that the army's actions were illegal or different than what a "good newspaper reporter would be able to gather" and that nothing injurious had been done or was immediately foreseeable, but concluded that the present system "constitutes an impermissible burden on [respondents] and other similarly situated which exercises a present inhibiting effect on their full expression and utilization of their First Amendment rights." It was this chilling effect that created a justiciable injury.

In a 5-4 decision authored by Chief Justice Burger, the Supreme Court reversed the circuit court, agreeing with the district court that the army's actions had not yet created a judicially remediable injury. In the absence of a concrete injury, the plaintiffs had no standing to sue. The majority did indicate, however, that the program was properly subject to judicial review should a litigant with the requisite injury appear before the Court. The Rehnquist Court built on this argument in Lujan v. Defenders of Wildlife (1992), holding that a party must be "injured in fact" in order to maintain a suit under the Endangered Species Act and that a generalized interest in the enforcement of environmental laws was not sufficient to create standing, even with a statutory provision designed to facilitate citizen suits.

As you read the opinions below, think about whether the justices in the Flast majority would have found a sufficient injury. What is your best understanding of the legal difference between Flast and Laird? Does that legal difference explain the different results in the cases? Why might the Burger Court have been interested tightening the rules on who could bring constitutional claims into the federal judiciary as compared to the Warren Court that decided Flast?

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

....

Our examination of the record satisfies us that the Court of Appeals properly identified the issue presented, namely, whether the jurisdiction of a federal court may be invoked by a complainant who alleges that the exercise of his First Amendment rights is being chilled by the mere existence, without more, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose. We conclude, however, that, having properly identified the issue, the Court of Appeals decided that issue incorrectly.

In recent years this Court has found in a number of cases that constitutional violations may arise from the deterrent, or "chilling," effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights. *E. g.*, *Baird v. State Bar of Arizona* (1971); *Keyishian v. Board of Regents* (1967) In none of these cases, however, did the chilling effect arise merely from the individual's knowledge that a governmental agency was engaged in certain activities or from the

individual's concomitant fear that, armed with the fruits of those activities, the agency might in the future take some *other* and additional action detrimental to that individual. Rather, in each of these cases, the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging.

. . . .
The decisions in these cases fully recognize that governmental action may be subject to constitutional challenge even though it has only an indirect effect on the exercise of First Amendment rights. At the same time, however, these decisions have in no way eroded the

"established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action . . ." *Ex parte Levitt*, 302 U.S. 633, 634 (1937).

The respondents do not meet this test; their claim, simply stated, is that they disagree with the judgments made by the Executive Branch with respect to the type and amount of information the Army needs and that the very existence of the Army's data-gathering system produces a constitutionally impermissible chilling effect upon the exercise of their First Amendment rights. That alleged "chilling" effect may perhaps be seen as arising from respondents' very perception of the system as inappropriate to the Army's role under our form of government, or as arising from respondents' beliefs that it is inherently dangerous for the military to be concerned with activities in the civilian sector, or as arising from respondents' less generalized yet speculative apprehensiveness that the Army may at some future date misuse the information in some way that would cause direct harm to respondents. Allegations of a subjective "chill" are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm; "the federal courts established pursuant to Article III of the Constitution do not render advisory opinions." *United Public Workers v. Mitchell*, 330 U.S. 75, 89 (1947).

Stripped to its essentials, what respondents appear to be seeking is a broad-scale investigation, conducted by themselves as private parties armed with the subpoena power of a federal district court and the power of cross-examination, to probe into the Army's intelligence gathering activities, with the district court determining at the conclusion of that investigation the extent to which those activities may or may not be appropriate to the Army's mission. The following excerpt from the opinion of the Court of Appeals suggests the broad sweep implicit in its holding:

"Apparently in the judgment of the civilian head of the Army not everything being done in the operation of this intelligence system was necessary to the performance of the military mission. *If the Secretary of the Army can formulate and implement such judgment based on facts within his Departmental knowledge, the United States District Court can hear evidence, ascertain the facts, and decide what, if any, further restrictions on the complained-of activities are called for to confine the military to their legitimate sphere of activity and to protect [respondents'] allegedly infringed constitutional rights.*" 444 F.2d, at 958. (Emphasis added.)

Carried to its logical end, this approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; such a role is appropriate for the Congress acting through its committees and the "power of the purse"; it is not the role of the judiciary, absent actual present or immediately threatened injury resulting from unlawful governmental action.

We, of course, intimate no view with respect to the propriety or desirability, from a policy standpoint, of the challenged activities of the Department of the Army; our conclusion is a narrow one, namely, that on this record the respondents have not presented a case for resolution by the courts.

The concerns of the Executive and Legislative Branches in response to disclosure of the Army surveillance activities -- and indeed the claims alleged in the complaint -- reflect a traditional and strong resistance of Americans to any military intrusion into civilian affairs. That tradition has deep roots in our history and found early expression, for example, in the Third Amendment's explicit prohibition against quartering soldiers in private homes without consent and in the constitutional provisions for civilian control of the military. Those prohibitions are not directly presented by this case, but their philosophical underpinnings explain our traditional insistence on limitations on military operations in peacetime. Indeed, when presented with claims of judicially cognizable injury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury; there is nothing in our Nation's history or in this Court's decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied.

Reversed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE MARSHALL joins, dissenting.

If Congress had passed a law authorizing the armed services to establish surveillance over the civilian population, a most serious constitutional problem would be presented. There is, however, no law authorizing surveillance over civilians, which in this case the Pentagon concededly had undertaken. The question is whether such authority may be implied. One can search the Constitution in vain for any such authority.

The start of the problem is the constitutional distinction between the "militia" and the Armed Forces. By Art. I, § 8, of the Constitution the militia is specifically confined to precise duties: "to execute the Laws of the Union, suppress Insurrections and repel Invasions."

.....
The upshot is that the Armed Services -- as distinguished from the "militia" -- are not regulatory agencies or bureaus that may be created as Congress desires and granted such powers as seem necessary and proper. The authority to provide rules "governing" the Armed Services means the grant of authority to the Armed Services to govern themselves, not the authority to govern civilians. Even when "martial law" is declared, as it often has been, its appropriateness is subject to judicial review

.....
The claim that respondents have no standing to challenge the Army's surveillance of them and the other members of the class they seek to represent is too transparent for serious argument. The surveillance of the Army over the civilian sector -- a part of society hitherto immune from its control -- is a serious charge. It is alleged that the Army maintains files on the membership, ideology, programs, and practices of virtually every activist political group in the country, including groups such as the Southern Christian Leadership Conference, Clergy and Laymen United Against the War in Vietnam, the American Civil Liberties Union, Women's Strike for Peace, and the National Association for the Advancement of Colored People. The Army uses undercover agents to infiltrate these civilian groups and to reach into confidential files of students and other groups. The Army moves as a secret group among civilian audiences, using cameras and electronic ears for surveillance. The data it collects are distributed to civilian officials in state, federal, and local governments and to each military intelligence unit and troop command under the Army's jurisdiction (both here and abroad); and these data are stored in one or more data banks.

.....
One need not wait to sue until he loses his job or until his reputation is defamed. To withhold standing to sue until that time arrives would in practical effect immunize from judicial scrutiny all surveillance activities, regardless of their misuse and their deterrent effect. As stated in *Flast v. Cohen*, 392 U.S. 83, 101, "in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." Or, as we put it in *Baker v. Carr*, 369

U.S. 186, 204, the gist of the standing issue is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."

The present controversy is not a remote, imaginary conflict. Respondents were targets of the Army's surveillance. . . .

. . . .

Surveillance of civilians is none of the Army's constitutional business and Congress has not undertaken to entrust it with any such function. The fact that since this litigation started the Army's surveillance may have been cut back is not an end of the matter. Whether there has been an actual cutback or whether the announcements are merely a ruse can be determined only after a hearing in the District Court. We are advised by an *amicus curiae* brief filed by a group of former Army Intelligence Agents that Army surveillance of civilians is rooted in secret programs of long standing:

. . . .

This case involves a cancer in our body politic. It is a measure of the disease which afflicts us. Army surveillance, like Army regimentation, is at war with the principles of the First Amendment. Those who already walk submissively will say there is no cause for alarm. But submissiveness is not our heritage. The First Amendment was designed to allow rebellion to remain as our heritage. The Constitution was designed to keep government off the backs of the people. The Bill of Rights was added to keep the precincts of belief and expression, of the press, of political and social activities free from surveillance. The Bill of Rights was designed to keep agents of government and official eavesdroppers away from assemblies of people. The aim was to allow men to be free and independent and to assert their rights against government. There can be no influence more paralyzing of that objective than Army surveillance. When an intelligence officer looks over every nonconformist's shoulder in the library, or walks invisibly by his side in a picket line, or infiltrates his club, the America once extolled as the voice of liberty heard around the world no longer is cast in the image which Jefferson and Madison designed, but more in the Russian image

. . . .

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

The Court of Appeals held that a justiciable controversy exists and that respondents have stated a claim upon which relief could be granted. . . .

. . . .

Respondents may or may not be able to prove the case they allege. But I agree with the Court of Appeals that they are entitled to try. I would therefore affirm the remand to the District Court for a trial and determination of the issues specified by the Court of Appeals.

2. POLITICAL QUESTIONS

Powell v. McCormack, 395 U.S. 486 (1969)

Adam Clayton Powell, Jr. was perhaps the most important black congressman of the mid-twentieth century. Early in his career he had broken with his party in order to endorse Dwight Eisenhower, whom he considered preferable on civil rights, but he had become a powerful legislator under John F. Kennedy and Lyndon Johnson. In 1966, Adam Clayton Powell, Jr., was reelected to his twelfth term as a Democratic member of the U.S. House of Representatives from Harlem in New York City. During his previous term, a House subcommittee had concluded that, as chairman of the House

Committee on Education and Labor, Powell had misused funds and falsified reports. The Democratic caucus voted to strip Powell of his chairmanship. When House members were sworn into office after the 1966 elections, the House resolved by a vote of 363-65 to refuse to administer the oath to Powell and to direct the Speaker of the House to appoint a select committee to determine whether Powell was eligible to serve in the House. After a series of hearings, the committee recommended that Powell be seated as a member but fined, censured, and stripped of his seniority. In a floor vote, the House rejected the recommendation of the committee and voted 248-176 on the critical amendment to exclude Powell from the House and declare his seat vacant (307-116 on the final vote).

Powell and a group of voters filed suit in federal district court against the Speaker of the House, John McCormack, and other House officers. Powell argued that the exclusion vote unconstitutionally added to the exclusive qualifications to the office of a member of the House of Representatives contained in Article I, Section 2 (age, citizenship, and residency) and requested an injunction against enforcing the House resolution excluding him from office and a declaratory judgment that the exclusion was unconstitutional. The district court dismissed the suit as non-justiciable and the Court of Appeals for the District of Columbia Circuit affirmed that decision.

Before the Supreme Court heard the case, Powell was elected to a thirteenth term, and the new Congress seated him but assessed a fine against him. (Powell had also won the special election that had been called when his seat was declared vacant and his suit had been dismissed by the district court, but he did not attempt to take his seat in the House.) The respondents moved that the case now be dismissed as moot. The Court heard the jurisdictional and substantive arguments together. In an 8-1 vote, the Supreme Court reversed the lower court, ruling both that the courts had the authority to decide such a case and that the House did not have the constitutional authority to exclude a duly elected member who met the minimal qualifications laid out in the text of the Constitution. Even in judging the qualifications of the members of the legislature, the Court, not Congress, was "the ultimate interpreter of the Constitution."

Powell failed to win renomination in his Democratic district in 1970 and so was not elected to a fourteenth term. He died less than two years later.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

....

Simply stated, a case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome. . . . Where one of the several issues presented becomes moot, the remaining live issues supply the constitutional requirement of a case or controversy. . . .

....

. . . [E]ven if respondents are correct that petitioners' averments as to injunctive relief are not sufficiently definite, it does not follow that this litigation must be dismissed as moot. . . . There is no suggestion that petitioners' averments as to declaratory relief are insufficient and Powell's allegedly unconstitutional deprivation of salary remains unresolved.

....

Respondents assert that the Speech or Debate Clause of the Constitution, Art. I, § 6, is an absolute bar to petitioners' action. . . . The Speech or Debate Clause, adopted by the Constitutional Convention without debate or opposition, finds its roots in the conflict between Parliament and the Crown culminating in the Glorious Revolution of 1688 and the English Bill of Rights of 1689. . . . Although the clause sprang from a fear of seditious libel actions instituted by the Crown to punish unfavorable speeches made in Parliament, we have held that it would be a "narrow view" to confine the protection of the Speech or Debate Clause to words spoken in debate. Committee reports, resolutions, and the act of voting are equally covered, as are "things generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn v. Thompson* (1881). . . .

Legislative immunity does not, of course, bar all judicial review of legislative acts. That issue was settled by implication as early as 1803, see *Marbury v. Madison*, and expressly in *Kilbourn v. Thompson*, the first of this Court's cases interpreting the reach of the Speech or Debate Clause. . . .

. . . .
The resolution excluding petitioner Powell was adopted by a vote in excess of two-thirds of the 434 Members of Congress -- 307 to 116. Article I, § 5, grants the House authority to expel a member "with the Concurrence of two thirds." Respondents assert that the House may expel a member for any reason whatsoever and that, since a two-thirds vote was obtained, the procedure by which Powell was denied his seat in the 90th Congress should be regarded as an expulsion, not an exclusion. . . .

Although respondents repeatedly urge this Court not to speculate as to the reasons for Powell's exclusion, their attempt to equate exclusion with expulsion would require a similar speculation that the House would have voted to expel Powell had it been faced with that question. . . . The Speaker ruled that the House was voting to exclude Powell, and we will not speculate what the result might have been if Powell had been seated and expulsion proceedings subsequently instituted.

Nor is the distinction between exclusion and expulsion merely one of form. The misconduct for which Powell was charged occurred prior to the convening of the 90th Congress. On several occasions the House has debated whether a member can be expelled for actions taken during a prior Congress and the House's own manual of procedure applicable in the 90th Congress states that "both Houses have distrusted their power to punish in such cases." . . .

. . . .
Respondents first contend that this is not a case "arising under" the Constitution within the meaning of Art. III. They emphasize that Art. I, § 5, assigns to each House of Congress the power to judge the elections and qualifications of its own members and to punish its members for disorderly behavior. . . . Thus, respondents maintain, the "power conferred on the courts by article III does not authorize this Court to do anything more than declare its lack of jurisdiction to proceed."

We reject this contention. Article III, § 1, provides that the "judicial Power . . . shall be vested in one supreme Court, and in such inferior Courts as the Congress may . . . establish." Further, § 2 mandates that the "judicial Power shall extend to all Cases . . . arising under this Constitution. . . ." It has long been held that a suit "arises under" the Constitution if a petitioner's claim "will be sustained if the Constitution . . . [is] given one construction and will be defeated if [it is] given another." . . .

. . . .
Respondents [maintain] that this case is not justiciable because, they assert, it is impossible for a federal court to "mold effective relief for resolving this case." Respondents emphasize that petitioners asked for coercive relief against the officers of the House, and, they contend, federal courts cannot issue mandamus or injunctions compelling officers or employees of the House to perform specific official acts.

. . . .
We need express no opinion about the appropriateness of coercive relief in this case, for petitioners sought a declaratory judgment, a form of relief the District Court could have issued. The Declaratory Judgment Act, 28 U. S. C. § 2201, provides that a district court may "declare the rights . . . of any interested party . . . whether or not further relief is or could be sought." . . . We thus conclude that in terms of the general criteria of justiciability, this case is justiciable.

Respondents maintain that even if this case is otherwise justiciable, it presents only a political question. It is well established that the federal courts will not adjudicate political questions. . . . In *Baker v. Carr* . . . we concluded that on the surface of any case held to involve a political question was at least one of the following formulations:

"a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of

government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

....

In order to determine whether there has been a textual commitment to a co-ordinate department of the Government, we must interpret the Constitution. In other words, we must first determine what power the Constitution confers upon the House through Art. I, § 5, before we can determine to what extent, if any, the exercise of that power is subject to judicial review. . . .

....

Had the intent of the Framers emerged from these materials with less clarity, we would nevertheless have been compelled to resolve any ambiguity in favor of a narrow construction of the scope of Congress' power to exclude members-elect. A fundamental principle of our representative democracy is, in Hamilton's words, "that the people should choose whom they please to govern them." 2 Elliot's Debates 257. As Madison pointed out at the Convention, this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself. In apparent agreement with this basic philosophy, the Convention adopted his suggestion limiting the power to expel. . . . Unquestionably, Congress has an interest in preserving its institutional integrity, but in most cases that interest can be sufficiently safeguarded by the exercise of its power to punish its members for disorderly behavior and, in extreme cases, to expel a member with the concurrence of two-thirds. In short, both the intention of the Framers, to the extent it can be determined, and an examination of the basic principles of our democratic system persuade us that the Constitution does not vest in the Congress a discretionary power to deny membership by a majority vote.

For these reasons, we have concluded that Art. I, § 5, is at most a "textually demonstrable commitment" to Congress to judge only the qualifications expressly set forth in the Constitution. Therefore, the "textual commitment" formulation of the political question doctrine does not bar federal courts from adjudicating petitioners' claims.

Respondents' alternate contention is that the case presents a political question because judicial resolution of petitioners' claim would produce a "potentially embarrassing confrontation between coordinate branches" of the Federal Government. But, as our interpretation of Art. I, § 5, discloses, a determination of petitioner Powell's right to sit would require no more than an interpretation of the Constitution. Such a determination falls within the traditional role accorded courts to interpret the law, and does not involve a "lack of the respect due [a] coordinate [branch] of government," nor does it involve an "initial policy determination of a kind clearly for nonjudicial discretion." *Baker v. Carr*. Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility. . . .

. . . . Finally, a judicial resolution of petitioners' claim will not result in "multifarious pronouncements by various departments on one question." For, as we noted in *Baker v. Carr*, it is the responsibility of this Court to act as the ultimate interpreter of the Constitution. *Marbury v. Madison*. Thus, we conclude that petitioners' claim is not barred by the political question doctrine, and, having determined that the claim is otherwise generally justiciable, we hold that the case is justiciable.

....

Further, analysis of the "textual commitment" under Art. I, § 5, has demonstrated that in judging the qualifications of its members Congress is limited to the standing qualifications prescribed in the Constitution. Respondents concede that Powell met these. Thus, there is no need to remand this case to determine whether he was entitled to be seated in the 90th Congress. Therefore, we hold that, since Adam Clayton Powell, Jr., was duly elected by the voters of the 18th Congressional District of New York and was not ineligible to serve under any provision of the Constitution, the House was without power to exclude him from its membership.

Petitioners seek additional forms of equitable relief, including mandamus for the release of petitioner Powell's back pay. The propriety of such remedies, however, is more appropriately considered in the first instance by the courts below. . . .

It is so ordered.

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court, I add a few words. As the Court says, the important constitutional question is whether the Congress has the power to deviate from or alter the qualifications for membership as a Representative contained in Art. I, § 2, cl. 2, of the Constitution. Up to now the understanding has been quite clear to the effect that such authority does not exist. To be sure, Art. I, § 5, provides that: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members" Contests may arise over whether an elected official meets the "qualifications" of the Constitution, in which event the House is the sole judge. But the House is not the sole judge when "qualifications" are added which are not specified in the Constitution.

A man is not seated because he is a Socialist or a Communist. Another is not seated because in his district members of a minority are systematically excluded from voting. Another is not seated because he has spoken out in opposition to the war in Vietnam. The possible list is long. Some cases will have the racist overtones of the present one. Others may reflect religious or ideological clashes.

At the root of all these cases, however, is the basic integrity of the electoral process. Today we proclaim the constitutional principle of "one man, one vote." When that principle is followed and the electors choose a person who is repulsive to the Establishment in Congress, by what constitutional authority can that group of electors be disenfranchised?

. . . .

MR. JUSTICE STEWART, dissenting.

. . . .

The essential purpose of this lawsuit by Congressman Powell and members of his constituency was to regain the seat from which he was barred by the 90th Congress. That purpose, however, became impossible of attainment on January 3, 1969, when the 90th Congress passed into history and the 91st Congress came into being. On that date, the petitioners' prayer for a judicial decree restraining enforcement of House Resolution No. 278 and commanding the respondents to admit Congressman Powell to membership in the 90th Congress became incontestably moot.

. . . . With the 90th Congress terminated and Powell now a member of the 91st, it cannot seriously be contended that there remains a judicial controversy between these parties over the power of the House of Representatives to exclude Powell and the power of a court to order him reseated. . . .

The petitioners' proposition that conduct of the 91st Congress has perpetuated the controversy is based on the fact that House Resolution No. 2 -- the same resolution by which the House voted to seat Powell -- fined him \$ 25,000 and provided that his seniority was to commence as of the date he became a member of the 91st Congress. That punishment, it is said, "arises out of the prior actions of the House which originally impelled this action." It is indisputable, however, that punishment of a House member involves constitutional issues entirely distinct from those raised by exclusion, and that a punishment in one Congress is in no legal sense a "continuation" of an exclusion from the previous Congress. A judicial determination that the exclusion was improper would have no bearing on the constitutionality of the punishment, nor any conceivable practical impact on Powell's status in the 91st Congress. . . .

. . . .

The passage of time and intervening events have, therefore, made it impossible to afford the petitioners the principal relief they sought in this case. If any aspect of the case remains alive, it is only

Congressman Powell's individual claim for the salary of which he was deprived by his absence from the 90th Congress. But even if that claim can be said to prevent this controversy from being moot, which I doubt, there is no need to reach the fundamental constitutional issues that the Court today undertakes to decide.

There are, then substantial questions as to whether, on his salary claim, Powell could obtain relief against any or all of these respondents. On the other hand, if he was entitled to a salary as a member of the 90th Congress, he has a certain and completely satisfactory remedy in an action for a money judgment against the United States in the Court of Claims. . . . Even if the mandatory relief sought by Powell is appropriate and could be effective, the Court should insist that the salary claim be litigated in a context that would clearly obviate the need to decide some of the constitutional questions with which the Court grapples today, and might avoid them altogether. . . .

. . . . If the fundamental principles restraining courts from unnecessarily or prematurely reaching out to decide grave and perhaps unsettling constitutional questions retain any vitality, see *Ashwander v. TVA*, 297 U.S. 288, 346-348 (Brandeis, J., concurring), surely there have been few cases more demanding of their application than this one. . . .

Massachusetts v. Laird, 451 F.2d 26 (1st Cir. 1971)

In 1970, the Massachusetts Legislature passed a law directing the state attorney general to file suit in federal suit – on behalf of its citizens and the “integrity” of the Constitution – seeking a declaration that the Vietnam War was unconstitutional because not initiated by a formal declaration of war and an injunction preventing Secretary of War Melvin Laird from ordering any Massachusetts citizens to the theater of operations in Southeast Asia. The attorney general filed suit in federal district court, joined by several state citizens who were current members of the armed forces or subject to the draft. The case was assigned to Chief Judge Charles Wyzanski, a Roosevelt appointee. He dismissed the complaint, observing that though “it is at least possible that the courts do have the power to determine the relative scope of Congressional and Presidential power to authorize the use abroad of our armed forces,” the plaintiffs failed on the merits since Congress had actively participated in the military build-up in Vietnam. Wyzanski was not the first to hear such a case, and he pointed to the decision of several district and circuit courts that had reached the same conclusion in similar cases the year before.

Undaunted, the plaintiffs appealed to the First Circuit Court of Appeals, and their case was heard by a three-judge panel that included an Eisenhower-appointee and two Johnson-appointees, including Frank Coffin, a one-time Maine congressman, who wrote the opinion for the unanimous court. Like other courts that heard cases involving the constitutionality of the war, this court was reluctant to simply dismiss the case as beyond the reach of the judicial power but it was also determined not to issue a declaration that the war was unconstitutional. In this opinion, did the judges take the issue of the constitutionality of the war to be a “political question” not subject to judicial review, or not? How had the earlier decisions of the judiciary opened the door to such a case?

*The state attorney general had first applied to the U.S. Supreme Court to hear the case, but the Court refused in *Massachusetts v. Laird*, 400 U.S. 886 (1970). Without an opinion explaining the reason for the Supreme Court's refusal to hear the case, lower courts were left with little guidance as to how to proceed when the state attorney general turned to them. Justice Douglas filed a dissent, along with two of his brethren, from the Court denial of the motion to file the case. Douglas argued that cases such as *Baker and Powell* had opened the door to such a case. “It is far more important to be respectful to the Constitution than to a coordinate branch of government,” Douglas asserted, “The question of an unconstitutional war is neither academic nor ‘political.’ This case has raised the question in an adversary setting. It should be settled here and now.”*

MR. JUDGE COFFIN delivered the opinion of the Court.

...
 . . . What remains is the contention that, since the substantiality of plaintiffs' constitutional claims is challenged, there is lack of subject matter jurisdiction, citing *Powell v. McCormack* (1969). No such doctrine can be drawn from *Powell*; the contrary was made clear in *Baker v. Carr* (1962), i.e., that only if a claim is absolutely devoid of merit or frivolous could dismissal for lack of jurisdiction be justified. Nor do we find any merit in the claim that the individual plaintiffs, particularly those serving in Southeast Asia, lack standing. *Berk v. Laird*, 429 F.2d 302 (2d Cir. 1970). . . .

. . . Suffice it to say that some of the plaintiffs are properly before us. While the challenge to the constitutionality of our participation in the Vietnam war is a large question, so also is the question whether such an issue is given to the courts to decide, under the circumstances of this case. The Supreme Court has thus far not ruled on the latter issue in this context. Other federal courts have differed in their rationales. Scholars have probed "the political question" and have found it just as much an impenetrable thicket as have the courts.

...
 . . . [O]nce given the principle that a plaintiff may challenge the constitutionality of undeclared military operations, a court must be prepared to adjudicate whether actions are justified as emergency ones needing no declaration, or have gone beyond this bound. In the latter event the court must adjudicate whether Congress has expressly or impliedly ratified them. Workable standards, fact finding, the prospect of conflicting inferior court decisions, and other factors might well give pause to the most intrepid court.

We do not, however, rely on these factors. Partly we feel that to base abstinence on such pragmatic, if realistic, considerations is not desirable unless so clearly dictated by circumstances that it cannot be mistaken as abdication. Moreover, on a question so dominant in the minds of so many, we deem it important to rule as a matter of constitutional interpretation if at all possible. Finally, and of course most pertinently, we derive recent guidance from the Supreme Court's approach in *Powell v. McCormack*, giving dominant consideration to the first decisional factor listed in *Baker v. Carr*. This is the inquiry "whether there is a 'textually demonstrable constitutional commitment of the issue to a coordinate political department' of government and what is the scope of such commitment."

...
 . . . [T]he war power of the country is an amalgam of powers, some distinct and others less sharply limned. In certain respects, the executive and the Congress may act independently. The Congress may without executive cooperation declare war, thus triggering treaty obligations and domestic emergency powers. The executive may without Congressional participation repel attack, perhaps catapulting the country into a major conflict. But beyond these independent powers, each of which has its own rationale, the Constitutional scheme envisages the joint participation of the Congress and the executive in determining the scale and duration of hostilities. To Congress is granted the power to appropriate funds for sustaining armies. . . . An analogous power given to the President is his power as Commander-in-Chief to station forces abroad. . . . *Johnson v. Eisentrager* (1950). Congress has the power to concur in or to counter the President's actions by its exclusive authority to appropriate monies in support of an army, navy and air force, . . . and by granting letters of marque and reprisal. . . . While the fact of shared war-making powers is clearly established by the Constitution, however, and some of its elements are indicated, a number of relevant specifics are missing. The Constitution does not contain an explicit provision to indicate whether these interdependent powers can properly be employed to sustain hostilities in the absence of a Congressional declaration of war. Hence this case.

The brief debate of the Founding Fathers sheds no light on this. All we can observe, after almost two centuries, is that the extreme supporters of each branch lost . . .

Under these circumstances, what can we say was "textually committed" to the Congress or to the executive? Strictly speaking, we lack the text. . . . We must have some license to construe the sense of the Constitutional framework, wholly apart from any doctrine of implied powers inherent in sovereignty, *cf. United States v. Curtiss-Wright Export Corp.* We observe, first, that the Founders' silence on the subject

of hostilities beyond repelling attack and without a declaration of war was not because the phenomenon was unknown. . . .

Secondly, we note that the Congressional power to declare war implies a negative: no one else has that power. But is the more general negative implied -- that Congress has no power to support a state of belligerency beyond repelling attack and short of a declared war? The drafters of the Constitution, who were not inept, did not say, "power to commence war". . . .

Finally, we give some significance to the fact that in the same "power to declare war clause", Article I, Section 8, Clause 11th, there is the power to grant letters of marque and reprisal. Were this a power attendant to and dependent upon a declared war, there would be no reason to specify it separately. . . . It is clear that there can be an "enemy", even though our country is not in a declared war. . . . *See also, Prize Cases.*

As to the power to conduct undeclared hostilities beyond emergency defense, then, we are inclined to believe that the Constitution, in giving some essential powers to Congress and others to the executive, committed the matter to both branches, whose joint concord precludes the judiciary from measuring a specific executive action against any specific clause in isolation. . . . In arriving at this conclusion we are aware that while we have addressed the problem of justiciability in the light of the textual commitment criterion, we have also addressed the merits of the constitutional issue. We think, however, that this is inherent when the constitutional issue is posed in terms of scope of authority.

In circumstances where powers are interrelated, Mr. Justice Jackson has said that:

"When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law." *Youngstown Sheet & Tube Co. v. Sawyer* (1952) (concurring opinion).

. . . .

The question remains to be asked: when the executive and Congress disagree not as to the advisability of fighting a war but as to the appropriate level of fighting, how shall the Constitution be served? When the executive takes a strong hand, Congress has no lack of corrective power. Congress has the power to tax, to appropriate, to impound, to override a veto. The executive has only the inherent power to propose and to implement, and the formal power to veto. The objective of the drafters of the Constitution was to give each branch "constitutional arms for its own defense". *The Federalist* No. 23 (Hamilton). But the advantage was given the Congress, Hamilton noting the "superior weight and influence of the legislative body in a free government, and the hazard to the Executive in a trial of strength with that body."

All we hold here is that in a situation of prolonged but undeclared hostilities, where the executive continues to act not only in the absence of any conflicting Congressional claim of authority but with steady Congressional support, the Constitution has not been breached. The war in Vietnam is a product of the jointly supportive actions of the two branches to whom the congeries of the war powers have been committed. Because the branches are not in opposition, there is no necessity of determining boundaries. Should either branch be opposed to the continuance of hostilities, however, and present the issue in clear terms, a court might well take a different view. This question we do not face. Nor does the prospect that such a question might be posed indicate a different answer in the present case.

In 1978, President Jimmy Carter announced that the United States would recognize the People's Republic of China as the sole government of that country and withdraw recognition of the Republic of China (Taiwan), and soon after the State Department informed Taiwan that it was terminating the Mutual Defense Treaty of 1955. Barry Goldwater, along with other senators, sought an injunction against the president from terminating the treaty without a two-thirds vote of the Senate. The district court issued the injunction against the Secretary of State, holding that historical practice required Senate participation in the termination of treaties. The circuit court reversed on the merits. Without hearing arguments, the Supreme Court granted certiorari, vacated the judgment of the lower court, and remanded with instructions to dismiss the suit. There was no opinion for the Court in Goldwater because the justices could not agree on the reasons for dismissing the case. Justice Rehnquist, Chief Justice Burger, Justice Stewart and Justice Stevens insisted that whether the President could unilaterally terminate a treaty was a nonjusticiable political question. Justice Powell believed the matter justiciable, but that the issue was not ripe for adjudication because Congress had not officially objected to the President's action.

MR. JUSTICE POWELL, concurring.

Although I agree with the result reached by the Court, I would dismiss the complaint as not ripe for judicial review.

....

This Court has recognized that an issue should not be decided if it is not ripe for judicial review. *Buckley v. Valeo*, 424 U.S. 1, 113-114 (1976) (per curiam). Prudential considerations persuade me that a dispute between Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority. Differences between the President and the Congress are commonplace under our system. The differences should, and almost invariably do, turn on political rather than legal considerations. The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse. Otherwise, we would encourage small groups or even individual Members of Congress to seek judicial resolution of issues before the normal political process has the opportunity to resolve the conflict.

... It cannot be said that either the Senate or the House has rejected the President's claim. If the Congress chooses not to confront the President, it is not our task to do so. I therefore concur in the dismissal of this case.

....

MR. JUSTICE REHNQUIST suggests, however, that the issue presented by this case is a nonjusticiable political question which can never be considered by this Court. I cannot agree. In my view, reliance upon the political-question doctrine is inconsistent with our precedents. As set forth in the seminal case of *Baker v. Carr*, 369 U.S. 186, 217 (1962), the doctrine incorporates three inquiries: (i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention? In my opinion the answer to each of these inquiries would require us to decide this case if it were ready for review.

....

... [T]he text of the Constitution does not unquestionably commit the power to terminate treaties to the President alone.

... We are asked to decide whether the President may terminate a treaty under the Constitution without congressional approval. Resolution of the question may not be easy, but it only requires us to apply normal principles of interpretation to the constitutional provisions at issue. ... This case "touches" foreign relations, but the question presented to us concerns only the constitutional division of power between Congress and the President.

....

... Interpretation of the Constitution does not imply lack of respect for a coordinate branch. *Powell v. McCormack* (1969). If the President and the Congress had reached irreconcilable positions,

final disposition of the question presented by this case would eliminate, rather than create, multiple constitutional interpretations. The specter of the Federal Government brought to a halt because of the mutual intransigence of the President and the Congress would require this Court to provide a resolution pursuant to our duty "to say what the law is." *United States v. Nixon*, 418 U.S. 683, 703 (1974), quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803).

.....

In my view, the suggestion that this case presents a political question is incompatible with this Court's willingness on previous occasions to decide whether one branch of our Government has impinged upon the power of another. See *Buckley v. Valeo*; *United States v. Nixon*; The Pocket Veto Case (1929); *Myers v. United States* (1926). Under the criteria enunciated in *Baker v. Carr*, we have the responsibility to decide whether both the Executive and Legislative Branches have constitutional roles to play in termination of a treaty. If the Congress, by appropriate formal action, had challenged the President's authority to terminate the treaty with Taiwan, the resulting uncertainty could have serious consequences for our country. In that situation, it would be the duty of this Court to resolve the issue.

.....

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE STEVENS join, concurring.

I am of the view that the basic question presented by the petitioners in this case is "political" and therefore nonjusticiable because it involves the authority of the President in the conduct of our country's foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President. . . .

.....

I believe it follows a fortiori from *Coleman v. Miller* (1939) [holding that it is a political question whether a state legislature can rescind an earlier vote on ratification of a constitutional amendment] that the controversy in the instant case is a nonjusticiable political dispute that should be left for resolution by the Executive and Legislative Branches of the Government. Here, while the Constitution is express as to the manner in which the Senate shall participate in the ratification of a treaty, it is silent as to that body's participation in the abrogation of a treaty. . . .

I think that the justification for concluding that the question here is political in nature are even more compelling than in *Coleman* because it involves foreign relations -- specifically a treaty commitment to use military force in the defense of a foreign government if attacked. . . .

The present case differs in several important respects from *Youngstown Sheet & Tube Co. v. Sawyer* (1952), cited by petitioners as authority both for reaching the merits of this dispute and for reversing the Court of Appeals. In *Youngstown*, private litigants brought a suit contesting the President's authority under his war powers to seize the Nation's steel industry, an action of profound and demonstrable domestic impact. Here, by contrast, we are asked to settle a dispute between coequal branches of our Government, each of which has resources available to protect and assert its interests, resources not available to private litigants outside the judicial forum. Moreover, as in *Curtiss-Wright*, the effect of this action, as far as we can tell, is "entirely external to the United States, and [falls] within the category of foreign affairs." Finally, as already noted, the situation presented here is closely akin to that presented in *Coleman*, where the Constitution spoke only to the procedure for ratification of an amendment, not to its rejection.

.....

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE WHITE joins, dissenting in part.

In my view, the time factor and its importance are illusory; if the President does not have the power to terminate the treaty (a substantial issue that we should address only after briefing and oral argument), the notice of intention to terminate surely has no legal effect. It is also indefensible, without further study, to pass on the issue of justiciability or on the issues of standing or ripeness. While I therefore join in the grant of the petition for certiorari, I would set the case for oral argument and give it the plenary consideration it so obviously deserves.

MR. JUSTICE BRENNAN, dissenting.

I respectfully dissent from the order directing the District Court to dismiss this case, and would affirm the judgment of the Court of Appeals insofar as it rests upon the President's well-established authority to recognize, and withdraw recognition from, foreign governments.

In stating that this case presents a nonjusticiable "political question." MR. JUSTICE REHNQUIST, in my view, profoundly misapprehends the political-question principle as it applies to matters of foreign relations. Properly understood, the political-question doctrine restrains courts from reviewing an exercise of foreign policy judgment by the coordinate political branch to which authority to make that judgment has been "constitutional[ly] commit[ted]." *Baker v. Carr* (1962). But the doctrine does not pertain when a court is faced with the antecedent question whether a particular branch has been constitutionally designated as the repository of political decision making power. Cf. *Powell v. McCormack* (1969). The issue of decision making authority must be resolved as a matter of constitutional law, not political discretion; accordingly, it falls within the competence of the courts.

3. RECUSAL

Laird v. Tatum, 409 US. 824 (1972) (memo)

Having had their circuit court victory reserved by a 5-4 decision in the Supreme Court in Laird v. Tatum, the appellees petitioned the Court to throw out its earlier decision and rehear the case and moved that Justice William Rehnquist (a member of the five-person majority) recuse himself from further deliberations on the case. The recusal of judges and justices (their declining to sit on a particular case) is guided by both statute and historical practice, but the decision to recuse is made by the judge or justice in question. Justices rarely offer an explanation for their decision as to whether or not to recuse themselves from a case, but Rehnquist did respond to this motion by filing a memorandum explaining his decision to deny the motion and to continue to participate in the case. In doing so, he provided a general discussion on the significance of prior public statements by justices and future justices on issues that eventually come before the Court, observing that "proof that a Justice's mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias."

Memorandum of MR. JUSTICE REHNQUIST.

Respondents in this case have moved that I disqualify myself from participation. While neither the Court nor any Justice individually appears ever to have done so, I have determined that it would be appropriate for me to state the reasons which have led to my decision with respect to respondents' motion. In so doing, I do not wish to suggest that I believe such a course would be desirable or even appropriate in any but the peculiar circumstances present here.

....

Respondents in their motion do not explicitly relate their factual contentions to the applicable provisions of 28 U. S. C. § 455. The so-called "mandatory" provisions of that section require disqualification of a Justice or judge "in any case in which he has a substantial interest, has been of counsel, is or has been a material witness"

Since I have neither been of counsel nor have I been a material witness in *Laird v. Tatum*, these provisions are not applicable. Respondents refer to a memorandum prepared in the Office of Legal Counsel for the benefit of MR. JUSTICE WHITE shortly before he came on the Court, relating to disqualification. I reviewed it at the time of my confirmation hearings and found myself in substantial agreement with it. Its principal thrust is that a Justice Department official is disqualified if he either signs a pleading or brief or "if he actively participated in any case even though he did not sign a pleading or brief." I agree. In both *United States v. United States District Court*, 407 U.S. 297 (1972), for which I was not officially responsible in the Department but with respect to which I assisted in drafting the brief, and in *S&E Contractors v. United States*, 406 U.S. 1 (1972), in which I had only an advisory role which terminated immediately prior to the commencement of the litigation, I disqualified myself. Since I did not have even an advisory role in the conduct of the case of *Laird v. Tatum*, the application of such a rule would not require or authorize disqualification here.

This leaves remaining the so-called discretionary portion of the section, requiring disqualification where the judge "is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein." The interpretation and application of this section by the various Justices who have sat on this Court seem to have varied widely. . . .

Indeed, different Justices who have come from the Department of Justice have treated the same or very similar situations differently. In *Schneiderman v. United States* (1943), a case brought and tried during the time Mr. Justice Murphy was Attorney General, but defended on appeal during the time that Mr. Justice Jackson was Attorney General, the latter disqualified himself but the former did not.

I have no hesitation in concluding that my total lack of connection while in the Department of Justice with the defense of the case of *Laird v. Tatum* does not suggest discretionary disqualification here because of my previous relationship with the Justice Department.

However, respondents also contend that I should disqualify myself because I have previously expressed in public an understanding of the law on the question of the constitutionality of governmental surveillance. While no provision of the statute sets out such a provision for disqualification in so many words, it could conceivably be embraced within the general language of the discretionary clause. Such a contention raises rather squarely the question of whether a member of this Court, who prior to his taking that office has expressed a public view as to what the law is or ought to be, should later sit as a judge in a case raising that particular question. . . .

My impression is that none of the former Justices of this Court since 1911 have followed a practice of disqualifying themselves in cases involving points of law with respect to which they had expressed an opinion or formulated policy prior to ascending to the bench.

Mr. Justice Black while in the Senate was one of the principal authors of the Fair Labor Standards Act; indeed, it is cited in the popular-name index of the 1970 edition of the United States Code as the "Black-Connelly Fair Labor Standards Act." . . .

Nonetheless, he sat in the case that upheld the constitutionality of that Act, *United States v. Darby* (1941) [T]o my knowledge his Senate role with respect to the Act was never a source of criticism for his participation in the above cases.

Mr. Justice Frankfurter had, prior to coming to this Court, written extensively in the field of labor law. . . . Justice Frankfurter had not only publicly expressed his views, but had when a law professor played an important, perhaps dominant, part in the drafting of the Norris-LaGuardia Act Yet, in addition to sitting in one of the leading cases interpreting the scope of the Act, *United States v. Hutcheson* (1941), Justice Frankfurter wrote the Court's opinion.

Mr. Justice Jackson in *McGrath v. Kristensen* (1950), participated in a case raising exactly the same issue that he had decided as Attorney General (in a way opposite to that in which the Court decided it). . . .

Two years before he was appointed Chief Justice of this Court, Charles Evans Hughes wrote a book entitled *The Supreme Court of the United States* . . . [where] he discussed at some length the doctrine expounded in the case of *Adkins v. Children's Hospital* (1923). I think that one would be warranted in saying that he implied some reservations about the holding of that case. Nine years later, Mr. Chief Justice Hughes wrote the Court's opinion in *West Coast Hotel Co. v. Parrish* (1937), in which a closely divided Court overruled *Adkins*. I have never heard any suggestion that because of his discussion of the subject in his book he should have recused himself.

. . . .

Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers. Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.¹

. . . .

The oath prescribed by 28 U. S. C. § 453 that is taken by each person upon becoming a member of the federal judiciary requires that he "administer justice without respect to persons, and do equal right to the poor and to the rich," that he "faithfully and impartially discharge and perform all the duties incumbent upon [him] . . . agreeably to the Constitution and laws of the United States." Every litigant is entitled to have his case heard by a judge mindful of this oath. But neither the oath, the disqualification statute, nor the practice of the former Justices of this Court guarantees a litigant that each judge will start off from dead center in his willingness or ability to reconcile the opposing arguments of counsel with his understanding of the Constitution and the law. That being the case, it is not a ground for disqualification that a judge has prior to his nomination expressed his then understanding of the meaning of some particular provision of the Constitution.

Based on the foregoing considerations, I conclude that respondents' motion that I disqualify myself in this case should be, and it hereby is, denied.

Notes:

1. In a footnote to his memorandum, Rehnquist distinguishes between public statements made prior to judicial nomination and public statements made during the nomination process itself. As both a lawyer in the Nixon administration and a Supreme Court justice, Rehnquist thought that nominees could only make confirmation more difficult by volunteering information during their confirmation process and worried by the questions that were being asked during the confirmation process that nominees were being asked to commit to how they would vote in future cases that might come before them. When Clarence Thomas was nominated to the Supreme Court by President George H.W. Bush in 1991, he was questioned closely by Democratic senators about his views regarding abortion rights. In the aftermath of President Ronald Reagan's failed nomination of Robert Bork to the Supreme Court, the Bush administration was

¹ In terms of propriety, rather than disqualification, I would distinguish quite sharply between a public statement made prior to nomination for the bench, on the one hand, and a public statement made by a nominee to the bench. For the latter to express any but the most general observation about the law would suggest that, in order to obtain favorable consideration of his nomination, he deliberately was announcing in advance, without benefit of judicial oath, briefs, or argument, how he would decide a particular question that might come before him as a judge. [footnote repositioned from the original, eds.]

determined to select “stealth nominees” whose views on many issues were not as publicly known and advised their nominees to evade answering substantive questions about their views during the confirmation process. To the frustration of Democratic senators, Thomas stuck to the script.

Senator Patrick Leahy tried a different angle by noting that *Roe v. Wade* was decided while Thomas was a law student at Yale, and it could be assumed that “one of the more important cases decided by the U.S. Supreme Court . . . would have been discussed in the law school while you were there.” Not only did Thomas refuse to take the bait, he denied that he ever had any significant conversations about the case.

JUDGE THOMAS: “I was a married student and I worked, I did not spend a lot of time around the law school doing what the other students enjoyed so much, and that’s debating all the current cases and all the slip opinions. My schedule was such that I went to classes and generally went to work and went home . . . I cannot remember personally engaging in those discussions. The groups that I met with at that time during my years in law school were small study groups.”

SENATOR LEAHY: “Have you ever had discussion of Roe versus Wade other than in this room? (Laughter.) In the 17 or 18 years it’s been there?”

JUDGE THOMAS: “Only, I guess, Senator, in fact that, in the most general sense, that other individuals express concerns one way or the other and you listen and you try to be thoughtful. If you’re asking me whether or not I’ve ever debated the contents of it, the answer to that is no, Senator.”

SENATOR LEAHY: “Have you ever, private gathering or otherwise, stated whether you felt that it was properly decided or not?”

JUDGE THOMAS: “Senator, in trying to recall and recollect on that, I don’t recollect commenting one way or the other. There were, again, debates about it in various places, but I generally did not participate. I don’t remember or recall participating, Senator.”

.....

SENATOR LEAHY: “Well, was it properly decided or not?”

JUDGE THOMAS: “Senator, I think that that’s where I just have to say what I’ve said before, that to comment on the building in that case would compromise my ability to rule . . .”¹

Given Rehnquist’s argument in his memo in *Laird v. Tatum*, is it appropriate, or even necessary, for nominees to refuse to answer substantive questions about constitutional issues during the confirmation process? Did the answer Thomas offered to Leahy’s line of questioning satisfy the standards that Rehnquist set out for a qualified jurist?

2. Justice Antonin Scalia is among the most outspoken justices in the recent history of the Supreme Court, frequently speaking to public audiences about his constitutional philosophy and the issues of the day. As a result, he recused himself from the 2004 case of *Elk Grove Unified School District v. Newdow* (regarding the use of “under God” in the Pledge of Allegiance as recited in public schools), since he had publicly commented on the merits of the case in an earlier phase of litigation. In 2004, Scalia was also asked to recuse himself from the case of *Cheney v. United States District Court for the District of Columbia* (2004) for a different reason. Sierra Club was the respondent in one of the cases consolidated in *Cheney*, and it filed a motion requesting Scalia’s recusal on the grounds that he had recently attended a hunting trip with Vice President Dick Cheney, a party in the case. Federal statute requires recusal when “impartiality might reasonably be questioned,” but practice helps fill in what questions are reasonable ones. In a memorandum refusing the motion for recusal, Scalia detailed the circumstances of the hunting trip, which involved a large party and no “opportunity for private conversation.”² Scalia noted that his

¹ GET CITE

² Memorandum on Justice Scalia, *Cheney v. United States District Court for the District of Columbia*, 541 U.S. 913 (2004).

friendship with Cheney dated back to their shared service in the Ford administration, but friendship “has traditionally *not* been a ground for recusal where official action is at issue [as opposed to personal interests], no matter how important the *official action* was to the ambitions or the reputation of the Government officer.” Given that justices were often appointed to the Court precisely because of their personal relations with members of the political elite, it would be “utterly disabling” to adopt a rule by which they could not sit in cases involving the official acts of those friends. Likewise, it would be “quite wrong” for judges to focus on the political implications of the cases that come before them, if only to consider whether those political implications suggest the need for a recusal. Indeed, Scalia saw a slippery slope on which judges could be pressured by public opinion to recuse themselves for “inappropriate (and increasingly silly) reasons,” casting unnecessary doubt on the integrity of the judiciary in the process.

How important should even misinformed public perception be in determining whether a judge should grant a recusal motion? Scalia notes that “Washington officials know the rules, and know that discussing with judges pending cases . . . is forbidden,” and similarly that routine “social courtesies” – such as a shared ride on the vice president’s plane, a White House dinner, or a sponsored talk at a law school that is also involved in litigation – are not meaningful “gifts” that should raise concerns about a judge’s impartiality. Are the social conventions of justices an adequate basis for protecting the integrity of the judicial process? Under what circumstances would a historically accepted practice become unacceptable?

Suggested Readings:

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Carmines, Edward G., and James A. Stimson, *Issue Evolution: Race and the Transformation of American Politics* (Princeton: Princeton University Press, 1989).

Ely, John Hart. *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* (Princeton: Princeton University Press, 1993).

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Keck, Thomas M. *The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism* (Chicago: University of Chicago Press, 2004).

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Whittington, Keith E. *Constitutional Construction: Divided Powers and Constitutional Meaning* (Cambridge: Harvard University Press, 1999).

Whittington, Keith E. *Political Foundations of Judicial Supremacy: The President, the Supreme Court, and Constitutional Leadership in U.S. History* (Princeton: Princeton University Press, 2007).

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Table 9-1: Major Issues and Decisions of the Era of Liberalism Divided

Major Political Issues	Major Constitutional Issues	Major Court Decisions
New Deal	National Regulatory Authority	Carter v. Carter Coal Co. (1936)
World War II	Property Rights	United States v. Curtiss-Wright Export Co. (1936)
Cold War	Presidential War Powers	National Labor Relations Board v. Jones & Laughlin Steel (1937)
Domestic Security	Legislative Investigation Powers	Palko v. Connecticut (1937)
Korean War	Executive Privilege	Wickard v. Filburn (1942)
Civil Rights Movement	Judicial Review	Youngstown Sheet & Tube Co. v. Sawyer (1952)
Vietnam War	Civil Rights	Brown v. Board (1954)
	Civil Liberties	Baker v. Carr (1962)

Note: A host of more detailed civil liberties and civil rights issues became the subject of controversy during this period, and these are explored in more detail in volume two.

Box 9-1: A Partial Cast of Characters of the Era of Liberalism Divided

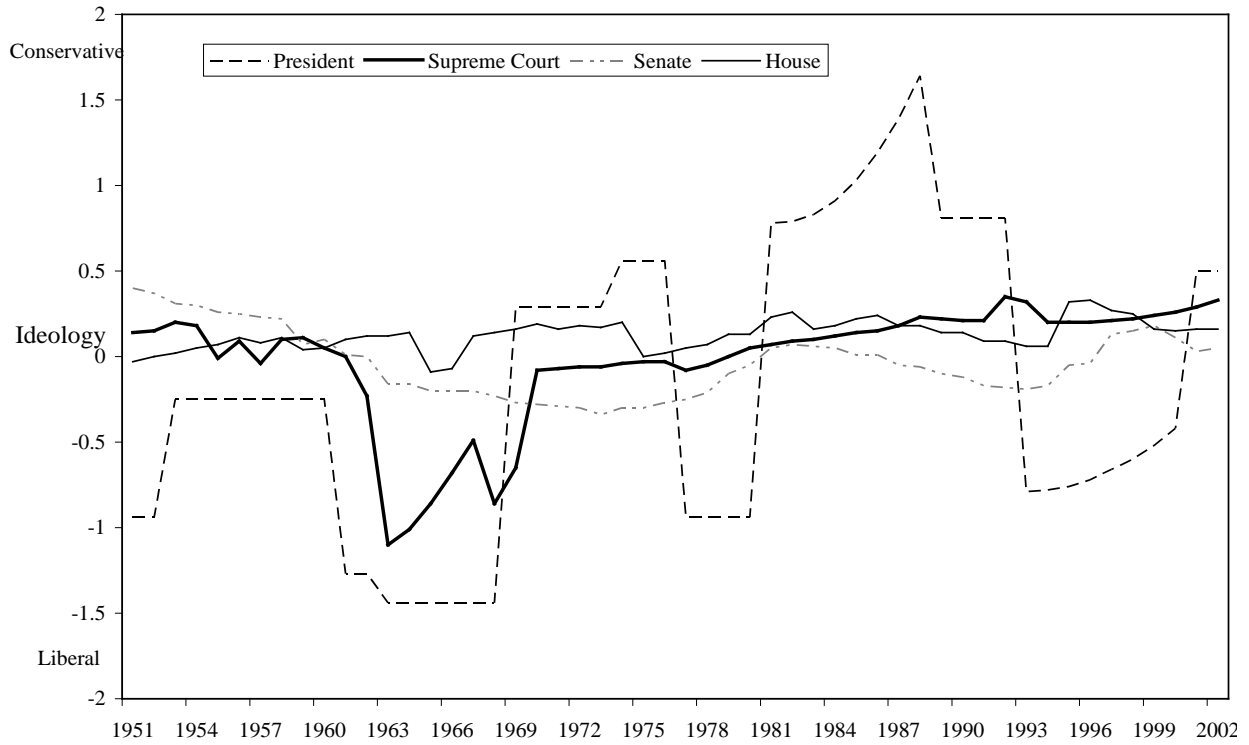
Burger, Warren	Republican, Minnesota lawyer, appointed by Eisenhower to the federal circuit court (1956-69), appointed by Nixon to be Chief Justice of the United States (1969-86), a public critic of the Warren Court while serving as a circuit court judge, Burger was conservative on social issues and emphasized checks and balances on separation of powers issues, developed a reputation as a weak chief justice
Fulbright, William J.	Democrat, Rhodes Scholar and lawyer from Arkansas, president of the University of Arkansas (1939-1941), U.S. Representative (1943-1945), U.S. Senator (1945-74), long-serving chair of the Senate Foreign Relations Committee, critic of conservative anti-Communists, a sponsor of the Gulf of Tonkin Resolution he became a leading critic of the Vietnam War and of presidential war powers, defeated in the Democratic primary in 1974
Powell, Lewis F.	Democrat, Virginia lawyer, presided over desegregation of public schools as chair of Richmond school board (1952-61) and facilitated the creation of the Legal Services Program as president of the American Bar Association (1964-65) but also encouraged more active efforts by business to build public and political support for the “free enterprise system.” Appointed by Nixon to the Supreme Court (1972-87), where he became an important swing vote on the Burger Court and developed a reputation as a moderate.
White, Byron	Democrat, a Rhodes Scholar and star professional football player from Colorado before World War II, he attended law school after serving in naval intelligence and clerked for Chief Justice Fred Vinson, deputy attorney general (1961-62), appointed by Kennedy to Supreme Court (1962-93), known as a pragmatic jurist and a swing vote on the Warren and Burger Courts.

Illustration 9-1: President Richard Nixon presents William Rehnquist with his commission as associate justice.



Source: Richard Nixon Library

Figure: 9-1: Left-Right Location of Supreme Court Relative to Other Branches, 1950-2002



Source: Michael Bailey, "Comparable Preference Estimates across Time and Institutions for the Court, Congress and Presidency," <http://www9.georgetown.edu/faculty/baileyma/Data.htm>

Note: Median member of each institution placed on common ideological scale based on actual individual votes on cases (Court), bills (Congress), or individual statements about the actions taken by other institutions.